
"Government as Brothel: What's Your Pleasure, Honey?"

Remarks on Public Gambling
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by Kelly Clark, Esquire.

Introduction: Legally, Politically, Morally -- This is Wrong.

I have been asked to speak to you about the peculiar situation we have out in Oregon-- land of milk and honey, of pristine coastlines and sacred forests, of high mountains and low clouds, land of coffee shops and bookstores and populist politics, a red state dominated by a blue city, and a state whose constitution proudly proclaims that there shall be no casinos staining our public lands and our public virtue -- where, strangely, over the last decades our governors have sited nearly a dozen tribal casinos, and where more are being sited as I speak. Of course I am honored to do speak to you about that, as a lawyer who has filed two lawsuits and plans to file more to try to stop this absurd and plainly unconstitutional practice. How is it in a state whose constitution prohibits casinos that our governors keep siting casinos? Stay tuned for an answer that only a government lawyer could love.

But I am afraid I cannot limit myself in these remarks to the legal landscape only. I happen to be a trial lawyer, and- at the risk of appearing immodest- I hope I am a good one. But if that is true, it is because my advocacy springs from my convictions -- my deepest philosophical and political and moral beliefs. I try only to take cases that I believe in, as a lawyer and as a citizen and as a human being.

So my second perspective on tribal gaming is as a citizen who thinks and cares about public policy. In my career I have engaged in formal academic study of political science and law and theology, and I have served in both the US Congress as a staffer to Senator Mark Hatfield and in the Oregon Legislature as an elected legislator, and when I speak about public gambling I must always restate why it is such a terrible public policy, arguments I have made since the 1989 Oregon Legislative session, when I stood side by side with liberal Democrats and conservative Republicans and unsuccessfully fought the expansion of public gambling by the Oregon Lottery.

And finally I must tell you that my remarks are coloured by a third perspective, far more personal than simply my role as a lawyer or public citizen. You see, 14 years ago through the intervention of loving friends and family my life was saved from the twin tornadoes of alcohol and addiction; and ever since then as a sober recovering alcoholic I have spent enormous time and energy working my program and helping other men whose lives are snared by the hooks of addiction: alcohol and drugs, sex and pornography, and- as cruel and deadly as any of these others- compulsive gambling. And though I myself have never had to get caught in the gambling web, I have worked with men in recovery for whom gambling was every bit as enslaving as any drug or drink. And so the third

part of my remarks are a moral condemnation of government-sponsored addiction, from the perspective of a recovering man who hates compulsive gambling for what it does to the lives and souls and families of the men and women in its path: to the young and the old, to the rich and - more often - to the poor, to teachers and truck drivers and trial lawyers.

Finally by way of introduction, let me candidly admit that, other than perhaps on a few narrow legal questions concerning the Oregon situation, I am no expert in federal Indian policy. You have a wealth of people talking to you this week who have forgotten more than I know about the nature and history of these questions. But perhaps it is good to have a generalist in the midst of these rightly respected specialists. Instead of the kind of detailed and sophisticated analysis that comes from academic or technical expertise, I can perhaps offer the view from 30,000 feet, a look at the whole diseased forest rather than the up close look at individual sickly trees. For I believe that we will not rid ourselves of this national vice unless and until we see the big picture -- and until we help our fellow citizens see that big picture-- that it is wrong for the government to sell our public virtue like a street hooker sells her private virtue, simply so she can meet her short-term financial needs or ease her guilt over her past mistakes.

1. Why We Site Casinos in a State Whose Constitution Proclaims "No Casinos."

For the last two years I have been privileged to represent a citizens' group of some of the finest people I have ever met, calling themselves "PACT- People Against a Casino Town." The Town is the coastal hamlet of Florence, Oregon. Now this is a quaint and quiet place on the stunning Oregon coast, a town that- if you added some snow and took away the coastal setting - might remind you of Jimmy Stewart's Bedford Falls: where folks know their neighbors, where fishermen and parents and business owners gather at the community center to talk out community problems, and where people are proud of the small town way of life.

Well to cut to the chase, about ten years ago a confederation of native tribes petitioned the federal government to bring some land called the Hatch Tract into tribal dominion. And they made very public representations that they had no plans to build a casino on this land. Then, later, well, you might not be surprised to learn that they decided that, after all, a casino would be a good idea. And of course, this created quite a firestorm of controversy in Florence, which has in the last few years been host to more campaigns and elections and lawsuits than any small town should have to bear, pitting neighbor against neighbor and citizen against city hall, the result of which has been as ugly as anything I have ever seen in local politics. But the PACT remain committed to stopping the casino right where it is, a glorified tent that -- we are told -- because of our lawsuit cannot obtain permanent financing to build the massive bricks and mortar monstrosity that is planned and that would effectively turn Bedford Falls into Pottersville.

