

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

KRISTIN M. PERRY,)
SANDRA B. STIER, PAUL T. KATAMI,)
and JEFFREY J. ZARRILLO,)
)
Plaintiffs,)

VS.) NO. C 09-2292-VRW

)
ARNOLD SCHWARZENEGGER, in his)
official capacity as Governor of)
California; EDMUND G. BROWN, JR.,)
in his official capacity as)
Attorney General of California;)
MARK B. HORTON, in his official)
capacity as Director of the)
California Department of Public)
Health and State Registrar of)
Vital Statistics; LINETTE SCOTT,)
in her official capacity as Deputy)
Director of Health Information &)
Strategic Planning for the)
California Department of Public)
Health; PATRICK O'CONNELL, in his)
official capacity as)
Clerk-Recorder for the County of)
Alameda; and DEAN C. LOGAN, in his)
official capacity as)
Registrar-Recorder/County Clerk) San Francisco, California
for the County of Los Angeles,) Tuesday
Defendants.) January 12, 2010
) 8:30 a.m.

TRANSCRIPT OF COURT TRIAL PROCEEDINGS

Reported By: *Katherine Powell Sullivan, CRR, CSR 5812*
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P R O C E E D I N G S

JANUARY 12, 2010

8:36 A.M.

THE COURT: Very well. Good morning, Counsel.

(Counsel greet the Court.)

THE COURT: Let me ask that you enter your appearance this morning by simply signing in with the clerk. And she will provide that to the court reporter, so all who wish to enter an appearance can have that recorded without the necessity of us going through the litany that we have during these proceedings.

Now, one other point. Is Ms. Pachter, the attorney general's --

MR. BURNS: She is not here right now, Your Honor.

THE COURT: I beg your pardon?

MR. BURNS: She is not here right now.

THE COURT: All right. Well, I have entered an order this morning asking and setting a deadline for a response to the question that I asked her yesterday, of 5:00 p.m. on Thursday. And then would ask the proponents and plaintiffs to respond with whatever position they have on that question.

Whether it has some bearing on the issue of standing that we discussed on Wednesday, I'm not sure. But at least that's a thought rolling around in the back of my mind. And with your able assistance, I'd like to be able to sort through that question.

1 **MR. THOMPSON:** Very well.

2 **THE COURT:** All right. I believe we are ready to
3 continue the testimony of Ms. Cott.

4 **MR. BOUTROUS:** That's correct, Your Honor.

5 **THE COURT:** Very well. Would you bring her forward.

6 **MR. BOUTROUS:** Ms. Cott.

7 **NANCY COTT,**

8 called as a witness for the Plaintiffs herein, having been
9 previously duly sworn, was examined and testified further as
10 follows:

11 **THE COURT:** And as you come to the stand, Ms. Cott,
12 let me remind you, you are still under oath. Do you understand
13 that?

14 **THE WITNESS:** Yes, Your Honor.

15 **THE COURT:** All right. Fine. The oath you took
16 yesterday applies to this testimony, as it did yesterday.

17 You may proceed, Mr. Boutrous.

18 **MR. BOUTROUS:** Thank you, Your Honor.

19 **DIRECT EXAMINATION RESUMED**

20 **BY MR. BOUTROUS:**

21 **Q.** Good morning, Professor Cott.

22 **A.** Good morning, Mr. Boutrous.

23 **MR. BOUTROUS:** Your Honor, before I proceed with the
24 examination, one exhibit issue. I have conferred with
25 Mr. Thompson, and the proponents do not have any objections to

1 the select group of exhibits that were relied upon by Professor
2 Cott in her testimony. So I would move that they be admitted
3 into evidence.

4 **THE COURT:** Let's see. Those are exhibit numbers --

5 **MR. BOUTROUS:** I could list them off for the Court,
6 if that would be helpful. In fact, I have a list.

7 **THE COURT:** All right. Why don't you just hand that
8 list up to the court clerk.

9 **MR. BOUTROUS:** Yes.

10 **THE COURT:** And we'll take care of it.

11 (Plaintiffs' Exhibits 1308, 1309, 1314, 1316, 1317,
12 1319, 1322, 1324, 1325, 1326, 1327, 1328, 1334, 1335,
13 1746, 1750, received in evidence.)

14 **MR. BOUTROUS:** Thank you, Your Honor.

15 Your Honor, I would like to publish to the screen
16 another demonstrative I created out of the transcript of
17 Mr. Cooper's opening. And I have labeled it, "Proponents'
18 Position 2." If we could publish that, please.

19 (Document displayed)

20 **BY MR. BOUTROUS:**

21 **Q.** Professor Cott, I have displayed on the screen one of
22 Mr. Cooper's statements yesterday about the purpose of
23 marriage. And I will read it for the record. Mr. Cooper said
24 that:

25 "The purpose of the institution of marriage,

1 the central purpose, is to promote
2 procreation and to channel naturally
3 procreative sexual activity between men and
4 women into stable and enduring unions ... it
5 is the central and we would submit defining
6 purpose of marriage."

7 In your work as a historian, have you examined the
8 purposes of marriage in the United States?

9 **A.** Yes.

10 **Q.** Could you give me your views, as an expert in the history
11 of marriage in the United States, as to that statement by
12 Mr. Cooper in his opening statement.

13 **A.** I could.

14 **Q.** Would you do that for me.

15 **A.** Let me begin by saying, when I'm speaking of the purposes
16 I mean from the point of view of the state that sets up and
17 defines the terms of marriage.

18 And as I look at the history of the institution in
19 our country, I would certainly agree that this is one of the
20 purposes. But it is by no means the central or the defining
21 purpose of marriage.

22 In fact, picking this out rather -- when I heard it
23 yesterday, it rather reminded me of the story about the seven
24 blind men and the elephant, in that each of them is feeling the
25 animal at some side of it; and the one that feels the trunk

1 says, oh, this animal is just like a snake.

2 That is, marriage has many purposes. It is, as I
3 mentioned yesterday, a capacious, complex institution. And the
4 state's interest in having sexual activity between men and
5 women channeled into stable unions is one of the purposes of
6 marriage.

7 But I think that the larger understanding of
8 marriage, from the state's point of view, and the larger
9 purpose would put an emphasis on the household formation that
10 marriage founds, and the stability of that household formation,
11 its contribution to social order, to economic benefit, to
12 governance.

13 And I emphasize this because, as I said at the
14 outside, it's important to recognize the extent to which
15 marriage has been an institution of governance in our history.

16 **Q.** Let me ask you about that.

17 When you say "governance," how is marriage an
18 instrument of governance, when it's a union between two people?
19 How does that contribute to governance?

20 **A.** Looking at this historically, what I'm emphasizing here in
21 using that word is the regulatory purpose of marriage from the
22 state's point of view.

23 And long ago marriage had an important political
24 governance purpose. It set up men as heads of households who
25 would be responsible economically for their spouses and for any

1 of their dependents, whether those were biological children,
2 adopted children, stepchildren, slaves, apprentices, et cetera.

3 But the point of establishing marriage and giving
4 certain benefits to it was to ensure that the sovereign would
5 be able to govern the amorphous, large, variable population in
6 smaller subunits which were households.

7 Now, that political governance purpose of marriage
8 today is -- has shifted rather dramatically, because we no
9 longer assume that a single head of household governs everyone
10 below it. We have a much more individualized distribution of
11 political power in our population, particularly since 1920,
12 when women got the right to vote.

13 However, still today, the purpose of the state in
14 licensing and incentivizing marriage is to create stable
15 households in which the adults who reside there and are
16 committed to one another by their own consents will support one
17 another as well as their dependents.

18 The institution of marriage has always been at least
19 as much about supporting adults as it has been about supporting
20 minors, children, as the proponents tend to emphasize the
21 child's side.

22 **Q.** Has the ability or willingness to procreate ever been a
23 litmus test or a test of any kind in terms of the validity of a
24 marriage in the United States during our history?

25 **A.** No.

1 Q. And has -- as a historical matter, have there been -- has
2 it been recognized that there are other benefits, aside from
3 child-rearing benefits from marriage?

4 A. Most definitely, from the point of view of the state as
5 well as the point of view of the individuals who join it.

6 There has never been a requirement that a couple
7 produce children in order to have a valid marriage. Of course,
8 people beyond procreative age have always been allowed to
9 marry. And known sterility or barrenness in a woman has never
10 been a reason not to allow a marriage.

11 In fact, it's a surprise to many people to learn that
12 George Washington, who is often called the father of our
13 country, was sterile, and was known to be sterile because he
14 was in a second marriage to a woman who had had children. And
15 after George Washington and she married, they had no children.

16 This was an advantage, in many people's minds,
17 because he couldn't establish a hereditary monarchy when he
18 became president.

19 But this is just a rather striking example of the
20 extent to which procreative ability has never been a
21 qualification for marriage. Nor has it been a ground -- the
22 lack of same has never been a ground for divorce.

23 Q. Now, as a historical matter, has there been a function of
24 marriage, a purpose of marriage, that -- in terms of
25 legitimating children?

1 **A.** Yes. This function is not at all as vigorous as it used
2 to be in the longer past, when there was a much stricter line
3 of moral judgment between heterosexual couples who were married
4 and those who were not married, if they were engaging in sexual
5 activity.

6 Certainly, the line between legitimacy and
7 illegitimacy for any child born of a heterosexual couple was
8 the line of marriage/nonmarriage.

9 And that was a very important function of --
10 particularly among the propertied, because of the lines of
11 inheritance that would flow through legitimate children, and
12 only problematically, or much less so, through so-called
13 illegitimate children.

14 Now, today, in the 20th century, the tendency has
15 been to remove that bright line in terms of the child's just
16 desserts.

17 However, I believe it is still true in our family
18 courts that the marital family's children has the presumption
19 of all benefits that should flow to children; whereas, the
20 unmarried couple's children has to prove their -- that they
21 deserve these inheritance rights and other benefits of their
22 parents.

23 **Q.** Yesterday you spoke about the social meaning of marriage.

24 Does the legitimacy factor in a broader sense have
25 any connection to the social meaning of marriage, as it's

1 developed in our history?

2 **A.** Yes.

3 **Q.** Could you describe in what way.

4 **A.** I think I would just say that the fact that the state is
5 involved in granting these kinds of benefits and legitimacy to
6 the marital family tends to lend a prestige, a status to that
7 institution that no informal marriage has ever approximated.

8 **MR. BOUTROUS:** I would like to, Your Honor, display
9 what I have labeled, "Proponents' Position 3," which is another
10 statement taken from Mr. Cooper's opening statement, as a
11 demonstrative, with the Court's permission.

12 **THE COURT:** Very well.

13 **MR. BOUTROUS:** Thank you, Your Honor.

14 (Document displayed.)

15 **BY MR. BOUTROUS:**

16 **Q.** Now, here, Professor Cott, I'll read this for the record.
17 Mr. Cooper said that:

18 "Across history and customs marriage is
19 fundamentally a pro-child institution
20 between a man and a woman. Marriage aims to
21 meet the child's need to be emotionally,
22 morally practically and legally affiliated
23 with the woman and man whose sexual union
24 brought the child into the world."

25 In your view, from a historical perspective, is that

1 a correct and complete description of the purposes of marriage?

2 **A.** No. I think it's a very partial description.

3 **Q.** And why is it only a partial description?

4 **A.** Well, as I look at the history, I see very little evidence
5 that state authorities considered marriage from the point of
6 view of its pro-child, particularly it's pro-biological-child
7 advantages.

8 It's not that those advantages were absent. Not at
9 all. But, rather, that the purpose of the state, as I began to
10 say before, and the incentives given to marriage were much
11 broader than this, in the aim to create stable and enduring
12 unions between couples, and so that they would support one
13 another, whether or not they had children, and that they would
14 support the broad range of their dependents. Biological
15 children, but others.

16 In the longer history of the United States, what we
17 now call blended families and often think of as a contemporary
18 innovation, such families were extremely common in the past
19 because of early death and remarriage.

20 And many, many families in the past, that were
21 maritally based, included in them, among their dependents,
22 stepchildren, nieces and nephews whose parents might be absent
23 or dead, maiden aunts, unmarried sisters, aged parents.

24 And the establishment of marital unions and the
25 expectation that the head of household -- or in the 20th

1 century, as we moved toward the later 20th century, both heads
2 of household -- would be responsible for these dependents, has
3 been an extremely central, I would say, purpose of the state's
4 incentivizing of the marriage institution.

5 **Q.** Does marriage today serve any purposes beyond the purposes
6 that it served at the founding of our country?

7 **A.** I think that the purposes it serves today one can find
8 roots of these through the past. But the emphasis has shifted,
9 I think, in which purposes are more salient and which now have
10 less emphasis.

11 **Q.** The -- yesterday we talked about the history of marriage
12 as it related to slavery. I would like to ask you some
13 questions, now, going back to that general topic concerning
14 whether marriage laws in this country have always given members
15 of the population equal access to the institution of marriage.

16 Have marriage laws always treated citizens and other
17 members of the population equally and fairly in this country?

18 **A.** No. I would say they have not.

19 **Q.** In addition to the restrictions on slaves marrying, do
20 other restrictions come to mind?

21 **A.** Yes. And I think these are more directly relevant than
22 the slave example, which I used simply to illustrate starkly
23 how marriage is -- being able to marry is a sign that one has
24 the basic civil rights and ability to consent.

25 But the restrictions on marriage that have played

1 through American history are one major way in which I can show
2 evidence that marriage rules have been used as a mode of
3 governance.

4 And that was, as I mentioned yesterday, in dynamic
5 tension with the extent to which marriage -- a marriage once
6 formed is a zone of liberty for the partners within it. That,
7 by the way, is the emphasis toward which, I think, modern
8 marriage has gone.

9 But on the restrictive examples, there are several I
10 could mention. And the most plentiful are restrictions that as
11 many as 41 states and territories had for significant periods
12 of their history on marriage between a white person and a
13 person of color.

14 I use that phrase because while these laws originated
15 in the colonies in the 17th century, with bars on marriage
16 between whites and so-called negroes or mulattos, there were
17 also bars in some states as early as the 17th century on
18 marriage between whites and Indians.

19 And these bars, nullifications, criminalizations --
20 different states treated it differently -- they -- these kinds
21 of restrictions multiplied after the Civil War when emancipated
22 slaves could now marry.

23 And while the slavery regime had controlled these
24 marriages to a great extent -- there were laws in the
25 antebellum era -- nonetheless, after 1865 these laws multiplied

1 across the country. And in California and other western states
2 where there was considerable in migration of people from Asia,
3 there were many laws with strange descriptive categories -- I
4 say "strange" from our contemporary point of view -- of Asian
5 ethnic or so-called racial groups, including Malays,
6 Mongolians, Canacas, and, of course, Chinese and Japanese.

7 The marriage laws of California and Oregon, and a
8 number of other western states, prohibited marriages between
9 whites and persons of those descriptions.

10 Now, these laws, of course, did not prevent any
11 particular white or any particular Asian person from marrying
12 totally. But they did prevent a white person who fell in love
13 with an Asian from marrying that person. And, therefore, it
14 was a limitation on partner. It was a limitation on choice.

15 And I want to add that legislators, in passing these
16 laws, of course, hoped to reduce the number of them, of such
17 relationships, preventing the marriages. They wanted to reduce
18 the number of such relationships, since they could not end in
19 marriage.

20 **Q.** Let me stop you and ask you about that.

21 **A.** Yeah.

22 **Q.** How did legislators and others who advocated these
23 restrictions how did they justify their fairness and legitimacy
24 in enacting them?

25 **A.** I'll answer that, but if I could just finish my previous

1 sentence, please.

2 **Q.** Sure.

3 **MR. BOUTROUS:** Your Honor.

4 **THE COURT:** Well, it's handy to throw in a question
5 now and then, Ms. Cott.

6 **THE WITNESS:** I'm sorry. Perhaps I was being too
7 long-winded.

8 The point I wanted to make, really, was legislators
9 knew these relationships were occurring. They simply did not
10 want to give them the imprimatur of valid marriage. They
11 wanted to make these relationships a second class sort of
12 relationship, a sort of disfavored sort of relationship, and
13 mark them that way by not giving them the full name and
14 benefits of marriage.

15 **BY MR. BOUTROUS:**

16 **Q.** And, given that, how did they at the same time justify
17 them to the people of the United States as necessary and
18 legitimate laws and restrictions?

19 **A.** Well, they were usually justified as only natural that
20 these laws were fulfilling God's plan that the races not mix.
21 That these were obvious, and how could anyone object?

22 They were highly defended as absolutely within
23 nature's and God's plan, that certain marriages were right and
24 other marriages were obviously not right.

25 And the legislators, while they, of course, were

1 enacting the changes themselves, were citing -- were
2 rhetorically citing larger and higher reasons for their
3 existence.

4 **MR. BOUTROUS:** Your Honor, I would like to publish
5 one more statement from Mr. Cooper's opening, which I'm
6 calling, "Proponents' Position number 4." With the Court's
7 permission.

8 **THE COURT:** Very well.

9 **MR. BOUTROUS:** Thank you.

10 (Document displayed.)

11 **BY MR. BOUTROUS:**

12 **Q.** So, Professor Cott, in his opening statement Mr. Cooper
13 declared that:

14 "Racial restrictions were never a
15 definitional feature of the institution of
16 marriage."

17 In your expert view as a historian, does that
18 statement accurately reflect our history?

19 **A.** No. I think it's inaccurate.

20 **Q.** Now, these restrictions, the racial restrictions, as you
21 mention, were not limited to black and white citizens. I think
22 you mentioned Asians.

23 Were there any particular restrictions that related
24 to Asian-Americans and Chinese-Americans, or people from those
25 areas who had -- were living here?

1 **A.** Yes. This is a complicated history. I'll try to be
2 brief.

3 There were a series of laws passed by Congress, from
4 the 1880s on, to exclude Chinese laborers from entering the
5 United States. Laborers were the great bulk of those who
6 wanted to immigrate. However, at the time exclusion laws were
7 passed, there were at least a hundred thousand or more Chinese
8 men resident in the United States, who stayed. And there was
9 the question of how they could find marriage partners, since
10 there were very, very few Chinese women.

11 And, as I said, around the same time, many western
12 states where most of these men lived passed laws preventing
13 Chinese from marrying whites.

14 Now, that would seem to destine these Chinese men to
15 bachelorhood, which many of them stayed in. However, of
16 course, there were states where there were not Asian-white
17 restrictions.

18 However, added to that, in 1907, as part of an
19 immigration law, the federal government made a statement which
20 became law that American women, native-born American citizens,
21 upon marrying foreign men, or aliens in the language of
22 immigration law, upon marrying aliens would lose their own
23 American citizenship.

24 I have to go into this. But this is another kind of
25 restriction placed through marriage policy, in this case not

1 law, because, of course, only the states really have the power
2 to pass laws in marriage.

3 But this federal policy said that any American woman
4 who married a foreigner would have to take his citizenship, and
5 would lose her American citizenship, even if she was descended
6 from the Mayflower.

7 Now, that was bad enough. But in the case of a woman
8 marrying a German, let's say, if he wanted to become an
9 American citizen, he could. He could go through the
10 naturalization process. He could become an American citizen.
11 And she could, as his spouse, also become an American citizen.
12 He was no longer an alien.

13 But Chinese were regarded as aliens ineligible to
14 citizenship. That is, not only did the U.S. exclude Chinese,
15 and later Japanese and many other Asians, but they prevented
16 those here from ever becoming citizens by naturalization.

17 **Q.** Was that a label that -- the phrase you just used, a label
18 that was actually used, "aliens ineligible for citizenship"?

19 **A.** Yes. I believe, in fact, the State of California invented
20 that phrase in order to designate those who could not own
21 property in California without naming them racially. It was a
22 way to designate exactly which group was meant, without a
23 specifically racial designation.

24 And so if I can just finish that train of thought.
25 So an American woman who married a Chinese man would not only

1 lose her American citizenship, but would never be able to
2 regain it unless he died. Or, I think, if she divorced him she
3 could apply for naturalization.

4 Now, that what seems in retrospect amazing
5 restriction on American women's citizenship rights because of
6 who they married, was actually very strongly fought in the
7 1920s, once women got the right to vote. And it was lifted by
8 a federal act. It was changed in the '20s. Except, that the
9 particular extra punishment for American women who married
10 aliens ineligible to citizenship remained. And it was
11 partially lifted for a very small group in the late '30s, but
12 not really entirely lifted until the U.S. became an ally of
13 China in World War II, and the seemliness of the great
14 restrictions on Chinese citizenship and naturalization came to
15 seem not very -- not very smart in terms of international
16 alliances and relationships.

17 **Q.** As a historical matter, the institution of marriage has
18 generally been regulated by states?

19 **A.** That is right.

20 **Q.** And so was it unusual for the federal government to weigh
21 in on marriage the way it did regarding Chinese and Asians in
22 the acts you described?

23 **A.** Well, of course, the federal government has the power over
24 immigration and naturalization and matters of national
25 citizenship.

1 And in setting this policy into the 1907 Immigration
2 Act, it seems to me, this is one of these cases where the
3 federal government wasn't really very circumspect in looking at
4 how this would have an impact on people, and, really, whether
5 it had the power to do so.

6 Because the law rendered numbers of women stateless.
7 The United States government had no power to say, well, this
8 woman is married to a Russian, a -- after the Bolshevik
9 Revolution, the USSR did not follow the policy that an
10 American -- that a woman would take her husband's citizenship.

11 So a woman who married somebody from the USSR in
12 1919, would be stateless. She would have lost her American
13 citizenship, and she would not have gained citizenship in the
14 Soviet Union.

15 And there were all sorts of anomalies as a result,
16 and it was -- I think I can say, in retrospect, it was an
17 extremely misguided policy in many ways. But it was an
18 expression of policy that had a tremendous impact on marriage.

19 **Q.** Are you aware of any more recent examples in our history,
20 where the federal government has inserted itself into the
21 marriage relationships in this country?

22 **A.** Yes.

23 **Q.** Could you give me an example.

24 **A.** I think the major area where this has been the case is
25 with respect to channeling benefits to Americans through the

1 institution of marriage.

2 And a very great move in this direction was taken, of
3 course, in the New Deal, when in the '30s the whole question of
4 citizenship was amplified, and matters of social -- social
5 sufficiency, economic sufficiency, were seen as part of
6 citizenship. Not only the political right to vote.

7 And so in the major benefits that were designed and
8 implemented through the Social Security Act, for instance,
9 there was a marital advantage built in, a very distinct marital
10 advantage for those who were married couples as compared to
11 either single individuals or unmarried couples.

12 And since then, with the expansion of federal
13 policies, et cetera, in the 20th century, the federal
14 government has tended to use the institution of marriage and
15 the marriage-based family as the conduit for benefits of many
16 sorts.

17 **Q.** Do you, as a historian, see any parallels between the
18 restrictions relating to race in our history in the institution
19 of marriage, and the restrictions that now exist in California
20 concerning individuals of the same gender who wish to marry the
21 person of their choosing?

22 **A.** Yes, I do see parallels.

23 **Q.** Could you explain to me, as a historical matter, what
24 parallels you see.

25 **A.** I think that the most direct parallel is that the

1 racially-restrictive laws prevented individuals from having
2 complete choice on whom they married, in a way that designated
3 some groups as less worthy than other groups, and some
4 marriages as less worthy than other marriages.

5 And it, as part of the same effort, the same
6 direction, it meant that the informal unions between couples
7 who made that choice would have less honor, less status, fewer
8 benefits, and so on.

9 **Q.** Now, at some point, the racial restrictions and the limits
10 on marrying persons across color lines were abolished, correct?

11 **A.** Yes.

12 **Q.** And when -- when that happened, were alarms sounded in the
13 populace regarding what might happen to the institution of
14 marriage?

15 **A.** Yes. These --

16 **Q.** Could you describe how people reacted, and the kind of
17 arguments that were made at the time.

18 **A.** Yes. Of course, these were state laws. And the shifts
19 and change in them, both the passage of them and the removal of
20 them, there were a lot of cycles.

21 There was a big burst of these laws being passed in
22 1913, for instance. Even though one might think they were
23 being seen to be overly restrictive, they recurred through
24 American history.

25 In fact, it's quite striking that even though the

1 U.S. Supreme Court, in 1923, first named the right to marry as
2 a fundamental right, the very next year, in 1924, Virginia
3 passed the most restrictive law in the nation about whites and
4 blacks marrying.

5 Now, there has always been -- just by the same token
6 that these laws were defended as naturally-based and God's plan
7 just being put into positive law, the efforts to undo them met
8 extreme alarm among those who thought these laws were correct.

9 And while the question of the constitutionality of
10 these laws could have come before the U.S. Supreme Court
11 earlier than the Supreme Court did decide on that question,
12 because this was thought to be such a hot-button issue and be
13 such a matter of controversy, the U.S. Supreme Court approached
14 it extremely cautiously, and did not take it -- although, they
15 could have taken a case in 1955, which would have brought this
16 issue before the nation, they waited until the case that was
17 decided in 1967, which came from Virginia and from that
18 extremely restrictive law passed in 1924.

19 So, yes, there have -- all along that history was --
20 the subject was extremely controversial, and the people who
21 supported such laws saw these as very important definitional
22 features of who could and should marry, and who could not and
23 should not.

24 **Q.** Did proponents of those laws argue that the abolition of
25 them would ruin the institution of marriage?

1 **A.** I don't know whether the word "ruin" was used. But,
2 certainly, they assumed that should couples across the color
3 line be admitted to marriage, that the institution would be
4 degraded, that their own marriages would somehow be devalued.

5 **Q.** And, as a historical matter, in your view, were they
6 correct or incorrect in those assumptions?

7 **A.** I think they were incorrect.

8 **Q.** Why is that?

9 **A.** Well, there has been no evidence that the institution of
10 marriage has been become less popular because -- or less valued
11 by people or by the state, even though couples needn't -- white
12 people can marry whoever they want. So that it doesn't seem,
13 to me, to have been borne out in the history.

14 And I might also mention that even to date, the
15 proportion of marriages that are across the color line in the
16 United States remains rather small.

17 It tripled in its percentage between -- I think, in
18 the 1960s, it was about 2 percent of marriages were across the
19 color line. And by the end of the 20th century, about
20 6 percent of marriages were across the color line.

21 Now, while that is a tripling of those marriages,
22 it's also still a very, very small proportion of those
23 marriages. And that's worth observing in terms of the alarm
24 about how the change would affect the institution.

25 **Q.** Professor Cott, have marriage laws in the United States

1 ever involved the state, the government, dictating the roles of
2 spouses?

3 **A.** Yes, indeed.

4 **Q.** Could you tell -- was there -- is there a term for that
5 role that the state played?

6 **A.** Well, marriage traditionally in the United States came
7 from the common law. And the common law included a doctrine
8 that was called "coverture" that described what marital roles
9 and duties were.

10 **Q.** Why was it called "coverture"?

11 **A.** Well, this is a word from the Norman French, but it has to
12 do with the fact that upon marriage the wife was covered, in
13 effect, by her husband's legal and economic identity. And
14 she -- she lost her independent legal and economic
15 individuality. Certainly not her personality, we know that
16 from literature. But she lost her legal and economic
17 individuality, which is really why Jane Doe became Mrs. John
18 Smith. She no longer had her legal individuality as Jane Doe.

19 **Q.** How did society and the states justify that doctrine that
20 took away a woman's individuality and individual status, in
21 essence, once they became married?

22 **A.** Well, this was the marital bargain to which both spouses
23 consented. And it was a reciprocal bargain in which the
24 husband had certain very important and -- very important
25 obligations that were enforced by the state.

1 His obligation was to support his wife, provide her
2 with the basic material goods of life, and to do so for their
3 dependents. And her part of the bargain was to serve and obey
4 him, and to lend to him all of her property, and also enable
5 him to take all of her earnings, and represent her in court or
6 in any sort of legal or economic transaction.

7 And this was a highly-asymmetrical bargain that, to
8 us today, appears to enforce inequality. And I think that
9 judgment isn't unwarranted. But I do want to stress it was not
10 simply domination and submission. It was a mutual bargain, a
11 reciprocal bargain joined by consent.

12 And it was the state, the common law and then the
13 positive law that adopted the common law, that enforced those
14 terms for the consensual bargain. The couple had to freely
15 consent to it, but the state set the terms.

16 **Q.** Was it viewed as -- based on assumptions at the time, as
17 sort of a natural division of labor between a man and a woman?

18 **A.** This asymmetricality had everything to do with the sexual
19 division of labor. Because assumptions were, at the time, that
20 men were suited to be providers, were suited for certain sorts
21 of work; whereas, women, the weaker sex, were suited to be
22 dependent, needed a stronger hand to guide them, support them
23 and protect them.

24 Women's work in the household was also extremely
25 important. And the kinds of work that women did and were

1 willing to do were the kinds of work that men would not do,
2 like gardening and milking the cows. This was all very
3 socially conventional.

4 In other cultures, the sexual division of labor might
5 be quite different, in terms of what was assigned to which sex.
6 But the sexual division of labor underlay the formation of the
7 marital household, and the reason that a man and a woman were
8 seen to be necessary to form a marital household. So that
9 their complementary tasks and duties and talents would be put
10 in synch and would enable the household to survive.

11 **Q.** So did the difference in sexes of marital couples have a
12 connection to and explain, at least in part, what -- let me
13 strike that and reframe it.

14 Did the sexual division of labor, does it explain in
15 any manner the sexual differences in marital couples that we've
16 seen through most of our history?

17 **A.** I think, yes.

18 **Q.** Could you just elaborate on that briefly.

19 **A.** Well, I think that with -- at a time period which extended
20 over a very long period of time, and really until the 20th
21 century, when the sexes were seen as so unsuited to the same
22 type of work, and their -- the work of each sex was seen as so
23 particular to the work of men on the one hand, the work of
24 women on the other, yet both really were seen as crucial to
25 human survival, and particularly to household sufficiency and

1 flourishing, that this was an extremely important reason, from
2 the state's point of view, to credit and create incentives for
3 the formation of marital households where the population could
4 live and be cared for.

5 **Q.** At some point in our history, did the sexual division of
6 roles of spouses come to an end?

7 **A.** Well, in the law, not fully until the 1970s. But that was
8 catching up, I think, with an overall change in the economy and
9 society toward -- this is with the development of
10 industrialization, move away from agrarian society, into a
11 society in which work is mechanized, takes place in factories
12 and shops, and so on, that with the direction of social and
13 economic change, as well as change in values about what is
14 appropriate for each of the two sexes to do, the sexual
15 division of labor became far less rigid.

16 And this was -- certainly, beginning by the late 19th
17 century, but through the 20th century and into our era, the
18 sexual division of labor is no longer necessary for the kinds
19 of work people do in the world.

20 And particularly after the Title VII of the Civil
21 Rights Act, the assignment of spousal roles on the basis of
22 very different proprieties for the sexual division of labor
23 came to seem increasingly archaic. So that in the law in the
24 1970s, as part of the more widespread Women's Rights
25 revolution, the states, really, by Supreme Court decisions, had

1 to step out of this assignment of spousal roles by gender.

2 And this did not, however, in any way reduce the
3 spouses' economic responsibility for one another and their
4 bargain to support one another, which had always been
5 reciprocal, though asymmetrical.

6 So that, currently, spousal roles are gender-neutral,
7 in terms of the states' assignment of them; that both spouses
8 are obligated to support one another, but they are not
9 obligated to do one another with a specific emphasis on one
10 spouse being the provider and the other being the dependent.

11 **Q.** Do you believe, as an expert, that that move towards
12 gender neutrality in spousal relationships is relevant in terms
13 of the historical development of marriage as it relates to the
14 marriage between individuals of the same gender?

15 **A.** It does seem to me quite relevant, yes.

16 **Q.** Why is it relevant?

17 **A.** Well, in the many years when the sexual division of labor
18 and this assumption that the marital couple was a -- an
19 asymmetrical couple with a provider and a dependent, that was
20 quite consistent with marriage between a man and a woman.

21 However, the more symmetrical and gender-neutral
22 spousal roles have become in fact, I would say, in the social
23 world and certainly in the law, the more that the marriage
24 between couples of the same sex seems perfectly capable of
25 fulfilling the purposes of marriage.

1 And as it stands today, individual couples are
2 certainly free to have gender-asymmetrical roles if they
3 prefer. But that's merely a matter of personal decision. It's
4 not something the state prescribes. The coverture doctrine is
5 dead. It's something up to intimate decision-making.

6 And the presence in marriage, in valid marriage of a
7 couple of the same sex fulfills all of the historical purposes
8 of marriage that continue into the present day.

9 **Q.** When these changes in gender equality within the marital
10 relationship occurred and began to occur, were there people in
11 society who said that that would have a negative impact on the
12 institution of marriage in this country?

13 **A.** Most definitely.

14 **Q.** Could you give me an overview of the kind of objections
15 and concerns that were expressed on those issues.

16 **A.** Well, a century ago, or throughout the entire 19th
17 century, when this became a controversial issue as certain
18 state laws were passed that edged into reducing the coverture
19 doctrine in its entirety, tremendous alarms were raised because
20 the primacy of the husband as the legal and economic
21 representative of the couple, and the protector and provider
22 for his wife, was seen as absolutely essential to what marriage
23 was. That asymmetry was seen as absolutely essential.

