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TABLE OF CONTENTS

BANKRUPTCY & CONSENT 5

Daniel J. Bussel and Kenneth N. Klee

CRITIQUE BY COMPARISON IN FEDERAL INDIAN LAW 22

Carole Goldberg

RACING THE CLOSET 46

Russell K. Robinson

NONLETHAL SELF-DEFENSE, (ALMOST ENTIRELY)
NONLETHAL WEAPONS, AND THE RIGHTS TO KEEP AND
BEAR ARMS AND DEFEND LIFE 66

Eugene Volokh



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BANKRUPTCY & CONSENT*

Daniel J. Bussel and Kenneth N. Klee**

Consent justifies pragmatic resolutions otherwise unavailable under prevailing legal rules. Bankruptcy law facilitates consent by exploiting inertia, ambiguity, proxies, relaxed legal standards, novel procedures and institutional structures, and altering substantive rights. Professors Bussel & Klee critique current consent standards in bankruptcy relating to (i) home mortgage modification; (ii) sales free and clear; (iii) third-party releases; (iv) sales of substantially all assets; (v) balloting of conflicted parties; and (vi) proxy consents by creditors' committees. Recently, most notoriously in the Chrysler and GM cases, the advantages of generating solutions by manufacturing consent rather than imposition have been too casually abandoned.

Understanding how consent is manipulated in bankruptcy provides critical insight into the bankruptcy process. Imposing legal outcomes without consent comes at an ideological cost that undermines acceptance of the result. Bankruptcy law often less-forthrightly prefers to finesse conflict among legal rules and business needs by watering down the quality of the consent it finds necessary or sufficient to alter legal entitlements.

I. INTRODUCTION

Competing pressures, for very loose consent standards arising out of the practical exigencies of bankruptcy cases, and for stringent rules to control historical abuses in consent-gathering, result in widely varying consent standards in bankruptcy. In descending order of rigor, transformative consent may require:

- (i) Informed subjective consent plus formal requirements such as disclosures and certifications;
- (ii) informed subjective consent;
- (iii) objective manifestations of assent;
- (iv) formal actions neither subjectively nor objectively manifesting assent but from which consent is presumed;
- (v) inaction;
- (vi) consent by proxies or similarly situated persons;
- (vii) inaction by proxies or similarly situated persons; or
- (viii) nothing—consent is conclusively presumed, notwithstanding timely objection by the “consenting” party.

The recent restructurings of Chrysler and GM are important landmarks in the ever-evolving role of consent in bankruptcy. As the financial situations of GM and Chrysler became dire at the end of 2008, some suggested that the magnitude of the auto industry's problems required a new process less reliant on consent than chapter 11. Shifting the forum for building a consensus over the complex restructuring options facing these firms from bankruptcy court to Congress, however, would only substitute Congressional for party consent. The Obama Administration preferred the cover of a bankruptcy court in imposing difficult political and economic choices on GM and Chrysler constituents. However, the Administration viewed traditional bankruptcy-style consent as unduly onerous given the urgent and complex economic and political problems raised by these reorganizations.

For Chrysler, the Administration orchestrated a § 363 sale in a transaction that was a reorganization plan in all but name. The nominal buyer, Fiat, holds only a minority stake in New Chrysler for which it paid nothing. Although § 363 sales ordinarily require the consent of secured creditors, they dispense with class consents and other confirmation requirements. Initial opposition from secured creditors collapsed under Government pressure, and, after the Supreme Court terminated a brief stay, the sale was consummated over the objections of certain pension funds, holding small amounts of secured debt, and certain tort claimants. The “consent” of dissenting secured parties was found in standard agency provisions the courts construed to permit the agent consent's to bind the objecting holders. The objection that § 363 sales cannot dictate distribution of value and other terms of a reorganization plan was overruled notwithstanding special treatment of particular constituents, especially labor and tort claimants, that left no real reorganizational or distributional issues for resolution through a chapter 11 plan.

While Chrysler may have been a case where prompt § 363 sale was the only viable alternative to a disastrous forced liquidation, it is implausible that the Government ever would have permitted forced liquidation of GM. Nevertheless, for GM, the Administration similarly short-circuited the plan process, using § 363 to recapitalize a “Good GM” without obtaining the creditor and shareholder acceptances to confirm a reorganization plan. No third-party buyer even arguably existed for GM. The Government emerged with 60% of the equity in New GM, with the rest distributed to existing GM constituents, primarily representatives of GM's unionized workforce. Again all the key reorganizational issues (involving

a complex settlement among labor, management, the Administration, tort claimants, secured creditors and debentureholders) were resolved through the § 363 sale process.

Cloaking practical accommodations with manufactured consent is at the heart of our bankruptcy law as it evolved over the 19th and 20th centuries. Modern circumstances, in some instances, call for further exploitation of these techniques, or more mandatory rules, to better balance party autonomy against other values. We suggest, however, that recently, perhaps in exaggerated response to those circumstances, perhaps inadvertently, the role of consent has at times been unduly diminished. The GM and Chrysler cases are only the most extreme examples of this trend, the long-term systemic cost of which remains to be seen.

Legal rights are adjusted and renegotiated in bankruptcy. Specialized bankruptcy procedures affect that renegotiation and remove obstacles to its success. Perhaps more importantly, bankruptcy creates new legal rights and alters established entitlements, often in unclear ways. The Code first alters parties' nonbankruptcy rights in order to create incentives for consent that then serve as a further basis for the transformation of rights. Frequently bankruptcy law enshrouds that alteration of rights in ambiguity and uncertainty, generating further pressure for compromise. New bankruptcy remedies are substituted for those available under nonbankruptcy law, priorities among creditors are reordered, and otherwise valid claims subordinated or disallowed on bases unknown to nonbankruptcy law. In short, bankruptcy alters legal entitlements as a matter of course.

Those substantive alterations structure a massive, concurrent renegotiation of the parties' rights and liabilities. Adverse and uncertain changes in nondebtors' rights make previously unattractive proposals appealing. To paraphrase Don Corleone, a previously unattractive offer may suddenly appear to a creditor as one "he couldn't refuse." Consent is manufactured more effectively, it turns out, if the consenting party is first softened up by a downward adjustment in its substantive entitlement.

Commentators decry vague and uncertain legal rules as impeding efficient resource allocation. Bankruptcy law, however, has long depended on uncertainty to force renegotiation of legal rights and facilitate reorganization. Plans must be

II. FACILITATING CONSENT BY ALTERING RIGHTS

“fair and equitable” and secured parties are entitled to “adequate protection” of property interests securing their claims, which may be restructured according to a standard of “indubitable equivalence.” Parties’ rights are frequently made to turn on valuation of firms and collateral, although these are among the thorniest factual issues that courts regularly encounter. Moreover, bankruptcy courts determine value on the basis of testimony, not current market bids. “Though this be madness, yet there is method in’t.” By creating uncertainty, especially factual uncertainty, bankruptcy law encourages parties to compromise their rights. Transformation of legal rights becomes a two-step process where rights are first muddled up, and then clarified based on a negotiated solution. By focusing on step two, bankruptcy law manages to appear to accommodate conflicting rights on the basis of consent rather than imposition.

III. CONSENT IN 21ST CENTURY BANKRUPTCY LAW

A. *Relevant Factors*

Fixing consent standards demands experience, judgment, and attention to context. Useful factors to consider include:

- The sophistication and bargaining power of putative consenting parties;
- The number, and dispersion, of putative consenting parties;
- The availability of good proxies;
- The nature, value, and importance of putative consenting parties’ legal rights;
- The cost of obtaining consent both in out of pocket terms and in terms of burdening (or even precluding) effective reorganization;
- Public and third party interests favoring reorganization;
- The risk of abuse by insiders in obtaining consents and imposing nonconsensual resolutions;
- The risk of strategic (“rent-seeking”) behavior in the exercise of consent rights by those holding entitlements;
- The cost (including delay and legitimacy costs) of imposing coercive rather than consensual solutions; and
- The value of flexibility in consensual, particularized solutions.

By (i) lowering the standard for effective consent; (ii) relying on proxy consents; (iii) altering party baselines; and (iv) making the enforcement or content of legal rights uncertain, the consent bar can be manipulated downward. Moreover, mandatory rules may substitute for consent. Experience cautions, however, against too quickly jumping toward mandatory rules. Rules that seem appropriate in the abstract may not work in concrete cases. Congress or the judiciary may not know

what the right answer is, even if they think they do, or the right answer may differ in unanticipated or unusual circumstances. Even if an appropriate mandatory rule can be confidently framed, legitimacy and autonomy values must be weighed against the efficiencies of mandatory rules. The experience in bankruptcy shows that facilitating consent to, rather than imposing, a preferred resolution is often a better road leading to the same destination.

Technology has vastly reduced the cost of communicating with and organizing dispersed constituencies. While new technologies facilitate consent-gathering, they also facilitate the orchestration of dissent. Whether the net effect is to facilitate or obstruct consent-gathering is unclear, but the force of inertia, although still powerful, is certainly reduced. Moreover, the general public's current reality of free and easy Internet access to large quantities of information reduces the need for traditional forms of disclosure.

***B. The Need to
Reassess Consent
Standards***

Other changes clearly make it more difficult today to obtain individual consents. The financial world is far more complex today, with vast new markets for securitizations and financial derivatives. This complexity breeds conflicts of interest that impede consent-gathering. Legal and technological changes make it easy to perfect security interests in substantially all of a firm's property. Accordingly, few debtors enter bankruptcy today with significant unencumbered assets. Trade credit is less important as firms have turned to capital markets for financing and reduced working capital. Growing mass tort litigation means tort claimants (who are involuntary creditors) are an increasingly important part of the mix in large bankruptcy cases. Modern claims trading means new parties whose consent must be obtained emerge just as previously consenting or passive parties exit. Strategic behavior is even more a problem than in the past as bankruptcy processes are better understood. Sophisticated parties are more prone than ever to engage in such behavior, employing new financial engineering tools unconstrained by gentlemen's agreements honored in the past.

Other scholars (prior to the financial panic of 2008) have argued that the depth and liquidity of modern capital markets make resolution of bankruptcy cases by negotiated restructuring (rather than by sale and distribution in accordance with legal priorities) less advantageous than in the past.

So, broadly speaking, consent is on balance somewhat harder to obtain and less necessary to resolve a bankruptcy case today than in earlier times. Given this

broad perspective, greater scope for mandatory rules, a general lowering of the bar for transformative consent, and greater alteration of party baselines, is sensible under modern circumstances. Too high a consent threshold may unduly burden or even preclude efficient dispute resolution or successful business reorganization as parties engage in strategic behavior to extract value to which they are not otherwise entitled, perhaps by obstructing an otherwise desirable plan.

In light of current circumstances, we consider below some features of bankruptcy law that are candidates for further downward manipulation of consent standards, and others where consent standards might plausibly be further tightened to better reflect underlying policies in light of current circumstances. We intend this discussion to be provocative and illustrative, not exhaustive.

C. Relaxing Certain Consent

1. Home Mortgage Modification

In 1978, when home lenders obtained anti-modification protection for first mortgages on principal residences, the standard first mortgage was limited to 80% of the value of the home. Then mortgage lending was deregulated and increasing securitization of home mortgages insulated mortgage originators from credit risk. Indeed, somewhat perversely, mortgage originators were paid handsome fees to originate loans without much regard to collateral value or the borrowers' creditworthiness. Although in the long run and in the aggregate these practices proved disastrous, they flourished because originators expected to promptly offload any credit risk by reselling the loans in an anonymous securitization market where risk was supposedly mitigated by diversification and tranching and the assumption of ever-rising property values. The highest expression of this folly was in subprime markets where some homeowners, specially selected for their poor credit histories, could borrow up to 125% of current home value. As a result, from inception, some mortgages on principal residences were undersecured. With the recent plunge of home values the percentage of underwater mortgages has soared. Yet chapter 13 retains an outdated prohibition on the modification of first mortgages on principal residences unless the lender consents. This requirement has scuttled confirmation of chapter 13 plans and debtor rehabilitation. Moreover, since most home mortgages were pooled and securitized, often debtors cannot even identify, let alone negotiate with, the beneficial holders, and thus, have no meaningful way to obtain lender consent to loan modification. Mortgage loan servicers often have little discretion or economic incentive to modify home mortgages in light of changes in the housing market or the homeowner's circumstances.

Accordingly, it is time to allow modification of first mortgages on homes on the same standard applicable to other secured claims. The possibility of cram down based upon uncertain judicial valuation historically has led—in an overwhelming majority of cases—to realistic consensual renegotiation of the terms of secured claims in light of current market values, and there is every reason to believe that extending the general rule to home mortgages will have the same result.

Theory and experience, even if compelling, do not always overcome political realities. Although Congress considered amending the Code twice in 2009 to permit some form of cram down on home lenders, the bills failed to pass.

No issue in chapter 11 practice has divided courts more than the permissible scope of third-party releases under reorganization plans. Typically, plan proponents condition plans on the release of estate or debtor claims against parties that are critical to the successful reorganization or otherwise have leverage over “the deal.” The plan proponent and these released parties may seek to condition the deal further on obtaining a general release not only of estate claims but of claims of other constituents. The common justification is that “global peace” requires broad general releases. Insiders often condition cooperation on obtaining such releases. Insurers, lenders, or others making cash or other contributions to the reorganization effort may also seek to condition their participation in the reorganization on such releases.

2. Third-party Releases

Some courts hold that parties cannot contractually consent to injunctions or releases not authorized by the Code under a chapter 11 plan. Others allow individual parties to waive rights against third-parties or consent to an injunction under a plan. Still other courts authorize plans that condition acceptances on such a waiver, presenting plan and waiver together to creditors as a take-it-or-leave-it package deal. Some courts allow accepting classes of claims to bind dissenters so that the entire class would release claims against designated third parties. Finally, some courts go so far as to approve plans releasing third-party claims over the objection of an entire dissenting class on the basis that a settlement was a crucial part of the plan.

Recently, in the mass-asbestos context, the Supreme Court was poised to address whether a bankruptcy court may enjoin creditors from asserting independent claims against third parties. The Second Circuit had determined that the

bankruptcy court lacked jurisdiction to do so. The Supreme Court, however, decided the case on narrow *res judicata* grounds without resolving the scope of the bankruptcy court's jurisdiction to enjoin claims against third parties.¹

History and policy considerations counsel against the cram down of third-party releases over the objections of an entire dissenting class. Third-party releases may be the grease necessary to resolve a reorganization case, but there is a significant difference between imposing that release nonconsensually and conditioning the final deal on individual or class consent to global peace. On the other hand, a particular creditor's affirmative, informed consent to a release should be sufficient to make that release binding on that creditor. Moreover, there is no apparent reason to require that a contractual release be obtained outside the plan process when it is more efficient and convenient to solicit it within that process.

The remaining contestable issue is whether class consent should bind dissenters to third-party releases. In bankruptcy, class consents commonly effectuate all sorts of settlements not only vis-à-vis the bankruptcy estate and the debtor, but among the classes themselves, with respect to such matters as plan settlements, avoiding power claims, and subordination disputes. The acceptance of an offer of settlement from a third party conditioned on global peace may be little different. In an appropriate context a class vote should be sufficient to bind dissenting class members to the release. Unlike most intercreditor disputes (and disputes relating to estate or derivative claims or claims against the estate), however, class members may hold differing interests with respect to third-party releases. Classification generally turns on whether the class members hold similar rights against the debtor. Although, those with dissimilar rights against the debtor may not be classified together, those with dissimilar rights against putative third-party releasees may be.

Imposing a third-party release on dissenters by class vote should require that all class members hold similar rights against the putative releasee. If those that have no third-party claim are classified together with those that do, those without the third-party claim may happily bargain away the third-party claims of their fellows to obtain otherwise favorable plan treatment. Deals including third-party releases should be permitted, but consent to the deal should be measured by requisite majorities of classes composed of members with similar rights against the putative releasees.

The Code, as drafted, expressly limited secured claims to the value of the collateral and made liens void except to the extent securing an allowed secured claim so measured. Thus an “underwater” lien (that is a lien against collateral whose value was exhausted by senior liens) was void. As such, property subject to an undersecured first lien and a fully underwater second lien could be sold with the consent of the first lienholder. Consent of the underwater junior was not required once the lien was stripped.