To understand the theory of our lawsuit is not

difficult. In 1984 when the Oregon Lottery was created, Oregonians were cautious enough to add a provision to our state constitution that prohibits casinos. Seems as if scratch-it lottery tickets were one thing, but outright casino gambling was not something we were willing to tolerate. So as tribal casinos started being thrown up in the 1990's, more and more eyebrows were raised but nothing was done. Perhaps part of this is because the lottery itself was expanding hand over fist, video poker, line games, and all the rest.

But along came PACT a few years ago and decided to call the Governor's bluff and demand that he do his sworn duty to uphold the Oregon Constitution. Four courts and three lawsuits later, we are still trying to get an answer to our Very Simple Question - how is it legal for a governor to approve casinos in a state whose constitution expressly says "no casinos."

I will spare you the details of the amazing shell games PACT has faced, getting bounced back and forth between the state and federal courts, the Tribes and the State playing good cop/bad cop- all the while avoiding the Very Simple Question. But in essence the State has argued that the federal IGRA requires the Governor to site these casinos, that the Oregon Constitution in this circumstance is nothing more than a "state regulation" to be overridden by IGRA, and that, since we have a lottery that allows some types of Class III gaming, he is powerless to stop the Tribal casinos.

In response to this we have pointed out that IGRA is not the issue. We want a simple answer to a simple state law question: under the Oregon Constitution, can the Governor lawfully sign a compact for any casino? We point out that IGRA specifically defers to state policy on gaming and nowhere requires a state to violate its own

constitution to site casinos. This is why there are no casinos in Utah - their state constitution outlaws gambling. Oregon's Constitution, we keep reminding anyone who will listen, outlaws casinos.

Now, our latest attempt at justice- the third lawsuit - landed us in federal court; how that transpired I won't go into. But a federal judge decided last Spring that we could not maintain our suit, since the Tribes - whom we had only reluctantly sued - have sovereign immunity. Right. We knew that - which is why the previous lawyers handling the case before I got involved, and then I, did not sue the Tribes in the first place. But way back then, at the State's motion, the first court threw our case out because the Tribes weren't named. Hmmm.

Anyway, while some people saw this most recent decision as a defeat, I thought, and still think, that it proves that PACT's original theory and lawsuit was correct - that, under state law, a lawsuit against the Governor, not the Tribes, is the proper vehicle for answering the Very Simple Question. We are now able to prove what we could only argue before - that, because of tribal sovereignty, we cannot obtain a remedy through the normal legal channels- we have no "adequate remedy at law," and so we simply need a court to issue a mandamus and order the Governor to abide by the Oregon Constitution. That question is now before the Oregon Court of Appeals, and if we lose there, we will go on up to the Oregon Supreme Court.

Let me highlight this dizzying procedural history. I must confess that, after 23 years of practicing law, much of it public and constitutional law, I am astounded at what is transpiring here. First, that a group of citizens is forced to act as de facto Attorney General, seeking to enforce the Oregon Constitution, because neither the official Attorney General nor his client the Governor will do their

job. They, not we, should be the ones rising up indignantly and saying: "over my dead body will I violate the Oregon Constitution. I cannot trade my first duty - and my public integrity - for any purpose, good or not, even in exchange for Tribal promises to sprinkle lots of cash around the community. I cannot and will not do it." That is what he should be saying. Instead, we are left to ask a court to order him to say it.

The second staggering fact is that, so far, the courts won't do it. They seem paralyzed by a fear of rocking the boat. They seem to believe that under IGRA, the fix is in. "Shut up and go away," the courts seems to whisper: "Don't you get it? Congress has cut the deal in Washington. IGRA means that the federal government has chosen to throw the Tribes some bones and in exchange they will be quiet about historical and economic injustice. So the deal is done and the fix is in. Now, will you just shut up??"

Well, no, we won't. PACT won't and I won't. I have been in long battles before - twice in my career it has taken me a decade or more to get a case up the appellate courts and back down to trial, and half a dozen times I have been at a case for 5 or 6 years. So long battles are no big deal to me. And after this latest decision by the federal court, my law partner - a hot-headed Irish Catholic who has a passion for what is right - he and I and our whole team have committed to doing the rest of this case pro bono, for as long as it takes.