24 And while the initial ways of breaking into that,
25 which were a series of laws that were passed to enable married

1 women to have their own property and then their earnings, while
2 these initial forays raised tremendous alarm, they were
3 motivated, really, by concern -- economic concerns about
4 families' economic stability.

5 They were not, in motivation on the part of the
6 legislators, about women's equality and individuality. In
7 fact, there were lots of assumptions that the model of
8 marriage, provider/dependent, and so on, with all of its
9 implications about different sex roles, that these would
10 persist.

11 But over time, and particularly as the Women's Rights
12 movement and the Suffrage movement gained steam, and when women
13 gained the vote -- which was, of course, a very important move
14 towards their legal individuality -- the doctrine of coverture
15 came to seem more and more archaic.

16 Still, because there were such alarms about it and
17 such resistance to change in this what had been seen as quite
18 an essential characteristic of marriage, it took a very, very
19 long time before this trajectory of the removal of the state
20 from prescribing these rigid spousal roles was completed.

21 And, in fact, there are instances I could cite --
22 which I won't -- of how it recurred in certain decisions and
23 policies in the early 20th century.

24 However, I think I'm fairly confident in saying that
25 because of the Supreme Court decisions in the 1970s, that in

1 terms of the law, that this quality of marriage has been
2 removed to no apparent damage to the institution. And, in
3 fact, I think to the benefit of the institution.

4 **Q.** Let me ask you, in terms of historical trends in changes
5 to the institution of marriage, do you see such trends? Has
6 there been a trend or a trajectory, as marriage has developed
7 and the laws have changed?

8 **A.** Well, this is never a straight line. I do think there has
9 been an overall direction of change in the way marriage has
10 been defined and understood, and regulated through the states.

11 And that is toward a greater symmetrical
12 understanding of the two partners' roles in the marriage,
13 greater equality of those two partners, and fewer restrictions
14 on the choice of marital partner.

15 Therefore, the -- the overall emphasis I mentioned
16 earlier, that certain of the emphases within the purposes of
17 marriage had shifted, in terms of their gravity over time, and
18 I think the shift has been toward reemphasizing the extent to
19 which marriage choice and the zone of privacy and intimacy and
20 familial harmony that marriage ideally should create has been
21 the emphasis on that as a zone of liberty that it should be
22 available to citizens has been more greatly emphasized.
23 Whereas, the aspect of marriage as a regulatory and governing
24 institution, that -- in which the state is more prescriptive
25 about who should and shouldn't marry, and what should go on in

1 a marriage, the direction has been away from governance and
2 toward liberty. Although, both characters still typify the
3 marriage institution as a whole.

4 **Q.** Do you have a view, based on your historical research and
5 study, as to how those trends bear on the issue of whether
6 individuals of the same gender should have the right to marry?

7 **A.** It does seem to me that that direction of change leans
8 consistently toward -- toward the appropriateness of allowing
9 same-sex couples to marry.

10 **Q.** Why is that?

11 **A.** Because if gender symmetry and equality and the couples'
12 own definition of spousal roles are characteristic of marriage,
13 then same-sex couples seem perfectly able to fulfill those
14 roles.

15 There is no longer an expectation that the man-woman
16 difference need found household, given that the sexual division
17 of labor is no longer so pronounced in our society and isn't, I
18 hope, a founding feature of our economy and how economic
19 benefit is created.

20 And in all those respects, including the respect in
21 which, importantly, I think, other restrictions on choice of
22 marital partner, other restrictions that seem to have a
23 constitutional question aroused in them, like race, these have
24 been removed.

25 Of course, the state retains its right to restrict

1 access to marriage, and still does in many other ways which are
2 not controversial.

3 **Q.** You were aware -- and I want you to assume that the
4 proponents' witness or witnesses have suggested that if the
5 state authorizes individuals of the same sex to marry, that
6 will damage the institution of marriage and perhaps cause --
7 well, you were aware of that, correct?

8 **A.** I am.

9 **Q.** Are you, as a historian, based on your study in your book,
10 and in forming your opinions here, are you aware of any basis,
11 empirical basis, to conclude that authorizing individuals of
12 the same gender to marry would increase the divorce rate?

13 **A.** No, not aware.

14 **Q.** Are you aware of any evidence that would refute that
15 assertion?

16 **MR. THOMPSON:** Objection, Your Honor. It's not only
17 leading, but the witness was asked during her deposition
18 whether she was an expert in the consequences of same-sex
19 marriage. And she said:

20 "That seems to me an impossible question to
21 answer."

22 And so, now, she is being asked the question she
23 refused to answer during her deposition, and which is not in
24 her report in any meaningful way.

25 **MR. BOUTROUS:** Your Honor, may I -- I'm sorry.

1 **THE COURT:** Mr. Boutrous.

2 **MR. BOUTROUS:** I'm sorry. I didn't mean to
3 interrupt.

4 It is in her report, on page 5 of her rebuttal
5 report. And on page 199 of her deposition, Mr. Thompson
6 examined her on the issue of divorce in her home state.

7 **THE COURT:** Page 5?

8 **MR. BOUTROUS:** Page 5 of her rebuttal report.

9 **THE COURT:** But not in the deposition?

10 **MR. BOUTROUS:** It is in the deposition, on page 199.
11 She was questioned about that, as well.

12 **THE COURT:** Let me take a look.

13 **MR. BOUTROUS:** Actually begins on 198, and then
14 carries over.

15 **THE COURT:** It does appear this subject was explored,
16 at least to some degree, in the deposition.

17 Let me overrule the objection and hear the testimony.
18 And then, if necessary, you can review -- you can renew the
19 objection by way of a motion to strike.

20 **MR. THOMPSON:** Thank you, Your Honor.

21 **MR. BOUTROUS:** Thank you, Your Honor.

22 **THE WITNESS:** Could you rephrase the question,
23 please.

24 **BY MR. BOUTROUS:**

25 **Q.** Yes. Are you aware of any evidence, empirical evidence,

1 that bears on the issue of whether a law allowing individuals
2 of the same gender to marry would affect the divorce rate?

3 **A.** My only comment can come from observation of my home state
4 of Massachusetts, which has had same-sex marriage for five
5 years now. And this is, of course, only a correlation, but
6 Massachusetts has the lowest divorce rate in the nation.

7 **Q.** And has it increased since marriage between individuals of
8 the same sex has been recognized?

9 **A.** No. It has fluctuated but -- around a tenth of a
10 percentage point. But, if anything, the direction has been
11 down rather than up.

12 **Q.** Thank you.

13 To go back to something you mentioned a moment ago,
14 what do you today, based on the collection of events that make
15 up our history as a nation, view as the key defining
16 characteristics of the institution of marriage in the
17 United States?

18 **A.** First, of course, the consent of the two parties, which
19 has been the basis for marriage since the era of the common
20 law, the free consent of the two parties.

21 And I'll just add that in the United States, as
22 compared to Europe, for centuries that consent has been
23 presumed to rest on a love match, not on an arranged marriage.

24 So mutual consent between partners who freely choose
25 each other, and their commitment to establish a continuing

1 stable relationship as the foundation for a household in which
2 they will economically support one another and their
3 dependents, and enable themselves to compose a family.

4 **Q.** Do you believe that a law recognizing the ability of
5 individuals of the same sex to marry would be consistent and
6 would include those characteristics you have just identified as
7 being defining?

8 **A.** Yes.

9 **Q.** Why?

10 **A.** It seems to me that couples of the same sex have expressed
11 many of the same motivations as couples of different sex to
12 marry and to establish stable households.

13 And, in that regard, especially in an era when
14 families can have children that are not the result of
15 biological procreation, and so many families do, that it seems
16 to me same-sex couples fulfill the aims of marriage from the
17 point of view of the state.

18 And, certainly, it's up to any partner -- intimate
19 pair to decide whether they wish to be married or not. But
20 seems to me that by excluding same-sex couples from the ability
21 to marry and engage in this highly-valued institution, that
22 society is actually denying itself another -- another resource
23 for stability and social order.

24 **MR. BOUTROUS:** Your Honor, if I may just check with
25 my colleagues, I think I may have covered the waterfront.

1 **THE COURT:** Very well.

2 (Pause)

3 **MR. BOUTROUS:** No further questions, Your Honor.

4 **THE COURT:** Very well. Mr. Thompson, you may
5 cross-examine.

6 **MR. THOMPSON:** Thank you, Your Honor. We have some
7 binders. May we approach the Court and the witness and pass
8 out the binders?

9 **THE COURT:** Certainly. You may do so.

10 **MR. THOMPSON:** Thank you, Your Honor.

11 **CROSS EXAMINATION**

12 **BY MR. THOMPSON:**

13 **Q.** Good morning, Professor.

14 **A.** Good morning, Mr. Thompson.

15 **Q.** You don't consider yourself an expert in the history of
16 marriage in countries outside the United States, correct?

17 **A.** Since I place a fairly high bar on what is expertise, the
18 answer is yes.

19 **Q.** So you're not an expert in the history of marriage outside
20 the United States?

21 **A.** Not in my own terms, no.

22 **Q.** And you are not familiar with the institution of marriage
23 in the most populated countries on the planet, China and India,
24 correct?

25 **A.** I'm somewhat familiar.

1 Q. Well, let's look at what you said in your deposition in
2 the Iowa case. And that's tab 2 of your witness binder. And I
3 would like to direct your attention to page 55, lines 12
4 through 14.

5 A. Page 55 is under tab 2; is that right?

6 Q. Yes.

7 A. I see. Oh, I need my reading glasses for this. Which
8 page?

9 Q. 55. It's in the upper right-hand corner.

10 A. Uh-huh.

11 Q. And in line 12 you were asked:

12 "Are you familiar with the institution of
13 marriage in the most populated countries on
14 the planet, China and India?"

15 And you answered:

16 "No, not really. I mean, no."

17 The consequences of same-sex marriage is an
18 impossible question to answer. Yes or no?

19 A. You're asking me to say yes or no?

20 Q. I am.

21 A. Right. I believe no one predicts the future that
22 accurately.

23 Q. And you're not an expert on marriage practices in ancient
24 Greece, correct?

25 A. I am not an expert on that. I am somewhat familiar with

1 it.

2 **Q.** You think gays and lesbians should have the right to
3 marry, correct?

4 **A.** I have come to that view from my research and study of the
5 history of marriage, yes.

6 **Q.** And you feel that you're somewhat between a neutral party
7 and an advocate, correct?

8 **A.** I would call myself not an advocate, but someone who has
9 come to a personal opinion as a result of my historical
10 research and study of this matter of the history of marriage
11 for quite a number of years now.

12 **Q.** Let's see what you said during your Iowa deposition.

13 The next page, page 59, top of the page, lines 1
14 through 4. You said:

15 "So I feel I'm somewhat between a neutral
16 party and an advocate, in that I feel I'm led
17 by my particular historical expertise to feel
18 that this is the direction."

19 Now, you've put in amicus briefs and signed on to
20 amicus briefs in New York, New Jersey, and Washington State; is
21 that correct?

22 **A.** Historians briefs, that is right.

23 **Q.** And you weren't compensated for your work in those cases,
24 were you?

25 **A.** I was not.

1 Q. Okay. And you volunteered your time because you viewed
2 this as an important civil rights issue, correct?

3 A. I volunteered my time because I think it's very important
4 for historians to contribute to public-policy discussions.

5 Q. I'd like to direct your attention to tab 4 of your binder.
6 And this is the Alternatives to Marriage Project. It's the
7 annual report of 2002. And I'd like to direct your attention
8 to page 13.

9 It's the upper right-hand column. It lists donors to
10 this organization. And it lists a Nancy cot. Is that you?
11 Did you contribute to the Alternatives to Marriage Project?

12 A. It's possible. I don't recall. It's possible.

13 Q. Okay. Let's turn to page 4 of this report, to the mission
14 statement of the Alternatives to Marriage Project. And it
15 states that:

16 "This organization advocates for equality and
17 fairness for unmarried people, including
18 people who choose not to marry, cannot marry,
19 or live together before marriage."

20 And you support that mission, don't you?

21 A. I do.

22 Q. And in the third sentence of that paragraph it states:

23 "We believe that marriage is only one of many
24 acceptable family forms, and that society
25 should recognize and support healthy

1 relationships in all their diversity."

2 And you support that mission statement, don't you?

3 **A.** I do.

4 **Q.** And a polyamorphous family is one in which there are three
5 or more adults who are in the family group; is that correct?

6 **A.** I don't know. At the time I signed this statement, I had
7 never heard the term polyamory.

8 **Q.** Have you heard it since?

9 **A.** I have heard it since.

10 **Q.** What is your understanding of polyamory?

11 **A.** My understanding happens to come from an article that was
12 in the Boston Globe about a week ago. And that was, really, my
13 education on what it is. And, apparently, it's a network of
14 people who are in multiple but stable relationships.

15 **Q.** And let's turn to page 6 of this annual report, to the
16 final bullet point on the page, which reads -- and this was
17 written, of course, between the -- before the Supreme Judicial
18 Court of Massachusetts had ruled, so it's a little dated. But
19 it said:

20 "Same-sex couples are denied the right to
21 marry in every state. Others are also unable
22 to marry, including those in relationships of
23 more than two people."

24 And, so, is it your understanding and do you support
25 the concept that rights and benefits should be extended to

1 polyamorphous families?

2 **A.** No.

3 **Q.** Did you support it at the time when you gave money to this
4 organization?

5 **A.** I wasn't aware of it. I knew the couple -- the
6 heterosexual couple who founded this organization. They had
7 started it around the time I was publishing my book.

8 And they were mainly interested and their
9 organization was started to give credit to those heterosexuals
10 who wanted to live in stable unions without marrying.

11 And I think the right to marry should be accompanied
12 by an emphasis that one does not have to marry, if one doesn't
13 want to. And it was from that angle that I supported this
14 young heterosexual couple who had been pressured by their
15 families to marry, and they didn't want to enter the
16 institution.

17 **Q.** And turning to tab 6 in your binder, this is an
18 Affirmation of Family Diversity. It's part of the Alternatives
19 to Marriage Project.

20 And turning to the third page in your binder, behind
21 tab 6, do you see second line that says, "Nancy Cott, History
22 in American Studies, Yale University"?

23 **A.** It's not in my -- in my binder. No. I see the "View
24 signatures here," but I don't see any names.

25 **THE COURT:** It's not in my binder either, Counsel.

1 **MR. THOMPSON:** Okay. Well, maybe we can pull that up
2 on a screen.

3 **BY MR. THOMPSON:**

4 **Q.** But, regardless, do you recall this document and having
5 signed on to it?

6 **A.** I do.

7 **Q.** You do?

8 **A.** I do.

9 **Q.** Okay. And you supported the contents of this documents,
10 or you wouldn't have signed it?

11 **A.** Yes. That all healthy families should be supported by
12 social views, yes.

13 **Q.** Okay. And you shared the concern that was referenced at
14 the end of the first paragraph, "What worries us is the
15 mistaken notion that marriage is the only acceptable
16 relationship or family structure." You supported that view?

17 **A.** Yes, I did.

18 **Q.** And you think couples should keep a skeptical stance on
19 marriage, correct?

20 **A.** I don't think I've ever made that point.

21 **Q.** Well --

22 **A.** Maybe I did. It's possible I said that somewhere, in
23 passing.

24 **Q.** All right. Let's refresh your recollection, turning to
25 behind tab 3.

1 This is an interview that you provided with a
2 Priscilla Yamin. Do you remember this interview?

3 **A.** Vaguely.

4 **Q.** Okay. And turning to the fourth page of the interview.
5 Just one paragraph. It's seven line down. Says, "I would also
6 say couples should keep a skeptical stance on marriage."

7 Did you believe that at the time you made that
8 statement?

9 **A.** I can't really recall. And this -- I never had an
10 opportunity to check the transcript of the interview before she
11 put it up on the Web. So I really can't affirm whether or not
12 I said this at the time.

13 **Q.** Public authorities are very interested in making sure that
14 as few people as possible are assigned to public sources of
15 funds for their support, correct? Yes or no?

16 **A.** I think that tends to be the case, yes.

17 **Q.** Throughout American history, legislatures and courts, in
18 other words the public apparatus in general, has been very,
19 very interested in making sure that dependent children will be
20 supported by their parents. Yes or no?

21 **A.** That has definitely been a motivation of state
22 authorities, yes.

23 **Q.** One of the purposes of marriage today is to assign
24 providers to care for dependents, including children, and to
25 limit the public's liability to care for the vulnerable,

1 correct?

2 **A.** Yes.

3 **Q.** And one of the purposes that marriage has served over this
4 country's history is to create stable families, correct?

5 **A.** Yes. That's fair.

6 **Q.** Another purpose that marriage has served over this
7 country's history is to assign providers to care for
8 dependents, including the very young, correct?

9 **A.** Yes. You asked me that already.

10 **Q.** And one of the purposes of the institution of marriage is
11 to ensure that children are raised by their natural mother and
12 father, correct?

13 **A.** No, I wouldn't say that.

14 **Q.** Another one of the purposes that marriage has served over
15 this country's history is to legitimate children, correct?

16 **A.** Yes. But, as I said, that legitimation function is less
17 important now.

18 **Q.** You talked in your direct about laws prohibiting
19 interracial marriage. Isn't it true that those laws required
20 that children of an interracial couple be born out of wedlock?

21 **A.** In effect, it created illegitimate sex out of cross-racial
22 relationships, yes.

23 **Q.** And illegitimate children, too?

24 **A.** Exactly, yes. Any results in children.

25 **Q.** And the laws banning interracial marriage created barriers

1 to the establishment of legal ties connecting mother, father
2 and child, correct?

3 **A.** I wouldn't say they created barriers to legal ties. They
4 simply did not create legal ties or legal obligations the way
5 that legal marriage did.

6 **Q.** Now, let's turn to the history of laws prohibiting
7 interracial marriage.

8 The first slaves arrived in this country in 1619,
9 correct?

10 **A.** I believe so.

11 **Q.** And the first law banning interracial marriage was in
12 1691, in Virginia, correct?

13 **A.** No, that is not correct.

14 **Q.** When was the first law banning interracial marriage in the
15 United States?

16 **A.** Well, it wasn't phrased precisely with the word
17 "marriage." But a law was passed in the colonial Chesapeake,
18 in 1667, that punished shameful matches, as they said, between
19 free white women and negroes. And that -- so "shameful
20 matches" were -- those were the words. But it's clear that the
21 intent was to penalize and criminalize marriages.

22 **Q.** Now, let's look at the time of the founding of this
23 country, in 1789, and at the original 13 states.

24 It's true that New York never has had a law
25 prohibiting interracial marriage, correct?

1 **A.** I can't say I know absolutely for sure, but it's very
2 plausible that it has never had one.

3 **Q.** And Pennsylvania has never had a law prohibiting
4 interracial marriage, correct?

5 **A.** Frankly, I don't know this colony by colony.

6 **Q.** New Jersey has never had a law prohibiting interracial
7 marriage, correct?

8 **A.** In the entire state's history?

9 **Q.** Correct.

10 **A.** Well, I haven't rechecked every state for the purposes of
11 this report, so I can't confirm or disconfirm what you're
12 saying about those three states.

13 **Q.** So you have no idea whether the majority of states at the
14 founding of the country did not have a prohibition on
15 interracial marriage?

16 **A.** That is an irrelevant question, really, because --

17 **Q.** On redirect you can give a speech. It's yes or no now.

18 **A.** Okay. Fine.

19 **Q.** So you don't know --

20 (Simultaneous colloquy.)

21 **A.** I don't know precisely how many of the original 13
22 colonies had such laws.

23 **Q.** Okay. But it's fair to say there was never a uniform
24 legal prohibition on interracial marriage throughout the
25 United States, correct?

1 **A.** It is true that there was never a time that a couple could
2 not go to some state and marry across the color line. That's
3 correct.

4 **Q.** And bans on marriage across the color lines were measures
5 designed to maintain white supremacy, correct?

6 **A.** They were never seen so at the time they were passed.
7 They were seen so in 1967, but not until then.

8 **Q.** Now, I'd like to ask you some questions about the
9 importance of marriage to society.

10 In the western world, when you look at any new
11 government that has been formed, especially through revolution,
12 one of the first things that is done is the formulation of the
13 marital policy that will accord with this form of government,
14 correct?

15 **THE COURT:** First, you confined the witness's
16 testimony to the United States. Now, you are going abroad.

17 **MR. THOMPSON:** Well, I would be happy to strike all
18 of her testimony about anything outside the United States.

19 That's fine. I appreciate that, Your Honor. I will
20 focus a little more carefully on the United States.

21 **BY MR. THOMPSON:**

22 **Q.** The institution of marriage in the United States requires
23 public affirmation, correct?

24 **A.** Public witness, public license, if that's what you mean.
25 Public affirmation.

1 Q. Public affirmation?

2 A. The stamp of the state, yes.

3 Q. And as the courts consider whether to redefine marriage so
4 that it is no longer the union of one man and one woman, you
5 would agree that this is a very important point to mark in the
6 evolution of marriage. Yes or no?

7 A. What is a very important point?

8 Q. As the courts consider whether to redefine marriage so it
9 is no longer the union of one man and one woman, you would
10 agree that this is a very important point to mark in the
11 evolution of marriage, correct?

12 A. I think it's an important point.

13 Q. And although marriage has always been a changing
14 institution, and one could point to earlier watersheds, perhaps
15 there is none quite so explicit as this particular turning
16 point. Correct?

17 A. One could argue about that.

18 Q. Well, you remember you gave an interview to NPR after --
19 when the Supreme Judicial Court -- supreme of Massachusetts,
20 was poised to rule, do you recall that, in April of 2004?

21 A. I don't, in fact.

22 Q. All right. Well, I'd like to play you an excerpt from
23 that. See if it refreshes your recollection.

24 THE CLERK: Counsel --

25 MR. THOMPSON: We need to switch, I think, the

1 monitor.

2 **THE CLERK:** It is switched. What are we playing? Is
3 it an admitted exhibit?

4 **MR. THOMPSON:** It is not an exhibit.

5 **THE CLERK:** Oh, okay.

6 **MR. BOUTROUS:** Your Honor, before it's played, we
7 would just like to object and ask whether we are going to hear
8 the whole interview. And we request that the entire interview
9 be played, as opposed to some excerpt.

10 **MR. THOMPSON:** As the witness has proven, she is very
11 eloquent and wholesome in her answers. I believe it's a
12 20-minute interview. But I just want to play it to refresh her
13 recollection.

14 And on redirect we are happy to give you the link.
15 You can listen to it at the break and play the whole thing on
16 redirect, if you like.

17 **THE COURT:** Let's just see the portion of the
18 interview that you are seeking to refresh the witness's
19 recollection with.

20 **MR. BOUTROUS:** Your Honor, if I could just add one
21 more objection.

22 This is something that was not disclosed to us and
23 provided to us. That's why I don't have the link. So --

24 **MR. THOMPSON:** We --

25 **THE COURT:** I see. Well, let's just take this one

1 step at a time.

2 Mr. Thompson, the portion of the interview that you
3 wish to show to the witness.

4 **MR. THOMPSON:** Thank you, Your Honor. Okay. Now
5 we're, I think, ready to go.

6 (Audio recording played in open court.)

7 **THE COURT:** We better start at the beginning. Let's
8 start -- let's start at the beginning, with the volume, so that
9 everybody can hear it, including the witness, most importantly.

10 (Laughter)

11 **MR. THOMPSON:** Thank you, Your Honor.

12 (Audio recording played in open court.)

13 **BY MR. THOMPSON:**

14 **Q.** All right. Does that refresh -- that was you --

15 **MR. BOUTROUS:** I'm going to object. That sounded
16 like a good sentence. I would like to hear that next answer.

17 (Laughter)

18 **THE COURT:** Counsel, go ahead.

19 **BY MR. THOMPSON:**

20 **Q.** Professor, was that you -- was that your voice that we
21 just played?

22 **A.** Yes.

23 **Q.** And did it refresh your recollection that you had done an
24 NPR interview?

25 **A.** Yes.

1 Q. Okay. And do you agree with the statement you made there,
2 which is, "One could point to earlier watersheds, but perhaps
3 none quite so explicit as this particular turning point"? Do
4 you agree with that statement?

5 A. As I said there, perhaps -- and that was how I responded
6 to you -- that one could argue about this. But it's arguably a
7 highly-distinctive turning point.

8 Q. As a historian, you do not assume that progress is the
9 rule of history, correct?

10 A. That's correct.

11 Q. Marriage is a very complex institution, correct?

12 A. Indeed.

13 Q. There is a long, ongoing series of arguments among
14 historians, competing theories about how we find the causes of
15 any major phenomenon, correct?

16 A. Yes.

17 Q. Some historians prefer to weight ideas, correct?

18 A. True.

19 Q. Others prefer to weight economic factors, correct?

20 A. Yes.

21 Q. Some weigh pure contingency of how things occur, correct?

22 A. Give it more weight, yes.

23 Q. But to you, the most reasonable historical explanation
24 gives some weight to all of these factors, so that none of them
25 operates solely on its own, correct?

1 **A.** Yes.

2 **Q.** I'd like to turn your attention to tab 9 in your witness
3 binder. This is DIX1434. It's a law review article from the
4 Virginia Law Review, entitled, "We Will Get What We Asked for:
5 Why Legalizing Gay and Lesbian Marriage Will Not 'Dismantle the
6 Legal Structure of Gender in Every marriage.'" And it's
7 authored by Nancy D. Polikoff. The UVA Law Review is a
8 well-regarded publication?

9 **A.** I can't affirm or disconfirm that. I assume so, but I
10 don't really know.

11 **Q.** And Nancy Polikoff is openly gay and an advocate for gay
12 rights; is that correct?

13 **A.** I don't know.

14 **Q.** She is a professor at American University. Do you know
15 that?

16 **A.** I'm not familiar with her.

17 **Q.** Okay. I would like to turn your attention to page 1536,
18 to the second full paragraph, which reads:

19 "The only argument that has ever tempted me
20 to support efforts to obtain lesbian and gay
21 marriage is the contention that marriages
22 between two men or two women would inherently
23 transform the institution of marriage for all
24 people."

25 Is it true that there are some people who subscribe

1 to the view that Professor Polikoff has articulated?

2 **A.** Certainly, she does, or she thinks there is. I --

3 **MR. THOMPSON:** Your Honor, we would move the
4 admission of DIX1434.

5 **MR. BOUTROUS:** Objection, Your Honor. Irrelevant.
6 Written by another person.

7 I don't see what bearing it has. The witness said
8 she was not familiar with either the author or the article.

9 **MR. THOMPSON:** Your Honor, this goes to our -- one of
10 our contentions that we have spoken to before, about
11 legislative facts and the Ninth Circuit's ruling in *Marshall*
12 *vs. Sawyer*, in which they said, "Legislative facts relate to
13 public policy or questions of law."

14 And the Supreme Court, from *Brown vs. Board of*
15 *Education*, to *Roe vs. Wade*, to *Grutter*, to *Lawrence*, in every
16 one of those big-ticket cases, has looked at precisely these
17 types of law review articles for the truth of the matter
18 asserted.

19 And we maintain that all of this evidence, just as
20 they wanted to move an entire book into the record, that we are
21 entitled to put into the record in this court these types of
22 articles and publications that pertain on a key issue, which
23 is: What are the consequences, potentially, of same-sex
24 marriage? And -- yes.

25 (Laughter)

1 **THE COURT:** Well, the court certainly can take
2 judicial notice of what's published in law reviews. And I can
3 certainly do that.

4 This is a law review, however, written by another
5 individual. The witness has stated that she is not familiar
6 with either the article or the author. So I'll certainly take
7 judicial notice of it. It can be included in the record, if
8 you like. The record is as it is.

9 **MR. THOMPSON:** Thank you, Your Honor. And that's all
10 we're asking for.

11 **THE COURT:** Fine.

12 **MR. THOMPSON:** We appreciate that.

13 **THE COURT:** All right. That's going to be -- we
14 better have it marked. Previously marked?

15 **MR. THOMPSON:** It is marked, yes, Your Honor.

16 **THE COURT:** As Exhibit --

17 **MR. THOMPSON:** DIX1434.

18 **THE COURT:** 1434. All right. Very well.

19 **MR. THOMPSON:** And we'd like to turn your attention
20 to the next tab, which is DIX1020. And this is an article in
21 the *Chapman Journal of Law & Policy*. It's dated 2008/9 by a
22 Jeffrey Redding.

23 **BY MR. THOMPSON:**

24 **Q.** Are you familiar with Professor Redding?

25 **A.** I have never heard of him.

1 Q. He taught at Harvard and Yale, so I thought perhaps you
2 had overlapped. But he's now at the University of Saint Louis
3 law school.

4 I would like to direct your attention to page 7 of
5 this article, to the paragraph -- it's the third full paragraph
6 from the bottom. And it reads:

7 "The gay and lesbian civil rights movement's
8 insistence that 'marriage' is the proper
9 province of secular states (instead of
10 churches and temples) and its insistence that
11 'marriage' can incorporate fertile, same-sex
12 couples (just as readily as it can sterile
13 opposite-sex couples) is a further testament
14 to this movement's deep-seated desire to
15 challenge the conventional meaning of words
16 and concepts."

17 Do you agree that allowing same-sex marriage would
18 challenge the conventional meaning of marriage?

19 A. I believe it would amplify the conventional meaning of
20 marriage.

21 **MR. THOMPSON:** Your Honor, we would ask the Court to
22 take judicial notice of DIX1020.

23 **THE COURT:** Very well.

24 **BY MR. THOMPSON:**

25 Q. Turning to the next tab in your binder, Professor, which

1 is DIX1033. And this is a book entitled, *All of Our Families.*
2 *New policies for a New Century.* Published by the Oxford
3 University Press.

4 That's a pretty prestigious press; is it not?

5 **A.** Yes, it is.

6 **Q.** And turning to the fourth page of your binder, which is
7 page 1 -- it has "144" at the bottom. Shows that this is an
8 article by Judith Stacey, entitled, "Gay and Lesbian Families:
9 Queer Like Us."

10 And Professor Stacey is a professor of sociology at
11 NYU; is that right?

12 **A.** I know she is a professor of sociology. I'm not sure
13 where she teaches right now.

14 **Q.** She is a supporter of gay and lesbian rights; is that
15 right?

16 **A.** I don't know.

17 **Q.** Turning to page 155 of this document, she states, at the
18 top of the page, in the first full paragraph:

19 "Despite the paucity of mainstream political
20 enthusiasm for legalizing gay marriage, there
21 are good reasons to believe that gays and
22 lesbians will eventually win this right and
23 to support their struggle to do so.

24 Legitimizing gay and lesbian marriages would
25 promote a democratic pluralist expansion of

1 the meaning, practice, and politics of family
2 life in the United States, helping to
3 supplant the destructive sanctity of *The*
4 *Family* with respect for diverse and vibrant
5 families."

6 Do you agree with Professor Stacey?

7 **MR. BOUTROUS:** Your Honor, I'm going to object again.
8 This is just argument from --

9 **THE COURT:** I beg your pardon?

10 **MR. BOUTROUS:** I'm going to object.

11 This is simply argument from an article that does not
12 have anything to do with Professor Cott.

13 **THE COURT:** I think it's appropriate for counsel to
14 place before the witness propositions that have been -- factual
15 propositions of this kind, that have been asserted by
16 individuals who have expressed views on the subject, and ask
17 whether or not she agrees or disagrees with the statement.

18 And I think that's what counsel is doing. And I
19 think it's an appropriate form of examination.

20 Very well. Proceed, Mr. Thompson.

21 **MR. THOMPSON:** Thank you, Your Honor. And we'd ask
22 the Court to take judicial notice of DIX1033.

23 **THE COURT:** Very well.

24 **BY MR. THOMPSON:**

25 **Q.** Professor, turning to the next tab in your binder, which

1 is tab 12, and this is entitled, "Ethics" --

2 **THE COURT:** I'm not sure you got an answer to the
3 question with respect to 1033, Mr. Thompson.

4 (Laughter)

5 **BY MR. THOMPSON:**

6 **Q.** Do you agree with Professor Stacey's position?

7 **A.** The sentence that begins, "Legitimizing gay and lesbian
8 marriages," is what you are asking about, on page 155?

9 **Q.** Yes. The one that will "supplant the destructive sanctity
10 of the family."

11 **A.** This is a statement of her opinion. And I think that it's
12 a plausible line of reasoning, but I -- it's a prediction. And
13 so I -- I'm really rather neutral on it.

14 **Q.** Okay. Let's turn to tab 12, which is entitled, "Ethics In
15 The Public Domain. Essays in the Morality of Law and
16 Politics," by Joseph Raz.

17 And Professor Raz is a prominent philosopher; is that
18 right?

19 **A.** I really do not know.

20 **Q.** This was published by the Oxford University Press. Do you
21 see that at the bottom of this first page?

22 **A.** Clarendon Press in Oxford, yes.

23 **Q.** And turning your attention to page 23 of this article.
24 Let me know when you're there.

