

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)
for the County of Los Angeles,)

) San Francisco, California
Defendants.) Friday
) January 22, 2010

TRANSCRIPT OF PROCEEDINGS

Reported By: *Katherine Powell Sullivan, CRR, CSR 5812*
Debra L. Pas, CRR, CSR 11916
Official Reporters - U.S. District Court

APPEARANCES:**For Plaintiffs:**

GIBSON, DUNN & CRUTCHER LLP
 1050 Connecticut Avenue, N.W.
 Washington, D.C. 20036-5306

**BY: THEODORE B. OLSON, ESQUIRE
 MATTHEW D. MCGILL, ESQUIRE**

GIBSON, DUNN & CRUTCHER LLP
 333 South Grand Avenue
 Los Angeles, California 90071-3197

**BY: THEODORE J. BOUTROUS, JR., ESQUIRE
 CHRISTOPHER D. DUSSEAULT, ESQUIRE
 SCOTT MALZAHN, ESQUIRE
 THEANE KAPUR, ESQUIRE**

GIBSON, DUNN & CRUTCHER LLP
 555 Mission Street, Suite 3000
 San Francisco, California 94105-2933

**BY: ETHAN D. DETTMER, JR., ESQUIRE
 ENRIQUE A. MONAGAS, ESQUIRE
 SARAH. E. PIEPMEIER, ESQUIRE**

BOIES, SCHILLER & FLEXNER LLP
 333 Main Street
 Armonk, New York 10504

BY: DAVID BOIES, ESQUIRE

BOIES, SCHILLER & FLEXNER LLP
 575 Lexington Avenue, 7th Floor
 New York, New York 10022

BY: JOSHUA I. SCHILLER, ESQUIRE

BOIES, SCHILLER & FLEXNER LLP
 1999 Harrison Street, Suite 900
 Oakland, California 94612

**BY: JEREMY MICHAEL GOLDMAN, ESQUIRE
 STEVEN C. HOLTZMAN, ESQUIRE**

**For Plaintiff-
 Intervenor:**

CITY AND COUNTY OF SAN FRANCISCO
 OFFICE OF THE CITY ATTORNEY
 One Drive Carlton B. Goodlett Place
 San Francisco, California 94102-4682

BY: DANNY CHOU, DEPUTY CITY ATTORNEY

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

APPEARANCES (CONTINUED):

For Defendant MENNEMEIER, GLASSMAN & STROUD
Gov. Schwarzenegger: 980 9th Street, Suite 1700
 Sacramento, California 95814-2736
BY: ANDREW WALTER STROUD, ESQUIRE

For Defendant STATE ATTORNEY GENERAL'S OFFICE
Edmund G. Brown Jr.: 455 Golden Gate Avenue, Suite 11000
 San Francisco, California 94102-7004
BY: TAMAR PACHTER, DEPUTY ATTORNEY GENERAL

For Defendant- COOPER & KIRK
Intervenors: 1523 New Hampshire Avenue, N.W.
 Washington, D.C. 20036
BY: CHARLES J. COOPER, ESQUIRE
DAVID H. THOMPSON, ESQUIRE
HOWARD C. NIELSON, JR., ESQUIRE
NICOLE MOSS, ESQUIRE
PETER PATTERSON, ESQUIRE

ALLIANCE DEFENSE FUND
 15100 North 90th Street
 Scottsdale, Arizona 85260
BY: BRIAN W. RAUM, SENIOR COUNSEL
JAMES A. CAMPBELL, ESQUIRE
JORDAN LORENCE, ESQUIRE
DALE SCHOWENGERDT, ESQUIRE

ALLIANCE DEFENSE FUND
 101 Parkshore Drive, Suite 100
 Folsom, California 95630
BY: TIMOTHY D. CHANDLER, ESQUIRE

ALLIANCE DEFENSE FUND
 801 G Street NW, Suite 509
 Washington, D.C. 90001
BY: AUSTIN R. NIMOCKS, SENIOR LEGAL COUNSEL

For James Garlow, AMERICAN CENTER FOR LAW & JUSTICE
Miles McPherson: 11 West Chestnut Hill Road
 Litchfield, Connecticut 06759
BY: VINCENT P. MCCARTHY, ESQUIRE

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

APPEARANCES (CONTINUED):

**For Dennis
Hollingsworth:**

ANDREW PERRY PUGNO, ESQUIRE
101 Parkshore Dr #100
Folsom, California 95630-4726

**For Proposed
Intervenor Imperial
County, et al.:**

ADVOCATES FOR FAITH AND FREEDOM
24910 Las Brisas Road, Suite 110
Murrieta, California 92562

BY: ROBERT H. TYLER, ESQUIRE

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P R O C E E D I N G S

JANUARY 22, 2010

8:32 A.M.

THE COURT: Very well. Good morning, Counsel.

(Counsel greet the Court.)

THE COURT: Any matters to take up before we hear the next witness?

Mr. Boutrous.

MR. BOUTROUS: Yes, Your Honor. I had a couple of things.

First, wanted to inquire of the Court in terms of the Court's expectations and wishes regarding closing arguments, in terms of timing and time, and how you'd like to proceed in that regard for planning purposes.

THE COURT: Sure. I think that would be well to discuss.

My thinking is this. Given the volume of material that has been submitted, I think it would be well, at the conclusion of the evidence, to take a break, to schedule closing argument sometime in the future, probably weeks in the future.

I think closing argument would be much more productive and useful if I have a chance to go over all of this evidence, think about it, tease out some questions that we can discuss in closing argument.

1 So postpone closing argument until sometime in the
2 future that we can work out consistent with your respective
3 schedules. So that's what I would prefer to do, rather than
4 have closing argument at the close of evidence.

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

6 **THE COURT:** Does anybody have a problem with that?

7 **MR. OLSON:** No, Your Honor. That's fine with us.

8 **MR. COOPER:** That's fine with the
9 defendant-intervenor.

10 **THE COURT:** All right.

11 **MR. BOUTROUS:** And the -- quick matter, just an
12 exhibit.

13 As you'll recall, Your Honor, we had played portions
14 of Dr. Tam's deposition earlier in the case. And I had vowed
15 to provide the court reporter and the Court with the excerpts
16 and then the DVD copy of what was played, to enter into the
17 record as exhibits. The DVD is PX2542, and the transcript
18 excerpts are PX2543.

19 So I would like to have those admitted into evidence
20 and made part of the record. And I will give the --

21 **THE COURT:** Very well.

22 (Plaintiffs' Exhibit 2542 and 2543 received in
23 evidence.)

24 **MR. BOUTROUS:** And then -- one last matter, Your
25 Honor.

1 The various exhibits that we had entered into
2 evidence during Professor Segura's testimony, we had further
3 discussions with the defendant-intervenors about redactions.
4 And, as the Court may recall, as to Exhibit 2389, which was
5 the -- the e-mail from Mr. Dolejsi, we went ahead and redacted
6 it further, to take into account some of the issues raised.
7 And then Mr. Pugno asked that we add back in a paragraph.

8 So I now have a version that the parties have agreed
9 to. It's got a lot of redactions. But the parts that we had
10 read into the record are now revealed in the document.

11 **THE COURT:** Let's see. This is the document we were
12 dealing with yesterday?

13 **MR. BOUTROUS:** This was Wednesday, the first day of
14 Professor Segura's testimony.

15 **THE COURT:** I see. All right.

16 **MR. BOUTROUS:** So I would like to provide that to the
17 Court, and have that admitted into evidence in that version.
18 We will provide electronic copies of that, as well.

19 And I believe that's it, in terms of exhibits. We
20 may have a few more we are still talking about, to get
21 agreement on.

22 **THE COURT:** I suspect that both sides will want to
23 review the situation with respect to exhibits, before we
24 formally close the book on exhibits.

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

1 **THE COURT:** Yes, Mr. Cooper.

2 **MR. COOPER:** Just one other similar type of item to
3 bring forward to the Court's attention.

4 We have now done our counterdesignations with respect
5 to the Nathanson and Young depositions, and the deposition
6 excerpts that were played the day before yesterday in court,
7 and just want the Court to be alerted to that fact, and our
8 readiness to present those -- those counter --

9 **THE COURT:** Counterdesignations.

10 **MR. COOPER:** Yes, Your Honor.

11 **THE COURT:** Mr. Boies.

12 **MR. BOIES:** Yes, Your Honor. We have just received
13 those. I'm looking through them now. I know that there will
14 be some portions that we will object to as being outside of the
15 scope of any conceivable expertise that the witness has.

16 And we can present those to the Court, probably,
17 anytime after the luncheon recess. I'll be finished looking at
18 them by then.

19 **THE COURT:** Very well. That will be fine.

20 But I gather, Mr. Cooper, you're still not going to
21 call those witnesses, Mr. Nathanson and Dr. Young.

22 **MR. COOPER:** No, Your Honor, we are not.

23 And we're going to offer these from their depositions
24 in reaction and opposition to the excerpts that were offered by
25 the plaintiffs, essentially calling these experts as their own.

1 So that will be our -- that will be our purpose.

2 **THE COURT:** That's -- that can be done, and been done
3 before.

4 All right. Now, are we ready for a witness?

5 **MR. BOUTROUS:** Yes, Your Honor. Plaintiffs now call
6 Dr. Herek. And Mr. Dettmer will be conducting the examination.

7 **THE COURT:** Very well.

8 **MR. DETTMER:** Good morning, Your Honor. Ethan --

9 **THE COURT:** Good morning, Mr. Dettmer.

10 **MR. DETTMER:** Thank you.

11 **THE CLERK:** Raise your right hand, please.

12 **GREGORY M. HEREK,**

13 called as a witness for the Plaintiffs herein, having been
14 first duly sworn, was examined and testified as follows:

15 **THE WITNESS:** I do.

16 **THE CLERK:** Thank you. State your name, please.

17 **THE WITNESS:** My name is Gregory M. Herek, H-e-r-e-k.

18 **THE CLERK:** Thank you.

19 **DIRECT EXAMINATION**

20 **BY MR. DETTMER:**

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

22 **A.** Good morning.

23 **Q.** Can you please describe for the Court your educational
24 background.

25 **A.** Yes. I received my doctorate in social psychology from

1 the University of California in 1983.

2 **Q.** I'm sorry, what was the field in which you received your
3 doctorate?

4 **A.** In social psychology, a subdiscipline of psychology.

5 **Q.** Can you describe for the Court, briefly, what is social
6 psychology?

7 **A.** Social psychology is actually a field that intersects
8 psychology and sociology. It's the study of human behavior and
9 experiences within a social context.

10 **Q.** And can you describe for the Court, what was the subject
11 of your dissertation?

12 **A.** My dissertation focused on heterosexuals attitudes towards
13 lesbians and gay men.

14 **Q.** When did you received your Ph.D.?

15 **A.** In 1983.

16 **Q.** Did you continue your research after you received your
17 Ph.D.?

18 **A.** Yes. After receiving my Ph.D., I received the
19 postdoctoral fellowship at Yale University, and I worked there
20 for two years.

