

Urban Bias, Rural Sexual Minorities, and the Courts

Luke A. Boso



ABSTRACT

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 contributes to a broader discussion about how law and society construct gay identity in exclusionary ways across race and class, and it expands that discussion to attend to place. The cultural prerogative to come out and into a gay community disregards social- and class-based circumstances that can necessitate alternative strategies for belonging, and it 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.

Second, this Article draws attention to the legal dilemmas faced by a largely invisible population. Judges play a key role in perpetuating urban bias by internalizing stereotypes about gay people and gay identity and by explicitly approving the belief that sexual minorities do not belong in small towns. Acknowledging the existence of rural sexual minorities, understanding that various factors may render uprooting to an urban gay community undesirable or impossible, and appreciating that rurality brings distinct social experiences and legal needs are first steps in combatting discrimination against these vulnerable people. Rather than invoking characteristics common to rural life to make rural communities more hostile to residents who are sexual minorities, courts should account for those same characteristics in rural sexual minorities' claims to legal protections and access to justice. This Article offers suggestions for how judges should take rural sexual minorities into account to maximize the latter's ability to live comfortably in their homes.

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INTRODUCTION

Despite conventional wisdom, same-sex desire and self-identified gay, bisexual, and lesbian people exist and thrive outside of urban enclaves. Analysis of the latest U.S. Census data shows that same-sex couples are present in almost every county of every state.¹ They live and work on farms in the Midwest and the Great Plains,² in Appalachian coalmining towns,³ in New England valleys and woodlands,⁴ in the Deep South,⁵ in small desert towns in the Southwest,⁶ and in small rural communities all across America.⁷ 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 seldomly studied people defies the cultural truism that anyone who has same-sex desire belongs in an urban gay community. Professor 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 city where “closeted subjects . . . ‘come out’ into an urban setting.”⁸ Professor

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1. See Gary J. Gates, Williams Distinguished Scholar, Williams Inst., UCLA Sch. of Law, Keynote Address at Loyola of Los Angeles Law Review Symposium: LGBT Identity and the Law (Oct. 21, 2011) (presentation available at <http://www.outandequal.org/documents/2012ExFoPresentationGGates.pptx>).
 2. For stories about men who have sex with men who grew up on farms in the American Midwest, see FARM BOYS: LIVES OF GAY MEN FROM THE RURAL MIDWEST (Will Fellows ed., 1996). See also Jerry Lee Kramer, *Bachelor Farmers and Spinsters: Gay and Lesbian Identities and Communities in Rural North Dakota*, in MAPPING DESIRE: GEOGRAPHIES OF SEXUALITIES 200, 203–08 (David Bell & Gill Valentine eds., 1995), for stories of self-identified lesbians’ experiences in rural farming country.
 3. See, e.g., NEIL MILLER, IN SEARCH OF GAY AMERICA: WOMEN AND MEN IN A TIME OF CHANGE 43–50 (1990) (describing the life of a self-identified lesbian ex-coalminer who lives and works in a blue-collar community in West Virginia).
 4. See generally, e.g., Paul L. Cody & Peter L. Welch, *Rural Gay Men in Northern New England: Life Experiences and Coping Styles*, 33 J. HOMOSEXUALITY 51 (1997); Susan A. Comerford et al., *Crone Songs: Voices of Lesbian Elders on Aging in a Rural Environment*, 19 AFFILIA 418, 427 (2004) (discussing findings from a study of aging self-identified lesbians living in rural Vermont regarding both positive and negative aspects of rural living).
 5. 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. See *id.* at 34–78.
 6. See, e.g., Breeze, *Lesbian Social Service Needs and Resources in Rural Communities*, 3 CATALYST, no. 4, 1981, at 71, 72–73 (1981) (discussing gay people in rural communities in Arizona).
 7. Twelve percent of same-sex couples live in rural America. Bill Bishop, *Finding Gay Rural America*, DAILY YONDER (Sept. 27, 2011), <http://www.dailyyonder.com/finding-gay-rural-america/2011/09/26/3536>.
 8. JUDITH HALBERSTAM, IN A QUEER TIME AND PLACE: TRANSGENDER BODIES, SUBCULTURAL LIVES 36 (2005).

Kath Weston identifies the “Great Gay Migration” as the voyage from rural to urban in search of gay liberation and identity.⁹ 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.¹⁰ Contemporary activists reproduce urban gay narratives by assuring youth that “It Gets Better,”¹¹ a promise premised on the belief that coming out, being openly gay, and assimilating into a lesbian, gay, bisexual, and transgender (LGBT) community are the key ingredients for happy lives.¹² Often, the message is clear: Come to the city where you can be who you truly are,¹³ and create for yourself a “life worth living.”¹⁴

The persistent call 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.¹⁵ Nor does it liberate rural sexual minorities who embark on the Great Gay Migration and feel unsophisticated, backwards, and isolated by urban gay culture: “[T]he sense of sexual outsidership is often swapped for the outsidership of being rural in the urban, of having to let go of heritage and homeland.”¹⁶

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

9. Kath Weston, *Get Thee to a Big City: Sexual Imaginary and the Great Gay Migration*, 2 GLQ 253, 255 (1995).

10. HALBERSTAM, *supra* note 8, at 36.

11. See, e.g., *About Us*, IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/pages/about-it-gets-better-project> (last visited Nov. 9, 2012).

12. *Id.*

13. See, e.g., *Mike Bloomberg: It Gets Better*, IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/video/entry/2876> (last visited Nov. 9, 2012). New York City’s Mayor Bloomberg reaches out to youth: “New York City wants you. New York has always been the place where anyone can go and be who they are supposed to be, regardless of ethnicity, religion, gender, or sexual identity.”

14. See generally IT GETS BETTER: COMING OUT, OVERCOMING BULLYING, AND CREATING A LIFE WORTH LIVING (Dan Savage & Terry Miller eds., 2011).

15. See Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 603–04 (1997).

16. David Bell, *Cowboy Love*, in COUNTRY BOYS: MASCULINITY AND RURAL LIFE 163, 174 (Hugh Campbell et al. eds., 2006).

that rural sexual minorities must integrate into gay communities both presumes autonomy of 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.

The law reflects society's urban bias. Sexual minorities are uniquely vulnerable in many small towns and rural areas. Social discrimination and limited economic opportunities can leave them restricted in their ability to live freely and comfortably in their homes, and many predominately rural places lack even basic legal protections from discrimination based on sexual orientation. Judges, moreover, facilitate and perpetuate discrimination against rural sexual minorities. Even through seemingly progay analysis, courts limit opportunities to participate in rural life on one's own terms.

This Article makes two central points. First, courts must combat discrimination against rural sexual minorities, not exacerbate it.¹⁷ Judges tend to invoke factors common to rural life as justifications for discrimination. But while they confirm 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 a rural community's disapproval of overt expressions of homosexuality and of a perceived gay lifestyle as justifications for discrimination in family and employment disputes, courts wrongly cast sexual minorities as outsiders who are fundamentally different from their straight friends and neighbors. In doing so, judges perpetuate urban bias by validating prejudices rooted in dominant urban narratives about gay, lesbian, and bisexual people, which in turn fosters rural antigay attitudes. Conversely, by failing to appreciate how low population density, lack of anonymity, and the limited acceptance of overt 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

17. In focusing on the role of courts, this Article builds on the work of Lisa Pruitt, who demonstrates how the law overlooks or misunderstands features of rural life, and explains the "legal relevance of these features to critical junctures at which women encounter the law." Lisa R. Pruitt, *Toward A Feminist Theory of the Rural*, 2007 UTAH L. REV. 421, 421 [hereinafter Pruitt, *Rural Feminist Theory*]; see also Lisa R. Pruitt, *Gender, Geography & Rural Justice*, 23 BERKELEY J. GENDER L. & JUST. 338 (2008) [hereinafter Pruitt, *Rural Justice*].

sexual minorities to leave their rural homes if they want to live openly or even discretely as gay people.

Second, the predominant social script in which one must come out and assimilate into gay community and culture to have a “life worth living”¹⁸ is likewise a product of urban bias. Many scholars have argued that law and society construct gay identity in exclusionary ways that cut across class and race; this Article seeks to build on those critiques by demonstrating how dominant gay tropes elide issues of place. The cultural prerogative to come out and into the gay community disregards the social- and class-based circumstances that can necessitate alternative strategies for belonging in minority, poor, and rural communities. Urban bias both erases the most economically and geographically marginalized sexual minorities’ experiences from public discourse and places the burden on individuals to make positive change for themselves. Specifically for rural sexual minorities, accepted urban gay narratives reinforce the belief that homosexuality and small town America are incompatible and erect a blockade that inhibits legal and social solutions for helping rural sexual minorities live comfortably in their communities.¹⁹ Sexual minorities’ access to justice in the American legal system cannot depend on where they live.

This Article draws attention to the legal dilemmas faced by a largely invisible population.²⁰ To appreciate the unique experiences of this diverse group, and to identify potential legal responses that might improve their lives, Part I begins with a brief discussion of what it means to be “rural” or from a “small town,” and it describes the specific axes on which this Article focuses. Part II then describes the core tenets of urban bias and demonstrates how these hegemonic gay narratives work to marginalize rural sexual minorities’ experiences in law and social discourse.

With a focus on litigation and the judiciary, Part III examines law’s role in the lives of rural sexual minorities. This Part demonstrates how courts affirm and facilitate discrimination against rural sexual minorities, and it urges judges to consider and analyze how the rural context can operate to deny rural sexual minorities

18. IT GETS BETTER, *supra* note 14.

19. “Focusing on individual solutions to sociocultural problems pathologizes[and] revictimizes” rural LGBT people. Carol A. Snively, *Building Community-Based Alliances Between GLBTQQA Youth and Adults in Rural Settings*, 16 J. GAY & LESBIAN SOC. SERVICES 99, 103 (2004). Because rural sexual minorities often cannot or do not want to leave their home environments, “change of their home communities must be pursued.” *Id.*

20. 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 urban assumptions regarding LGB identity and focuses on judicial rhetoric in which courts explicitly denote both (1) rural geographic setting or background and (2) homosexuality. 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 consider rural context.

the liberty to live, create families, and work in rural environments. Part III.A focuses on state action and discrimination against sexual minorities. Part III.A.1 discusses in particular courts' analysis of gay political power under the Equal Protection Clause and explains that, by considering rural sexual minorities' political powerlessness, judges are more likely to find that all governmental classifications based on sexual orientation must be analyzed under heightened judicial scrutiny. Part III.A.2, in turn, shows how the failure to apply heightened scrutiny to governmental classifications based on sexual orientation continues to harm rural sexual minorities uniquely in family and employment law contexts, where judges explicitly invoke antigay rural norms to justify societal discrimination. Part III.B then turns to private discrimination and privacy issues in the law. Part III.B.1 discusses evidence and arguments about homosexuality in rural court proceedings, and it urges judges to analyze critically whether the introduction of evidence or argument about sexual orientation may result in unfair prejudice or impede access to justice. Part III.B.2 examines legal issues regarding privacy-based legal claims 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 concludes by calling for legislators, scholars, and gay rights advocates 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 . . . gay people live quiet lives far removed from the much-analyzed spectacle of urban gay communities."²¹ 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 comfort 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.

At the outset, it is important to clarify terminology. This Article uses the phrase "sexual minorities" to describe people who are not strictly heterosexual—in other words, to describe people who have same-sex desire, same-sex attraction, or engage in same-sex sex. Though representative of an imperfect classification system, the term "sexual minorities" serves to reconcile the tension between rural experiences and mainstream identity politics. Many rural people identify as lesbian,

21. URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* 7 (1995).

gay, or bisexual (LGB), in which case I denote self-designation. As this Article explains, however, many others do not so identify. This Article does not use the word “queer” as an identity label since most rural people continue to find it pejorative and would contest its use as applied to them. Further, this Article does not specifically speak to the rural transgender experience. Gender performance and expression implicate realities and consequences different from those of people who have same-sex desire but are or perceive themselves to be gender conforming. Femininity, masculinity, and gender identity in rural contexts warrant extensive independent scholarly inquiry and are the focus of an upcoming project.

I. DEFINING “RURAL”

At first blush, the meaning of “rural” may seem obvious.²² Most people think of rural places as geographically isolated, sparsely populated, and far removed from a metropolitan area.²³ The U.S. Census, for example, uses an intricate set of guidelines to classify urban and rural areas largely based on population density and proximity to a major city;²⁴ several federal statutes likewise define rural areas according to these criteria.²⁵ These measures hinge on objectively quantifiable physical

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22. See MICHAEL WOODS, RURAL GEOGRAPHY: PROCESSES, RESPONSES AND EXPERIENCES IN RURAL RESTRUCTURING 15 (2005) (“‘Rural’ is one of those curious words which everyone thinks they know what it means, but which is actually very difficult to define precisely.”). This Article discusses people who live in “rural” areas, “small towns,” and the “country,” but intends no specific distinction.
23. See, e.g., GLENN V. FUGUITT ET AL., RURAL AND SMALL TOWN AMERICA 4 (1989) (defining rural communities as those with small sizes and low settlement densities); Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273, 289–90 (2003) (defining rural as “communities of 2,500 or fewer people, which are located at least fifty miles from a community of 20,000 or more”); Comerford et al., *supra* note 4, at 419 (noting the size and population density of a community as a factor in “[w]hat constitutes a rural environment”); Ken Deavers, *What Is Rural?*, 20 POLY STUD. J. 184, 185 (1992) (noting that rural areas are typically small-scale, low-density settlements located some physical distance from large urban centers); Pruitt, *Rural Feminist Theory*, *supra* note 17, at 424 & n.5 (deploying the term “rural” primarily to describe “sparsely populated places,” and noting that “all rural areas share one common characteristic: relatively low population densities” (quoting Greg Duncan et al., *Lessons Learned: Welfare Reform and Food Assistance in Rural America*, in RURAL DIMENSIONS OF WELFARE REFORM: WELFARE, FOOD ASSISTANCE AND POVERTY IN RURAL AMERICA 455, 456 (Bruce A. Weber et al. eds., 2002)) (internal quotation marks omitted)).
24. Urban Area Criteria for the 2010 Census, 76 Fed. Reg. 53,030 (Aug. 24, 2011), available at <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]erritory not defined as urban.” *Id.*
25. The federal government regularly classifies areas as “rural” based on (inconsistent) population numbers. See, e.g., 7 U.S.C. § 6612(3)(A) (2006) (limiting “rural communities” to those with populations of “not more than 10,000 individuals”); 12 U.S.C. § 2128(f) (2006) (designating “rural areas” as “all

space and demographic differences, but there are several pitfalls in relying on only this simplistic understanding of the “rural.”²⁶

First, 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 objective measures.²⁷ Studies of rural populations vary widely on these criteria. Accordingly, while this Article focuses on sparsely populated and relatively isolated places, it does not delineate rigid boundaries for what falls within or outside rurality’s scope.

Second, people understand rurality by employing an array of factors. What constitutes rural depends on when and where rural is being defined, as well as who is doing the defining and for what purpose. Accordingly, social scientists argue against a single stable definition of “rural,”²⁸ and they advocate instead for a pluralistic conception in which ruralities are understood as constructed social and ideological categories.²⁹ 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

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. § 11501 (2006) (drawing the rural line at jurisdictions with fewer than 50,000 people). For a fuller discussion of how the federal government defines “rural,” see Bassett, *supra* note 23, at 285–87.

26. See generally Andrew Gorman-Murray et al., *Scaling the Rural: Reflections on Rural Cultural Studies*, 45 AUSTL. HUMAN. REV. 37 (2008).
27. See, e.g., FUGUITT ET AL., *supra* note 23, at 5 (explaining that what is small depends on the viewpoint of the observer).
28. See Hugh Campbell et al., *Masculinity and Rural Life: An Introduction*, in COUNTRY BOYS, *supra* note 16, at 1, 15.
29. 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 22, at 11 (“The question of defining rurality hence becomes one of how people construct themselves as being rural, understanding rurality as ‘a state of mind.’” (internal quotation marks omitted)); Paul Cloke & Paul Milbourne, *Deprivation and Lifestyles in Rural Wales—II. Rurality and the Cultural Dimension*, 8 J. RURAL STUD. 359, 360 (1992) (describing the rural as a “world of social, moral and cultural values in which rural dwellers participate”); Paul Cloke, *Conceptualizing Rurality*, in THE HANDBOOK OF RURAL STUDIES 18, 18 (Paul Cloke et al. eds., 2006) (“The rural stands . . . as a significant imaginative space, connected with all kinds of cultural meanings”); Gerald W. Creed & Barbara Ching, *Recognizing Rusticity: Identity and the Power of Place*, in KNOWING YOUR PLACE: RURAL IDENTITY AND CULTURAL HIERARCHY 1, 12 (Barbara Ching & Gerald W. Creed eds., 1997) (“[P]lace identities are clearly linked to a particular kind of place, but even identities built upon the land are social constructions.”); Gorman-Murray et al., *supra* note 26, at 38 (“The rural, then, is a symbolic lens for certain moral and cultural values which vary across time and space.”).

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.³⁰

Though vague and somewhat circular, the court's characterization represents the complexity of rurality as something more than sheer population and geography. Rural can be a place, a culture, a way of life, and even an identity. Accordingly, to understand fully the lives of sexual minorities who live in small towns, this Article looks principally to sparsely populated and isolated places (loosely defined). It also seeks, however, to uncover the ways in which social, cultural, and economic features affect how residents perceive and negotiate the rural self.³¹

Of course, factors such as age, class, race, and region all coalesce to ensure that there is no uniform rural experience. Life in the rural South might differ dramatically from life in a small coastal town in New England or northern California, a farming community in the Midwest, or a Native American community in the Southwest.³² Rurality's complexity does not mean, however, that there are not important commonalities between divergent places. Empirical and qualitative studies reveal key similarities between many rural areas, identifiable differences from most urban areas, and common experiences shared by the sexual minorities who live in small American towns. I am cautious to avoid essentializing rural people and places, and the dimensions of rurality I discuss, although not universally applicable, reflect reality for many.

The structure of community interaction and the norms transmitted through interaction are among the elements of rural life that most directly affect sexual minorities. "Low population density produces a 'high density of acquaintanceship[;]' . . . People know each other well and place more meaning on casual social interaction."³³ This actual or perceived lack of individual anonymity is a fundamental feature of rural life.³⁴ In turn, this sense of community familiarity works to reinforce

30. *Stephens v. Raleigh Cnty. Bd. of Educ.*, 257 S.E.2d 175, 180 (W. Va. 1979).

31. See 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, 287 (William Meezan & James I. Martin eds., 2009).

32. "Even within the United States, of course, the rural is far from homogenous—the West being 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, 179 (Paul Cloke ed., 2003).

33. Robert M. Moore, *Introduction*, in THE HIDDEN AMERICA: SOCIAL PROBLEMS IN RURAL AMERICA FOR THE TWENTY-FIRST CENTURY 13, 16 (Robert M. Moore III ed., 2001) (quoting Cornelia Butler Flora & Jan L. Flora, *Entrepreneurial Social Infrastructure: A Necessary Ingredient*, 529 ANNALS AM. ACAD. POL. & SOC. SCI. 48, 52 (1993)).

34. See, e.g., Emily Kazyak, *Disrupting Cultural Selves: Constructing Gay and Lesbian Identities in Rural Locales*, 34 QUALITATIVE SOC. 561, 573–76 (2011). In Kazyak's study of sexual minorities living

the cultural and ideological homogeneity common in most rural areas, where there is often little internal racial or ethnic diversity.³⁵ Accordingly, rural social interactions tend to “organize around an appreciation for solidarity expressed through blending in” and not setting oneself apart.³⁶ A community ethos that embraces solidarity and “fitting in”³⁷ holds value and purchases a sense of belonging that is central to acceptance and survival in rural life.³⁸

Without the ebb and flow of demographic and ideological change, and buttressed by a strong emphasis on community solidarity, rural areas tend to be more ideologically conservative³⁹ and hold more traditional values⁴⁰ than urban areas.

in rural Illinois and Michigan, “[i]nterviewees repeatedly characterized rural locales as creating a small, close-knit, everybody knows everybody and their business atmosphere.” *Id.* at 573; *see also*, e.g., Mark L. Williams et al., *The Social/Sexual Environment of Gay Men Residing in a Rural Frontier State: Implications for the Development of HIV Prevention Programs*, 21 J. RURAL HEALTH 48, 53 (2005) (noting that participants in a study of rural self-identified gay men in Wyoming avoided HIV prevention programs largely because “anonymity in rural areas and small towns is virtually nonexistent”).