25 **A.** Okay.

1 Q. And the first full paragraph, the last two sentences read:
2 "When people demand recognition of gay
3 marriages, they usually mean to demand access
4 to an existing good. In fact, they also ask
5 for the transformation of that good. For
6 there can be no doubt that the recognition of
7 gay marriages will affect as great a
8 transformation in the nature of marriage as
9 that from polygamists to monogamists, or from
10 arranged to unarranged marriage."
11 Do you agree with that statement?

12 A. I do not.

13 MR. THOMPSON: Your Honor, we ask the Court to take
14 judicial notice of DIX1444.

15 THE COURT: Very well.

16 BY MR. THOMPSON:

17 Q. Professor, I would like you to turn to your next tab in
18 the binder, which is an article by E.J. Graff, entitled,
19 "Retying the Knot," in *The Nation*. And it's DIX1445.

20 And do you know E.J. Graff?

21 A. I have been acquainted with her, briefly, in the past.

22 Q. She is at Brandeis University; is that right?

23 A. I don't know. I knew her 12, 14 years ago. And it's when
24 she was not at Brandeis. But I don't know where she is now.

25 Q. Where was she when you knew her, if you recall?

1 **A.** She was a journalist, trying to write a book.

2 **Q.** And turning to the first sentence of this, it says:

3 "The right wing gets it: Same-sex marriage

4 is a breathtakingly subversive idea."

5 Do you agree with that statement?

6 **A.** No.

7 **MR. THOMPSON:** All right. Your Honor, we ask the
8 Court to take judicial notice of DIX-1445.

9 **THE COURT:** Very well.

10 **BY MR. THOMPSON:**

11 **Q.** And E.J. Graft is a supporter of the rights of gays and
12 lesbians, is that correct?

13 **A.** I believe so. I'm not current with her thinking.

14 **Q.** You don't have any views on what are the factors that have
15 affected the divorce rate in Massachusetts since same-sex
16 marriage was legalized, correct?

17 **A.** Incorrect.

18 **Q.** All right. Let's look at your deposition page 199. It's
19 behind tab one.

20 And are you there, Professor?

21 **THE COURT:** This the deposition in Iowa or the
22 deposition here?

23 **MR. THOMPSON:** Sorry, your Honor. This is the one in
24 this case, which is behind tab one.

25 I put it in the witness binder as well, so I was

1 behind tab two and the deposition and the deposition in this
2 case is behind tab one.

3 **THE COURT:** I beg your pardon. Thank you very much.
4 199?

5 **MR. THOMPSON:** Yes, your Honor.

6 **BY MR. THOMPSON:**

7 **Q.** And, Professor, do you see on line five where I asked --

8 **A.** I'm sorry. What page?

9 **Q.** 199.

10 **A.** 199, okay.

11 **Q.** On line five I asked you:

12 **"QUESTION:** What are the factors that have
13 affected divorce rates in Massachusetts over
14 the last five years, in your opinion?"
15 "Objection. Objection. Calls for
16 speculation. Vague. Beyond the scope of
17 this report."

18 **"ANSWER:** I don't have any views on what are
19 the factors that have affected the divorce
20 rate in Massachusetts. I raised this in the
21 report mainly because the reports I was
22 rebutting seemed to connect frequency of
23 divorce to -- in a group of negative factors
24 affecting current social life, that they
25 think a same-sex marriage would contribute

1 further to. And so I mentioned that, not as
2 a result of the fact that there is same-sex
3 marriage, but just as a concomitant
4 phenomenon that is worthy of notice."

5 You gave that testimony?

6 **A.** I did. I could clarify the difference between what I
7 responded to you verbally and what is said here, but I can
8 refrain from that as well.

9 **Q.** I would like to ask you to turn to tab 17 in your binder,
10 which is DIX-1028. It's an article by Monte Stewart entitled
11 "Marriage Facts." And I would like you, Professor, to turn to
12 page 327, the first full paragraph.

13 It says:

14 "A fundamental purpose of marriage then is to
15 situate heterosexual passion within a social
16 institution that will, to the largest extent
17 practical, assure that the consequences of
18 procreative passion, namely children, begin
19 and continue life with adequate private
20 welfare. Although the immediate objects of
21 the protective aspects of this private
22 welfare purpose are the child, and the often
23 vulnerable mother, society itself is the
24 ultimate beneficiary."

25 Do you agree that society itself is the ultimate

1 beneficiary of marriage?

2 **A.** I think that's a very difficult question to answer "yes"
3 or "no" without really giving my complete opinion.

4 The question is posed in such a way that I can't
5 really answer it honestly "yes" or "no."

6 **MR. THOMPSON:** Your Honor, we would ask the Court to
7 take judicial notice of DIX-1028.

8 **THE COURT:** Very well. And you were reading from
9 page --

10 **MR. THOMPSON:** 327, your Honor.

11 **THE COURT:** Thank you.

12 **MR. THOMPSON:** Yes, sir.

13 **BY MR. THOMPSON:**

14 **Q.** Professor, I would like to direct your attention to tab 18
15 in your binder, which is DIX-1475. It's an article that
16 appeared on September 19th, 2008 in the *Los Angeles Times* by
17 our expert in this case, David Blankenhorn.

18 He starts by saying:

19 "I'm a liberal Democrat and I do not favor
20 same-sex marriage. Do those positions sound
21 contradictory? To me, they fit together."

22 And then turning to the second to last paragraph of
23 this article, he states:

24 "Here is my reasoning. I reject homophobia
25 and believe in the equal dignity of gay and

1 lesbian love because I also believe with all
2 my heart in the right of the child to the
3 mother and father who made her. I believe
4 that we, as a society, should seek to
5 maintain and to strengthen the only human
6 institution, marriage, that is specifically
7 intended to safeguard that right and make it
8 real for our children."

9 Professor, is there any other social institution in
10 this country as important to children as marriage?

11 **A.** I think families are important to children. They do not
12 have to be marital families. They often are.

13 But I can't agree with the approach of Blankenhorn's
14 statements here, which imply that the biological link between
15 parents and children is a necessary foundation of marriage and
16 why it's good for society.

17 **Q.** Do you think the biological connection between parents and
18 children is irrelevant to the social well-being of children?

19 **A.** No, I do not think it's irrelevant.

20 **Q.** Okay.

21 **A.** I just don't think it's comprehensive in describing what
22 is good for children.

23 **Q.** Now, I asked you whether you thought there was a social
24 institution in this country as important to children as
25 marriage and you answered, "Well, their families are

1 important."

2 Do you consider families a social institution?

3 **A.** Yes, I do.

4 **Q.** Okay. And I would like to direct your attention back -- I
5 apologize for flipping around, but to tab 16 for a moment,
6 which is from the CDC --

7 **MR. THOMPSON:** I should have said, your Honor, I ask
8 that you take judicial notice of DIX-1475.

9 **THE COURT:** That will be fine.

10 **MR. THOMPSON:** Thank you, your Honor.

11 **THE COURT:** And I think the same for 1028.

12 **MR. THOMPSON:** Thank you, your Honor.

13 **THE WITNESS:** May I ask, Judge Walker --

14 **THE COURT:** All right. I think maybe this would be a
15 good time to take a break.

16 **THE WITNESS:** I would like to have a break, please,
17 your Honor.

18 **THE COURT:** That's not a bad idea. I suspect you are
19 not the only one, Professor.

20 **THE WITNESS:** Thank you.

21 **THE COURT:** All right. Sorry for the interruption,
22 counsel. Why don't we take until 10:30 and then we will resume
23 with further cross-examination of this witness.

24 **MR. THOMPSON:** Thank you.

25 (Whereupon there was a recess in the proceedings)

1 from 10:17 a.m. until 10:40 a.m.)

2 **THE COURT:** Before we begin, and as the witness is
3 coming to the stand, let me advise counsel, we are organizing
4 all of the comments that have been received with respect to
5 broadcasting or webcasting the proceedings. They are in the
6 jury room. There are thousands of them. I don't know how to
7 make them part of the record, if we do at all. Some more, of
8 course, are coming in today.

9 They are going to be available for your inspection
10 and I appreciate the suggestions you have for how we handle
11 them. There are quite a number. So I invite you to inspect
12 them and to give your advice as to what we do with them. All
13 right?

14 They are not quite ready, but they'll probably be
15 ready, I would imagine, about the time we take our luncheon
16 break or you can wait until the end of the day. Whatever your
17 pleasure is.

18 All right. Mr. Thompson.

19 **MR. THOMPSON:** Thank you, your Honor.

20 **BY MR. THOMPSON:**

21 **Q.** Professor, I would like to direct your attention to tab 16
22 in your binder. And this is a document from the CDC website
23 from 2004 entitled "Assistive Reproductive Technology," which
24 is in the first sentence of the document is -- the shorthand is
25 ART.

1 And then if you turn to the second page in the second
2 full sentence it says:

3 "Approximately one percent of U.S. infants
4 born in 2004 were conceived through ART."

5 Professor, is it your understanding that 99 percent
6 of all children born in the United States are born of -- as a
7 result of a procreative act between a man and a woman and not
8 through ART?

9 **A.** These are not statistics that I've looked into at all.

10 **MR. THOMPSON:** Your Honor, we would ask the Court to
11 take judicial notice of DIX-1049.

12 **THE COURT:** Very well.

13 **BY MR. THOMPSON:**

14 **Q.** Professor, turning to tab 19 -- I guess before we get
15 there let me ask you: Do you agree population growth is no
16 longer necessarily seen as so desirable?

17 **A.** Where?

18 **Q.** In the United States.

19 **A.** Not as so desirable as it was two centuries ago. Yes,
20 that I believe is true.

21 **Q.** Okay. And directing your attention to the second page
22 behind tab 19, this is a document entitled "Low Fertility: Can
23 Governments Make a Difference?" by a gentleman who is at the
24 United Nations dated April 2, 2004. It's DIX-1046.

25 And on the second page in the second full paragraph

1 it states:

2 "A growing number of countries view their low
3 birth rates with the resulting population
4 decline and aging to be a serious crisis,
5 jeopardizing the basic foundations of the
6 nation and threatening its survival.

7 Economic growth and vitality, defense, and
8 pensions and healthcare for the elderly, for
9 example, are all areas of major concern."

10 Professor, do you know whether it's true that in the
11 United States the birth rate is barely at the replacement rate?

12 **A.** I think it's approximately at the replacement rate. But,
13 of course, in the United States immigration has always been a
14 great source of our population growth. We have not relied
15 strictly on reproduction.

16 **Q.** Illegal immigration?

17 **A.** No. Immigration that has been legal.

18 **Q.** Oh, I see.

19 **A.** Immigration that has been encouraged and legal through our
20 history.

21 **Q.** Okay. And the birth rate has declined significantly from
22 about 3.5 in the 1960's to about 2.1 today, is that correct?

23 **A.** I haven't reviewed these statistics recently. That sounds
24 like it could be right, but I can't confirm.

25 **MR. THOMPSON:** Your Honor, we would ask the Court to

1 take judicial notice of DIX-1046.

2 **THE COURT:** Very well.

3 **BY MR. THOMPSON:**

4 **Q.** Professor, I would like to ask you to turn your attention
5 to tab 20. And this is an interview with Jonathan Rauch. Mr.
6 Rauch is a prominent supporter of a gay rights, is he not?

7 **A.** I really don't know.

8 **Q.** Okay. We would -- and this is DIX-1035. I would like to
9 direct your attention to the third page of this document, and
10 in particular to the paragraph that's the fourth full
11 paragraph. And it says:

12 "Marriage is not like voting, something the
13 government just gives you at the stroke of a
14 pen by fiat. Marriage must be a community
15 institution to have its full power, which is
16 to make couples actually closer. It actually
17 fortifies and not just ratifies
18 relationships. Your marriage has to be
19 recognized by your community, your friends,
20 your family, your kids' teachers, your
21 coworkers, all of the people around you as a
22 marriage with all of the expectations and
23 social support that goes with that. The law
24 can't give you that."

25 Is Mr. Rauch right that the law can't give you the

1 full power of marriage without the community support?

2 **A.** I have maintained through my work that law and society
3 work in a dynamic relation in the institution of marriage.

4 **MR. THOMPSON:** Your Honor, we would ask the Court to
5 take judicial notice of DIX-1035.

6 **THE COURT:** Very well.

7 **BY MR. THOMPSON:**

8 **Q.** I would like to switch gears, Professor, to talk about
9 marriage in gender and then marriage in religion.

10 First, marriage uniquely and powerfully influences
11 the way differences between the sexes are conveyed and
12 symbolized, correct?

13 **A.** I believe that has been true through most of our history,
14 yes.

15 **Q.** So far as marriage is a public institution, it is the
16 vehicle through which the apparatus of state can shape the
17 gender order, correct?

18 **A.** Yes.

19 **Q.** The whole system of attribution and meaning we call gender
20 relies on and to a great extent derives from the structuring
21 provided by marriage, correct?

22 **A.** I wrote that.

23 **Q.** And you agree with it?

24 **A.** I do.

25 **Q.** Okay. And gender matters; that is, it matters that human

1 beings do not appear as neuter individuals, correct?

2 **A.** Yes.

3 **Q.** Notions of gender are not constant, but are specific to
4 time and place, correct?

5 **A.** Yes. I think what we attribute to gender specificity
6 definitely is changing over time.

7 **Q.** But the gender binary of masculine and feminine is a basic
8 classification in human thinking and appears in human usage in
9 every culture, correct?

10 **A.** Yes.

11 **Q.** We can't really think about human beings without
12 implicitly seeing them in gendered form, correct?

13 **A.** Yes.

14 **Q.** Now, let's turn to the role of religion and its
15 relationship to marriage in the United States.

16 You said during direct that civil law has been
17 supreme in the United States; do you remember that?

18 **A.** In validating marriages, yes.

19 **Q.** From the founding of the United States to the present day,
20 assumptions about the importance of marriage and its
21 appropriate form have been deeply implanted in public policy,
22 correct?

23 **A.** Yes.

24 **Q.** Public authorities in the United States expected monogamy
25 on a Christian model to prevail, correct?

1 **A.** In the past, yes.

2 **Q.** And it did, correct?

3 **A.** Yes. They -- yes.

4 **Q.** A commitment to monogamous marriage on a Christian model
5 was lodged deep in American political theory, correct?

6 **A.** Yes.

7 **Q.** The great majority of colonists believed in basic tenets
8 of Christian monogamy, correct?

9 **A.** Yes.

10 **Q.** In the history of this country, both the church and the
11 state have regulated marriage in the sense of instilling people
12 with conscience about what are the appropriate behaviors in
13 marriage, correct?

14 **A.** Yes.

15 **Q.** Monogamy on a Christian model prevailed in part because of
16 widespread Christian faith, correct?

17 **A.** Yes.

18 **Q.** The particular form of monogamous marriage that is
19 supposed to be life long and involve sexual faithfulness
20 between the partners and economic mutual support, that form of
21 marriage arose first as a result of Christianity, correct?

22 **A.** I think that's a historical finding, yes, since in the
23 many ancient world most everybody else was polygamous.

24 **THE COURT:** Maybe you could keep your voice up. That
25 would be helpful.

1 **THE WITNESS:** Yes --

2 **BY MR. THOMPSON:**

3 **Q.** -- and one of the distinctive things about Jesus Christ
4 and his Apostles' teachings was to pursue a single partner in
5 marriage and not multiple partners, correct?

6 **A.** I know very little about Jesus Christ and his Apostles.

7 **Q.** You seemed to know a little bit more during your
8 deposition. Let's look at page 61 of your deposition. It's
9 behind tab one.

10 **THE COURT:** Page reference, counsel?

11 **MR. THOMPSON:** Page 61, line five, your Honor.

12 **BY MR. THOMPSON:**

13 **Q.** And you said, Professor, when I asked you:

14 **"QUESTION:** What do you mean by Christian
15 monogamy?

16 **"ANSWER:** Well, if we look back to the era of
17 the origins of Christianity -- which
18 originated, of course, among Jews -- Jews
19 were apparently not at that time a
20 monogamous. Polygamy was accepted. And one
21 of the distinctive things about Jesus Christ
22 or his Apostles' teaching was to pursue a
23 single partner in marriage and not multiple
24 partners."

25 You stand by that testimony, right?

1 **A.** I do. And I was using Jesus Christ or his Apostles as a
2 stand-in for the notion that this was a notion that began with
3 Christianity; not that it was enforceable initially, but it was
4 an innovation, is what I meant to imply here.

5 **Q.** The generation that founded the United States of America
6 in 1789 subscribed to the basic tenets of Christian monogamy,
7 correct?

8 **A.** Yes. But, again, I want to make it clear, since you're
9 repeating my words outside of the larger context, that I'm
10 using "Christian monogamy" there simply to emphasize that
11 monogamy -- simply to emphasize monogamy, not to point to any
12 other tenets of Christianity that might have been embraced or
13 not embraced.

14 **THE COURT:** Are you saying that there is a difference
15 between Christian monogamy and some other form of monogamy?

16 **THE WITNESS:** No. I'm simply saying that monogamy in
17 world history is attributable, so far as I am aware, to
18 Christian precepts.

19 **THE COURT:** That pre-Christian societies did not
20 either require monogamy or impose standards of monogamy; is
21 that what you are saying?

22 **THE WITNESS:** As far as I am aware in the history of
23 our own civilizations, that pre-Christian and, certainly, the
24 early middle eastern arenas where Christianity arose, those
25 areas were not restricted to the practice of monogamy, right.

1 **THE COURT:** You are talking about the western world,
2 I assume?

3 **THE WITNESS:** Well, if we think of western
4 civilization and the Judeo-Christian ethic that is broadly what
5 characterizes our western civilization, Christianity was what
6 introduced a restriction to a single partner for life as the
7 marital regime.

8 **BY MR. THOMPSON:**

9 **Q.** And, Professor, one of the basic tenets of Christian
10 monogamy was that marriage was between a man and a woman,
11 correct?

12 **A.** That was assumed, yes.

13 **Q.** And to this day large segments of Americans accept the
14 Christian conception of sexual fidelity in marriage, correct?

15 **A.** Yes. I do think the notion of sexual fidelity and
16 marriage goes beyond Christianity, but, yes. You could put
17 it -- I would agree with it the way you put it.

18 **Q.** In 1789 there were laws that prohibited brothers from
19 marrying sisters, correct?

20 **A.** Probably, yes. There have typically been restrictions on
21 close familial association for marriage.

22 **Q.** And this law reflected a biblical tenet, correct?

23 **A.** I can't say what it arose from of. It could have arisen
24 equally from the common law.

25 **Q.** I would like to direct your attention to your deposition

1 at page 136, line 25.

2 **A.** 136, you said?

3 **Q.** 136, Professor. And I asked you:

4 **"QUESTION:** What was the purpose that the
5 prohibition on brothers marrying sisters,
6 what purpose was served by that law?"

7 Various objections.

8 **"ANSWER:** Yeah, I can't really comment on the
9 purpose. I don't know the intentions, the
10 purposeful intentions of the legislatures."

11 **"QUESTION:** Do you know what the objective is
12 of such laws?

13 "Objection. Asked and answered. Calls for
14 speculation."

15 **"ANSWER:** What was your --

16 **"QUESTION:** The objective?

17 **"ANSWER:** Oh, the objective. To stop people
18 from marrying close members of their family
19 clearly.

20 **"QUESTION:** Well, that's tautological, but
21 why wouldn't you have that objective.

22 "MS. BAXTER: Objection. Calls for
23 speculation. Beyond the purpose of the
24 report.

25 **"ANSWER:** Well, I would simply say that this

1 was a biblical tenet, that there were
2 prohibited degrees of marriage and while the
3 biblical prohibited degrees are very
4 extensive and, interestingly, accordingly to
5 a scholar of father/daughter incest, do not
6 prevent the father from marrying his
7 daughter."

8 Do you stand by your testimony?

9 **A.** Well, as I said there, there were proscriptions and limits
10 listed biblically about that, but I don't say here that it was
11 clearly the ground from which those legislative rulings arose.
12 As I go on to say there, I mention the common law.

13 Frankly, I -- I think there were multiple bases for
14 the assumption that close members of families should -- this
15 was a restriction that the legislature thought was appropriate.

16 **Q.** In Massachusetts Puritan religious values strongly infused
17 the English tradition? "Yes" or "no."

18 **A.** Certainly, in colonial Massachusetts.

19 **Q.** And Puritan ideology demanded fidelity of both partners,
20 correct?

21 **A.** Yes.

22 **Q.** From the sixteenth century through the eighteenth, Puritan
23 reformers advocated chastity before marriage and fidelity after
24 for men as well as women, correct?

25 **A.** Did I say "reformers"? Are you reading my testimony or

1 what?

2 **Q.** I don't have to tell you where you said it.

3 **A.** Well, there weren't Puritan reformers. They were Puritans
4 from the beginning.

5 Puritans definitely believed in chastity before
6 marriage and fidelity within it, that's clear.

7 **Q.** There were differences between Puritan theory and canon
8 law, correct?

9 **A.** Puritans were radical Protestants. They did not believe
10 in the Catholic teachings.

11 **THE COURT:** You are opening the door to the witness's
12 testimony outside the United States.

13 **MR. THOMPSON:** That is true. The fifteenth century
14 Puritans, I would concede -- sixteenth century Puritans, she
15 did write an article on the sixteenth century Puritans --

16 **THE WITNESS:** No, I did not.

17 **MR. THOMPSON:** Oh, okay. Well --

18 **THE WITNESS:** I have never dealt with the Puritans
19 before the seventeenth century.

20 **BY MR. THOMPSON:**

21 **Q.** Let's look at tab 24 of your binder, which is an article
22 that you wrote 34 years ago, and it's called "Divorce and the
23 Changing Status of Women in Eighteenth Century Massachusetts."
24 And let's turn to page 600.

25 And in the second sentence you said:

1 "From the sixteenth century through the
2 eighteenth, Puritan reformers attacked the
3 double standard by advocating chastity before
4 marriage and dealt after for men as well as
5 women."

6 Does that --

7 **A.** I'm sorry. What page and what line are you on?

8 **Q.** 600, second full sentence.

9 **A.** Well, I'm -- yeah. I'm actually talking about Puritans in
10 England because there weren't any Puritans in Massachusetts in
11 the sixteenth century.

12 Yeah, well it's a general comment. Right. It's
13 hardly an article about Puritans in the sixteenth century.
14 Probably half of one line, a 30-page article.

15 **Q.** Well, let's take -- you would concede that there are
16 differences between Puritan theory and canon law in eighteenth
17 century Massachusetts, correct?

18 **A.** Particularly with regard to divorce, which was the subject
19 of this article.

20 **Q.** And under canon law desertion was not even grounds for
21 separate bed and board unless it was combined with cruelty, is
22 that correct?

23 **A.** Gosh, Mr. Thompson, I haven't worked on this since the
24 mid-1970's. I have to refresh my own memory about these
25 matters.

1 Q. That would be fine. Let's do that together. Turn to page
2 608, if you would.

3 (Witness complied.)

4 Q. And you wrote -- and we can look at this together. I'll
5 just read it and you can let me know if you stand by this or
6 whether your research has changed your thinking on this.

7 But on page 608, fourth line down:

8 "In Puritan theory desertion warranted
9 divorce. Under canon law, on the contrary,
10 desertion was not even grounds for separate
11 bed and board unless it was combined with
12 cruelty. Excepting the Ferre and Fletcher
13 cases, the governor and council acted as
14 though canon law controlled their decisions
15 on desertion."

16 Does that reflect -- refresh your recollection that
17 there were instances in which in Massachusetts the governor
18 acted as though canon law were controlling?

19 A. I'm afraid that you misinterpret my comment there to mean
20 that I literally thought they were following canon law.

21 This was simply an artful way of saying they did not
22 grant divorces on the basis of desertion unless cruelty
23 accompanied it.

24 The intent -- of course, I took this from another
25 secondary source, "Howard's Matrimonial Institutions."

1 But my point was simply that they were enforcing a
2 stricter -- a stricter standard for separation from bed and
3 board. It didn't mean they were reading canon law and
4 following it because they were canon law specialists.

5 **Q.** Well, in turning to the first sentence of the next
6 paragraph where you say:

7 "Canon law, rather than Puritan precept,
8 appears to have guided the decisions in
9 cruelty cases as well."

10 **A.** I guess so. I guess I thought so then from the research
11 that I was doing.

12 **Q.** And you stand by that, correct?

13 **A.** I -- I can't redo the research on the stand here, so I
14 have no reason to think that what I said there was mistaken.

15 Although the authorities may have changed. I was
16 citing -- I was citing a book, "Howard's Matrimonial
17 Institutions" that was written quite awhile before that, I
18 think, in the early twentieth century. It was a summary of
19 various colonial laws on divorce.

20 Since the 1970's a lot more work has been done on
21 colonial divorce and it's not an issue that I have returned to
22 in my research in a detailed way.

23 So I -- I can't say with absolutely certainty that in
24 my scholarly opinion this is still correct because I haven't
25 done the detailed research that would enable me to affirm that

1 with great confidence.

2 **Q.** At the time of the founding, there was a broadly-shared
3 understanding of the essentials of the institution of marriage,
4 correct?

5 **A.** Broadly shared -- what was the word?

6 **Q.** At the time of the founding, there was a broadly-shared
7 understanding of the essentials of the institution of marriage?

8 **A.** Yes. Yes, I agree.

9 **Q.** The most important was the unity of husband and wife,
10 correct?

11 **A.** Yes. By "unity" I meant the doctrine of coverture, as I
12 was discussing earlier.

13 **Q.** In the nineteenth century the Christian religious
14 background of marriage was unquestionably present and
15 prominent, correct?

16 **A.** In definitions of marriage and in common understandings of
17 marriage, yes.

18 **Q.** The Christian religious background of marriage was adopted
19 in and filtered through legislation, correct?

20 **A.** That is correct, if you understand me to mean that
21 Christian background, in the very basic sense of its being
22 monogamous, ideally life long and entailing sexual fidelity,
23 yes.

24 **Q.** And by the end of the nineteenth century there was an
25 alliance between national authority and Christian monogamous

1 morality settled firmly in place, is that correct?

2 **A.** Well, I made that comment with respect to the long
3 campaign that federal authorities took against polygamy as it
4 was being practiced in Utah by the Mormons.

5 The single standard that the national authorities
6 wanted to enforce was that of monogamy, and they had also
7 supported it with respect to trying to support the marriages of
8 emancipated slaves in the immediate post Civil War period.

9 **Q.** In the general sense, the social meaning of marriage did
10 not greatly change from 1789 to 1868, correct?

11 **A.** Correct.

12 **Q.** There was actually a lot of legal change in the 15 years
13 after the Civil War, correct?

14 **A.** With respect to the laws barring marriage across the color
15 line, yes, there was a lot of change.

16 **Q.** And there was challenges to the prohibitions on marriages
17 between blacks and whites in those years, correct?

18 **A.** Yes, on the basis of contractual freedom of the parties to
19 marry.

20 **Q.** And some of those challenges were successful, at least
21 temporarily, correct?

22 **A.** Very briefly in states that were controlled by black
23 legislators.

24 **Q.** In the nineteenth century many Americans engaged in
25 informal marriages, correct?

1 **A.** That is true.

2 **Q.** And pregnancy or child birth was the signal for a couple
3 to consider themselves married, correct?

4 **A.** Not always. Sometimes.

5 **Q.** Well, let's look at *Public Vows*, your book, which has been
6 admitted, page 31. It appears behind tab 31 in your binder.

7 **A.** Page 31, you said?

8 **Q.** Page 31. And it's the last paragraph and it reads in
9 part:

10 "Informal practices continued as white
11 immigrants fanned out to the south and west.

12 Marriage frequently followed upon a sexual
13 relationship between and man and a woman" --

14 That may be a typo. Is that a typo in the book?

15 **A.** Yes. I think you are right.

16 **Q.** Okay.

17 "...between a man and a woman proving
18 fruitful, rather than preceding it:

19 Pregnancy or child birth was the signal for a
20 couple to consider themselves married."

21 You believed that when you wrote these words, didn't
22 you?

23 **A.** Well, as I said, frequently, yes. This part of the
24 sentence that follows the -- the colon the -- also incorporates
25 that "frequently adverse." I'm saying, yes, it often was, not

1 always.

2 **Q.** One recent change in marriage has been the emergence of
3 covenant marriage in certain states, correct?

4 **A.** I'm aware that it exists.

5 **Q.** Do you know how many states have covenant marriages?

6 **A.** I believe it's two.

7 **Q.** Which states?

8 **A.** Louisiana and Arkansas, I think.

9 **Q.** Any others?

10 **A.** I'm not sure.

11 **Q.** And covenant marriage represents a change in the
12 institution of marriage in Louisiana and Arkansas, correct?

13 **A.** I'm not -- my understanding was that it provided an
14 alternative sort of marriage to what had been available before
15 covenant was authorized, an additional form of marriage.

16 **Q.** And in that sense it's a change to the institution of
17 marriage to give couples that option, correct?

18 **A.** I really hadn't thought about how much of a change it is.
19 It seemed to me that covenant marriage was more a restriction
20 that the couple placed upon themselves by deciding for that
21 option, rather than the standard option.

22 **THE COURT:** What is covenant marriage?

23 **THE WITNESS:** As I understand it, I think the couple
24 pledges never to divorce, but I -- they pledge never to
25 divorce, is that what it is?

1 **BY MR. THOMPSON:**

2 **Q.** Well, you're the expert.

3 **A.** Well, no. I mean, this is something that's happened in
4 just the past few years that I didn't -- I think it hadn't even
5 happened when I wrote my book and I never really followed up on
6 it since I didn't see it as a major -- I don't know. I just
7 didn't follow up on it.

8 So I -- my sense was that it was harder to get out of
9 a covenant marriage than a standard marriage. And that was
10 what the states had done, provide an option for spouses to say,
11 "I want to join this even firmer commitment."

12 **Q.** And then the state would enforce that decision, correct?

13 **A.** Well, I assume so, in making it harder for them to
14 divorce, if that -- I don't know what the specific provisions
15 of covenant marriage are or whether there are any punitive
16 measures of enforcement or exactly -- I don't know how it's
17 enforced.

18 **Q.** The legislation that inspired covenant marriage in
19 Louisiana reflected Christian moral principles, is that right?

20 **A.** I don't know.

21 **Q.** Now, you have reviewed the Congressional testimony
22 surrounding the Defense of Marriage Act in connection with
23 writing your book, is that right?

24 **A.** Not all of it, but a bunch of it, yes.

25 **Q.** And Congressional debate on the Defense of Marriage Act

1 reiterated long-lived official insistence on traditional
2 marriage as a necessary pillar of the nation, correct?

3 **A.** Yes. Many of the proponents of the Defense of Marriage
4 Act did.

5 **Q.** Did any of the proponents of the Defense of Marriage Act
6 explain their support for the legislation by reference to their
7 religious convictions?

8 **A.** I don't recall.

9 **Q.** You have read Edmund Burke's "Reflection on the French
10 Revolution," haven't you?

11 **A.** If I did, it was an awfully long time ago.

12 **Q.** Do you know whether -- whether you read it or not, do you
13 know that one of the things that Edmund Burke emphasized was a
14 respect for tradition in that work?

15 **A.** I really can't say.

16 **Q.** Okay. Do you know whether any of the supporters of the
17 Defense of Marriage Act supported the legislation because of a
18 respect for tradition?

19 **A.** I assume they did. I think that could be inferred.

20 **Q.** Did you find evidence in the historical record suggesting
21 that each and every supporter of the Defense of Marriage Act
22 did so because of moral disapproval of gays and lesbians?

23 **A.** I don't know.

24 **Q.** In the United States a state has never prevented a man who
25 is homosexually oriented from marrying a woman who, herself, is

1 homosexually oriented, correct?

2 **A.** That's correct, so far as I know.

3 **Q.** And it's definitely happened that a gay man has married a
4 lesbian, correct?

5 **A.** It has happened.

6 **Q.** And so in that sense, sexual orientation is not literally
7 what the law is prescribing in marriage, correct?

8 **MR. BOUTROUS:** Object, your Honor. Calls for a legal
9 conclusion.

10 **THE COURT:** Objection overruled.

11 **A.** Well, the man and the woman were able to marry, so that's
12 all I can say.

13 **BY MR. THOMPSON:**

14 **Q.** Well, let's look at what you said during your Iowa
15 deposition. Tab two, page 52.

16 **A.** My Iowa deposition is which tab?

17 **Q.** Tab two.

18 **A.** Somehow I'm only getting tab 35. I must be reversed. Tab
19 two, page what?

20 **Q.** 52.

21 **A.** Page 52, okay.

22 **Q.** So if we start at line 13, you were asked:

23 **"QUESTION:** If you take sexual orientation
24 out of the equation then, can you think of
25 any reason the state may not want to permit

1 two heterosexual men to marry each other?

2 **"ANSWER:** Let me just answer your question in
3 another way. Another way to illustrate the
4 point I was making about how that -- I was
5 being literal is that the state has never
6 prevented a man who is actually homosexually
7 oriented from marrying a woman who, herself,
8 is homosexually oriented; that is, that has
9 definitely happened, that a gay man has
10 married a lesbian. The state has never
11 prevented that. So in that sense sexual
12 orientation is not literally what the law is
13 prescribing in marriage."