*Dewsnup v. Timm*² upended this result by construing the Code (despite its plain language) to prevent the voiding of an underwater lien in chapter 7. This posed no issue in confirming chapter 11 plans because a lien could be stripped under a chapter 11 plan notwithstanding *Dewsnup*, but *Dewsnup* inadvertently gave the underwater lienholder (who until plan confirmation retained its underwater lien) a veto power over § 363 sales. Consent of the undersecured first lien no longer sufficed to authorize a sale under § 363 because the underwater junior had an interest in the property to be sold. This caused few problems in chapter 7 cases. Chapter 7 trustees can simply abandon property that lacks any equity or grant the senior lienholder relief from the automatic stay to foreclose. Recently, however, some courts have upheld vetoes by underwater junior liens over chapter 11 sales outside of a plan. Where preplan sales under § 363 are justified, there is no reason to give an out-of-the-money second lien a veto over an otherwise desirable sale. The confluence of *Dewsnup* and increased reliance on § 363 sales in chapter 11 cases confers undue leverage on the underwater junior lienholder. Allowing property to be sold free and clear of an underwater lien without the junior’s consent will limit strategic behavior in situations where prompt § 363 sale is justified.

Bankruptcy sales of all assets used to be exceptional. To conduct a sale outside the chapter 11 plan process, the debtor had to demonstrate exigent circumstances, such as rapidly wasting assets. As time passed, courts allowed such sales absent an emergency if supported by an articulated business purpose, but not simply to appease creditors. Later, courts simply balanced the interests of the parties in deciding whether to authorize the sale. Although courts rejected sales that restructured creditors’ rights as *sub rosa* plans, they usually permitted sales leaving the proceeds for distribution under a plan.

Currently, § 363 sales have increasingly displaced chapter 11 plans. When the debtor seeks court approval of a § 363 sale, unsecured creditors do not vote. Rather, only

secured creditor consent is required, and then only in the limited case where there is no equity in the property and the lien is not subject to *bona fide* dispute. Frequently, the buyer is an affiliate of the secured party sometimes acting in concert with insiders. When the buyer is the secured party or acting in concert with the secured party the sale bears more than a passing resemblance to the *faux* foreclosure sales in old equity receivership practice. The secured party acts as both seller and buyer and its ability to capture post-sale appreciation motivates it to keep the sale price low. Data developed by Professors Lynn LoPucki and Joseph Doherty suggest that in fact § 363 sales tend to yield less value to the estate than chapter 11 reorganizations of comparable firms.

It is time to bolster consent requirements for a sale of substantially all of the assets outside the plan process, particularly if the buyer credit bids or teams up with insiders. Rushed sales under manufactured emergencies deny due process and preclude meaningful creditor input. Moreover, the statute bars meaningful appellate review of sale orders. Postpetition lenders (frequently the prepetition secured lenders themselves or allied institutions) have made maximizing value difficult by conditioning financing on very short sale periods. And more recently, terms of sale require certain debts be assumed or paid in derogation of the *sub rosa* plan doctrine. Practically, the cumulative effect is to reduce purchase prices, reorder priorities, pretermite plan bargaining, and unfairly treat creditors left behind.

One solution is to require that sales (or at least sales to constituents or affiliates) take place under a plan, a process designed to control the abuses that attended the orchestrated foreclosures in the equity receiverships of old. Alternatively, § 363 could selectively incorporate elements of the chapter 11 plan process. We prefer to limit the circumstances under which a sale of substantially all assets may be made outside of a plan to a true emergency, such as when the firm's assets are rapidly wasting, or when the buyer is a genuine third party and the § 363 sale is broadly supported by all the key constituencies. Otherwise, sales should be subject to the voting requirements, statutory protections, and consent rights established for chapter 11 plans.

2. Policing Proxy Voting

Bankruptcy's sophisticated use of proxies to bind their putative principals is a signature feature of American reorganization law upon which rests much of its legitimacy. There is a growing gap, however, between the interest of the consenting proxies and their bound constituents.

The rise of “hedge funds,” the advent of claims trading, financial derivatives, the transformation of the banking industry through disintermediation and deregulation, all work together to multiply conflicts of interest in reorganization cases. Holders commonly acquire claims and interests at many different levels of the debtor’s capital structure and hedge those interests through options and forwards in ways that obscure their true net position, which frequently changes during the course of the case.

Bankruptcy law’s reliance on the consent of proxies, successors, or others similarly situated has become especially problematic as consent rights are increasingly divorced from economic rights through modern financial engineering. This separation is not entirely new: Certainly, the old robber barons understood that control of the vote of one constituency might advantage their other economic interests to the detriment of the voting class. But today undisclosed and nontransparent use of derivatives multiplies opportunities for this sort of manipulation and degrades courts’ ability to control abuse. Using derivatives, security holders can and do commonly acquire or dispose of substantially all the underlying economic interests (or even short the relevant interest) without transferring the correlative right to vote on a reorganization plan or other legal consent rights. We must take account of these developments in determining whose consent is, or should be, relevant to maintain the credibility of the bankruptcy process. To date, the complexity of the issues, coupled with a general ideological commitment to deregulated financial markets, has precluded reform. The Great Recession of 2008-09, and resulting disrepute into which financial deregulation has fallen, may open a window to begin addressing this issue. More disclosure and more aggressive use of the court’s power to disqualify votes are likely starting places. Greater regulation of over-the-counter financial derivatives may also mitigate some of these problems.

Disclosure of conflicts, and, in appropriate cases, disqualification from voting or committee service are obvious remedies. Demanding ongoing timely disclosure of all positions for all major constituencies and their respective affiliates is an easy first step. Similarly, disclosure should be required of all parties that support or oppose critical motions to approve financing, sales, or reorganization plans. Ethical walls are of questionable efficacy in many cases: decisionmaking is not effectively compartmentalized in many investment funds. Nevertheless, ethical walls may be useful if the conflicted institution is large enough and sufficiently compartmentalized to make them workable.

The harder problem is whether holding claims and interests in different classes (or short positions) should disqualify a holder's vote. Traditionally, each creditor may vote its claims and interests in accordance with its own aggregate economic interest as it sees it. Greater scrutiny has sometimes been applied to claims acquired after bankruptcy for strategic purposes, but even then courts generally allow creditors to vote claims in a junior class to advantage a senior position. Courts have been more skeptical of attempts to advantage junior interests or acquire stock or assets by strategically voting senior claims. Nevertheless, understandably courts rarely disenfranchise large holders. The uncertainty regarding voting rights in these circumstances has no doubt deterred creditors from pursuing these strategies in some instances. Here again bankruptcy law has used ambiguity and uncertainty to induce settlements that avoid adjudication of difficult questions.

For now, the best available means to control these abuses may be continued reliance on existing vague standards as a sword of Damocles dangling over the conflicted. Nevertheless, the ever-increasing incidence of these conflicts raises the question whether the traditional chapter 11 model of generating broad consensus among real economic parties in interest will remain viable long-term. That process hinges on identifying the real economic interest holders and bringing them to the bargaining table or at least the ballot box, an increasingly daunting enterprise. Thus, the lure of mandatory rules, or fiduciary models, or sales in lieu of plans, all of which seek to impose solutions outside the chapter 11 plan process.

ii) Committee as Proxy

Creditors' committees serve important functions and are a valuable check on debtors and secured creditors. The Code, however, does not expressly contemplate the current practice of committees giving *de facto* binding consent to preplan case-dispositive settlements, financings and sales. Certainly the most salutary check on overweening committee power to consent to case-dispositive sales and financings would be to require case-dispositive restructuring transactions to take place generally through plans (over which committee powers are properly circumscribed) rather than on motion. To the extent, however, that committees assume the key role of proxy in consenting to case-dispositive transactions, even greater care must be taken in structuring representative committees. When the committee is *de facto* final decisionmaker, less emphasis on its coalition-building function and more on its ability to represent faithfully the interests of a particular constituency is warranted. Sharply divergent interests may coexist

among unsecured creditors. If so, multiple committees, each representing a unified interest may be more appropriate surrogates than a single, divided, and conflicted committee when matters turn on committee consent to a particular motion rather than its negotiation of a plan that must be accepted by the requisite majorities of the holders. As chapter 11 practice moves away from plans toward case-dispositive financings, settlements and sales, a rethinking of the role, number, and structure of committees is appropriate.

Practically accommodating conflicting rights is a perfectly sensible way of dealing with the issues of business failure and financial distress. That practical accommodation of conflicting legal rights is accomplished partly by consent and partly by imposition.

IV. CONCLUSION

Although bankruptcy law generally determines consent on ordinary contract law standards, it relaxes, or, less commonly, heightens the standard in a variety of circumstances. Bankruptcy law facilitates consent by exploiting inertia effects, by putting consent-generating structures in place (for example, committees, futures representatives, class voting rules, and stays of litigation), and by substituting vague standards that depend heavily on judicial discretion for more crisply defined nonbankruptcy rights. By diluting, reallocating, and inducing consent, bankruptcy law subtly alters the meaning of consent to achieve its ends. Sometimes, this manufactured consent, disguised by elaborate ritual and reinforced by the symbols of judicial authority, masks imposition. Other times, the consent required, while real, is a tool to be manipulated as much as an obstacle to be overcome. Finally, in some instances, bankruptcy law substitutes mandatory rules for consent to advance certain goals of the bankruptcy process, protect the rights of nonconsenting third parties or protect the putative consenting party itself.

Sound bankruptcy reform requires sensitivity to bankruptcy's traditional reliance on party consent. Legal, business, and social changes place pressure on the system to lower the bar, further alter party baselines and increase judicial discretion by substituting vague standards for crisp rights, and ultimately adopt more mandatory rules. In some cases, bankruptcy law has not responded promptly to these pressures and maintains overly-restrictive consent standards: consider for example, home mortgage modification and the sale free and clear rules. In other areas, the law has overreacted by unduly and unnecessarily devaluing consent most particularly in connection with the substitution of settlement, financing, and sale motions for chapter 11 reorganization. Carefully recalibrating consent standards will be central to bankruptcy law reform for the 21st century.

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1 *Travelers Indem. Co. v. Bailey*, 129 S.Ct. 2195 (2009).

2 502 U.S. 410 (1992).



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Professor Goldberg has written widely on the subject of federal Indian law and tribal law, and is co-editor and co-author of Cohen's *Handbook of Federal Indian Law* (1982 and 2005 editions), as well as co-author of a casebook, *American Indian Law: Native Nations and the Federal System*. Her most recent book, co-authored with anthropologist Gelya Frank, is *Defying the Odds: The Tule River Tribe's Struggle for Sovereignty in Three Centuries* (Yale University Press 2010). She is currently co-principal investigator of a \$1.5 million grant from the National Institute of Justice to study the administration of criminal justice in Indian country.

CRITIQUE BY COMPARISON IN FEDERAL INDIAN LAW*

Carole Goldberg**

Federal Indian law's central question is the legal status of the indigenous peoples whose traditional territories now comprise the United States. A fledgling United States made treaties that recognized both the governmental status and property holding rights of these groups. For example, treaties established intergovernmental extradition arrangements, effected land sales from tribes to the United States, and recognized lands "reserved" by the Native groups for their exclusive use and occupation.¹ Treaty-making of this type continued past the Civil War. In 1871, the House of Representatives insisted that it participate in Indian affairs, and future relations with indigenous peoples were conducted through agreements ratified by Congress as a whole and by legislation.² Federal policies over the subsequent 130 years fluctuated, sometimes offering more, sometimes less recognition of indigenous peoples as governments and property owners. Over the past fifty years, federal policies in Congress and the executive branch have favored greater respect, while the Supreme Court has leaned in the opposite direction, taking an activist role to diminish Native governmental and property rights through development of federal common law.³

As an Indian law scholar, I inevitably engage questions surrounding the legal status of indigenous peoples, and many scholarly approaches are available. One line of research focuses on basic principles established during the early years of United States-Native relations, and criticizes recent court cases for their departure from those principles.⁴ Other lines of scholarship take more of a legal process approach, challenging the propriety of policy-making by courts rather than the Congress.⁵ Still others focus on the tainted origins of doctrine in the field, steeped in racism and colonialism.⁶ And other scholars, drawing on moral and political philosophy, emphasize the divergence of doctrine from basic principles of social justice.⁷ Increasingly, historical and empirical research has documented the persistence and growth of Native institutions of governance and land management, emphasizing the underlying political realities that drive legal development.⁸ At one time or another, my own scholarship has traveled down each of these intellectual paths.⁹

When the University of North Dakota invited a group of nationally recognized Indian law scholars to reflect on pedagogy in the field, I turned my attention to a form of critical argument or approach that cuts across these scholarly enterprises—criticism that challenges internal inconsistency in the law. This genre of criticism typically looks at the way federal Indian law treats Indian nations, and compares that treatment with the way American law treats some other entity, one that supposedly shares key characteristics with the Native tribes or nations. For purposes of the Indian law pedagogy symposium, I wanted to engage the issue of comparison as comprehensively as possible. One could ask, how should Anglo-American law conceive of the Native nation or Indian tribe in relation to other, more familiar legal constructs? Should it be treated the same as a foreign nation? As a state of the Union? As a municipal entity? As a private property owner? As a government property owner? As a corporate business? As an ethnic group? As none of the above, because its position is too distinct? As a critical method, this way of assessing proper legal treatment for Indian nations has natural appeal for law students. They are taught that the Anglo-American legal system is based on precedent, striving for consistency and predictability, and deploying reasoning by analogy. Like individuals and entities should be treated alike. If you can find a relevant difference, you can argue for different treatment. The challenge, of course, is to determine which differences of fact should justify different treatment in law.

I focused on this form of analysis and critique in Indian law not only because of its pedagogic relevance, however. Finding the proper comparison set for Indian nations has taken on greater practical significance over the past twenty years, as Native nations have undertaken new forms of economic development and expanded their governmental roles, and as international bodies have intensified their interest in the claims of indigenous peoples. All of these developments have produced novel, though dissimilar, arguments about the proper way to think about Indian nations. Beginning with passage of the Indian Gaming Regulatory Act in 1988, for example, some well-located Native nations have been able to establish highly successful tribal casinos, and have used the revenue to launch other substantial economic enterprises. Some politicians and courts have responded by arguing that Native nations should be treated as private businesses for purposes of labor law, taxation, and other state and federal regulatory schemes.¹⁰ In contrast, Native nations have begun arguing that they should enjoy the same immunities and privileges as state and local governments because they serve many of the same functions, such as law enforcement, environmental

protection, and child welfare.¹¹ In the international context, bodies such as the United Nations General Assembly and the Organization of American States have generated new understandings of the rights of indigenous peoples, carving out a distinctive category of rights that doesn't fully map onto established international law categories, such as the right of "peoples" to self-determination.¹²

As the struggle to situate tribal polities, lands, and individuals within the Anglo-American legal system has intensified in the political and legal realms, it has also prompted greater scholarly reflection on the appropriate comparisons between Native nations and other legal entities. Most provocative has been the exchange of views stimulated by Professor Philip Frickey's penetrating article on *(Native) American Exceptionalism in Federal Public Law* in the *Harvard Law Review*,¹³ and various responses to it posted in the *Harvard Law Review Forum*.¹⁴ Professor Frickey challenges the Justices and scholars who want to import general constitutional doctrines and values into federal Indian law, ending distinctive treatment of tribes where such matters as federal preemption, equal protection, and inherent sovereignty are involved. Federal Indian law is different for good reasons, he asserts, reasons grounded in the uneasy coexistence of American constitutionalism and colonialism. What some of the ensuing commentaries on his article suggest, however, is that federal Indian law cannot always be viewed as *sui generis* within the Anglo-American legal system. According to this view, continuities with non-Indian law are sometimes justified—indeed desired—in order to achieve justice for Native nations and their peoples and to steer clear of racism.