35. *See* Otis, *supra* note 31, at 283; *see also*, e.g., Diane Kholos Wysocki, “*Growing Up Gay in Rural Nebraska*” or a Feminist Relocates to the Midwest, SEXUALITY & CULTURE, Sept. 2000, at 57, 59. 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 small 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, RURAL PEOPLE AND COMMUNITIES IN THE 21ST CENTURY: RESILIENCE AND TRANSFORMATION 122–46 (2011) (discussing the geographic areas where rural racial and ethnic minority populations are concentrated in the United States).
36. MARY L. GRAY, OUT IN THE COUNTRY: YOUTH, MEDIA, AND QUEER VISIBILITY IN RURAL AMERICA 38 (2009).
37. 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.
38. *Id.*
39. *See, e.g.*, ANNA GREENBERG & WILLIAM GREENER, GREENBERG QUINLAN ROSNER RESEARCH, RURAL AMERICA COMPETITIVE: BUSH PROBLEMS AND ECONOMIC STRESS PUT RURAL AMERICA “IN PLAY” IN 2008, at 1 (2007) (finding that nearly 50 percent of rural Americans are self-ascribed conservatives as compared to the national average of 40 percent); Seth C. McKee, *Rural Voters in Presidential Elections, 1992–2004*, FORUM, July 2007, art. 2, at 1, 8–10 (analyzing data from voter exit polls taken between 1992 and 2004 showing that rural voters are far more socially conservative than urban voters); *see also* Pruitt, *Rural Feminist Theory*, *supra* note 17, at 426 (suggesting that rural women’s lives are profoundly shaped by conservative views).
40. *See, e.g.*, Anastasia R. Snyder & Diane K. McLaughlin, *Female-Headed Families and Poverty in Rural America*, 69 RURAL SOC. 127, 128–29 (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 (citations omitted).

Religious institutions play a primary role in small-town life, and social conservatism can wield enormous power in defining norms and expectations.⁴¹ Particularly with respect to sexuality, social norms and the community's ability to police them can dictate the parameters of acceptable desires, behaviors, and identity formation.⁴² Simply put, sexual difference is generally less accepted in rural areas than in urban areas.⁴³

These facts limit the possibilities for—and tangible access to—difference in lifestyles and cultures,⁴⁴ powerfully distinguishing urban from rural settings.⁴⁵ 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.”⁴⁶ 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”;⁴⁷ this is especially problematic for rural children, who are often subject to tight parental controls and may have difficulty bypassing

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41. Otis, *supra* note 31, at 283–84 (noting that many rural areas, unlike most urban areas, lack access to secular social service providers); *see also* HOWARD, *supra* note 5, at 64 (describing the home, the school, and the church as “the three key institutions of [rural] community life”).
 42. *See* McKee, *supra* note 39, at 10 (showing that in 2004, 53 percent of rural voters, compared to 35 percent of urban voters, opposed same-sex marriage); Megan R. Yost & Jennifer F. Chmielewski, *Narrating Rural Lesbian Lives: Body Image and Lesbian Community in Central Pennsylvania*, 15 J. LESBIAN STUD. 148, 150 (2011) (“[R]ural areas are often more politically and religiously conservative regarding sexual orientation.” (citation omitted)).
 43. *See, e.g.*, Gregory M. Herek, *Heterosexuals’ Attitudes Toward Bisexual Men and Women in the United States*, 39 J. SEX RES. 264, 270 (2002) (explaining the results of a national telephone survey, which showed that self-identified rural-area and small-town residents “expressed significantly more negative attitudes than residents of larger urban centers and suburban locales”); Julia A. Puckett et al., *Out in the Country: Rural Sexual Minority Mothers*, 15 J. LESBIAN STUD. 176, 177 (2011) (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”).
 44. *See* Yueh-Huang Huang & William P. Stewart, *Rural Tourism Development: Shifting Basis of Community Solidarity*, J. TRAVEL RES., Apr. 1996, at 26, 26, 30 (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 (3d ed. 1953) (“[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” (footnote omitted)).
 45. *See* Deborah Bray Preston et al., *Issues in the Development of HIV-Preventive Interventions for Men Who Have Sex With Men (MSM) in Rural Areas*, 23 J. PRIMARY PREVENTION 199, 200 (2002).
 46. Bassett, *supra* note 23, at 282.
 47. Fern K. Willits et al., *Persistence of Rural/Urban Differences*, in *RURAL SOCIETY IN THE U.S.: ISSUES FOR THE 1980S* 69, 73 (Don A. Dillman & Daryl J. Hobbs eds., 1982).

literal and figurative firewalls to access relevant information about sexuality and make connections with other sexual minority youths.

Finally, class powerfully affects the experiences of those who live in places described as rural. Certainly there are many wealthy rural enclaves, particularly in coastal areas and in metropolitan exurbs.⁴⁸ But because the nation's poor overwhelmingly live in rural areas, and studies show that the poorest counties in the United States are rural, this Article focuses primarily on low-income rural areas.⁴⁹ Compared to city dwellers, rural people have lower incomes and fewer educational opportunities. Fewer rural people attain white-collar employment, and significantly fewer rural people attend or even apply to college.⁵⁰ In many rural areas, and particularly in places like Appalachia and in Midwest farm country, dependence on a single industry and the lack of economic diversification further limits job opportunities and entrenches poverty.⁵¹ 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

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48. Exurbs are places typically associated with urban sprawl, and, though not homogenous, they share certain features in common. "Exurbia captures the phenomenon of very-low-density, amenity-seeking, post-productivist residential settlement in rural areas," and those who live in exurbia tend to be city people who commute to urban and suburban areas for work, shopping, and entertainment, and who have "deliberately chosen the rural landscape as a setting for their homes." Laura Taylor, *No Boundaries: Exurbia and the Study of Contemporary Urban Dispersion*, 76 GEOJOURNAL 323, 324 (2011). Exurbia tends to cater to and draw in "high-end single family residential developments," pushing lower-income natives out towards less amenity rich rural areas; there thus remains a sharp divide between exurbia (for example, on the coasts of places like Florida, California, and Oregon) and endemically poor rural areas (for example, in much of Appalachia, the Great Plains, the Intermountain West, and the Deep South). See David Marcouiller et al., *An Introduction, in RURAL HOUSING, EXURBANIZATION, AND AMENITY-DRIVEN DEVELOPMENT: CONTRASTING THE "HAVES" AND THE "HAVE NOTS"* 3, 3–4 (David W. Marcouiller et al. eds., 2011).
49. BROWN & SCHAFFT, *supra* note 35, at 193 (finding that "nonmetropolitan poverty rates have been consistently higher than metropolitan poverty rates throughout the last thirty years," and inner-cities and nonmetropolitan areas are the nation's poorest types of places); Willits et al., *supra* note 47, at 71 (showing that more rural than urban families live in poverty).
50. See FUGUITT ET AL., *supra* note 23, at 401; cf. Bassett, *supra* note 23, at 303–16. 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.
Id. at 312–13 (footnote omitted).
51. See, e.g., Anne Marie Lofaso, *What We Owe Our Coal Miners*, 5 HARV. L. & POL'Y REV. 87, 93–94 (2011) (describing how, in economically impoverished Appalachia, "[c]oal mining might be the only industry for hundreds of miles," and explaining that "Appalachian people, who also have fewer educational opportunities than other Americans, might have no choice but to accept the relatively well-paying coal-mining job or (more commonly) leave the region" (footnote omitted)).

city dwellers,⁵² and they 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.⁵³ Even when quality services are available, many rural residents lack the transportation necessary to facilitate meaningful access.⁵⁴

Some might object to these generalizations regarding rural context and to the purported differences between urban and rural cultural experiences. For example, it is true that some rural areas are socially progressive and accepting of difference and openly LGB people.⁵⁵ These communities, however, are not the norm. They tend to have highly educated populations, as in small college towns, or strong metropolitan links.⁵⁶ It is also true that many city and suburban neighborhoods boast community solidarity similar to that seen in rural areas;⁵⁷ certainly, social conservatism and public hostility toward sexual difference is not unique to rural life.⁵⁸ Nevertheless, the effects of intraurban solidarity and antigay 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 antigay discourse does not dominate the public climate in comparable ways to the rural context.⁵⁹ Urbanites have

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52. J. Dennis Murray & Peter A. Keller, *Psychology and Rural America: Current Status and Future Directions*, 46 AM. PSYCHOLOGIST 220, 222 (1991).
 53. Willits et al., *supra* note 47, at 71.
 54. Otis, *supra* note 31, at 282–83; *see also* Katherine Cason, *Poverty in Rural America*, in THE HIDDEN AMERICA, *supra* note 33, at 27, 27 (noting that “public transportation is rare” in rural areas and often personal transportation or sharing rides with friends are the only ways for a person to get around).
 55. *See generally* Kenneth Kirkey & Ann Forsyth, *Men in the Valley: Gay Male Life on the Suburban–Rural Fringe*, 17 J. RURAL STUD. 421 (2001) (describing a thriving lesbian and gay enclave in an exurban Massachusetts area).
 56. *See id.* at 425 (“[I]n some parts of the US, such as the northeast, rural areas are largely integrated into nearby metropolitan areas.”); *see also* Kazzyak, *supra* note 34, at 569 (quoting an interviewee who believed that greater acceptance of sexual diversity in rural areas is linked to higher levels of education and income); *supra* note 48.
 57. *See* R.S. Oropesa, *Social Structure, Social Solidarity and Involvement in Neighborhood Improvement Associations*, 62 SOC. INQUIRY 107 (1992).
 58. *See* Joseph G. Kosciw et al., *Who, What, Where, When, and Why: Demographic and Ecological Factors Contributing to Hostile School Climate for Lesbian, Gay, Bisexual, and Transgender Youth*, 38 J. YOUTH & ADOLESCENCE 976, 984 (2009) (noting that, although LGBT youth in rural communities are the most vulnerable to hostility based on sexual orientation, LGBT youth experience a high degree of victimization regardless of locale).
 59. Ramona Faith Oswald & Linda S. Culton, *Under the Rainbow: Rural Gay Life and Its Relevance for Family Providers*, 52 FAM. REL. 72, 77 (2003); *see also* Kosciw et al., *supra* note 58, at 985 (describing how characteristics common in rural areas, and particularly remote rural areas far removed from a major metropolitan area, contribute to more “concentrated homophobia” than in urban and suburban areas).

access to, or at least familiarity with, a diversity of lifestyles, attitudes, and resources that rural people simply lack.⁶⁰

II. CONTESTING URBAN BIAS

Urban bias shapes how law and society perceive sexual minorities. Its tenets geographically situate gays, lesbians, and bisexuals in urban gay communities; dictate the cultural contours of how to be a modern gay person; and demand openness and open affiliation with LGB identity. To view sexual minorities through this urban lens can elide nongay communities and sources of belonging, including families of origin, religion, and predominately straight small towns and rural places. Urban bias propels one's sexual self to ultimate importance and subordinates other perhaps more central aspects of identity. Critically, it masks the vulnerability and needs of those who fail to subscribe to urbanized norms.

By focusing on the disjuncture between rural life and hegemonic—or dominant—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 allow for a broader discussion of the ways in which law and society construct gay identity in exclusionary ways across class, race, and place, which in turn provide opportunities for thinking about nuanced strategies for helping all sexual minorities live comfortably in their homes.

A. The City as a Symbol for Where to Be Gay: Migration, Community, and Exclusion

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”⁶¹ with feelings of same-sex desire, she searches for others like her and discovers

60. City dwellers possess a degree of exposure to diverse people and cultures by virtue of living in a more demographically heterogeneous place. “Rural America as a whole is and has tended to be far less racially and ethnically diverse than America’s urban areas.” BROWN & SCHAFFT, *supra* note 35, at 141; *see also* Huang & Stewart, *supra* note 44, at 30.

61. 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!”

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 gay identities and communities have historical roots in American industrialization, urban growth, and wartime dislocation.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 Professor 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 toward 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 The residential patterns of sexual minorities into certain major cities, and a small number of neighborhoods within them, increase localized LGBT political power, prompting some local governments to enact progay and protective legislation.⁶⁸ And as sexual minorities increasingly take flight to urban gay

Weston, *supra* note 9, at 261 (alteration omitted). Despite widespread availability of the internet, it remains true today that many rural sexual minorities grow up with no or few positive gay role models, and some youth may not even know that gay people exist. Socially conservative families and churches in rural areas wield enormous control over the information to which youth have access. *See generally*, e.g., Jennifer E. Hansen & Serena M. Lambert, *Grief and Loss of Religion: The Experiences of Four Rural Lesbians*, 15 J. LESBIAN STUD. 187 (2011). One of Hansen and Lambert's interview participants, who grew up in a "very rural area," explains that she had no exposure to LGBTQ individuals, and, as a teenager, she did not know what the words gay and lesbian meant. *Id.* at 191.

62. *See generally* Kazyak, *supra* note 34, at 561–63 (describing as a cultural "stock character" the "'oppressed rural gay' [who] flee[s] to the city . . . , find[s] a queer community, and become[s] 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, 1890–1940* (1994).
64. *See generally* Weston, *supra* note 9.
65. *See* Stephen Clark, *Progressive Federalism? A Gay Liberationist Perspective*, 66 ALB. L. REV. 719, 719–20 (2003) ("[T]he gay presence in urban centers is far greater than in other parts of the country. This concentration is a result of . . . a perpetual Great Migration that brings lesbians and gay men to places where more tolerant attitudes make for a better quality of life . . ." (footnote omitted)).
66. *See* Samuel A. Marcossou, *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. & FAM. STUD. 217, 230 (1998) ("[T]here has been a 'gay flight' to the cities—refuges where lesbians and gay men could find others like ourselves and find a somewhat safer existence."); Weston, *supra* note 9, at 253.
67. *See* Fernando J. Gutierrez, *Gay and Lesbian: An Ethnic Identity Deserving Equal Protection*, 4 LAW & SEXUALITY 195, 223 (1994).
68. Yishai Blank & Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C. L. REV. 955 *passim* (2012) (describing this phenomenon as the "localization of sexuality"). As Blank and Rosen-Zvi eloquently note: "The delegation of many issues regarding sexuality to localities . . . not only impacts residential patterns of gays and lesbians, but has also brought about a plethora of positive consequences to sexual minorities: it has driven the creation of safe havens for gays and lesbians in which they are protected

spaces, opportunities for finding like-minded friends, suitable sexual partners, or a long-term romantic relationship increase for those who make cities their home.⁶⁹ These factors and the cyclical migratory loop they foster contribute to the widely shared belief that cities are the refuge of gay people.⁷⁰ In turn, scientists and scholars who study homosexuality and LGB populations have focused predominately on urban locales, further contributing to the urbanization of gay knowledge and perception.⁷¹

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 ever been—confined to large cities. Society's preoccupation with the urban has resulted in a lack of information about the experiences of sexual minorities who live in rural areas.⁷² 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—a young gay man who was murdered in Laramie, Wyoming because of his sexual orientation⁷³—or as portrayed in *Brokeback Mountain*.⁷⁴ People often wonder why anyone would

from discrimination and harassment and in which they may lead public lives according to their shared identity; it has enabled the building and flourishing of communities; it has allowed marginalized sexual minorities to not only speak out concerning their dissenting views, but also to act upon their views, drawing state and national attention to their plight; it has facilitated the visualization of a previously invisible minority; and it has enhanced the pluralism of society as a whole by allowing radically different communities to exist side by side." *Id.* at 960–61 (emphasis omitted).

69. See RICHARD A. POSNER, *SEX AND REASON* 126 (1992) (reasoning that, as more homosexuals move to cities, cities become more attractive to other homosexuals because of the increasing size of the dating pool).
70. See DIDIER ERIBON, *INSULT AND THE MAKING OF THE GAY SELF* 18–24 (Michèle Aina Barale et al. eds., Michael Lucey trans., 2004).
71. Gail Leedy & Cathy Connolly, *Out in the Cowboy State: A Look at Gay and Lesbian Lives in Wyoming*, 19 J. GAY & LESBIAN SOC. SERVICES 17, 17 (2006). In the United States, the most visible and studied gay geography is urban; "one might be forgiven for thinking that . . . all gay men congregate in San Francisco." David J. Bell, *Insignificant Others: Lesbian and Gay Geographies*, 23 AREA 323, 325 (1991).
72. See, e.g., Jo Little, *Gender and Sexuality in Rural Communities*, in THE HANDBOOK OF RURAL STUDIES, *supra* note 29, at 365, 373 (describing how it took until the mid-1990s for academics to challenge the "neglect of rural homosexuality").
73. In October 1998, Matthew Shepard was tied to a fence, severely beaten, and left unconscious in rural Laramie, Wyoming. He ultimately died. See generally JUDY SHEPARD, *THE MEANING OF MATTHEW: MY SON'S MURDER IN LARAMIE, AND A WORLD TRANSFORMED* (2009).
74. *Brokeback Mountain* is a short story and popular 2005 movie that focuses on the intimate relationship of two men living in the rural American west. Annie Proulx, *Brokeback Mountain*, NEW YORKER, Oct. 13, 1997, at 74; BROKEBACK MOUNTAIN (Focus Features 2005). It ends in tragedy when one of the men is beaten to death, presumably because of his sexuality.

choose to endure life in a supposedly intolerant and even brutally violent place.⁷⁵ The question wrongly presumes the existence of resources and freedom necessary for a person to pick up and move from one place to another, and it dismisses those who prefer to stay in their hometowns despite challenges.

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 rural hometowns.⁷⁶

There are, however, real and important consequences to the geographic conflation of gay people and cities. First, the presumption that same-sex desire is best experienced and exercised in a city disregards urban narratives that end unhappily. The rural native who embarks on the Great Gay Migration may arrive to discover that she has little in common with gay people,⁷⁷ feeling conspicuous or embarrassed because of her rural roots and provincial mannerisms.⁷⁸ She might come to find that she left her home and family for an accepting gay community that exists more in theory than in reality;⁷⁹ this is especially true for people of color who tend to place tremendous importance on nuclear families and relatives for social organization and as sites of solace and resistance against racial oppression in broader society.⁸⁰ 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.⁸¹ Instead, “the promise of urban gay communit[y]” and identity “is often

75. See HALBERSTAM, *supra* note 8, at 36–37 (“[T]he metronormative story of migration from ‘country’ to ‘town’ is 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 20, at 270.

76. See Gilbert Herdt & Andrew Boxer, *Introduction: Culture, History, and Life Course of Gay Men*, in *GAY CULTURE IN AMERICA*, *supra* note 47, at 1, 8–14 (describing large urban centers as geographic sites for psychological repair, social mobility, and protection from the violence of homophobia).

77. See Weston, *supra* note 9, at 269–70.

78. See ELI CLARE, *EXILE & PRIDE: DISABILITY, QUEERNESS AND LIBERATION* 38 (2009) (describing the author’s 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); Alexis Annes & Meredith Redlin, *Coming Out and Coming Back: Rural Gay Migration and the City*, 28 *J. RURAL STUD.* 56, 64–65 (2012) (describing the stress rural-to-urban sexual minority migrants feel because of ignorance about—and pressures to conform to—the implied codes that regulate interaction and behavior in urban gay spaces).

79. See Mark S. King, *Did I Abandon Family for the Gay Community?*, *GAY.NET* (Nov. 7, 2011), <http://www.gay.net/positive-proud/2011/11/07/did-i-abandon-family-gay-community>.

80. See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 *HARV. L. REV.* 1419, 1470–71 (1991); see also Todd Brower, *It’s Not Just Shopping, Urban Lofts, and the Lesbian Gay-by Boom: How Sexual Orientation Demographics Can Inform Family Courts*, 17 *AM. U.J. GENDER SOC. POLY & L.* 1, 3 (2009) (explaining that people of color who have same-sex desire or who are in same-sex relationships tend to live where others of their own race or ethnicity live rather than in urban gay enclaves).