14 And you stand by that testimony, correct?

15 **A.** I do.

16 **Q.** Okay. Now, let's turn to the history of California and
17 marriage. And when did California become a state?

18 **A.** 1851. 1850 or 1851, somewhere in there. I think the
19 first constitution was '51, but I think the state may have been
20 admitted the year before.

21 **Q.** In California in 1851 it was simply assumed that marriage
22 would be between a man and woman, correct?

23 **A.** I would say so.

24 **Q.** And the overwhelming reason why it was assumed was because
25 marriage had long been practiced in that form, correct?

1 **A.** Yes.

2 **Q.** And coverture was a creation of the English common law,
3 correct?

4 **A.** That's right.

5 **Q.** California laws -- California's laws in 1851 were not
6 derived from English common law, correct?

7 **A.** The laws of domestic relations you mean specifically?

8 **Q.** Yes.

9 **A.** They were certainly influenced by the civil law, but
10 common law preconceptions and practices about marital roles
11 were incorporated into that. They were not absent from
12 California domestic relation law, despite its civil law
13 lineage.

14 **Q.** In those common law states that maintained coverture,
15 coverture was a bargain in which each spouse had a very
16 important role the state enforced, correct?

17 **A.** Yes.

18 **Q.** Coverture would not have existed as long as it did were it
19 not a bargain that was seen by those who participated in it as
20 reciprocal, as having something in it for both parties,
21 correct?

22 **A.** Correct.

23 **Q.** While coverture was in place, there were no statutes that
24 ever said that only the husband can work and the wife can't,
25 correct?

1 **A.** What do you mean by "work"? Work for pay?

2 **Q.** Let's take work for pay. There was never a law that said
3 a woman couldn't work for pay?

4 **A.** That's correct, but under coverture her wages would go to
5 her husband. She wouldn't own them.

6 **Q.** Under coverture a woman's personal and real property,
7 whether acquired before or after the marriage, immediately
8 became the property of her husband, correct?

9 **A.** Yes.

10 **Q.** But that was never the case in California, correct?

11 **A.** Under community property the wife retained title to her
12 property, but the husband was, upon the marriage, the manager
13 of that property and had the right to dispose of it and make
14 the decisions.

15 So that the asymmetry of marital roles was still very
16 much a part of the California community property system.

17 **Q.** By the time California became a state, coverture had
18 already been significantly broken into by married women's
19 property laws in various states, correct?

20 **A.** Significantly, but not -- not in such a way as to
21 eviscerate by any means the institution.

22 It was simply that in many states by 1850 -- although
23 not that many by 1850, more by 1860 -- married women had formal
24 title to their property, but all of the other elements of
25 coverture remained very much in place.

1 Q. By the time California became a state, coverture had
2 already been -- excuse me.

3 Before California became a state, the people of
4 California were governed by Spanish law, correct?

5 A. I'm not sure precisely. I assume so. You know, before
6 1848, before the war, Mexico had the property and so I don't
7 know exactly what governed between 1848 and 1850. I guess it
8 was part of a U.S. territory.

9 Q. All right. And just so the record is clear, under civil
10 law coverture did not exist, correct?

11 A. Coverture, as such, did not, but I don't think we should
12 assume that that meant a vast difference in terms of the
13 understanding of marriage as dictating quite different spousal
14 roles, quite asymmetrical spousal roles.

15 Q. Federal Courts had very little role in the dismantling of
16 coverture, correct?

17 A. That is correct.

18 Q. Fairly early in California's history, there were legal
19 acknowledgments that a married woman had the right to keep her
20 own property, correct?

21 A. Yes, it was fairly early.

22 Q. Now, let's talk about the social meaning of marriage,
23 which is a term you used in your book and in your report. When
24 you used the term "social meaning of marriage," you're
25 referring to how the public views marriage, correct?

1 **A.** Yes, general societal understandings.

2 **Q.** And you -- it's your understanding that there is a very,
3 very high proportion of people who believe that the time to get
4 married is when you want to have children, correct?

5 **A.** I think that's generally true of heterosexual couples,
6 yes.

7 **Q.** Is it different for homosexual couples?

8 **A.** I think the question would be more variable for -- I mean,
9 I don't have any data, since same-sex couples have not been
10 able to marry, when it is they make the choice to marry.

11 **Q.** Marriage has evolved into a civil institution through
12 which the state formally recognizes and ennobles individual's
13 choices to enter into long-term, committed, intimate
14 relationships, correct?

15 **A.** Yes.

16 **Q.** But there is no requirement in law that a person who
17 wishes to get married actually intends to have a long-term
18 relationship, correct?

19 **A.** I don't think that marriage licensors inquire into
20 intentions. I think that's accurate.

21 **Q.** Mutual love has always been a part of the social meaning
22 of marriage in the United States, correct?

23 **A.** Part of the social meaning, never a precise requisite for
24 entering the institution, but part of a social meaning indeed.

25 **Q.** Yeah, but there has never been a legal requirement that

1 people be in love to get married, correct?

2 **A.** Not at all.

3 **Q.** Marriage, in your opinion, is a status which implies one's
4 having grown up, is that correct?

5 **A.** I think that is part of the social meaning, that it is
6 seen as a mark of adulthood, settling down.

7 **Q.** Another social meaning of marriage has been that it is the
8 way to found a household, a living unit that is an economic
9 partnership and that involves a commitment to one's partner,
10 correct?

11 **A.** Yes.

12 **Q.** Marriage also has a whole set of romantic meanings for
13 people, correct?

14 **A.** Yes.

15 **Q.** And this is broadcast to us all the time in our public
16 culture, correct?

17 **A.** Yes.

18 **Q.** So the public culture has an impact on the social meaning
19 of marriage, correct?

20 **A.** Yes, it does.

21 **Q.** The social meaning of marriage unquestionably has real
22 world consequences, correct?

23 **A.** Social meaning exists in the real world, yes.

24 **Q.** And just so the record is clear, the social meaning of
25 marriage unquestionably has real world consequences? "Yes" or

1 "no."

2 **A.** Yes.

3 **Q.** That it is far easier to say that the social meaning of
4 marriage has consequences than to measure the consequences,
5 correct?

6 **A.** I'm going to say, yes.

7 **Q.** For the generality of people, the social meanings of
8 marriage are highly influential in their own personal views of
9 the institution, correct?

10 **A.** Yes.

11 **Q.** One way the social meaning of marriage changes is through
12 actual social practices, correct?

13 **A.** Yes.

14 **Q.** Another way the social meaning of marriage changes is
15 through economic transformations, correct?

16 **A.** Economic transformations have a great impact on the social
17 meaning of marriage, yes.

18 **Q.** Another way the social meaning of marriage changes is
19 through ideas and ideology, correct?

20 **A.** These things are all bound up together, yes.

21 **Q.** So that's a yes?

22 **A.** Yes.

23 **Q.** There are also technological reasons why the social
24 meaning of marriage changes, correct?

25 **A.** Yes, specifically with -- with respect to the technology

1 of birth control and other reproductive technologies.

2 **Q.** And the law very definitely has an impact on the social
3 meaning of marriage, correct?

4 **A.** Yes.

5 **Q.** How a given person thinks about gay marriage, their own or
6 others, it's usually quite affected by quite small scale
7 factors; how they were brought up, who their friends are, what
8 their religion is, what they have observed and their own
9 personal experience, correct?

10 **A.** Yes.

11 **Q.** Now, let me ask you some questions about the state of
12 marriage today.

13 In your opinion, morality has been uncoupled from
14 marriage, correct?

15 **A.** If -- if you are quoting my work there, that was a
16 statement made in a context in which I made the point that
17 whereas in the past adultery and fornication were crimes that
18 were punished by the state; that the state enforced those
19 morally disapproved actions that -- in support of marriage, and
20 in support of making marriage the only licensed legitimate
21 place where sex could take place.

22 And I think what I was describing in making that
23 claim about morality being uncoupled was that we have a much
24 broader and more flexible set of social mores about sex,
25 marriage and morality in the past couple of generations.

1 So that state regulations about marriage are no
2 longer -- and the state enforcement of regulations are no
3 longer principally interested in punishing sex that takes place
4 outside of marriage. Rather, marriage is upheld for other
5 forms of social good and not the seemed to be moral goods that
6 it was a principal conveyor of in the past. Morality,
7 particularly with regard to sexual behavior.

8 **Q.** The public forgiveness of President Clinton's sexual
9 misadventures can only be understood against the background of
10 a generation's seismic shift in marriage practices, correct?

11 **A.** Yes. I was referring to the fact that the public tended
12 to -- at least a majority of the public did not topple
13 President Clinton from the presidency, even though his
14 infidelities were made public because, I argued, the -- the
15 social meaning of marriage had moved toward assuming that
16 spouses themselves are the best ones to decide on what is
17 appropriate behavior within the marriage.

18 So that the public tended to see this as a matter
19 between Hillary Clinton and Bill Clinton and not a matter that
20 was something the state should judge.

21 **MR. THOMPSON:** Your Honor, I would request that the
22 witness be instructed to answer the questions "yes" or "no"
23 rather than give these long speeches.

24 **THE COURT:** Well, I think you got an answer.

25 **MR. THOMPSON:** I got an answer all right.

1 **THE COURT:** Follow up on it, but I don't know that we
2 need to go into Bill and Hillary Clinton in any great depth.

3 (Laughter.)

4 **BY MR. THOMPSON:**

5 **Q.** At the twentieth century's close, marriage could no longer
6 be considered a predictable venture, is that correct?

7 **A.** That's correct.

8 **Q.** Marriage, in part, marriage laws, in part, reflect
9 concerns about population size, correct?

10 **A.** I'm sorry. Could you repeat that?

11 **Q.** Sure. Marriage laws, in part, reflect concerns about
12 population size?

13 **A.** It's certainly a potential, yes, of marriage laws to be
14 concerned about that.

15 **Q.** The alteration in the relationship between marriage and
16 the state might be called disestablishment, correct? "Yes" or
17 "no."

18 **A.** As a heuristic device, yes, it might.

19 **Q.** In the history of religion, the term disestablishment is
20 sometimes used, correct?

21 **A.** It is a descriptive term in the history of religion.

22 **Q.** In some countries there is an established religion, and
23 the ending of that special status is called disestablishment,
24 correct?

25 **A.** Yes.

1 Q. Disestablishment did not mean that religious institutions
2 disappeared, correct?

3 A. Correct.

4 Q. On the contrary, the consequence more often of
5 disestablishment was that religious sex proliferated and no
6 single model was any longer supported and enforced by the
7 state, correct?

8 A. Yes.

9 Q. By analogy, one could argue that the particular model of
10 marriage which was for so long the officially supported one has
11 been disestablished, correct?

12 A. One could argue.

13 Q. Today plural marriages have bloomed in your opinion,
14 correct?

15 A. Illegally, yes.

16 Q. And, in fact, in your opinion, marriage is now understood
17 as a private choice today, correct?

18 A. A choice whether to marry or not to marry is understood as
19 a private choice, yes.

20 Q. This stance has allowed hundreds and perhaps thousands of
21 individuals to revive polygamy, correct?

22 A. I don't think it's that that has allowed it.

23 Q. Well, let's look at what you wrote in *Public Vows*. Page
24 213, tab 31.

25 **THE COURT:** Page reference, counsel?

1 **MR. THOMPSON:** 213, your Honor, tab 31.

2 **A.** I'm sorry. Tell me the page again please.

3 **BY MR. THOMPSON:**

4 **Q.** 213. You wrote in the first full paragraph in the second
5 sentence:

6 "Couples who are not following the
7 conventional model look for endorsement from
8 like-minded communities and expect to be left
9 alone by others whom they are not harming
10 since marriage is understood as a private
11 choice. This stance has allowed hundreds and
12 perhaps thousands of fundamentalist Mormons
13 in Utah and Arizona to revive polygamy."

14 Do you stand by that statement?

15 **A.** By this observation, yes.

16 **Q.** Okay. And the emergence in politics of the new right
17 responded, in part, to the apparent disestablishment of
18 traditional marriage, correct?

19 **A.** Yes.

20 **Q.** The new right makes a connection between the stability of
21 conventional model of monogamy and the health of the nation,
22 correct?

23 **A.** Yes.

24 **Q.** But, in your opinion, the resistance to same-sex marriage
25 shows that the profound transformation of disestablishment has

1 not taken place, correct?

2 **A.** Yes.

3 **Q.** In fact, if despite sweeping reformulations and intimate
4 relations in the past quarter century, one can doubt whether
5 most Americans's common sense about marriage has vastly
6 changed?

7 **A.** Yes, I think that's correct.

8 **Q.** Congressional rhetoric on behalf of the defense of
9 marriage undercut the idea that disestablishment of the
10 traditional institution of marriage was well underway, correct?

11 **A.** Yes.

12 **Q.** The bill's supporters announced that traditional marriage
13 was the fundamental building block of society, correct?

14 **A.** They did.

15 **Q.** The bill supporters also announced that nature and the
16 Judeo-Christian moral tradition commanded or comported with
17 traditional heterosexual marriage, correct?

18 **A.** They did.

19 **Q.** The bill's supporters maintained that traditional
20 heterosexual marriage was the basis of civilization, correct?

21 **A.** They did.

22 **Q.** Congressman James Talent of Missouri declared:

23 "It is an act of hubris to believe that
24 marriage can be infinitely malleable; that it
25 can be pushed and pulled around like silly

1 putty without destroying its essential
2 stability."

3 He added:

4 "Marriage goes, then the family goes and if
5 the family goes, we have none of the decency
6 or ordered liberty which Americans have been
7 brought up to enjoy and to appreciate."

8 And this pretty well summed up the predominant view
9 among the bill's supporters, correct?

10 **A.** Yes.

11 **Q.** And marriage is not an infinitely elastic contract between
12 two people, correct?

13 **A.** I can't answer that question.

14 **Q.** Well, let's look at the amicus brief that you signed onto,
15 which appears behind tab 25. This is the amicus brief that was
16 submitted to the Supreme Judicial Court of Massachusetts.

17 And you were a signatory to that brief, is that
18 correct?

19 **A.** Let me look. This is the historian's brief?

20 **Q.** Yes, the professors of history of marriage.

21 **A.** Yes. I did sign this brief.

22 **Q.** Okay. And then let's turn to page 32. And the first
23 sentence says:

24 "Twentieth century courts have made clear
25 that marriage is not an infinitely elastic

1 contract between two people."

2 Do you agree with that statement?

3 **A.** Okay. Yes. I'll agree with it. Not infinitely elastic.

4 **Q.** Congressman Talent, in the comments I just read, voiced a
5 tension that had been present ever since legislators began
6 altering the terms of marriage in the 1840's, correct?

7 **A.** Yes.

8 **Q.** And during the debate on the Defense of Marriage Act, the
9 fear was expressed that licensing same-sex marriage would start
10 a slippery slope to licensing polygamy, correct?

11 **A.** It was.

12 **Q.** Now, while you were at Harvard, you have taught a class
13 entitled "Men, Women and Marriage," is that right?

14 **A.** Yes, I did.

15 **Q.** And you taught that class in 2006 or '07, is that right?

16 **A.** That sounds about right.

17 **Q.** And in that class you assigned some selections from a
18 collection that Andrew Sullivan had put together that were
19 documents relating to the same-sex marriage controversy, is
20 that correct?

21 **A.** That sounds right.

22 **MR. THOMPSON:** Your Honor, we would like to move the
23 admission or ask the Court to judicial notice of DIX-1032. We
24 have provided copies to plaintiffs prior to trial and to the
25 Court.

1 **THE COURT:** 1032?

2 **MR. THOMPSON:** Yes, your Honor.

3 **THE COURT:** Maybe you can connect that up to the
4 witness.

5 **MR. THOMPSON:** Yes.

6 **BY MR. THOMPSON:**

7 **Q.** Did you know of a better collection of -- if someone
8 wanted to look at the arguments for and against same-sex
9 marriage as a policy matter, not as a legal matter, do you know
10 of a better resource that captures fairly and accurately all of
11 the different point of views than Andrew Sullivan's book?

12 **A.** I can't answer that. I know I chose it at the time
13 because it was convenient. I assigned a few documents within
14 it. It was handy.

15 I can't say that it's the best rendition of pro and
16 con ideas. No, I can't affirm that.

17 **Q.** Well, can you name one that's better?

18 **A.** This is not a type of anthology I have researched lately.
19 So I -- I just don't have the wherewithal to answer that.

20 **Q.** Okay. But when you were teaching your class at Harvard,
21 you thought it was --

22 **A.** I thought it was adequate. Whether it was the best, I
23 can't say.

24 **Q.** I see. And in your class you focused on the extent to
25 which opposition to same-sex marriage seems to have been rooted

1 in a fear of gender differentiation disappearing, is that
2 right?

3 **A.** In a single lecture in the class I -- I believe I raised
4 that as a theory of why opposition ran so deep.

5 **Q.** And you've testified before that the -- or provided a
6 statement to the Vermont legislature when it was considering
7 same-sex marriage?

8 **A.** Not exactly.

9 **Q.** Well, in the aftermath of the ruling of the Vermont
10 Supreme Court requiring either civil unions or same-sex
11 marriage, you provided some input, is that right?

12 **A.** Not to the legislature. To their joint judiciary
13 committee.

14 **Q.** Okay. And so it was a committee of the legislature?

15 **A.** Yes.

16 **Q.** I see.

17 **A.** Of both houses.

18 **Q.** I see. When you testified or provided that statement in
19 Vermont, the law that resulted was a compromise which gave
20 something to the Catholics and other conservative groups and
21 something to the LGBT community, correct?

22 **A.** It did state in its first line, "Marriage is between a man
23 and a woman." And then it went on to grant a civil union
24 arrangement that gave all the rights and benefits to same-sex
25 couples, yes.

1 Q. And all of your teaching involves political history to
2 some degree, correct?

3 A. It does.

4 Q. And the concept of political power is relevant to your
5 classes, correct?

6 A. Yes.

7 Q. And you define political power as the capability to have
8 one's wishes effectuated, correct?

9 A. In the political sphere, yes.

10 Q. Now, you believe that there are changed circumstances that
11 have -- that support extending marriage to same-sex couples,
12 correct?

13 A. I do.

14 Q. And in the nineteenth century marriage was confined to a
15 man and a woman and not extended to same-sex couples as a
16 matter of tradition, correct?

17 A. I don't believe anyone ever pressed for marriage, any
18 couple of the same sex ever pressed for marriage, so the
19 question was never defended.

20 Q. So it was -- marriage was maintained between a man and a
21 woman in the nineteenth century as a matter of tradition,
22 correct?

23 A. Of custom, yes.

24 Q. And at the time the homosexual as a person had not really
25 been recognized as such, correct?

1 **A.** Correct. It was -- homosexual acts were recognized, but
2 not the attribution of a different kind of personhood to
3 someone because he or is she had homosexual desire or practiced
4 homosexual acts.

5 **Q.** It wasn't until the twentieth century when sexuality as a
6 mode of defining the very self of the person really came into
7 the fore, correct?

8 **A.** Yes.

9 **Q.** And by the term "homosexual" today, you understand that
10 term to mean a person who is erotically desirous of members of
11 the same sex, correct?

12 **A.** Yes.

13 **Q.** And that's a big difference from the nineteenth century
14 where gender presentation ruled interpretation of a person's
15 behavior, not his desire, correct?

16 **THE COURT:** We have an objection.

17 **MR. BOUTROUS:** Objection, your Honor. I just wanted
18 to have clarification as to whether counsel is talking about
19 within the United States, these customs, or is he talking more
20 broadly? He has been jumping around a little bit.

21 **MR. THOMPSON:** Oh, in the United States. My
22 questions today pertain to that.

23 **THE COURT:** Very well. Can you answer?

24 **A.** Yes. I think speaking in broad scale that one can say
25 that from centuries past when a person was judged by whether he

1 looked masculine or she looked feminine, there has been a shift
2 from that being the principal way of identifying someone's
3 sexuality to recognizing desire and -- desire and motivation
4 toward -- toward another individual, an individual of the same
5 sex or an individual of the other sex.

6 This is more definitive today in medical,
7 psychological, social and cultural meanings of sexuality.

8 **Q.** In your opinion, there are -- excuse me.

9 One changing circumstance is acceptance of
10 homosexuality and the recognition that discrimination against
11 homosexuals is a form of discrimination and not simply a moral
12 behavior, correct?

13 **A.** What was the beginning of that long question?

14 **Q.** Well, we're talking about the changed circumstances which
15 you believe support extending the institution of marriage to
16 same-sex couples, and one of those changed circumstances is the
17 recognition, in your opinion, that discrimination against
18 homosexuals is a form of discrimination in fact and not just a
19 moral behavior, correct?

20 **A.** Yes.

21 **Q.** And there is considerable social survey evidence showing
22 that among the young, discrimination against homosexuals is
23 much less than it was in the past century, correct?

24 **A.** Yes.

25 **Q.** And another one of these changing circumstances is men's

1 and women's gender roles that have made them, while not
2 completely fungible, much more duplicative of one another in
3 many arenas of life, correct?

4 **A.** Yes.

5 **Q.** And, in your opinion, these things together make up a
6 series of changing circumstances that make same-sex marriage a
7 very reasonable proposition, in fact, a very reasonable thing
8 to enact, correct?

9 **A.** Yes.

10 **Q.** Now, let me ask you about gender differences.

11 You're familiar with the concept of sex ratio, by
12 which I mean the relative proportion of men and women in a
13 given society?

14 **A.** Yes.

15 **Q.** And you are perfectly willing to grant that there might
16 well be different rules when there is a scarcity of women as
17 opposed to a scarcity of men, correct?

18 **A.** Different state rules or different customs? I'm not sure
19 what you mean.

20 **Q.** Different customs.

21 **A.** Different customs, yeah.

22 **Q.** And, in fact, it's highly likely there would be difference
23 in rules pertaining to sexual relations in a community where
24 you had a relative scarcity of men, as opposed to a community
25 where you had a relative scarcity of women, correct?

1 **A.** It's a reasonable hypothesis.

2 **Q.** Now, let's turn to no-fault divorce. The innovation of
3 no-fault divorce indicated a major shift, correct?

4 **A.** Yes.

5 **Q.** The provision of divorce on more and more grounds has
6 certainly changed marriage and changed people's expectations of
7 marriage, correct?

8 **A.** Yes. This has been a long process, beginning in the
9 nineteenth century. The provision of more grounds and no fault
10 moved that significantly in the direction of letting the
11 spouses themselves decide on the grounds.

12 **Q.** You can't identify in any complete way the effect of
13 no-fault divorce, correct?

14 **A.** I think that's correct.

15 **Q.** And if you are attempting to assess whether no-fault
16 divorce changed the relative standing of men and women within
17 marriages that persisted, it would be extremely hard to discern
18 the answer to that question, correct?

19 **MR. BOUTROUS:** Object, your Honor. Vague, confusing.

20 **THE COURT:** It is a little vague. Maybe you can
21 sharpen it up.

22 **MR. THOMPSON:** Well, let me see if I'm quoting her or
23 I'm quoting my bad question at the deposition.

24 **BY MR. THOMPSON:**

25 **Q.** It was page 174 of the deposition.

1 First, when you began your research in connection
2 with *Public Vows* and your inquiry into the history of marriage
3 in the United States, I guess it was back in 1990, had you
4 formed a view on whether same-sex marriage should be authorized
5 or whether it was a -- constitutionally permissible?

6 **A.** I hadn't formed a view.

7 **Q.** And what -- what led you to the view that you hold today
8 that -- concerning same-sex marriage?

9 **A.** It really was the research and thinking I did in writing
10 the book. And initially what the advocacy of -- for marriage
11 to be, allowed to same-sex couples, what that advocacy did,
12 because it was going on beginning at the time, was to point me
13 toward the great importance of the state in creating marriages
14 and defining marriages.

15 And so it was a goad to my whole approach to focus on
16 public vows, but I was really motivated to write the book
17 because of my interest in the gender order between how men and
18 women have understood their roles in society privately and
19 publicly, and I was most interested in how marriage has been a
20 vehicle for shaping that.

21 But it was through the -- through the period of the
22 research and the writing that I learned a lot more about the
23 history of marriage and, particularly, about the ways that
24 marriage laws had been used punitively. I was -- this was
25 the -- really, a great shock to me, just how repeatedly with

1 different groups, like Native Americans and blacks, of course,
2 and Asians and women who made the bad choice to marry someone
3 who was not an American at a certain period of time, the period
4 of high immigration. I was -- I was really amazed at how these
5 laws were used punitively and restrictively, yet, most of those
6 restrictions had been gradually seen to be a bar on liberty and
7 had been dismantled.

8 And this fed into my thinking about the question of
9 marriage for couples of the same sex and, also, my research on
10 the extent to which the state, as the third party to the
11 bargain of marriage, had entered into the business of
12 prescribing spousal roles.

13 And so that history was very clear, what direction it
14 had moved in, that the state had moved more and more out of
15 that, allowing the couple involved in choosing one another and
16 forming a marriage and household to decide themselves how they
17 would allocate their respective duties.

18 And so it's those -- it was those things I came to
19 see that moved me very solidly into the direction of, first,
20 supporting the right of couples of the same sex to marry simply
21 because I think it is a civil right to marry the partner of
22 your choice.

23 **Q.** If your historical research during that period had led you
24 to conclude that history and tradition in the United States and
25 the changes in our history did not support the elimination of

1 barriers to individuals of the same sex marrying, would you be
2 here today testifying in support of the plaintiffs?

3 **A.** I don't think so, but I -- another thing I might mention
4 is that in studying this history I was also really struck with
5 the extent to which marriage has not been one thing, that it is
6 a flexible institution.

7 And, in fact, what we -- the fact that it is so alive
8 and vigorous today and so desirable a status and that couples
9 of the same sex want to enter it is testimony to how far it has
10 not been one static thing over time; that it has shed its
11 attributes of inequality and it has shed most restrictions to
12 entering this honored institution.

13 And I sometimes think of it as rather like our U.S.
14 Constitution; that it has certainly essentials that remain the
15 same, but it has been altered to adjust to changing
16 circumstances so that it remains a very alive and vigorous
17 institution today.

18 **Q.** Let me ask you about the elimination of the racial
19 restrictions, coverture, the other discriminatory prohibitions
20 you talked about.

21 Did the elimination of those barriers to marriage
22 change the social meaning of marriage?

23 **A.** I think they changed it in a very positive direction, and
24 this is -- was particularly evident in the 1960's, 70's period
25 of social turmoil over marriages and among -- about many other

1 things and then the period after, in that there was a great
2 deal of -- of negative sentiment voiced about the institution
3 of marriage in the 1970's and many alternatives to marriage
4 then, like, swinging -- and these were all among heterosexuals,
5 but open marriage.

6 Many, many complaints about the injustices embodied
7 in the institution of marriage and the ways that there ought to
8 be alternatives to it that would be socially approved.

9 And after that there -- since then, I would say,
10 particularly in the 80's and 90's, both because of groups on
11 the right, like Focus On The Family, who have stressed all the
12 benefits and advantages to society and the individuals of
13 marriage and, also, importantly, because of the advocacy of
14 same-sex couples to enter the institution, I think, in the past
15 20 to 25 years that we don't see a critical perspective on
16 marriage as the principal thing looming in its social meaning.
17 We see a very highly valued and honored set of expectations
18 about the institution.

19 And so I -- I think this -- this is another
20 suggestion that by clearing away from the marriage institution
21 its aspects of restriction and regulation and emphasizing the
22 liberty aspects, the creation of a zone of intimacy that the
23 partners choose, that these emphases within marriage and in the
24 state's prescription of what marriage is have helped to give it
25 new reverence in recent years as compared to, say, 40, 50 years

1 ago, when it was really under fire.

2 **Q.** What did you mean in your book *Public Vows* when you spoke
3 about this concept of disestablishment that Mr. Thompson raised
4 with you a moment ago?

5 **A.** Well, I was using it as a heuristic device or a framework
6 for thinking about research and suggesting, as I said in answer
7 to him, that there might be an analogy to the disestablishment
8 of religion, which was not bad for religion. It was actually
9 quite good for religion in that many sects, like the Methodists
10 and Baptists and so on, were able to flourish in addition to
11 the standard Presbyterians and Congregationalists and so on.

12 What I really meant was that the established marriage
13 that I had been tracking over 200 years in American history was
14 that one that prescribed spousal roles; that put strong, bright
15 lines of morality between extra-marital relationships and
16 marital relationships and that imposed certain restrictions on
17 access. And disestablishment would be to give a more flexible
18 and amplified definition for the institution.

19 However, I -- I did say that when one looked at -- I
20 was looking at the national scene, so I looked at the Defense
21 of Marriage Act and the strong prescription in the Defense of
22 Marriage Act that marriage was only between a man and a woman,
23 certainly made it clear that that feature of marriage was still
24 very much established.

25 And there was another federal law -- The Personal

1 Responsibility and Work Act -- at the same time, which also put
2 tremendous emphasis on marriage in a somewhat backward-looking
3 way; that marriage was the way for a woman to be supported by
4 her husband and that it was a very desirable institution in
5 society for that reason. It seemed to go back on the law, the
6 constitutional law about gender asymmetry -- I'm sorry, about
7 the gender symmetry and equality in the marital relationship.

8 But at any rate, I did conclude that the state's
9 involvement in marriage, I think, is salutary. The question
10 is, what is that investment going to be and what are those
11 definitions going to be? And I think that judging on the basis
12 of the history, that an amplified understanding of the
13 institution and what it can successfully accept, including the
14 marriage of a couple of the same sex, seem to me very
15 reasonable to assent to.

16 **Q.** Now, Mr. Thompson showed you, I believe it was under tab
17 18, the article by his own expert, Mr. Blankenhorn, in the *Los*
18 *Angeles Times*. Do you recall that? Maybe you can turn to
19 that.

20 **A.** There was something by Blankenhorn. Yes, it is number 18.

21 **Q.** And you recall from your work in this case,
22 Mr. Blankenhorn has used the phrase "deinstitutionalization."
23 Do you recall that?

24 **A.** Yes.

25 **Q.** And is disestablishment, the way you use the term, the

1 same thing as deinstitutionalization as you understand Mr.
2 Blankenhorn to be using that term?

3 **A.** I'm very puzzled by what is meant by
4 disinstitutionalization in his usages, but I feel pretty sure
5 that it is not what I mean by disestablishment, which, first of
6 all, was not -- it was a -- as I said, a framework for thinking
7 about what change has been.

8 **Q.** And in the -- in the course of reviewing Mr. Blankenhorn's
9 work and his statements, did you form any opinions about his
10 methodology and his conclusions?

11 **A.** I would say, yes. I did have some assessments of his --
12 of his overall -- if not his method, which is unclear, of his
13 conclusions and of his -- of the concerns that he brings
14 forward.

15 Because it seems to me that insofar as I understand
16 deinstitutionalization as a -- as something he posits as
17 extremely negative, that it is a -- it is to render changes
18 that have happened in the history of marriage that have
19 preceded and have been brought about by things other than the
20 advocacy for same-sex marriage; that is, there has been since
21 the 1960's a rising -- there was a steeply rising divorce rate
22 in the '60s in the United States. There -- since '60s we have
23 seen fewer couples marrying. And there has been an increase in
24 births out of wedlock. But these seem to me the worrisome
25 things that Mr. Blankenhorn would put under the category of

1 deinstitutionalization.

2 And I want to make a larger -- you know, a historical
3 observation there. Between 1965 and 1980, not only in the
4 United States, but in all the industrialized world, from Europe
5 to Japan, these indicators, the rate at which people married,
6 the rate at which people divorced, one sank, you know, one
7 rose, and the rate of out-of-wedlock pregnancies, these
8 underwent very, very sharp shifts in all these countries within
9 the space of 15 years.

10 It was a true demographic and cultural watershed and
11 turning point in the history of the industrialized world in
12 which, as -- and I'm citing the authority of a French
13 demographer Pierre Rouselle on this, but he called it the
14 "banalization of previous mores." That is, things that had
15 formerly been thought outside the pale of respectability became
16 respectable, acceptable, not worthy of comment among middle
17 class people.

18 And it was that shift that I think is really behind
19 the concerns that Professor Blankenhorn brings forward. And
20 these shifts -- which have actually moderated since 1980. None
21 of these indicators has continued to go up at the rate that it
22 did suddenly zoom up -- I mean, the bad indicators, you know,
23 as it did between '65 and '80.

24 The divorce rate, in fact, in the United States, the
25 rate of increase in the divorce rate plateaued in 1981. And

1 while divorces continue, the numbers continue to rise, the rate
2 of increase of divorce has plateaued for 25 years.

3 So the question of same-sex marriage, I think, is
4 quite separate from the kinds of concerns about what I
5 understand Mr. Blankenhorn to be concerned about with respect
6 to deinstitutionalization.

7 I think it has more to do with changes that have
8 occurred in heterosexual mores about love and sex outside of
9 marriage than it does to do with the question of same-sex
10 couples wanting to enter the marriage institution and gain its
11 stability and its formal imprimatur.