So, Governor listen up. I am not yet an old man, and I plan on being a thorn in your side, or that of your successor, for many years to come. And the people of PACT are made of pure steel. So, no, we won't go away. Not because of delay or obfuscation or Keystone cop routines or not- this is the most outrageous of all - the outlandish charge that

anyone with the unmitigated temerity to raise these issues is racist.

We are not going away. Not until someone in a black robe gives us an answer to our Very Simple Question.

Now, time will not permit me to go into detail about Oregon's newest planned casino, an off-reservation, giant Wal-Mart type-thing that the Warm Springs tribe wants to put near the town of Cascade Locks, right in the heart of the Columbia Gorge- that National Scenic area that defines the Pacific Northwest, a vast breathtaking canyon channeling the mighty Columbia River through mountains and cliffs and two hundred foot tall old growth forests. But imagine putting the largest casino in Connecticut right in the middle of Yosemite National Park in California, or the Grand Canyon or Yellowstone Park.

Well, this has triggered some very interesting opposition -- as liberal environmental groups join hands with conservative Christian family groups, and politicians in our latest race for Governor danced around the issue. Polls show close to 75% of Oregonians are opposed to this casino. And while the first attempt went down because of a botched environmental impact statement, they say they'll be back. Well, so will we. We filed suit against the first compact and we will do it on the next one as well.

Speaking of the National Environmental Policy Act brings me to another point I want to make on the legal front- that there are a number of legal theories and tools that can be brought to bear in fighting our national vice of gambling. Of course there is NEPA and IGRA and all the federal avenues that you are discussing here about to try to stop these wretched tribal gambling halls.

But there may be other things that can be done to attack public gambling. I am currently researching the possibility of suing the Oregon Lottery and the manufacturers of the line games and video poker machines using a tobacco-style products liability theory.

Think about it: if the tobacco companies cannot fraudulently sell highly addictive products, then why can the government? Let's get some subpoenas out there and light these guys up and find out exactly how they program those lights and bells on these machines so as to trigger the brain chemistry in the most addictive way possible. You KNOW they do that. Let's go prove it.

Or perhaps a straight case for violation of the truth in advertising laws: listen sometime to the disclaimers at the end of pharmaceutical ads on TV. You don't hear that kind of thing from the government advertising the lottery.

Instead they say this: "The Oregon Lottery- it does good things for schools." I wanna know why they don't have to tell the truth, and I wanna sue them over and over and over again until they get honest and until we raise the cost of doing business so high that they will have to do it differently or not do it at all.

But this brings me to my second major point in my remarks- the public policy challenge that lies before us, and the limits of lawsuits.

2. The Limits of Lawsuits in creating Public Policy.

I want to say something that might seem incongruous to you, given what I have just argued about the potential legal challenges to tribal gaming. For, no matter how effective lawsuits might be in beating specific instances of government sponsored gambling, ultimately lawsuits alone will not stop the larger trend. The only thing that will do that is when a working majority of the citizens oppose it, and that majority then begins to show up in elections and ballot measures and public opinion polls.

For support of my point I invoke no less than Lincoln, who understood this as well as any American President ever has. In his long, patient effort to starve and then choke slavery, he knew that he could only go as fast as the nation was ready to go. "Public opinion is everything," Lincoln said; "with it you can do anything, and without it you can do nothing." Later on, civil rights advocates knew the same thing. That the courts were way ahead of the country on civil rights does not mean that there wasn't a growing plurality as early as the 1950's and 60's who were fed up with American apartheid. No one understood this better than Martin Luther King, Jr, who focused like a laser beam on building public opinion. All of his efforts, speeches, marches, and books were done with this sole purpose in mind. When Eisenhower and then Kennedy and then Johnson started sending in federal troops and signing legislation to end legal racism in this country, they also knew that a working majority of Americans - maybe not everywhere, but a working national majority- supported what they were doing. This must be our goal in attacking tribal gaming and state-sponsored gambling.

I tell my conservative friends in the Pro-Life movement that they need to work more on public opinion and less on legislation. "Go change the hearts and minds of another 25% of the population and the public policy will follow," I tell them. The stem-cell research people understand this brilliantly, which is why they have high profile actors all over the TV and news making their case-- and they are winning, with breathtaking speed. Of course, the public policy and legislation will follow easily and naturally; it has already started in California and in Congress. Likewise, environmental groups have always known the centrality of public opinion, and their legal strategies have usually been designed to achieve symbolic wins or to buy time while they educate the public.