81. Weston, *supra* note 9, at 268–70.

compromised in the face of racism, Eurocentric aesthetic standards, and ultimately, new forms of marginality.⁸² Further, the disconnect between the gay imaginary and the reality of attempted assimilation into an urban gay community can lead to tangible economic struggle and even homelessness.⁸³ Rural dwellers who hope to migrate to the city for a better quality of life may ultimately prove uncompetitive in metropolitan markets, where workers and applicants typically have more and better educational and training opportunities.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 ignores the presence and needs of the thousands of sexual minorities who live in rural communities and small towns. According to the Williams Institute at UCLA School of Law, analysis of the 2010 Census data shows that approximately 64,000 cohabitating same-sex couples live in rural America, representing roughly 10 percent of all cohabitating same-sex couples in the country.⁸⁶ While not insignificant, this figure is grossly underinclusive, and it is impossible to know precisely how many people in rural America have same-sex desire, have same-sex sex, or identify as LGB.

Certainly, many of these rural sexual minorities 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

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 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; see also Natalie Oswin, *Critical Geographies and the Uses of Sexuality: Deconstructing Queer Space*, 32 PROGRESS HUM. GEOGRAPHY 89, 93 (2008) (arguing that “queer space” is often white space).

83. Between 30 and 40 percent of homeless youth in big cities, 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>. Anecdotal evidence suggests that 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 & Jennifer Clare Burke eds., 2010).

84. See Cynthia B. Struthers & Janet L. Bokemeier, *Myths and Realities of Raising Children and Creating Family Life in Rural County*, 21 J. FAM. ISSUES 17, 41 (2000).

85. Weston, *supra* note 9, at 265.

86. Bill Bishop, *Same-Sex Couples in Rural America*, DAILY YONDER (Oct. 10, 2011), <http://www.dailyyonder.com/same-sex-couples-rural-america/2011/10/07/3555>.

87. See David Knapp Whittier, *Social Conflict Among “Gay” Men in a Small(er) Southern Town*, 7 J. GAY & LESBIAN SOC. SERVICES 53, 66 (1998) (“Class is certainly a factor in determining who migrates from a [small] town . . . and who does not.” (citation omitted)).

88. GRAY, *supra* note 36, at 6.

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 These wistful sexual minorities, yearning but unable to get out, ultimately become the most vulnerable in their small communities. As sexual minorities flee rural areas, many of whom are privileged with good educations and financial flexibility, those who unwillingly remain may find it difficult to form and cultivate close relationships with other same-sex interested people—whether for companionship, love, sex, or safety. Underprivileged, isolated, and made more visible by the exodus of fellow sexual dissidents, these sexual minorities may be susceptible to harm.⁹¹

More positively, however, countless other rural sexual minorities prefer small-town life or happily get by.⁹² These sexual minorities claim alternative forms of belonging in otherwise mostly straight and remote places. In numerous studies, sexual minorities routinely identify family as among the best things about rural life.⁹³ Rural inhabitants tend to rely on their families for social, emotional, and financial support,⁹⁴ and these families represent important safety nets in these

89. See Kirkey & Forsyth, *supra* note 55, 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. See Bassett, *supra* note 23, 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.” (footnote omitted)); Murray & Keller, *supra* note 52, at 222.

91. Blank & Rosen-Zvi, *supra* note 68, at 961 (arguing that the territorialization of urban places as safe gay havens “might entrench and even enhance discrimination and violence toward gays and lesbians who live outside of the cities”).

92. 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. See, e.g., CLARE, *supra* note 78, at 40. A longtime 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 the middle of nowhere. I think the Midwest is a wonderful place to be.” Mark Vanderbeek, in FARM BOYS, *supra* note 2, at 202, 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 continue 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, <http://articles.latimes.com/1999/mar/14/news/mn-17291> (internal quotation marks omitted). Further, in a study of fifteen elderly 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 their rural communities so hospitable. Comerford et al., *supra* note 4, at 427.

93. See, e.g., Robert J. Corber, *Queer Regionalism*, 11 AM. LITERARY HIST. 391, 394 (1999) (noting the importance of both religion and family to sexual minorities who are from the South and Midwest); Oswald & Culton, *supra* note 59, at 74; Whittier, *supra* note 87, at 57–58.

94. See Anthony R. D’Augelli & Mary M. Hart, *Gay Women, Men, and Families in Rural Settings: Toward the Development of Helping Communities*, 15 AM. J. COMMUNITY PSYCHOL. 79, 85 (1987)

communities where resources and opportunities are limited.⁹⁵ Religious institutions can similarly have “an important impact on gay people,” and sometimes offer social, emotional, and spiritual support for sexual minorities who might otherwise feel isolated.⁹⁶

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.⁹⁷ In one study of gay men in a small town, respondents explained that the familiarity with others in town is what they liked most.⁹⁸ “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.”⁹⁹ 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 community things here. It is easy for me to do that in a small town.”¹⁰⁰

Rural sexual minorities also commonly share a love of nature, the land, “and activities particular to the area, such as farming and hunting.”¹⁰¹ Some feel that “larger geographic distances between neighbors” offer greater freedom to go about their lives than in cities.¹⁰² Some own farms or acreage and scoff at the idea of giving up spatial freedom to be in more heavily populated areas.¹⁰³ Others feel that the “beauty of the natural environment” contributes to their physical and emotional wellbeing,¹⁰⁴ and some even feel a “spiritual” connection to the land.¹⁰⁵ Emmett, a Russell County, Alabama native, and self-identified gay black man, had this to say about his rural home:

(“Rural residents ordinarily rely on families, kin, and close friends to solve their problems, seldom turning to professionals . . .”).

95. See, e.g., GRAY, *supra* note 36, at 128. Sarah, a self-identified lesbian youth living in rural Kentucky, noted that she “didn’t want to escape from rural Kentucky[, i]n part . . . because of her close ties with family.” *Id.* Moreover, she, like most of the rural youth who participated in the study, “had no funds to leave her hometown and no educational training or particularly marketable job skills to make moving anything but a frightening prospect.” *Id.*
96. James Donald Smith, *Working With Larger Systems: Rural Lesbians and Gays*, 7 J. GAY & LESBIAN SOC. SERVICES 13, 18 (1998).
97. Otis, *supra* note 31, at 283.
98. David Knapp Whittier, *Race and Gay Community in Southern Town*, in *OUT IN THE SOUTH* 72, 89–90 (Carlos L. Dews & Carolyn Leste Law eds., 2001).
99. *Id.*
100. MILLER, *supra* note 3, at 21 (internal quotation marks omitted).
101. Struthers & Bokemeier, *supra* note 84, at 20.
102. Comerford et al., *supra* note 4, at 426.
103. Oswald & Culton, *supra* note 59, at 74.
104. Sandra S. Butler & Barbara Hope, *Health and Well-Being for Late Middle-Aged and Old Lesbians in a Rural Area*, 9 J. GAY & LESBIAN SOC. SERVICES 27, 35–36 (1999).
105. Martin Scherz, in *FARM BOYS*, *supra* note 2, at 160, 160.

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—this may sound strange—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.¹⁰⁶

Finally, although most rural areas lack organized LGBT communities and provide little or no access to LGBT-specific gathering places, informal support networks for sexual minorities can develop. These informal networks cultivate a tight-knit sense of community among members.¹⁰⁷ They are generally unknown to heterosexuals, and they may be difficult to permeate unless one has an internal connection.¹⁰⁸ For those who can find them, important “car-facilitated networks across space can stand in for place-based communities”¹⁰⁹ and provide support, advice, and a “source of profound reassurance.”¹¹⁰ Particularly for rural women, who face pronounced forms of isolation and a lack of women-specific services, informal helping networks are critical forms of support, especially for those raising children.¹¹¹

Whether those who remain in small towns do so by choice or by necessity, happily or unhappily, many lack legal protection against discrimination based on sexual orientation,¹¹² and legal recognitions or benefits for same-sex couples are

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106. Joseph Beam, *Emmett's Story: Russell County, Alabama*, in *OUT IN THE SOUTH*, *supra* note 98, at 9, 13 (alteration in original). 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.
107. *See, e.g.*, Cody & Welch, *supra* note 4, at 66; Oswald & Culton, *supra* note 59, at 75.
108. *See* Anthony R. D'Augelli et al., *Social Support Patterns of Lesbian Women in a Rural Helping Network*, 8 *J. RURAL COMMUNITY PSYCHOL.* 12, 14 (1987); *see also* D'Augelli & Hart, *supra* note 94, 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.*
109. Bell, *supra* note 32, at 187.
110. Anthony R. D'Augelli, *Lesbian Women in a Rural Helping Network: Exploring Informal Helping Resources*, in *LESBIANISM: AFFIRMING NONTRADITIONAL ROLES* 119, 124 (Esther D. Rothblum & Ellen Cole eds., 1989). *See generally id.* at 122, 124–25 (analyzing the role of informal helping networks in rural women's lives).
111. *See id.*; *see also* Comerford et al., *supra* note 4, at 420–23 (discussing the “critical” nature of informal helping networks for aging rural lesbians); Jo Little, *Gender Relations in Rural Areas: The Importance of Women's Domestic Role*, 3 *J. RURAL STUD.* 335, 338 (1987) (noting the special importance of informal helping networks for women with children).
112. Twenty-one states and Washington D.C. prohibit employment discrimination based on sexual orientation. No Southern state prohibits such discrimination, nor do the mostly rural states in the Midwest. *Statewide Employment Laws & Policies*, HUM. RTS. CAMPAIGN, http://www.hrc.org/files/assets/resources/Employment_Laws_and_Policies.pdf (last updated June 12, 2012).

rare.¹¹³ Even in states that have legalized same-sex marriage, some local officials “defy their state, refusing to sign marriage certificates of same-sex couples.”¹¹⁴ This not only provokes shame and signals moral disapproval, but it may pose a significant hurdle for sexual minorities in small towns with few remedial avenues. Worse, some local governments actively target sexual minorities for disapproval or condemnation, by “using their zoning powers in an exclusionary manner and by targeting gay- and gay-friendly establishments when applying their licensing and public health authorities.”¹¹⁵

Thus, not only are rural sexual minorities vulnerable because of the cultural and economic factors common to small-town life, they are vulnerable under the law. This vulnerability is rarely addressed, yet it denies sexual minorities opportunities to live comfortably and negotiate sexual identity on their own terms. The metronormative narrative fixing sexual minorities into presumably welcoming urban gay neighborhoods is omnipresent, rendering it easily accessible by both pro- and antigay people. Gay rights advocates 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.”¹¹⁶ 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.¹¹⁷

113. M.V. LEE BADGETT & JODY L. HERMAN, WILLIAMS INST., PATTERNS OF RELATIONSHIP RECOGNITION BY SAME-SEX COUPLES IN THE UNITED STATES 2 tbl.1 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Herman-Marriage-Dissolution-Nov-2011.pdf> (noting that nineteen states and Washington D.C. provide legal recognition for same-sex couples; apart from Wisconsin, Iowa, Colorado, and Illinois, these states are in New England or on the Pacific Coast and none is in the Deep South).

114. Blank & Rosen-Zvi, *supra* note 68, at 976 (citing one incident in rural Volney, New York, where a town clerk refused to sign a marriage certificate because of religious and moral objections to homosexuality).

115. *Id.* at 1010.

116. See Kramer, *supra* note 2, at 206.

117. 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 (Jackson, Miss.), Aug. 13, 2003, at 1E. In response to the U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), 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.” Santa Maria, *supra*, at 1E (some internal quotation marks omitted).

By exposing and contesting urban bias, this Article discredits the notion that sexual minorities “belong in cities in a way that they don’t belong in . . . small towns[] or the rural recesses of the American hinterlands.”¹¹⁸ To the contrary, sexual minorities belong in rural communities every bit as much as their heterosexual friends, families, and neighbors. Eloquently put by Judith Halberstam, “The rural queer may be attracted to the small town for precisely those reasons that make it seem uninhabitable to the urban queer.”¹¹⁹ It is important to recognize the positive aspects of small-town living 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 they hold dear.¹²⁰ 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 urban gay 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.¹²¹

118. Colin R. Johnson, *Homosexuals in Unexpected Places? An Introduction*, AM. STUD., Summer 2007, at 5, 5.

119. HALBERSTAM, *supra* note 8, at 43.

120. 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 59, at 74–75 (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) (noting that sexual minorities widely report “self-acceptance, close relationships, and high quality of life” as the primary benefits of rural living (quoting Oswald & Culton, *supra* note 59, at 74) (internal quotation marks omitted)).

121. Bonnie J. Morris, *Women’s Festivals on the Front Lines*, in OUT IN THE SOUTH, *supra* note 98, at 56, 57. Wanda Henson founded the Gulf Coast Womyn’s Festival in 1989 after losing custody of her children to her former husband. She started the community to provide a clean and sober alternative to the bar scene and to do political work. *Id.* at 58.

B. The City as a Symbol for How to Be Gay

1. Gay Culture, Gay Stereotypes, and Antigay Bias

In his landmark *Perry v. Schwarzenegger*¹²² decision, Judge Vaughn Walker aptly noted that “[w]ell-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.”¹²³ These and other stereotypes about sexual minorities and their “lifestyles”¹²⁴ reflect persistent assumptions about homosexuality and gay identity that operate to perpetuate discrimination against all people who have same-sex desire. While these assumptions are indeed well known, their embedded urban implications are less frequently discussed.

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.”¹²⁵ Because it is so firmly anchored to the social understanding of where gay people live, so too has the city come to operate as the cultural referent for how to be gay. Of course, it seems obvious to point out that there is no single way to perform gay identity, nor does a uniform gay culture exist. Yet, in modern society, depictions of gay people almost exclusively revolve around cities, and attendant cultural tropes have emerged, become dominant, and do tremendous work in validating and reinforcing well-known stereotypes about gay people.¹²⁶ Like the geographic tenet of urban bias, this cultural component has profound negative effects for all sexual minorities, and especially for those who exist on the economic and geographic margins.

For example, dominant depictions of gay culture frequently display sexual minorities as creatures of leisure and wealth. Both pro- and antigay representations situate LGB people around sites of metropolitan consumerism, or “scene spac-

122. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

123. *Id.* at 982–83.

124. See generally Larry Mutz, Essay, *A Fairy Tale: The Myth of the Homosexual Lifestyle in Anti-Gay-and-Lesbian Rhetoric*, 27 WOMEN’S RTS. L. REP. 69 (2006) (discussing the use of the term “lifestyle” when referring to gay or lesbian people and its incorrect implication that all sexual minorities lead similar lives).

125. HERRING, *supra* note 29, at 4.

126. See, e.g., Weston, *supra* note 9, at 262 (“From pride parades to persons with AIDS, representations of the gay subject are almost always situated in an urban setting.”).

es,¹²⁷ where they spend time and money in gay bars, dance clubs, bookstores, coffeehouses, theaters, gyms, and other shops.¹²⁸ While certainly many LGB people enjoy gay-specific commerce and relaxation, popular representations tend to showcase only the most exaggerated exemplars, as well as a particularized exclusionary aesthetic. Professor Scott Herring describes this authoritative portrayal of gay culture as one in which sexual minorities are cast as urbanites who 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.”¹²⁹ “Urbanity,” in this narrow and exclusionary sense, “has been critical to the development of a gay sensibility.”¹³⁰

The focus on the most economically privileged gay urbanites and exclusive gay scene spaces, in turn, makes it difficult for sexual minorities who are poor or rural to connect with gay culture and identity.¹³¹ For sexual minorities in small towns, especially those who live in economically disadvantaged areas with low concentrations of self-identified gay people, the notion of a gay community complete with gay amenities has little salience.¹³² These areas have few LGB resources, and perhaps no physical LGB-specific gathering places to go to for fun or support; the nearest gay bar or bookstore may be hundreds of miles away.¹³³ Even the seemingly

127. Yvette Taylor, *Not All Bright Lights, Big City? Classed Intersections in Urban and Rural Sexual Geographies*, in *RESHAPING GENDER AND CLASS IN RURAL SPACES* 179, 180–81 (Barbara Pini & Belinda Leach eds., 2011).

128. See, e.g., Mark Bartholomew, *Advertising and Social Identity*, 58 *BUFF. L. REV.* 931, 971 (2010) (arguing that today, gay identity is constituted by a consumption of advertised products more than by shared sexuality); Jeff Maskovsky, *Do We All “Reek of the 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) (explaining how the growth of presumably liberating gay communities in cities, fueled by urban-based consumerism, has come at the expense of poor sexual minorities); David M. Skover & Kellye Y. Testy, *LesBiGay Identity as Commodity*, 90 *CALIF. L. REV.* 223, 238–44 (2002) (describing the impact of commercialism on the construction of LGB identities).

129. HERRING, *supra* note 29, at 16 (emphasis omitted).

130. Charles J. Ten Brink, *Gayborhoods: Intersections of Land Use Regulation, Sexual Minorities, and the Creative Class*, 28 *GA. ST. U. L. REV.* 789, 824 (2012). Ten Brink notes that, early in the history of gay liberation, “gayborhoods . . . tended to be of a particular form: entertainment-centered, aggressively sexualized, youthful, male, and white.” *Id.* at 828.

131. *Id.* at 829 (arguing that the way in which gay sensibility and urban gayborhoods operate in the public imagination “suggests that there are no blue-collar gays, no gays of color, and no lesbians”).

132. See HOWARD, *supra* note 5, at 15 (distinguishing rural “[g]ay community” as a “concept lacking in explanatory power, a notion that incompletely and inadequately gets at the shape and scope of [rural] queer life”).

133. See, e.g., Scott Herring, *Out of the Closets, Into the Woods: RFD, Country Women, and the Post-Stonewall Emergence of Queer Anti-urbanism*, 59 *AM. Q.* 341, 351–52 (2007). In a study of lesbian-identified women living in rural Pennsylvania, all participants were concerned about the lack of space for sexual

private act of ordering a gay-themed book in the mail can be a privileged act, too risky in a rural atmosphere lacking anonymity.¹³⁴ Where gay scene spaces do exist in small towns, literal financial barriers limit access to only those who can afford admission and consumption.¹³⁵ Moreover, because these areas tend to have few, if any, known local role models to counter extreme urbanized stereotypes about LGB people,¹³⁶ rural sexual minorities often feel alienated by gay identity, community, and culture. Stereotypical depictions of gay scenes and events, where the aesthetic can appear hostile to the very idea of rural areas and the presumed rednecks that live in them,¹³⁷ can serve as a repellent and ignite antiurban attitudes among many rural sexual minorities.¹³⁸ Rural heterosexuals likewise digest and internalize these urbanized stereotypes, which bolsters and conflates both antigay and antiurban animus. Indeed, many rural natives, straight and gay alike, have a strong distaste for perceived urban elitism and choose to stay in their communities precisely because they “actively dislike metropolitan attitudes and behaviors.”¹³⁹

Another dominant cultural stereotype about gay people, and particularly gay men, relies on the presumption that sexual minorities prefer sexual variety in practices and partners. Some prominent progay advocates suggest that unrestrained sex is authentically queer, and even imply that sexual liberation is authentically

minorities; participants found it difficult to develop connections to an organized community in their hometown. Yost & Chmielewski, *supra* note 42, at 160.