21 **Q.** What was the subject of your research at Yale?

22 **A.** Well, at Yale, I continued my research from my graduate
23 school dissertation on attitudes towards lesbians and gay men.

24 I also expanded my research in looking at attitudes
25 and the stigma attached to HIV and AIDS, which at that time was

1 a relatively new phenomenon in the United States.

2 And I also studied some other areas as well.

3 **Q.** And what did you do after you left Yale?

4 **A.** Well, actually, I said I was there for two years. That
5 was for my postdoc. I was invited to stay on for a year after
6 I completed my postdoc, and I taught classes at Yale for one
7 year.

8 After that, I was appointed as an assistant professor
9 at the City University of New York's graduate school, in their
10 program in social and personality psychology.

11 **Q.** And how long were you at the City University of New York?

12 **A.** Three years.

13 **Q.** And after that, what was your next employment?

14 **A.** After that, I returned to California. And I took a
15 position as an associate research psychologist at the
16 University of California.

17 The research psychologist position is in a series
18 that's parallel to the professor series, but there's no
19 teaching involved. It focuses entirely on research.

20 **Q.** And did you ever receive tenure at Davis?

21 **A.** Well, I was an associate research psychologist, and then
22 promoted to full research psychologist.

23 And then in 1999, I was appointed as a tenured full
24 professor at UC Davis. And that's been my position since then.

25 **Q.** And what sort of courses do you teach at Davis?

1 **A.** Right now, I regularly teach a course called "Sexual
2 Orientation and Prejudice," which is a course that deals with a
3 variety of topics related to sexual orientation, as well as to
4 societal stigma and individual prejudice based on sexual
5 orientation.

6 I also regularly teach a graduate methods course, in
7 which I teach students the methodological techniques
8 associated with conducting survey and questionnaire research.
9 I also teach an undergraduate version of that course.

10 And I teach occasional seminars on various topics,
11 including topics relating to sexual orientation and to stigma
12 and prejudice.

13 **Q.** Now, do you have exhibit binders up there? I'm sorry?

14 **A.** I don't believe I do.

15 **Q.** I'm sorry.

16 **MR. DETTMER:** Your Honor, may I approach?

17 **THE COURT:** You may.

18 **MR. DETTMER:** My apologies, Your Honor.

19 **BY MR. DETTMER:**

20 **Q.** Professor Herek, if you could please turn to 2326 in that
21 binder.

22 **MR. DETTMER:** It's in the second volume, Your Honor.

23 **THE COURT:** What's the number, again?

24 **MR. DETTMER:** 2326.

25 **THE COURT:** 2326?

1 **MR. DETTMER:** Yes, sir. Yes, Your Honor.

2 **BY MR. DETTMER:**

3 **Q.** Professor Herek, what is that document, Exhibit 2326?

4 **A.** This is my curriculum vitae.

5 **Q.** Okay.

6 **MR. DETTMER:** Your Honor, we would move Exhibit 2326
7 into evidence.

8 **MR. NIELSON:** No objection.

9 **THE COURT:** Very well.

10 (Plaintiffs' Exhibit 2326 received in evidence.)

11 **BY MR. DETTMER:**

12 **Q.** Now, Professor Herek, have you served on the editorial
13 board of any peer-reviewed journals?

14 **A.** Yes, I serve on several editorial boards.

15 **Q.** What type of journals do you serve on the editorial board?

16 **A.** Well, there are a variety. And they are listed in the
17 vitae.

18 For example, I'm on the editorial board of a journal
19 called *Basic and Applied Social Psychology*, which, as the name
20 suggests is a social psychological research journal.

21 I am on the board of the *Journal of Sex Research*,
22 which is an interdisciplinary research journal devoted to
23 issues around sexuality.

24 And there are several others that are also listed in
25 the vitae.

1 Q. Are you a member of any professional associations?

2 A. Yes. I'm a member and a fellow of the American
3 Psychological Association, the Association for psychological
4 Science, the Society for Experimental Social Psychology, and
5 several other associations that are also listed in my vitae.

6 Q. Professor Herek, have you authored any scholarly writing
7 in your subject matter?

8 A. Yes, I have.

9 Q. Can you describe, briefly, the types of writings you've
10 authored.

11 A. Well, I've published approximately 100 articles and
12 chapters in journals and edited volumes that cover topics
13 related to sexual orientation, stigma, prejudice, and related
14 topics.

15 Q. Have you received grant funding for your research?

16 A. Yes, I have.

17 Q. About how much and from where?

18 A. Well, over the course of my career, I've received in
19 excess of \$5 million in grant funding. Most of it from the
20 National Institutes of Health.

21 **MR. DETTMER:** Your Honor, the plaintiffs would tender
22 Dr. Herek as an expert on social psychology, with a focus on
23 sexual orientation and stigma.

24 **THE COURT:** Very well. Any voir dire?

25 **MR. NIELSON:** No objection.

1 **THE COURT:** Very well. You may proceed, Mr. Dettmer.

2 **MR. DETTMER:** Thank you, Your Honor.

3 **BY MR. DETTMER:**

4 **Q.** Professor Herek, do you intend to offer any opinions in
5 this matter?

6 **A.** Yes, I do.

7 **Q.** And what opinions do you intoned offer?

8 **A.** I intend to offer opinions concerning the nature of sexual
9 orientation and how it is understood in the fields of
10 psychology and psychiatry today; about the amenability of
11 sexual orientation to change through interventions and --
12 through various intervention techniques; and the nature of
13 stigma and prejudice as they relate to sexual orientation and
14 as they are related to Proposition 8.

15 **Q.** Now, Professor Herek, I've given the court reporter a copy
16 of a list of the exhibits that are in your binders there.

17 **MR. DETTMER:** And I'd like, if I may, Your Honor, to
18 offer you a copy as well. And if I may approach Dr. Herek.
19 Your Honor, may I approach?

20 **THE COURT:** You may.

21 **MR. DETTMER:** I've handed Professor Herek a list of
22 exhibits that are in the binders in front of him.

23 And just for the sake of efficiency, I've run these
24 exhibits by Mr. Nielson. And I understand that they will have
25 no objection to the admission of these documents.

1 **MR. NIELSON:** That is correct, Your Honor.

2 **THE COURT:** Very well. Appreciate your cooperation.

3 (Plaintiffs' Exhibits 764, 884, 885, 886, 887, 888,

4 889, 894, 898, 901, 902, 903, 906, 907, 911, 912,

5 915, 916, 917, 918, 919, 920, 924, 925, 928, 929,

6 930, 931, 932, 933, 936, 940, 945, 946, 947, 949,

7 953, 954, 956, 957, 958, 959, 963, 970, 971, 2265,

8 2326, 2338, 2350, 2563, 2564, 2565 and 2567 received

9 in evidence.)

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

11 **BY MR. DETTMER:**

12 **Q.** Now, Professor Herek, I know you've had a chance to look

13 at this list before, but with the exception of five exhibits

14 listed there, 2265, 2563, 2564, 2565 and 2567, are those

15 exhibits documents or studies that you've relied on in reaching

16 your opinions in this case?

17 **A.** I believe so. But could you say the numbers one more

18 time.

19 **Q.** Certainly. The exhibits I'm excepting are 2265, 2563 --

20 **A.** 2265. Oh, I see. Okay. Sorry.

21 **Q.** That's quite all right. 2564, 2565 and 2567.

22 With the exception of those five documents, are the

23 exhibits listed there the exhibits among the documents you've

24 relied on in reaching your opinions in this case?

25 **A.** I believe 2350 is not one that I relied on.

1 Q. Thank you. Any other exceptions to that?

2 A. I don't think so.

3 Q. Now, turning to your opinions, Dr. Herek, can you describe
4 for the Court, what is sexual orientation?

5 A. Sexual orientation is a term that we use to describe an
6 enduring sexual, romantic, or intensely affectional attraction
7 to men, to women, or to both men and women.

8 It's also used to refer to an identity or a sense of
9 self that is based on one's enduring patterns of attraction.

10 And it's also sometimes used to describe an enduring pattern of
11 behavior. So, sexual behaviors with men, with women, or with
12 both men and women.

13 Q. You've described three different aspects of that
14 definition. Can you give examples of how those aspects are
15 used in different context?

16 A. Well, researchers use them in different context depending
17 upon their focus in a particular research study.

18 So, for example, in public health research, it's
19 often the case that the focus is on, say, sexually-transmitted
20 diseases or other aspects of sexual behavior. So in that
21 context, sexual orientation is often defined in operational
22 terms, according to patterns of sexual behavior.

23 In other areas we might be interested in looking at,
24 for example, the effects of discrimination on people who are
25 lesbian, gay, or bisexual. In that context, we would probably

1 focus on identity, on terms that people use to identify
2 themselves in terms of their sexual orientation.

3 So it really varies, somewhat, depending upon the
4 research context.

5 **Q.** Now, that's a definition used by researchers and experts
6 in the field.

7 Do you, in your research, ask ordinary laypeople
8 about their own sexual orientation?

9 **A.** Yes. I've done that frequently.

10 **Q.** Do you find that ordinary people have an understanding of
11 their own sexual orientation?

12 **A.** Well, when -- when I ask the question and when other
13 researchers ask the question in surveys, we typically don't use
14 terms like "sexual orientation" because that has a technical
15 quality to it. And we don't expect people to necessarily know
16 that specific term.

17 So what we typically do is to ask people if they are
18 heterosexual or straight, gay, lesbian, or bisexual. And
19 that's a question people generally are able to answer fairly
20 easily.

21 **THE COURT:** I gather, when you say "ordinary people"
22 you mean people without professional training?

23 **MR. DETTMER:** That's correct, Your Honor. People
24 outside the field of Professor Herek's expertise.

25

1 **BY MR. DETTMER:**

2 **Q.** Professor Herek, where do relationships fit into what
3 we've been discussing?

4 **A.** Well, you know, really, sexual orientation is at its heart
5 a relational construct, because it is all about a relationship
6 of some sort between one individual and another, and a
7 relationship that is defined by the sex of the two persons
8 involved, whether male and female, male and male, female and
9 female.

10 It is -- whether we are talking about behavior or
11 attraction or identity, it is really about the fundamental
12 relationships that people form to meet their needs for intimacy
13 and attachment.

14 **Q.** And why are these issues important, in your view?

15 **A.** Well, because those -- those sorts of relationships, that
16 need for intimacy, that need for attachment, is a very core
17 part of the human experience, and a very fundamental need that
18 people have.

19 **Q.** Switching to a different topic, is homosexuality
20 considered a mental disorder?

21 **A.** No.

22 **Q.** And why do you say that?

23 **A.** Well, the American Psychiatric Association, the American
24 Psychological Association, and other of the -- of the major
25 professional mental health associations, have all gone on

1 record affirming that homosexuality is a normal expression of
2 sexuality, that it is not in any way a form of pathology.

3 **Q.** Does homosexuality have any impact on one's ability to
4 contribute to society?