12 **Q.** Mr. Thompson pointed you to page 199 of your deposition,
13 which is under tab one. I would like you to turn to that, if
14 you would.

15 And beginning on line two where he asked you the
16 question about the Massachusetts divorce rates, you were not
17 allowed to give the context and the full meaning of what you
18 meant there.

19 Could you do that now?

20 **A.** Well, it really relates to exactly what I just said, in
21 that I -- I think that the divorce rate question is very hard
22 to answer in a period of simply five years, which is all there
23 has been same-sex marriage in Massachusetts. And that's why I
24 would -- I simply couldn't make a claim about that relation,
25 but the divorce rate question is a long-term trend.

1 Q. Now, since we are talking about divorce, what in your view
2 is the relevance of the no-fault divorce movement that swept
3 the nation, the United States, in terms of the analysis of the
4 issues in this case, in the Perry case?

5 A. I think it's -- very clearly that the passage of no-fault
6 divorce here starting in California, of course, which was the
7 first state and then sweeping through the states, and as well
8 becoming the characteristic form of divorce in Europe, was an
9 indication of the shift in -- in weight from the state to the
10 couple with respect to the terms of marital performance. That,
11 as I have said, spousal roles used to be dictated by the state.
12 Now they are dictated by the couple themselves. There's no
13 requirement that they do X or Y if they are one spouse or the
14 other.

15 And similarly with divorce, that under the adversary
16 regime that preceded the no-fault dispensation, one spouse had
17 to accuse the other of a fault that the state had defined as
18 the reason a marriage could be ended. And that led to -- that
19 was behind the times, in that many couples by the 20th century
20 both knew that their marriage had broken down. One of them may
21 not have committed the fault that the state defined,
22 particularly in the State of New York, which only had the
23 ground of adultery and, of course, is a very large and
24 influential state. So couples would collude to present a fault
25 before the Court. And this was -- the movement for no-fault

1 divorce was, in fact, started by lawyers who thought this was
2 very bad for the law; that peoples should be colluding and
3 their lawyers should be colluding with them.

4 So no-fault divorce really set into actual practice
5 what had been happening to a great extent behind the shadow of
6 the adversary regime, and it represented that the state was no
7 longer so interested in saying, Okay, this is -- this is what
8 breaks up a marriage; or if you are a husband, you have to do
9 this; if you are a wife, you have to do that.

10 And that move, it underlines the fact that gender
11 asymmetry, that specific performance of one marital role or
12 another, is not what is in the law of marriage these days and
13 seems to me to open the door to the appropriateness of a
14 same-sex couple getting married.

15 **Q.** Does it reinforce that trend that you mentioned earlier
16 relating to mutual consent and choice in terms of the person to
17 whom you would be married?

18 **A.** Yes, in respect that the mutual consent and choice about
19 the marriage ending is now part of the no-fault dispensation.

20 **Q.** When no-fault divorce swept the nation, were there alarm
21 bells sounded concerning the effect that might have on the
22 institution of marriage in this country?

23 **A.** I think at the time there were so many alarms raised about
24 marriage between 1965 and 1980 that I'm not sure I could
25 separate out the particular alarms by no-fault divorce -- about

1 no-fault divorce, but certainly it was never uncontroversial
2 and any change in terms of marriage have always had their
3 points and their alarm is.

4 **MR. BOUTROUS:** Your Honor, I probably have about 20
5 minutes more of questioning.

6 **THE COURT:** What's that?

7 **MR. BOUTROUS:** I have about 20 minute of additional
8 questioning. I can do it now or if the Court would like to
9 break now, whatever Court prefers.

10 **THE COURT:** Let's move along and maybe you can
11 squeeze that 20 minutes down.

12 **MR. BOUTROUS:** Okay. I can take a hint.

13 **BY MR. BOUTROUS:**

14 **Q.** Professor Cott, once coverture ended in California and
15 other places in the United States, did that put an end to the
16 laws of marriage dictating spousal roles in this country?

17 **A.** Well, not entirely because coverture lent a very, very
18 long shadow to the marriage relationship and the gender
19 asymmetry of roles with respect to who was the expected
20 provider in the family and who was the dependent was then
21 reinvigorated in the level -- at the level of federal policy
22 with many new deal provisions, particularly Social Security,
23 which gave special additional benefits to a married man when he
24 got to the age of collecting his old age pension.

25 If he had a wife, his wife would receive 50 percent

1 of his -- his benefit that he would get as a single individual.
2 This was a very definite material advantage to those married
3 spouses as compared to single individuals.

4 And it was a very major step in what has become the
5 federal channeling of benefits through the marital
6 relationship.

7 It was gender specific. It did not give -- even if a
8 wife had been, and she could be in the 1930's, the principal
9 earner in her family and her husband had been her dependent,
10 that was possible in real life, but by the time they aged, she
11 would not be able to collect a spousal benefit for her
12 dependent husband.

13 So those things were challenged in the 1970's and the
14 Supreme Court found that those spousal assignments within the
15 marriage institution were -- were unconstitutional.

16 But that, that was -- I would say that was a
17 reinvigoration of certain expectations of coverture that gave
18 asymmetrical roles and particularly gave the husband the role
19 of the provider, the main agent of the family.

20 **Q.** And did those asymmetrical gender roles persist into the
21 70's?

22 **A.** Well, in the federal benefits, yes, most certainly.

23 **Q.** How about culturally from a historical perspective?

24 **A.** Well, I think that the cultural -- certainly, the state's
25 role in assigning benefit to marriage itself, those material

1 advantages is one of the -- one of the things that holds up the
2 particular prestige that marriage has. It's in a reciprocal
3 relation with the other cultural evaluations.

4 But, yes, I think that the -- all of these state
5 benefits that prescribe a certain way of living tend to have
6 cultural impacts and after the -- after the challenges in the
7 mid-70's to the spouse specificity, the gender specificity of
8 various federal benefits, I think it's been -- actually been a
9 great benefit to that and has enabled wives who might want to
10 support their husbands to be able to do that without thinking,
11 Oh, well, if we did that, when we retired we would be at a
12 great disadvantage.

13 **Q.** In your view as a matter of historical analysis, is the
14 institution of family important to American society?

15 **A.** Yes, indeed.

16 **Q.** In your view, is the raising of children and responsible
17 raising of children an important value in American society?

18 **A.** It is.

19 **MR. THOMPSON:** Objection, your Honor. Leading. We
20 have been giving a lot of latitude, but this is bordering on
21 testimony.

22 **THE COURT:** Objection overruled.

23 **BY MR. BOUTROUS:**

24 **Q.** Did you answer?

25 **A.** Yes, it is.

1 Q. In your view, would providing the ability -- providing
2 individuals of the same sex the ability to marry be consistent
3 with those two American values?

4 A. Yes, I think it would be.

5 Q. Why?

6 A. I think it's clear that couples of the same sex are going
7 to form intimate relationships and rear children of their own
8 or adopted. And it seems to me to the public's interest for
9 them to be able to do that in marital units that are recognized
10 as such and honored as such, and that's even without speaking
11 about the individual dignity that being able to participate in
12 marriage will impart to the individuals.

13 But from a social point of view, given the extent to
14 which marriage benefits from the point of view of the state
15 have been always about establishing continuity and stability in
16 households and social order, it seems to me this is a direction
17 that the state would want to go to pursue that aim.

18 Q. Mr. Thompson asked you some questions sprinkled throughout
19 about polygamy, and I would like to ask you a few questions
20 about that briefly.

21 On page 213 of *Public Vows* -- do you have that in
22 front of you?

23 A. I think I do because I was looking at it before. I
24 forget which number it was in the tab.

25 Q. Tab 31 I believe it was. Thank you. The top of 213, I

1 believe, or the first full paragraph.

2 And Mr. Thompson had read the sentence about:

3 "This stance has allowed hundreds and perhaps
4 thousands of Fundamentalist Mormons in Utah
5 and Arizona to revive polygamy."

6 When you wrote that sentence, were you in any way
7 endorsing polygamy?

8 **A.** Absolutely not.

9 **Q.** And were you suggesting in any way that it had become
10 legal?

11 **A.** I'm just trying to find the spot. I was on 215, I think.

12 (Brief pause.)

13 **A.** Here we go.

14 **Q.** First full paragraph beginning with the word "Commuted."

15 **A.** No. Actually I say in the next sentence:

16 "The open practice of polygamy unprosecuted,
17 although it is illegal as well as officially
18 disapproved by the Church of the Latter Day
19 Saints."

20 I think I was really pointing to the ways in which
21 the -- most states do not prosecute behavior that is seen as
22 private, even when it is formally against the law that; that
23 is, I think probably many states still have adultery as a crime
24 on their laws.

25 I don't know for sure, but I think it has remained in

1 many state's legal codes. But the states do not prosecute
2 adultery, not in the state's motivation. An angry partner
3 might but that's something else.

4 So what I really was emphasizing here was the extent
5 to -- the extent to which marital behavior has become more --
6 you know, the state has given more latitude on marital
7 behavior. I think this example -- personally, I think this is
8 an egregious example of state non-prosecution of something that
9 is illegal and not at all in the tradition of American
10 marriage.

11 **Q.** When you evaluate the sweep of history in America, is
12 there anything that suggests to you that the recognition of the
13 ability of individuals of the same gender to marry would
14 somehow create a slippery slope or pave the way towards lawful
15 polygamy?

16 **A.** I do not think so.

17 **Q.** Why not?

18 **A.** Well, monogamy, as I said yesterday, is not only -- has
19 not only come down to us through the common law and through its
20 Christian background. It also has a political foundation in
21 the American republic.

22 Yesterday when I was talking about the founder's
23 emphasis on the consent and voluntary allegiance that they
24 hoped for from the to-be citizens of the United States being
25 analogized to the consent and voluntary allegiance in

1 monogamous marriage, they made an explicit contrast to
2 polygamy, which in their political view could only be
3 associated with despotism and non-consent, because in their --
4 in their eyes they couldn't imagine why a woman would agree to
5 marry a man if he already had wives, that she must be being
6 coerced.

7 And through the long campaign against Mormon polygamy
8 before Utah entered -- was allowed to enter the union, this
9 theme of polygamy equaling despotism, whereas monogamy equaled
10 consent and free choice, was a political theme. And so I think
11 that monogamy is very, very deeply engrained in the American
12 political tradition, as well as having, certainly, a religious
13 background and a common law background, a more specific common
14 law background.

15 **Q.** And what, in your view as a historian, the laws of
16 incest -- Mr. Thompson referenced those -- have they served?

17 **A.** Well, as I understand it, these are some of the many
18 hygienic -- thought to be hygienic or eugenic laws that many
19 states have put into their codes.

20 And, actually, hygienic laws have varied over time,
21 usually in tune of what is thought to be scientific. In the
22 period from the 1880's through to the 1930's with the rise of
23 eugenics to very high status, there were very many laws put
24 into states saying that certain people considered feeble-minded
25 couldn't marry or other characteristics and categories that we

1 don't really use today or don't consider legitimate.

2 And, for instance, but -- on the question of first
3 cousin marriage. These marriages were very highly thought of
4 and were often the most status-filled marriages in the
5 antebellum south for instance. It was a very common way for
6 rich families to consolidate their holdings over land, to have
7 first cousins marry and not lose the family property to
8 complete outsiders. But that -- then most of the states
9 decided that first cousins shouldn't marry; that it was
10 eugenically ill advised.

11 So these things have shifted and the states, of
12 course, do retain certain restrictions on marriage,
13 particularly age of consent, age below which no marriage can be
14 contracted.

15 **Q.** In your view, do laws allowing individuals of the same
16 gender to marry suggest or jeopardize those other restrictions
17 in any way?

18 **A.** I don't think so, no.

19 **Q.** Let me ask you one or two, I think, final questions.

20 As a historical matter, is there any basis for
21 concluding that allowing individuals of the same gender to
22 marry would affect population growth?

23 **A.** I don't see any reason for concluding that, no.

24 **Q.** Has there been a separation of church and state as to
25 marriage in this country since its founding?

1 **A.** Yes.

2 **Q.** As a historical matter, does the fact that civil marriage
3 borrowed and looked to some traditions from religion in
4 formulating the law, does that make the institution of marriage
5 in this country a religious institution?

6 **A.** Definitely not. We are a multi-religious society and our
7 civil marriage serves to keep that harmonious society.
8 Different religions may place their requirements on marriages,
9 but they are not superior to the civil law validation and
10 authority over marriage.

11 **Q.** Are you, based on your study of history, a believer in the
12 public institution of marriage?

13 **A.** I believe it's a very valuable institution.

14 **Q.** And do you think its value will be enhanced if individuals
15 of the same gender are allowed to marry in this country?

16 **A.** I think that -- judging from the way their advocacy over
17 the past 20 years has raised the status of the institution in
18 many people's eyes, made them appreciate its benefits, I would
19 expect that, yes, amplifying it to allow them entry would be
20 very beneficial to the institution.

21 **MR. BOUTROUS:** Your Honor, I'm going to consult with
22 my colleagues. Thank you.

23 **THE COURT:** All right.

24 (Discussion held off the record
25 amongst plaintiffs' counsel.)

1 **MR. BOUTROUS:** Your Honor, I believe that's the end
2 of my questioning.

3 I just wanted to make sure, as a formal matter, that
4 the exhibits on the list that I had presented the Court were
5 admitted into evidence before Professor Cott steps down.

6 **THE COURT:** That's my understanding, along with those
7 referred to by Mr. Thompson.

8 **MR. BOUTROUS:** Those were the judicial notice.

9 **THE COURT:** That's correct.

10 Let me ask, while you are on the stand, Professor,
11 you described marriage as an instrument of government. How is
12 it that the state, or government, became the principal
13 formulator of the rules of this government rather than the
14 governance being left up to contractual relations between the
15 parties or private institutions?

16 **THE WITNESS:** Well, I think that simply -- let me put
17 it this way.

18 Our marriage rules are inherited from the colonists,
19 who originally were in this nation. And in both -- in both
20 England and the common law and the civil law, there were long
21 traditions of governmental authority over marriage.

22 Under the civil order they were not exclusive to the
23 government. That is, for three, four centuries in Europe their
24 great tussles between the church and the state over which of
25 these authorities should control marriage because of the extent

1 to which it was a governing vehicle.

2 But in all of the modern monarchies in Europe, the
3 state one and, certainly, in the one most relevant to our
4 institutions in the United States, in Britain the state
5 retained control using the church as the ceremonial partner in
6 marriage.

7 The United States form, going up from the colonies,
8 was even more decidedly toward the secular authority.

9 I think it had a great deal to do with the fact that
10 religious authority was very poorly established.
11 Ecclesiastical authority of the Church of England was extremely
12 poorly established in the early United States and there simply
13 wasn't the biomass around to enter.

14 **THE COURT:** Is what you are saying the state
15 regulation of marriage was not invented in the United States?

16 **THE WITNESS:** Oh, certainly not. Certainly not.

17 **THE COURT:** It came here as part of the heritage of
18 those who settled in the United States.

19 **THE WITNESS:** Yes.

20 **THE COURT:** And what were the driving forces behind
21 this growth of state regulation of marriage?

22 **THE WITNESS:** Well, I wouldn't say "growth." I would
23 simply say that the -- the states were the ones who set the
24 terms.

25 From the beginning, from the beginning, from colonial

1 legislatures to state legislatures. I think what's -- perhaps
2 this will clarify --

3 **THE COURT:** But I understood you to say that the
4 state's role in the United States was more expansive, more
5 vigorous than it had been in Europe. Is that a fair --

6 **THE WITNESS:** No. It's simply that there was no
7 contest between the state and church of anything like the
8 proportion that the contest between monarchs and the Catholic
9 church that occurred over centuries in Europe.

10 But not -- it's simply that there wasn't so much of a
11 contest. It was civil authority. Not 100 percent, but, you
12 know, majority percent from the beginning.

13 Maryland, for instance, was a more Catholic colony.
14 It had more Ecclesiastical authority over marriage.

15 Certainly, from the founding of the United States and
16 establishment of state governments, as compared to colonial
17 legislatures under the British empire, in all the state
18 governments secular authority over marriage was established and
19 it was considered part of the police power; the power of the
20 states over the health, safety and welfare of their population.

21 Marriage rules were seen as part of that police power
22 and it's one of the reasons that they -- this power to regulate
23 and define has remained at the state level and does -- by the
24 Tenth Amendment is actually not part of federal power to
25 prescribe, although federal policies on marriage have greatly

1 affected marriage, the states have the right to define marital
2 entry, exit, et cetera.

3 **THE COURT:** Was there some sort of vacuum that the
4 state power was flowing into and filling? A vacuum because
5 there was the absence of private regulation or regulation by
6 private entities or institutions?

7 **THE WITNESS:** Well, in the Anglo American tradition,
8 marriage has always been a matter for governance. It was --
9 certainly, it involved --

10 **THE COURT:** State governance. There is private
11 governance and state governance. That's the distinction I'm
12 trying to draw.

13 **THE WITNESS:** Okay, okay. Oh, okay. I apologize,
14 your Honor.

15 When I use "governance," I am using it with respect
16 to governmental authorities. And private contract is an
17 essential to marriage. The contract of two parties to consent
18 to marry one another.

19 But that contract to marry is not valid in our nation
20 unless the state joins in as a third party and says, I credit
21 your private contract.

22 That's what I meant in the very beginning by saying
23 marriage is this unique public/private blend in that it
24 requires private free consent, but it involves the public in
25 monitoring and setting the terms of whether that consent

1 creates merely an informal relationship or a valid marriage.

2 **THE COURT:** And what are those interests that the
3 government has in this contract between the two marriage
4 partners?

5 **THE WITNESS:** Well, I think the interests are, as I
6 was suggesting. In bundling certain social rewards with the
7 duties that are imposed on the couple by the state, in order to
8 incentivize stable long-term household formation and care of
9 the couple for one another.

10 The -- that reciprocal bargain in marriage, long ago
11 when it was unequal and today, is one spouse takes up the
12 obligation to support the other in marriage, and that is
13 enforced by the state.

14 **THE COURT:** And you are saying in the absence of --

15 **THE WITNESS:** The --

16 **THE COURT:** And you are saying in the absence of that
17 bargain, there are certain harms or externalities or social
18 costs that flow and it's in the state's interests to regulate?

19 **THE WITNESS:** Yes. The state has always seen it as
20 in its interest to regulate it, yes, and I think that interest
21 continues.

22 **THE COURT:** Very well. Thank you, Professor Cott,
23 for your testimony. You may step down.

24 (Witness excused.)

25 **THE COURT:** And why don't we take our luncheon break

1 at this time. Be back and ready to go, if you can, at 1:30.

2 (Whereupon at 12:23 p.m.proceedings

3 were adjourned for noon recess.)

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P R O C E E D I N G S1
2 JANUARY 12, 2010

1:33 P.M.

3
4 **THE COURT:** Very well. We will soon be ready for our
5 next witness. Let me just mention a couple of items.6 With respect to the proposal for recording these
7 proceedings and the local rule change, all of the responses
8 that have been received are arrayed in the jury room. Counsel
9 may inspect them.10 I have filed those that came from organizations.
11 These are lawyer organizations, I believe exclusively, but did
12 not file the individual comments because of their numerosity.13 I'll be pleased to receive whatever suggestions
14 counsel have with respect to how we deal with those.15 And with respect to a letter dated January 11, that I
16 received from Mr. Cooper, concerning the seating arrangement
17 and the direction that the camera is -- that is focusing on
18 counsel, is pointed at, and he expressed concern that he and
19 members of his team could be observed in the background
20 conferring, I've seen the situation now that you're seated on
21 the other side of the table.22 And I hope it's no disappointment to you, Mr. Cooper,
23 but you cannot be observed.

24 (Laughter)

25 You are out of camera range. So you can consult with

1 your colleagues without fear of being picked up on the camera.

2 All right. Mr. Boies, are you taking the next
3 witness?

4 **MR. BOIES:** No, Your Honor.

5 The next witness is Professor George Chauncey. He is
6 a witness that has some issues that are particular to the City
7 and County of San Francisco, and also some issues that are
8 broader.

9 In order to make the presentation most efficient, and
10 avoid having multiple lawyers examine, each for separate
11 parties, we've agreed that the counsel for the City and County
12 of San Francisco will do the entire examination.

13 **THE COURT:** That will be fine.

14 I assume that's without objection, Mr. Thompson.

15 **MR. THOMPSON:** No objection, Your Honor.

16 **THE COURT:** All right. Ms. Stewart.

17 **MS. STEWART:** Thank you, Your Honor.

18 We would like to call the -- the plaintiffs and the
19 plaintiff-intervenors would like to call Professor
20 George Chauncey to the stand.

21 **THE CLERK:** Raise your right hand, please.

22 **GEORGE CHAUNCEY,**
23 called as a witness for the Plaintiffs herein, having been
24 first duly sworn, was examined and testified as follows:

25 **THE WITNESS:** I do.

1 And then three and a half years ago, I moved to Yale,
2 where I'm a professor of history in American studies.

3 **Q.** Would you tell us about the books that you've authored or
4 edited.

5 **A.** One is called *Gay New York: Gender, Urban Culture, and*
6 *the Making of the Gay Male World, 1890-1940*. That was
7 published in 1994.

8 Another is, *Why Marriage: The History Shaping*
9 *Today's Debate Over Gay Equality*. It was published in 2004.

10 Also co-edited a book called *Hidden from History*,
11 which was an early collection of essays in lesbian and gay
12 history.

13 And I'm constantly -- currently working on finishing
14 a book about post war gay culture in politics.

15 **Q.** Would you also tell us a little bit about the other kinds
16 of academic publications you have authored.

17 **A.** Uhm, I've published something more than a dozen articles
18 and scholarly journals and collections.

19 **Q.** And how about conference papers?

20 **A.** And I've given many conference papers and chaired sessions
21 at the major professional meetings of the American Historical
22 Association, Organization of American Historians, American
23 Studies Association. And have been invited to give lectures
24 across the United States, in Europe, Latin America, China, and
25 Australia.

1 Q. Have you received any awards for your scholarly work?

2 A. Uhm, *Gay New York*, which was my dissertation at Yale,
3 received two awards there. One was for the co-winner of the
4 best -- prize for best dissertation in American history. And
5 then it won the University's top dissertation prize for a
6 dissertation in any department.

7 And, then, as a book it won two awards from the
8 Organization of American Historians. One was for the first
9 best book in any field of history. And the other was for the
10 best book published in the previous two years in American
11 social history.

12 Won the Los Angeles book times -- sorry, the
13 *Los Angeles Times* book prize, and a couple of other prizes.

14 Q. Would you tell us a little bit about the kinds of sources
15 that you study in the work that you do in your research and
16 writing and your teaching.

17 A. Well, as a social historian, I draw very widely on
18 sources. So I've looked at court records, police records,
19 probation department records, records of various private moral
20 reform societies, records of gay organizations, social service
21 agencies. I've also looked at diaries, correspondence.

22 I've interviewed -- actually, sort of lost track, but
23 I think it's about 180 elderly gay men, about their
24 experiences.

25 I've also looked at films, advertising, so forth.

1 The sorts of things that I also teach in my teaching. Of
2 course, I assign a range of studies by historians and other
3 scholars, and then primary documents which would be drawn from
4 all these fields, as well as films.

5 I often teach films in my classes, and teach students
6 how to interpret them in the context of the historical period.

7 **Q.** And how about government or political materials?

8 **A.** Well, in addition to the records of the courts and the
9 police I've mentioned, I've looked at Congressional records and
10 reports, publications put out by mayors' offices, and their
11 correspondence, and so forth.

12 **Q.** Would you just quickly describe for the Court the kinds of
13 courses that you've taught, summarizing, given the 20-year
14 history of your teaching?

15 **A.** Sure. Broadly, courses in 20th century American history.
16 The broadest being a 2-semester lecture course of the
17 United States since 1919.

18 And, then, more specialized courses on post World War
19 II American culture in society, urban history, social history,
20 the history of gender and sexuality. Lesbian and gay history
21 is a lecture course and is a seminar.

22 **MS. STEWART:** Your Honor, we would like to offer
23 Professor Chauncey in the subjects that he just described.
24 That is, in the history of -- 20th century U.S. history,
25 broadly, but with specialization in gender and sexuality, and

1 the social, cultural, and political history of lesbian and gay
2 men, and their place in American society.

3 **THE COURT:** Mr. Thompson.

4 **MR. THOMPSON:** We have no objection, Your Honor.

5 **THE COURT:** Very well. You may proceed, Ms. Stewart.

6 **BY MS. STEWART:**

7 **Q.** Dr. Chauncey, before we go into the substance or the
8 details, if you will, of your opinions, could you just give the
9 Court a brief summary of the expert opinions that you're going
10 to offer to the Court today.

11 **A.** Well, most broadly, I guess, my reading of the historical
12 record is that lesbians and gay men have experienced widespread
13 and acute discrimination from both public and private
14 authorities over the course of the 20th century. And that has
15 continuing legacies and effects.

16 This has been manifested in the criminalization of
17 sexual intimacy and association; the discrimination in public
18 accommodations, in employment; censorship of images about gay
19 people and speech by gay activists; stereotyping and
20 demonization of lesbians and gay men. And that all this has
21 been drawn on and reinforced sustained patterns of prejudice
22 and hostility.

23 **Q.** I'd like to turn, then, to the first of those things that
24 you mentioned, criminalization. Could you tell us, give me an
25 example of one of the major ways that gay people have been

1 criminalized.

2 **A.** Well, the first obvious example would be sodomy laws.

3 Although, there is a complicated history there. They were
4 enacted in one form or another in the early American colonies.

5 Typically, they didn't specify homosexual conduct and
6 only homosexual conduct. Though, some of the Puritan colonies
7 did actually just quote Leviticus, prohibiting a man from lying
8 with a man. But, very often, they prohibited a range of
9 non-procreative forms of sexual course between men and men, men
10 and women, men and animals in some cases.

11 They also didn't criminalize all forms of homosexual
12 conduct. Relatively few of them criminalized female
13 interactions, for instance.

14 But these laws were reformulated after independence;
15 changed over the course of the late 19th century. They were
16 enforced more in the colonial period; and then relatively
17 little for some period after that.

18 Enforcement increased in the late 19th century. And,
19 then, even then, they often focused on particular kinds --
20 certainly, some people who engaged in consensual homosexual
21 relations were prosecuted. They typically went after sex with
22 minors, sex involving violence, and so forth.

23 What's striking about the development of those laws
24 over the course of the 20th century is that even though they
25 were broadly construed, of course, they came to symbolize the

1 criminalization of homosexual sex in particular.

2 Ironically, this was probably most striking in the
3 Supreme Court's decision in *Bowers v. Hardwick*, where they were
4 deciding about a Georgia statute, which actually criminalized
5 anal and oral sex between men and women, heterosexuals, as well
6 as homosexuals, and yet they describe that case as if it were
7 simply bearing on homosexual sex. And I think that, broadly,
8 that's been the way that sodomy has come to be understood.
9 And, of course, some of the laws did penalize just same sex.

10 And in the 1960s, and especially '70s, as more and
11 more states decriminalized sodomy as part of their general
12 reform of the moral code, they -- several states actually
13 enacted new legislation that specified homosexual conduct, such
14 as the Texas statute.

15 **Q.** Were there other ways, besides the sodomy laws, that gay
16 people have been criminalized, as you have used that term?

17 **A.** Well, beginning again, in the late 19th century, when you
18 had the emergence of highly-developed and more visible lesbian
19 and gay subcultures in large American cities, there was a
20 stepped-up policing of those communities and people.

21 And the police began to enforce a range of laws that
22 didn't specifically mention homosexuality, but could be used
23 against -- I will just give you one example.

24 The disorderly conduct statute as, of course, a very
25 broad rubric, could be used by the police and courts to

1 penalize a wide range of behavior that they considered
2 disorderly.

3 And in New York City, which I've studied -- although,
4 there are comparable laws in California -- we can see that
5 these laws began to be applied more and more to homosexuals.

6 (Reporter interrupts.)

7 Sorry. The disorderly conduct statute began to be
8 applied more and more to homosexuals. And, actually, at some
9 point, the police started registering disorderly conduct,
10 parentheses, degenerate, in their own police record books.

11 And then in 1923 or '24, the New York state
12 legislature specified as a form of disorderly conduct one
13 person standing about in a public place for purposes of
14 soliciting a man for unnatural sexual acts.

15 And so this law then was used both, certainly, to
16 literally criminalize one man trying to pick up another man, to
17 ask him to have sex, but was also used to arrest people who
18 were found in a bar or a club, a restaurant. Sometimes it was
19 used against people who were simply found at a gay party, in a
20 private home.

21 And over the course of period from 1924 until 1966,
22 when New York's mayor, John Lindsay, stopped the police from
23 using entrapment to enforce this law, there were approximately
24 50,000 arrests under this charge.

25 And the -- the scale of this, I guess, came home to

1 me when I -- at some point when I had interviewed 75 or a
2 hundred gay men. Actually counted up and realized that half of
3 them had been arrested at least once on a gay-related charge in
4 their lives. And this was the most common charge. And so it
5 was a really a very pervasive form of policing.

6 **Q.** You mentioned New York. And I take it that was just an
7 example. Did this happen elsewhere?

8 **A.** Yes. There was a similar law used in California. The
9 vagrancy law was often used in California. And these sorts of
10 laws, general-purpose laws, were sort of tailored to deal with
11 homosexuals in a variety of states.

12 **Q.** What effects did the discrimination of gay people, of
13 which you have given these examples, have on gay people?

14 **A.** Well, I think one effect was simply to register the
15 society's disapproval of their behavior and make that
16 abundantly clear.

17 And the idea -- especially this idea that sodomy laws
18 were anti-homosexual laws, has been used in recent years to
19 justify a range of forms of discrimination.

20 You couldn't let openly-gay soldiers serve in the
21 military because what they do, what defines them in some sense
22 as being homosexual, is a criminal offense. It was mobilized
23 in some of the anti-gay-rights referenda of recent decades.

24 But it stood as a sign of social disapproval of
25 homosexuals. And then, of course, it just had palpable effects

1 on people's lives. As I said, it meant that a phenomenal
2 number of people, at one point or another, ran across the law,
3 and that they knew that the police were out there looking for
4 them.

5 **Q.** Did some people -- did it affect their willingness to go
6 out and be in public?

7 **A.** It did for some. There were certainly many very bold
8 people who went out and about; went to gay meeting places;
9 certainly, developed gay social networks and the like.

10 But, at times when there were police crackdowns --
11 and periodically these would happen in major cities, even small
12 towns around the country -- and the heat was on, as it were,
13 people were then much more likely to be careful about going out
14 and associating, especially --

15 **Q.** What --

16 (Simultaneous colloquy.)

17 **Q.** -- if you did get arrested?

18 **A.** Well, one of the biggest fears -- disorderly conduct
19 itself, of course, is not that significant. A misdemeanor.
20 But it -- it opened up much more consequential dangers to
21 people.

22 So that both the lawyers I've talked with, who
23 represented men who had been charged this way, and some of the
24 men I've interviewed, who faced these charges, all agree that
25 their first concern was that the fact that they had been

1 arrested on this would lead the police to call their relatives
2 to confirm their identity, call their landlord to confirm their
3 address, call their employer to confirm their workplace.

4 And so the biggest fear, really, was that this would
5 expose them as being gay, and that that would lead to much more
6 significant social consequences: The loss of a job or a home
7 or of social respect; rip ties with their family.

8 **Q.** And did it lead to those kinds of losses, in fact?

9 **A.** It certainly did sometimes, yes.

10 **Q.** You mentioned as the second topic or item that you were
11 going to discuss today was discrimination, is the word I think
12 that you used.

13 And I wondered if you could describe the
14 discrimination or give some examples of the discrimination that
15 has been perpetrated on gay people.

16 **A.** Right. I was going to discuss discrimination in public
17 accommodations and employment.

18 Start with public accommodations. Probably one of
19 the most important instances of this was the fact that in 1933,
20 with the repeal of prohibition, first New York state, and then
21 successively many other states, issued regulations that
22 prohibited bars from serving -- sorry, bars, restaurants
23 cabarets, or anyplace with a liquor license, from serving
24 drinks to lesbians or gay men, or allowing them to congregate
25 on the premises.

1 And this, of course, just had a profound impact on
2 lesbian and gay sociability for lesbians and gay men, as well
3 as for heterosexuals.

4 Bars and restaurants were places to go to meet your
5 friends, to socialize. But they were particularly important
6 for lesbians and gay men, because they had to be so careful to
7 hide their gay identities in so many of the social settings, at
8 the workplace, often with their biological families, and so
9 forth. So that they were really keen to find places where they
10 could go and be more open, just socialize with people of their
11 own kind.

12 And what it meant was that this criminalization meant
13 that, a, when people went to a regular bar or restaurant, a
14 normal bar or restaurant, they typically had to be very careful
15 to hide the fact that they were gay, for fear of being
16 excluded.