In contrast, to use a recent example, the gay community - for all their political sophistication - has not yet understood this fundamental dynamic, relying almost exclusively on courtrooms instead of town squares. They have approached the goal of same sex marriage by trying to mirror the ACLU's "impact litigation" model. But the two situations are markedly different: the ACLU knows that a working majority of Americans support the Bill of Rights, even if they do not agree with how it gets applied from time to time. The ACLU litigation strategy has always been designed to sustain and improve public support for the Bill of Rights - not to act as a substitute for that public support. In the long view, courts can only deliver what the population will support.

Public opinion is everything.

So. No matter how much success guys like me have in courtroom wins, all I can do is provide teachable moments for the public - chances for groups like yours and PACT, for the Oregon Family Council

and Friends of the Columbia Gorge, to take these legal cases and use them as part of the larger campaign to mold public opinion. The legal must always serve the political; not the other way round. YOU must convince the public - much more than I must convince the courts -- that this is bad policy.

Now folks like you know the public policy arguments better than I- you have a whole host of smart people here this week to remind you of them. Public gambling costs society more than it offers, economically and socially and morally. You have heard the statistics about the way these casinos suck the economic life out of communities, and the crime and vice they throw off, and the lives they destroy. Make those arguments.

But of all the dishonesty from the other side, there is one piece that, as a former elected official who still cares about public policy, especially galls me. This is the idea wrapped up in the slogan I mentioned a minute ago. "The Oregon Lottery- it does good things for schools." Now nearly every state has such a slogan, and the Tribes have picked up on this approach as well. So in Florence the Casino has thrown money around town like a drunken sailor on leave- one who is trying very hard to impress his Captain with what a big-hearted guy he is. They spend money for community centers and handicapped kids and road improvements and even general fund taxes. Of course they do this- the Tribes are no dummies. They understand the battle for public opinion! In the case of the Columbia Gorge- the Warm Springs Tribe have promised so many perks that local officials are falling all over themselves to say yes. The fact is that governments have themselves become addicted to these revenues. In Oregon, the state lottery is responsible for something like 20% of the K-12 education budget.

Public agencies have become gaming junkies. They like the fix.

To this I just have two comments. First, I say-- I a political conservative -- that this is an incredibly dishonest way to raise public revenue, because it neglects the need to justify the programs. Where are the old school pro-government guys, the honest tax and spend liberals who would get in your face and argue and advocate for their programs and tell you why it was morally and socially and economically right for you to pay taxes to support this program? Where are the Roosevelts and the Trumans and the Hubert Humphreys-- who were convinced and clear and honest about what they wanted to do and what it would cost you and why you should be willing to pay for it? Give me those guys any day over these mealy-mouthed bureaucrats who try to paper over important public policy questions with gambling revenues.

Second, the argument that gambling revenues are a voluntary tax is utterly idiotic and duplicitous. For one, we know that for a significant portion of those who gamble it is anything but voluntary. Otherwise why does the Oregon lottery now allocate 8% of its revenues for gambling addicts?

But apart from this, the rationale of "voluntary tax" totally begs the question of whether it is right and moral for government to sell vice and addiction as a way to raise revenue! For crying out loud, I can think of lots of ways to raise government revenue if vice is the engine. How about state sponsored prostitution?... "The Oregon Brothel Network: We're Waiting for You, Honey." Or maybe: "The Oregon Cocaine Connection: Helping You Reach New Heights." I am not talking about just regulating and taxing the vices, like we regulate and tax liquor. No, no, let's actually hire the hookers and manufacture the cocaine. Like

gambling, let's get into the business. Because, of course, both the Oregon Brothel Network and the Cocaine Connection can do good things for schools.

But, really now. Is this the sole criterion for how we raise money - that it is voluntary and successful? Of course not. If that were so, then we really would be sponsoring brothels and manufacturing cocaine. But we know instinctively that some things just aren't worth it. And there, again, is your job-- to convince the populace that gambling is one of those things. Of course, the bureaucrats who spend the gambling monies and the private interests who profit from them will never admit this. They cannot afford to; and they don't have the guts. Breaking an addiction, after all, is hard; and it takes both courage and rigorous honesty- two things in short supply in the world of public gaming.