5 **A.** There's no inherent relationship between a person's sexual
6 orientation and their ability to be productive and contributing
7 members of society, to be happy, to lead a fulfilling life.

8 **Q.** Has homosexuality ever, in the past, been seen as a mental
9 disorder?

10 **A.** Yes.

11 **Q.** Okay. And can you describe the history of that?

12 **A.** Well, if we go back to the early part of the 20th century,
13 we see that there was a great deal of discussion and debate.

14 In 1952, the American Psychiatric Association created
15 its first official roster of mental illnesses. It was called
16 the *Diagnostic and Statistical Manual of Mental Disorders*, or
17 the DSM for short.

18 And homosexuality was included in that first edition
19 of the DSM. Over time, that inclusion was disputed, and there
20 were many challenges to it such that by 1973, just about 20
21 years later, the American Psychiatric Association removed
22 homosexuality from its DSM.

23 And shortly after that, the American Psychological
24 Association went on record strongly supporting the decision by
25 the Psychiatric Association.

1 Q. Thank you.

2 If I could ask you, in the first volume of your
3 exhibits there, to turn to Exhibit 885. That's PX885. Can you
4 please tell the Court what this document is?

5 A. This is a copy of that first *Diagnostic and Statistical*
6 *Manual of Mental Disorders*, that was published in 1952.

7 Q. Could you please turn to pages 38 and 39. Under the
8 heading -- sorry. I'll wait until you get there.

9 Under the heading "Sexual Deviation" is that what
10 you've been referring to?

11 A. Right. This is one of the subheadings under "Sociopathic
12 Personality Disturbance," and sexual deviation includes
13 homosexuality as a diagnosis.

14 Q. Now, if I could ask you, then, to turn earlier in that
15 same volume to page 76 -- I'm sorry, to Exhibit 764.

16 **THE COURT:** 74?

17 **MR. DETTMER:** 764, Your Honor.

18 **BY MR. DETTMER:**

19 Q. Professor Herek, if you could please describe for the
20 Court what this document is.

21 A. Well, this is the policy statement that I was referring to
22 earlier, when I said that the American Psychological
23 Association had endorsed the action by the psychiatrists.

24 This was their resolution that was passed by the
25 council of representatives, which is their legislative body, in

1 1975, affirming that:

2 "Homosexuality per se implies no impairment
3 in judgment, stability, reliability, or
4 general social and vocational capabilities."

5 And it goes on to say that:

6 "The American Psychological Association urges
7 all mental health professionals to take the
8 lead in removing the stigma of mental illness
9 that has long been associated with homosexual
10 orientations."

11 **Q.** And do you understand that position that you've just read
12 to still be the position of the American Psychological
13 Association?

14 **A.** Yes. In fact, the APA has reaffirmed that position in
15 several subsequent resolutions.

16 **Q.** Now --

17 **THE COURT:** What led to the change?

18 **THE WITNESS:** To the change in 1973?

19 **THE COURT:** Yes.

20 **THE WITNESS:** With the psychiatrists? Well, that's a
21 long story, I think.

22 **THE COURT:** Well, we're here for those.

23 (Laughter)

24 **THE WITNESS:** Okay.

25 There was a great deal of debate and argument about

1 it. It's, perhaps, instructive to ask how homosexuality got in
2 the DSM in the first place. And it turns out that there was
3 not a great deal of empirical data to support it.

4 It actually reflected more common knowledge and
5 assumption among many psychiatrists in the 1940s and 1950s.

6 In the -- by the 1970s, that common wisdom was being
7 challenged both in the form of empirical research that was
8 showing that there certainly were people who were homosexual,
9 who were very well-adjusted; and other than the label of being
10 homosexual, showed no indication that they were suffering from
11 any sort of mental disorder.

12 And there was also a change in the culture that was
13 leading many individuals and institutions to rethink their
14 previous positions about homosexuality. And that included
15 psychiatrists and psychologists.

16 Those events and patterns sort of culminated in 1973,
17 when the board of directors of the American Psychiatric
18 Association voted to -- to remove homosexuality from the DSM
19 based on their understanding of the empirical research as it
20 existed at that time.

21 **THE COURT:** So you're saying that the position that's
22 reflected in the first DSM, Plaintiffs' Exhibit 885, was not
23 based upon empiricism, but that the change reflected in Exhibit
24 764, the statement in 1975, was based upon empirical evidence;
25 is that a fair statement?

1 **THE WITNESS:** That's a fair statement. And I would
2 say that it was not only empirical data. There were -- the
3 times had changed. And there was a new perspective that no
4 longer viewed homosexuality as this necessarily bad thing, this
5 thing that was necessarily indicative of mental illness.

6 But there were also empirical studies that had been
7 conducted, that had failed to support the view of homosexuality
8 as a mental illness.

9 I would also just point out, this resolution is the
10 one passed by the psychologists in '75. They were endorsing
11 the resolution by the psychiatrists, which was in '73.

12 **THE COURT:** Thank you, Mr. Dettmer.

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

14 **BY MR. DETTMER:**

15 **Q.** Moving to a slightly different topic, Professor Herek.

16 Do people choose their sexual orientation?

17 **A.** Well, I've conducted research that -- in which I found
18 that the vast majority of lesbians and gay men, and most
19 bisexuals as well, when asked if they feel that they -- how
20 much choice they've had been their sexual orientation, about
21 being gay or lesbian or bisexual, say that they have
22 experienced no choice or very little choice about that.

23 **Q.** Are you familiar with the terms "reparative therapy" or
24 "sexual-orientation-change therapy"?

25 **A.** I am familiar with those terms.

1 Q. Can you explain what those terms mean?

2 A. Well, those are terms that are used to refer to various
3 types of interventions that are intended to alter a person's
4 sexual orientation, to change them from becoming homosexual
5 into heterosexual.

6 Q. Have those types of therapies been found to be effective?

7 A. Uhm, well, before I answer that, it's -- it's useful,
8 maybe, to say what constitutes effectiveness or how we think
9 about effectiveness.

10 When we use the word "effective" in connection with
11 therapeutic interventions, what we mean is -- excuse me, what
12 we mean is that an intervention or a therapy has been shown to
13 consistently work, to consistently produce the outcome that
14 it's supposed to produce in the population for which it is
15 designed, and that it does so without causing harm to the
16 individuals involved.

17 And with those standards, no, various reparative
18 therapies or sexual-orientation-change therapies have not been
19 found to be effective.

20 Q. Has the American Psychological Association taken a stand
21 on these types of therapies?

22 A. Yes, it has.

23 Q. And can you describe how it came to take a stand on those.

24 A. Well, these therapies have been around for a long time.

25 And there's been a great deal of discussion and debate about

1 them.

2 The APA has considered them a number of times. Most
3 recently, it convened a task force. I believe the task force
4 was convened in 2008 or 2009. It produced its report in 2009.

5 But this was a task force that was given the task of
6 evaluating the current status of these therapies, and to
7 produce a report advising the Association on their
8 effectiveness, their safety, and -- and whether or not they
9 should be used.

10 **Q.** And what were the conclusions reached as a result of those
11 studies?

12 **A.** Well, the -- the task force did a very thorough review of
13 the research literature, and, first of all, found that there
14 were actually not very many high-quality studies that had been
15 conducted that could actually speak to the effectiveness of
16 these therapies.

17 But when one looks at the studies that are available
18 and that have used the methods of sufficient quality, what one
19 finds is that they are of very limited effectiveness and are
20 also potentially associated with some harms to individuals.

21 **Q.** If I could ask you to turn to Exhibit 888 in your first
22 binder.

23 **MR. DETTMER:** And, also, if we could have -- I'd like
24 to publish a first demonstrative, Your Honor.

25 (Document displayed)

1 **BY MR. DETTMER:**

2 **Q.** Professor Herek, could you please tell the Court what
3 Exhibit 888 is.

4 **A.** Well, this is the cover of the report from the task force
5 that I just mentioned.

6 **Q.** And 888 in your binder is -- can you describe what that --

7 **A.** I'm sorry. It's the report of the American Psychological
8 Association Task Force on Appropriate Therapeutic Responses to
9 Sexual Orientation. And, yes, the entire report is here in the
10 binder.

11 **Q.** Okay. If we could move to the next demonstrative, please.

12 If you look on pages 2 to 3 of Exhibit 888, do you
13 find the conclusion here of -- of the task force?

14 **A.** Yes.

15 **Q.** And do you mind reading that, please, into the record.

16 It's also on your screen there.

17 **A.** Okay. It's easier to read it from the screen.

18 "Enduring change to an individual's sexual
19 orientation is uncommon. The participants in
20 this body of research continued to experience
21 same-sex attractions following SOCE" -- an
22 acronym for sexual-orientation-change
23 efforts -- "and did not report significant
24 change to other-sex attractions that could be
25 empirically validated, though some showed

1 lessened physiological arousal to all sexual
2 stimuli. Compelling evidence of decreased
3 same-sex sexual behavior and of engagement in
4 sexual behavior with the other sex was rare.
5 "Few studies provided strong evidence that
6 any changes produced in laboratory conditions
7 translated to daily life. Thus, the results
8 of scientifically valid research indicate
9 that it is unlikely that individuals will be
10 able to reduce same-sex attractions or
11 increase other-sex sexual attractions through
12 SOCE."

13 **Q.** Thank you.

14 Are these conclusions consistent with your own
15 opinion?

16 **A.** Yes.

17 **Q.** Do you know whether the task force made any conclusions
18 with respect to the safety of these types of therapies?

19 **A.** Well, the task force pointed out that just as there are
20 problems with the research on the effectiveness which make it
21 difficult to say that there is a cause-and-effect relationship
22 between any changes that occurred in -- and the actual
23 participation in the therapy, they also found that there were
24 many anecdotal reports of individuals who felt that they had
25 experienced harm related to these therapies.

1 There were some instances in those rigorous
2 experimental studies that did document individuals experiencing
3 harm in the form of, say, depression or anxiety problems.

4 There were also self-reports of individuals who said
5 that they felt that they had been harmed by the therapies. But
6 I would hasten to point out that those are self-reports of
7 people's perceptions. And so to show that they actually
8 experienced those harms as a result of the therapy is somewhat
9 tenuous. We can't assume that that's absolutely true. But
10 there have been those reports of harm.

11 **Q.** Is a mental health professional or a scholar in the mental
12 health field more concerned about self-reports of harm as
13 opposed to self-reports of other types of instances?

14 **A.** Well, I would say we give great weight to concerns about
15 harm.

16 One of the first things you want to do with any sort
17 of intervention, whether it's pharmaceutical or therapy, is to
18 make sure that it doesn't harm people. So, in a sense, I would
19 say there's a lower bar for concerns about harm to individuals.

20 And so we would take very seriously those
21 self-reports of people feeling that they had experienced harm
22 as a result of these therapies, and would certainly want to
23 evaluate them carefully.

24 **Q.** Do you know whether the American Psychological Association
25 adopted any resolutions based on this work?

1 **A.** Yes, there was a resolution that was adopted in response
2 to the task force report.