17 And so they often sought out places that had decided
18 that they could make money with the snitch market; would pay
19 higher prices for drinks. So there were so few places where
20 they could go and be open. But those places, to survive, had
21 to pay bribes to the police, or often to organized criminal
22 syndicates which had relationships with the police, or were
23 even run by organized criminal syndicates.

24 So it meant that gay life was just inmeshed in a web
25 of criminality because of the criminalization of gay and

1 lesbian sociability.

2 **Q.** Did any of the bars sort of explicitly exclude people in
3 light of the law? And how did they do that?

4 **A.** Well, they did it in a range of ways. Certainly,
5 bartenders in a normal bar, quote/unquote, if they realized
6 that someone was gay, could simply 86 them, as they put it;
7 refuse to serve them a drink; tell them they are 86'd, they had
8 to leave the bar. Which could be quite embarrassing.

9 I have interviewed people who have who had that
10 experience in front of their friends, and found it really
11 humiliating.

12 But, then, in the lesbian and gay bars themselves,
13 particularly -- well, actually, not just in those. In bars in
14 neighborhoods with a gay reputation, bar owners sometimes put a
15 sign over the bar itself that would say -- I've heard various
16 signs described, and seen them in the literature -- "If you are
17 gay, please stay away." Or "It is against law to serve
18 homosexuals. Please do not ask us to serve homosexuals."

19 And so this conveyed a very clear message to both gay
20 and straight customers that homosexuals were a despised
21 category to be excluded. And they were also part of the way
22 the bars tried to protect themselves from the police, to show
23 that they were being vigilant to exclude gay people.

24 **Q.** So how did the authorities enforce those laws?

25 **A.** Well, they -- the beauty of the liquor licensing and the

1 licensing system was that it meant that a small business owner
2 who ran a bar had to get a license to sell, or a restaurant,
3 cabaret, had to get a license to sell liquor, and had to
4 enforce the regulations imposed by whatever the liquor
5 authority was; and knew that he or she always risked losing
6 that license and really losing that investment if the liquor
7 authority realized they were not enforcing those regulations.

8 So, first of all, the licensing system itself meant
9 that every single bar had a staff that was trying to make sure
10 the bar wouldn't get in trouble.

11 But, secondly, local patrolmen could step in
12 periodically, would sort of look in, see what was happening in
13 your place, make sure it wasn't disorderly.

14 And then the liquor authorities themselves had a
15 staff of special investigators who would go undercover into
16 restaurants and bars, and so forth, to just make sure that a
17 range of regulations were being followed, including the
18 prohibition against serving homosexuals. They, then, if they
19 saw them, would report this. And this could lead to the
20 closure of a place.

21 **Q.** Did other authorities besides the police, the local police
22 or the liquor authorities, get involved in that policing
23 effort?

24 **A.** Well, bars that were close to military bases, certainly in
25 the big cities during the war, were also put under surveillance

1 by a sort of coalition task force of military officials and
2 police officials, because the military was quite keen to make
3 sure that its sailors and soldiers weren't going to such
4 places. So they joined with the police in investigating them;
5 had their off-limits list; tried to get places closed. So
6 other forces were brought in.

7 **Q.** So if you were police officer and you were enforcing this
8 effort, or a military person, how did you know the bar was
9 serving gay people?

10 **A.** Well, it's a good question. There were two major
11 techniques used. One was to record, take note of an act of one
12 man picking up another man. And it was usually a man in this
13 case, since that was a sure sign that homosexuals were there.

14 So what the police and the liquor authority agents
15 did, often, was to send plainclothes policemen into the bars,
16 who would strike up conversations with customers, lead them on,
17 and then, at some point, when an invitation was issued to leave
18 the bar and go home, bring out the handcuffs and arrest them.

19 So that would lead to the arrest of the bar goer.
20 And they would also be the best proof possible that homosexuals
21 were at the bar. And so it would then be reported, and that
22 would lead to proceedings to revoke the liquor license.

23 The other way that was used -- and I've seen this in
24 a bunch of court records, where a bar has resisted, has tried
25 to challenge the revocation of its license. The police would

1 actually point to stereotypical gender behavior or cross-gender
2 behavior that was associated with lesbians and gay men, and use
3 that as evidence that a bar was patronized by them.

4 So, for instance, a police woman might report that
5 she had seen two women dancing together, or women with short
6 hair, or women who were wearing some articles of masculine
7 clothing, or women who seemed to stagger, swagger around a bar
8 in a way that was more masculine than a woman should walk.

9 Or, likewise, they would point to men whose clothing
10 was just a little too unconventional, a little too colorful,
11 whose hair was too long, who addressed each other in effeminate
12 ways.

13 The most startling example, to me, was sort of one of
14 the signs the police officer gave that a bar was gay was that
15 he had overheard two men talking about the opera; something
16 that no real man would do in the 1950s.

17 (Laughter)

18 So there were just a range of ways that sort of
19 unconventional behavior, gender behavior, stereotypically
20 associated with lesbians and gay men was used to identify them.

21 I think it's actually a kind of striking thing,
22 because it's one of the clearest examples of how the policing
23 of homosexuality has often been used in a very specific legal
24 sense, and then broadly and culturally, to police gender norms
25 so that, actually, people who went into bars, who behaved in

1 unconventional ways, cross-gendered ways, could be suspected of
2 being homosexual. And a bar might push them out for that very
3 reason.

4 **Q.** Did any of the bars or restaurants who -- where the liquor
5 authorities tried to enforce the law, resist or endeavor to
6 fight the charge?

7 **A.** Yes. Some did. I'd have to say that most just closed
8 quietly, because they realized that they weren't going to be
9 able to beat this charge. But many did try, either by
10 appealing to the liquor authority itself, or by going to the
11 courts.

12 Usually, the first line of defense was simply that
13 they didn't know and they couldn't be expected to know that
14 there were gay people there. Thus, the signs, "It's against
15 the law." You know, "Don't ask us to break the law."

16 But, periodically, people did pose a challenge to the
17 idea of this law, that you could actually discriminate against
18 a class of people on the basis of their homosexual status.

19 And in both New York state and in California, in the
20 1950s, there were rulings by the states' highest court that
21 invalidated that kind of discrimination.

22 So a famous case in California, the Black Cat Cafe,
23 here in San Francisco, which lost its license, I think, around
24 1949, filed a suit. It got a state Supreme Court ruling in '51
25 that said, actually, you couldn't discriminate in this way.

1 And, then, for several years there are was relative
2 peace and quiet for bars in San Francisco. And then the San
3 Francisco Police Department started a campaign against
4 homosexuals, '54, '55, sweeps of streets and parks, cracked
5 down on bars.

6 In '55, the state legislature circumvented that
7 ruling by passing a law that outlawed bars or restaurants that
8 became what it called resorts for sex perverts.

9 And the Alcoholic Beverage Commission, which was just
10 then established, then launched a campaign against such bars
11 and restaurants, which led to many more being closed.

12 Finally, there was another state Supreme Court ruling
13 which said, no, they meant it; you couldn't do this.

14 And, nonetheless, Mayor George Christopher, here in
15 San Francisco, had had a tough reelection campaign in '59. And
16 his opponent had charged that he had allowed San Francisco to
17 become a mecca for homosexuals.

18 And he was so determined to show that wasn't true,
19 that once he was reelected he launched a two-year-long campaign
20 against gay life in the City. Which led to, by one historian's
21 account, 40 to 60 arrests a week, and about a third of the bars
22 being shut down.

23 **Q.** After the Supreme Court ruling?

24 **A.** After. After this ruling.

25 And after that, things slowed down in San Francisco.

1 But there continued to be such raids in Los Angeles.

2 **Q.** So when did these sort of bar raids and, you know, this
3 kind of activity end?

4 **A.** Well, they -- they continued periodically, even in places
5 where they had been ruled unconstitutional.

6 I mean, most famously, of course, in 1969, the police
7 raided the Stonewall Bar, in Greenwich Village, in New York,
8 after in fact the courts had already ruled that it was
9 legitimate to serve lesbians and gay men. In that case, they
10 were going after mob-oriented bars.

11 These raids periodically happened, certainly in
12 San Francisco and L.A., into the '60s and '70s. Later in L.A.

13 And, actually, last summer, in Fort Worth, Texas, the
14 police went into a bar and arrested seven of the patrons. And
15 there was quite a controversy about that.

16 So, obviously, the number of such events has
17 dramatically fallen off, but it happened at very different
18 rates across the country.

19 **Q.** So can you describe the effects of that practice of
20 basically shutting down places where gay people gathered, on
21 gay people?

22 **A.** Well, it -- it just meant, again, that they had -- it was
23 one more way it was conveyed to them that they were a despised
24 class of people and a group of outlaws in the eyes of the law;
25 and that they had to take great care in protecting or keeping

1 secret the fact that they were gay.

2 And I think -- and I've said this already, but it
3 sort of more broadly helped -- not just for gay people, but
4 sort of in the public at large, associated gay life with
5 criminality.

6 There were periodically campaigns against gay bars.
7 And they often talked about the police corruption that was
8 required to keep these bars going.

9 And instead of pointing to the criminalization of
10 them as the predicate of that, they talked about gay bars as
11 corrupters of the police. And it contributed to the growing
12 sense on the part of many people that gay people were dangerous
13 and a part of the violent -- seedy, violent criminal
14 underworld.

15 **Q.** So, earlier you mentioned you were going to talk about
16 employment discrimination, and give some examples of that. Can
17 you turn to that subject now?

18 **A.** Sure. I guess the first striking example I'd mention was
19 in the military itself.

20 There had have been various regulations affecting
21 homosexual conduct and homosexuals in the military before the
22 second World War, but it was really at the beginning of the
23 second World War that for the first time, facing the necessity
24 of mobilizing literally millions of people very quickly to
25 fight the war, that the military decided to absolutely exclude

1 all homosexuals and to institute screening procedures that
2 would keep homosexuals out.

3 And so this became a part of the induction process,
4 the screening process for everyone who was volunteered or
5 drafted to serve in the war.

6 Not surprisingly, they didn't ferret out many people,
7 despite this policy. I think it was only five or six thousand.

8 Most young gay people, like their heterosexual peers,
9 were deeply concerned to defend the country in the face of
10 Japanese and German attacks. And they -- so they, you know,
11 found ways. They were quite accustomed, at this point, finding
12 how to pass as straight. So they got passed through.

13 And, of course, people in smaller towns were afraid
14 that if their Selective Service Board learned that they were
15 gay, word would spread very quickly to their families and
16 neighbors about this. And so they were very concerned to keep
17 that hidden.

18 But the military was sort of aware of this, and so it
19 had various procedures in place to try to discover homosexuals,
20 and discharged homosexuals during the war. And, actually, the
21 discharges increased during the period of demobilization at the
22 end of the war, when the manpower needs were not quite so
23 pressing.

24 And this regulation, well, in one form or another, is
25 continuing to the present day.

1 Q. So what happened to soldiers who had served but were
2 discharged, at some point along the way, for being gay?

3 A. Well, first, of course, they faced the stigma of not
4 serving their country, those who were not allowed into the
5 military.

6 If you were a man of a certain age, and you weren't
7 in the military or a critical defense industry, people really
8 had questions about why you weren't. And so this was really
9 humiliating to people.

10 And then people who were either kept out or were
11 discharged -- actually, including people who had served in
12 combat, who were discharged -- were then denied benefits under
13 the GI Bill after the end of the war.

14 And, of course, the GI Bill was just a phenomenally
15 important piece of social engineering in the post-war years.
16 It gave virtually an entire generation of young men privileged
17 access to education, financial support for continuing their
18 education, preferential access to jobs, help in buying a home.
19 A lot of the post war suburban building boom was financed
20 through the GI Bill.

21 It had profound consequences. And it meant that
22 homosexuals who were kept out of the military, or discharged as
23 homosexuals, were prohibited from getting those benefits, and
24 so in many ways were kept from that citizenship right.

25 Q. And what about the several thousand that were ferreted

1 out, I think is the word you used? I know you mentioned that
2 they could be found out by family members or people in their
3 towns, but did it affect their ability to, you know, sort of
4 participate as Americans in any way in our society?

5 **A.** Well, you know, at sort of the most basic practical level,
6 in the early days, especially after the war, people wanted to
7 see your discharge papers when they were going to hire you,
8 very often. And they would see that was what you were
9 discharged for. And that was not a very good thing if you were
10 looking for a job.

11 I think, in a way, it also had sort of a very --
12 well, and it certainly impressed upon people that they were
13 being denied their membership in the community, their
14 citizenship, really.

15 And I think, in some way, it really conveyed that to
16 the whole country. I mean, the war was such an important
17 moment in bringing people together, and bringing together
18 people who had been really divided during the first World War.

19 There had been a lot of demonization of Catholics
20 during the war, and a lot of antisemitism. In the first world
21 war, that is.

22 And the second World War really brought this -- I
23 mean, think of the kind of classic movies that come out of
24 World War II, where you've got the Jew from Brooklyn, and the
25 Irish guy from Chicago, and the Italian from San Francisco.

1 And homosexuals were not a part of that group.

2 There was a really profound way in which gay people
3 were being excluded from the cultural image of the nation.

4 **Q.** And you said, I think, earlier that the policy has
5 continued in one way or another to this day. But I wonder if
6 you could explain what Don't Ask, Don't Tell, what that policy
7 did.

8 **A.** Well, of course, President Clinton, as a candidate, had
9 promised to repeal the prohibition on lesbians and gay men
10 serving in the military.

11 And, then, when he assumed the presidency, there was
12 such a firestorm of opposition to that, on the part of the
13 leadership of the military and grassroots groups across the
14 country, that he retreated from that, and produced a
15 compromise: Don't Ask, Don't Tell.

16 Which, theoretically, said that so long as gay people
17 didn't tell the fact that they were gay, the military wouldn't
18 go around anymore asking if they were.

19 In fact, it didn't quite work out that way. People
20 were found out. And something like about 9500 people were
21 discharged in the first decade of the policy of Don't Ask,
22 Don't Tell.

23 **Q.** Were there -- let me just ask it this way.

24 What were the effects on the country, of its
25 exclusion of gay people from military service, either more

1 recently or in the past?

2 **A.** Well, as a number of people have pointed out, it -- it
3 meant that the country lost the services of patriotic citizens
4 who wanted to join in the country's defense.

5 And so the -- you know, in some cases, those were
6 quite important services.

7 There's been a lot of attention given, recently, to a
8 number of people who have been discharged who were translators
9 of Arabic. Something pretty important right now.

10 But, broadly, it meant that the country lost the
11 services of large groups of people, and had the financial cost
12 associated with that of recruiting people to take their place
13 and training of people to take their place.

14 **Q.** I'd like to ask you, now, to look at the Plaintiffs'
15 Exhibit that's marked 872, in your binder, if you would.

16 **A.** Would that be this binder?

17 **Q.** I think it would be --

18 **A.** This is Cott's Direct binder. These are Nancy Cott's
19 binders?

20 **UNIDENTIFIED SPEAKER:** May I approach, Your Honor?

21 **MS. STEWART:** Have we given the Court -- sorry, Your
22 Honor.

23 **THE COURT:** This is PX872?

24 **MS. STEWART:** Yes, Your Honor.
25

1 **BY MS. STEWART:**

2 **Q.** 872.

3 **A.** The thin one?

4 **Q.** In the fat binder.

5 **A.** Yes.

6 **Q.** Dr. Chauncey, are you familiar with this report?

7 **A.** Yes. This is a report by the U.S. Government

8 Accountability Office, to Congressional requesters.

9 And it's titled, "Military Personnel Financial Cost
10 and Loss of Critical Skills Due to the Department of Defense's
11 Homosexual Conduct Policy Cannot be Completely Estimated."

12 **Q.** Have you reviewed this report?

13 **A.** I have looked at this report.

14 **Q.** Does this report indicate at least some of the costs that
15 the military incurred by virtue of the Don't Ask, Don't Tell
16 policy?

17 **A.** Yes. It estimates that over the first ten-year period of
18 enforcement of that policy, they estimated that it may have
19 cost the Defense Department about \$95 million in 2004 dollars,
20 to recruit replacements for service members separated under the
21 policy.

22 And then they estimated it cost approximately another
23 95 million to train their replacements.

24 **MS. STEWART:** Your Honor, I would like to move this
25 document into evidence.

1 **MR. THOMPSON:** No objection, Your Honor.

2 **THE COURT:** 872 will be admitted.

3 (Plaintiffs' Exhibit 872 received in evidence.)

4 **BY MS. STEWART:**

5 **Q.** So, Professor Chauncey, besides the discrimination in
6 employment in the military, was there other employment
7 discrimination? Or can you give another example of employment
8 discrimination that was significant in our country's history?

9 **A.** Well, after the second World War, the employment of
10 homosexuals in the civilian sectors of employment also became a
11 major issue.

12 And in 1950, Senator Joseph McCarthy announced that
13 he knew the names not only -- or had a list of names not only
14 of Communists in the State Department and other agencies, but
15 of sex perverts.

16 This led to a couple of Congressional committees
17 investigating this charge. And one of them, a standing
18 committee, subcommittee which produced a report called, "On the
19 Employment of Homosexuals and Other Sex Perverts in Government
20 in 1950."

21 And this report surveyed, was based on investigation
22 of the way the government was dealing with this problem, and
23 took note of the fact that checking Civil Service Commission
24 records, they found that since this had become more of an issue
25 in 1947, two and a half years that they looked at, some 1,700

1 people had been prohibited from getting civilian jobs because
2 it had been discovered that they were homosexual.

3 They were concerned that the procedures for
4 identifying homosexuals were inadequate, and for ferreting them
5 out and discharging them. So they recommended a tightening of
6 procedures.

7 And in 1953, shortly after Dwight Eisenhower became
8 president, one of his first executive orders decreed that
9 civilian -- that homosexuals would be prohibited from civilian
10 as well as military employment in the federal government.

11 And it actually also required private companies,
12 which had contracts with the government, to ferret out and fire
13 their homosexual employees.

14 **Q.** When -- well, first, let me ask you, how did the McCarthy
15 senate's treatment of gay people in their investigation compare
16 to their treatment of Communists?

17 **A.** Uhm, well, they -- they gave a lot of attention, of
18 course, to Communists, and were quite concerned about Communist
19 infiltration into the State Department in particular, and other
20 agencies of the government.

21 But the historian who has done the closest study of
22 this policy estimates that at the height of the McCarthy period
23 in the 1950s, the State Department actually dismissed more
24 suspected homosexuals than Communists.

25 **Q.** I'd like to ask you, Dr. Chauncey, to look at Plaintiffs'

1 Exhibit 2337. I think it's towards the end of your binder.

2 Can you identify that exhibit for the Court?

3 **A.** Yes.

4 **THE COURT:** 2337?

5 **MS. STEWART:** Yes, Your Honor.

6 **THE WITNESS:** Yes. This is the report I mentioned,
7 "Employment of Homosexuals and Other Sex Perverts In
8 Government."

9 **MS. STEWART:** Your Honor, I would like to move this
10 document into evidence.

11 **MR. THOMPSON:** No objection, Your Honor.

12 **THE COURT:** 2337 is admitted.

13 (Plaintiffs' Exhibit 2337 received in evidence.)

14 **BY MS. STEWART:**

15 **Q.** Turning for a minute to the -- we'll come back to that one
16 at a later point. But I wanted to turn to President
17 Eisenhower's executive order.

18 I think you said it required that employees who were
19 in the federal government, who were found to be gay, would be
20 discharged. And I think -- did I understand, also not hiring?

21 **A.** Right.

22 **Q.** When did that policy end?

23 **A.** Uhm, that policy ended for most federal agencies in 1975,
24 when President Carter rescinded that policy. Though, it
25 continued to be in effect for some of the highly-sensitive

1 intelligence agencies, and so forth.

2 And then it was only in the 1990s that President
3 Clinton both ended the policy bearing on intelligence agencies,
4 and also prohibited discrimination in federal employment.

5 **Q.** Can you explain the difference between what President
6 Carter did and what -- I mean --

7 **A.** Sure.

8 **Q.** Besides the scope.

9 **A.** Right. So, basically, President Carter said that federal
10 agencies were no longer required to dismiss their homosexual
11 employees or keep homosexuals from their employ. And, then,
12 President Clinton enacted anti-discrimination order that they
13 could not discriminate. So in that intervening period,
14 agencies were not required to discriminate, but they could
15 discriminate.

16 **Q.** Was the discrimination in public employment limited to the
17 federal government?

18 **A.** No. There -- across the country, state governments took
19 up this issue and, in a variety of ways, tried to
20 institutionalize employment discrimination against lesbians and
21 gay men.

22 Just give you one example. In the late '50s, state
23 legislature had a legislative investigation committee which
24 launched an investigation of homosexuals in the state
25 university system, which eventually led to the firing of more

1 than a dozen members of the faculty and other staff. And I
2 think more than 300 people were interrogated over the course of
3 that investigation, which lasted several years.

4 And so there were a variety of ways that this sort of
5 campaign was carried on at the state level.

6 And at the city level, I mean, I've seen in my own
7 research that, for instance, the Welfare Department in New York
8 City had to fire several of its welfare workers in the 1950s,
9 when it was brought to their attention and they had been
10 discovered as being gay.

11 **Q.** Did the mandated discrimination in the federal government
12 or other government affect access to jobs for gay people in the
13 private sector?

14 **A.** Well, as I said, President Eisenhower's executive order
15 required private companies with government contracts to ferret
16 out and fire their homosexual employees.

17 I would say that more broadly, though, gay people
18 faced customary discrimination and a range of -- from a range
19 of employers. And so it was -- the degree of -- the
20 enforcement of this varied from occupation to occupation and
21 company to company. But, certainly, most people realized that
22 they had to be very careful to hide their homosexuality at the
23 workplace, for fear of losing their jobs.

24 **Q.** Did employment discrimination in any sector, private,
25 public, federal, state, what have you, limit gay people's job

1 choices, or channel them into particular professions?

2 **A.** Well, of course, we have no real statistical evidence to
3 base this on. But I would say that, based on the interviews
4 I've done, that, certainly, there were a good number of gay
5 people who just took the risk and pursued the profession that
6 they wanted or the line of work they wanted, and did what they
7 needed to, to hide their identities at work.

8 But there were also a good number of people who just
9 didn't want to risk that, and didn't want to have to put up
10 with that. And so, in effect, sort of funneled into the kinds
11 of low-status jobs where people were less likely to care that
12 they were gay. Someone who was sort of stereotypically
13 associated with gay people even today. But, being a waiter.
14 Being a hair dresser. Taking on being a low-level clerical
15 worker. Kinds of niches in the employment sector where people
16 felt they would be somewhat safer.

17 **Q.** So what were the effects of this widespread discrimination
18 in employment on gay people generally?

19 **A.** Well, I guess I'd have to say that, broadly, it meant that
20 gay life really was pushed underground, indeed, and sort of
21 everything I've described so far.

22 And I think some people interpret that to mean that
23 there was very little organized gay life at all. And that's
24 simply not the case. There in fact were meeting places. There
25 were parties in private apartments. People did have a gay

1 social life. But they had to be very, very careful to hide it.

2 And although this had already been true earlier in
3 the 20th century, most people didn't want to take this risk.

4 It really increased the stakes for people. And so it meant
5 that a -- they really became sort of a world within a world.

6 It was very secretive, had its own codes, so that people could
7 talk with one another without alerting outsiders.

8 Actually, the word "gay" itself is probably the best
9 example of this. Gay liberationists in the 1970s were
10 determined to bring gay people out of the closet. And so they
11 used -- they called themselves gay liberationists.

12 But in the 1940s, and '50s, and early '60s, very few
13 straight people realized that gay people, homosexuals, had
14 given "gay" a sort of homosexual meaning.

15 So that a lesbian standing at the office watercooler
16 could say to another woman that she had gone to a gay place the
17 night before, had a gay time, met a gay gal, and really
18 communicate quite a lot to the person she was talking to,
19 without worrying that someone next to her would overhear this
20 and understand what was going on?

21 But it just meant that there was a level of secrecy
22 required. Of course, this also meant that fewer heterosexuals,
23 or relatively few heterosexuals, thought that they knew gay
24 people.

25 And in the context of that is a variety of studies

1 have shown sort of ignorance, lack of contact with people, has
2 increased this prejudice.

3 So it's easier for demonic stereotypes to develop of
4 gay people, given that real-living gay people had to be so
5 careful to hide themselves.

6 **Q.** Did the -- or, I should say, has the discrimination in
7 employment in the state and local public arena ended?

8 **A.** Uhm, no. It's not ended. It's -- certainly, I think it's
9 clear that it has lessened since the 1950s. And there have
10 been a series of laws passed at the local and state level that
11 prohibit such discrimination.

12 There are a lot of complaints of such discrimination
13 brought under those laws. But there's still -- I believe these
14 are the right figures -- 20 states that do not prohibit
15 discrimination in public employment. And another -- and 28
16 that don't prohibit it in private employment.

17 **Q.** The third area that you mentioned you would talk about
18 today was censorship. And I'm wondering if you could explain
19 what you mean when you said that gay people have been subject
20 to censorship.

21 **A.** Well, one of the most significant examples of this would
22 be the censorship of the representation of homosexuality in the
23 movies.

24 In the early '30s, there was the mass censorship
25 campaign, led by a group called the "Legion of Decency," led by

1 Catholic leaders, with Jewish and Protestant support, which was
2 concerned about what they considered to be the immorality of
3 Hollywood films.

4 This was, of course, very early in the history of
5 Hollywood and the film industry. And so they pressured the --
6 the Hollywood studios to enact some sort of censorship code,
7 which it eventually did, in order to try to forestall federal
8 censorship.

9 And, then, in 1934, under more pressure, they really
10 started enforcing this code with the Production Code authority.
11 And this code imposed certain rules on how certain delicate
12 issues would be dealt with: Crime, adultery. These could be
13 represented, but in certain ways. Usually, crime had to pay,
14 et cetera. The offender needed to be punished.

15 But there were certain things that they prohibited
16 from being included in the movies at all. For instance,
17 interracial relationships were absolutely forbidden from being
18 represented. And lesbian and gay characters, or the discussion
19 of homosexuality, or even, as the code put it, the inference of
20 sex perversion was prohibited.

21 So that this meant that for a generation, until the
22 code began to fall apart in the late '50s and early '60s,
23 Hollywood films, the dominant medium of the mid 20th century,
24 could not include gay characters, could not explore gay lives.

25 Q. You mentioned that the code was enforced, got more

1 enforced, I think you said, in 1934?

2 **A.** '4.

3 **Q.** How was it enforced?

4 **A.** The Hollywood studios were required to submit their
5 scripts to the Production Code administration, the Hays Office,
6 which would review the scripts and bring to their attention
7 anything that they thought was problematic.

8 So there would often be a back and forth -- I've read
9 some of these exchanges -- a back and forth between the studios
10 and the Production Code about exactly what could or could not
11 be included. So it wasn't just a kind of general, informal
12 regulation. It was very strictly managed.

13 **Q.** Did the Hays code affect television?

14 **A.** Uhm, the Hays code itself didn't. But, in some ways,
15 there was even more concern about television in its early
16 years.

17 Television expanded very rapidly into American homes
18 in the early 1950s. But, in those days, way before cable,
19 there were, you know, only a handful of networks. Most people
20 had access to just two or three stations.

21 So there was a lot of concern about what it meant to
22 bring that into the home, where children might see things that
23 parents wouldn't necessarily be able to supervise.

24 So the television networks were actually much more
25 constrained than even Hollywood, in dealing with certain

1 issues. So that there were very few, very few characters who
2 could even be hinted at as being gay, in the first several
3 decades of television.

4 And, you know, there began to be -- certainly, there
5 were some, and some discussion of homosexuality that began to
6 increase in the -- really, just in the 1980s.

7 And as recently as 1989 -- so just over 20 years
8 ago -- a very popular TV series called Thirtysomething did
9 actually have a scene written in, where it showed two men in
10 bed together, with the sheets pulled up to here (indicating),
11 for about 15 seconds.

12 And this was so shocking, that various religious --
13 conservative religious organizations organized boycott threats.
14 And the sponsors withdrew from that segment. And a lot of
15 local affiliates either didn't show it at all, or bumped it out
16 of prime time, to midnight.

17 And that sort of briefly put a chilling effect on the
18 inclusion of gay characters. But by the mid '90s, the numbers
19 had begun to increase.

20 And as recently as 1996, there was so astonishing
21 that Ellen Degeneres would come out as a lesbian as a character
22 on her show and as a person, that it put her on the cover of
23 *Time Magazine*.

24 This idea was so -- it's almost, for the young people
25 who might hear this, probably impossible to believe that this

1 was the case. But this was sort of the way that for several
2 generations that people just did not have gay characters in the
3 major medium -- media of their culture.

4 **Q.** So how did that affect them? How did the censorship of
5 gay people out of the movies and television affect them?

6 **A.** Well, it -- you know, it certainly meant that many young
7 people growing up, young gay people, had no idea that there
8 were other people like themselves in the world, who didn't see
9 it in their families and their schools and neighbors, and
10 didn't see it in the media.

11 It meant that older gay people didn't see themselves
12 represented in the films, and were once again reminded of the
13 fact that they were a despised category, to be excluded from
14 the dominant media of the culture.

15 And, of course, some directors, some actors, used
16 codes to try to suggest homosexuality, gay characters in themes
17 in films especially, and so sophisticated people could read
18 those codes and maybe guess at what was going on.

19 But it meant that, for most people, gay people were
20 not a part of the media landscape, were not a part of the world
21 that they knew.

22 So not only were they unlikely to realize that they
23 knew gay people, because the people in their lives were so
24 careful to hide themselves, but, also, they didn't have other
25 ways on the screen to learn about gay life. And in that

1 context, again, it was easier for more frightening stereotypes
2 to emerge.

3 **Q.** So the fourth area that you mentioned you would give some
4 examples of, I think you called it "demonization" or
5 "stigmatization."

6 So what did you mean when you said that gay people
7 have been demonized or stereotyped or stigmatized?

8 **A.** Well, like most outsider groups, there have been
9 stereotypes associated with gay people. And, certainly, in the
10 case of gay people as a really despised group, a range of
11 groups have worked together to -- (inaudible) in a coordinated
12 way, but have cumulatively served to develop stereotypical
13 images of gay people.

14 There is -- certainly, many clergy in churches
15 considered homosexuality to be a sin and preached against
16 homosexuality. So people heard those sermons. And then,
17 especially in the last generation, have led campaigns against
18 gay rights.

19 Doctors began to pay attention to questions of sex
20 perversion in a more sustained way in the late 19th century,
21 and sort of from the beginning assumed -- most of them assumed
22 this to be a pathology. And they reinforced a range of
23 stereotypes associated with gay people. Certainly, they were
24 pathological, sick, something wrong with them, something wrong
25 with their bodies.

1 A lot of the early medical literature in the late
2 19th and early 20th century focused on gender nonconformity as
3 an essential component of sex perversion, and so talked about
4 mannish women and effeminate men as the sort of quintessential
5 emblems of homosexuals; and, indeed, thought that homosexuality
6 was one sign of a more general gender inversion or reversal of
7 one's gender role.

8 And some doctors went on -- at a time when a good
9 many doctors were arguing that it would be dangerous for a
10 woman to take a job because it might hurt her reproductive
11 capacities -- were arguing that women who wanted the vote, or
12 women who smoked cigars, or women who engaged in strenuous
13 athletics somehow share the kind of pathology of inversion that
14 lesbians did.

15 In the 1920s, Freudian theories became -- began to
16 become more important, which thought less as a bodily issue, as
17 homosexuality emerging out of the body, and more a
18 psychological construct?

19 And Freud's American followers were actually more
20 conservative than Freud himself. But they typically imagined
21 homosexuality to be a sign of arrested development, that for a
22 variety of reasons, a child's inability to identify with the
23 right parent or some trauma, that they didn't go through the
24 full developmental process to become heterosexuals and were
25 stuck in a homosexual stage. And so this sort of image of

1 homosexuals as immature became very powerful.

2 And then in the -- I think, in some ways the most
3 dangerous stereotypes for homosexuals really developed between
4 the 1930s and '50s, when there were a series of press and
5 police campaigns that identified homosexuals as child
6 molesters. As not just effeminate queens you might laugh at
7 but had no real reason to fear, but actually as hyper men who
8 were unconstrained by women and who threatened the nation's
9 children.

10 And this image was really driven home in a series of
11 press campaigns around the country, usually sparked by some
12 particularly awful murderer or attack on a child. Although,
13 almost all of those attacks were men attacking girls. But
14 under the theories of the day, that ended up being something
15 you could lay at the feet of homosexuals.

16 **Q.** So did this -- how did the -- let me just ask it this way.

17 How did gay people go from being kinds of pathetic or
18 amusing, or something like that, more sick, to being
19 frightening?

20 **A.** Well, there's this sort of intellectual answer to that,
21 this sort of intellectual theory. But I think probably -- just
22 to keep my answers a little bit briefer -- probably the
23 important thing to stress here is the cultural process driving
24 this.

25 Again, a series of press campaigns against assault on

1 children, which focused on sex perverts or sex deviants. And
2 the homosexual emerged as the quintessential sex deviant.