But when? Identifying the circumstances where such continuities may be appropriate is no small task, and has never been carried out in systematic fashion. One could argue that courts should simply rely on the characterizations of tribes offered by the political branches, following or rejecting comparisons as Congress and the Executive Branch have dictated in treaties, statutes, and regulations. That would be fine if the positive law afforded a crisp and comprehensive characterization. Alas, it does not. The Constitution addresses the character of Indian tribes in relation to other entities only obliquely.¹⁵ And statutory law offers no consistent treatment, as a look at the federal environmental laws reveals. In some statutes, such as the Clean Air Act¹⁶ and the Clean Water Act,¹⁷ Native nations are clearly classified the same as states of the Union. Yet, in the Resource Conservation and Recovery Act, tribes are treated the same as municipalities.¹⁸ Similarly, in the Nonintercourse Acts,¹⁹ which limit land transfers by Native nations,

tribes are framed as property owners. Yet in other federal statutes, where Native nations could conceivably hold rights as property owners, such as the basic federal civil rights act,²⁰ their status is not mentioned at all. For the tribes that have treaties, those documents were almost never intended to clarify the comparisons between tribes and other legal entities, leaving one to develop a theory of appropriate comparison.

I have tried to advance this line of inquiry by examining some of the more prominent types of comparisons that arise in federal Indian law, specifically as they affect treatment of tribes, and to suggest some criteria for sorting the more helpful from the less helpful. Mostly, I find, they are unhelpful, because they are not or cannot be carried through consistently. Largely aligning myself with the “exceptionalist” camp, I suggest an alternative to comparative analysis as a way of arguing for Native nations’ claims to governmental status and property holding. That alternative emphasizes an in-depth, historical and empirical exposition of the strivings, capacities, and actual functions of Native nations as they contend with the forces of colonialism, leading to a distinctive position within the American political and legal system. As I discuss below, my own research has increasingly turned in that direction.

In the early nineteenth century, when the Supreme Court decided its first major Indian law case, *Johnson v. M’Intosh*,²¹ the prevailing natural law philosophy demanded “reasoned” comparisons in order to establish appropriate legal rules. Courts felt obliged to consider the requirements of “natural justice,” which were thought to be accessible to “natural reason;” and natural reason presupposed logical consistency. In *Johnson*, the question was whether a Native nation could hold and convey full fee simple title to the property within its territory, title that would survive a treaty ceding that same territory to the United States. Chief Justice Marshall looked to Europe for a familiar analogy. He framed the inquiry as whether private property owners in one European country would retain full title even after their country came under the political domination of another European country. Since the Napoleonic and Austro-Hungarian Empires were known phenomena at that time, this was not an entirely speculative project. Marshall’s conclusion was that private property rights would be retained in the European context in order to foster the integration of the dominated peoples into the new political arrangement. Then, having asserted this comparison, Chief Justice Marshall rejected it on the basis of differences between indigenous North

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Americans and Europeans, which made such integration “impossible,” as well as on the basis of positive law to the contrary. Instead, Chief Justice Marshall set forth what has become known as the “doctrine of discovery,” which limited the rights of Native nations in their territory by inserting an ownership interest in the “discovering sovereign” or its successor, which in *Johnson v. M’Intosh* was the United States.

As if to underscore the contrast between Native nations and European states, Justice Marshall wrote another opinion, ten years later, reaching the opposite result from *Johnson v. M’Intosh* in the case of a European sovereign that had granted land to a private party and then ceded the same land to the United States. The case, *United States v. Percheman*,²² considered whether an individual who had received a Spanish grant of land in what is now Florida would retain his property rights after Spain ceded the entire Florida territory to the United States. Chief Justice Marshall insisted on the universal character of a nation’s right to confer private property rights and then cede territory to another government, claiming that the “sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled” once the source of political authority changes in a given part of the world.²³ Nowhere in the opinion discussing this “universal” law of nations does *Johnson v. M’Intosh* even merit a mention.

Professor Kenneth Bobroff has argued that the Court was wrong to reject the comparison between Native nations and foreign states in *Johnson v. M’Intosh*. His point is that considerations of “race and culture” determined the different outcomes in *Johnson* and *United States v. Percheman*; and implicit in his claim is that such considerations are inappropriate. The Illinois and Piankeshaw Indians, who had granted the land in *Johnson*, were just as much nations as Spain, and therefore their grant of land should have been respected in the same way after a cession of territory to the United States. The appropriate analogy, then, was between a Native nation and a foreign, European state.

Such a comparison between the land grant of the Illinois and Piankeshaw Indians on the one hand and the land grant of Spain on the other has strong appeal. The cases also present interesting differences, however. First, at the level of positive law, the land cession from the Tribe to the United States and the cession from Spain addressed private property rights differently. The Tribes’ treaty with the United States included no terms protecting existing private property rights. Spain,

in contrast, had included specific terms in its treaty of February 22, 1819, which protected the rights of preexisting private property owners.²⁴ This difference in the treaties should perhaps come as no surprise, as the non-Native private property holders in Illinois and Piankeshaw territory were not people toward whom the Tribes felt any allegiance. Thus, *Johnson v. M'Intosh* could merely reflect the Court's deference to a different positive law as the context for its "natural law" analysis.

Second, as the Court noted in *Johnson v. M'Intosh* itself, it was not at all clear that the original grant made by the Illinois and Piankeshaw was designed to convey a full ownership interest to the grantees. In contrast, Spain, which was in the business of rewarding its influential and loyal citizens with land grants, intended that its grants convey full private property rights.²⁵ Indeed, the value of those rights probably depended on individuals' expectations that Spain would look out for them in negotiations with other countries. A different characterization for the tribal grant to Johnson's predecessor can be inferred from the Tribe's later cession of the same land to the United States without any protection for existing private property rights. It is also suggested by the nature of most tribes' legal systems, which did not generally acknowledge property rights beyond revocable use rights. In other words, the underlying assumption of natural law in the international realm was that the granting sovereign intended a full private property grant. If that condition was not met, then the natural law requirement did not apply.²⁶

When considering the comparison between Native nations and European states, the problem with *Johnson v. M'Intosh* is not so much its unwillingness to draw an appropriate analogy, as its elaboration of doctrines of discovery and aboriginal title that were contrary to the facts and unnecessary to the decision in the case. The characterization of Native peoples as savage hunters was erroneous and racist,²⁷ and scholars such as UCLA Professor Stuart Banner have exposed the characterization of positive law as partial and historically inaccurate.²⁸ The Court would have done better, in my view, to accept, *arguendo*, the analogy to foreign nations, and then explain why the different treaty language and national (tribal) property law dictated a different decision than if the granting sovereign had been Spain or another European nation. But like Professor Bobroff, most Indian law scholarship is highly critical of the *Johnson* court for rejecting the analogy.²⁹

Not long after *Johnson v. M'Intosh*, the Court again confronted the comparison between Native nations and foreign nations in *Cherokee Nation v. Georgia*.³⁰ *Cherokee Nation* posed the question squarely in relation to positive law, specifically

Article III of the Constitution. The Cherokee wanted to invoke the Supreme Court's original jurisdiction for its suit against the state of Georgia, arguing that it presented a controversy "between a state ... and foreign states," within the meaning of Article III, section 2. The Court rejected the characterization of the Cherokee Nation as a "foreign state," relying in part on the distinction drawn in Article I, section 8, the Indian Commerce Clause, between "commerce ... with the Indian tribes" and "commerce with foreign nations." Had the framers of the Constitution believed Indian tribes were the same as foreign nations, the Court observed, they would not have referred to them in separate and distinct phrases.

In *Cherokee Nation*, the Court also offers some natural law-inspired discussion of the nature of Indian tribes, considering whether they match the characteristics of foreign nations in relation to the United States. This discussion, which gives rise to the oft-quoted and obscure characterization of tribes as "domestic dependent nations," first considers whether the Cherokee Nation is properly deemed a "state," and then focuses on what it means for one state to be "foreign" to another state. Can a state be foreign at the same time it acknowledges itself to be "dependent" and under the "protection" of another? As Justice Thompson noted in dissent, "A weak state, in order to provide for its safety, may place itself under the protection of one or more powerful, without stripping itself of the right of government, and ceasing to be a state."³¹ Yet, Chief Justice Marshall, writing for the majority, used that very dependent position of the Cherokee Nation as a reason to deny it the status of a "foreign" state. Not surprisingly, teachers and scholars of federal Indian law have criticized that denial of the comparison to foreign states. In our casebook, for example, Professors Robert Clinton, Rebecca Tsosie, and I note that international status is given today to at least two "feudatory" states that depend for protection and defense on other nations—Monaco, which relies on France, and the Vatican, which relies on Italy. Both are represented in some way in the United Nations. Monaco is a member of the General Assembly, and the Vatican has a permanent observer status. While the positive law argument may have some force, the argument from essential difference between foreign states and Native nations is one we challenge.³²

But if Indian law scholars are often drawn to the international comparison in *Johnson v. M'Intosh* and *Cherokee Nation v. Georgia*, they often recoil from it in addressing a case decided in the opening years of the twentieth century, *Lone Wolf v. Hitchcock*.³³ *Lone Wolf* considers whether the United States may abrogate treaties with Indian nations through subsequently enacted legislation. After

rejecting the comparison between tribes and foreign states in *Cherokee Nation*, the Court embraces it in *Lone Wolf*, pointing out that since federal law affirms the power of the Congress to pass laws that conflict with international treaties, it follows that Congress can pass laws that abrogate Indian treaties.³⁴ Is that a sound analogy? Our casebook offers reasons to doubt that it is, questioning whether the consequences of unilaterally abrogating a foreign treaty are the same as the consequences of unilaterally abrogating an Indian treaty.³⁵ We ask,

Does it make any difference that Indian tribes are geographically within exterior boundaries of the United States and foreign nations are not? Does unilateral abrogation of a foreign treaty enlarge United States sovereignty over the foreign government, its lands, or people? Did abrogation of the Medicine Lodge Treaty do so in *Lone Wolf* to the Kiowa, Comanche, and Apache? Is this difference a sufficient reason to formulate a different rule for Indian treaties?³⁶

Interestingly, at least one of the grounds we suggest for distinguishing Indian treaties from foreign treaties, namely the presence of Indian nations within the geographical boundaries of the United States, is one of the very reasons Chief Justice Marshall gave for distinguishing Indian nations from foreign states in *Cherokee Nation v. Georgia*.³⁷

Are scholars and teachers of Indian law merely picking and choosing among the comparisons between Native nations and foreign states to argue for results favoring tribal parties? Is there perhaps some principled basis for favoring the comparison in the cases of *Johnson v. M'Intosh* and *Cherokee Nation v. Georgia*, and then opposing it in *Lone Wolf v. Hitchcock*? Would changes in the circumstances of Indian nations between the early nineteenth and early twentieth centuries justify dropping a once-valid comparison? Or should we be avoiding all these arguments from comparison altogether as hopelessly inadequate to the normative work of federal Indian law? Certainly scholars who favor the analogy to foreign nations must think through some tough implications, such as the applicability of the ban on political campaign contributions by foreign nations and the use of comity rather than “full faith and credit” for enforcement of foreign judgments. The fact that Indian people have been United States citizens since 1924, along with the geographic location of Native nations within the United States, suggests the need for some hard thinking about the equation of Native nations with foreign states. *Cherokee Nation* suggested a way of thinking about Native nations as *sui*

generis—in a category by themselves—that may retain value to this day. While this approach lacks the clear predictability of analogy to a known legal commodity, and opens the door to judicial hostility, it also confronts, directly, essential and unavoidable normative questions.

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Some Native nations that entered into early treaties with the United States were offered a form of representation in the American government;³⁸ and the possibility of turning the Indian Territory (later Oklahoma) into a multi-tribal state of the Union attracted some interest in the late nineteenth century.³⁹ Still, nothing in American constitutional law or treaties posits that Native nations are the equivalent of the states. And only recently have some federal environmental statutes⁴⁰ and locally-administered federal benefit programs⁴¹ expressly put Indian nations on par with states.

Nonetheless, opportunities to analogize Native nations to states arise regularly in scholarship and teaching of federal Indian law, and a frequently heard critique of the Court's contemporary Indian law decisions is that the Court denies Native nations the same kinds of governmental powers typically exercised by states. Illustrations abound. In discussions of federal "plenary" power over Indian affairs, the ebbs and flows of congressional power under the Indian Commerce Clause are often compared with similar movements in judicial interpretation of the Interstate Commerce Clause. Specifically, as Supreme Court decisions of the past decade have contained the reach of federal power over interstate commerce, ostensibly because the states and their people never consented to or delegated broad, plenary commerce powers to the federal government,⁴² many, including our casebook, have questioned the Court's consistency in continuing to uphold robust federal power over Indian affairs. Considering the treaty relationship between the United States and Native nations, we ask:

[W]ould not an even-handed application to Indian tribes of the same legal principles the Court applies to states suggest a total lack of federal authority over the tribes and their members without their consent reflected in a treaty or treaty-substitute? ... Why has the Supreme Court not applied the same principles even-handedly between protecting state sovereignty through the New Federalism cases and protecting tribal sovereignty from the excesses of the exercise of congressional power?⁴³

If we are not arguing that Native nations are generally the equivalent of states, at least we are suggesting that in certain relevant respects, Native nations and states share certain attributes, particularly lack of consent to the extension of federal power.

In other situations, teachers and scholars of federal Indian law raise concerns about the Court's consistency in denying jurisdiction to tribes under circumstances where state jurisdiction is clearly recognized. For example, as Professor Sarah Krakoff points out, the Supreme Court has denied tribes authority, exclusive of the states, to impose sales taxes on non-Indian purchasers buying goods on reservations, purportedly because it is wrong for tribes to "market a tax exemption."⁴⁴ Yet states are allowed to do this all the time, competing for customers by marketing their lower taxes.⁴⁵ Likewise, one of the reasons the Court has given for denying tribal criminal jurisdiction over non-Indians is that non-Indians are ineligible to become tribal citizens.⁴⁶ Yet states regularly exercise jurisdiction over non-citizens. It is true that some of these non-citizens subject to state jurisdiction may be eligible to become state citizens if they change their residence, at least those who are American citizens. However, at the time the state jurisdiction is exercised over them, that eligibility does them no good. Non-citizens are still unable to exercise any political influence over the state government that is attempting to regulate their conduct or their property. And the foreigners subjected to state jurisdiction may never be able to become state citizens.

Where federal law is silent with respect to tribes but mentions states, Indian law scholars and teachers often must ask whether any special treatment or exemptions accorded to states should be extended to tribes as well. The issue arises in numerous contexts, including interpreting the "full faith and credit" provisions of the Constitution and its implementing federal statute,⁴⁷ determining the proper scope of federal tax laws concerned with issuance of tax exempt government bonds,⁴⁸ and deciding whether the National Labor Relations Act and other federal employment legislation apply to tribal enterprises.⁴⁹

In the full faith and credit context, the legal question is whether tribal courts are included in the obligations of mutual enforcement of orders and judgments imposed upon the states and territories of the United States.⁵⁰ Sharply different answers to this question have emerged among Indian law scholars as well as among state and federal courts. Do Native nations benefit from the comparison with states and territories, especially since the obligations are reciprocal, and

tribes would have to enforce state judgments as well as having their own judgments enforced in state courts? How could we go about assessing their interests in inclusion or exclusion? For example, would we have to know whether it was more likely that Native nations would want to be able to have their judgments enforced in state courts, as opposed to states wanting to have their judgments enforced in tribal courts? How, exactly, would tribes be integrated into the federal system if they were to be treated like states and territories under these provisions? The inquiry is complicated by the fact that some federal laws that address particular cross-boundary enforcement needs, such as those presented by child support orders, specifically define “states” to include tribes.⁵¹

In the tax-exempt bond and labor law contexts, the analysis of tribal-state comparisons is different, because the tribes largely benefit from treatment as states under these legal regimes, and do not assume reciprocal burdens. Nonetheless, challenging questions emerge because of agencies’ and courts’ concern that Native nations sometimes function more like business entities than like state governments, and therefore do not deserve treatment as states. Indian law scholars generally subscribe to the view that tribal commercial development is the object of improper discrimination if it is treated differently for tax purposes from the many commercial development projects initiated by state and municipal governments.⁵² Emphasis is placed on the fact that tribes, like states, have obligations to provide their citizens with public services, infrastructure development, and economic opportunities. One commentator has even argued that it is racist (*i.e.*, grounded in racist views of the inferiority of tribalism) for the federal government to deny tribes the same tax treatment as states.⁵³

Critiques have also been leveled at the D.C. Circuit’s recent decision applying the National Labor Relations Act to tribal commercial activities employing large numbers of non-Indians, even though the Act specifically excludes state governments without reference to the type of employment offered by the state, and territories of the United States have been treated as exempt, despite not being mentioned in the Act.⁵⁴ Similar challenges have been made to court decisions that make tribal exemption from federal employment laws of general applicability depend on whether the tribal activity in question has a commercial as well as a conventionally governmental dimension, even though that overlap is not considered for state-owned enterprises.⁵⁵ One commentator has described this differential treatment as “incorrect logic,” pointing to the taxing, law-making and judicial powers that Native nations share with states, and arguing

that tribal employment is always governmental in nature because even when their businesses make money, those businesses are “imperative to tribal self-determination,” and that money is “predominantly for the benefit of the tribal government and members.”⁵⁶

Should scholarship in federal Indian law be devoting time and energy to arguments about the “illogic” of treating Native nations differently from states for such purposes? Certainly we need to consider whether there are differences between Native nations and states that warrant differences in treatment.⁵⁷ Both states and tribes are subject to federal law. A crucial difference between them, however, is that states consented to this arrangement in the Constitution, and Native nations did not.⁵⁸ Furthermore, as Professor Clinton has noted, these two sets of governmental entities may not be similarly situated with respect to the Supremacy Clause of the Constitution, with only states subject to direct federal review of their decisions regarding federal law.⁵⁹ Native nations are also not subject to the limiting force of the Fourteenth Amendment, although the Indian Civil Rights Act of 1968 has extended many of those individual rights protections to persons affected by tribal action.⁶⁰ Furthermore, when we compare state jurisdiction over non-citizens with tribal jurisdiction, as many Indian law scholars do, we must keep in mind that an American residing in a state is eligible to become a voter after a very short period of time,⁶¹ while an American non-tribal member who has lived on a reservation for decades is not and will never become eligible for citizenship. Furthermore, a state of the Union never has to be concerned about another state having sovereignty within its boundaries, while a Native nation must, at least under federal Indian law doctrine dating from the late nineteenth century.⁶² In this litany of arguable differences between states and tribes, we should also note that implicit in the way United States law deals with states is an assumption of basic normative regularity among them, despite local differences. That assumption does not hold for many Native nations. Indeed, one of the mainstays of normative appeals for tribal sovereignty is that Native nations need autonomy in order to maintain alternative normative orders. Increasing international attention to the rights of indigenous peoples means that Native nations must be mindful of the baseline human rights that international law also affirms.⁶³ For purposes of current federal Indian law, however, the nature and extent of this restraint are speculative, at best.