3 **Q.** I'd ask you to turn to page 120 of this exhibit, 888.

4 (Document displayed.)

5 And on page 120, do you see that these are
6 resolutions that you were referring to?

7 **A.** Yes. Yes. This is the text of the resolution that was
8 adopted by the American Psychological Association.

9 **Q.** And, just for the record, could you read the -- the two
10 operative resolutions there, that are on the screen?

11 **A.** (As read)

12 "Be it further resolved that, the American
13 Psychological Association reaffirms its
14 position that homosexuality per se is not a
15 mental disorder, and opposes portrayals of
16 sexual minority youths and adults as mentally
17 ill due to their sexual orientation.

18 "Be it further resolved that, the American
19 Psychological Association concludes that
20 there is insufficient evidence to support the
21 use of psychological interventions to change
22 sexual orientation."

23 **Q.** Now, are these conclusions consistent with your own
24 opinions?

25 **A.** Uhm, yes.

1 Q. Are you aware of any other major mental health
2 organizations that have endorsed the use of these therapies?

3 A. That have endorsed them, no.

4 Q. Are there specific concerns surrounding these types of
5 therapies when -- when used with adolescents?

6 A. I think there's a concern when they're used with anyone,
7 but adolescents are a special case for a variety of reasons.

8 Adolescents are at a very formative stage in life
9 where they are typically just developing their sexual -- their
10 sexuality. And, also, adolescents are frequently in a fairly
11 vulnerable situation, in terms of not being in complete control
12 of their lives.

13 And there's a concern that has been expressed by the
14 American Psychological Association in, actually, a previous
15 resolution to this one, that they were concerned that
16 adolescents who went through these interventions might often
17 not be able to provide true informed consent; that they might
18 actually be coerced into going through these interventions; and
19 that that could be especially harmful to the adolescent person.

20 Also, it's important to realize that the underlying
21 assumption of these therapies tends to be that there's
22 something wrong; that homosexuality is a mental illness; that
23 it's something that needs to be cured or something that needs
24 to be fixed or repaired.

25 And that, of course, is completely inconsistent with

1 the stance of the American Psychological Association, the
2 American Psychiatric Association, and other professional
3 organizations in this area.

4 And so they have pointed out that this message might
5 be especially harmful to transmit to adolescents who are just
6 in the formative stage of their sexuality.

7 **Q.** Could I ask you to turn to Exhibit 2338, which is in the
8 smaller binder there.

9 (Document displayed.)

10 Do you know what that document is, Professor Herek?

11 **A.** Yes. This is a pamphlet called, "Just the Facts about
12 Sexual Orientation and Youth: A Primer for Principals,
13 Educators and School Personnel," that was created by and
14 cosponsored by a number of mental health associations, as well
15 as some teacher and school professional associations.

16 **Q.** All right. And looking at the first page of that
17 document, it lists the -- the organizations that endorse this
18 publication --

19 **A.** Yes.

20 **Q.** -- is that right?

21 The American Academy of Pediatrics. American
22 Association of School Administrators. American Counseling
23 Association. American Federation of Teachers. American
24 Psychological Association. American School Counselor
25 Association. American School Health Association. Interfaith

1 Alliance Foundation. National Association of School
2 Psychologists. National Association of Secondary School
3 Principals. National Association of Social Workers. National
4 Education Association. And the School Social Work Association
5 of America.

6 Is that consistent with your understanding of who's
7 endorsed this particular publication?

8 **A.** Yes.

9 **Q.** And if you turn to page 14 of this document. I'm sorry,
10 it's not page 14.

11 (Document displayed)

12 **A.** No, I don't think it's 14.

13 **Q.** My apologies. Page 1 of this document -- my apologies.
14 I'm going to start over. Page 5 lists the conclusion here, and
15 the findings of these organizations.

16 **MR. DETTMER:** Excuse me, Your Honor.

17 **BY MR. DETTMER:**

18 **Q.** Could you read, please, the findings of these
19 organizations as set forth in this document.

20 **A.** (As read)

21 "Despite the general consensus of major
22 medical, health, and mental health
23 professions that both heterosexuality and
24 homosexuality are normal expressions of human
25 sexuality, efforts to change through therapy

1 have been adopted by some political and
2 religious organizations and aggressively
3 promoted to the public. However, such
4 efforts have serious potential to harm young
5 people because they present the view that the
6 sexual orientation of lesbian, gay, and
7 bisexual youth is a mental illness or
8 disorder, and they often frame the inability
9 to change one's sexual orientation as a
10 personal and moral failure."

11 **Q.** Are these findings consistent with your own opinion?

12 **A.** Yes.

13 **Q.** Now, I'd like to change to a different topic.

14 Do you understand, Professor Herek, that gay men and
15 lesbians can actually get married in California today?

16 **A.** Well, they can marry someone of the other sex.

17 **Q.** Is that a realistic option for gay men or lesbians?

18 **A.** For the vast majority of gay men and lesbians, that's not
19 a realistic option.

20 **Q.** And why do you say that?

21 **A.** Well, as I said earlier, sexual orientation is really
22 about the relationships that an individual forms. It really
23 defines the universe of people with whom one is going to be
24 able to form the sort of intimate, committed relationship that
25 would be the basis for marriage.

1 Q. Despite that, have gay men and lesbians gotten married to
2 people of the opposite sex?

3 A. Yes, yes they have.

4 Q. Do you know of reasons why that happens?

5 A. Well, there's a variety of reasons why it's happened.

6 We know that, in some cases, people have gotten
7 married at a time in life when they really hadn't quite
8 understood their own sexuality, and it was only after being
9 married sometime later that they realized that they themselves
10 were gay or lesbian.

11 In other cases, people might have known or at least
12 had strong suspicions that they were gay or lesbian at the time
13 that they married, but they married because they were subjected
14 to intense social pressures to do so, because they hoped that,
15 perhaps, by marrying this would change them, they would become
16 heterosexual as a result; that this would somehow, you know,
17 help them to not be gay anymore.

18 There are a variety of reasons. Those are just a few
19 examples.

20 Q. Is this a problem with those sorts of marriages, with gay
21 men and lesbians marrying somebody of the opposite sex?

22 A. Well, it's certainly not the case that all of those
23 marriages dissolve. But many of them do. And many of them
24 experience considerable problems, just because of the fact that
25 one of the partners is -- is gay or lesbian.

1 It certainly -- especially, if it's something which
2 is typically the case, that the spouse, the other spouse, did
3 not know when they went into the marriage.

4 It is likely to create a great deal of conflict and
5 tension in the relationship and -- and is just going to create
6 many, many problems. Not only for the couple, but, also, if
7 they have children, perhaps for the children, for the other
8 members of the -- of their extended families, for their
9 friends. It's a ripple effect. It can create problems for all
10 sorts of different people.

11 **Q.** Now, do you understand that lesbians and gay men in
12 California who are in a same-sex relationship can enter into
13 domestic partnerships?

14 **A.** Yes.

15 **Q.** Do you understand that domestic partnerships have most of
16 the same rights and privileges as marriage?

17 **A.** It's my understanding that domestic partners in California
18 have virtually all the same rights and privileges as married
19 couples.

20 **Q.** So is all we're talking about a word? Is the only
21 difference that we're talking about here between the word
22 "marriage" and "domestic partnership"?

23 **A.** I would say it's not simply a word, no.

24 **Q.** Why do you say that?

25 **A.** Well, I think that if we -- if we look at, for example,

1 public opinion data, what we see is that there's a sizable
2 proportion of the public, both in California and in the
3 United States, who say that they are willing to let same-sex
4 couples have domestic partnerships or civil unions or some --
5 something that gives them the benefits of marriage without
6 calling it marriage.

7 And, yet, they are not -- they are willing to extend
8 those benefits, but they are not willing to extend marriage to
9 same-sex couples, which suggests that in the minds of a large
10 number of -- of Americans, there is some distinction between
11 domestic partnerships and marriage; that it's not simply a
12 word, that there's more to it than that.

13 I think, also, if we look at the recent history of
14 California, when it became possible for same-sex couples to
15 marry, thousands of them did. And many of those who did were
16 domestic partners. So, clearly, they thought there was
17 something different about getting married.

18 And I would say that just the fact that we're here
19 today suggests that this is more than just a word; that
20 there's, clearly, a great deal of strong feeling and emotion
21 about the difference between marriage and domestic
22 partnerships.

23 **Q.** Does marriage encourage the stability of a relationship?

24 **A.** Uhm, yes, it does.

25 **Q.** And why do you say that?

1 **A.** Well, researchers who look at -- at committed
2 relationships usually think of -- of the factors that
3 contribute to long-term commitment and stability in terms of
4 both the rewards that the relationship has and the barriers to
5 leaving, barriers to dissolution.

6 So, on the one hand, people are brought together and
7 stay together for positive reasons. They -- they like and love
8 their partner. They enjoy being with their partner. They
9 experience many positive things as a result of being with that
10 person.

11 But when people are married, there are also a number
12 of barriers that make it not an easy thing to simply dissolve
13 the marriage. And these refer to both legal barriers as well
14 as to social barriers.

15 For example, the expectations of family and friends,
16 the idea that their -- the members of their community, the
17 members of their family, their friends circles are likely to be
18 hoping and pulling for a couple to stay together, to stay
19 married.

20 There are -- there are many other sorts of barriers
21 to dissolution that exist with marriage. And the point about
22 that is that we -- we know that relationships are more likely
23 to be stable and enduring when they are based primarily on
24 rewards, on those positive things that people get.

25 But the barriers can be an incentive or encouragement

1 for individuals who might be going through a rough patch to try
2 to resolve those problems, to try to work things out rather
3 than separating. And it may well be the case that they do get
4 through that rough patch, and they are able to maintain the
5 marriage over the long-term. And so, in that sense, these
6 barriers can be helpful in maintaining the stability of the
7 relationship.

8 **Q.** Do domestic partnerships create those same barriers?

9 **A.** Uhm, I -- we're -- we're lacking in a great deal of
10 empirical data. But I would say, no, domestic partnerships are
11 not perceived in the same way as marriage is, in terms of those
12 barriers.

13 **Q.** And have you seen illustrations of that observation with
14 respect to domestic partnerships in California?

15 **A.** Well, I think one -- one interesting example that
16 illustrates that fact is that in 2004, the California
17 legislature enacted legislation that -- that increased the
18 benefits and responsibilities associated with domestic
19 partnership. And what that meant was that there were going to
20 be changes of all sorts associated with being a domestic
21 partner.

22 And in 2004 -- that law was going to go into effect
23 the beginning of 2005.

24 In 2004, the California Secretary of State mailed a
25 letter to all registered domestic partners in the state,

1 advising them of these changes, and, in essence, saying you
2 should consider whether or not you want to dissolve your
3 domestic partnership in light of these changes that are going
4 to occur in the law, which may have an impact on you,
5 especially a financial impact.

6 I find it difficult to imagine that if there were
7 changes in the tax laws that were going to affect married
8 couples, that you would have the state government sending
9 letters to people suggesting that they consider whether or not
10 they want to get divorced before this new law goes into effect.