3 And these campaigns took place in cities across the
4 country, beginning in the late '30s, and then, really, with
5 special force in the late '40s and early '50s.

6 And the national magazine literature chimed in.
7 Governments responded to the outcry by the press and the
8 people, by establishing special commissions to study the
9 problem of what they usually called the deviated criminal sex
10 offender. Which came up with recommendations like
11 indeterminate sentencing laws.

12 So that someone who was convicted of such a range of
13 offenses, was suspected of being a sex deviant, could be a sex
14 psychopath, which was usually traditionally used, could be
15 committed to psychiatric observation; if determined to be a sex
16 psychopath, committed for an indeterminate sentence. So that
17 they would be kept in a sort of prison slash mental institution
18 until they had been cured of their pathology.

19 Very -- although, it was sort of the worst kinds of
20 murderers and rapists who were kind of behind the impetus for
21 this, in the end, most D.A.s didn't want to send those folks to
22 a mental institution, so they went to prison. And it was
23 typically the more minor offenders who were sent to the mental
24 institutions, and quite a lot of homosexuals amongst them.

25 And very quickly, actually, the doctors who were

1 charged with curing them complained that they couldn't cure --
2 quote/unquote, cure homosexuals; they couldn't turn them into
3 heterosexuals.

4 So this -- and, again, this was given the imprimatur
5 of government officials. So it's hard to overstate the -- the
6 extent of the fear in the press campaigns on the part of many
7 Americans, and the way this really built this image of
8 homosexuals as child molesters.

9 **Q.** Was there any foundation to the charge?

10 **A.** Well, again, as I've said, in looking at the press
11 coverage, it's really striking that most of the stories are
12 actually about men attacking girls. There would not appear to
13 be a basis for this charge.

14 **Q.** Would you take a look, for a moment, at the exhibit that's
15 marked Plaintiffs' 851. It's in the big binder.

16 **A.** Yes.

17 **Q.** Would you just identify that for the Court.

18 **A.** This is an article that I wrote, called, "The Post War Sex
19 Crime Panic."

20 **Q.** And could you look at the page that you pointed to me
21 earlier. I think it's 171. And you were mentioning the press
22 statements about this -- you know, perpetuating this idea.

23 Can you read into the record the press quote that you
24 have referred to.

25 **A.** You're referring to the *Coronet* quote?

1 Q. Yes.

2 (Reporter interrupts.)

3 A. Sorry. This is a quote from an article published in
4 *Coronet Magazine*, in the fall of 1950. *Coronet* was a very
5 popular magazine that went into homes all over the country.

6 It published in this issue an article called, "New
7 Moral Menace to our Youth."

8 (Reporter interrupts.)

9 "New Moral Menace to our Youth." And the section
10 that I quoted in this article reads:

11 "Once a man assumes the role of homosexual,
12 he often throws off all moral restraints.

13 Some male sex deviants do not stop with
14 infecting their often innocent partners.

15 They descend through perversions to other
16 forms of depravity, such as drug addiction,
17 burglary, sadism, and even murder."

18 Q. How do you interpret that language?

19 A. Well, I think it's -- one, it's a sign of the way that
20 sort of moral arguments and psychological arguments about
21 homosexuality were merged here, as they often were, so that
22 this is really an argument about depiction of homosexuals as
23 subjects of moral decay.

24 So that when he throws off all moral restraints, once
25 he breaks the bounds and is willing to become a homosexual,

1 then he can do anything, if he does that.

2 And that they will go on to infect other people. So
3 a sense of homosexuality as a disease. Not just a randomly
4 contagious disease, but one in which the carriers infect other
5 people with.

6 And this reference to infecting their often innocent
7 partners, the term "innocent" pretty clearly indicates they are
8 talking about children.

9 **Q.** Thank you.

10 **MS. STEWART:** Your Honor, I would like to move
11 Exhibit 851 into evidence.

12 **MR. THOMPSON:** No objection, Your Honor.

13 **THE COURT:** 851 will be admitted.

14 (Plaintiffs' Exhibit 851 received in evidence.)

15 **BY MS. STEWART:**

16 **Q.** I think you mentioned earlier, Dr. Chauncey, that
17 government played a role in perpetuating this idea, or in
18 distributing it in any way.

19 I would like you to look at the same exhibit, but
20 this time the quote that I think you pointed me to on page 170.

21 **A.** Right. This is a statement by a Special Assistant
22 Attorney General of California, made in 1949, that I've seen
23 reprinted a number of places. It says:

24 "The sex pervert, in his more innocuous form,
25 is too frequently regarded as merely a queer

1 individual who never hurts anyone but
2 himself. All too often, we lose sight of the
3 fact that the homosexual is an inveterate
4 seducer of the young of both sexes, and is
5 ever seeking for younger victims."

6 **Q.** How widely were these kinds -- I mean, you mentioned
7 *Coronet Magazine*. But was this a message that was widely
8 circulated?

9 **A.** Uhm, yes. As I said, these -- this particular quote I've
10 seen reprinted in a number of places. But there were media
11 campaigns. Many magazines published articles on this issue.
12 Local newspapers did.

13 And I actually think you sort of see in the A.G.'s
14 quote here, the attorney general's quote, this sort of -- his
15 argument against an older understanding of homosexuals as being
16 relatively innocuous. You might laugh at them or pity them,
17 maybe worry about them. But, in fact, they are really
18 dangerous and seducers.

19 **Q.** Did the messages -- you know, were they largely addressed
20 to adults, or did they also reach the ears of children?

21 **A.** Well, they were mostly addressed to adults who were, of
22 course, concerned, understandably concerned about the safety of
23 their children, and were being taught to believe that
24 homosexuals posed a threat to their children.

25 But this is also a time when school districts, in

1 response to the growing concern about this, began issuing
2 brochures to school children, warning them to avoid strangers,
3 and that sort of thing. The sorts of things that are done
4 today, many of which we would all understand and support. But
5 some of these really bred a fear of homosexuals in particular.

6 There was actually an educational film produced in
7 1961, I think, by a fellow who made a lot of educational films
8 for the California school system, called, "Boys Beware," which
9 was -- really, warned boys that they needed to be aware of
10 homosexuals; that homosexuals couldn't be detected, and were
11 out to -- and were sick, and were out to infect people like
12 them; and might lead to really very dangerous situations.

13 So, again, sort of focusing in on the danger that
14 homosexuals posed.

15 **Q.** Dr. Chauncey, I want to ask you to look at and read from
16 one more exhibit on this topic. And that is one we admitted
17 earlier, 2337. It's that U.S. Senate report. And I think you
18 pointed me earlier to page 4 of that report, as an example of
19 this.

20 Can you find that and read that to the Court.

21 **A.** Right. Right. So the -- the report gave a variety of
22 reasons to explain the unsuitability of sex perverts, quoting
23 their language, which included their immaturity, instability,
24 the fear that they were liable to blackmail, and so forth and
25 so on.

1 And one of the arguments that they made was that they
2 actually could endanger young people working in a government
3 office. So, just to quote the paragraph to that effect:

4 "Most of the authorities agree and our
5 investigation has shown that the presence of
6 a sex pervert in a government agency tends to
7 have a corrosive influence upon his fellow
8 employees. These perverts will frequently
9 attempt to entice normal individuals to
10 engage in perverted practices. This is
11 particularly true in the case of young and
12 impressionable people who might come under
13 the influence of a pervert.

14 "Government officials have the responsibility
15 of keeping this type of corrosive influence
16 out of the agencies under their control. It
17 is particularly important that the thousands
18 of young men and women who are brought into
19 federal jobs not be subjected to that type of
20 influence while in the service of the
21 government. One homosexual can pollute a
22 government office."

23 **Q.** Dr. Chauncey, this is, as I think you testified earlier, a
24 Senate subcommittee report for the U.S. Senate. Did it
25 influence other government agencies?

1 **A.** Well, as I've said, they encouraged the tightening of
2 procedures to regulate, to ferret out and dismiss homosexuals.
3 And then in 1950 -- sorry, 1953, President Eisenhower issued
4 the order banning them altogether, systematically.

5 I guess, it seems to me, perhaps what's most
6 significant about this is just the degree to which it's giving
7 the imprimatur of senior government officials to these images
8 of stereotypes of homosexuals.

9 **Q.** Was there state or -- I think, state legislative action
10 in -- you know, in light of this sort of attitude of gay people
11 as deviants or perverts?

12 **A.** Well, I believe I've talked about that already, but both
13 the federal policies and then state policies that discriminated
14 against employees.

15 **Q.** Uhm, when people were determined to be perverts within the
16 course of this -- or as defined by this kind of report, did
17 they end up in jail?

18 **A.** Well, they could. To say here, the -- I mean, this is,
19 again, sort of one element of a wide range of things that I
20 have discussed. And I've talked about the laws that have been
21 put in place prohibiting gay people from assembling in public,
22 bars and restaurants, and so forth.

23 In response to the local press campaigns, which then
24 went -- really went national periodically, in the late '30s and
25 late '40s and early '50s, there was a tremendous escalation of

1 the enforcement of those regulations across the country. So
2 that there was a tremendous escalation in the number of raids
3 on gay bars, on the arrest of gay people.

4 Certainly, in New York City the statistics jumped
5 dramatically in the late '40s and early '50s, in response to
6 these campaigns.

7 You know, the police felt they needed to show that
8 they were doing something to deal with these problems. And
9 cracking down on gay bars or interrogating the men who were on
10 the list they often had developed, of homosexuals in the city,
11 was one way of doing that.

12 And so people, you know, were under much greater
13 risk. And at those moments many people did avoid going to
14 those meeting places, for fear and it could have, really,
15 life-changing effects on people.

16 I interviewed one person in New York, who was a
17 librarian who worked at the New York Public Library, the huge
18 marble building, Central Library at 42nd Street and Fifth
19 Avenue. And he was arrested in one of these sweeps on a
20 gay-related charge; spent a couple of days in jail.

21 And he told me the story of how when he returned to
22 work, after being released from jail, he discovered that his
23 employers had learned that he was gay. And his supervisor met
24 him at the door, marched him down the hall, fired him publicly.
25 Had him collect his personal effects, and marched him down the

1 hall.

2 And he said that not only was it, of course,
3 horrifying, the thought that he might lose his career, but that
4 he -- he was humiliated by having all of his fellow workers,
5 who he had known for years, come to the door and watch him be
6 escorted out, knowing that he had been arrested on a homosexual
7 charge. That sort of story happened many times.

8 **Q.** I want to ask you what you think the most enduring legacy
9 is of the years that these sort of demonic stereotypes emerged
10 on gay people or their place in our country.

11 **A.** Well, I guess, I think there are really two.

12 One is that the -- the growing crackdowns, police
13 campaigns against gay life, the federal campaigns of soldiers
14 and then civilian employees, actually led to the start of the
15 very earliest gay rights movement or homophile movement, as it
16 was called in the '40s and '50s.

17 So small groups of people -- there was a small group
18 from New York. The best-known group started in Los Angeles and
19 San Francisco, actually -- started to try to counteract this.

20 Now, of course, they remained very small for years.
21 But we see the origins of the gay rights movement and the
22 response to the systematic discrimination and demonization.

23 And I guess, on the other hand, I see the creation
24 and then re-enforcement of a series of demonic images of
25 homosexuals that stay with us today. And so the fear of

1 homosexuals as child molesters or as recruiters continues to
2 have -- play a role in debates over gay rights, and with
3 particular attention to gay teachers, parents, and married
4 couples, people who might have close contact with children.

5 **Q.** Another area you mentioned in your list of opinions that
6 you were going to give today was that gay people have suffered
7 sustained hostility and prejudice. And I wondered if you would
8 give us an example of how hostility and prejudice have affected
9 gay people.

10 **A.** Uhm, well, one would be the violence that many gay people
11 face. And so the general hostility towards them, and prejudice
12 towards them, which -- and for many years the sense that the
13 police would do nothing to defend them, made them liable to
14 violence of various kinds, if they were identified as gay.

15 Our evidence about this is sketchy for the earlier
16 periods. But, certainly, I've heard stories, and other
17 historians who have worked on this have been told stories of
18 people being attacked when they were identified as gay.

19 And that, you know, we have more recently statistics.
20 The FBI has been collecting hate crime statistics. And they
21 show it averages about 1500 hate crimes a year, across the
22 country, directed at lesbians and gay men, or people perceived
23 to be gay.

24 There have been studies done in some of the big
25 school systems. The California school system produced research

1 that was analyzed, that estimated that 200,000 students in
2 California's junior high schools and high schools are harassed
3 for being gay or perceived for being gay, every year; that a
4 good number of those harassed several times.

5 So that -- and then we, of course -- many of us are
6 familiar with the most famous examples of this, a handful of
7 incidents that have achieved -- have received a lot of media
8 attention.

9 Matthew Shepard's murder in 1998, in Laramie, where
10 he was met by a couple of guys who drove him out to the country
11 and tied him to a post and pistolwhipped him, and left him to
12 die, just a year and a half ago or so.

13 Larry Folks King, a 15-year-old student in a junior
14 high school here in California, who was shot in his school's
15 computer lab by a -- and killed by a boy who later explained
16 that Larry had said he was attracted to him.

17 So that it's -- but these are the sort of very famous
18 examples, and the studies that show how pervasive it is.

19 And so I would say that I think more than the
20 policing, the official policing of gay life, it's that fear of
21 vigilante violence that really affects the lives of many gay
22 people.

23 When a gay couple walks down the street, if they have
24 second thoughts about holding hands it's not really because
25 they are afraid the police are going to come out, these days,

1 and put the handcuffs around them. It's that they are afraid
2 someone who sees them could harass them verbally or physically.

3 So I think that that -- the scope of that violence is
4 one of the most powerful continuing effects of these campaigns
5 of generating prejudice and hostility.

6 **Q.** I want to ask you to take a look at Exhibit -- Plaintiffs'
7 Exhibit 873, and identify that for the Court, if you would.

8 **A.** These are hate crime statistics. I presume that these are
9 the hate crime statistics produced by the FBI. They look like
10 that. Although, it doesn't say on the first page that I have.

11 **Q.** Can you take a moment to look at it.

12 **A.** Yes.

13 **Q.** It appears that the first page is missing, and I'm not
14 quire sure why.

15 **A.** Yes, but I see here in the introduction:

16 "In response to the passage of Hate Crime
17 Statistics Act of 1990, the Attorney General
18 designated the FBI's Uniform Crime Reporting
19 Program to develop and implement a data
20 collection system."

21 **Q.** If you look at the second page, or the page that's labeled
22 "2," you see it appears to be dated 1998? Or at least it
23 appears to be reporting on crimes in 1998?

24 **A.** Yes, 1998, uh-huh.

25 **Q.** And, then, I would also like you to look at the next

1 exhibit, actually, 874, and tell me if you recognize that.

2 **A.** Yes. This is a document, "Safe Place to Learn
3 Consequences of Harassment Based on Actual or Perceived Sexual
4 Orientation and Gender Nonconformity, and Steps for Making
5 Schools Safer."

6 So this is a document put out by the California State
7 Schools Coalition, about the harassment.

8 **Q.** And is this the document from which you got that 200,000
9 figure?

10 **A.** Yes, this is, uh-huh.

11 **Q.** Do you recall whether 873 is the document from which you
12 got your figure of 1500 or so?

13 **A.** Yes, this does look like that document, yes.

14 **MS. STEWART:** Your Honor, I would like to move those
15 two exhibits, 873 and 874, into evidence.

16 **MR. THOMPSON:** Your Honor, I don't believe these were
17 disclosed to us on Sunday night, in the e-mail. I'm not
18 anticipating a problem.

19 Could they be provisionally admitted, and then at our
20 next break, or in the morning, we could clarify whether we have
21 an objection?

22 **THE COURT:** That will be fine.

23 **MR. THOMPSON:** Thank you, Your Honor.

24 **MS. STEWART:** I wish I could respond. I know we
25 provided a pretty long list.

1 That's probably the best way to deal with it.

2 **THE COURT:** All right. Well, Mr. Thompson is quite
3 properly allowing this matter to be worked out.

4 So how much longer do you have with this witness?

5 **MS. STEWART:** Your Honor -- I'm going to say about 45
6 minutes.

7 **THE COURT:** Okay. Maybe you can pick up the pace.

8 **MS. STEWART:** Okay. Will do.

9 **MR. THOMPSON:** Your Honor, Counsel has kindly showed
10 me that they did disclose this. We have no objection.

11 **THE COURT:** Very well. Thank you, sir.

12 (Plaintiffs' Exhibits 873 and 874 received in
13 evidence.)

14 **THE WITNESS:** Sorry, Your Honor. I will try to keep
15 my answers shorter.

16 **THE COURT:** Well, if the questions are shorter and
17 answers are shorter, why, we will just move it along.

18 (Laughter)

19 **BY MS. STEWART:**

20 **Q.** You described anti-gay violence as one example of a
21 hostility and prejudice against gay people.

22 Can you give us one more example?

23 **A.** Yes. I think that the -- that the whole series of
24 referendum initiatives we have seen since the mid to late '70s,
25 over gay rights, are another example of continuing prejudice

1 and hostility.

2 Maybe I should step back a second and try to briefly
3 put this in larger historical context.

4 I've described the way that rules of
5 secrecy/discretion really govern gay life in response to this
6 discrimination and policing.

7 And part of what happened in the 1970s is that
8 growing numbers of gay people decided to come out. And,
9 indeed, the gay liberation movements in the 1970s shared the
10 feeling of many other movements of that period, of
11 African-American, Asian-Americans, other groups, that were
12 searching for dignity as well as rights.

13 And more and more people felt that they really ought
14 to have the rights to be openly gay. There are a variety of
15 reasons for this. I won't go into those.

16 But that really set in stage a kind of confrontation,
17 as they began advocating both the rights to be openly gay and
18 antidiscrimination legislation to protect them.

19 And beginning in the 1970s, about 40 towns and cities
20 enacted antidiscrimination laws. Another 40 did in the 1980s.
21 And this very quickly produced a response.

22 And the most famous, really, of that response was a
23 campaign called, "Save Our Children," in Dade County, Miami,
24 Florida, in 1977, led by Anita Bryant, a famous Baptist singer,
25 which was designed to overturn the local metro council's

1 enactment or adding sexual orientation to the
2 antidiscrimination law.

3 And this was a very effective campaign that -- and
4 its very name, "Save Our Children," revived -- drew on and
5 revived these older stereotypes of homosexuals as child
6 molesters, and led a successful campaign to overturn that.

7 And this inspired a series of campaigns in the late
8 '70s and early '80s, and then another major round of campaigns
9 in the late '80s and early '90s. So that the figures vary.
10 But let's say in the 20 years after, there were at least 60 of
11 these campaigns, usually to overturn existing gay rights
12 ordinances, and about three-quarters of which succeeded in
13 doing so.

14 **Q.** Three-quarters of which succeeded in doing so?

15 **A.** Yes, in overturning gay rights ordinances.

16 **Q.** Have you looked at some of the historical records for the
17 Save Our Children campaign?

18 **A.** Yes. And I teach about this campaign, and I have looked
19 at some of those records.

20 **Q.** Can you take a look at Exhibit 1621, Plaintiffs' 1621, in
21 your binder.

22 **A.** 1621?

23 **Q.** Yes. I think it's in your smaller binder, actually.

24 **A.** Okay.

25 **MR. THOMPSON:** Your Honor, we object to the witness

1 testifying to this document. It was not listed as a material
2 considered.

3 Plaintiffs also provided a supplemental list of
4 materials considered, and I don't believe it was on that
5 either.

6 **MS. STEWART:** Your Honor, two things. I think it was
7 on the supplemental.

8 But, in any event, Professor Chauncey discussed the
9 Save Our Children campaign at great length in his report and in
10 his deposition, and was examined about it extensively.

11 And, you know, this is -- he did rely on a source
12 which was a book that in turn quoted from this document, and
13 thought that the Court ought to be provided with the original
14 source document.

15 And another reason I think --

16 **THE COURT:** Well, but was the document identified to
17 the proponents --

18 **MS. STEWART:** It was identified --

19 **THE COURT:** -- as being used with this witness in his
20 direct examination?

21 **MS. STEWART:** Yes.

22 **THE COURT:** It was?

23 **MS. STEWART:** Yes.

24 **MR. THOMPSON:** Yes, Your Honor. We would admit, it
25 wasn't within 48 hours. But leaving that to the side -- they

1 were a little late on that.

2 But the more important point is that, under Rule 26,
3 they were obligated to provide us with the documents that he
4 considered in connection with his report, so that my deposition
5 could be thorough going on this issue.

6 **THE COURT:** I see.

7 **MR. THOMPSON:** And I did not get this document prior
8 to his deposition. And my records reflect, I did not get
9 notice of this until Sunday night.

10 And there are many documents that fall in this
11 category. If it were just one, I would let it go. But I will
12 be making this objection repeatedly, Your Honor.

13 **MS. STEWART:** I don't have that many more documents
14 to introduce, so I'm not quite sure. First of all, it was
15 disclosed. It was put on the --

16 **THE COURT:** I understand it was disclosed for the
17 witness's trial testimony. But Counsel is saying it was not
18 disclosed in connection with his -- with the witness's
19 deposition; and, therefore, Mr. Thompson didn't have an
20 opportunity to examine the witness concerning this document.

21 **MS. STEWART:** But, Your Honor, it was discussed in
22 this book, *Out for Good*, which was a source cited in the report
23 and provided quotes from the document.

24 And, furthermore, another reason the Court ought to
25 give us a little leeway here, I think -- or at least I would

1 request it -- is that the defendant-intervenors have refused to
2 testify at all about their messaging in this case.

3 And connection with that, the Ninth Circuit suggested
4 that we have our expert witnesses comment on their messaging.
5 And, very shortly, I intend to turn to that. But one way that
6 Dr. Chauncey --

7 **THE COURT:** This is not part of the proponents'
8 message --

9 (Simultaneous colloquy.)

10 **MS. STEWART:** Well, he's a historian, Your Honor. And
11 so the way that it's appropriate for him to comment on
12 messaging is comparative.

13 And, so, because he did testify in his deposition,
14 and was cross-examined about the Save Our Children campaign,
15 and it was -- that campaign was discussed in the report, and
16 quoted from some of these materials -- actually, this document
17 was in -- was quoted in the book, and referred to in the
18 report -- I don't think there's any prejudice. And, certainly,
19 Counsel can fully cross-examine him on it today or tomorrow.

20 **THE COURT:** I gather the book was identified in
21 connection with the witness's deposition?

22 **MS. STEWART:** Yes, it was, Your Honor.

23 **THE COURT:** Well, that may be your way of referring
24 to the content. But I'm going to sustain Counsel's objection.

25 **MR. THOMPSON:** Thank you, Your Honor.

1 **BY MS. STEWART:**

2 **Q.** Dr. Chauncey, I would like to ask you to look at Exhibit
3 864.

4 **MS. STEWART:** Your Honor, may I approach?

5 **THE COURT:** You may.

6 **BY MS. STEWART:**

7 **Q.** Dr. Chauncey, would you -- before we look at this exhibit,
8 would you tell the Court generally about the themes that were
9 used in the Save Our Children campaign that Anita Bryant led in
10 1977?

11 **A.** Yes. When they began the campaign their polling data
12 showed that there was a margin of support for the
13 anti-discrimination ordinance and that groups that they were
14 worried would support it, they needed to persuade.

15 And so they decided to focus on some of what they
16 argued were the consequences of allowing an anti-discrimination
17 law to stand, and they focused particularly on the effects that
18 this might have on children.

19 They made a variety of arguments, but two of them
20 were that the simple tolerance of gay people -- or allowing gay
21 people to be open, particularly if they were teachers or in
22 other positions where they might interact with children, would
23 allow them to serve role models -- as role models that would
24 encourage children to become homosexual themselves.

25 There was sort of -- there was a presumption here

1 that sexual identity is unstable, that children are easily
2 swayed to homosexuality, and that this would be a real danger.

3 And then they emphasized that point by drawing on the
4 stereotypes, whose development I have described, to argue that
5 homosexuals were child molesters and that, in effect, to allow
6 this anti-discrimination ordinance to stand would be to release
7 homosexual predators onto the children of Miami.

8 I would comment, also, they periodically would sort
9 of say, We are willing to tolerate homosexuals so long as they
10 don't flaunt their lifestyle, which was just basically to say
11 so long as they aren't open about being gay.

12 So I think you get a sense there of the kind of
13 conflict that was being set up in the 1970's as more gay people
14 were insisting on their right to be openly gay and a pretty
15 clear reaction against that.

16 **Q.** And was there discussion in the campaign materials about
17 homosexuals threatening heterosexual people's rights or other
18 people's rights or forcing themselves on people?

19 **A.** That's sort of aligned with the point I just made, the
20 sort of sense that to allow gay people to be open, have these
21 rights, would make them a protected class and would sort of
22 force themselves on other people simply by being open.

23 **Q.** Dr. Chauncey, would you take a look at page 303 of Exhibit
24 64 to the book *Out For Good*. And look at the bottom of that
25 page, the second to last paragraph, and read the language in

1 quotes that is ascribed to Anita Bryant in connection with that
2 campaign.

3 **A.** She is quoted here as saying:

4 "Some of the stories I can tell you of child
5 recruitment and child abuse by homosexuals
6 would turn your stomach."

7 **Q.** Would you also quote from the newspaper advertisement
8 that's quoted further down in that paragraph?

9 **A.** (As read)

10 "This recruitment of our children is
11 absolutely necessary for the survival and
12 growth of homosexuality, for since
13 homosexuals cannot reproduce, they must
14 recruit, must freshen their ranks. And who
15 qualifies as likely recruits, a 35-year-old
16 father or mother of two" -- sorry. "Who
17 qualifies as a likely recruit, a 35-year-old
18 father or mother of two, or a teen-age boy or
19 girl who is struggling, surging with sexual
20 awareness?"

21 **Q.** And after you testified in deposition in this case, did
22 you request that we seek to find the original article that you
23 just quoted from?

24 **A.** Yes.

25 **Q.** And is that what exhibit -- the exhibit that was not

1 admitted is?

2 **A.** I will have to check the footnotes to confirm that, but I
3 believe that's the case.

4 **MS. STEWART:** Your Honor, while the witness is
5 confirming that, I would like to offer Exhibit 1621 for
6 judicial notice.

7 Even -- there is no question about the authenticity
8 of the document, or at least that's what we have been told, and
9 so I would request that the Court take judicial notice of the
10 document.

11 **MR. THOMPSON:** We have no objection, your Honor.

12 **THE COURT:** Very well.

13 **BY MS. STEWART:**

14 **Q.** Dr. Chauncey, just to make it easier, if you look at --

15 **A.** Yes. The quote I read you from the newspaper is from the
16 article.

17 **Q.** Would you take a look as well at the -- I'm sorry. Going
18 back to *Out For Good*, the Exhibit 864, the top of page 304, and
19 read the material quoted from the *Miami Herald* advertisement
20 that's at that part of the book?

21 **A.** Okay. So this is from an ad. It reads:

22 "There is no human right to corrupt our
23 children. Many parents are confused and
24 don't know the real dangers posed by many
25 homosexuals and perceive them as all being

1 gentle, non-aggressive types.

2 "The other side of the homosexual coin is a
3 hair-raising pattern of recruitment and
4 outright seduction and molestation, a growing
5 pattern that predictably will intensify if
6 society approves laws bringing legitimacy to
7 the sexually perverted."

8 **Q.** Dr. Chauncey, would you turn to page 306 of *Out For Good*
9 and read the language quoted from Anita Bryant in the bottom
10 paragraph about the middle of that paragraph?

11 Well actually -- yes. It begins, "Homosexuality is a
12 conduct."

13 **A.** (As read)

14 "Homosexuality is a conduct, a choice, a way
15 of life. And if you choose to have a
16 lifestyle as such, then you're going to have
17 to live with the consequences. It's not a
18 sickness, but a sin."

19 **Q.** Last, Dr. Chauncey, would you take a look at page 308 of
20 *Out For Good*, and take a look at the bottom of that page and
21 read the language that Anita Bryant is quoted as saying in her
22 written victory statement to her audience?

23 **A.** She is quoted as saying:

24 "Tonight the laws of God and the cultural
25 values of man have been vindicated. I thank

1 God for the strength he has given me and I
2 thank my fellow citizens who join me in what
3 at first was a walk through the wilderness,
4 the people of Dade County. The normal
5 majority have said enough, enough, enough.
6 They voted to repeal an obnoxious assault on
7 our moral values despite our community's
8 reputation as one of the most liberal areas
9 in the country."

10 **Q.** Professor Chauncey, did the Save Our Children campaign
11 have an impact outside Dade County, Florida?

12 **A.** Yes. The success of the campaign inspired other groups
13 around the country to start referendum campaigns to revoke
14 anti-discrimination laws bearing on homosexuality.

15 There was a series of campaigns, St. Paul, Eugene,
16 California, in the late 70's and early 80's. Two of them were
17 unsuccessful. One, the Brinks initiative here in California,
18 one in Seattle when the others passed.

19 And then, as I think I said before, over the next 20
20 years or so there were dozens of such campaigns designed
21 primarily to overturn such anti-discrimination laws, but
22 sometimes to engage in other -- to in other ways restrict
23 homosexuals.

24 **Q.** Professor Chauncey, when we started today, you expressed
25 your expert opinion that the history of discrimination that you

1 have recounted has had continuing effects today. And I want to
2 wrap up by talking a little bit about the Proposition 8
3 campaign.

4 Are you familiar with the initiative called
5 Proposition 8?

6 **A.** I am.

7 **Q.** And how do you understand the purpose and effect of
8 Proposition 8?

9 **A.** It was a proposed vote on a proposed amendment to the
10 California constitution, which would have restricted marriage
11 to a man and a woman. And it was put on the ballot in response
12 to the California State Supreme Court's decision that gay
13 couples did have marriage rights, and it passed and did take
14 those rights away.

15 **Q.** And is this Proposition 8, this measure, representative of
16 the history that you have described of a large number of direct
17 democracy campaigns that are hostile to gay people?

18 **A.** I do think as a historian that the wave of campaigns that
19 we have seen against gay marriage rights in the last decade
20 are, in effect, the latest stage and cycle of anti-gay rights
21 campaigns of a sort that I have been describing; that they
22 continue with a similar intent and use some of the same
23 imagery.

24 **Q.** And have you reviewed some of the materials that advocated
25 the passage of Prop 8?

1 A. I have.

2 Q. And do you believe that some of the stereotyped images of
3 gay people that you have described today can be seen in those
4 materials?

5 A. I do.

6 Q. And is one of the things that you reviewed today the
7 Official Voter Guide?

8 A. Yes, I did review that.

9 Q. I'm going to ask you to read a few passages from that.
10 Would you turn to Plaintiffs' Exhibit 1, which I believe is in
11 your skinny binder.

12 A. It's here. Yes.

13 Q. And if you would turn to the argument in favor --

14 THE COURT: I believe Exhibit No. 1 is in evidence,
15 isn't it?

16 MS. STEWART: Yes, it is, your Honor.

17 BY MS. STEWART:

18 Q. ...the argument in favor of Proposition 8 on -- well, the
19 page is marked 56, I think, of the ballot pamphlet.

20 A. Right. It would have been 56 from the Voter Guide.

21 Q. Would you start by reading the text of the seventh
22 paragraph that begins, "It protects our children"? It's the
23 paragraph after the --

24 A. (As read)

25 "It protects our children from being taught

1 in public schools that" -- sorry. I'll go
2 more slowly.

3 "It protects our children from being taught
4 in public schools that same-sex marriage is
5 the same as traditional marriage."

6 **Q.** Would you also now read the first full paragraph in the
7 right-hand column that begins, "We should not accept"?

8 **A.** Okay. I would actually like to read the next paragraph,
9 following the one I just read.

10 **Q.** Okay.

11 **A.** (As read)

12 "Proposition 8 protects marriage as an
13 essential institution of society. While
14 death, divorce or other circumstances may
15 prevent the ideal, the best situation for a
16 child is to be raised by a married mother and
17 father."

18 And then to go the passage you mentioned.

19 "We should not accept a Court decision that
20 may result in public schools teaching our
21 kids that gay marriage is okay. That is an
22 issue for parents to discuss with their
23 children according to their own values and
24 beliefs. It shouldn't be forced on us
25 against our will."

1 Q. And then would you read the passage, the second sentence
2 of the paragraph after the one you just read?"

3 A. (As read)

4 "However, while gays have the right to their
5 private lives" --

6 Q. I'm sorry. The sentence immediately above that.

7 A. Okay.

8 "Proposition 8 does not take away any of
9 those rights and does not interfere with gays
10 living the lifestyle they choose."

11 Q. And then read the sentence you were about to read.

12 A. (As read)

13 "However, while gays have the right to their
14 private lives, they do not have the right to
15 redefine marriage for everyone else."

16 Q. Could you explain how you believe the messages in these
17 arguments reflect the stereotypes whose historical origins you
18 have already discussed today?

19 A. Well, I think, in part, they certainly are premised on the
20 notion of the inferiority of gay people, gay people in their
21 relationships.

