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Journal of Scholarly Perspectives

Title

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<https://escholarship.org/uc/item/1bz6g64d>

Journal

Journal of Scholarly Perspectives, 6(01)

Author

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Publication Date

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

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

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

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.