There are also some anomalous ways in which Native nations act in ways that states do not—ways that may make them appear to be more like private entities

than like governments. The most noteworthy of these is the financial participation of tribes in state and federal elections,⁶⁴ something that states are forbidden. One could argue that Native nations should be allowed to participate in state elections, even though states themselves may not, because only Native nations are subject to the exercise of state power directly over their people, via statutes such as Public Law 280 that were passed without their consent.⁶⁵ This, of course, is an argument from difference, not from similarity with states, a difference that alludes to the history of colonialism.

There is a need for more sustained attention to the validity of the comparison at a deeper level, so that when scholars and teachers arrive at specific instances of potential comparison, they have an effective theory of the similarities and differences between the two polities within the United States system. Any such comparisons need to take account of the history of colonialism and meaning of the federal trust responsibility to Native nations. In fact, the “gotcha” claim of hypocrisy and/or racism within United States law may be deflated and turned back on the tribes if tribal opponents are able to seize upon inconsistencies in the use of the tribal-state comparison.

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Except where reservations have been wholly allotted or land bases entirely lost, Native nations are property owners as well as governments, holding land in common for the members of the tribe and often assigning it to individuals or families for residential, commercial, or other uses. Tribal property rights are a central topic in federal Indian law, and scholarship in the field often draws comparisons between Native nations as property owners and other holders of property rights, with Native nations frequently receiving less protection. Professor Joseph William Singer, a nationally known expert in the field of American property law as well as an esteemed federal Indian law scholar, has presented these disparities with particular force.⁶⁶ In his articles on Indian law, we are required to confront the unexplained and unjustified differences between the treatment of tribal property and the treatment of all other property.

The Supreme Court’s refusal to grant compensation for the taking of Native nations’ aboriginal title in their lands is a particularly striking instance of such disparity,⁶⁷ especially after the Court had earlier described aboriginal title as being “as sacred as the fee simple of the Whites.”⁶⁸ The Court’s reasons for denying compensation to aboriginal title simply do not stand up if we compare the nature

of the Indians' property claims to those of non-Indians.⁶⁹ Another noteworthy instance of this differential treatment is the Court's allowance of forced allotment, redistributing tribal property to individual tribal members without the tribe's consent. As Professor Singer has taught us, the forced distribution of tribal lands to individual tribal citizens looks like just as much of an unconstitutional "taking" as the forced distribution of corporate assets to the corporation's shareholders.⁷⁰ Another striking illustration that has received somewhat less attention is the Supreme Court's treatment of tribal water rights in the case of *Nevada v. United States*.⁷¹ There, the Court refused to allow litigation of the Pyramid Lake Paiute Tribe's claims because those claims had already been adjudicated in an earlier proceeding in which the United States represented the Tribe as trustee. The Tribe responded that the United States had simultaneously represented conflicting interests in the earlier proceeding, a fact that would have triggered a violation of the due process rights of any private property owner.⁷² The Court dismissed that concern, however, based on its view that Congress had directed the trustee to split its loyalties.⁷³

As casebook authors in federal Indian law, my colleagues and I have been quick to incorporate such critiques based on inconsistent treatment of Indian and other property owners.⁷⁴ What we have not done is to examine how such arguments from comparison with private property owners (or for that matter, other governmental entities that may own property) fit into the larger discussion of the exceptional nature of federal Indian law within the American constitutional scheme. We know, for example, that in the international context, it is not uncommon for countries that overtake others to claim the "sovereign" lands of the subordinated government, leaving individual property rights protected. Professor Stuart Banner has suggested that this concern led Hawaiian monarchs in the pre-American period to privatize collectively held lands in anticipation of a likely American seizure of the islands.⁷⁵ But for Native nations that had no notion of privately owned property (as opposed to privately used property) before contact with the United States, the status of their lands was difficult to incorporate into this dichotomy.⁷⁶ Non-Indian governmental entities may be property owners, but except under socialism, they are rarely the owners of their entire territory. Their claims to sovereignty are not founded in treaties that reserved or set aside lands for their collective use under the protection of another government. In other words, the connections between property and sovereignty are not nearly so intimate. These differences may not be sufficient to warrant disparate treatment of tribal property claims. But until we confront them, particularly as they relate to

claims of the special status of Native nations, we will not be fully serving the aims of Indian law pedagogy as well as scholarship.

**TRIBES
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The comparison of Indian nations with private businesses is a relatively recent phenomenon, nourished by the spectacular growth, for some Indian nations, of tribal gaming and the economic development that it facilitates. Unlike comparisons with foreign nations, states, and property owners, this comparison is invoked far more often by opponents of tribes than the tribes themselves. Opponents invoke it, among other reasons, to argue against tribal sovereign immunity⁷⁷ and to argue that tribes should be subjected to federal laws of general application, such as labor laws, that apply to businesses and do not expressly exempt Indian nations.⁷⁸ Tribes have succeeded in repelling the comparison for purposes of sovereign immunity, based on longstanding congressional practice and the constitutional recognition of Indian nations as governments in the Indian commerce clause.⁷⁹ Their record has been more mixed with respect to laws of general application, especially where those other laws refer specifically to other governmental entities and neglect to address the treatment of tribes.⁸⁰

The growing inclination of the non-Indian public to equate Indian nations with casinos, since those are the entities receiving greatest publicity, is something I, as a teacher of Indian law, find disturbing. In California, for example, this simple equation led the Governor to demand that tribes pay their “fair share” of gaming proceeds to the state, the share defined according to tax obligations of private businesses.⁸¹ Although the effort failed to pass, it should not have been necessary to explain that Indian nations, unlike businesses, have governmental responsibilities to their citizens and territorial inhabitants, including utilities, public safety, and fire protection. Furthermore, under the Indian Gaming Regulatory Act, Indian nations do not have the same freedom as private businesses to allocate their earnings as they wish, being limited to funding tribal government operations or programs, providing for the general welfare of the tribe and its members, promoting tribal economic development, donating to charitable organizations, and helping to fund operations of local government agencies.⁸²

What may confuse the non-Indian public are instances where tribes claim the right to conduct themselves in a capacity more closely associated with private businesses, especially contributing to state and federal elections. As noted above, a case can be made for Indian nations’ participation in such political activity, even where state,

local, and international governments may not. But it is a case resting on unique characteristics of Indian nations in relation to the United States and the states.

Teachers and scholars of federal Indian law commonly resort to comparisons with non-Indian law in order to craft critiques of judicial doctrine and positive law in the field. It is a powerful way to turn the legal and moral norms of the dominant society against its own practices, a hallowed American tradition.⁸³

CONCLUSION

However, the Supreme Court has been remarkably resistant to such comparison-based arguments, applying them only rarely for the benefit of Native nations (as in the sovereign immunity cases), and using them selectively (as in the treaty abrogation cases) to deny tribal jurisdiction and property rights. Does that mean Indian law scholars and teachers should be employing this type of critique more effectively, more selectively, or not at all? In the absence of such comparisons, will the courts operate unconstrained, with even more harmful effects for Indian nations' sovereignty and property?

Within the field of Indian law, comparison-making is rarely addressed at a meta-level, and there is little consideration of whether comparisons in one realm may undermine comparisons in another or even the entire enterprise of comparison-drawing. This survey has attempted to draw together many instances of this enterprise so we can begin to view the process more holistically, recognizing that the comparisons are in service of a larger vision of justice for Native nations in an American system tainted by colonialism. Most of them, I fear, are vulnerable to countercharges of inconsistency. Furthermore, they may distract us from the tougher but essential job of examining how much colonialism a constitutional system such as the United States can and should tolerate.

The best way to pursue that task, I have found, is to demonstrate, through historical and contemporary studies, the political and cultural identities, aspirations, practices, and achievements of Native nations. Where such political and cultural groups persist and do not consent to full incorporation, constitutional systems have great difficulty justifying their exercise of power. My recent book, *Defying the Odds: The Tule River Tribe's Struggle for Sovereignty in Three Centuries*, co-authored with anthropologist Gelya Frank and published by Yale University Press,⁸⁴ presents a narrative of persistence for one prominent central California tribe. It emphasizes efforts by the United States to suppress tribal political and

legal institutions, including the federal government's decision to prosecute four tribal members for murder based on their carrying out a tribal death penalty sentence. It then shows how the Tribe adapted its traditional leadership system and cultural practices through decades of domination, manipulation, and theft of assets by United States agents, ultimately developing a tribal government capable of advancing community goals in culturally appropriate fashion. The recent United Nations Declaration on the Rights of Indigenous Peoples recognizes that groups with such a history deserve rights of autonomy and cultural protection, just like other "peoples" in the world. But it also avoids a direct equation of indigenous peoples with foreign nations, an equation that would carry with it politically sensitive rights such as the right of secession from dominant nation states. In that sense, it carves out a status for Native nations that rests on normative claims of intercultural justice rather than on claims of illogic or inconsistency through comparison. Comparisons may sometimes be helpful, but they cannot perform all the work required to determine the governmental and property rights of Native nations.

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1 See Carole Goldberg, *Federal Policy and Treaty Making: A Federal View*, in 1 TREATIES WITH AMERICAN INDIANS 13-26 (Donald L. Fixico ed., 2008).

2 See NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 74-65 (4th ed. 2005) [hereafter 2005 COHEN'S HANDBOOK].

3 For an account of federal legislative and executive branch policy over the past fifty years, emphasizing its support for tribal self-determination, see 2005 *Cohen's Handbook* at § 1.07. For a portrayal of the Supreme Court's contrary view of Native nations, see Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48 (2010).

4 See, e.g., David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1995); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

5 See, e.g., Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003) [hereinafter Singer, *Canons of Conquest*] (challenging the substance of the Court's policy-making); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind-Justice, and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

6 See, e.g., ROBERT WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005).

7 See, e.g., Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615 (2000).

8 See, e.g., Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2005) (providing an in-depth account of the exercise of Navajo governmental powers).

9 See, e.g., Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373 (2002) (examining racial dimensions of federal Indian law); Carole Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L. J. 889 (2003) (applying political theory and philosophy to issues of individual rights in Indian country); CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 (2007) (empirical investigation of criminal justice on reservations, conducted with grant from the National Institute of Justice), available at <http://cdn.law.ucla.edu/SiteCollectionDocuments/centers%20and%20programs/native%20nations/pl280%20study.pdf>.

10 See, e.g., *San Manuel Bingo & Casino v. NLRB*, 475 F.3d 1306, 1318 (D.C. Cir. 2007) (applying National Labor Relations Act to tribal casino, characterized as a "purely commercial enterprise"); Chet Barfield, *Indian Casinos' Payout to State Spurs Debate*, SAN DIEGO UNION-TRIB., Oct. 10, 2004, at A-3 (describing a public perception that tribal gaming revenue "should be treated like any other corporation").

Dan Walters, Op-Ed., *A Slippery Slope: Are Tribes Governments or Businesses?*, SACRAMENTO BEE, Aug. 15, 2006, at A3. Showing some impatience with Native nations, Walters contends, "In effect, the tribes are governments when it suits them, and businesses when it suits them."

11 See, e.g., *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004) (successful tribal claim that state law barring light bars on tribal police vehicles discriminated against tribal governments, because vehicles of other state and local governments were allowed to have the light bars).

12 For discussion of this right, which is enshrined in international law, see Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, 55 WASH. & LEE L. REV. 773 (1998).

13 119 HARV. L. REV. 431 (2005).

- 14 See, e.g., Sarah Krakoff, *The Renaissance of Tribal Sovereignty, the Negative Doctrinal Feedback Loop, and the Rise of a New Exceptionalism*, 119 HARV. L. REV. F. 47 (2005); Joseph William Singer, *Double Bind: Indian Nations v. The Supreme Court*, 119 HARV. L. REV. F. 1 (2005) [hereinafter Singer, *Double Bind*].
- 15 See discussion of *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), *infra* at notes 30-37.
- 16 42 U.S.C. § 7601(d).
- 17 33 U.S.C. § 1377(e).
- 18 42 U.S.C. § 6903(13).
- 19 Now codified at 25 U.S.C. § 177.
- 20 42 U.S.C. § 1983. *But see* Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701, 711-12 (2003) (finding that tribes may not use § 1983 to vindicate sovereign rights).
- 21 21 U.S. 543 (1823).
- 22 32 U.S. 51 (1833).
- 23 *Percheman*, 32 U.S. at 86-87.
- 24 *Compare* Treaty with the Wyandot, Etc., Aug. 3, 1795, art. III, 7 Stat. 49, *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 42-43 (Charles J. Kappler ed., 1904) [hereinafter INDIAN AFFAIRS], *with* Amity, Settlement, and Limits, Cession of Florida with Spain, Feb. 22, 1819, art. VIII, 8 Stat. 252, T.S. No. 327.
- 25 See Elizabeth Nelson Patrick, *Land Grants During the Administration of Spanish Colonial Governor Pedro Fermin de Mendinueta*, 51 N.M. HIST. REV. 5, 6 (1976).
- 26 For elaboration of this point, see Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3.
- 27 See ROBERT N. CLINTON, CAROLE E. GOLDBERG, & REBECCA TSOSIE, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 61-63 (Rev. 4th ed. 2005) (discussing sources that contradict the portrayal of Native peoples in *Johnson v. M'Intosh*).
- 28 See STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005).
- 29 See, e.g., ROBERT WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 312-17 (1990).
- 30 30 U.S. (5 Pet.) 1 (1831).
- 31 30 U.S. (5 Pet.) at 54.
- 32 See CLINTON ET AL., *supra* note 27, at 75. For a similar critique of the *Cherokee Nation* holding, see Vine Deloria, Jr., *The Size and Status of Nations*, in NATIVE AMERICAN VOICES: A READER 457-65 (Susan Lobo & Steve Talbot eds., 1998). Deloria argues that in terms of geographic size, population, location in relation to other countries, and degree of economic dependence, many Native nations are quite similar to countries maintaining independent sovereign status as foreign nations. *Id.*
- 33 187 U.S. 553 (1903).
- 34 *Id.* at 566.
- 35 See CLINTON ET AL., *supra* note 27, at 452-53.
- 36 *Id.*
- 37 30 U.S. (5 Pet.) 15, 18 (1831).
- 38 Treaty of Fort Pitt with the Delaware Nation, art. VI, Sept. 17, 1778, 7 Stat. 13, *reprinted in* INDIAN AFFAIRS 4-5; Treaty of Hopewell with the Cherokee Nation, art. XII, Nov. 28, 1785, 7 Stat. 18, *reprinted in* INDIAN AFFAIRS 10.