11 I think that -- that letter just illustrates the way
12 in which domestic partnerships are viewed differently than
13 marriage.

14 **Q.** If I could ask you to turn to Exhibit 2265 in your binder,
15 please. It's the second binder.

16 Is that the letter you're referring to,
17 Professor Herek?

18 **A.** Yes.

19 **Q.** Do you know whether domestic partnerships were, in fact,
20 dissolved in California as a result of this?

21 **A.** Well, yes. The -- some researchers at UCLA were tracking
22 the number of dissolutions of domestic partnerships.

23 And it's very interesting. What they found was that
24 there was an increase in domestic partnership dissolutions
25 leading up to the end of 2004.

1 And, in fact, in December of 2004, there was a huge
2 spike in the number of domestic partnerships that were
3 dissolved in California, presumably in anticipation of this new
4 law, and perhaps in response to this letter that was sent from
5 the Secretary of State.

6 **Q.** Do you know whether there's empirical study of that?

7 **A.** Yeah, the UCLA researchers that I was mentioning had
8 actually tracked that.

9 **Q.** Could you turn to Exhibit 909, please, in your binder.

10 **A.** Okay.

11 **Q.** Is this the study you are referring to?

12 **A.** Yes.

13 (Document displayed)

14 **Q.** And figure 9 in this exhibit, which is on page 15, do you
15 know what that -- what that figure portrays?

16 **A.** Yeah. This is -- this is a bar chart that -- that shows
17 what I was describing a minute ago.

18 What you see is that -- these are the -- the number
19 of monthly dissolutions of domestic partnerships in California
20 through the last half of 2004, and the beginning of 2005.

21 And where you see that -- that very tall bar, with
22 "1188" above it, that was the number of dissolutions in
23 December, right before the new law went into effect.

24 And what you see is, it's a pretty dramatic spike
25 right there.

1 Q. Now, are you aware of any studies that have been done of
2 the effect of actually getting married for same-sex couples?

3 A. Well, you know, this is a fairly new phenomenon. And so
4 there -- there isn't a great deal of empirical data on married
5 same-sex couples.

6 I am familiar with one study that was conducted by
7 the Massachusetts Department of Public Health or the state
8 Department of Public Health, in which they asked a number of
9 questions of Massachusetts married couples, same-sex married
10 couples, about their experiences and their impressions of their
11 marriage.

12 Q. Do you know what the conclusions were of that --

13 A. Well, I think that one -- there were a number of different
14 conclusions in the study.

15 I think the one that was very interesting, and
16 perhaps relevant to what I was just saying, is that most of the
17 couples, in excess of 70 percent of the couples, said that as a
18 result of getting married they felt that their commitment to
19 their relationship had strengthened.

20 Q. Now, switching topics, are you familiar with the term
21 "stigma"?

22 A. Yes, I'm very familiar with that term.

23 Q. What does that term mean?

24 A. Well, stigma is a kind of shared cultural knowledge.

25 It's knowledge about particular characteristics or

1 attributes or groups that are viewed negatively by the society,
2 such that the members of those groups or individuals with those
3 characteristics or attributes are devalued. They're looked
4 down upon. And they're treated differently, such that they end
5 up having less control over the course of their own lives, less
6 influence over others, less access to the valued resources of
7 society, all of which are what we think of as power. So they
8 have less power than other individuals.

9 **Q.** Are you familiar with the term "structural stigma"?

10 **A.** Yes.

11 **Q.** And what does that term mean?

12 **A.** Well, structural stigma is a term that we use in contrast
13 to individual manifestations of stigma. So those -- that
14 cultural belief, that shared knowledge about certain groups
15 being devalued can be expressed by individuals through
16 ostracism, negative statements, even violence and
17 discrimination.

18 But there are also -- stigma is also manifested in
19 the institutions of society, in which case it doesn't matter
20 who the particular individuals are who are inhabiting that
21 institution at the time. This is just part of the institution
22 itself.

23 So, for example, a good example of structural stigma
24 is the law, the legal institutions that designate certain
25 groups as lacking certain resources relative to others. That's

1 an instance of structural stigma.

2 **Q.** Are gay men and lesbians stigmatized today?

3 **A.** Yes.

4 **Q.** Why do you say that?

5 **A.** Well, we have a great deal of research showing that
6 lesbians and gay men face stigma.

7 We know that, looking at national survey data, that
8 there are large numbers of people who will say that they have
9 negative feelings towards lesbians and gay men; that they --
10 even that they feel disgusted by lesbians and gay men.

11 We have instances of discrimination and violence
12 against people who are lesbian and gay.

13 The FBI and the State of California both track hate
14 crimes perpetrated against people because of their sexual
15 orientation.

16 In a national survey study that I conducted with a
17 nationally representative sample of lesbian, gay, and bisexual
18 adults, I found that roughly one in five of people in the
19 sample had experienced some sort of violence based on their
20 sexual orientation in the course of their lifetime.

21 And a slightly lower percentage of lesbians and gay
22 men had experienced some sort of discrimination, for example,
23 in employment, at some time during their lifetime.

24 We see instances of violence and harassment in the
25 public schools against children and youth who are perceived as

1 being gay or lesbian.

2 And I think, too, at a sort of intuitive level, I
3 think that most people understand that if two men were to walk
4 down the street holding hands, in many places that that would
5 elicit a great deal of negative reaction. And that's an
6 instance of the sort of stigma that I think everyone is aware
7 of, that is faced by people who are lesbian or gay.

8 **Q.** How is structural stigma related to the instances of
9 discrimination or harassment or violence that you've mentioned?

10 **A.** Well, as I mentioned a moment ago, those are -- those are
11 individual manifestations, individuals carrying out those acts.
12 But they do that within a context, within a broader social
13 context.

14 And structural stigma basically provides that
15 context. It identifies which members of society are devalued.
16 And, in a sense, it gives a level of permission to denigrate or
17 attack particular groups, or members who are perceived to be
18 members of particular groups in society.

19 **Q.** Does the stigma that you've described extend beyond just
20 gay men and lesbians, to same-sex relationships?

21 **A.** Oh, yes, yes. And, in fact, in some psychological
22 research, where for various methodological reasons the
23 researchers wanted to ascertain reactions based on visual
24 images rather than on words or descriptions, they have
25 sometimes used photographs of same-sex couples, and used that

1 as a way of conveying the idea of homosexuality or gay men and
2 lesbians.

3 And what they found is that they get substantially
4 more negative reactions to those photographs of same-sex
5 couples than they do to photographs of people in different-sex
6 couples.

7 **Q.** Is Proposition 8 an instance of structural stigma?

8 **A.** Well, by definition, it is, yes. It's part of the legal
9 system. And it differentiates people in same-sex relationships
10 from -- from those in heterosexual relationships. So in a
11 definitional sense, yes.

12 **Q.** Now, I want to go back, actually, to some of your earlier
13 testimony and ask you a couple of follow-up questions about
14 just one -- one aspect of your testimony earlier.

15 Do you remember earlier I had asked you if people
16 chose their sexual orientation?

17 **A.** Yes.

18 **Q.** And you had described some research that you did
19 surrounding that.

20 **A.** Yes.

21 **Q.** Can I ask you a couple of follow-up questions about that?

22 **A.** Sure.

23 **Q.** Could you look at Exhibit 928 in your binder.

24 **A.** Yes.

25 **Q.** Can you explain what this document is?

1 **A.** Well, this is a paper that I published with two colleagues
2 in the *Journal of Counseling Psychology* in 2009.

3 **Q.** And does this document contain some of the findings that
4 you had described about people's perception of their own sexual
5 orientation?

6 **A.** Yeah. As -- as part of this, the study that's described
7 in this paper, we asked members of a community sample that we
8 had collected in the Sacramento area -- it was approximately
9 2200 people. Among other things, we asked them questions about
10 the extent to which they -- how much choice they felt they had
11 about being lesbian or gay or bisexual.

12 And on page 39 of the paper, there is a table that
13 reports the frequencies of responses to this. And so, for
14 purposes of the study, these were referred to as essentialist
15 beliefs.

16 (Reporter interrupts.)

17 **A.** Essentialist beliefs.

18 And what you see there is that, among the gay men,
19 87 percent said they experienced no choice or only a little
20 choice about their sexual orientation, compared to 13 percent
21 who said they felt they had some choice, a fair amount of
22 choice, or a lot of choice.

23 Among lesbians, it was 70 percent who said no choice
24 or very little.

25 Among bisexual men, it was 59 percent who said no

1 choice or a little.

2 And among bisexual women, it was 45 percent.

3 Q. Thank you.

4 And you also mentioned that you have a more recent
5 study that addresses the same topic; is that right?

6 A. Yes.

7 Q. And can you turn to Exhibit 930 in your binder.

8 A. Yes.

9 Q. Is that the more recent study that you've referred to?

10 A. Yes.

11 Q. And can you describe, briefly, the findings on that topic
12 in this -- in this study.

13 A. Yes. This is a -- by the way, this is a study that has
14 been accepted for publication, but it hasn't yet been
15 published. So this is sort of a manuscript version of it.

16 But on page 33 of the manuscript -- oops, no, sorry,
17 that's the wrong page.

18 On page 27 of the manuscript, you see that the
19 percentages are reported there for a similar question. In that
20 group, in that -- in that table, you see that 88 percent of
21 men -- of gay men said they had no choice at all, with
22 approximately 7 percent saying they had a small amount of
23 choice.

24 For lesbians, it's about 68 percent saying no choice
25 at all, and another 15 percent saying a small amount of choice.

1 For bisexual men, it's about 38 percent and
2 22 percent.

3 And for bisexual women, it's about 40 percent and
4 15 percent, saying no choice or a small amount of choice.

5 **Q.** Now, are you aware of any empirical studies in which
6 heterosexual men and women were asked about their sexual
7 orientation?

8 **A.** Uhm, no, I'm not.

9 **Q.** Do you have any sense, based on your research, of what
10 heterosexual men and women do believe about their sexual
11 orientation?

12 **A.** Well, I think it would be a reasonable hypothesis to say
13 that, probably, most heterosexual men and women, if they were
14 asked the question and if they thought about it, would probably
15 report that they similarly don't experience -- they don't feel
16 that they made a choice to be heterosexual.

17 But that's a hypothesis. I don't have data that
18 would show that.

19 **Q.** Now, let me just finish, turning back to the topic we were
20 last on, regarding structural stigma in Proposition 8. And I'm
21 sorry to go out of order here.

22 There was testimony in this case -- and I'll ask to
23 have it put up on the screen -- from a woman who was married in
24 San Francisco in 2004, and whose marriage was later
25 invalidated.

1 (Document displayed)

2 I'll just read it for the record. This is the
3 testimony of Helen Zia in this trial. It says:

4 "We -- for a brief moment in time, we
5 experienced a feeling of what equality is.