134. See Linda McCarthy, *Poppies in a Wheat Field: Exploring the Lives of Rural Lesbians*, 39 J. HOMOSEXUALITY 75, 91 (2000).
135. “Even though many of the urban scene spaces had achieved a celebrity status as the gay ‘places to be’ . . . interviewees spoke of very real financial barriers against entry, and the tensions in accessing a space where only certain embodied presentations and ways of being were being recognized and affirmed.” Taylor, *supra* note 127, at 188.
136. See Kramer, *supra* note 2, at 211 (explaining that the lack of accurate information about homosexuality and positive LGB role models hampers the ability to counter stereotypes).
137. See, e.g., Bell, *supra* note 16, at 171 (noting that the “*Advocate*-style ‘metrosexuality’” that has disseminated into American culture “fails to represent and include the provincial (and rural) homosexual”); Herring, *supra* note 133, at 348–54 (discussing the gay-themed magazine *Advocate* as “confirm[ing] a white middle-class cosmopolitanism that marked norms of cultural and economic capital for many gay men and lesbians”).
138. 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—because of antiurban sentiment. See Bell, *supra* note 71, at 325 (“[G]roups of lesbians and gay men have established rural communes . . . embracing separatist anti-materialist and anti-urban values.” (citations omitted)); Mark Thompson, *This Gay Tribe: A Brief History of Fairies*, in GAY SPIRIT: MYTH AND MEANING 260 (Mark Thompson ed., 1987) (charting the development of a separatist gay men’s movement in the rural United States, resulting from dissatisfaction with urban-based gay political, cultural, and social scenes).
139. Leon H. Ginsberg, *Introduction: An Overview of Rural Social Work*, in SOCIAL WORK IN RURAL COMMUNITIES 3, 8 (Leon H. Ginsberg ed., 3d ed. 1998).

urban¹⁴⁰: “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.”¹⁴¹

As a corollary, hegemonic urban gay tropes deemphasize, and in many cases disown, traditional conceptions of family and religion.¹⁴² The narrative that places rural sexual minorities on a direct route to the nearest city presumes either severed ties with families or interaction only from a distance. It is widely believed that, in small towns, family connectedness leads to surveillance and prevents one from living “as Nature demands.”¹⁴³

The perception that sexual minorities are noncommittal, self-absorbed, and hypersexual is harmful to all LGB people, and it has historically justified the criminalization of those who have sex to express same-sex love, affection, and erotic desire.¹⁴⁴ The “sex-as-lifestyle” assumption¹⁴⁵ demeans and reduces gay identities and relationships to “fisting and fucking.”¹⁴⁶ And because these urbanized stereotypes are so pervasive, many sexual minorities perceive gay culture as dismissive or discriminatory toward those who emphasize religious or traditional family values

140. 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”).

141. *Id.* at 190.

142. See VAID, *supra* note 21, at 17 (“Gay and lesbian people are not thought of as a people with faith . . .”).

143. CHAUNCEY, *supra* note 63, at 131. Chauncey tells the story of a man who moved from his rural hometown to New York City in 1882, who declared,

“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.

Id.

144. See, e.g., *State v. Walsh*, 713 S.W.2d 508 (Mo. 1986) (en banc) (finding, based in part on evidence of hypersexuality among gay males, that a statute prohibiting private consensual homosexual activity was rationally related to the State’s objective of implementing and promoting public morality and public health).

145. Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 514 (1992) (noting that the “common understanding” of gay sexuality is perceived as “all-encompassing, obsessive, and completely divorced from love, long-term relationships, and family structure”).

146. Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867, 868 (2000).

as key to their understanding of self.¹⁴⁷ This can have a significant impact on sexual minorities who are of color,¹⁴⁸ working class, or who live in small towns.

In these communities, the church may serve as the primary institution for recreation, social congregation, and economic support.¹⁴⁹ 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.”¹⁵⁰ Others may use religious gatherings as opportunities to meet and develop relationships with other same-sex-interested people.¹⁵¹ But the perception that gay people spend their days in bars and in bed can make it difficult for these sexual minorities to find acceptance in churches and communities already skeptical of same-sex love and affection. In turn, their ability to be respected participants in their communities, and to receive much needed emotional and financial support, is limited. Particularly in small towns, where sexual minorities are inevitably more visible than in urban areas, the urbanized sexual-gratification bias 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,”¹⁵² reckless, and unfit to be parents. The glaring exposure of openly LGB people or same-sex partners in close-knit communities, coupled with urban stereotypes that paint sexual minorities as promiscuous and detached from families, can make rural sexual minorities easy targets in the courtroom.

The foregoing discussion sets the foundation for understanding how cultural urban bias can have legal implications. Judges are not insulated from social stereotypes about gay people, and, when presiding in cases in which sexual orientation is relevant or at issue, judicial rhetoric reveals the way in which these legal actors

147. Cf. R.R. Ganzevoort et al., *Growing Up Gay and Religious: Conflict, Dialogue, and Religious Identity Strategies*, 14 MENTAL HEALTH, RELIGION & CULTURE 209, 218 (2011) (“[I]n parts of gay subculture, a negative stance towards religion may result in homosexuals downplaying their religious desires, experiences, and beliefs.”).

148. See, e.g., Richard N. Pitt, “*Killing the Messenger*”: *Religious Black Gay Men’s Neutralization of Anti-gay Religious Messages*, 49 J. SOC’Y SCI. STUDY RELIGION 56 (2010) (summarizing studies showing that, in America, blacks are the most likely group to report formal religious affiliation, and gay black men report similarly high levels of religiosity).

149. See HOWARD, *supra* note 5, at 49–50, 230–31 (finding that in the South, churches were the most important institution for people of color). Urban biases that deem religion incompatible with homosexuality means that sexual minorities often find themselves caught between mainstream LGB subcultures and dominant religious culture in their communities. See Krista McQueeney, “*We Are God’s Children, Y’All*”: *Race, Gender, and Sexuality in Lesbian- and Gay-Affirming Congregations*, 56 SOC. PROBS. 151, 152 (2009).

150. HOWARD, *supra* note 5, at 109.

151. *Id.* at 49–53.

152. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 982 (N.D. Cal. 2010).

incorporate ubiquitous urban biases about gay people and their “lifestyles” into legal analysis.¹⁵³ For example, in *Mockeviciene v. United States Attorney General*,¹⁵⁴ a case involving an asylum petition based on sexual orientation, an Immigration Judge (IJ) ruled that a woman’s claim to lesbian identity was not credible.¹⁵⁵ 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 United States, and because she failed to produce any witnesses or credible documentation validating her lesbianism.¹⁵⁶ Indeed, judges typically require asylum applications to prove homosexuality via visible cultural markers of gay identity,¹⁵⁷ often demonstrated by membership in LGBT organizations, subscriptions to LGBT publications, and participation in gay pride events.¹⁵⁸ While

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153. Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159, 167–68 (2006) (explaining that judicial rhetoric demonstrates stereotypical notions of rural people and places, contributing to the persistent invisibility of rural realities). In *Chicoine v. Chicoine*, 479 N.W.2d 891, 897 (S.D. 1992) (Henderson, J., dissenting), for example, Justice Henderson raises the specter of the urban 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. While these statements refer to specific facts from the record, Justice Henderson seemingly situates these factual findings against her broader understanding of what it means to be a lesbian, which, as she revealingly describes it, means engaging in a “life of perversion” and a “life of abomination.” *Id.* at 896.
154. 237 F. App’x 569 (11th Cir. 2007).
155. *Id.* at 574. For the purposes of this Article, the focus on the law governing refugees and the right to seek political asylum is on proving “membership in a particular social group” necessary to make a successful asylum claim. See *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990) (holding that being “homosexual” qualifies as membership in a “particular social group,” while rejecting the Immigration and Naturalization Service’s contention that being a homosexual does not qualify as a “particular social group”); Attorney General Order No. 1895-94 (June 19, 1994) (designating *Toboso-Alfonso* as precedent for all immigration courts and asylum offices). 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 define the contours of what counts as gay. See Melanie A. Conroy, *Real Bias: How Real ID’s Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 BERKLEY J. GENDER L. & JUST. 1, 29–31 (2009) (explaining the challenges asylum applicants face when attempting to prove the truth of their sexual orientation); Hinger, *supra* note 160, at 388; Jenni Millbank, *The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations*, 21 INT’L J. REFUGEE L. 1, 16–22 (2009) (describing the problematic nature of credibility assessments given the gulfs between the experiences and cultural vantage points of applicants and adjudicators).
156. *Mockeviciene*, 237 F. App’x at 572.
157. See Dan Bilefsky, *Gays Seeking Asylum in U.S. Encounter a New Hurdle*, N.Y. TIMES, Jan. 29, 2011, at A19 (noting that judges and immigration officials require an applicant’s homosexuality to be socially visible to obtain asylum based on their sexual orientation).
158. See Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 LAW & SEXUALITY 135, 147 (2006) (stating that applicants are often successful in providing proof of sexual orientation that comports with judicial stereotypes of what it means to be gay); see also Swetha Sridharan, *The Difficulties of US Asylum Claims Based on Sexual Orientation*, MIGRATION INFO. SOURCE (Oct. 2008), <http://migrationinformation.org/Feature/display.cfm?ID=700> (“Judges look for material proof of sexual identity in asylum applicants’ answers.”)

many scholars have criticized courts' analyses in asylum jurisprudence as eliding people of color—arguing that judges base their perceptions of LGB identities on “racialized sexual stereotypes and white gay norms”¹⁵⁹ and on “certain traits stereotypically associated with gay identity in American culture”¹⁶⁰—these conceptions also elide rurality.

In another telling example, one judge 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.¹⁶¹ The court found, based on the father’s testimony, “a specific intent by him to orient the children to the gay lifestyle . . . by taking them to gay religious services and ceremonies, gay social events and gay artistic performances.”¹⁶² In response to the father’s concern that he might unknowingly violate the court’s order and jeopardize his parental rights, the judge apparently reasoned that the contours of a “homosexual lifestyle” are so clear that what constitutes “functions sponsored by or which otherwise promote the homosexual lifestyle” needs no additional elaboration.¹⁶³

And in *State v. Walsh*,¹⁶⁴ which involved a pre-*Lawrence v. Texas*¹⁶⁵ challenge to Missouri’s antisodomy statute that prohibited “deviate sexual intercourse [between] person[s] of the same sex,”¹⁶⁶ 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.¹⁶⁷ Discussing the public health risks purportedly inherent in same-sex sexual intercourse, the court stated that it “need not refer to medical literature to suggest, for example, that there might rationally be health ramifications to anal intercourse and/or oral-genital sex.”¹⁶⁸ Instead, the court cited to a dated pre-HIV/AIDS study describing the ostentatious sexual prac-

Proof may entail subscriptions to gay or lesbian publications, membership in relevant organizations, or an effeminate or masculine appearance that indicates homosexual identity.”).

159. Morgan, *supra* note 158, at 153.

160. See, e.g., Sarah Hinger, *Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims*, 19 COLUM. J. GENDER & L. 367, 387–88 (2010) (explaining that courts establish “whether the particular asylum applicant is truly a member of [a particular] social group” by “polic[ing] the boundaries of the particular social group, most often through appeal to certain traits stereotypically associated with gay identity in American culture”).

161. Marlow v. Marlow, 702 N.E.2d 733, 737–38 (Ind. Ct. App. 1998).

162. *Id.* at 737 (alteration in original).

163. *Id.* at 737–38; cf. J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 871–72 (Mo. Ct. App. 1982) (affirming restriction on father’s visitation that prohibited him from taking child to “gay activist social gatherings”).

164. 713 S.W.2d 508 (Mo. 1986) (en banc).

165. 539 U.S. 558 (2003) (finding a liberty interest in private sexual conduct between two consenting adults).

166. *Walsh*, 713 S.W.2d at 509.

167. *Id.* at 512.

168. *Id.*

tices of a select group of self-identified gay men living in the San Francisco Bay Area,¹⁶⁹ which is hardly an accurate representation of all men who have sex with men. The court 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.”¹⁷⁰

Judicial rhetoric, as demonstrated in these exemplars, reflects the societal presumption that there is a discernible gay culture of general applicability apart from self-identification, same-sex desire, or same-sex sex. Accordingly, in cases involving the most economically or geographically marginalized sexual minorities, judges may incorrectly presume that these individuals have access to sites common only in large cities (gay bars, gay-oriented social events, and gay-specific art), have disposable income to spend at these amenities,¹⁷¹ organize and congregate around visible politics of sexuality, and are hypersexual and detached from family life. Judges’ urban biases can have disastrous consequences for efforts to end discrimination against LGB people, and, as discussed more fully in Part III, judges rely on these presumptions to justify societal discrimination against all sexual minorities and to ignore their vulnerability.

169. The study stated:

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 ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 85 (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 different sources from which potential respondents could be drawn,” and where “the community life-style” would “enhance the possibility of a successful conclusion of the study.” BELL & WEINBERG, *supra*, at 27.

170. *Walsh*, 713 S.W.2d at 512–13 (footnote omitted).

171. *See, e.g.*, *Morrison v. Sadler*, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005) (implying that most gay and lesbian parents are wealthy by improperly focusing on the great expense of *in vitro* fertilization and adoption—the methods by which, according to the court, all same-sex couples must become new 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 courts “assume[] that same-sex couples possess an abundance of resources, financial and otherwise, which allow them to engage in responsible procreation”).

2. Coming Out and Its Geographic Limitations

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.¹⁷²

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, founder Dan Savage assumes 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."¹⁷³ In the inaugural "It Gets Better" video, Savage and his husband, Terry Miller, paint a class-privileged picture of 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. Toward the end of the video, Savage offers as encouragement, "[O]ne day you will find your community."¹⁷⁴

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"¹⁷⁵ 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."¹⁷⁶ "Gay activists push for people to be open, out and known,"¹⁷⁷ arguing that visibility is imperative to change people's hearts and minds.¹⁷⁸ Indeed, LGBT social movement activism has historically depended on the existence of a cohesive, visible community and its

172. IT GETS BETTER PROJECT, <http://www.itgetsbetter.org> (last visited Nov. 12, 2012).

173. Dan Savage, *Introduction*, in IT GETS BETTER, *supra* note 14, at 1, 6.

174. *It Gets Better: Dan and Terry*, IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/#7IcVyvg2Qlo> (last visited Sept. 8, 2012).

175. *The History of Coming Out*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/the-history-of-coming-out> (last visited Nov. 12, 2012).

176. Hutchinson, *supra* note 15, at 603 (citing Fajer, *supra* note 145, at 520) (arguing that Fajer's characterization "blurs race and class differences"). Professor Hutchinson argues that "race- and class-subordinate individuals are burdened by multiple forms of social and economic exclusion, [so they] can likely point to other, perhaps more 'central' and 'traumatic' experiences in their 'gay lives'—such as racial discrimination and economic deprivation." *Id.* (footnote omitted).

177. Smith, *supra* note 96, at 18.

178. See, e.g., VAID, *supra* note 21, at 33.

group consciousness and resistance to oppression.¹⁷⁹ 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 LGBT activists and progay people urge others to self-identify and come out, they must be careful not to presume to know what a person thinks or feels; nor can they presume that publicly embracing a nonheterosexual identity is always in a person's best interest or will lead to any greater truth.¹⁸⁰ 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 sometimes confirms preexisting beliefs about sexual identity. Contrary to what the project suggests, creating a "life worth living"¹⁸¹ does not necessarily require one to be openly gay at all times and integrate into LGBT communities. Many factors—including race, class, and place—drastically affect the calculus of self-identification and sexual expression.

Far removed from urban gay communities and culture, "rural non-heterosexuals [do] not necessarily position sexuality as the definitive characteristic of self."¹⁸² Instead, "the rural context allows for a different array of acts, practices, performances, and identifications."¹⁸³ For example, some rural sexual minorities might consider cultural or occupational identities, like "country" or "farmer," to be more salient to their identity than sexual orientation.¹⁸⁴ Others have deep genealogical roots, and feel that their identities are connected more closely to familial heritage and place than sexuality.¹⁸⁵ Where faith plays a key role in community cohesion, one's spirituality

179. Nan Alamilla Boyd, *Shopping for Rights: Gays, Lesbians, and Visibility Politics*, 75 DENV. U. L. REV. 1361, 1364 (1998) (describing a "politic of mainstream visibility" that "frames the history of lesbian and gay social activism").

180. See, e.g., Darrell G. Yarbrough, *Gay Adolescents in Rural Areas: Experiences and Coping Strategies*, 8 J. HUM. BEHAV. SOC. ENV'T, no. 2-3, 2003, at 129, 141 (finding in a study of rural gay youth in Texas that "participants who were not out in high school reported fewer negative experiences").

181. IT GETS BETTER, *supra* note 14.

182. Angelia R. Wilson, *Getting Your Kicks on Route 66!: Stories of Gay and Lesbian Life in Rural America c. 1950-1970s*, in DE-CENTRING SEXUALITIES: POLITICS AND REPRESENTATIONS BEYOND THE METROPOLIS 199, 210 (Richard Phillips et al. eds., 2000).

183. HALBERSTAM, *supra* note 8, at 44.

184. Wilson, *supra* note 182, at 211. Iconography from country music demonstrates this point well. For a playful modern example, see Gretchen Wilson, *Redneck Woman*, YOUTUBE (Oct. 2, 2009), <http://www.youtube.com/watch?v=82dDnv9zeLs> ("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.'").

185. Lisa R. Pruitt, *How You Gonna' Keep Her Down on the Farm . . .*, 78 UMKC L. REV. 1085, 1091 (2010) (describing how, because of her family's long-reaching roots in a community and geographic area in rural Arkansas, a significant component of her identity continues to be "grounded in place").

can constitute a moral identity that has currency with friends and neighbors.¹⁸⁶ 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, “privileg[ing] race over other identities.”¹⁸⁷

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 parts of one’s identity.”¹⁸⁸ Rural sexual minorities who come out, or tell others that they are gay, risk being seen only through the prism of sexual orientation, regardless of how significant or insignificant sexuality is to their individual identities. Reflecting this reality, many rural people who have same-sex desire or same-sex sex reject LGB identities,¹⁸⁹ and expressions of sexual orientation can “be very different from that of their urban counterparts.”¹⁹⁰ In fact, “[t]he split between homosexual activity and homosexual identity . . . is a major feature of nonmetropolitan homosexualities.”¹⁹¹ Further, because many rural sexual minorities are detached from dominant narratives about gay culture and identity, or are unable to access gay communities and amenities tangibly, they simply decline to self-identify as LGB because they feel excluded by these purported indicia of gay culture.¹⁹² The

even though she long ago left her rural home); see also Kazyak, *supra* note 34, at 564 (noting that rural LGBs might perceive the “rural” facet of identity as more important than sexuality).

186. McQueeney, *supra* note 149, at 156 (finding that many rural sexual minorities “ha[ve] relied on their [religious] identit[ies] since childhood as evidence that they were good people”).
187. *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 36, at 132 (internal quotation marks omitted). “I don’t think I could have handled being rejected by other black kids. Being black was more important to me.” *Id.*
188. Wilson, *supra* note 182, at 212–13.
189. See *id.* at 213.
190. Anthony R. D’Augelli et al., *Rural Men Who Have Sex With Men: An Exploratory Study of Sexual Orientation Characteristics and Adjustment Patterns*, E5 J. RURAL COMM. PSYCHOL., no. 2, 2002, <http://www.marshall.edu/jrcp/JRCP Intro GLBT/JRPC Rural Men/Rural men.htm>.
191. Kramer, *supra* note 2, 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*, DENVER POST, May 28, 1996, at 4B (internal quotation marks omitted).
192. See William J. Spurlin, *Remapping Same-Sex Desire: Queer Writing and Culture in the American Heartland*, in DE-CENTRING SEXUALITIES, *supra* note 182, at 182, 183 (discussing the “dissatisfaction” than many sexual minorities in nonurban parts of the country express toward LGBT people in coastal cities because of their “narrow image of what constitutes a queer identity”). See generally EDMUND WHITE, *STATES OF DESIRE: TRAVELS IN GAY AMERICA* 155–94 (1991) (recounting stories of gay men in the rural Midwest). 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,

dearth of positive information available in rural communities about LGB people and their lives inhibits the promotion of gay-affirming identities.¹⁹³

Many people in small towns, of course, do self-identify as lesbian, gay, or bisexual. Mere self-identification, however, should not mandate that one come out and be open or explicit about their sexuality at all times and in all contexts. As Professor 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 the individual given his [or her] particular identity and the norms of the [environment] . . . ?”¹⁹⁴ If not, might coming out be self-destructive or even dangerous?¹⁹⁵

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.¹⁹⁶ Likewise, in suburbs, the temporary anonymity offered by an adjacent metropolitan area is not far from 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 to have more freedom to form and perform openly LGB identities.¹⁹⁷ Rural sexual minorities, by contrast, may have difficulty finding even informal networks for support because of fears about discovery and may know of very few spaces where anonymity or

Queer Country: Rural Lesbian and Gay Lives, 11 J. RURAL STUD. 113, 116 (1995). Tom Rygh—born, raised, and remaining in rural Wisconsin—describes his life as a man who has sex with men 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.” *Tom Rygh*, in *FARM BOYS*, *supra* note 2, at 182, 182.