- 39 See Annie H. Abel, *Proposals for an Indian State 1778-1878*, 1 ANN. REP. AM. HIST. ASSN. 89, 94-102 (1907).
- 40 See notes 16-18, *supra*, and accompanying text.
- 41 For example, tribes and intertribal groups are included in the definition of “state agencies” that can receive direct federal funding under the federal Special Supplemental Nutrition Program for Women, Infants, and Children program. 42 U.S.C. § 1786(b)(13).
- 42 See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997).
- 43 CLINTON ET AL., *supra* note 27, at 466.
- 44 *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).
- 45 Krakoff, *supra* note 14, at 51 n.22.
- 46 *Duro v. Reina*, 495 U.S. 676, 688 (1990).
- 47 See, e.g., *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (finding that the federal obligation of full faith and credit does not extend to tribal judgments).
- 48 See Ellen P. Aprill, *Tribal Bonds: Indian Sovereignty and the Tax Legislative Process*, 46 ADMIN. L. REV. 333 (1994).
- 49 See *Menominee Tribal Enterprises v. Solis*, No. 09-2806, 2010 U.S. App. LEXIS 6100 (7th Cir. Mar. 24, 2010) (finding the federal Occupational Safety and Health Act applicable to a wholly owned tribal sawmill enterprise, notwithstanding statutory exemptions for state and local governments); *San Manuel Indian Bingo & Casino v. National Labor Relations Board*, 475 F.3d 1306 (D.C. Cir. 2007) (holding that the National Labor Relations Act applies to a tribal casino, even though states and their political subdivisions are exempted from its application).
- 50 28 U.S.C. § 1738.
- 51 See 28 U.S.C. § 1738B.
- 52 See, e.g., Gavin Clarkson, *Tribal Bondage: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009 (2007).
- 53 *Id.*
- 54 See, e.g., Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413, 431-34 (2007) (criticizing *San Manuel Indian Bingo & Casino v. National Labor Relations Board*, 475 F.3d 1306 (D.C. Cir. 2007), and pointing out that territories of the United States, such as Puerto Rico and the Virgin Islands, have been found exempt from the NLRA, even though they are not expressly mentioned in the Act). The statutory exemption from states and their subdivisions is at 29 U.S.C. § 152(2).
- 55 E.g., *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).
- 56 *Id.* at 218-19.
- 57 For example, the United States Supreme Court has justified its special federal preemption doctrine for Indian law by contrasting Indian nations with states of the Union:
- The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law.
- 58 See Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989).
- 59 See Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002).

- 60 See 2005 COHEN'S HANDBOOK 915-18.
- 61 *Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down one-year state durational residency requirement for voting as violation of equal protection clause); *Burns v. Fortson*, 410 U.S. 686 (1973) (indicating that state requirement that voters register at least 50 days before election may reach the limit of permissible timing regulation).
- 62 See, e.g., *United States v. McBratney*, 104 U.S. 621 (1881) (upholding state jurisdiction over crime by one non-Indian against another committed within Indian country).
- 63 See generally Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049 (2007).
- 64 See Mary Beth Maloney, Note, *Native American Federal Campaign Contributions: Rules, Risks, and Remedies*, 16 S. CAL. INTERDIS. L.J. 523 (2007); Cameron A. Reese, *Tribal Immunity from California's Campaign Contribution Disclosure Requirements*, 2004 BYU L. REV. 793, 823-24.
- 65 Public Law 280 is a federal statute authorizing certain state criminal and civil jurisdiction within Indian country in certain states. For an explanation of Public Law 280, see 2005 COHEN'S HANDBOOK at § 6.04[3]. For an early and spirited debate over the propriety of tribes and their members participating in state and federal politics, see John LaVelle, *Strengthening Tribal Sovereignty Through Indian Participation in American Politics: A Reply to Professor Porter*, 10 KAN. J.L. & PUB. POL'Y 533 (2001); Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107 (1999).
- 66 See Singer, *Double Bind*, *supra* note 14, at 4-6; Joseph William Singer, *Lone Wolf or How to Take Property by Calling It a "Mere Change in the Form of Investment,"* 38 TULSA L. REV. 37, 44 (2002) [hereinafter Singer, *Lone Wolf*]; Joseph William Singer, *Well-Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994).
- 67 See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955); Singer, *Double Bind*, *supra* note 14, at 4-6.
- 68 *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835).
- 69 Singer, *Double Bind*, *supra* note 14, at 4-6.
- 70 Singer, *Lone Wolf*, *supra* note 66, at 43-45.
- 71 463 U.S. 110 (1983).
- 72 See *Hansberry v. Lee*, 311 U.S. 32 (1940).
- 73 *Nevada*, 463 U.S. at 135-36 n.15.
- 74 See CLINTON ET AL., *supra* note 27, at 1019-23, 1031-39, 1124.
- 75 See Stuart Banner, *Preparing to Be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawaii*, 39 L. & SOC'Y REV. 273 (2005).
- 76 For in-depth analysis of the clash of property regimes that affected indigenous land rights after the coming of the British to New Zealand, see Stuart Banner, *Conquest by Contract: Wealth Transfer and Land Market Structure in Co-colonial New Zealand*, 34 L. & SOC'Y REV. 47 (2000); Stuart Banner, *Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand*, 24 L. & SOC. INQUIRY 807 (1999).
- 77 See, e.g., *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998).
- 78 See generally 2005 COHEN'S HANDBOOK § 2.03; *supra*, notes 54-55 and accompanying text.
- 79 See generally 2005 COHEN'S HANDBOOK § 7.05[1][a].
- 80 See cases cited in note 49, *supra*, and accompanying text.
- 81 See Carole Goldberg, Commentary, *Governor Is Double-Dealing on Indian Gaming; California Has Already Broken Too Many Promises to Its Native Tribes*, L.A. TIMES, Jan. 20, 2004, at B13.
- 82 See 25 U.S.C. § 2710(b)(2)(B).

83 For example, civil rights claims, including recent claims by proponents of same-sex marriage, typically draw upon fundamental American values of equal dignity of all persons, affirmed at the outset of the nation in the Declaration of Independence.

84 GELYA FRANK & CAROLE GOLDBERG, *DEFYING THE ODDS: THE TULE RIVER TRIBE'S STRUGGLE FOR SOVEREIGNTY IN THREE CENTURIES* (2010).



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RACING THE CLOSET*

Russell K. Robinson**

INTRODUCTION

Recently, the media have brought to light examples of ordinary black men who are said to live on the “down low” (or DL) in that they have primary romantic relationships with women while engaging in secret sex with men.¹ A central theme of this media coverage, which I will call “DL discourse,” is that DL men expose their unwitting female partners to HIV, which stems from their secret sex with men.² DL discourse warrants examination because it sits at the intersection of three important civil rights movements: (1) the gay rights movement, (2) the black anti-racist movement, and (3) AIDS activism. In this Article, I critique DL discourse in order to reveal important lessons about media framing, gender schemas, and victimization, and the relationship of all three to law. DL discourse tends to conceal several relevant and interconnected groups, including nonblack men who engage in similar practices, down low women, and women whose sexual relationships are not monogamous or “respectable.” These erasures permit the media to boil the underlying issues down to a battle between two caricatures—dangerous black men and their innocent wives and girlfriends.

The media and the public have applied an insidious racialized double standard to black and white men who engage in similar conduct. The black men who are depicted as having secret sex behind their wives’ backs in DL discourse horrify us, yet we see Ennis and Jack, the star-crossed lovers in the Oscar-nominated, box office hit *Brokeback Mountain*, as victims of the closet.³ When Governor Jim McGreevey came out as a “gay American,” the empathy that the public felt for his wife Dina did not require casting Jim as a villain. Thus, an important point of this Article is that we attend to our tendency to frame black and white men through radically disparate lenses even when they engage in the same underlying conduct. Juxtaposing what I call “white men on the down low”⁴ against the stories of all-black depravity featured in DL discourse makes apparent that these media stories race the closet.

Although DL discourse has convinced many readers that the DL is a real and significant phenomenon in the black community, no one has ever proved the prevalence of this practice in black communities or elsewhere. Indeed, it may

be impossible to do so since the very conception of the practice entails secrecy. Asking a man whether he is down low may not produce a reliable answer since DL men, by definition, are perceived as hiding their sexual relationships with men and denying the relevance of their involvement in such sex. Many media stories on the DL fail to quote any actual men on the DL beyond J.L. King, the one man who has built a career on acting as a media spokesperson for the group.⁵ Thus, the media set up the DL as a “phenomenon” whose existence can neither be proved nor refuted. In my view, the blossoming of the DL story in major media outlets, despite the lack of identifiable DL men and minimal empirical evidence, speaks to the background stereotypes about black pathology that enable the story to bypass normal expectations of verification.

This Article begins in Part I where I describe the main themes of DL discourse, laying the foundation for Part II, which deconstructs the framing of this discourse. While the media tend to pit black men who have sex with men (or MSM) against black women, framing the former as perpetrators and the latter as passive victims, I reveal often ignored subgroups that destabilize the discourse’s simplistic binary. I also reveal that the victimization of black men is masked by the assumption that only women can be victims. Such frames conceal the common ground of marginalization that black MSM and black women share.

Although I attack media conceptions of black men on the “down low,” and their links to government policies, I do not mean to excuse or justify the behavior of a man (of any race) who lies to his wife or female partner about his sexual relationships with men and exposes her to HIV.⁶ While there surely are some men who fit the DL caricature, media discourse on the DL contains little of the complexity, personal struggle, and humanity apparent in the lives of many black men who have sex with men and women and refuse to identify as gay.

In this Part, I describe the most common media narrative concerning the down low. Then in Part II, I show how conspicuous omissions in these stories perpetuate the perception that black MSM are enemies of black women, and I attempt to blur the perpetrator/victim divide delineated by the media.

**I. “DOWN LOW”
DISCOURSE:
THE DOMINANT
STORY**

What is the “down low”? Whether it is used in white-dominated media, such as the *New York Times*, or black-controlled media, such as *Essence*, the term “down low” typically refers to men who are “(1) Black, (2) not identifying as gay, (3) having

sex with both men and women, (4) not disclosing their sexual behavior with men to female partners, and (5) never, or inconsistently, using condoms with males and females.”⁷ Public health experts state that it is entirely unclear how many men satisfy this definition.⁸ Nor has it been established that the DL is more common among black men than men of other races or is a primary reason why HIV rates in black women are high.⁹

After briefly describing the central themes of DL discourse, I will illustrate them by analyzing some prominent examples. Media reports on this “phenomenon” are almost entirely anecdotal¹⁰ and tend to highlight the most alarming examples. The stories consistently frame the DL as a distinctly black issue, rarely even mentioning white men or nonblack men of color. Further, they present as a paradox DL men’s enjoyment of sex with men while denying that they are gay. In addition, they emphasize that the DL involves deception of women, a refusal to wear condoms, and exposure of female partners to a heightened risk of HIV. Moreover, the media tend not to acknowledge that scholars have not been able to pinpoint a single reason as the cause of HIV/AIDS among black women. Scholars have identified multiple factors that likely contribute to the high incidence of HIV/AIDS among black women, including sex between heterosexually identified men in prison who reenter the black community upon release, heterosexual black men who have multiple sex partners, sex work among impoverished black men, and IV drug use, which impacts not just users but also people who sleep with them.¹¹ Researchers also recently identified an apparent genetic link that may make many African Americans more vulnerable to HIV.¹² Despite these numerous factors, DL discourse tends to omit all factors other than the DL.¹³

Perhaps the most inflammatory example of this discourse is an episode of *The Oprah Winfrey Show* from April 2004. This episode featured J.L. King, an African American man and author of *On the Down Low*.¹⁴ In case King’s stories of sleeping with men while being married to and raising children with a black woman were not disturbing enough, Oprah featured two men with even more salacious tales of life on the low. Oprah began the show by stating that “AIDS is on the rise again. Here’s a shocker! It’s one of the big reasons why so many women are getting AIDS. Their husbands and their boyfriends are having secret sex with other men.”¹⁵ Then two men whose identities were obscured provided accounts of their sex lives with women and men:

Man # 1

Having a main girl, two other girls on the side and three guys makes

for a lot of sex in the course of a month. I have non-committed sex with men. In no way, shape, or form do I consider myself gay. I just don't—I refuse to accept that at all. I won't even use the term 'bi-sexual'. Being in a relationship with a woman . . . there is a certain warmness; a certain comfort that you just can't get with another dude. The women I sleep with have not always known that I also sleep with men. In the past, I haven't told them because it's a lot easier to just not to [sic] tell.

Man # 2

I'm shuffling three guys right now, actually. One is married, the other two gentleman [sic], I am with basically for sex. What we do is very promiscuous . . . very, very, very promiscuous. Sometimes I practice safe sex, sometimes I do not. The married guy, we use condoms all the time. He insists on it. The other two guys, we don't use condoms. Usually, if I am with a woman, we don't practice safe sex.

Man # 1

For quite a while, I had very bad behavior and had unprotected sex with men, with women.¹⁶
[Later in the show]

Man # 1

After I was diagnosed with HIV, my behaviors didn't change. My behaviors got worse. I hung out in bars and picked up anonymous people. I had unprotected sex with guys, with women. Unfortunately, I would say I most likely have infected other people. I didn't protect myself or anything else.¹⁷

Presumably, Oprah and her producers selected these men because their stories make for good television. However, they provided no reason for believing that these anecdotes are representative of DL black men in general. Nonetheless, the show perpetuated the notion that DL men are highly promiscuous with men and women and place their own sexual gratification above all else.¹⁸ As author J.L. King said in response to repeated pressing by Oprah to admit that he is gay: "If I was a gay man, I would want to be in a relationship with another man and play house. So when you're on the D.L., all you want to do is have sex. It's about gratification, not orientation."¹⁹ A prominent *New York Times Magazine* story tells a similar story: "DL culture . . . place[s] a premium on pleasure. It is, DL guys insist, one big party . . .

DL men convey a strong sense of masculine independence and power: I do what I want when I want with whom I want.”²⁰ According to an *Ebony* article, “for the most part, [DL men] think they are invincible. They don’t use condoms.”²¹

II. BLURRING THE PERPETRATOR/ VICTIM DIVIDE

A. Not All Black Women Are Victims

Even as DL discourse sets up a divide between black female victims and black MSM perpetrators, it grants only certain women access to the role of victim. Several categories of women are either expunged or shrouded because they would complicate the divide and present more complex and realistic images of black women. These marginalized women include those who knowingly sleep with an MSM, including bisexual women who might prefer or be comfortable with a bisexual man, and women who choose to stay with an MSM even after learning about his interest in men. The Centers for Disease Control (CDC) found that 12% of young men who disclose their sexual orientation (i.e., out gay or bisexual men) reported having one or more female sex partners within the last six months.²² Moreover, half of these men acknowledged having unprotected vaginal or anal sex with at least one female partner in the last six months.²³ A study by Richard Wolitski and others found that one-third of the men who self-identified as DL reported that their main partners were females who knew they had sex with male partners.²⁴ These findings counter several deeply entrenched assumptions in DL discourse: (1) out men do not sleep with women; (2) women would not sleep with a man if they knew he had sex with men; and (3) to the extent that a woman would sleep with such a man, she would certainly demand that he use a condom because of the risk of HIV.