6 But instead of having to go to the fountain
7 that is just for gay and lesbian people, here
8 we could go to the fountain that formerly
9 said heterosexuals only. And we tasted the
10 water that was sweeter there. And our
11 families experienced that."

12 Does this testimony speak to the effect of stigma, in
13 your view?

14 **A.** Well, I think that what she highlights there is this sense
15 of having felt different.

16 One of the leading writers in the area of stigma,
17 characterized stigma as an undesired differentness. And I
18 would say that this -- this is an illustration of how someone
19 who is in a stigmatized group has that feeling of being
20 different in an undesired way.

21 And what she seems to be expressing here is that
22 there was a brief time, in 2004, when she felt that that
23 difference had been removed. And -- and -- and that felt,
24 obviously, very good to her.

25 **MR. DETTMER:** Your Honor, I have no more questions at

1 this time.

2 **THE COURT:** Very well. Mr. Nielson, would you like
3 to cross-examine?

4 **MR. NIELSON:** Yes, Your Honor.

5 Your Honor, I believe that our paralegal is getting
6 the witness binders, if you could --

7 **THE COURT:** More binders.

8 **MR. NIELSON:** Yes, more binders.

9 Your Honor, permission to approach.

10 **THE COURT:** Yes, indeed.

11 **MR. NIELSON:** Thank you.

12 Good morning, Your Honor.

13 **CROSS EXAMINATION**

14 **BY MR. NIELSON:**

15 **Q.** Good morning, Professor Herek.

16 **A.** Good morning.

17 **Q.** I would first like to -- Professor Herek, I would first
18 like to discuss your opinion regarding the definition of sexual
19 orientation --

20 **A.** Okay.

21 **Q.** -- you've offered.

22 Now, social scientists conceive of sexual orientation
23 as a complex, multi-faceted phenomenon in --

24 (Reporter interrupts.)

25 **THE COURT:** Keep your voice up, Counsel.

1 **MR. NIELSON:** Yes. I apologize.

2 **BY MR. NIELSON:**

3 **Q.** Professor Herek, social scientists conceive of sexual
4 orientation as a complex, multi-faceted phenomenon, and
5 operationalize it in a variety of ways, correct?

6 **A.** That is correct.

7 **Q.** And most social and behavioral research has assessed
8 sexual orientation in terms of attraction, behavior, or
9 identity, or some combination of these constructs, correct?

10 **A.** That is correct.

11 **Q.** Now, in this case, you have said that, as commonly used,
12 sexual orientation refers to an enduring pattern or disposition
13 to experience sexual, affectional, or romantic desires for and
14 attractions to men, women, or both sexes, correct?

15 **A.** It also refers to patterns of sexual behavior and
16 identities. But, yes, also the patterns of attraction.

17 **Q.** Okay. Thank you.

18 And, specifically with respect to the enduring
19 pattern of affections, an "enduring pattern" refers to
20 something that goes beyond a momentary experience that is not
21 repeated again in an individual's life.

22 So we are talking about something that has at least
23 some consistency over a period of time, correct?

24 **A.** That is correct.

25 **Q.** But how long a period of time is not something that you

1 think is specified by people who use that term, correct?

2 **A.** I would say that there's a general understanding that
3 we're not talking about fleeting experiences, or experiences
4 that are specific to a very particular situation; but something
5 that constitutes an important period of one's life.

6 **Q.** So you think what you see is that when you actually look
7 at people's behavior and experiences, these are feelings and
8 attractions that endure over a significant portion of time,
9 beyond a few days, beyond a week, some period of time in the
10 individual's life, correct?

11 **A.** That's correct.

12 **Q.** And the term "sexual orientation" is also used to refer to
13 an individual's sense of personal and social identity, based on
14 those desires and attractions, behaviors expressing them, and
15 membership in the community of others who share them, correct?

16 **A.** Yes.

17 **Q.** And there may be a distinction between social and personal
18 identity, correct?

19 **A.** Uhm, yes. Sometimes we think of personal identity as
20 being something that is -- well, actually, it's easier to start
21 with social identity.

22 Social identity is an identity that is based on a
23 collective membership, a membership in a larger community.

24 Personal identity can focus more on an individual's
25 own personal life, on their idiosyncratic characteristics, on

1 their specific relationships with other people.

2 And so both of those types of identity can be
3 involved in sexual orientation.

4 **Q.** All right. Thank you.

5 So, specifically, it's also possible with a personal
6 identity that an individual does not really feel that he or she
7 is part of this larger collectivity, and that simply not --
8 this is simply not a group with which he or she identifies,
9 correct?

10 **A.** Some people can experience their sexual orientation as a
11 purely personal thing, and not feel a great sense of membership
12 in or affinity with a larger gay or lesbian or bisexual
13 community.

14 **Q.** So, in that case, the individual might feel that he or she
15 doesn't want to be treated as a member of the group; that he or
16 she wants to be understood as an individual. But,
17 nevertheless, has a personal identity, that it's related to his
18 or her sexual orientation, correct?

19 **A.** Some people don't feel comfortable being subsumed into a
20 collectivity and so they -- they prefer to be thought of just
21 as an individual, yes.

22 **Q.** Thank you.

23 Now, you use the word "gay" to refer collectively to
24 men and women whose social identity is based on their
25 homosexual orientation; that is, their sexual, affectional, or

1 romantic attraction primarily to members of their own sex.

2 Correct?

3 **A.** I frequently use the word "gay."

4 Sometimes, in talking about women who are homosexual
5 in their sexual orientation, I use the word "lesbian." That is
6 sometimes a preferred term for women.

7 And sometimes I and other writers or researchers in
8 this area will refer to "lesbian and gay" to make it explicit
9 that we're including both men and women in that group.

10 **Q.** Right. Other than preference of the individual, do you
11 have a distinction between gay and lesbian, other than the
12 preference and the fact that "gay" could be used to refer to
13 both sexes?

14 **A.** Well, "gay" can be used to refer to both sexes.

15 There are some women who are lesbians who prefer not
16 to use that term for themselves. But it is sometimes used
17 generically, yes.

18 **Q.** Thank you.

19 And an individual can label himself "gay" and yet not
20 necessarily feel that he is part of what is sometimes called
21 the gay community, correct?

22 **A.** Uhm, that would be an instance where the individual feels
23 a personal identity based on his presumed homosexuality, but
24 doesn't have that sense of collective belonging.

25 **Q.** Okay. Thank you.

1 And it could be that an individual's social identity
2 is very much tied to being gay. But it may be that it is not,
3 correct?

4 **A.** I'm sorry. Could you -- I didn't quite understand that
5 question.

6 **Q.** Yes. It could be that an individual's social identity is
7 very much tied to being gay. But it could be that it is not,
8 correct?

9 **A.** So, some individuals do have a very strong social identity
10 as part of -- being a part of that collectivity, and others do
11 not. That's correct.

12 **Q.** Thank you.

13 And although it's often discussed in terms of three
14 categories, sexual orientation ranges along a continuum from
15 exclusively heterosexual to exclusively homosexual, correct?

16 **A.** Well, this is a way of thinking about sexual orientation
17 or, rather, sexuality, that goes back at least to the days of
18 Alfred Kinsey, in which he talked about a continuum, ranging
19 from exclusively homosexual in behaviors or attractions, to
20 exclusively heterosexual in behaviors and attractions.

21 And, so, it's generally assumed that that continuum
22 exists; although, in practice, we generally refer to three
23 distinct groups: Homosexuals, heterosexual, and bisexuals.

24 **Q.** All right. But do you believe that sexual orientation
25 ranges along a continuum, from exclusively heterosexual to

1 exclusively homosexual?

2 **A.** Well, I believe that can be a very useful way of thinking
3 about sexual orientation, yes.

4 **Q.** Okay. Thank you.

5 Could you turn to tab 1 in the witness binder I gave
6 you.

7 Now, this is a copy of the expert report that you
8 filed in this case, correct?

9 **A.** Yes.

10 **Q.** And could you turn to paragraph 21. It's on page 6. And
11 in the third sentence of paragraph 21 you write, quote:

12 "Although sexual orientation ranges along a
13 continuum from exclusively heterosexual to
14 exclusively homosexual, it is use usually
15 discussed in terms of three categories."

16 And then you list the categories of: heterosexual,
17 homosexual, and bisexual, correct?

18 **A.** That's correct.

19 **Q.** So you explicitly did offer that opinion in this case,
20 correct?

21 **A.** Yes.

22 **Q.** Okay. Thank you.

23 Now, sexual orientation is always defined in
24 relational terms, and necessarily involves relationships with
25 other individuals, correct?

1 **A.** Yes.

2 **Q.** And sexual orientation is generally a characteristic that
3 is not immediately obvious from simply looking at a person,
4 correct?

5 **A.** In most instances, a person's sexual orientation is not
6 readily apparent just from looking at them. Unless, of course,
7 the person is wearing some item of apparel or a button or
8 something that identifies them.

9 But, in general, no, it's not immediately evident
10 what a person's sexual orientation is.

11 **Q.** All right. Thank you.

12 Professor Herek, could you please turn to tab 5 in
13 the witness binder. And you'll find a document that's
14 premarked PX0198. Could you identify this document?

15 **A.** Yes. This is an entry I wrote for the Encyclopedia of
16 Psychology on the term "homosexuality."

17 **Q.** Thank you.

18 **MR. NIELSON:** And, Your Honor, this was on the list,
19 I believe, of exhibits that plaintiff offered. So I believe
20 it's already in evidence.

21 **THE COURT:** Very well.

22 **BY MR. NIELSON:**

23 **Q.** All right. On page 149, at the very beginning of the
24 article you write, quote:

25 "Homosexuality encompasses a variety of

1 phenomena related to same-sex sexual
2 orientation. Although definitions of the
3 term often focus mainly on sexual acts and
4 attractions between persons of the same
5 biological sex, homosexuality also refers to
6 patterns of same-sex romantic and emotional
7 bonding, identities and communities based on
8 same-sex desires and relationships, and the
9 shared culture created by those communities."

10 Correct?

11 **A.** That's what I wrote.

12 **Q.** And do you consider -- did you consider these definitions
13 of homosexuality in forming your opinion regarding the nature
14 and definition of sexual orientation in this case?

15 **A.** I'm sorry, did I --

16 **Q.** Did you consider these definitions of homosexuality in
17 forming your opinions that you've offered in this case?

18 **A.** Uhm, yes.

19 **Q.** Okay. Thank you.

20 Now, in the next column on page 149, you write:

21 "Homosexuality has at least five different
22 components."

23 Correct?

24 **A.** Correct.

25 **Q.** And then you list these. And they are in the bold

1 headings continuing down the page as, first, "Sexual Attraction
2 and Desire," then "Sexual Behavior," then "Identities," then,
3 turning on the next page, "Relationships and Families," and,
4 then, on the next page "Communities," correct?

5 **A.** Right.

6 **Q.** And did you consider these components of homosexuality
7 when forming your opinions regarding the nature and definition
8 of sexual orientation in this case?

9 **A.** Yes, I did.