193. See D’Augelli & Hart, *supra* note 94, at 90 (explaining that the invisibility of LGB people and their families and the lack of supportive networks impede positive identity formation); McCarthy, *supra* note 134, at 90 (noting that 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 2, at 208.
194. Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1372–73 (2011).
195. See VAID, *supra* note 21, 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”).
196. William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880–1946*, 82 IOWA L. REV. 1007, 1018 (1997).
197. Preston et al., *supra* note 45, at 202. I do not mean to suggest that urban sexual minorities can easily be out in all places and at all times. Certainly, when and to whom LGB people reveal their sexual identities is nuanced regardless of geographic positioning.

safety is assured.¹⁹⁸ It is tempting to think that wide-open spaces lend themselves to private seclusion. Even in seclusion, however, there are risks. For example, passing a neighbor or acquaintance on the road en route to an out-of-the-way country spot—perhaps to meet a gay friend, lover, or anonymous sexual partner—can lead to uncomfortable questions about one’s whereabouts and associations.

In small towns, then, “coming out” in the broadest sense is not easy or always desired. To craft effective alternative forms of belonging in these mostly straight places, careful negotiations about sexual identity are necessary. Some may simply remain closeted in most situations, particularly those whose rural identities “are too precious and too foundational to risk.”¹⁹⁹ Though often denounced as a symbol of shame, the closet can serve as a location of resistance against widespread rural oppression.²⁰⁰ Especially for rural or deeply religious sexual minorities, the closet can even facilitate pride, albeit in secret, in the face of hostile social environments that otherwise deem homosexuality shameful.²⁰¹ Still, for those who would prefer to be out but rely on the closet for protection, this is a tragic compromise.

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 his or her sexual identity or engage in overt same-sex intimacy or other markers of gay identity (particularly in-your-face activism).²⁰² The public secret operates as an unspoken transactional bargain between sexual minorities and their communities;²⁰³ it permits sexual minorities to participate in community life if the community at large is not forced to acknowledge homosexuality actively.²⁰⁴ The breach of this bargain does not result in a balanced set of consequences—a sexual minority stands to lose a great deal more than does the community in which

198. See D’Augelli & Hart, *supra* note 94, at 82. “The gay community [in rural areas] is invisible to all but the most diligent searcher, and even within the identifiable social or sexual marketplaces, many self-identified homosexuals limit personal informational exchanges.” Kramer, *supra* note 2, at 209; see also Cohn & Hastings, *supra* note 120, at 143 (noting that “lack of a discernible community [is] one of the most frequently cited disadvantages of living in a rural area” (citing Oswald & Culton, *supra* note 59)).

199. McCarthy, *supra* note 134, at 92.

200. ERIBON, *supra* note 70, 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).

201. See *id.*

202. 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 159, 161–63 (explaining the public secret as an identity negotiation strategy employed by LGB southerners).

203. 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.

204. See Kazzyak, *supra* note 34, at 573 (“[T]he close-knit atmosphere of small towns facilitates an implicit recognition of sexual identity, yet one that is not necessarily explicitly talked about.”).

he or she lives.²⁰⁵ When rural LGB people come out, it is common for others to avoid associating publicly with them to thwart insinuations of homosexuality by association.²⁰⁶ Emotional and economic loss follows. Public hostility toward open homosexuality²⁰⁷ can instill in sexual minorities a fear of violence and personal attacks.²⁰⁸

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.”²⁰⁹ Given the traditional sexual climate and the fact that “most families know one another and share conservative values,”²¹⁰ 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.²¹¹ 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.²¹² Typically, only those “with a certain degree of social and economic privileges will have a greater ability to live openly gay or lesbian lives,”²¹³ and, for rural people, “the politics of LGBT visibility do not provide greater access to unequivocal pleasures of acceptance”²¹⁴ but instead can place their very survival in jeopardy.²¹⁵ Understanding this reality is crucially relevant to the question of how to help sexual minorities live comfortably in their homes.

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205. Ramona Faith Oswald & Brian P. Masciadrelli, *Generative Ritual Among Nonmetropolitan Lesbians and Gay Men: Promoting Social Inclusion*, 70 J. MARRIAGE & FAM. 1060, 1069 (2008) (finding that rural LG people were accepted in the broader community “as long as they did not bring attention to their sexuality”).
206. See Snively, *supra* note 19, at 101.
207. Williams et al., *supra* note 34, at 50 (noting that in a study of rural sexual minorities in Wyoming, “[t]he most often mentioned form of social hostility was an enforced silence surrounding the issue of homosexuality”).
208. See *id.* at 50–51 (describing the heightened threat of antigay violence in rural areas).
209. McCarthy, *supra* note 134, at 83.
210. Darlene Hudson & William Robinson, *How African-American Gay Activists in the Rural South Found Community Support*, 17 AM. J. HEALTH STUD. 89, 90 (2001) (noting that many black sexual minorities in rural Arkansas “lead ‘closeted’ lives to shield themselves from homophobic attitudes”).
211. See, e.g., D’Augelli, *supra* note 110, at 127 (“Women with access to few resources in their rural settings may find it impossible to consider alienating their parents without alternative resources.”).
212. See, e.g., Comerford et al., *supra* note 4, at 432 (noting the importance of sexual privacy for vulnerable elderly and disabled lesbians).
213. Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-racist Politics*, 47 BUFF. L. REV. 1, 51 (1999).
214. GRAY, *supra* note 36, at 134.
215. See, e.g., Oswald & Culton, *supra* note 59, at 75 (reporting that rural LGB 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 of survival or a way of coping with non-acceptance, discrimination, oppression or sometimes actual physical or psychological violence.” Smith, *supra* note 96, at 18.

III. TAKING RURAL SEXUAL MINORITIES INTO ACCOUNT

In American law and society, we view lesbian, gay, and bisexual people through an urban lens, and cities have thus come to symbolize both where and how to be gay. Embedded in dominant cultural narratives is the corollary belief that sexual minorities do not belong in small towns and rural places. This urban bias impedes the recognition that many sexual minorities live in rural areas both by choice and by necessity, face overt discrimination, and have unique experiences and needs that necessitate alternative strategies for belonging. To help all sexual minorities achieve the freedom to live comfortably in their homes, the law must be attentive to place and the ways in which it can produce and exacerbate vulnerability. This Article lays the groundwork for this corrective legal action by focusing on courts and legal analysis.

Though some may resist an emphasis on judges as agents of progressive change,²¹⁶ judicial decisionmaking has proven increasingly valuable in addressing and rooting out majoritarian antigay animus. For example, as this Article goes to press, every federal court that has ruled on the constitutionality of Section 3 of the Defense of Marriage Act (DOMA)²¹⁷—which forbids the federal government from recognizing same-sex marriages that are valid under state law—has found the Act unconstitutional.²¹⁸ Meanwhile, until 2012, in all thirty-two instances in which Americans had decided marriage equality's fate at the ballot box, voters had expressly limited marriage to different-sex couples.²¹⁹ As Professor Douglas

216. See Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 863 (2006) (cautioning that reliance on judges to bring about sweeping progressive change is unsustainable).

217. Pub. L. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2006)).

218. See *Windsor v. United States*, 699 F.3d 169 (2d Cir.), *aff'g* 833 F. Supp. 2d 394 (S.D.N.Y.), *cert. granted*, No. 12-307, 2012 WL 4009654 (U.S. 2012); *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 682 F.3d 1 (1st Cir. 2012), *aff'g* *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), *and* *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012); *Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-1750, 2012 WL 3113883 (D. Conn. July 31, 2012); *Dragovich v. U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178 (N.D. Cal. 2011).

219. Following the 2012 November elections, the tide now seems to be changing in at least some parts of the country. For the first time, voters supported same-sex marriage at the ballot box; same-sex marriage is now legal by popular governance in Maryland, Washington, and Maine. See Erik Eckholm, *As Victories Pile Up, Gay Rights Advocates Cheer 'Milestone Year'*, N.Y. TIMES, Nov. 8, 2012, <http://www.nytimes.com/2012/11/08/us/same-sex-marriage-gains-cheer-gay-rights-advocates.html>; see also Alana Semuels, *Maryland May Be First to Support Same-Sex Marriage in Ballot Box*, L.A. TIMES POLITICS NOW (Sept. 26, 2012, 9:00 AM), <http://www.latimes.com/news/politics/la-pn-gay-marriage-ballot-poll-20120926,0,171417.story>.

Voters in Minnesota also defeated a constitutional amendment to ban same-sex marriage, becoming only the second state to do so after Arizona in 2006. In Arizona, however, the ballot measure was slightly different because it would have banned both same-sex marriage and recognition of rights

NeJaime explains, courts in many circumstances have and will continue to be more hospitable to sexual minorities' claims to equality than majoritarian political processes.²²⁰ Further, by deciding disputes in sexual minorities' favor, judges often "transform particular legal controversies and rights claims into larger public messages" that can ultimately change a "prevailing cultural narrative in a given community."²²¹ This latter point is crucially important. The key to LGBT equality and acceptance is a change in attitudes, and through progay rulings, local judges in small towns can provide the credibility and persuasive authority for igniting that change.

Of course, many of the judges to whom this Article speaks are themselves rural, socially conservative, and may be averse to homosexuality.²²² These judges have played a powerful role in validating the social discrimination that many rural sexual minorities experience by buying into urban biases about who gay people are, by believing the conventional wisdom that sexual minorities do not belong in rural environments, and by wrongly concluding that sexual minorities and rural values are fundamentally incompatible. Nonetheless, judicial interventions may be the best immediate strategy for helping sexual minorities live comfortably in small-town America. This is particularly true in the poorest and most rural states, where local

for unmarried couples. See Nancy Polikoff, *Post-election Thoughts on the Marriage Ballot Measures, BEYOND (STRAIGHT AND GAY) MARRIAGE* (Nov. 7, 2012), <http://beyondstraightandgay-marriage.blogspot.com/2012/11/post-election-thoughts-on-marriage.html>.

220. Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 713 (2012) ("Courts have played, and continue to play, an essential role in the quest for LGBT equality."). NeJaime further explains,

Courts generally have an obligation to hear and consider a group's grievance, even when lawmakers do not provide a forum. And because courts enjoy some degree of independence, they may advance the group's cause even when political actors and the general public remain relatively hostile. Ultimately, a single judicial decision, positive or negative, may exert significant influence on the process of social change.

Id. at 665.

221. Eric K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 21 (1994).

222. As Jane Schacter has described,

There are, of course, many states that can be fairly characterized as broadly hostile to gay rights. Take Mississippi and Alabama as examples. These are states with plenty of statewide legislation restricting LGBT rights and no sexual orientation-based nondiscrimination legislation. These are states with a political process deeply inhospitable to any idea that LGBT equality claims might legitimately trump traditional cultural values. Yet, contrary to the assumption of process theory, it is strikingly implausible to think that judges in these states can or will stand apart from prevailing public opinion and take action to compensate for anti-gay bias decades before the political process shows movement on marriage or other issues of concern to LGBT citizens of the state.

Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1399 (2011) (footnote omitted).

and state politicians represent predominately conservative, older, and blue-collar constituencies, and where progay groups spend little time and resources. In these jurisdictions, local lawmakers are not likely to combat antigay discrimination independently, and progay groups are not likely to offer significant funding, organizational strength, or a high degree of community census to push for legislative change.²²³ For rural sexual minorities, then, courts often provide the most realistic and affordable avenue for vindicating rights. While it may be difficult to change judges' harmful preconceptions about gay people, it is wrongheaded to presume it impossible.²²⁴ This Article intends to help judges ground legal analysis in knowledge, not stereotypes.²²⁵

Though by no means an exhaustive survey, this Part highlights a variety of legal areas in which rural sexual minorities' realities should bear on legal doctrine and analysis. As Professor 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."²²⁶ Judges should therefore consider how rurality can operate to "perpetuate disadvantage, inequality, and oppression."²²⁷ Part III.A focuses on governmental actors that classify based on sexual orientation, particularly in the family and employment contexts. It argues that judges should evaluate these classifications under heightened scrutiny, and it deploys rural sexual minorities' experiences as a potent exemplar to demonstrate how politically powerless most sexual minorities are. It then discusses cases in which judges have used the unique context of rural life to validate antigay discrimination under mere rational basis review, which demonstrates the urgent need for heightened judicial scrutiny. Part III.B shifts to individual actors and antigay bias in rural communities, focusing on legal privacy arguments as mechanisms for invalidating discrimination.

223. NeJaime, *supra* note 220, at 688 (noting that, as opposed to other institutional tactics for achieving progressive change, "one individual, with little money and no community support, can initiate litigation").

224. Discussing commentators' skepticism about Lambda Legal's strategy to seek marriage equality in Iowa, Bud Jerke notes that this skepticism reflects the popular belief that "queer rights will never prevail in this rural geography." Jerke, *supra* note 20, at 270. "Rather," Jerke says tongue-in-cheek, "one should focus on enlightened urban areas, where queer people actually reside, and where chances for success will be greatest." *Id.* at 261.

225. See Pruitt, *supra* note 153, at 236 (explaining that courts often use rhetoric "not grounded in knowledge of or sensitivity to the people and places that make up rural America," and that the "judicial embrace of rural stereotypes has a demonstrable impact on the laws courts make and how they apply those laws").

226. Pruitt, *Rural Justice*, *supra* note 17, at 389–90 (footnote omitted); see also Jerke, *supra* note 20, at 304 ("Judges would benefit greatly by taking a more nuanced approach when considering rural queer litigants who appear before them . . .").

227. Pruitt, *Rural Justice*, *supra* note 17, at 391.

A. Governmental Discrimination

1. Sexual Orientation Classifications: Rurality, Political Powerlessness, and Heightened Judicial Scrutiny

One of the liveliest and most important debates about LGB equality in America concerns whether governmental classifications based on sexual orientation are suspect, and in turn, what level of judicial scrutiny is appropriate for reviewing the constitutionality of these classifications. The DOMA litigation is a chief example of this issue's contemporary resonance: Every federal court that has ruled on DOMA's constitutionality has been compelled to address this question before deciding DOMA's constitutional fate.²²⁸ The evolving nature of this debate and its implications for "the orderly development of constitutional principles" even served as a purported rationale for why the U.S. Supreme Court should not grant certiorari in *Hollingsworth v. Perry*²²⁹ regarding the constitutionality of California's Proposition 8.²³⁰ Missing from this conversation until now, however, has been a sustained focus on the nation's most geographically and economically disadvantaged sexual minorities. Accounting for these sexual minorities, particularly those who live in low-income rural areas, powerfully demonstrates both why sexual orientation classifications are suspect and why heightened scrutiny remains a crucial tool for combatting antigay discrimination.

The Equal Protection Clause of the U.S. Constitution commands that no state shall deny any person "the equal protection of the laws."²³¹ In other words, the government must treat all similarly situated people alike.²³² In reviewing equal

228. Compare *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012) ("[H]omosexuals compose a class that is subject to heightened scrutiny. We further conclude that the class is quasi-suspect (rather than suspect) based on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect."), *Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-1750, 2012 WL 3113883, at *35 (D. Conn. July 31, 2012) ("[H]omosexuals display all the traditional indicia of suspectness and therefore statutory classifications based on sexual orientation are entitled to a heightened form of judicial scrutiny."), and *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 990 (N.D. Cal. 2012) ("[H]aving analyzed the factors, the Court holds that the appropriate level of scrutiny to use when reviewing statutory classifications based on sexual orientation is heightened scrutiny."), *with Windsor v. United States*, 833 F. Supp. 2d 394, 402 (S.D.N.Y. 2012) ("[B]ecause the Court believes that the constitutional question presented here may be disposed of under a rational basis review, it need not decide today whether homosexuals are a suspect class.").

229. No. 12-144 (U.S. July 30, 2012).

230. Brief of Amici Curiae William N. Eskridge et al. in Support of Respondents at 20–21, *Hollingsworth v. Perry*, No. 12-144 (U.S. Aug. 30, 2012), 2012 WL 3838124 (arguing that the Court should deny further review in large part because of the uncertainty regarding equal protection scrutiny and the attendant need for additional litigation in lower courts).

231. U.S. CONST. amend. XIV, § 1.

232. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

protection challenges to state actions, courts have traditionally applied three levels of review.²³³ 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.²³⁴ “Quasi-suspect” classifications, in turn, warrant heightened judicial review, which means that, at a minimum, the classification must be “substantially related to an important governmental objective.”²³⁵

There is no precise formula for determining which classifications are suspect or quasi-suspect and are therefore entitled to some form of heightened judicial review.²³⁶ But courts tend to look at a combination of several factors in making their determination.²³⁷ One important factor is the amount of political power that the class in question wields.²³⁸ In his groundbreaking decision in *Golinski v. United States Office of Personnel Management*,²³⁹ 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.”²⁴⁰ While activists and litigators have been pushing courts for years to designate LGB people as a suspect or quasi-suspect class,²⁴¹ considering rural context strengthens the argument that sexual minorities lack the type of political power that generally diminishes claims to heightened judicial review.

233. *Id.* at 439–42 (articulating the three standards of review as “strict scrutiny,” intermediate scrutiny, and rational basis review).

234. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (“In order to satisfy this searching standard of review, the [government] must demonstrate that the use of [a suspect classification] is narrowly tailored to achieve a compelling government interest.” (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 225 (1995))) (internal quotation marks omitted).

235. *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 981 (N.D. Cal. 2012) (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

236. *See id.* at 983 (“No single factor for determining elevated scrutiny is dispositive.”).

237. 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 discrete group”? Third, are they “a minority or politically powerless”? *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990).

238. *Id.*; *see also* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (famously discussing the relative political powerlessness of a group as a factor warranting a “more exacting judicial inquiry” under the Fourteenth Amendment).

239. 824 F. Supp. 2d 968.

240. *Id.* at 989 (concluding that “the appropriate level of scrutiny to use when reviewing statutory classifications based on sexual orientation is heightened scrutiny”).

241. *See, e.g.*, Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1297 (1985) (“[I]t is clearly in the interest of gay people to be deemed a suspect class . . .”).

The contemporary debate about sexual orientation classifications and judicial scrutiny ignited both in and because of *Romer v. Evans*,²⁴² in which the geography of sexual equality was on full display.²⁴³ 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. Constitution.²⁴⁴ Amendment 2 repealed all existing Colorado ordinances prohibiting discrimination on the basis of sexual orientation—which had been enacted in some of Colorado’s wealthy resort towns and large cities—and barred all future “legislative, executive or judicial action at any level of state or local government designed to protect” homosexual or bisexual people.²⁴⁵ The court ultimately held that Amendment 2 violated the Equal Protection Clause because it “classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else.”²⁴⁶ “[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.”²⁴⁷

In a fiery and famous dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, disagreed with the majority’s characterization of sexual minorities as “politically unpopular,” and did so by explicitly deploying urban bias:

[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.²⁴⁸

Justice Scalia’s conclusion regarding the characteristics of “those who engage in homosexual conduct” embodies the hyperbolic arguments raised by both the State of Colorado and Proponents of Amendment 2: LGB people are wealthy,²⁴⁹ tend to live and organize in (urban) gay communities, and have disproportionate political

242. 517 U.S. 620 (1996).

243. *Id.*

244. *Id.* at 623.

245. *Id.* at 624.

246. *Id.* at 635.

247. *Id.* at 634–35 (alterations in original) (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted).

248. *Id.* at 646–47 (Scalia, J., dissenting) (citations omitted).