A central problem with DL discourse is its tendency to assume that all or most male-female sex occurs in the context of committed relationships, which is evident from its failure to discuss other sexual arrangements. The implicit and misplaced assumption is that every black woman—or every black woman who matters—is in a relationship that she views as committed and monogamous. The Wolitski study of self-identified DL men, however, found that “few DL-identified MSM in this study currently had a female main partner—most female partners reported by these men were nonprimary partners.”²⁵ The various forms of male-female relationships that fall outside of marriage or committed partners, whether called “hooking up,” “friends with benefits,” or “maintenance sex,” are not even mentioned in most DL discourse. The failure to acknowledge women in such situations, especially in black-controlled media, seems to arise from their failure to conform to a traditional, “respectable” image of female sexuality.²⁶

People sometimes have sex without asking questions about their partner's sexual history or other potential contemporaneous partners. Thus, in addition to the group of women who know about a man's involvement with men, there are others who do not know because they do not ask.²⁷ If they are simply hooking up for a night or two, women may choose not to ask about a man's other sexual involvements. Even if she did ask, such a woman might reason, she cannot expect full candor from someone she just met or knows only casually. Sex outside the context of a long-term relationship typically carries fewer markers of trust and reliability about the risk one takes on by becoming sexually involved.²⁸

Another woman who receives little attention in most DL discourse is the woman who chooses to stay with her husband after she learns of his involvement with men. The *New York Times* revealed such women in a story that focused on white couples and did not mention the DL.²⁹ The article identified "Brokeback marriages," named after the acclaimed, groundbreaking movie *Brokeback Mountain*, which depicted two men who fell in love and maintained a clandestine sexual relationship while they were married to women. According to the founder of the International Straight Spouse Network, a group that counsels people with queer spouses, one-third of the wives who contact the network stay with their husbands.³⁰ And half of those marriages last for at least three years.³¹ One woman in the story formally divorced her husband, yet later reconciled with him and permitted him to continue having sex with men.³² Another decided to keep her marriage intact but began having extramarital relations like her husband.³³ In light of Senator Larry Craig's conviction for soliciting sex from a male police officer, some would put his wife in this category of women who choose to stay.

In sharp contrast to the framing of most DL stories, the Brokeback marriages article assiduously avoids placing the blame on the men in such marriages and instead revealed the complex motivations animating the decision making of the husbands and wives. Consider the following passage:

On the whole these are not marriages of convenience or cynical efforts to create cover. Gay and bisexual men continue to marry for complex reasons, many impelled not only by discrimination, but also by wishful thinking, the layered ambiguities of sexual love and authentic affection.

"These men genuinely love their wives," said Joe Kort, a clinical social worker in Royal Oak, Mich., who has counseled hundreds of gay married men, including a minority who stay in their marriages. Many, he said, considered

themselves heterosexual men with homosexual urges that they hoped to confine to private fantasy life.

“They fall in love with their wives, they have children, they’re on a chemical, romantic high, and then after about seven years, the high falls away and their gay identity starts emerging,” Mr. Kort said. “They don’t mean any harm.”³⁴

Although the conduct of the men in Brokeback marriages is indistinguishable from that of DL men, the *New York Times* treats white men on the DL with a compassion and generosity that I have never seen in a DL story. Kort even suggests that the women who marry gay men bear some responsibility for the marriages: “Straight people rarely marry gay people accidentally,’ he wrote in a case study of a mixed-orientation marriage published [September 2005] in *Psychotherapy Networker* ... Some women, Mr. Kort said, find gay men less judgmental and more flexible, while others unconsciously seek partnerships that are not sexually passionate.”³⁵ One need not accept Kort’s essentialized conceptions of gay men to find that he raises a valid question. Some women may be drawn to gay or bisexual men (consciously or unconsciously) because of their own psychological reasons. Like many parents who raise queer children, a wife might know and yet not let herself see that her mate is gay. When lawyer/TV host Star Jones announced her marriage to Al Reynolds, rumors swirled that Reynolds had a gay past. Rather than denying that he was gay, the couple released a statement that some understood to imply that, on some level, Jones knew and accepted Reynolds’ past.³⁶ Former New Jersey Governor Jim McGreevey and his wife Dina are locked in a divorce battle that pivots largely on whether Dina knew her husband was gay. Dina has tapped the deep reservoir of sympathy for wronged wives by writing a book and promoting it with media appearances, including one on *The Oprah Winfrey Show*. But her husband and his chauffeur, Teddy Pedersen, charge that Dina knew of his sexual interest in men because they all engaged in “three-way” sex on a regular basis before the McGreeveys’ marriage and afterward.³⁷ Pedersen, who identifies as heterosexual, claims that his involvement was necessary for Jim to be interested in having sex with his wife.³⁸ If this is true, Dina either knew or should have known that her husband was not heterosexual. Black women may face even greater pressure to stay with an unfaithful man than their white counterparts because of the perceived lack of “good black men” and the community expectation that each black person is responsible for fostering the fragile black family.³⁹ This obligation may lead some black women to overlook their male partner’s infidelities, whether they are with women or men.

Finally, lesbian and bisexual women are overlooked in DL discourse. Followers of celebrity gossip know that a few high-profile Hollywood couples have been rumored to be closeted gays and lesbians in marriages of convenience. Whether these rumors are true or not, there likely are some women who marry a gay man in order to avoid their own interest in women. Out bisexual women, by contrast, may seek a bisexual man because he is more likely to understand her sexuality and less likely to be threatened than a heterosexual man. In such situations, a bisexual woman might see a man's sexual interest in men as a benefit, not a burden. For example, in one qualitative study of men who have sex with men and women, one subject reported that he came out to a female sex partner for the first time because she was bisexual and he anticipated that she would be comfortable with his bisexuality.⁴⁰

The dominant explanation of the down low is that it reveals that there are many black gay men who remain closeted because of the extreme homophobia of the black community.⁴¹ The perceived prevalence of such men encourages black women to root out men who are thought to be posing as straight but are actually gay. Although homophobia certainly is a factor, the central flaw in this account is that it denies the existence of genuine bisexuality, even though many men (black and otherwise) attest to experiencing significant sexual attraction to both sexes.⁴² A recent study indicated that over one million men identify as bisexual, almost as many as identify as gay.⁴³ Studies suggest that black men and other men of color are more likely to report having had sex with both men and women than white men.⁴⁴ However, many heterosexual and homosexual-identified people believe that men are either gay or straight—there is no room for something in between. A prominent *New York Times* article, entitled *Straight, Gay or Lying? Bisexuality Revisited*, advanced this belief and attempted to ground it in science.⁴⁵ The article reported on *Sexual Arousal Patterns of Bisexual Men*, a controversial 2005 study by Gerulf Rieger, Meredith L. Chivers and J. Michael Bailey.⁴⁶ The study attempted to measure sexual arousal patterns in self-identified bisexual men by attaching a gauge to each man's penis to measure its circumference and then showing each man clips of adult films.⁴⁷ All men were required to watch several two minute sexual clips, which were sandwiched in between two neutral, relaxing clips. Two sexual clips depicted two men having sex with each other; two other clips depicted two women having sex.⁴⁸

The results revealed discordance between the bisexual men's self-reported arousal during the sexual clips and the report of the gauge. While the bisexual

**B. Black Men Can
Be Victims Too**

men expressed in their self-reports substantial attraction to both the male-male and female-female clips, the circumferential gauge indicated that bisexual men were as likely as homosexuals and heterosexuals to have “much higher arousal to one sex than the other.”⁴⁹ The authors concluded that “most bisexual men appeared homosexual with respect to genital arousal, although some appeared heterosexual.”⁵⁰ The *New York Times* treated this study as corroboration of the statement by some gay men that a man is either “gay, straight or lying.”⁵¹ Based on this logic, to identify as bisexual is to reveal oneself as a liar, because real bisexuals do not exist.⁵²

However, a response by the National Gay and Lesbian Task Force (NGLTF) suggests that the *Times* glossed over the study’s various limitations as well as aspects of the findings that complicate this facile interpretation. First, the study measured only one aspect of sexual orientation, sexual desire as reflected in an erection. The researchers did not seem to recognize that not all sexual attraction instantly produces an erection.⁵³ Indeed, with respect to about one-third of the subjects, the gauge did not detect a sexual response to any of the clips.⁵⁴ As NGLTF commented:

Since the [*Times*] article[] quotes one of the authors as saying, ‘that for men arousal is orientation,’ does this mean that more than one-third of the participants had no sexual orientation? Any mechanical device that purports to accurately assess a condition and is unable to do so one out of three times is surely suspect.⁵⁵

Second, the study’s phallogentric conception of sexual orientation cannot account for emotional attachments, which many people see as central to their sexuality. Third, the Rieger study obtained its sample from advertisements in “gay oriented magazines.” Moreover, it required subjects to identify as “bisexual.”⁵⁶ Thus, the study says little about the many bisexually behaving MSM who shun gay culture and a bisexual label and identify as heterosexual, DL, or reject any sexual label at all.⁵⁷ Fourth, oddly the study’s measure of heterosexuality was not a clip of a naked woman but of two women having sex. Some bisexual men may not have responded to the female clip not because they are not aroused by women, but because they are not turned on by depictions of two women having sex. Finally, perhaps the most striking finding of the study is that about one-quarter of bisexual-identified men showed minimal attraction to men. While the “bisexual,’ but really gay” stereotype enjoys wide currency, there is no popular explanation for why a man with heterosexual patterns of sexual attraction would choose to

identify as bisexual and take on an immense social stigma. One real possibility is that the study imperfectly captured men's sexual attraction. In the end, rather than putting to rest the notion that real bisexual men exist—as suggested by the *Times's* headline—the study seems to raise more questions than it answers. Yet, as with DL discourse, there is a danger that the public will absorb media reports that rest on an unsteady empirical foundation because they are congruent with prevailing stereotypes.

The dominant stereotype of bisexuality in men is that evidence that a man has had sex with men is treated as conclusive proof that he is immutably and eternally gay and, further, any past romantic relationships with women were just a charade.⁵⁸ This model fits the experiences of many in the dominant white gay male community (and many out black men) and also dovetails nicely with the mainstream gay rights movement's political strategy of proving that queer people are born gay.⁵⁹ Frequently drawing on race as an analogy, the movement forcefully argues that queer people must be accepted for who they are because, like blacks, they were "born that way."⁶⁰ The immutability claim attempts to show the futility of trying to change queer people and simultaneously alleviates heterosexual anxieties that queer people want to convert straight adults and children. As politically effective as this argument may (or may not) be,⁶¹ it does not jibe with the significant community of men who have sex with men at some point in their lives but identify as "straight," "str8," "bisexual," "bicurious," "Same Gender Loving," "in the life," "questioning," "homothug," and "DL," among others, or who simply refuse to accept any sexual identity label and assert that they have genuine sexual and emotional attraction to women and men.⁶² Contrary to the implication of the DL discourse, this is no tiny fringe of people. Indeed, studies of human sexuality suggest that the category of men who have had sex with men but do not identify as gay is as large or larger than the category of men who self-identify as gay.⁶³ A 2002 CDC survey asked a nationally representative sample of men and women: "Do you think of yourself as heterosexual, homosexual, bisexual, or something else?"⁶⁴ Just 2.3% of men identified as homosexual. A larger group, 3.9%, chose "something else."⁶⁵ In addition, 1.8% identified as bisexual, and the same percentage did not answer the question.⁶⁶ It seems fair to assume that the men who chose "something else" and probably a good number of those who failed to answer are not entirely heterosexual since adopting a heterosexual identity carries no stigma. One could read the large percentage of men who picked "something else" over "bisexual" to reflect their awareness that bisexuality is not a realistic space for men to occupy—to identify as a bisexual man is to mark oneself as a dishonest

gay man.⁶⁷ The “something else” finding also may reveal the discomfort that many men of color have with the terms “gay,” “homosexual,” and “bisexual.”⁶⁸ The study concluded that “[i]t is noteworthy that 7.3 percent of Hispanic or Latino men, and 7.5 percent of black men, reported that their sexual orientation was ‘something else,’ and another 3-4 percent of each group did not report an answer to the question.”⁶⁹

Public attitudes toward men who identify as bisexual may be even more negative than attitudes toward gay men.⁷⁰ Bisexual men face condemnation not just from heterosexuals but also from homosexuals.⁷¹ The primary response to bisexual conduct and identification among men (and perhaps to MSM who refuse to label their sexuality) is essentially one of false consciousness. Bisexual men may say they are attracted to women, the argument goes, but that is just to avoid the full-on stigma of being perceived as gay.⁷² If there were no social pressure to be straight, they would confess that their genuine desire is to be with men and only men. All of the sex, long-term relationships, and even marriages that these men have shared with women are thus dismissed as a sham, motivated by social pressure rather than genuine sexual and emotional attraction. However, studies reveal that even openly gay men sometimes sleep with women. As discussed earlier, the CDC found that more than one in ten out young men reported having at least one female sex partner in the last six months.⁷³ This finding suggests that even some men who openly identify as gay or bisexual may enjoy sex with women. If a significant number of out men, who have little social capital to gain from post-coming out sex with women, engage in such sex nonetheless, they are presumably motivated by genuine sexual/emotional desire.

Clearly, there are a number of men who at some point in their lives said they enjoyed sex with women and identified as bisexual and yet later came to identify as gay and minimize their attraction to women. Because many gay men have experienced this sexual identification trajectory, they may misapprehend it to be the only trajectory for MSM. They might assume that their experience is representative of all men’s experiences and be skeptical of men who express interest in women and men. The very creation of a gay male community may serve to distort the perceptions of the prevalence of this bisexual-to-gay narrative. Gay enclaves are organized primarily around providing opportunities for men to meet male sexual partners and to consume gay culture (i.e., gay gyms, gay clubs, gay clothing stores). As a result, men who have a strong interest in women (in addition to their interest in men) are likely to be less interested in spending their time

exclusively in a male-centered enclave where potential heterosexual female sex partners are few.⁷⁴ As I have written elsewhere, the organization of a community around gay male sexuality is not infrequently coupled with hostility to women.⁷⁵ Moreover, there is a circular nature to this phenomenon. Bisexual men, anticipating skepticism and hostility from gay men in such male-centered spaces, avoid those spaces because they do not feel welcome or identify with gay culture. To the extent that such men congregate in gay spaces, they may “cover” their bisexuality. Hence, gay men immersed in gay enclaves and gay culture come across fewer genuinely bisexual men and come to doubt that such men exist. The upshot is that men who are exclusively interested in men dominate gay enclaves, and this most visible group of MSM often perceives itself and is perceived by the general public as representative of all nonheterosexual men.⁷⁶

The existence of genuine bisexuality in men matters because it suggests that some of the men who lead DL lives are not closeted gay men but rather men whose desires and behavior do not fit the reductive and simplistic conceptions of sexuality that are prevalent among gay and straight people. Some DL men may not be gay or straight; they might be “something else.” The sexual binary pressures such men to hide their interest in men because any expression of sexual interest in men is likely to be read by their wives or girlfriends as a disclosure of gay identity. In short, to the extent that DL men are genuinely bisexual or have a sexuality that does not fit any well-worn label, their failure to disclose their sexuality to women may not be driven by a gratuitous desire to deceive or harm their female partners but by the reality that their sexual desire, as they conceive and experience it, is unintelligible in contemporary U.S. culture.⁷⁷ Moreover, a black man who does not fit the heterosexual-homosexual binary is likely influenced by the knowledge that disclosing his sexuality will invite another form of discrimination, in addition to race-based discrimination, and that it may be more stigmatizing than simply coming out as gay, which at least is often understood as a legitimate if disfavored identity.⁷⁸

ENDNOTES

* This article is an abridged version of *Racing the Closet*, 61 *STAN. L. REV.* 1463 (2009). Copyright (c) 2009 the Board of Trustees of the Leland Stanford Junior University; Russell K. Robinson.

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1 See Chandra L. Ford et al., *Black Sexuality, Social Construction, and Research Targeting ‘The Down Low’ (‘The DL’)*, 17 *ANNALS OF EPIDEMIOLOGY* 209, 209 (2007) (“The DL gained considerable notoriety from publicity surrounding the publication of popular books and news features on the phenomenon.” (citation omitted)). Numerous media sources have covered the down low, including the *New York Times*, *Los Angeles Times*, *San Francisco Chronicle*, *Village Voice*, *Vibe*, and *Essence* magazines and *The Oprah Winfrey Show*. See, e.g., *infra* notes 14-32.

2 See Ford et al., *supra* note 1, at 209. Sixty-nine percent of women diagnosed with HIV/AIDS are black. *Id.* at 210.

3 See Richard N. Pitt, Jr., *Downlow Mountain?: De/Stigmatizing Bisexuality Through Pitying and Pejorative Discourses in Media*, 14 *J. MEN’S STUD.* 254, 255 (2006) (“Of 140 articles written about this movie in mainstream newspapers, none referred to the Jack and Ennis characters as bisexuals, let alone as men living on the down-low.”); *infra* text accompanying notes 77-79. Some may see the comparison to *Brokeback Mountain* as inapt. They might say that Jack and Ennis are fictional characters, while DL men are real. But as I describe more fully in the text, it remains unclear how many real DL men exist. Like the “welfare queen,” the DL man may loom large as a fictional boogeyman whose media representations are out of step with actual DL prevalence.