10 **Q.** All right. Now, homosexuality is usually understood as a
11 counterpart to heterosexuality, with bisexual applied to
12 individuals who manifest both heterosexual and homosexual
13 behavior or attraction, correct?

14 **A.** Yes. And usually we reserve that for people who manifest
15 what is called a significant amount of attraction or behavior
16 with both sexes.

17 **Q.** All right. Thank you for that clarification.

18 And such labels, referring back to heterosexuality,
19 bisexuality, and homosexuality, represent an
20 oversimplification, correct?

21 **A.** Well, they can in some cases, yes.

22 **Q.** All right. Please look at page 149 of this exhibit, in
23 the second paragraph. And the first two sentences, the first
24 sentence reads:

25 "Homosexuality is usually understood as the

1 counterpart to heterosexuality, with
2 bisexuality applied to individuals who
3 manifest both heterosexual and homosexual
4 behavior or attraction. Such labels,
5 however, represent an oversimplification."

6 Correct, that's what you wrote in this article?

7 **A.** And then I went on to explain that although most people
8 are consistent or display consistency in terms of their
9 behaviors and attractions and identities, there are some people
10 who don't.

11 So we do see instances where people may express a
12 particular attraction, but don't necessarily have sexual
13 behavior that conforms to that attraction. Or there are other
14 ways in which those don't always overlap.

15 **Q.** So not all people display consistency among their sexual
16 feelings, behavior, and identity, correct?

17 **A.** That is correct.

18 **Q.** All right. Professor Herek, please turn to tab 6 in the
19 witness binder.

20 You will find here a exhibit premarked PX919. And
21 can you identify this document?

22 **A.** This is another encyclopedia entry. This is from *The*
23 *Corsini Encyclopedia of Psychology and Behavioral Science*, the
24 third edition.

25 **Q.** Thank you. And, again, this is one you wrote?

1 **A.** Correct.

2 **MR. NIELSON:** Your Honor, again, I believe this is on
3 the plaintiffs' list that they offered this morning. So I
4 believe it's already in.

5 **THE COURT:** Very well.

6 **BY MR. NIELSON:**

7 **Q.** Now, at the start of the document you write, quote:

8 "Homosexuality refers to sexual behaviors,
9 desires, attractions, and relationships among
10 people of the same sex, as well as to the
11 culture, identities and communities
12 associated with them."

13 Correct?

14 **A.** Correct.

15 **Q.** Now, not all people with homosexual attractions develop a
16 gay or lesbian identity, correct?

17 **A.** Not all people -- correct, not all people with homosexual
18 attractions identify as lesbian or gay.

19 **Q.** Thank you.

20 And not all people who identify themselves as gay
21 engage in homosexual acts, correct?

22 **A.** This is true for both heterosexuals and homosexuals and
23 bisexuals.

24 **Q.** Many men, for example, regularly have sex with other men,
25 but, nevertheless, label themselves as gay or -- excuse me.

1 Many men, for example, regularly have sex with other
2 men, but never label themselves as gay or bisexual, correct?

3 **A.** This is a phenomenon that has been observed, yes.

4 **Q.** Thank you.

5 Please turn to tab 7 in the witness binder. You'll
6 find a document premarked PX926. Professor Herek, can you
7 identify this document?

8 **A.** This is a -- an entry or a paper that I coauthored with
9 Dr. Linda Garnets, for the *Annual Review of the Clinical*
10 *Psychology*. The title is "sexual Orientation and Mental
11 Health."

12 **Q.** Thank you.

13 **MR. NIELSON:** Now, Your Honor, I believe PX926 is
14 already in evidence, but if it is not I would like to offer it.

15 **THE COURT:** I assume without objection.

16 **MR. DETTMER:** We have no objection, Your Honor.

17 **THE COURT:** Very well.

18 **MR. NIELSON:** Okay. Thank you.

19 **BY MR. NIELSON:**

20 **Q.** On page 355, under the heading "Historical Background," it
21 says, quote:

22 "Historically speaking, sexual orientation is
23 a fairly new construct. Although
24 heterosexual and homosexual behaviors have
25 ubiquitous across human societies, notions of

1 'the homosexual' and 'the heterosexual' - as
2 well as the very idea that individuals can be
3 defined in terms of their sexual attractions
4 and behaviors - emerged in medical discourse
5 only in the 19th century."

6 Is that correct?

7 **A.** If we go back in time, what we see is that these ideas of
8 homosexuality and heterosexuality are probably -- did probably
9 emerge in medical discourse in the 19th century. They may have
10 existed somewhat earlier than that, in other types of -- of
11 understanding. But, yeah, that is where we see them emerge in
12 the medical discourse.

13 **Q.** All right. Now, as we discussed earlier, in most
14 empirical research, sexual orientation has been defined in
15 terms of sexual attraction, sexual behavior, or self-labeling
16 as gay, lesbian, or bisexual, correct?

17 **A.** Or, perhaps, as a combination of those in various ways.

18 **Q.** Or some combination. Thank you.

19 And because individuals are not always consistently
20 heterosexual or homosexual across these dimensions, research
21 participants who are categorized as heterosexual by one
22 criterion might have been classified as homosexual or bisexual
23 if a different operational definition had been employed
24 correct?

25 **A.** The data indicates that there are at least some people for

1 whom that would be the case, that -- that we -- although, we
2 see that the vast majority of people are consistent in their
3 behavior, their identity, and their attractions, it is the case
4 that there are some who are not.

5 And, so, it's true that there would be some
6 differences in classification for that -- that small group of
7 individuals.

8 **Q.** All right. Thank you.

9 Please turn to 362. And it's the very bottom of the
10 page. And I'm going to read there, starting at the bottom and
11 then continuing over to 363. And, in fact, it's the sentence
12 that starts at the very bottom of the second column. Can you
13 see that? I'll read it.

14 **A.** Okay.

15 **Q.** It is:

16 "Indeed, two leading researchers in this area
17 estimated that only half of the individuals
18 who report sexual contact with a same-sex
19 adult actually identify as lesbian, gay, or
20 bisexual."

21 Correct?

22 **A.** I was pointing that out in the context of saying that
23 there are -- there can be limitations for research that
24 combines all sexual minority respondents into just one group of
25 non-heterosexual, because that undifferentiated category

1 inevitably includes not only individuals who have this
2 collective sexual orientation identity, but it also includes
3 people who regard their sexuality in purely personal terms, and
4 perhaps only who engage occasionally in homosexual behavior,
5 without having any corresponding identity.

6 **Q.** And that would be personal identity or social identity;
7 would it not?

8 **A.** Possibly.

9 **Q.** Okay. And in the next sentence you write:

10 "Consistent with this observation, the
11 proportion of adults who identified as gay,
12 lesbian, or bisexual in a 2000 national
13 probability sample was roughly the same as
14 the proportion who reported same-sex behavior
15 but identified as heterosexual."

16 Correct?

17 **A.** That's what I wrote.

18 **Q.** So, essentially, equal-size groups of adults reporting
19 same-sex behavior, half of them identifying as gay, lesbian, or
20 bisexual, half identifying as heterosexual, correct?

21 **A.** Uhm, I believe so. I have to say I -- this is a study by
22 Drabble, et al. And I haven't looked at that study recently,
23 but I assume that I was -- that I said it correctly when we
24 wrote it here.

25 **Q.** All right. Thank you.

1 And did you consider these statistics in forming your
2 opinions in this case?

3 **A.** This -- which statistics?

4 **Q.** The ones we just read.

5 **A.** About the relative numbers of people in various groups?

6 **Q.** Correct.

7 **A.** They -- I certainly am aware of them. I'm not recalling a
8 specific instance in which I used them in writing my report,
9 for example.

10 **Q.** All right. So you may not have cited them, but you were
11 aware of them?

12 **A.** I have been aware of them, yes.

13 **Q.** Okay. Thank you.

14 Now, the -- now, the world in which today's sexual
15 minority youth come to understand their sexual orientation is
16 vastly different from that of previous generations, correct?

17 **A.** I would say that the world is vastly different from
18 previous generations in all sorts of respects.

19 **Q.** All right. Thank you.

20 And, indeed, not all manifestations of same-sex
21 sexuality among contemporary youth are adequately accounted for
22 by the labels "gay," "lesbian" and "bisexual," and the
23 identities associated with them, correct?

24 **A.** Well, for example, among youth, we see an embracing of the
25 term "queer." And people will use that as a self-descriptor.

1 And that, of course, was a label of derision that was
2 frequently used against a person who was perceived to be
3 homosexual.

4 Younger people have embraced that term, and use it
5 now as an identity label. So that's an instance where a term
6 like "gay," "lesbian" or "bisexual" may not be so applicable if
7 an individual self-identifies as "queer."

8 **Q.** So do you agree with the statement that not all
9 manifestations of same-sex sexuality among contemporary youth
10 are adequately accounted for by the labels "gay," "lesbian,"
11 and "bisexual"?

12 **A.** I believe I wrote that statement, yes.

13 **Q.** Okay. Thank you.

14 All right. Please turn to tab 8 in the witness
15 binder. And you will find a document premarked PX917. And,
16 Professor Herek, can you identify this document?

17 **A.** This is a chapter from a book that I co-edited back in the
18 1990s. The book was on social science research relative to the
19 question of lesbian and gay personnel in the U.S. military.

20 And this was a chapter that I wrote, "Why Tell If
21 You're Not asked? Self-Disclosure, Intergroup Contact, and
22 Heterosexuals' Attitudes Towards Lesbians and Gay Men."

23 **MR. NIELSON:** Thank you.

24 Your Honor, again, I believe this is on the list that
25 plaintiffs submitted this morning, so I believe it's already

1 been admitted.

2 **THE COURT:** But if not, I assume there is no
3 objection.

4 **MR. DETTMER:** No objection.

5 **MR. NIELSON:** If not, I would like to move it into
6 evidence, yes.

7 **THE COURT:** Very well.

8 **BY MR. NIELSON:**

9 **Q.** Now, please turn to page 201. And there's a heading in
10 the second column called, "Sexual Orientation, Heterosexuality,
11 and Homosexuality."

12 **THE COURT:** By the way, 926 was not offered, I
13 believe.

14 **MR. NIELSON:** I believe 926 was admitted a previous
15 day.

16 **THE COURT:** Oh.

17 **MR. NIELSON:** If it was not, I would like to move
18 into evidence.

19 **THE COURT:** Not with this witness.

20 **THE WITNESS:** Not with this witness, correct.

21 **THE COURT:** All right.

22 **MR. NIELSON:** And I apologize for not clarifying
23 that.

24 **BY MR. NIELSON:**

25 **Q.** So --

1 **THE COURT:** Sorry for the interruption.

2 **MR. NIELSON:** No, no. Thank you for the -- for that.

3 **BY MR. NIELSON:**

4 **Q.** All right. On the second column you write:

5 "Although heterosexual and homosexual
6 behaviors alike have been common throughout
7 human history the ways in which cultures" --
8 (Reporter interrupts.)