249. 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.

power, which they wield to secure “special protection” of their behavior-based lifestyle.²⁵⁰ Indeed, one group that supported ballot initiatives like Amendment 2 disseminated a video entitled “Gay Rights/Special Rights”²⁵¹ 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.”²⁵²

Justice Scalia’s characterization of sexual minorities is not wholly inaccurate. Indeed, many sexual minorities converge in gay metropolitan enclaves, take on a gay identity, and take up the banner of gay rights.²⁵³ But his rhetoric is underinclusive, particularly given its broad focus on those who engage in same-sex sex and not just those who self-identify as LGB, and is illustrative of the exclusionary analysis in modern equal protection jurisprudence and debate. The oft-made argument 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 areas and who have had disproportionate success in combatting discrimination and attaining public visibility in these limited locales.²⁵⁴

The common misperception that LGB people are overwhelmingly affluent, geographically connected, and engaged in dominant depictions of gay culture can dissuade courts from seeing or sympathizing with the actual powerlessness of most sexual minorities. While the persons of whom Justice Scalia spoke in *Romer* may share certain sexual practices, they often do not share sexual identities, political goals, or meaningful access to policymakers. Urban gays and lesbians, particularly those who live in gay neighborhoods, are easily able to mobilize and raise funds; for rural sexual minorities, however, local mobilization based on sexual identity and issues of sexual orientation is nearly impossible.²⁵⁵ Justice Scalia’s rhetoric overlooks

250. Darren Lenard Hutchinson, “Gay Rights” for “Gay Whites”?: Race, Sexual Identity, and Equal Protection Discourse, 85 CORNELL L. REV. 1358, 1372–75 (2000).

251. *Gay Rights/Special Rights: Inside the Homosexual Agenda*, YOUTUBE (July 19, 2009), http://www.youtube.com/watch?v=XTvqla_YK5I.

252. Mutz, *supra* note 124, at 72–73.

253. 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 (1995) (documenting the creation of a gay identity as associative with an urban territorial place).

254. Blank & Rosen-Zvi, *supra* note 68, at 1007 (noting that the concentration of LGB people in a limited number of cities and neighborhoods enables sexual minorities “to impact lawmaking and policy-making at the local level much more so than at the state and federal levels,” and that cities with a large LGB population are “much more likely to adopt antidiscrimination ordinances prohibiting discrimination on the basis of sexual orientation”).

255. “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

the fact that gay urban enclaves continue to grow and thrive in part because sexual minorities lack the political power requisite to bring about significant positive change at the federal level and in most locales.²⁵⁶ Rural sexual minorities, who lack even the basic tools “to bring about an end to discrimination and pervasive prejudice,”²⁵⁷ were entirely off Scalia’s radar. The reality is that most small towns remain largely “untouched by gay liberation.”²⁵⁸ The sexual minorities who live in rural America accordingly have little to no meaningful connection to a greater gay movement, and being out and proud, which some courts find to be indicia of political power,²⁵⁹ can run contrary to rural 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 to their hometowns in a way that provides the autonomy to stake out an LGB sexual identity freely and participate in community discourse on LGB issues.

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 36, at 3.

256. See, e.g., Blank & Rosen-Zvi, *supra* note 68, at 1013 (“[G]ay and lesbian empowerment at the local level, coupled with its ongoing weakness at the state and federal levels, might result in strengthening gay isolationist tendencies.”); 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.”).
257. *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 989 (N.D. Cal. 2012).
258. See generally EDMUND WHITE, *STATES OF DESIRE: TRAVELS IN GAY AMERICA* 155–94 (1991).
259. 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 minorities in just five sentences. The court declared matter of factly, “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 homosexual.” 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 (D.D.C. 1991), *aff’d*, 41 F.3d 677 (D.C. Cir. 1994), “it is still 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.” *Id.* at 7–8. “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 noted that there are several “openly homosexual” members of Congress, and it commented on the ability of “the homosexual community” to “move well and gain attention in political circles.” *Id.* at 9.

And as recently as 2008, in *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008), 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. See *id.* at 441–61 (concluding that LGB people possess political power).

Importantly, rural sexual minorities also may not share the “desired policy outcomes”²⁶⁰ of gays and lesbians who live and politick in urban gay enclaves. In *Romer*, Justice Scalia described a shared interest in “homosexual rights” issues as part of the political power wielded by sexual minorities.²⁶¹ But issues considered most pressing for urban gays and lesbians, such as marriage equality or obtaining benefits for same-sex partners, may lack the same urgency for economically and geographically marginalized sexual minorities. Many in this large group have same-sex sex or desire but do not identify as gay or lesbian; others live a public secret or cannot feasibly come out in the way that marrying a same-sex partner would require. For them, access to basic resources may constitute even more pressing “homosexual issues.”²⁶²

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.²⁶³ Indeed, despite still-prevailing stereotypes that paint sexual minorities as affluent consumerists (a stereotype that Justice Scalia evokes), studies show that rural sexual minorities evince patterns of economic disadvantage similar to those displayed in many communities of color.²⁶⁴ Compared to their urban counterparts, rural people who are in same-sex relationships are almost twice as likely to receive public assistance, and they are significantly less likely to have health insurance.²⁶⁵ Rural sexual minorities struggle against unemployment, inadequate food and housing, and lack of access to basic healthcare and education.²⁶⁶ The insufficiency of basic amenities and resources further exacerbates the effects of common rural poverty. 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 ser-

260. *Golinski*, 824 F.Supp.2d at 989.

261. *Romer v. Evans*, 517 U.S. 620, 645 (1996) (Scalia, J., dissenting).

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

263. *See* Colleen S. Poon & Elizabeth M. Saewyc, *Out Yonder: Sexual-Minority Adolescents in Rural Communities in British Columbia*, 99 AM. J. PUB. HEALTH 118, 120 (2009).

264. *See* Gary Gates, *Economic Disadvantage in the LGBT Community*, MGMT. INFO. EXCHANGE J., Spring 2012, at 45. *See generally* RANDY ALBELDA ET AL., WILLIAMS INST., POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY (2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf>.

265. Gates, *supra* note 264, at 47.

266. *Cf.* CLARE, *supra* note 78, at 40 (noting that rural people, including sexual minorities, are mostly poor and working class and persistently struggle against economic injustice in addition to rural sexual oppression).

vices regarding HIV and AIDS.²⁶⁷ “Discrimination . . . and unwillingness to care for both [men who have sex with men] and people living with HIV/AIDS . . . have been found among physicians, dentists, rural nurses, and social workers.”²⁶⁸

For rural sexual minorities, therefore, there are more universal problems than “homosexual issues” regarding societal discrimination against LGB people.²⁶⁹ There are also issues of economic injustice, as well as the structural barriers, legal vulnerabilities, and societal pressures that constrict identity formation and a gay way of life. These factors powerfully coalesce and “operate to make effective political participation unlikely if not impossible.”²⁷⁰ 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.

2. Rural Antigay Bias and the Case for Heightened Scrutiny

The experiences of sexual minorities who live in small towns tend to be invisible in law and social discourse, and making them visible demonstrates compellingly the political powerlessness that many sexual minorities continue to face. While the rural experience is only one, albeit significant, example of political powerlessness, it has relevance for poor, working class, and sexual minorities of color in all geographies who face similar social and economic barriers to meaningful political participation.

Highlighting the serious, broadscale political powerlessness that all but the most privileged sexual minorities encounter, however, does not settle the debate about suspect status or the level of judicial scrutiny that courts should apply when the government invokes sexual orientation. Many progressive scholars question the efficacy of the quest to include sexual orientation among those classifications

267. Deborah Bray Preston et al., *The Influence of Stigma on the Sexual Risk Behavior of Rural Men Who Have Sex With Men*, 16 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.” (citation omitted)).

268. *Id.* at 293 (citations omitted); *see also, e.g.*, Williams et al., *supra* note 34, 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.*

269. *Cf.* High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 574 (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”).

270. *Watkins v. U.S. Army*, 875 F.2d 699, 727 (9th Cir. 1989) (en banc) (Norris, J., concurring in the judgment); *see also id.* (reasoning that homosexuals “lack the political power necessary to ensure fair treatment at the hands of government” because the social and economic pressures that cause people to conceal their sexuality means that the “voices of many homosexuals are not even heard”).

deemed suspect under equal protection analysis. Some argue, for example, that traditional tiered equal protection analysis embodies identity politics, which exacerbates differences and drives us apart.²⁷¹ Others who embrace categories and are identity conscious argue that affirmative action programs aimed to benefit LGBT people are more likely to be deemed unconstitutional under heightened scrutiny review.²⁷²

This Article represents the mainstream, progay viewpoint that sexual orientation classifications are suspect (or quasi-suspect), though it is sensitive to progressive critiques of tiered equal protection review.²⁷³ Nevertheless, this Article works within doctrine as it currently exists, tabling for now a discussion about the flaws therein, and pursues heightened scrutiny as a crucial mechanism for weeding out imbedded and in many places still quite acceptable overt antigay animus. It seeks to convince both judges and scholars that heightened scrutiny is necessary by demonstrating that many sexual minorities, especially in low-income and rural areas, remain particularly susceptible to discrimination at the hands of the state. Judges who preside in these areas may offer little refuge from state sponsored discrimination, and instead are often willing to validate antigay attitudes in the name of pro-

271. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 793 (2011) (explaining that the judicial move toward liberty claims and away from traditional tier-based equal protection analysis may signal a shift from group-based civil rights to universal human rights).

272. Cf., e.g., Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 487, 508–12 (2004) (“[T]he suspect classification label has made it more, rather than less, difficult for government to remedy the effects of hostility toward racial minorities in employment, voting, and other arenas.”); Russell K. Robinson, *Marriage Equality & Post-racialism*, 61 UCLA L. REV. (forthcoming 2013) (manuscript at 45–46) (on file with author) (positing that litigators who argue that sexual orientation classifications are suspect “ignore what strict scrutiny has done to African American progress”).

273. I support the underlying principles that birthed tiered review. I perceive the principle problem with heightened scrutiny to be the conservative and unduly rigid way in which the Supreme Court has come to apply it to race-based classifications, striving for formal equality at the expense of substantive equality. The promise of heightened scrutiny has not faltered because tiered layers of review is a bad idea—indeed, heightened scrutiny developed because courts are “highly skeptical” of legislation where there is a substantial risk that the legislation might be based on “prejudice.” Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 7 (1994). I remain (perhaps naively) hopeful that changing social mores and newly appointed Justices under current and future administrations will once again lead to an era of progressive strict scrutiny application where substantive equality is a valid constitutional aim. See Sunstein, *supra*, at 12 (noting that the whole purpose of the Fourteenth Amendment was to eradicate racial hierarchies and a racial caste system, which necessarily goes beyond mere formal equality).

Moreover, it is true that—in light of increasing progay legislation and changing attitudes toward LGBT people—more programs specifically designed to compensate for a history of LGBT prejudice and discrimination may be on the horizon. But for now, gay affirmative action is little more than a fantasy in most places in the United States, and concerns about how suspect classification may render gay-specific remedies more difficult are not yet ripe. Furthermore, existing LGBT affirmative action programs may disproportionately benefit sexual minorities who are “out” and therefore already possess a certain degree of privilege.

tecting the sensibilities of conservative and rural environments. Because some judges fail to acknowledge sexual minorities as valuable participants in rural communities,²⁷⁴ and because many buy into urban biases about who sexual minorities are, judges can easily conclude that treating sexual minorities differently than heterosexuals is justified because the two classes are fundamentally different. Heightened scrutiny renders judicial endorsement of antigay animus a much more difficult task.²⁷⁵

a. Validating Rural Antigay Bias in Family Disputes

One realm in which courts have used antigay rural attitudes 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 have invoked the conservative or close knit rural context ostensibly to protect children, using 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.²⁷⁶ These judges manifest urban bias by presuming that being in a same-sex relationship entails an attendant "lifestyle" reflective of dominant urban gay stereotypes, positioning sexual minority parents in contrast to small town American values. They send the implicit message that sexual minority parents are not welcome in rural areas unless they either convert or cover their sexuality.²⁷⁷ Those who wish to live openly, or even discretely, as LGB people should simply do so elsewhere; move to a more tolerant 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, which denies sexual minority parents the ability

274. *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). *Varnum* is a rare example of a court acknowledging, albeit implicitly, sexual minorities as valuable members of small, rural communities.

275. See Yoshino, *supra* note 271, at 761 (explaining that lack of heightened scrutiny can have "profoundly negative effects" on sexual minorities' equal protection claims because even under a "rational basis with bite" level of equal protection review, many courts continue to validate governmental discrimination based on sexual orientation).

276. This is true despite *Palmore v. Sidoti*, 466 U.S. 429 (1984), in which 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. *Id.* at 433-34; cf. *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 . . . ha[s] been afforded." (citations omitted)).

277. 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.").

to negotiate and express their sexuality as they choose. Simply moving to a presumably more tolerant place is not desirable or feasible for many rural sexual minorities (especially parents, who are disproportionately poor and undereducated),²⁷⁸ but staying put may mean sacrificing LGB friends, relationships, and a sense of identity. The law cannot give effect to this urban bias.

Perhaps the most explicit representation of how rurality heightens sexual minorities' legal vulnerability as parents is *S.E.G. v. R.A.G.*,²⁷⁹ in which the Missouri Court of Appeals removed four minor children from a lesbian mother's custody.²⁸⁰ The court explained, "Union, Missouri is a small, conservative community with a population of about 5500. 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."²⁸¹ Interestingly, the court further admonished the mother for "inviting acknowledgment" of her sexuality by both her children and the community,²⁸² 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.

The Missouri Court of Appeals is not alone in its belief that the perceived incompatibility of small town values and homosexual "lifestyles" justifies limitations on sexual minority parents' custody rights. In *Maxwell v. Maxwell*,²⁸³ a 2012 child custody dispute between a lesbian mother and her ex-husband in Hardin County, Kentucky, a judge awarded sole custody of the ex-couple's three children to the father and limited the mother's time with the children.²⁸⁴ Despite the fact that there was no evidence to suggest that the mother's same-sex relationship "had any negative impact on the children,"²⁸⁵ the family court judge stated the following in her order:

278. Gary J. Gates, *Family Formation and Raising Children Among Same-Sex Couples*, FAMILY FOCUS (Nat'l Council on Family Relations, Minneapolis, Minn.), Winter 2011, at F1, F3, available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf> (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).

279. 735 S.W.2d 164.

280. *Id.* at 167.

281. *Id.* at 166.

282. *Id.*

283. No. 2012-CA-000224-ME, 2012 WL 5050588 (Ky. Ct. App. Oct. 19, 2012).

284. *Id.* at *1; see Nancy Polikoff, *Kentucky Appeals Court Reverses Trial Court Ruling Against Lesbian Mother*, BEYOND (STRAIGHT AND GAY) MARRIAGE (Oct. 19, 2012), <http://beyondstraightandgaymarriage.blogspot.com/2012/10/kentucky-appeals-court-reverses-trial.html>.

285. *Maxwell*, 2012 WL 5050588, at *7 (noting that the family court judge was concerned that the children might be "teased" about their mother's same-sex relationship).

The Respondent is seeking to live an unconventional life-style that has not been fully embraced by society at large regardless of whether or not same-sex relationships should or should not be considered sexual misconduct. Like it or not, this decision will impact her children in ways that she may not have fully considered and most will be unfavorable.²⁸⁶

Similarly, in *McGriff v. McGriff*,²⁸⁷ 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.²⁸⁸ In reaching its decision, the lower court evoked 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 the children reside."²⁸⁹ And as this Article goes to press, one lesbian mother in a small Virginia town is making national headlines as she faces unfavorable odds in her protracted fight for custody and visitation rights. According to media reports, "The judge in this case has allowed [the mother] to suffer multiple day-long sessions of cross examination of her gay life, as if she spent every day in a rainbow-soaked sapphic orgy."²⁹⁰

Even mere suspicion of homosexuality may support limiting parental rights. In *Bowen v. Bowen*,²⁹¹ the Mississippi Supreme Court 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"²⁹² that the mother, because of her "close relationship" with a rumored lesbian, was also a lesbian.²⁹³ 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

286. *Id.* at *5 (internal quotation marks omitted).

287. 99 P.3d 111 (Idaho 2004).

288. *Id.* at 120–21.

289. *Id.* at 117.

290. Kimberly Krautter, *A Mother's Gay Pride and Native American Heritage Mean Justice Denied in a Virginia Child Custody Fight*, HUFFINGTON POST (Oct. 18, 2012, 1:44 PM), http://www.huffingtonpost.com/kimberly-krautter/a-mothers-gay-pride-and-n_b_1971620.html.

291. 688 So. 2d 1374 (Miss. 1997).

292. *Id.* at 1376. In 1990, Raleigh had a population of 1291; the U.S. Census did not separately calculate Cohay's population. *1990 Census of Population and Housing*, U.S. CENSUS BUREAU, <http://censtats.census.gov/cgi-bin/pl94/pl94.shtml> (last visited Nov. 16, 2012) (under "Geographic Level," choose "Place (Parts)," and under "Geographic Area," choose "Mississippi," then click "Go," then under "County," choose "Smith County," and click "Go," and use the options under "County Subdivision" to view population data for Raleigh town in Smith County Districts 1, 4, and 5).

293. *Bowen*, 688 So. 2d at 1376.

live with his heterosexual father.²⁹⁴ For the rumored lesbian paramour in this case, the court's holding exemplifies the social forces that lead to rural sexual minorities' endemic feelings of isolation and loneliness.²⁹⁵ Community-wide disapproval of homosexuality and the presumption that one is gay by association function 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.

As these cases demonstrate, same-sex parents in rural areas are highly visible. With this visibility comes pronounced scrutiny from within the community. These parents often operate in an environment where residents' exposure to gay people comes largely from the media. And, as discussed above, media representations often serve to fuel antigay attitudes in rural areas because of their distinctly ant rural tone, cosmopolitan backdrop, and emphasis on sex and wealth. These cultural tropes exacerbate perceptions that sexual minorities are fundamentally different from the heterosexuals who populate rural areas, and serve to stigmatize those who are or become visible.

The point here is not to single out rural areas as uniquely prejudiced; private biases take many forms, none of which are unique to small towns. In rural areas, however, antigay animus can be compounded by unsympathetic judges who feel justified in treating gay parents differently from their straight counterparts. These judges may not appreciate that many sexual minorities, and especially those who live in rural and low-income environments, tend to seek a loving and monogamous relationship, are good neighbors, are 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, yet the false perception that sexual minorities have city values (in a pejorative sense of the phrase) and do not belong in rural areas blinds judges to reality. Judges positioned in rural communities may therefore be more likely to allow community prejudice to transform into legitimate concerns about a child's best interests.

Judges are right to note that small towns tend to be conservative and hold traditional values, and thus may be skeptical of same-sex parents. But these private biases should not serve as a basis for the state to deny or limit parental rights. In *Palmore v. Sidoti*,²⁹⁶ the Supreme Court accepted as true that community prejudice against

294. *Id.* at 1381.

295. See, e.g., Kate Black & Marc A. Rhorer, *Out in the Mountains: Exploring Lesbian and Gay Lives, in OUT IN THE SOUTH*, *supra* note 98, at 16, 17 (explaining findings from their study of self-identified Appalachian lesbians and gay men that all respondents reported feelings of isolation while many stated that they did not know that other gays and lesbians existed); D'Augelli et al., *supra* note 190 (noting the "common experience" of isolation and lack of networking opportunities).

296. 466 U.S. 429 (1984).

nontraditional households can have negative effects on the children who live in them, but it nonetheless rejected “private biases and the possible injury they might inflict” as permissible reasons to remove a child from a parent’s custody.²⁹⁷ Likewise, community disapproval of homosexuality, regardless of where it occurs, should never justify limitations on parental or children’s rights. Perhaps unsurprisingly, some courts have distinguished *Palmore* with respect to LGB parents’ parental rights because *Palmore* involved a custody determination premised on race, which triggers heightened scrutiny.²⁹⁸ Others have distinguished *Palmore* by seemingly ignoring its mandate, framing the relevant community’s antigay attitudes as a factor affecting the child’s best interest.²⁹⁹ The cases discussed above serve as examples for how antigay animus can affect judicial decisionmaking in family law disputes, particularly in conservative, insular communities. They demonstrate the need for a jurisprudence that treats sexual orientation classifications as suspect or quasi-suspect. Even if, however, courts continue to find that governmental classifications based on sexual orientation are not suspect and thus receive only rational basis review, prejudice—despite how normalized in any given community—is the very antithesis to rationality. “The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”³⁰⁰

In evaluating children’s best interests, courts should never presume that the same-sex nature of a parent’s relationship is incompatible with rural communities and the values of the people who live in them.³⁰¹ It is simply not in a child’s best

297. *Id.* at 433; *see also id.* (“There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.”).