4 For other examples of white men on the DL, see KEITH BOYKIN, *BEYOND THE DOWN LOW: SEX AND DENIAL IN BLACK AMERICA* 69-71 (2005) (discussing politicians Michael Huffington and Edward Schrock, and entertainment mogul David Geffen); David Amsden, *Married Man Seeks Same for Discreet Play*, *N.Y. MAG.*, July 23, 2007, available at <http://nymag.com/news/features/34985/> (describing Wall Street professional men meeting other men for sex on Craigslist.org); James E. McGreevey, *The Making of a Gay American*, *N.Y. MAG.*, Sept. 18, 2006, available at <http://nymag.com/news/politics/21340/> (describing a secret enclave of white married men who meet for sex, including “power brokers and backroom operatives and future leaders of America”). More recently, Senator Larry Craig and Pastor Ted Haggard were caught living what appear to be down low lifestyles. See Eric Gorski, *Haggard Says He’s Not Gay*, *DENV. POST*, Feb. 6, 2007, at A1; Dan Popkey, *More Gay Men Describe Sexual Encounters with U.S. Sen. Craig*, *IDAHO STATESMAN*, Dec. 3, 2007, available at <http://www.idahostatesman.com/eyepiece/story/226703.html>.

5 See BOYKIN, *supra* note 4, at 126-30 (characterizing King as ill-informed and self-serving). An exception is the Oprah episode on the DL, which I discuss below. See *infra* text accompanying notes 14-19. That episode featured two men said to be on the DL, but their identities were cloaked. It is questionable whether the show, which does not appear to abide by the standards of a network news program, confirmed that these men actually engage in the DL lifestyle.

6 Further, to argue that some women know that their male partners are having sex with men, as I do below, is not to claim that such women deserve to become infected with HIV.

7 Richard J. Wolitski et al., *Self-Identification as “Down Low” Among Men Who Have Sex with Men (MSM) from 12 US Cities*, 10 *AIDS & BEHAV.* 519, 519 (2006) (citing news stories about DL MSM).

8 See, e.g., *id.*

9 See, e.g., Ford et al., *supra* note 1, at 210 (“More complete population-based information ... is necessary ... before the DL can be linked epidemiologically to HIV/AIDS racial disparities.”); *id.* (criticizing media for frequently suggesting that the DL is “new and limited to blacks”); Vickie M. Mays et al., *HIV Prevention Research: Are We Meeting the Needs of African American Men Who Have Sex with Men?*, 30 *J. BLACK PSYCHOL.* 78, 84 (2004) (recognizing that while “scientific literature has firmly established that African American MSM should be a focus of HIV prevention[,] ... the connection between the risk of disease and the unique circumstances of African American MSM is in its infancy”). Eighty percent of women who contracted HIV through sex with a man in 2002 did not know or report whether their male sexual partners were in a high-risk group, such as men with multiple partners, MSM, or IV drug users. Ford et al., *supra* note 1, at 210. In a 2003 study, “[o]nly 2% of heterosexually infected Black and Hispanic women had a male partner who was known to be bisexual.” Wolitski, *supra* note 7, at 520.

10 See, e.g., Ford et al., *supra* note 1, at 210; Wolitski, *supra* note 7, at 519 (stating that DL discourse is “largely based on anecdotal reports and externally applied labels”).

11 See Brian Dodge et al., *Beyond the Down Low: Sexual Risk, Protection, and Disclosure Among At-Risk Black Men Who Have Sex with Both Men and Women (MSMW)*, 37 ARCHIVES SEXUAL BEHAV. 683, 683 (2008) (discussing findings suggesting that black men are significantly more likely to engage in sex work than white men); Gregorio A. Millett et al., *Explaining Disparities in HIV Infection Among Black and White Men Who Have Sex with Men: A Meta-Analysis of HIV Risk Behaviors*, 21 AIDS 2083, 2084 (2007); J. P. Montgomery et al., *The Extent of Bisexual Behaviour in HIV-Infected Men and Implications for Transmission to Their Female Sex Partners*, 15 AIDS CARE 829, 833 (2003) (referring to prolonged incarceration, particularly among black and Hispanic men, as one explanation for their bisexual behavior); Rucker C. Johnson & Steven Raphael, *The Effects of Male Incarceration Dynamics on AIDS Infection Rates Among African-American Women and Men* 5-8 (U.C. Berkeley Ctr. on Insts. and Governance, Working Paper No. 47, 2006), available at http://igov.berkeley.edu/workingpapers/series2/No47_Johnson.pdf. I analyze sexuality between men in prison and its legal and cultural implications in a work-in-progress. See Russell K. Robinson, *Masculinity as Prison* (Mar. 11, 2009) (unpublished manuscript, on file with author).

12 See Nicholas Wade, *Gene Variation May Raise Risk of H.I.V., Study Finds*, N.Y. TIMES, July 17, 2008, at A12.

13 An exception to this trend appeared in *Ebony* in 2004. Zondra Hughes, *Why Sisters Are the No. 1 Victims of HIV and How You Can Avoid It*, EBONY, July 2004, at 64 (expressing concern that obsession with DL will distract from other contributing factors).

14 *The Oprah Winfrey Show* (CBS television broadcast Apr. 16, 2004) (transcript on file with author); J. L. KING, ON THE DOWN LOW: A JOURNEY INTO THE LIVES OF “STRAIGHT” BLACK MEN WHO SLEEP WITH MEN (2004).

15 *The Oprah Winfrey Show*, *supra* note 14.

16 *Id.*

17 *Id.*

18 Man #1 failed even to recognize the humanity of the people he harmed: “I didn’t protect myself or anything else.” *Id.* (emphasis added). In general, studies show that black MSM are no more promiscuous than white MSM. See, e.g., Millett et al., *supra* note 11, at 2086 (concluding, based on meta-analysis of 53 studies, that “black MSM reported significantly fewer sex partners across studies than white MSM” and engaged in no more unprotected anal sex than white MSM); Montgomery et al., *supra* note 11, at 832-34 (concluding, with respect to HIV-positive men with male and female partners, that “[t]here were no significant differences in the distribution of number of partners by race/ethnicity”).

19 *The Oprah Winfrey Show*, *supra* note 14.

20 Benoit Denizet-Lewis, *Double Lives on the Down Low*, N.Y. TIMES, Aug. 3, 2003, (Magazine), at 31.

21 Lynn Norment, *The Low-Down on the Down-Low*, EBONY, Aug. 2004, at 34; see also *id.* (“So the DL man is sleeping with his men and his women and not using protection with anybody, and putting the entire Black community at risk of AIDS, just because he can’t face the fact that he is gay?” (emphasis added)).

22 The sample of disclosing individuals comprised 4,952 men. See *HIV/STD Risks in Young Men Who Have Sex with Men Who Do Not Disclose Their Sexual Orientation—Six U.S. Cities, 1994-2000*, 52 MORBIDITY & MORTALITY WKLY. REP. 81, 81, 84 (2003).

23 See *id.* A different study found that just 28% of DL-identified men had unprotected vaginal sex in the prior thirty days. See Wolitski et al., *supra* note 7, at 522.

24 See Wolitski et al., *supra* note 7, at 523; see also Dodge et al., *supra* note 11, at 684 (stating that studies of bisexually behaving men have reported rates of disclosure to female partners ranging from one-tenth to one-third). The Wolitski study’s sample of 455 MSM, which was one-third black, one-third Latino and one-third white, yielded only 12 DL-identified men with a main female

partner. See Wolitski et al, *supra* note 7, at 523. In addition, 13 non-DL-identified men reported primary relationships with women and having sex with a man within the prior 6 months. See *id.* at 520, 522. As suggested in the introduction, studies that focus on DL identity must be interpreted with caution. The practices of men who cooperate with researchers and identify themselves to researchers as DL may not track the practices of men whose behavior fits the media definition of DL but who may not identify as such to researchers or cooperate with them.

25 See Wolitski et al., *supra* note 7, at 526; see also Montgomery et al., *supra* note 11, at 834 (finding that most HIV-positive men who had sex with men and women reported one to five male and one to five female partners in prior five years, contrary to “common belief that bisexual men often are in a committed relationship with a woman and have many male sex partners”).

26 Cf. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1270 (1991) (noting that in the context of rape prosecutions “[p]ast sexual conduct as well as the specific circumstances leading up to the rape are often used to distinguish the moral character of the legitimate rape victim from women who are regarded as morally debased”); *id.* at 1274 (describing black-community criticism of Desiree Washington, who accused Mike Tyson of rape, because she “had no business in Tyson’s hotel room at 2:00 a.m.”).

27 The presumption of heterosexuality, coupled with the myth that all “gay” men are identifiable, may lead women to assume that there is no need to question a man’s sexual orientation if he appears masculine. See, e.g., Linda Villarosa, *AIDS Fears Grow for Black Women*, N.Y. TIMES, Apr. 5, 2004, at A1.

28 The authors of a small qualitative study of black men who have sex with men and women found that “because of the anonymous, emotionally detached nature of some sexual encounters, many of our participants simply did not feel obliged to disclose to some male partners.” Dodge et al., *supra* note 11, at 694.

29 See Katy Butler, *Many Couples Must Negotiate Terms of ‘Brokeback’ Marriages*, N.Y. TIMES, Mar. 7, 2006, at F5.

30 See *id.*

31 See *id.*; see also Kevin Chappell, *The Truth About Bisexuality in Black America*, EBONY, Aug. 2002, at 162 (“Some women confront the issue, and stay in the relationship with a belief that their partner will never again commit a bisexual act.”).

32 See Butler, *supra* note 30, at F5.

33 See *id.*

34 *Id.* In a similar vein, the wife of one gay man compared men like her husband to reckless teenagers discovering their sexuality who do not “really realize how much they’re hurting their spouse.” *Id.*

35 *Id.*

36 The statement said: “My fiancé and I have discussed all relevant parts of our personal histories. We are satisfied that we know everything we need to know about each other’s pasts and are looking forward to our future together.” Lynn Norment, *Star & Al*, EBONY, Dec. 2004, at 172, 173.

37 See Jeane MacIntosh, *I Was McG and Wife’s Three-Way Sex Stud: Ex-Driver*, N.Y. POST, Mar. 17, 2008, at 6. In explaining his decision to testify, Pedersen stated: “She’s framed herself as a victim—yet she was a willing participant. She had complete control over what happened in her relationship ... She was there, she knew what was happening, she made the moves. We all did. It’s disgusting to watch her play the victim card.” *Id.*

38 See *id.*

39 Cf. ANITA L. ALLEN, WHY PRIVACY ISN’T EVERYTHING: FEMINIST REFLECTIONS IN PERSONAL RESPONSIBILITY 98 (2003) (stating that black women are urged to “give older, younger, and lower-income black men a chance before giving up on the possibility of finding a suitable black mate”).

40 Dodge et al., *supra* note 11, at 691.

41 See Denizet-Lewis, *supra* note 20, at 32 (“The easy answer to most of these questions is that the black community is simply too homophobic . . .”).

42 See, e.g., Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 377-85 (2000) (reviewing studies of self-reports of sexual desire and concluding that “the incidence of bisexuality was greater than or comparable to the incidence of homosexuality” (emphasis omitted)).

43 See William D. Mosher et al., *Sexual Behavior and Selected Health Measures: Men and Women 15-44 Years of Age, United States, 2002*, 362 ADVANCE DATA FROM VITAL & HEALTH STAT., (Nat’l Ctrs. For Health Statistics), Sept. 15, 2005, at 32 tbl.14.

44 See, e.g., Gary Goldbaum et al., *Differences in Risk Behavior and Sources of AIDS Information Among Gay, Bisexual, and Straight-Identified Men Who Have Sex with Men*, 2 AIDS & BEHAV. 13, 16 (1998) (finding that black men at MSM public sex venues were more likely to identify as bisexual or straight than white men); Gregorio Millett et al., *Focusing “Down Low”: Bisexual Black Men, HIV Risk and Heterosexual Transmission*, J. NAT’L MED. ASS’N, July 2005, at 52S, 53S (“Studies clearly show that black MSM are more likely than MSM of other races and ethnicities to identify themselves as bisexual and to be bisexually active.”); Montgomery et al., *supra* note 11, at 831 (reporting that the following percentages of HIV-positive MSM reported sex with women in the last five years: 34% black, 26% Hispanic, 19% Asian/Pacific Islander, 13% American Indian/Alaska Native, and 13% white). The Montgomery study found that, even though black and Latino men were most likely to report having had male and female sex partners, black and Latina women were least likely to report having had sex with bisexual men. See *id.* (stating that 14% of white women reported sex with bisexual men, compared to 6% of blacks and 6% of Latinas). Note, however, that the study’s five-year window is very broad and many of the men who reported sex with women may have engaged in it before they began having sex with men. Some might think the greater prevalence of bisexual behavior among black men is evidence of greater homophobia in the black community, which coerces such men into having sex with women. See Carlos Ulises Decena, *Profiles, Compulsory Disclosure and Ethical Sexual Citizenship in the Contemporary USA*, 11 SEXUALITIES 397, 398, 401 (2008) (criticizing public health scholars for uncritical assumptions that “internalized homophobia” among black men produces the DL and can be cured by urging men to come out). However, this interpretation rests on an erroneous assumption that the level of bisexuality among white people is the “correct” level and that there is something necessarily deviant in black behavior that departs from this white baseline.

45 See Benedict Carey, *Straight, Gay or Lying? Bisexuality Revisited*, N.Y. TIMES, July 5, 2005, at F1 (describing a scientific study suggesting that bisexuality in men does not exist).

46 Gerulf Rieger et al., *Sexual Arousal Patterns of Bisexual Men*, 16 PSYCHOL. SCI. 579 (2005).

47 See *id.* at 580-81 (describing use of “circumferential strain gauge that reflects the changes in penile girth during erection”). The initial sample included 101 men, including 30 self-identified heterosexuals, 33 bisexuals, and 38 homosexuals. *Id.* at 580.

48 *Id.*

49 *Id.* at 582.

50 *Id.* at 579.

51 Carey, *supra* note 46, at F1.

52 See Yoshino, *supra* note 43, at 395 (noting academic arguments that “all self-identified bisexuals were actually homosexuals in denial” and arguing that such explicit denials of bisexuality’s existence are currently outnumbered by implicit denials that speak of heterosexuals and homosexuals as if no intermediate category exists).

53 Recall that the clips were just two minutes in length. Rieger et al., *supra* note 47, at 580.

54 See *id.* at 580-81.

55 See NAT’L GAY & LESBIAN TASK FORCE, THE PROBLEMS WITH “STRAIGHT, GAY OR LYING?” (2005), <http://www.thetaskforce.org/downloads/reports/NYTBisexualityFactSheet.pdf>.

56 Rieger et al., *supra* note 47, at 580. The study also advertised for subjects in an “alternative” newspaper, *id.*, but the authors did not report how many subjects responded to the advertisements in gay magazines and how many responded to the newspaper. To the authors’ credit, their sample was roughly half nonwhite. *See id.* They did not provide a further racial breakdown.

57 As I describe more fully below, almost four percent of men who responded to a CDC survey described their sexuality as “something else” when the other options were heterosexual, homosexual, and bisexual. *See* Mosher et al., *supra* note 41, at 13. By contrast, less than two percent of men identified as bisexual. *Id.*

58 There are minor exceptions to this rule. Some might discount sexual behavior that happens in prison and during early adolescence.

59 *See* Edward Stein, *Born that Way? Not a Choice?: Problems with Biological and Psychological Arguments for Gay Rights* 45 (Benjamin N. Cardozo Sch. of Law, Working Paper No. 223, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104538.

60 *Id.* at 9 (internal quotation marks removed); *See id.* at 7.

61 *See* generally Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).

62 *See* Vickie Mays et al., Preferred Sexual Orientation Labels for African American Men Who Have Sex with Men: Implications for HIV/AIDS Research and Interventions (draft on file with author). These labels could be subdivided based on whether they acknowledge same-sex attraction (e.g., “Same Gender Loving,” “bicurious”), deny it (“straight”), or seek not to answer the question at all (those who refuse to label their sexuality).