22 So to argue that the best situation for a child is to
23 be raised by a married mother and father is to argue that a
24 married heterosexual couple was superior to a gay couple.

25 So it continues the long history that I have

1 described, which is presumed the inferiority of gay people.

2 And then it focuses on children, not calling them
3 child molester -- gay people child molesters and so forth, but
4 warning that we should not teach our kids that gay marriage is
5 okay; that it shouldn't be forced on us against our will.

6 In effect, that we should not be told that gay
7 marriage, in effect, gay equality, which I think is linked to
8 the openness of gay people on their call for the full
9 recognition of their rights that other people enjoy, their
10 right to be public in their relationships, that we shouldn't
11 have to expose our kids to that.

12 And this sort of image, it shouldn't be forced on us
13 against our will and it evokes that -- the fears of the
14 aggressiveness of the sexual -- and the society, that they do
15 not have the rights to -- however, while gays have the right to
16 their private lives, they do not have the right to redefine
17 marriage for everyone else.

18 Again, they have the rights to do what they want to
19 their own, just don't make us take note of it. So their rights
20 to be open about who -- who they are and about their
21 relationships is less important than our rights and not have to
22 recognize them.

23 **Q.** And in that Voter Guide on several -- in several places
24 uses the language "protects our children." How do you
25 interpret that language?

1 **A.** Well, you have to ask the question, protect against what?
2 And it evokes, for me, the language of saving our children, the
3 need to protect children from exposure to homosexuality; not
4 just from exposure to homosexuals as presumed child molesters,
5 but protecting them from exposure, from the idea of openly gay
6 people.

7 **Q.** I would like to ask you to look now at -- sorry. Give me
8 a moment.

9 Let me do this. Professor Chauncey, have you
10 reviewed any the television ads that were broadcast in
11 California in support of Proposition 8?

12 **A.** I have.

13 **Q.** Do you believe the messages in those campaign ads reflect
14 the stereotypes whose history you have described?

15 **A.** Umm, I think they do. I mean, they're certainly more
16 polite than the ads that Anita Bryant used 30 years ago.

17 It's a sign, I think, of how the place of gay people
18 in American society has changed and what one can say in polite
19 society about gay people has changed.

20 But I guess I was especially struck by -- I think
21 those ads in general focused -- what their focus in protecting
22 their children, the concern about people of faith, religious
23 institutions somehow being harmed by the recognition of gay
24 marriage are in them.

25 But what I suppose is most striking to me is the

1 image of the little girl who comes in to tell her mom in the
2 kitchen that that day she read a book in school called *King and*
3 *King*, and she learned that a prince can marry a prince and
4 maybe I can marry a princess.

5 And so here I think you have got a pretty strong echo
6 of this idea that simple exposure to gay people and their
7 relationships is going to somehow lead a generation of young
8 kids to become gay.

9 **MS. STEWART:** Your Honor, I would like to show some
10 of the short video ads, the ones that are marked Exhibits 29,
11 99, 91, 15 and 16.

12 (Brief pause.)

13 **MS. STEWART:** Your Honor, I will offer in evidence
14 all five of them, to the extent they are not already admitted.
15 I think one or two of them may already have been admitted
16 yesterday.

17 (Discussion held off the record
18 amongst plaintiffs' counsel.)

19 **MS. STEWART:** 99 and 15 are in, your Honor.

20 **THE COURT:** Under a different number?

21 **MS. STEWART:** No, same number.

22 **THE COURT:** All right. So 15 and 91 are in.

23 **MS. STEWART:** 99. Sorry, your Honor.

24 **THE COURT:** 99, I'm sorry. And you are offering?

25 **MS. STEWART:** 29, 91 and 16.

1 **THE COURT:** Hearing no objection.

2 **MR. THOMPSON:** Your Honor, we don't anticipate any
3 objection, but could we just see the ads and then we will say
4 "no objection" once we see them?

5 **MS. STEWART:** That would be fine with me, your Honor.
6 (Videotapes played in open court.)

7 **MR. THOMPSON:** Your Honor, having seen the videos, we
8 have no objection to their being admitted.

9 **THE COURT:** Very well. 15, 16, 29, 91 -- well, those
10 four are admitted.

11 (Plaintiffs' Exhibits 15, 16, 29, 91 received in
12 evidence)

13 **BY MS. STEWART:**

14 **Q.** What are some of the key messages being communicated in
15 these ads that you think reflect the history of discrimination
16 you have discussed with us today?

17 **A.** Well, again, the sense that the inequality of gay people
18 and their relationships; that marriage will convey equal status
19 to gay people and their relationships.

20 The fear of something being forced on people, which
21 certainly animated many of the referendum campaigns that I've
22 mentioned, designed to put it to a popular vote, popular
23 resistance to something being imposed on them by legislators
24 for the courts.

25 And this focus on children, I think, is the most

1 striking thing; that we have to protect our children from
2 exposure to the idea of gay marriage, which was a sign of the
3 full equality of gay people and of our recognition of them.

4 And, certainly, the implication, as I said, in that
5 ad that such exposure could actually lead children who have
6 unstable sexual identities to become gay --

7 **Q.** I would like to --

8 **A.** -- the fear of that.

9 I mean, there clearly, the underlying message here is
10 something about the -- the undesirability of homosexuality,
11 that we don't want our children to become this way.

12 **Q.** Thank you.

13 I would like to just quickly have you look at two
14 print ads and then we will be about ready to wrap this up.

15 I would like you to look at Exhibits 1763, which I --
16 I'm hoping our tech people can put on the screen.

17 **MR. THOMPSON:** Your Honor, we object to Dr. Chauncey
18 testifying to this document. We do not object to its being
19 admitted into evidence, but this was not disclosed in his
20 expert report as material considered.

21 **THE COURT:** Ms. Stewart?

22 **MS. STEWART:** Your Honor, it's correct that it was
23 not. He had not yet seen it at the time. We were still
24 getting discovery from the plaintiffs at that time. And so
25 much of the written material -- I can't say for certain that

1 this one came before or after, but the material we were getting
2 from the plaintiffs was coming in quite late.

3 **MR. THOMPSON:** Your Honor, I can say definitively,
4 and this was in the first production well before the expert
5 report was due on October 2nd.

6 **THE COURT:** The objection is this was not disclosed
7 at the time the witness was deposed?

8 **MR. THOMPSON:** Yes, your Honor. And it would violate
9 Rule 26, when this was in possession of the plaintiffs before
10 his report was due, for him then to come into court now and for
11 the first time offer his opinions on it.

12 **MS. STEWART:** Your Honor, if I might.

13 Again, the Ninth Circuit indicated quite late, that
14 is in December -- and its decision wasn't even final until
15 January 4th -- that we should use our experts to talk about
16 messaging.

17 These are two exhibits. I'm just about done here.
18 But I think that because the delay in the plaintiffs producing
19 their evidence and their refusal to talk about them led the --
20 to the understanding that we would need experts solely to
21 comment on the messaging or at least it would be unlikely we
22 would be able to get the plaintiffs to comment on them.

23 **THE COURT:** When did this particular document come
24 into your possession?

25 **MS. STEWART:** That I don't know, your Honor, because

1 the volume came at us fast and furious, but maybe one of my
2 colleagues can answer the question.

3 **MR. THOMPSON:** It was in the first production.

4 **MS. STEWART:** What about the 1775?

5 **THE COURT:** When was that first production?

6 **MR. THOMPSON:** Your Honor, I know that the second
7 production was September 18th. So I know it was before
8 September 18th, and the expert reports were due on October 2nd.

9 And I would further add, your Honor, that they did a
10 supplemental production of materials considered and this was
11 not part of it.

12 So this is totally the first time that we -- other
13 than on Sunday night when we not the laundry list of documents
14 that we had any idea that Professor Chauncey was going to
15 testify about this.

16 **THE COURT:** Well, this is a little different in that
17 this is a document that appears to have been produced by your
18 client.

19 **MR. THOMPSON:** Yes, your Honor, but I --

20 **THE COURT:** It's unlike the *Miami Herald* article of
21 1977.

22 **MR. THOMPSON:** Your Honor, I have known about this
23 document. We are proud of this document. We don't have a
24 problem with it being admitted into evidence.

25 What we do have a problem with is under Rule 26 a

1 witness coming in, never having disclosed it in his expert
2 report, never having given any indication in the report he
3 would opine on it, my not being able to depose him on it and
4 now he comes in, you know, trying to speak to it.

5 **MS. STEWART:** Your Honor, it's not deep. Professor
6 Chauncey discussed at length in his report and in his
7 deposition the messaging.

8 These are both simple documents, simple message.
9 And, you know, it's going to take less than a minute probably
10 to get through this testimony. I don't think that this --

11 **THE COURT:** I'm not sure that's an argument for
12 getting it in.

13 But inasmuch as this is a document of the
14 defendant-intervenors and in view of your description and, I
15 think, an accurate one of the Ninth Circuit's initial holding
16 with respect to the scope of expert testimony, I think since
17 the document is coming in, since it is a document of the
18 proponents, that it's not unfair to permit the witness to
19 testify about it and his conclusions concerning the document.

20 And so the objection will be overruled with respect
21 to 1763.

22 **MS. STEWART:** And, your Honor, can -- 1775 is
23 similar, although I think it may have been produced later.

24 **THE COURT:** Same circumstances?

25 **MR. THOMPSON:** Your Honor, there are the same

1 circumstances. I won't repeat my objection, but we do have an
2 issue about authenticity, which we may be able to resolve and
3 we may be willing to let it come in provisionally.

4 But this is a photocopy and I have no idea whether
5 this is actually a Protect Marriage -- you can see from the
6 quality of it, it could have been digitally altered. It's not
7 like the first document, which is one of ours.

8 **THE COURT:** Subject to an authenticity objection,
9 then, you may proceed with 1775. And 1763 will be admitted.

10 (Plaintiffs' Exhibit 1763 received in evidence)

11 **BY MS. STEWART:**

12 **Q.** Dr. Chauncey, if you could just look at 1775 --

13 **A.** Seventy-four?

14 **Q.** Five.

15 **A.** Five.

16 **Q.** Can you describe the --

17 **THE COURT:** Well, have you asked him about 1763?

18 **MS. STEWART:** I know. I'm going to do them in
19 reverse order, if that's all right.

20 **THE COURT:** I'm sorry. That's all right. It's your
21 witness.

22 **BY MS. STEWART:**

23 **Q.** Dr. Chauncey, can you read the language of this sign into
24 the record?

25 **A.** Yes. It says: "Yes On 8. Protect Marriage. You have

1 the power to protect your children." Gives the website,
2 ProtectMarriage.com.

3 **Q.** And what does the photograph depict?

4 **A.** It depicts what is presumably a married couple with their
5 child. And so we see here, again, the indication of protecting
6 marriage, the need to protect your children.

7 The question is, what are we protecting our children
8 from? Actually, the image we see, the mother and father, in
9 fact, protecting the child on either side of the child and
10 expressing love for that child.

11 I mean, in many ways it's a wonderful image, but,
12 again, it implies the inferiority of a same-sex couple with
13 holding a similar child, and the -- the need to protect
14 children from the exposure, I take it, to the idea of gay
15 marriage and idea of gay equality.

16 **Q.** Dr. Chauncey, can you now look at Exhibit 1763?

17 **MR. THOMPSON:** And, your Honor, I have conferred with
18 my client, who has confirmed this is not an authentic
19 ProtectMarriage.com document.

20 So unlike the one that they are turning to now, which
21 we have no objection as to authenticity, we do have an
22 authenticity objection to the document that was just discussed.

23 **MS. STEWART:** Your Honor, if you would indulge me,
24 what I would like to do is tomorrow provide you with the
25 information about the document. Perhaps I can resolve with

1 counsel the authenticity without even taking it up with the
2 Court.

3 **THE COURT:** All right. We will see if there is a
4 foundation for 1775.

5 **BY MS. STEWART:**

6 **Q.** And, Dr. Chauncey, would you read into the record the
7 language of the -- what appears to be a flyer that is 1763?

8 **A.** Right. It says: "Yes On 8. Protect Marriage. Restoring
9 marriage and protecting California children. You can help.
10 Visit our website or call us for more information.
11 www.ProtectMarriage.com," and a phone number.

12 **Q.** And can you describe the images on the page?

13 **A.** Well, there's both a graphic image at the top that shows
14 dimensional graphics. A heterosexual couple, both holding up a
15 banner saying "Protect Marriage" and implicitly protecting
16 their children, standing on either side of their children.
17 Then a series of photographs of happy heterosexual families.

18 **THE COURT:** How do you know they're heterosexual?

19 **THE WITNESS:** Okay. Let me say, mixed sex families.

20 **BY MS. STEWART:**

21 **Q.** Perhaps opposite sex would be --

22 **A.** Opposite sex families.

23 (Laughter.)

24 **A.** I don't know, but I think that's the implication of the
25 picture in the context of the campaign. And I -- I believe

1 that that's what's meant to be conveyed here.

2 And so, again, it's this reiteration of protecting
3 California's children. What are we protecting them from? We
4 are protecting them from exposure to gay people, gay people and
5 the idea of gay equality and the full recognition of gay
6 relationships and the equality of gay relationships.

7 **Q.** Thank you.

8 Professor Chauncey, I have one more question and then
9 I want to simply do some housekeeping and move into evidence
10 some of your sources.

11 And the question is: Have you written about the
12 parallels between from the religious debates over segregation
13 and the religious debates over same-sex marriage? And if so,
14 could you describe those parallels?

15 **A.** Well, that's a very delicate question and I hope I will be
16 alert enough after two hours and 15 minutes of this to give you
17 the answer I would like.

18 Obviously, people of strong religious principle have
19 supported Prop 8, organized Prop 8 to protect their vision of
20 marriage, their understanding of what marriage should be.
21 Often their feelings are driven by deeply-held religious
22 beliefs.

23 We -- we tend to think of all the argument on the
24 marriage debate as being on that side of the marriage debate
25 and all the argument on the debate over civil rights in the

1 1940's, 50's and 60's as being on the other side because of the
2 prominence of Reverend Martin Luther King and the black
3 churches and the civil rights campaign.

4 But what's, I guess, striking to me is that -- and
5 many other historians have commented on this, written about
6 this, is that, in fact, during the civil rights era, very many
7 southern white Christians believed very deeply and sincerely
8 that segregation was part of God's will for humankind.

9 Reverend Jerry Falwell himself preached a sermon in
10 1958 criticizing the Supreme Court's *Brown v Board of Education*
11 decision as going against God's will and warning, actually,
12 that it could lead to interracial marriage, which was then sort
13 of the ultimate sign of black and white equality.

14 And so, I guess, I just want to suggest here that
15 there are -- people hold their beliefs very deeply, and they
16 read scripture by their own lights. You know, as we see in
17 history, their interpretations of that scripture change over
18 time.

19 And that in the -- I'm just struck by the degree to
20 which religious arguments were mobilized in the 1950's to argue
21 that -- against interracial marriage and integration as against
22 God's will in a way that arguments have been mobilized in this
23 campaign and the other -- many of the other campaigns I have
24 described since Anita Bryant's argue that we need to do this
25 because homosexuality itself or gay people or the recognition

1 of gay people, the recognition of their equality, is against
2 God's will.

3 **Q.** Thank you, Professor Chauncey.

4 Before we let you go, I would just like to ask you
5 what the major sources were that you relied on today. And to
6 speed things along here -- meaning the articles and books and
7 other sources that you relied on for your testimony -- your
8 Honor, I would like to move some of those items into evidence.

9 Dr. Chauncey prepared a list for us, which might make
10 it easier than reading the list of sources into the record, but
11 I leave it to your Honor whether he would prefer it the other
12 way.

13 **THE COURT:** I trust you have disclosed the list to
14 Mr. Thompson?

15 **MS. STEWART:** We have not -- I mean, all of the
16 documents on it were disclosed on Monday night and previously
17 and.

18 **MR. THOMPSON:** Your Honor, may I propose that we look
19 at the list overnight, and I'm sure we will be able to agree to
20 things.

21 **MS. STEWART:** That would be fine.

22 **THE COURT:** You took the words out of my mouth,
23 Mr. Thompson. Issues.

24 **MS. STEWART:** Thank you, your Honor. Then we will
25 have that little bit of housekeeping in the morning or -- well,

1 your Honor, you tell me your pleasure.

2 **THE COURT:** I think Mr. Thompson can get started. He
3 has got 10 minutes or so and he looks like he's ready.

4 **MR. THOMPSON:** Let's roll.

5 **THE COURT:** All right. Cross examine, Mr. Thompson.
6 I'll cut you off in 10 minutes or thereabouts, so
7 find a spot in that vicinity and we will take our recess for
8 the day at that point, but make it a convenient point in your
9 cross-examination.

10 **MR. THOMPSON:** May I approach, your Honor?

11 **THE COURT:** Certainly you may.

12 (Whereupon, a binder was tendered
13 to the witness.)

14 **CROSS EXAMINATION**

15 **BY MR. THOMPSON:**

16 **Q.** Good afternoon, Professor.

17 **A.** Good afternoon.

18 **Q.** Just a little bit of background. You have donated money
19 to the Lambda Legal Defense in the past, is that right?

20 **A.** I have in the past.

21 **Q.** And you have also donated money in the past to the Gay and
22 Lesbian Advocates and Defenders, is that right?

23 **A.** I have in the past.

24 **Q.** And you strongly support the right of same-sex couples to
25 have access to the institution of marriage, is that correct?

1 **A.** I do support the right of same-sex couples to have the
2 right to marriage.

3 **Q.** And do you recall that the *University of Chicago Magazine*
4 did a profile on you? It was -- it's Tab 4 in your binder and
5 it's entitled "Moment of Decision."

6 "Chicago Professor George Chauncey has spent
7 a fair portion of his life fighting for civil
8 liberties. His latest battle, historical
9 scholarship."

10 Do you remember this article?

11 **A.** I do remember this article.

12 **Q.** And then --

13 **A.** Yes.

14 **Q.** And on the last page of the article it ends:

15 "George Chauncey is beyond question an
16 advocate."

17 And do you believe that to be true?

18 **A.** Excuse me. Where does it say that?

19 **Q.** The last line of the article. It says:

20 "George Chauncey is beyond question an
21 advocate."

22 **A.** Umm, actually, I almost said this when you read the first
23 line as well, the subtitle in this.

24 This is journalist characterization and one that I
25 would resist. I like the second line there, that "He is beyond

1 question a historian's historian." So that, yes, I like that
2 line.

3 (Laughter.)

4 Q. You get the bitter with the sweet.

5 A. So I would say that, yes, I do support the right of gay
6 couples to marriage. And I distinguish that from my historical
7 scholarship, which I have been very careful to try to be as
8 accurate to the historical record as I can be.

9 Q. Now, I would like to go over some definitional issues with
10 you.

11 When you use the term "homosexual" as a noun, you
12 would be referring to people with identities which have primary
13 erotic and emotional attraction to people of the same sex, is
14 that right?

15 A. I wouldn't necessarily say "identities." People who have
16 a primary erotic and emotional attraction to people of the same
17 sex.

18 Q. Well, let's look at your deposition in this case, which is
19 behind tab two and page 48, line 23. Let me know when you are
20 there, Professor.

21 (Brief pause.)

22 A. Sorry, that was 48?

23 Q. 48, and let's actually start at line 16 to get the full
24 context. I asked you:

25 **"QUESTION:** What do you mean by the term

1 homosexual as you used it?

2 "ANSWER: Well, I" --

3 A. I'm sorry, I haven't found it.

4 Q. Oh, sorry.

5 A. Sorry. I was... Very odd way they paginate here on these
6 condensed. So line 16?

7 Q. 16, yes, sir. I asked:

8 "QUESTION: So what do you mean by the term
9 homosexual as you used it?"

10 And you answered:

11 "ANSWER: Well, in that context as I just
12 used it I was using it objectively,
13 substantively to refer to sexual relations
14 between people of the same sex."

15 "QUESTION: Can that word have a different
16 meaning in a different context?

17 "ANSWER: Well, homosexual as a noun used to
18 refer to -- usually would be used to refer to
19 people with identities" -- and I believe this
20 is -- "which have primary erotic and
21 emotional attraction to people of the same
22 sex."

23 You gave that testimony, right?

24 A. What I said here is that homosexual as a noun is --

25 THE COURT: The question is: Did you give that

1 testimony?

2 **THE WITNESS:** Yes, sir, I did.

3 **BY MR. THOMPSON:**

4 **Q.** Homosexual as an adjective can describe sexual relations
5 of people of the same sex even where one of them would not
6 identify as a homosexual, correct?

7 **A.** Yes. I did write that, yes. I did say that.

8 **Q.** And most historians now would argue that categories of
9 sexual difference that were available to people changed over
10 time, correct?

11 **A.** Yes. Most historians would argue that.

12 **Q.** And although the gay male world of the prewar years was
13 remarkably visible and integrated into the straight world. It
14 was a world very different from our own, is that right?

15 **A.** I did write that, yes.

16 **Q.** Okay. Only in the 1930's, 40's and 50's did the now
17 conventional division of men based on the sex of their partners
18 replace the division of men based on their imaginary gender
19 status as the hegemonic way of understanding sexuality,
20 correct?

21 **A.** I was referring there particularly to men in immigrant
22 communities, working class communities.

23 So as I show in another point in the book those sorts
24 of identities had emerged earlier in middle class culture, so
25 that broadly there is a shift in that period.

1 Q. And by the "book" you mean *Gay New York*?

2 A. Yes, *Gay New York*.

3 Q. And the ascendancy of the term "gay" reflected a
4 reorganization of sexual categories, correct?

5 A. Yes.

6 Q. There was a transition from an early twentieth century
7 culture divided into queers and men on the basis of gender
8 status to a late twentieth century culture divided into
9 homosexuals and heterosexuals on the basis of sexual object
10 choice, correct?

11 A. Yes.

12 Q. Any such taxonomy is necessarily inadequate as a measure
13 of sexual behavior, correct?

14 A. Yes, I did write that.

15 Q. The most striking difference between the dominant sexual
16 culture of the early twentieth century and that of our own era
17 is the degree to which the earlier culture permitted men to
18 engage in sexual relations with other men, often on a regular
19 basis, without requiring them to regard themselves or to be
20 regarded as gay, correct?

21 A. Yes. And here, again, I am generalizing for purposes of
22 the introduction, I believe, to the particular groups of people
23 I will talk about later in the book. They were different from
24 other groups.

25 Q. And there were many men involved in same-sex relationships

1 at that time who were also on intimate terms with women and
2 went on to marry them, correct?

3 **A.** Yes.

4 **Q.** You would agree that whether homosexuality is good or bad,
5 chosen or determined, natural or unnatural, is in the realm
6 relief ideology and the subject to contestation, correct?

7 **A.** I did write that.

8 **Q.** And you agree with it?

9 **A.** Yes.

10 **Q.** And we are living in a time when a previously dominant
11 ideological position that homosexuality is immoral or
12 pathological faces a powerful and increasingly successful
13 challenge from an alternative ideology which regards
14 homosexuality as neutral, healthy or even good, correct?

15 **A.** Yes, I did say that that ideology faced an increasingly
16 powerful challenge.

17 **MR. THOMPSON:** Your Honor, I would suggest that this
18 is a natural breaking point.

19 **THE COURT:** All right. Then that's fine. We will do
20 our little housekeeping tomorrow morning.

21 Any matters to take up before we adjourn this
22 afternoon?

23 **MR. BOUTROUS:** Your Honor, I had two matters,
24 procedural matters, if I may.

25 **THE COURT:** Very well.

1 **MR. BOUTROUS:** The first issue, your Honor, relates
2 to the motion we filed today. It's an administrative motion to
3 file several documents under seal.

4 The only reason we filed them under seal was to put
5 them before the Court to get the Court's guidance. They were
6 produced pursuant to Magistrate Judge Spero's order compelling
7 production of documents from the defendant-intervenors. They
8 are documents that we believe are relevant.

9 We would like to use them with our witnesses, but
10 they were produced pursuant to the attorneys' eyes protective
11 order. As far as I can tell, there is absolutely no basis for
12 covering them under the protective order and we would like to
13 use them with our witnesses.

14 And since Mr. Thompson has been such a stickler for
15 disclosure, I would note that we may not end up being able
16 to give quite as much notice as to these documents because we
17 just received them and they should have been produced many,
18 many months ago.

19 So I guess my question is how -- the best way the
20 Court would like to resolve questions relating to documents we
21 are just getting. They are producing them under a protective
22 order.

23 Whether it makes sense to have Magistrate Judge Spero
24 take a look first tomorrow while we are here in trial. Really,
25 just wanted to get the Court's guidance.

1 **THE COURT:** Do you have any views, Mr. Thompson, or
2 Mr. Cooper?

3 **MR. COOPER:** Your Honor, we really don't have any
4 views to present to the Court on this very recently raised
5 issue at this moment.

6 We will try to study on this issue this evening and
7 have some views, at least half baked, for you in the morning.

8 **THE COURT:** I'm sure they will be fully baked.

9 (Laughter.)

10 **THE COURT:** At this juncture and since we may very
11 well confront this problem going forward, would it delay
12 matters to refer this back to the magistrate rather than for us
13 to take it up right here, because you are planning to use or
14 going to be using these documents, if you are permitted to,
15 with witnesses on the stand?

16 **MR. BOUTROUS:** It may delay matters, your Honor. And
17 it's -- we are moving, I think, at a nice pace, but there are
18 witnesses coming up that I think we want to use these
19 documents.

20 I've looked at the documents. I can't say anything
21 in detail right now because they are still under seal, but the
22 burden, as the Court knows, is significant to sealed documents
23 and there is -- these are documents that -- these are the
24 external documents that were sent beyond the core group as
25 defined by the Ninth Circuit and by Judge Spero, who gave an

1 even broader interpretation to the core group, I think, than
2 was mandated.

3 And so these documents cannot in any way be deemed
4 the kind of confidential protected information. And we really
5 would like to use them. In fact, there are all kinds of issues
6 I think they are directly relevant to based on today's
7 testimony. So whatever the speediest manner we can do it in.

8 **THE COURT:** Which witness do you plan to use these
9 documents with?

10 **MR. BOUTROUS:** I will certainly be using them with
11 Professor Segura, who will probably come up possibly towards
12 the -- on Friday, but more likely on Tuesday. And so that's
13 probably the most likely, but it may be some of our witnesses
14 earlier.

15 We are still just reviewing the documents and I think
16 there are probably some more documents that may come up with
17 the witnesses later this week.

18 **THE COURT:** It might be helpful if I were to see
19 those documents so I had some idea of what it you are talking
20 about.

21 And I assume that's without objection, Mr. Cooper?

22 **MR. COOPER:** Of course, your Honor. And I believe
23 they have been filed with the Court under seal --

24 **THE COURT:** I see.

25 **MR. COOPER:** -- and they are available to the Court

1 to review.

2 As I say, I think I'm correct in saying these came to
3 us yesterday and I think it was late yesterday. But in any
4 event we are -- we are looking at them and trying to assess
5 them.

6 I think that I agree with Mr. Boutrous that sending
7 this back to Magistrate Judge Spero very well might delay
8 things that if we dealt with them here -- and we will have to
9 deal with them on a document-by-document basis -- some may not
10 be objectionable, and I'm not sure the ones he submitted are
11 objectionable, but some others certainly may be objectionable
12 or at least documents that we believe ought to be protected by
13 some kind of protective order and remain under seal, even if
14 they are ultimately available to the Court for its review.

15 So we will just have to, I think, prepare our
16 thoughts on this for tomorrow morning.

17 **THE COURT:** You say these have already been filed,
18 filed under seal. Do you have a docket number?

19 **MR. BOUTROUS:** Your Honor, I think we do. In fact,
20 I -- actually, we didn't -- the electronic version, because we
21 filed them under seal, we couldn't file the documents, but we
22 provided your staff with the sealed versions, two copies.

23 **THE COURT:** So I can take a look at those documents
24 and have some idea of what it is you are talking about and that
25 will help me figure out what would be an appropriate way to

1 proceed.

2 **MR. COOPER:** And while we are on this subject, it
3 might be well to deal with another matter like the one I -- we
4 opened our trial with, which is to place on the record for
5 purposes of preservation again an objection to the introduction
6 and admissibility of these -- the documents of this ilk that
7 are being now produced on a rolling basis to the -- to the
8 plaintiffs pursuant to Magistrate Judge Spero's order, but that
9 we do believe -- and notwithstanding the Ninth Circuit's
10 decision, we do believe qualify for a First Amendment privilege
11 and, also, are irrelevant.

12 We would like to place that objection, again, to
13 preserve it and ask that it be continuing in nature, again, so
14 I don't have to interrupt the progress of the trial every time
15 a document is offered of this kind or a question is asked of a
16 witness that would elicit information that we believe is of
17 this kind.

18 And if we could have that, your Honor, we would be
19 content.

20 **MR. BOIES:** Yes. We have no objection.

21 **THE COURT:** I beg your pardon, Mr. Boies?

22 **MR. BOIES:** We have no objection actually.

23 **THE COURT:** All right. Continuing objection is
24 noted, and I will take a look at these documents.

25 And, counsel, have a pleasant evening.

1 **MR. BOUTROUS:** And, your Honor, I had one more. This
2 is one is even less controversial.

3 Amicus briefs, we have had a number of additional
4 requests about filing them and we wanted to just get
5 clarification if the Court would accept them. We were going to
6 propose a deadline of seven days after the end of the trial,
7 applications for amicus briefs on both sides.

8 **THE COURT:** I certainly would support a deadline for
9 the filing of amicus briefs.

10 (Laughter.)

11 **THE COURT:** I gather, Mr. Cooper, you would also
12 support a deadline of filing amicus briefs.

13 **MR. COOPER:** Your Honor, I would -- apparently, a
14 number of amicus parties who would support our side of the case
15 filed amicus briefs a couple days ago. So I would propose a
16 deadline of yesterday.

17 (Laughter.)

18 **MR. COOPER:** But I would certainly support the
19 deadline that Mr. Boutrous has articulated, yes.

20 **THE COURT:** All right. Well, that will be fine.
21 Seven days after the conclusion of the presentation of
22 evidence.

23 **MR. BOUTROUS:** Thank you, your Honor.

24 **THE COURT:** Anything else?

25 **MR. MARTINEZ:** Yes, your Honor.

1 **THE COURT:** Oh, you are?

2 **MR. MARTINEZ:** Manuel Martinez. I'm representing two
3 parties today. Normally I represent Defendant Patrick
4 O'Connell, Clerk-Recorder for County of Alameda.

5 I'm also standing in as a friend of Defendant Dean
6 Logan, Los Angeles County Registrar-Recorder/County Clerk.

7 **THE COURT:** What county? What is the second county?

8 **MR. MARTINEZ:** Los Angeles County.

9 The reason I rise, your Honor, is just simply to
10 bring it to the Court's attention that two motions with
11 stipulations signed by all the parties were filed last Thursday
12 regarding the attendance of Alameda County and Los Angeles
13 County. I just want to put it on the Court's table.

14 **THE COURT:** I have already signed that.

15 **MR. MARTINEZ:** Thank you, your Honor. I appreciate
16 that.

17 **THE COURT:** All right. See you tomorrow, 8:30.

18 (Whereupon at 4:09 p.m. further proceedings
19 in the above-entitled cause was adjourned
20 until Wednesday, January 13, 2010 at 8:30 a.m.)

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I N D E XPLAINTIFF'S WITNESSESPAGEVOL.**COTT, NANCY**

Direct Examination Resumed by Mr. Boutrous

218

2

Cross Examination by Mr. Thompson

253

2

Redirect Examination by Mr. Boutrous

328

2

CHAUNCEY, GEORGE

(SWORN)

356

2

Direct Examination by Ms. Stewart

357

2

Cross Examination by Mr. Thompson

442

2

- - - -

E X H I B I T S

	<u>PLAINTIFFS' EXHIBITS</u>	<u>IDEN</u>	<u>VOL.</u>	<u>EVID</u>	<u>VOL.</u>
5	15, 16, 29, 91			431	2
	851			401	2
6	872			383	2
	873			412	2
7	874			412	2
	1308			219	2
8	1309			219	2
	1314			219	2
9	1316			219	2
	1317			219	2
10	1319			219	2
	1322			219	2
11	1324			219	2
	1325			219	2
12	1326			219	2
	1327			219	2
13	1328			219	2
	1334			219	2
14	1335			219	2
	1746			219	2
15	1750			219	2
	1763			436	2
16	2337			385	2

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CERTIFICATE OF REPORTERS

We, KATHERINE POWELL SULLIVAN and DEBRA L. PAS, Official Reporters for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 09-2292 VRW, **Kristin M. Perry vs. Arnold Schwarzenegger, in his official capacity as Governor of California**, were reported by us, certified shorthand reporters, and were thereafter transcribed under our direction into typewriting; that the foregoing is a full, complete and true record of said proceedings at the time of filing.

/s/ Katherine Powell Sullivan

Katherine Powell Sullivan, CSR #5812, RPR, CRR
U.S. Court Reporter

/s/ Debra L. Pas

Debra L. Pas, CSR #11916, RMR CRR

Tuesday, January 12, 2010