298. *See, e.g., S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).

299. *See, e.g., Marlow v. Marlow*, 702 N.E.2d 733, 737 (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.”).

300. *Palmore*, 466 U.S. at 433.

301. For other cases in which conservative geographic norms affected legal analysis, *see, for example, Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995), and *In re Adoption of Charles B.*, No. 3382, 1988 WL 119937 (Ohio Ct. App. Oct. 28, 1988), *rev’d*, 552 N.E.2d 884 (Ohio 1990). In *Bottoms*, the Supreme Court of Virginia reasoned,

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.

Bottoms, 457 S.E.2d at 108 (quoting *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985)) (internal quotation marks omitted)). In *Charles B.*, 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.

interest for a court to deny a meaningful relationship with an LGB parent based solely on the fact that the community in which they live may be averse to sexual difference. Indeed, thousands of same-sex couples are already raising children in rural areas of the United States, proving 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.³⁰² But because rural sexual minorities are uniquely vulnerable—and often politically powerless—in geographic areas defined by conservatism and social solidarity, it remains crucial for advocates to pursue heightened scrutiny for governmental invocations of sexual orientation. In turn, if more courts begin to accept this argument, judges inclined to transform rural antigay sentiment into legitimate concerns for a child’s best interests will find it more difficult to do so.

b. Validating Rural Antigay Bias in Employment Disputes

Employment is another context in which governmental actors have relied on antigay rural attitudes to discriminate against sexual minorities, and in which courts may find the purported rationale to be reasonable under the most lenient tier of judicial review. In *Endsley v. Naes*,³⁰³ for example, the Saline County Sheriff’s Department fired the plaintiff after “rumors began to circulate . . . that plaintiff and another female road patrol deputy . . . were homosexuals.”³⁰⁴ The court noted that members of the community were aware of the rumors, and the defendants admitted that “plaintiff was discharged or asked to resign in order to quell rumors . . . that plaintiff was engaged in a homosexual relationship with another female road patrol deputy.”³⁰⁵ The court found the defendants’ concerns to be reasonable, explaining that they “acted to protect the public image of the Department and to maintain close working relationships internally and externally with the community.”³⁰⁶ Thus, because of the community’s disapproval of homosexuality, the department’s request that Endsley resign was “legitimate” and “non-discriminatory.”³⁰⁷

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.

Adoption of Charles B., 1988 WL 119937, at *1.

302. See Gates, *supra* note 264, at F3 (“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%).”).

303. 673 F. Supp. 1032 (D. Kan. 1987).

304. *Id.* at 1035. *Endsley* involved a Title VII employment discrimination claim.

305. *Id.* at 1035, 1037.

306. *Id.* at 1038.

307. *Id.* at 1036.

Though the events in *Endsley* occurred almost twenty-five years ago, the case represents a social and legal reality that remains unchanged for many. As of November 2012, twenty-nine states lack laws that prohibit discrimination based on actual or perceived sexual orientation,³⁰⁸ and no federal law offers such protection. Today, if a private employer fires a sexual minority because of his or her sexual orientation and that person lives in a jurisdiction without employment antidiscrimination protections, the employee may have no legal remedy.³⁰⁹ 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.³¹⁰ For these courts, as in *Endsley*, an employer's deference to community standards may be legitimate.³¹¹ Highly deferential rational basis analysis in employment disputes can thus exacerbate the already fraught economic situation facing rural sexual minority employees. In small, deeply conservative rural areas, an employer may feel implicit or overt pressure from the community to employ heterosexual, family oriented employees (especially fathers raising children) who share the community's values. Because that employer is dependent on its rural patrons, the employer may be more likely to discriminate against sexual-minority employees and applicants than if that employer were located in an urban or more anonymous environment.

Imagine a scenario in which a rural public employer fires a suspected gay employee. The employer argues that it fired the employee because the employee—or the community's information grapevine—made his or her “personal sexual

308. *Employment Non-discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://lgbtmap.org/equality-maps/employment_non_discrimination_laws (last updated Nov. 13, 2012).

309. See, e.g., *Williams v. Waffle House*, No. 10-357-M2, 2010 WL 4512819, at *1 (M.D. La. Nov. 2, 2010) (dismissing a complaint brought by a pro se plaintiff alleging that he was fired because of rumors that he had sex with his male supervisor). The court found that Williams's discrimination claims were not based on 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. *Id.*

310. 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 classifications based on 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).

311. *Contra, e.g.*, *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160, 1169 (S.D. Ohio 2000) (finding that nonrenewal of Glover's teaching contract constituted unconstitutional discrimination motivated by “animus”—perhaps in response to the local community's disapproval of Glover's sexuality); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1289 (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.”).

preferences the topic of comment and discussion³¹² in town, which in turn made customers or coworkers uncomfortable. The employer insists that it did not fire the employee because of a bare “desire to effectuate one’s animus against homosexuals,”³¹³ 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.”³¹⁴ After learning that people in the small community are talking about its employee’s sexual activity, a responsive employer concludes that the employee’s disruptive “conduct,” not his sexual orientation, “impaired his ability” to do his job.³¹⁵

While these rationales may seem like mere pretext for discrimination based solely on animus toward LGB people, courts continue to accept them as legitimate justifications for employers’ actions. In other words, there is a real danger that, without a federal jurisprudence holding that government classifications based on sexual orientation are suspect or quasi-suspect, judges so inclined will continue to accept thinly veiled homophobia as a legitimate basis for taking an adverse employment action against an employee. This danger is especially real in rural or otherwise conservative jurisdictions where religiously motivated conceptions of morality can play a decisive role in law, public policy, and daily life.

Although Justice O’Connor famously suggested, in voting to strike down Texas’s antisodomy law, that “[m]oral disapproval of a group,” *by itself*, “cannot be a legitimate governmental interest under the Equal Protection Clause,”³¹⁶ whether morality can play any legitimate role in other contexts remains a contested question. For example, in *Williams v. Attorney General of Alabama*,³¹⁷ the Eleventh Circuit Court of Appeals resisted the notion that public morality cannot support

312. *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444, 452 (6th Cir. 1984) (finding no equal protection violation where a bisexual school guidance counselor was asked to resign after coming out to several colleagues).

313. *Stemler v. City of Florence*, 126 F.3d 856, 874 (6th Cir. 1997).

314. *Ross v. Springfield Sch. Dist. No. 19*, 641 P.2d 600, 608 (Or. Ct. App. 1982) (finding no equal protection violation where a teacher was fired following the public exposure of his homosexual activities in an 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 [an adult bookstore], which the school board was entitled to determine impaired his ability to teach in the district.”).

315. *Id.*

316. *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O’Connor, J., concurring). In the majority opinion, Justice Kennedy notes that Justice Stevens’s dissenting opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), “should control here.” *Lawrence*, 539 U.S. at 578. In *Bowers*, Justice Stevens reasoned that “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.” *Id.* at 577–78 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)) (internal quotation marks omitted).

317. 378 F.3d 1232 (11th Cir. 2004).

governmental decisionmaking.³¹⁸ In ruling that Alabama's ban on the sale of sex toys was constitutional, the court suggested that the *Lawrence* holding rejected "public morality as a legitimate state interest" only to justify criminalizing private consensual sexual conduct,³¹⁹ not to ban public commercial conduct. Though the court seemingly recognized that its contextual distinction rested 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"³²⁰

Other courts have likewise embraced the *Williams* court's reasoning,³²¹ potentially 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.³²² Upholding public morality, the argument may go, is key to a rural business's very survival and success because consumers give

318. *See id.* at 1234.

319. *Id.* at 1237 n.8.

320. *Id.*

321. In *Lofton v. Secretary of the Department of Children & Family Services*, 358 F.3d 804 (11th Cir. 2005), the Eleventh Circuit again strongly suggested that promoting public morality is alive and well as a legitimate government interest. *Id.* at 819 n.17. Though the court declined to rule explicitly 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,' 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.'" *Id.* (alteration in original) (citations omitted) (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality opinion)); *see also* *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); *Williams v. King*, 420 F. Supp. 2d 1224, 1249–50 (N.D. Ala. 2006) ("To hold that public morality can never serve as a rational basis for legislation after *Lawrence* would cause a 'massive disruption of the current social order,' one this court is not willing to set into motion." (emphasis omitted) (quoting *Lawrence v. Texas*, 539 U.S. 558, 591 (2003) (Scalia, J., dissenting))); 1568 Montgomery Highway, Inc. v. City of Hoover, 45 So. 3d 319, 333 (Ala. 2010) (noting that the Eleventh Circuit recently declared that the furtherance of public morality is a legitimate state interest).

322. 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 an affair with a male officer from a different department while attending an out-of-town training seminar. La Verkin City, Utah, had a population 3392 as of the 2000 Census. 2000 Summary File 1 (SF 1), *La Verkin City*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/00_SF1/QTP1/1600000US4943440 (last visited Nov. 20, 2012). 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." *Seegmiller*, 528 F.3d at 762. 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 772.

and withhold patronage based on the values that businesses represent. One need only look to the national boycotts and rival “appreciation days” staged in 2012 for Chick-fil-A—a company that famously expressed support for antigay causes—for a reminder that a business can become a symbol for religiously motivated morality.³²³

At least one modern federal appellate court has wrestled with the issue of whether a community’s moral disapproval of homosexuality can justify employment discrimination. In *Milligan-Hitt v. Board of Trustees*,³²⁴ a lesbian couple moved from Rock Springs, Wyoming, to Sheridan, Wyoming to work as administrators in the public school system.³²⁵ 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.”³²⁶ Both women denied this accusation, but the superintendent angrily explained that he had “called Rock Springs and . . . knew all about” them.³²⁷ They were each subsequently denied positions to which they applied.³²⁸ Noting that the lower court found the adverse employment action to be “motivated by community notions of morality,”³²⁹ the Tenth Circuit Court of Appeals was forced to decide whether a public employer may constitutionally “defer to community standards when discriminating on non-suspect grounds”—in this case, the nonsuspect ground of sexual orientation.³³⁰ The court identified *Romer v. Evans* as the relevant precedent, but reasoned that *Romer* does not stand for a broad rule against governmental discrimination against LGB people. To the contrary, “*Romer* did not actually declare sexuality to be a ‘suspect’ classification like racial classification, and did not indicate that discrimination on the basis of sexuality in other, more common, contexts would be judged with a similar stringency.”³³¹

The *Milligan-Hitt* court thus recognized that a community’s discomfort over—or moral disapproval of—sexual difference may serve as a legitimate basis for discriminatory treatment, and it is a perfect example of how conservative community values (particularly in rural places) can creep into valid legal defenses for employer discrimination. Because of the legal uncertainty regarding morality’s role in jus-

323. Kim Severson, *Chick-fil-A Thrust Back Into Spotlight on Gay Rights*, N.Y. TIMES, Jul. 25, 2012, <http://www.nytimes.com/2012/07/26/us/gay-rights-uproar-over-chick-fil-a-widens.html>.

324. 523 F.3d 1219 (10th Cir. 2008).

325. *Id.* at 1221.

326. *Id.*

327. *Id.* at 1222 (internal quotation marks omitted).

328. *Id.*

329. *Id.* at 1232 (internal quotation marks omitted).

330. *Id.* at 1233.

331. *Id.* at 1234.

tifying governmental action in some jurisdictions—and courts' willingness to rely on it and others—and the heightened economic and social vulnerability of many sexual minorities (particularly in rural and otherwise socially conservative places), it remains vitally important that classifications based on sexual orientation be treated as suspect or quasi-suspect. Though a federal Employment Non-Discrimination Act³³² would more meaningfully ensure that sexual minorities in all parts of the country have the same opportunities to earn a living as their straight friends and neighbors, the present political reality and the endemic political powerlessness of sexual minorities in many areas portend that its eventual passage may be a long way off. Heightened scrutiny is only one tool in the arsenal to combat discrimination, but it remains an important one for rooting out the animus that motivates public employers who deny sexual minorities opportunities to achieve basic economic stability.

B. Private Discrimination

The question of how best to address private discrimination against gay, lesbian, and bisexual people is an old and complicated one. Legal proposals focus primarily on enacting or amending statutory antidiscrimination measures, while social activists stress changing hearts and minds through increasing LGBT visibility. This Article bristles at a one size fits all approach and urges a cautious evaluation of place. Effecting change on the ground might look different in a large metropolitan area than in the rural South. Meaningful change in hearts, minds, and statutory regimes may be a long way off in places where new ideas are slower to take hold. In many rural areas, therefore, sexual minorities' ability to live as free from discrimination as possible may depend on the ability to maintain sexual privacy. This is not to suggest that all sexual minorities in rural areas live in the closet. But being out, and drawing direct attention to sexual difference, can come with risks. This Subpart continues the Article's sustained focus on courts and legal analysis and specifically discusses issues of privacy in both rural court proceedings and in legal claims.

332. 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”).

1. 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, those same studies demonstrate that heterosexuals sometimes undervalue the risks that sexual minorities run by making their sexual orientation visible in court.”³³³

Inevitably, some rural sexual minorities will forego legal recourse for fear that their sexuality will be exposed or called into question.³³⁴ Lawyers, particularly in small towns, should always discuss these possibilities with sexual minority clients and weigh the costs and benefits of pursuing legal action.³³⁵ 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 in rural places when making arguments and rulings regarding the admissibility of sexual orientation evidence, and they should evaluate the appropriateness of argument in open court implicating or invoking sexual orientation.

Consider, for example, *City of Kalispell v. Miller*.³³⁶ In *Miller*, the defendant was charged with obstruction after she reported to police dispatchers that a previously placed 911 call regarding her female partner had been a prank. At trial, the defendant moved to exclude the romantic and sexual nature of her relationship with her partner 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.³³⁷ In deciding that the trial judge had erred by admitting the evidence, the Montana Supreme Court, in a 4–3 decision, reasoned that

333. Brower, *supra* note 80, at 7 (footnote omitted).

334. Telephone Interview With Amy Williams, Managing Attorney, Legal Servs. of N. Cal. (Oct. 19, 2011).

335. *Id.* Amy 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 that includes this risk in determining whether to go to court.

336. 230 P.3d 792 (Mont. 2010).

337. *Id.* at 794; Molly Miller Appeal Brief at 5, *Miller*, 230 P.3d 792 (No. DA-09-0255), 2009 WL 2251206 (noting that the prosecutor referred to Molly’s homosexuality at least twelve times during trial).

[s]ociety 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.³³⁸

A brief but strongly worded dissent written on behalf of three Justices, however, chided 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 because of her same-sex relationship.³³⁹ The dissent further accused the majority of engaging in the same “stereotypes from which it professes to protect” by presuming that evidence of homosexuality is prejudicial.³⁴⁰

Many who believe in social justice and equality for LGB people might disagree with the *Miller* majority—and for a number of potentially valid reasons. First, embedded 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.”³⁴¹ 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.³⁴²

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 into account place-based norms. The effect on the jury of introducing evidence or arguments about sexual orientation may differ in some small towns compared to in metropolitan areas, and what would not result in unfair prejudice in a city might result in unfair prejudice before a rural jury.³⁴³

338. *Miller*, 230 P.3d at 794–95.

339. *Id.* at 796–97 (Morris, J., dissenting).

340. *Id.* at 796.

341. Peter Nicolas, “*They Say He’s Gay*”: *The Admissibility of Evidence of Sexual Orientation*, 37 GA. L. REV. 793, 844–45 (2003).

342. Under the Federal Rules of Evidence, evidence that is “relevant” is nonetheless inadmissible “if its probative value is substantially outweighed by,” among other things, “the risk of 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.

343. See Nicolas, *supra* note 341, at 845.

According to 2010 Census data, Kalispell's population is 19,927.³⁴⁴ 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 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 1000 residents, far removed from a major metropolitan area, and where there are few or no openly LGB people. By virtue of low population density, traditional sexual mores common in places that fit this description, and unfavorable views of homosexuality still shared by many in small towns, the potential for unfair prejudice resulting from admitting evidence of sexual difference (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."³⁴⁵ But studies on attitudes toward homosexuality show consistently higher degrees of intolerance toward sexual difference in rural areas than in urban and suburban areas.³⁴⁶ 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.³⁴⁷ 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 *United States v. Baldrige*,³⁴⁸ for example, Randy Baldrige, a former elected commissioner in Rogers County, Oklahoma, appealed from his conviction on eight counts of white-collar crime.³⁴⁹ Baldrige 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

344. *Profile of General Population and Housing Characteristics: 2010*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/1600000US3040075 (last visited Nov. 20, 2012).

345. Jerke, *supra* note 20, at 295.

346. *See supra* note 43 and accompanying text.

347. *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., *supra* note 34, at 53 (identifying the "perceived need to assimilate" as a theme of rural life for sexual minorities).

348. 559 F.3d 1126 (10th Cir. 2009).

349. *Id.* at 1129.

that Baldrige is a homosexual.³⁵⁰ “Baldrige claims this situation is exceptional because an insinuation of homosexuality in rural Oklahoma is incendiary, not likely to be forgotten or forgiven by the jurors.”³⁵¹ “*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.”³⁵²

The court plainly acknowledged the possibility that the prosecutor’s gay-baiting line of questioning could have prejudiced the jury but nonetheless found no error³⁵³ and declined even to engage in analysis of whether the potential prejudice affected the fairness of the trial. Moreover, the court mischaracterized Baldrige’s claim. Baldrige did not ask for an across-the-board “homosexual exception” to the Federal Rules of Evidence, as the court bemused; instead, he sought a meaningful analysis of how invocation of homosexuality in his particular rural Oklahoma community affected his access to justice. Though Baldrige’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. Baldrige’s legal counsel claimed that an insinuation of homosexuality in rural Oklahoma is akin to suicide³⁵⁴ but offered no substantive explanation, elaboration, or evidence. With few exceptions,³⁵⁵ 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

350. Appellant’s Opening Brief at 2, *Baldrige*, 559 F.3d 1126 (No. 07-5121), 2008 WL 2336808; *see id.* at 24–25 (“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 [Baldrige] and Slover took trips together and lived in the same house together, even though both were well beyond the normal age for marriage. . . . By his treacherously-calculated question to Brian Slover, ‘Do you love the defendant Randy Baldrige?’ the Appellant, regardless of the fact that defense counsel’s objection was sustained, had been effectively tarred-and-feathered in the minds of the jury as gay.” (citations omitted)).

351. *Baldrige*, 559 F.3d at 1135.

352. *Id.* at 1135–36 (emphasis added). The court explained that if the witness and Baldrige had an “intimate relationship,” the witness’s testimony could have been biased. The court acknowledged, however, that the witness’s testimony could have been biased “even if their relationship was not sexual, but merely close.” *Id.* at 1135.

353. *Id.* at 1134–36. The court reviewed the prosecutor’s conduct for “plain error.” *Id.* at 1135. The court explained that “[p]lain 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.* (citing *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1199 (10th Cir. 2007)).

354. Appellant’s Opening Brief, *supra* note 350, at 31.

355. *See* Chris Johnson, *Senate Confirms Lesbian to Federal Judiciary*, WASH. BLADE (Oct. 13, 2011), <http://www.washingtonblade.com/2011/10/13/senate-confirms-lesbian-to-federal-judiciary> (noting that confirmation of Alison Nathan to be a U.S. District Court judge for the Southern District of New York made her only the third openly LGB Article III judge).

repeat the *Baldrige* court's mistake by glibly dismissing even the suggestion that the contextual norms of a given place are legally relevant.