63 *See* EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 296-97 (1997) (finding that 2.8% of men self-identify as gay or bisexual while 9% of men report having had at least one male sexual partner since puberty); Ritch C. Savin-Williams, *Who’s Gay? Does it Matter?*, 15 CURRENT DIRECTIONS IN PSYCHOL. SCI. 40 (2006). Sonia Katyal’s examination of non-Western conceptions of sexuality provides further evidence that many MSM do not *See* sex with men as necessitating the adoption of gay identity. *See* Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 156 (2002) (discussing men in India and elsewhere who view “their sexual orientation as heterosexual, and consider their same-sex sexual activities to be a completely separate pastime, rather than a determinative part of their identities”).

64 Mosher et al., *supra* note 41, at 1, 13. This sample included adults in households who were ages fifteen to forty-four. The results from this question focus on those eighteen to forty-four. *See id.* at 13. A 1994 study found that just 1% of respondents identified as “something else.” LAUMANN ET AL., *supra* note 96, at 293 n.11.

65 Mosher et al., *supra* note 41, at 13.

66 *Id.*

67 *See supra* text accompanying notes 46-52.

68 *See* Montgomery et al., *supra* note 11, at 832 (finding that black and Latino MSM who reported only male partners were less likely to self-identify as gay than their white counterparts).

69 Mosher et al., *supra* note 41, at 13.

70 *See* Gregory M. Herek, *Heterosexuals’ Attitudes Toward Bisexual Men and Women in the United States*, 39 J. SEX RES. 264, 268 tbl.1 (2002) (reporting results of national survey demonstrating that public attitudes toward bisexuals were lower than any other stigmatized group listed in the survey, except drug users). In general, attitudes toward bisexual male targets were more negative than those toward bisexual women. *See id.* at 271. The Herek study also found that people of color expressed greater negativity toward bisexuals than whites, but once Herek factored in class, this effect was not significant. However, white women’s attitudes remained more favorable than other women and all men. *See id.* at 270.

71 *See, e.g.,* Yoshino, *supra* note 43, at 399 (stating that the “gay community abounds with negative images of bisexuals as fence-sitters, traitors, cop-outs, closet cases, people whose primary goal in life is to retain ‘heterosexual privilege,’ [or] power-hungry seducers who use and discard

their same-sex lovers”)) (quoting Lisa Orlando, *Loving Whom We Choose*, in *BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT* 223, 224 (Lorraine Hutchins & Lani Kaahumanu eds., 1991)). An important contributor to bisexual invisibility is that people typically look to a person’s current partner to define his sexual orientation. Hence, a man who has a boyfriend is marked as gay even though his last relationship might have been with a woman. See Mary Bradford, *The Bisexual Experience: Living in a Dichotomous Culture*, in *CURRENT RESEARCH ON BISEXUALITY* 14 (Ronald C. Fox ed., 2004).

72 See Bradford, *supra* note 72, at 15 (“One man who felt his bisexuality was invalidated by gay men said, “If I tell my gay friends that I’m bi, they immediately say, ‘Well, you just have not figured it out yet,’ or ‘You want to hang onto the straight world,’ or ‘You’re not ready to admit that you’re gay.’”).

73 See *supra* text accompanying note 24.

74 See Thomas C. Mills et al., *Health-Related Characteristics of Men Who Have Sex with Men: A Comparison of Those Living in “Gay Ghettos” with Those Living Elsewhere*, 91 *AM. J. PUB. HEALTH* 980, 980-81 (2001) (comparing characteristics of MSM in four major cities and finding that those who do not live in gay enclaves are more likely to identify as bisexual).

75 See Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 *FORDHAM L. REV.* 2787, 2802 (2008); see also Corey W. Johnson & Diane M. Samdahl, “*The Night They Took Over*”: *Misogyny in a Country-Western Gay Bar*, 27 *LEISURE SCI.* 331, 337 (2005) (documenting in an ethnographic study the hostility expressed by gay men at lesbians whom they perceived to be invading their space during a bar’s sole “Lesbian Night”).

76 Cf. Crenshaw, *Mapping the Margins*, *supra* note 27, at 1299 (calling “attention to how the identity of ‘the group’ has been centered on the intersectional identities of a few”).

77 See Bradford, *supra* note 72, at 21 (“To affirm a bisexual identity requires transcending the culture.”).

78 Of course racial discrimination and sexual orientation discrimination are not experienced as distinct forces. Once he discloses his bisexual behavior, a man is likely to find that stereotypes about bisexuals inflect the racial discrimination that he faces and vice versa.



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NONLETHAL SELF-DEFENSE, (ALMOST ENTIRELY) NONLETHAL WEAPONS, AND THE RIGHTS TO KEEP AND BEAR ARMS AND DEFEND LIFE*

Eugene Volokh**

Owning a stun gun or Taser is a crime in seven states and several cities. Carrying irritant sprays, such as pepper spray or Mace, is probably illegal in several jurisdictions. Even possessing irritant sprays at home is illegal in Massachusetts if you're not a citizen.

Yet in most of these jurisdictions, people are free to possess guns in the same situations where stun guns or irritant sprays are illegal. So people who have deadly devices are fine. But those who have a nonlethal weapon—perhaps because they have religious, ethical, or emotional compunctions about killing, or because they worry about killing someone by mistake, or because they worry about a family member misusing the gun—are criminals.

Other jurisdictions ban some people (such as felons and minors) from possessing not just stun guns and irritant sprays but also firearms. Others bar all people from possessing all three kinds of weapons in all public places, in public universities, in public housing, or on public transportation systems. People there are entirely stripped of the ability to defend themselves with any of the devices that are most effective for self-defense.

I will argue below that such regulatory schemes are generally bad policy. And I will argue that they are unconstitutional, perhaps under the Second Amendment and in any event under those state constitutions that secure a right to bear arms or a separate right to self-defense.

**LAWS THAT RESTRICT
NONLETHAL
WEAPONS WHEN
GUNS ARE ALLOWED**

Stun guns and irritant sprays might sometimes be abused in situations where firearms wouldn't be (though each such abuse would likely be much less harmful). Robbers might be likelier to stun or spray victims than shoot them,

precisely because this won't expose the robber to a murder charge. People looking for nondeadly revenge, or trying to pull a prank, might stun or spray their victims even if they wouldn't have tried to kill them.

But bans focused on nonlethal weapons are likely to be unproductive or counterproductive. First, nonlethal weapon bans, especially city- and state-level ones, are likely to have only modest effects on stun gun or irritant spray crime, precisely because much such crime would be perpetrated by serious criminals. Someone who is not stymied by the laws against robbery or rape is unlikely to be much influenced by laws against carrying stun guns or sprays.

It's possible that total possession and sales bans might make nonlethal weapons harder to get. But many criminals would have no trouble visiting a neighboring city or even neighboring state to buy the weapon. And if the nonlethal weapons prove to be useful enough for criminals, a lively black market would likely develop.

Second, a crime committed with a stun gun or irritant spray will often otherwise have been committed with a gun or a knife. Thus, banning nonlethal weapons might decrease painful stunnings or pepper spray attacks, but might increase knife and gun crimes that cause death, serious injury, and psychological trauma. And even if the stun gun crime or irritant spray crime would otherwise have been committed using only manual force, that too could have led to serious pain, lasting injury, or even death.

Third, banning nonlethal weapons is likely to decrease self-defense by law-abiding citizens much more than it would decrease attacks by criminals. A woman who wants a nonlethal weapon for self-defense is much more likely to be deterred by the threat of legal punishment for illegally buying, possessing, or carrying the weapon than a criminal would be. And if she can't get the nonlethal weapon that works best for her, she might be less able to protect herself against robbery, rape, abuse, or even murder.

Why then do some jurisdictions treat nonlethal weapons—especially stun guns—worse than firearms? Not, I think, because allowing stun guns is indeed more dangerous than allowing only firearms. Rather, it's because firearms bans draw public hostility in ways that stun gun bans do not.

There is no well-organized National Stun Gun Association with millions of members who fight proposed stun gun bans. There is no stun gun culture in which people

remember their fathers' taking them to the woods to Taser a deer. There is no stun gun hunting, target-shooting, or collecting that makes people want to protect stun gun possession even when they feel little need to have stun guns for self-defense.

Relatedly, because irritant sprays and stun guns are still fairly uncommon compared to guns, laws that partly deregulate guns are sometimes enacted with little thought given to other weapons. And the state stun gun bans date back to before Taser International started widely marketing guns to the public. When the bans were enacted, stun guns might well have seemed like exotic weapons that were rarely used for self-defense by law-abiding citizens. But today stun guns are practically viable self-defense weapons, owned by nearly 200,000 people. The self-defense interests of prospective stun gun owners and of prospective irritant spray owners ought not be ignored.

Much of this, of course, is speculation. There is no available data about how often stun guns or irritant sprays are used either criminally or defensively. But for the reasons I mentioned above, I think such speculation strongly points toward the choice selected by forty-three states (minus a few cities) as to stun guns and by all states (minus some restrictions in a few states) as to sprays: allowing stun gun and irritant spray possession, and criminalizing only misuse.

This is especially so given the value of self-defense, a value that is constitutionally recognized. (Irritant sprays and stun guns are largely banned in other English-speaking Western countries, but this seems to be part of those countries' generally more restrictive view of self-defense rights.) If there is uncertainty, we should resolve this uncertainty in favor of letting law-abiding people use nonlethal tools to defend themselves and their families.

**LAWS THAT
RESTRICT BOTH
NONLETHAL
WEAPONS AND
HANDGUNS**

In several states, even law-abiding adults generally can't get licenses to carry concealed handguns, and can't possess or carry stun guns. In some other states, eighteen-to-twenty-year-olds are restricted this way. In some jurisdictions, both handguns and irritant sprays are likewise unavailable to all people in public places, or to some people anywhere. And many universities, as well as some public housing systems and some public transportation systems, ban handgun, stun gun, and irritant spray possession on the premises, even when the premises are residences (such as university dorm rooms). Law-abiding citizens in those states

or places are thus entirely barred from defending themselves in public using the most effective defensive weapons.

Legislatures that impose such broad weapons bans can at least say they are worried about the criminal uses of weapons generally, not just about the relatively rare situations where a stun gun or irritant spray would be misused but a handgun would not be. And indeed nonlethal weapons can be used both for crime and for self-defense.

But this is likewise true for the criminal law justification of self-defense: Allowing lethal self-defense lets some deliberate murderers get away with their crimes by falsely claiming self-defense. The killer is alive, and able to claim he was reacting to a threat from the victim. The victim is dead, and can't rebut the killer's claim. The killer doesn't have to prove the victim had a weapon, since it is enough for him to claim that the victim said something threatening and reached for his pocket. And the prosecution has to disprove the killer's claims beyond a reasonable doubt.

Sometimes the jury will see through the killer's false claims of self-defense, and conclude the claims are false beyond a reasonable doubt. But sometimes it won't, and the killer will be acquitted. And sometimes a killer will be emboldened to kill by the possibility that he might get away on a self-defense theory. The self-defense defense, like a weapon, is crime-enabling as well as defense-enabling—and yet it still allowed, and rightly so.

Irritant sprays are likewise crime-enabling as well as defense-enabling; yet they are now legal nearly everywhere in the United States, with the narrow exceptions noted above. The same is true of the skills taught in fighting classes, whether the classes focus on street fighting (such as Krav Maga), Asian martial arts, or boxing. Yet these classes are not only lawful, but generally seen as socially valuable, even when they focus chiefly on self-defense and not just on physical fitness.

Likewise, stun guns and irritant sprays should generally be legal to possess and to carry, because of the protection they offer to law-abiding citizens and despite the modest extra risk of crime they pose. The few jurisdictions that ban such weapons should largely repeal the bans, even for older minors and nonviolent felons. (Young children and violent felons seem especially likely to misuse the weapons, so bans on their possessing such weapons do make sense.) The many jurisdictions that don't have such bans shouldn't enact them.

The arguments above aren't just policy arguments. They are also constitutional arguments. To begin with, the right to keep and bear arms in self-defense is secured by the Second Amendment, and by at least forty state constitutions, including those of many states that restrict nonlethal weapons.

And stun guns and irritant sprays should be treated as “arms” for constitutional purposes. *District of Columbia v. Heller* rightly rejected the view “that only those arms in existence in the 18th century are protected by the Second Amendment.” Instead, *Heller* held, “Just as the First Amendment protects modern forms of communications [such as the Internet], and the Fourth Amendment applies to modern forms of search [such as heat detection devices], the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”¹

Heller does limit “arms” to weapons that are “of the kind in common use.”² Many state constitutional cases have used similar definitions. But this definition arose in cases involving weapons that were seen as unusually dangerous, not unusually safe. In particular, *Heller* reasons that the “limitation [to weapons in common use] is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”³ This suggests that uncommon weapons that are less dangerous than the common and protected weapons should indeed be outside the limitation, and should thus be constitutionally protected.

Moreover, twenty-one state constitutions, including several in states that ban stun guns or contain cities that ban stun guns, expressly secure a right to “defend[] life.” To quote one such provision, “All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”⁴ And the “defending life” and “protecting property” provisions have been read as securing a judicially enforceable right.

Nonlethal weapon bans substantially burden people’s right to “defend[] life and liberty,” because they take away a device without which defending life and liberty becomes much harder. And as with other constitutional rights, such a substantial burden should be treated as presumptively unconstitutional.

Consider, for instance, contraceptive bans, which deny people devices for preventing contraception but leave people free to use device-less techniques such as the rhythm method. Despite the availability of the rhythm method, the bans remain substantial burdens on people's right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁵ The right to control one's reproduction is implicated not just by overt prohibitions on begetting or not begetting a child, such as the mandatory sterilization at issue in *Skinner v. Oklahoma*.⁶ It is also implicated by bans on devices that are especially useful for avoiding pregnancy, since such bans substantially burden the exercise of the right to control reproduction. The same logic should apply to bans on those devices that are especially effective at defending life.

Likewise, the freedom of speech includes the freedom to use physical devices, such as telephones, the Internet, loudspeakers, and the like in order to speak, because they too are important devices for making speech effective. And, similarly, the right to defend property—a close cousin of the right to defend life—has been read by courts to include the right to use devices to kill wild animals that have been destroying one's property. No one suggests that the right to defend property lets one defend one's crops against moose, but only with one's bare hands, just as no one suggests that the right to control one's reproduction protects only device-free contraceptive techniques and not condoms. The right to defend life should likewise presumptively include the right to use those devices needed to make self-defense especially effective.

Of course, these rights are not unlimited in scope. For instance, though courts have held that the right to speak often includes the right to use loudspeakers, it might not include the right to use loudspeakers that are used at night or are too loud, and are thus excessively distracting. Similarly, one can argue that the right to defend life does not include the right to possess deadly weapons, precisely because those weapons pose special dangers of death well beyond the dangers inherently posed by the recognition of self-defense as a defense to a charge of homicide. A court may conclude that such a dangerous right must be expressly secured through a right-to-bear-arms provision, rather than being implicitly found in a provision protecting the defense of life.

But when it comes to nonlethal weapons, the extra danger of crime posed by their possession is not particularly great, and the burden on the right to defend

life posed by bans on nonlethal weapons is great indeed. So the general principle outlined above should apply: the right to defend life should include the right to possess the nonlethal weapons needed for effective self-defense, much as other rights include the right to possess and use devices needed to effectively exercise those rights.

* * *

There are powerful arguments for limiting deadly defensive tools, especially firearms, given the grave harms that gun misuse routinely causes. I don't generally endorse such arguments, partly because I think gun bans will do little to stop the misuse but much to stop lawful defensive use. But I see the force of those arguments.

Yet the crime control arguments for gun bans do not apply with anywhere near the same force to stun guns and to irritant sprays. And the self-defense arguments against gun bans do apply to such nondeadly weapons. On balance, people's right to defend themselves nonlethally with stun guns ought to be protected—both as a matter of sound policy and as a matter of our nation's and states' constitutions.

* This excerpt is based on *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199 (2009).

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1 128 S. Ct. 2783, 2791 (2008).

2 *Id.* at 2815-16.

3 *Id.* at 2817.

4 PA. CONST. art. I, § 1.

5 *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

6 316 U.S. 535 (1942).



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