Which brings me to my last perspective. My government is trying to addict me; and as someone who knows something about addiction, I am appalled and outraged.

So let's talk about Government as Dealer.

3. Government as Dealer.

In this last Sunday's Oregonian newspaper the front page feature was entitled: "Lottery Creates More Women Addicts." And the piece was complete with sickening statistics and half a dozen stories of women who got hooked and could not stop gambling. They spent their household money and then credit card money that they didn't have. They stole from their husbands and employers. They weren't there for their families-including one sad story of a woman whose cancer-ridden mother died while she, the adult daughter, was gambling in one

of the casinos. Now, being in recovery for 14 years you would think I might get used to the stories of what people do when they are addicted, but I never do. It always makes me sad and I always want to help the addict who still suffers. And I want to break the knees of anyone who enables or encourages an addiction.

But another piece of this that you should think about. I never cease to be surprised at how ignorant and judgmental so many people are about addiction, thinking it is a character issue or a moral issue. Now this is surely not the place to discuss the disease model of addiction, and certainly it is true that the best recovery programs insist on recognizing our moral failings and cleaning the slate by owning our own mistakes and righting our wrongs. But if addiction only happened to people of weak or poor character, then you would find no people of good character in recovery. In fact, I have found the opposite to be true. In my home recovery group are about 75 men who are sober and helping others to get sober, men who are good husbands and fathers and employees and citizens, men who are living honorable lives and who would crawl over broken glass to keep their word. I have to assume that this is the moral character that was there all the time and that by beating the disease they have simply "recovered" their essence.

I go into some detail on this because we need to realize that our government is foisting a terrible vice on good and moral people, some of whom happen to be predisposed to addiction. And the government is doing it knowingly. And so are the Tribes. And this is simply wrong. It is immoral. This has got to be part of the argument you make.

Of course, there have always been gamblers, as the government types will argue. Sure, it used to be

you could find a place to gamble if you wanted to. But you had to look for it. But now thanks to government and the Tribes, it is in your living room at night and in the newspapers in the day, in your favorite restaurant or pub or on the highway to the Columbia Gorge or the Oregon Coast. The government and the Tribes will tell you that people will gamble no matter what. Really? Then why do they advertise?? Because they know their advertising works and gets people to gamble who otherwise would not. That's why they do it.

Have you studied the statistics on gambling addiction since the advent of the lotteries and the tribal casinos in the 1980's and 1990's? They have skyrocketed. Because it is more available. People who have never lied in their lives start being dishonest; people who have never stolen anything become thieves. Good people start doing bad things -- housewives and pastors and really nice old pharmacists. The disease, as we say, is no respecter of persons or professions. And the destruction in these lives is nearly total. Do you know how long it takes to recover from \$100,000 in debt if you make \$35,000 a year? Or how long to mend the trust of spouses and children, of friends and employers? How long to forgive oneself and again become a productive member of society?

And here is the salient point for our purposes today - and your best argument: these ruined lives are a known consequence of an official government policy. Collateral damage. This is no different than if the government were to knowingly expose citizens to asbestos, or young adults to the aids virus, or kids to risks of cancer. If we could raise 20% of some public budget with a 10% collateral damage of broken homes and bankruptcies and lost jobs and suicides, would we do it? Of course not. It would be immoral. So why do we tolerate our government acting as a Dealer of gambling

addiction? Where is the government's moral compass? Where is their shame? And where is society's moral outrage- from women's advocates and consumer groups and the churches and the media? Where is the outrage?

Conclusion: Go Tell It.

Friends, let me conclude by recalling that, ever since I was a 31 year-old freshman legislator and I saw in the budget for the Oregon Lottery that they were setting aside a good chunk of their revenues for gambling addiction programs, I knew something was terribly, terribly wrong. And it still is. As I have mentioned, these days I spend a good deal of time working with young men in recovery- and more and more often these days they come in dually addicted: drugs or alcohol on the one hand and internet porn or government-sponsored gambling on the other. And let me tell you when they come in they are in pain. No one comes into recovery on a winning streak. The Big Book of Alcoholics Anonymous describes the inability to quit as "hopeless and incomprehensible demoralization." That is as good a description as I can find for the suffering addict. So when I consider that a significant portion of this pain is knowingly caused by my government and by my fellow citizens in the Native American Tribes,

I am appalled.

I am angry. I won't stand for it.

And I know you won't either.

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