Especially perilous is the situation for indigent and pro se claimants who cannot afford legal representation. *Scible v. Haines*³⁵⁶ exemplifies this problem. There, Lawrence Scible filed a writ of habeas corpus, pro se, following his conviction on several criminal counts, including one for "maintaining a house of ill fame and assignation,"³⁵⁷ in Pendleton County, West Virginia. Scible argued that he was denied his right to a fair trial because the West Virginia subjected him to a "lesbian trial."³⁵⁸ While the phrasing of the allegation lacks eloquence, the record colorfully validates Scible'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.³⁵⁹ Then, during his closing argument, the prosecutor stated the following:

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 [sic] 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.³⁶⁰

According to 2010 U.S. Census data, Pendleton County, West Virginia has a population of 7695.³⁶¹ Ignoring for a moment that the foregoing evidence and argument border on pornographic, in communities of this size, and particularly in this geographic area, the word "lesbian" may be considered dirty; even the word

356. No. 2:04 CV 92, 2006 WL 4032013 (N.D. W. Va. Jan. 20, 2006).

357. *Id.* at *2.

358. *Id.* at *11.

359. *Id.*

360. *Id.* at *12 (internal quotation marks omitted).

361. *Profile of General Population and Housing Characteristics: 2010*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/0500000US54071 (last visited Nov. 20, 2012).

“homosexual” is difficult for many to say.³⁶² Often, rural heterosexuals broach the uncomfortable topic of homosexuality by referring to people as “that way” or “like that.”³⁶³ Scible was right to raise the argument that “the county prosecutor titillated the rural community and jurors of Pendleton County with a lesbian trial.”³⁶⁴ Yet in discussing whether the introduction of the video evidence, as well as the prosecutor’s closing argument, rendered the trial fundamentally unfair, the court simply concluded that Scible had provided “no evidence” that he had been prejudiced.³⁶⁵

It is unclear what evidence courts would find sufficient to demonstrate the prejudicial effect of inflammatory gay-baiting evidence and argument in cases like *Scible* and *Baldridge*. But at minimum, courts must acknowledge that the rural context is at least relevant in cases implicating sexual orientation, and they must conscientiously analyze whether evidence and argument regarding homosexuality is unduly prejudicial. Simply brushing these questions aside without meaningful analysis 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 toward homosexuality. Judges should question lawyers and solicit testimony from parties about the atmosphere and attitudes toward 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.”³⁶⁶ They should take into consideration whether any local laws, regulations, or ordinances prohibit discrimination based on sexual orientation or provide benefits to same-sex partners.³⁶⁷

362. “Most Southerners who aren’t comfortable with homosexuality don’t use terms like ‘gay’ or ‘lesbian.’ They’ll use euphemisms. A gay man is a ‘little light in the loafers’ or has ‘sugar in his britches.’ If a lesbian has a partner, the partner is often referred to as her ‘friend.’” Karen L. Cox, Op-Ed, *We’re Here, We’re Queer, Y’all*, N.Y. TIMES, Oct. 3, 2012, <http://www.nytimes.com/2012/10/04/opinion/were-here-were-queer-yall.html>.

363. See generally HOWARD, *supra* note 5. On a personal note, I remember often hearing the phrases “that way” and “like that” used to describe effeminate men or openly LGB people in the small town where I grew up, but I rarely heard people respectfully describe someone as “gay” or “lesbian.” There is a distinct discomfort in uttering words associated with sexual identity for many rural people.

364. *Scible*, 2006 WL 4032013, at *11 (internal quotation marks omitted).

365. *Id.* at *12.

366. 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).

367. 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 New York state and enacted and pending gay rights state legislation. *Stern v. Cosby*, 645 F. Supp. 2d

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.³⁶⁸ But as this Article demonstrates, it is possible to appreciate how rurality can disadvantage sexual minorities without simply stereotyping all rural people. 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 in which sexual orientation may be implicated is to conduct voir dire 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,"³⁶⁹ and courts permit both civil and criminal litigants to strike prospective jurors who they suspect may be biased.³⁷⁰ Courts have broad discretion in determining the scope of voir dire;³⁷¹ some courts have denied requests to pose questions regarding attitudes about sexual orientation,³⁷² while others have permitted them.³⁷³ Judges must appreciate that the high potential for bias regarding issues of sexual difference in rural areas warrants voir dire on the issue. Further, if permitted by state law, courts should question—or permit attorneys to question—jurors indi-

258, 273–76 (S.D.N.Y. 2009). Similar evidence, though on a local rather than a state scale, may be relevant in analyzing the prejudicial effect of evidence or argument regarding sexual orientation in rural courts.

368. See Pruitt, *supra* note 153, at 211; *id* at 207 ("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.").
369. Peters v. Kiff, 407 U.S. 493, 501 (1972).
370. See, e.g., FED. R. CIV. P. 47 ("The court may permit the parties or their attorneys to examine prospective jurors or may itself do so."); FED. R. CRIM. P. 24 ("The court may examine prospective jurors or may permit the attorneys for the parties to do so."); see also Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 YALE J.L. & FEMINISM 1, 8 (2001).
371. See, e.g., Aldridge v. United States, 283 U.S. 308, 310 (1931) (holding that the trial court has "broad discretion as to the questions to be asked" during voir dire). A decision to deny a voir dire question is reviewed for abuse of discretion. See, e.g., United States v. Hirschberg, 988 F.2d 1509, 1514 (7th Cir. 1993); United States v. Bobo, 994 F.2d 524, 527–28 (8th Cir. 1993).
372. See, e.g., United States v. Click, 807 F.2d 847, 850 (9th Cir. 1987) (holding that trial judge did not abuse his discretion by denying questions regarding attitudes toward homosexuals).
373. For a discussion of some of the various decisions permitting questions on sexual orientation bias, see Eisemann, *supra* note 370, at 14–21. The issue of whether state and federal constitutional provisions compel voir dire regarding potential homosexual bias is beyond the scope of this Article.

vidually rather than collectively³⁷⁴ 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;”³⁷⁵ rather, it manifests concretely in the findings of studies in diverse fields and 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 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.

2. Rural Sexual Minorities and Privacy-Based Claims

Information about sexuality and sexual orientation can be especially sensitive in small towns. Unwanted disclosure of a same-sex sexual encounter or of someone’s self-identification as LGB might 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 *Sterling v. Borough of Minersville*,³⁷⁶ 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 is thin. Social scientists and courts alike acknowledge the existence of rural information grapevines.³⁷⁷ A justice of the North Dakota Supreme Court once noted that “in nearly all counties in [North Dakota], . . . most jurors know something about every other person in the county, their families, or their businesses.”³⁷⁸ A New York court similarly noted that, in rural communities, “word of mouth spreads like a brush fire.”³⁷⁹ And according to the Iowa Supreme Court, “It is a hallmark of our still rural-oriented society—often scorned by elitists but nonetheless

374. *Id.* at 16–21; see also Heather C. Brunelli, Note, *The Double Bind: Unequal Treatment for Homosexuals Within the American Legal Framework*, 20 B.C. THIRD WORLD L.J. 201, 223–26 (2000) (discussing how different courts have handled requests for individual voir dire).

375. *Click*, 807 F.2d at 850; see *id.* (noting that courts may refuse questions that are “tied to prejudice only speculatively”).

376. 232 F.3d 190 (3rd Cir. 2000). “It is difficult to imagine a more private matter than one’s sexuality . . .” *Id.* at 196.

377. See D’Augelli et al., *supra* note 190; see also *infra* Part II.B.2.

378. *State v. Brooks*, 520 N.W.2d 796, 802 (N.D. 1994) (Meschke, J., concurring).

379. *Ward Telecomm. & Computer Serv. v. State*, 372 N.Y.S.2d 423, 437 (Ct. Cl. 1975).

extant—that we know the misfortunes of our neighbors.”³⁸⁰ Judges in rural communities are keenly aware of this dynamic, and they must account for this characteristic 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.”³⁸¹ Particularly in geographic areas lacking specific antidiscrimination 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. Historically, this strategy has had limited success, and may face more hurdles as LGBT rights make greater gains at the national level.³⁸²

*Plaxico v. Michael*³⁸³ 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 young daughter lived in a secluded cabin in the woods in Tippah County, Mississippi,³⁸⁴ which then had a population of 19,523.³⁸⁵ 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 a woman.³⁸⁶ Michael drove to the cabin, grabbed a camera from his truck, and, through the bedroom window, watched and took photos of the two women having sex.³⁸⁷ 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

380. *Lunday v. Vogelmann*, 213 N.W.2d 904, 910 (Iowa 1973); *see also, e.g.*, *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”); *McCarney v. Meier*, 286 N.W.2d 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 . . .”).

381. Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711, 1712 (2010).

382. *See id.* at 1716 (“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.”).

383. 735 So. 2d 1036 (Miss. 1999).

384. *Id.* at 1038.

385. *Mississippi: Population of Counties by Decennial Census: 1900–1990*, U.S. CENSUS BUREAU (Mar. 27, 1995), <http://www.census.gov/population/cencounts/ms190090.txt>.

386. *Plaxico*, 735 So. 2d at 1038.

387. *Id.*

daughter (which the chancellor granted, presumably to protect the minor child from her mother's "illicit" relationship).³⁸⁸

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.”³⁸⁹ 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.”³⁹⁰

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.³⁹¹ 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 neighbors,”³⁹² the seclusion of the home—particularly a cabin in the woods—may be the only place where people are free to live and socialize with each other without setting the town abuzz with fresh gossip. Michael encroached on one of the few spaces in Plaxico’s rural community where she felt comfortable being intimate with another woman. 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,”³⁹³ rural women have far fewer opportunities for social and intimate interaction and must “chart a new course that creates space for a lesbian narrative.”³⁹⁴ Private homes are places of solace for rural women who have sex with women who might otherwise face extreme isolation, and intrusion into that space can strip rural sexual minorities of their only safe outlet for sexual expression. Moreover, as an additional consequence of Michael’s interference, he may also have effectively outed both women to others in town via hard photographic evidence. The majority neglected to consider who developed the photos Michael took and whether information regarding

388. *Id.* at 1038. “[Michael’s] concern was based on numerous rumors of an illicit lesbian sexual relationship between Plaxico and his former wife. [He] decided that it was not in the best interests of his daughter to allow her to remain in the custody of her mother” *Id.* at 1039.

389. *Id.* at 1039 (quoting RESTATEMENT (SECOND) OF TORTS § 652B cmt. d (1977)) (internal quotation marks omitted).

390. *Id.* at 1039–40.

391. *See id.* at 1041 (McRae, J., dissenting) (“[I]t matters not whether Michael’s former wife was involved in a lesbian or a heterosexual relationship.”).

392. *Sims v. Reeves*, 261 S.W.2d 812, 814 (Ky. Ct. App. 1953).

393. McCarthy, *supra* note 134, at 88.

394. Cohn & Hastings, *supra* note 120, at 141.

their existence had disseminated throughout the community, but the dissent correctly implied that these issues are pertinent.³⁹⁵

At least one court, however, has not allowed the inherently public nature of rural life to render sexual minorities' privacy rights meaningless. *Simpson v. Burrows*³⁹⁶ 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 Jo Anne Simpson and her same-sex partner purchased a commercial lodge in Christmas Valley, Oregon, which, as the court noted, is a "primarily rural area with approximately 200–300 residents in the valley and approximately fifty residents in the town."³⁹⁷ 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.³⁹⁸ All together, twelve letters were submitted into evidence³⁹⁹:

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 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."⁴⁰⁰

Simpson raised various tort-based claims against Burrows, including a claim for invasion of privacy.⁴⁰¹ 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 generally or to a large number of persons; and (3) disclosure was in a 'form of publicity of a highly objectionable kind.'"⁴⁰²

Although the court described Simpson as a "lesbian" throughout the opinion and acknowledged that others in the community learned of Simpson's sexual ori-

395. *Plaxico*, 735 So. 2d 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").

396. 90 F. Supp. 2d 1108 (D. Or. 2000).

397. *Id.* at 1113.

398. *Id.* at 1114–17.

399. *Id.* at 1114.

400. *Id.* (original alterations omitted) (citations omitted).

401. *Id.* at 1125 (quoting *Tollefson v. Price*, 430 P.2d 990, 991 (1967)).

402. *Id.*

entation before the dissemination of the letters,⁴⁰³ it nonetheless concluded, without analysis, that Simpson's sexual orientation is a private fact.⁴⁰⁴ 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. The *Burrows* court respected the plaintiff'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,⁴⁰⁵ the court found that the disclosure of Simpson's sexual orientation via dissemination of inflammatory and vitriolic letters throughout the community was "extremely outrageous,"⁴⁰⁶ and that there was "no doubt" that the purpose in writing and distributing them was to force Simpson to sell the lodge and leave Christmas Valley.⁴⁰⁷ The court demonstrated that it understood 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 awarded Simpson economic damages, finding that "some people boycotted the Lodge after seeing or hearing about the letters."⁴⁰⁸ Taking the rural into account, the court provided a remedy for the place-based wrong Simpson suffered. The court offered Simpson and her partner the discretion to negotiate their sexual identities as they saw fit in their community, and it declined to let the *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

403. It noted that

[A lodge employee], 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. [She] testified that the 'churchgoers' stopped coming, because of plaintiff's and Swanson's lifestyle, as soon as the sale papers were signed. [Another witness] stated that controversy began almost instantly after plaintiff and Swanson bought the Lodge and that it was unrelated to the letters.

Id. at 1121.

404. *Id.* at 1125.

405. Based on the testimony of several witnesses, the court found that Burrows disclosed Simpson's sexual orientation to the public: "[K]nowledge 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.* at 1115.

406. *Id.* at 1125.

407. *Id.* at 1123.

408. *Id.* at 1128.

information exposed is a matter of “legitimate concern to the public.”⁴⁰⁹ 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 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 morbid or sensationalist interest in homosexuality.⁴¹⁰ This is not to suggest that a rural community’s interest in someone’s sexual orientation is never legitimate. Instead, the nature of rural environments ought to raise a flag, and legal analysis must be especially discerning.

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.*⁴¹¹ There, a self-identified gay man, who was in a crowd in San Francisco, saved President Ford’s life by grabbing a would-be assassin’s arm before he could shoot his gun at the president.⁴¹² 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 who published his homosexuality, 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.⁴¹³

Quoting the Ninth Circuit, 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

409. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

410. In *Crumrine v. Harte-Hanks Television, Inc.*, 37 S.W.3d 124 (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. *Id.* at 125–26. 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.* (quoting *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474 (Tex. 1995)). 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 a broadly defined safety interest, other courts might follow suit and similarly credit as legitimate a small rural community’s broadly defined interest in homosexuality per se.

411. 201 Cal. Rptr. 665 (Ct. App. 1984).

412. *Id.* at 666.

413. *Id.* at 670–71 (finding Sipple’s sexuality to be a sufficiently “political consideration” because it dispelled “the false public opinion that gays were timid, weak and unheroic figures”).

member of the public, with decent standards, would say that he had no concern.⁴¹⁴

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 curiosity⁴¹⁵ more intensely than in urban areas, particularly because of the relatively few openly LGB people 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 supposedly decent standards may therefore be part of a community where homosexuality is everyone's ostensible 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, nor should courts accept at face value an interest in homosexuality tied to safety or health concerns as legitimate. Courts should carefully scrutinize the interest asserted to discern whether a rural community seeks simply to peer into the windows of otherwise private intimate lives. Alternatively, and perhaps a far more radical suggestion, courts could evaluate a legitimate public interest defense by assessing what information is of legitimate concern to a reasonable member of the general public—not a member of the particular rural community at issue.⁴¹⁶ If local rural community standards dictate what matters are of legitimate public interest, many sexual minorities may have a right without a remedy.

This Article does not provide concrete guidelines for how judges should differentiate between legitimate and illegitimate interests in a person's sexual orientation, nor does it demarcate precise guidelines for surmising when a person's sexual orientation or disturbance therewith satisfies the relevant elements of privacy torts. As with all legal claims and defenses, the answers to these legal questions will almost always be fact dependent. The Article instead seeks, rather modestly, to raise judicial awareness that rural context heightens the risk that privacy rights can be

414. *Id.* at 670 (emphasis omitted) (quoting *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975)) (internal quotation marks omitted).

415. *Cf. Hawkins ex rel. Hawkins v. Multimedia, Inc.*, 344 S.E.2d 145, 146 (S.C. 1986) (“The right of privacy does not prohibit the publication of matter which is of legitimate public or general interest. Public or general interest does not mean mere curiosity . . .”).

416. Under First Amendment obscenity doctrine, courts typically instruct jurors to discern whether material appeals to prurient interests and is patently offensive according to state or local community standards (and without expert witnesses), but they remain constitutionally free to instruct jurors to apply a national standard. Bret Boyce, *Obscenity and Community Standards*, 33 *YALE J. INT'L L.* 299, 319–21 (2008). The Supreme Court has never set geographic limitations on community standards under the First Amendment “public concern” defense to tortious invasion of privacy.

rendered meaningless by needless prying. Judges who are not sensitive to the ways in which rural context can consume privacy rights encourage sexual minorities to participate in the Great Gay Migration—to pursue the anonymity and freedom to live a gay life that one is presumed to find in cities, far away from the watchful eye of neighbors. The law, in all contexts, must be sensitive to the factors that can inhibit those who seek alternative forms of belonging in their rural homes.

CONCLUSION

Sexuality and sexual identity are complex and fraught issues, and how individuals negotiate their sexual selves is contingent on a host of factors. Critical Race Theory and Feminism impart the lesson that identity cannot be examined or explained through a single lens. Rather, identities are intersectional, and individuals are differently positioned within society according to various overlapping traits and axes, such as sex, race, and class.⁴¹⁷ This Article argues that—like sex, race, and class—place matters. Where a person lives and works drastically affects the calculus of sexual identity negotiation and sexual behavior, as well as the degree and kind of marginalization they experience. Geographic norms and their embedded economic dimensions dictate appropriate sexuality, which in turn can stifle willingness to claim a lesbian, gay, or bisexual identity or even act on same-sex desires.

Society subconsciously and often overtly recognizes that, in matters of sexuality, place matters. The Great Gay Migration from rural to urban areas captures perfectly the reality that geography can powerfully affect real and imagined access to different sexual identities, experiences, and sources of knowledge. This Article zooms in from place broadly to rurality more narrowly because rural places are neglected and forgotten geographies. Rural places are those from which society assumes gay, lesbian, and bisexual people escape and where those who remain lead miserable lives in the face of overwhelming oppression. The widely shared belief that sexual minorities do not belong in small towns inhibits society's commitment to helping those who remain in them either by choice or by necessity. Urban bias causes us to overlook how rural context can powerfully influence the ways in which law touches sexual minorities' lives in small towns, and it squanders opportunities to incorporate rural sexual minorities' experiences into legal doctrine in ways that would strengthen antidiscrimination tools for all sexual minorities in the United States, regardless of location.

417. Kimberlé Crenshaw pioneered intersectionality theory to study how different groups of people with multiple overlapping identities are differently discriminated against, oppressed, and situated within society. See generally, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

This Article is the beginning of what I anticipate will be an extended project in examining the relationship between law, sexuality, gender, and place. It discusses how rurality informs conceptions of sexuality, and how law overlooks, contributes to, and should expand to account for urban and rural differences. It offers normative suggestions for helping all sexual minorities achieve liberty and equality, and in particular those who live in small towns. Because this Article focuses on the judiciary and creating change through litigation and the courts, the legal suggestions it sets forth for empowering sexual minorities could be characterized as modest rather than sweeping. But, in rural and otherwise socially conservative or poor geographic areas, change through the judiciary may be the best hope for meaningful legal reforms. Moreover, in rural areas, judges are frequent perpetrators of urban bias, and they can be a powerful force in validating the social discrimination that many sexual minorities experience in their communities. As long as judges remain ignorant about rural sexual minorities' lives, they deny meaningful access to justice and continue to be part of the social force that drives a wedge between rural people and the gay community.

By raising awareness about rural sexual minorities' experiences, including those who choose rural life, and by showing how advocates can create change through courts, this Article seeks to help judges, lawyers, legislators, advocates, and scholars think critically about how to address the unique realities facing sexual minorities in small towns. Above all, this requires that we understand place-based limitations with regard to making visible a gay or bisexual identity. For those who struggle to negotiate identities and search for same-sex love, affection, and erotic experience outside of urban gay communities, we must do more than simply tell them that "it gets better."