9 Okay.

10 "Although heterosexual and homosexual
11 behaviors alike have been common throughout
12 human history, ways in which cultures have
13 made sense of these behaviors and the rules
14 governing them have varied widely."

15 Is that correct?

16 **A.** I would say that, as with all sorts of phenomena, race,
17 ethnicity, social class, and sexuality, that that's correct.

18 **Q.** Okay. Thank you.

19 And in the United States today, human sexuality has
20 been popularly understood in terms of the dichotomy between two
21 types of people: those who are attracted to their same gender,
22 homosexuals, and those who are attracted to the other gender,
23 heterosexuals, correct?

24 **A.** Well, except I believe that the sentence began, "For at
25 least a century in the United States and Europe..."

1 Q. Okay.

2 A. And then the part you read.

3 Q. But do you agree that in the United States today, that's
4 true?

5 A. Well, I would say that the dichotomy has yielded to
6 something of a trichotomy, in that bisexuals are now much more
7 widely recognized, really, just in the last few decades, than
8 was the case before that.

9 Q. All right. Thank you for that clarification.

10 Now, this classification system differs from other
11 possible ways of understanding sexuality, in that its focus is
12 on the individual rather than the behavior, correct?

13 A. I'm sorry. I lost my place here.

14 Q. This classification system differs from other possible
15 ways --

16 A. Okay.

17 Q. -- of understanding sexuality in that its focus is on the
18 individual rather than the behavior, correct?

19 A. Yes.

20 Q. And instead of conceiving of people as capable of a wide
21 range of sexual attractions and behaviors, the
22 heterosexual-homosexual dichotomy creates two ideal types that,
23 depending on the individual, correspond more or less to actual
24 experience and behavior, correct?

25 A. Well, again, I would say that there has been the expansion

1 in the last few decades of a greater recognition of bisexuality
2 being another -- another type, if you will, that is related to
3 sexuality.

4 **Q.** All right. Would you agree with the statement that the
5 heterosexual-bisexual-homosexuality trichotomy creates three
6 ideal types that, depending on the individual, corresponds more
7 or less to actual experience and behavior?

8 **A.** And I would point out, I'm using "type" here or "ideal
9 type --"

10 **Q.** Yes.

11 **A.** -- in the social science sense, which means that this is
12 a -- something of a construct. This is a category. And, so,
13 yes.

14 **Q.** Okay. Thank you.

15 And by a "construct" or a "category," that's what you
16 mean when you say that, depending on the individual, it may
17 correspond more or less to actual experience and behavior,
18 correct?

19 **A.** By saying "ideal type," I didn't want you to think that I
20 was somehow saying this is how it should be, or this is the
21 ideal we should strive for.

22 But, rather, these are -- there's a sort of clean,
23 clear distinction between all individuals according to this
24 dichotomy or trichotomy. And that's what's meant by "ideal
25 type."

1 Q. Thank you.

2 Now, defining oneself personally and socially as
3 "gay" or "lesbian," or more recently "queer," provides entry to
4 alternative communities that have developed in the
5 United States and elsewhere, correct?

6 A. I'm sorry. Are you still reading from this? I lost where
7 you are, if you are, if you're reading from it.

8 Q. Well, I'm not reading from that paragraph.

9 A. Okay.

10 Q. I'm asking you a question.

11 A. I'm sorry. I thought we were just reading through. I'm
12 sorry, could you --

13 Q. Defining oneself personally and socially as "gay" or
14 "lesbian," or more recently "queer," provides entry into
15 alternative communities that have developed in the
16 United States and elsewhere, correct?

17 A. Yes.

18 Q. Thank you.

19 Now, would I -- if you would, please, turn to tab 10
20 in the witness binder, Professor Herek.

21 And you'll see here in the binder select pages from a
22 book that we have designated as DIX2654. And I have a physical
23 copy of the book here in the courtroom, if you would like to
24 look at that. But these are the pages that I'm going to look
25 at.

1 **MR. NIELSON:** Your Honor, should I -- do I need to
2 show him the book, or is this sufficient?

3 **THE COURT:** Well, let's let the witness make that
4 decision.

5 **THE WITNESS:** I would like to see the book because,
6 actually, I don't recognize this.

7 **MR. NIELSON:** All right. Just a moment, if you
8 would.

9 (Pause)

10 Your Honor, permission to approach the witness.

11 **THE COURT:** Of course.

12 **MR. DETTMER:** Your Honor, if we could get a copy, as
13 well.

14 **THE COURT:** Do you have a copy for counsel?

15 **MR. NIELSON:** I don't have an extra copy. The
16 discussion that we are going to use is all reproduced in the
17 exhibit book.

18 **THE COURT:** Well, let's try a question, and take it
19 one step at a time.

20 **MR. NIELSON:** Okay. Thank you.

21 **BY MR. NIELSON:**

22 **Q.** Can you identify that document, Professor Herek?

23 **A.** No, I can't. I've never seen it before.

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

25 **A.** I know Professor Badgett.

1 Q. And she is the editor of this book, correct?

2 A. It's edited by M.V. Lee Badgett and Jefferson Frank.

3 Q. And that Lee Badgett is Professor Badgett that we are
4 speaking of, correct?

5 A. Yes.

6 Q. Okay. Thank you.

7 And if you turn to page 21, it's reproduced in the
8 binder. Or you can turn in the book, if you would prefer.

9 We are in a chapter of that book that's written by
10 Professor Badgett called "Discrimination Based on Sexual
11 Orientation. A Review of the Literature in Economics and
12 Beyond." Can you see that?

13 A. Yes.

14 Q. Okay. Thank you.

15 And as, again, you're familiar with
16 Professor Badgett?

17 A. I am familiar with Professor Badgett. I have never read
18 this article, to the best of my knowledge.

19 MR. NIELSON: Your Honor, I would like to offer this
20 into evidence, Exhibit DIX2654.

21 THE COURT: It's under tab 10?

22 MR. NIELSON: That's correct.

23 THE COURT: Well, why don't you ask a question,
24 since --

25 MR. NIELSON: All right.

1 **THE COURT:** -- this hasn't, apparently, been provided
2 to your opposing counsel before now. Why don't we --

3 **MR. NIELSON:** We designated this as an exhibit some
4 time ago. And we've -- with books on both sides we've -- we've
5 identified the books, I believe.

6 For copyright reasons, we haven't attempted to make
7 complete photocopies of the books, and just give them as PDFs.
8 And I believe that's true across the board for both sides, Your
9 Honor.

10 **THE COURT:** Fair enough. Let's try a question --

11 **MR. NIELSON:** Okay.

12 **THE COURT:** -- and see whether we can put this
13 particular book or document or excerpt to a question to the
14 witness.

15 **MR. NIELSON:** All right. We will do that.

16 **BY MR. NIELSON:**

17 **Q.** Please look at page 21. Professor Badgett writes, on --
18 it's on the first full paragraph:

19 "The first complication is defining what one
20 means by 'sexual orientation' or being gay,
21 lesbian, bisexual, or heterosexual.

22 Sexuality encompasses several potentially
23 distinct dimensions of human behavior,
24 attraction, and personal identity, as decades
25 of research on human sexuality has shown."

1 Do you agree that sexual orientation encompasses
2 several dimensions of behavior, attraction, and identity?

3 **A.** Well, as I said earlier, I -- the definition encompasses
4 those three different dimensions.

5 **Q.** Do you agree with the characterization of -- in the
6 sentence, of "several potentially distinct dimensions"?

7 **A.** Well, there's certainly a difference between attraction
8 and behavior. So, in that sense, I -- I guess so. You can --
9 these are different sorts of dimensions.

10 **Q.** All right. Thank you.

11 And later down on the page, again 21, you'll see in
12 the second sentence Professor Badgett writes:

13 "One approach that I have used with data from
14 the General Social Survey (Badgett 1995,
15 2001) involves identifying" --

16 **A.** Wait a minute. I'm sorry. I don't see that citation.

17 **Q.** Okay. It's in the second sentence.

18 **A.** Oh, okay. Okay. I see. You are way down at the bottom.
19 Okay.

20 **Q.** Do you see that?

21 **A.** Yes.

22 **Q.** Thank you.

23 "One approach that I have used with data from
24 the General Social Survey (Badgett 1995,
25 2001) involves identifying LGBT people based

1 on the relative lifetime frequency of
2 same-sex sexual behavior. In other words, I
3 classify a person as LGBT if he or she has
4 had at least same-sex partners as
5 different-sex partners since the age of 18."

6 Do you believe that's a reasonable way to classify
7 individuals as LGB?

8 **A.** Well, Professor Badgett, if I understand this in the
9 context in which it's done, in her studies she was dealing with
10 the question of how to draw some conclusions from national
11 survey data that didn't actually ask people if they were gay,
12 or lesbian, or bisexual, or heterosexual.

13 A bit earlier on the page she refers to the Laumann
14 study of the National Health and Social Life Survey, in which
15 they found that although about 90 percent of the people in the
16 sample were consistently heterosexual in their behavior and
17 attractions and identity, and a core group of probably 1 to
18 2 percent of the sample were consistently lesbian, gay, or
19 bisexual in their attractions, behavior, and identity, there
20 were some individuals who were not consistent in those -- in
21 those different ways.

22 And so I believe that what Professor Badgett is doing
23 here -- and, of course, I've never seen this before, so this is
24 the first I've seen it. But I would assume what she's trying
25 to do is explain that, in the absence of better measures which

1 weren't available through this General Social Survey, better
2 measures of sexual orientation, she chose to look at behavior
3 as a proxy variable for sexual orientation. And I would assume
4 that she's explaining the rationale for doing that.

5 **Q.** And do you agree with her rationale?

6 **A.** I read it.

7 **Q.** All right. Do you agree that, depending on the data
8 available, classifying a person as LGB if he or she has had at
9 least as many same-sex partners as different-sex partners since
10 the age of 18 might be a reasonable approach?

11 **A.** Well, you know, what we have to do as social scientists
12 is, we frequently end up having to make a variety of
13 assumptions in operationalizing our variables.

14 (Reporter interrupts.)

15 I'm sorry. We frequently make a variety of
16 assumptions when we operationalize our variables.

17 And one of the rules that we live by is, we explain
18 the assumptions that we've made, and we explain what we've
19 done, so that other social scientists can evaluate that.

20 And, so, Professor Badgett, in looking at the survey
21 data from the General Social Survey, ended up having to count
22 as lesbian, gay, or bisexual, individuals who reported having
23 at least as much sexual contact with someone of the same sex as
24 with someone of the other sex.

25 Now, I would say that some researchers would suggest

1 that that might not be an ideal approach to operationalizing
2 lesbian, gay, or bisexual individuals. It's what she did in
3 this study. And I believe that in other studies there have
4 been other approaches to operationalizing them.

5 So what's important is that she's spelling out what
6 she did and what assumptions she made, and so when we evaluate
7 her data we will know that and we will evaluate it with that
8 information in mind.

9 **Q.** Thank you.

10 And you said you know Professor Badgett. Are you
11 aware of her reputation as a scholar in her field?

12 **A.** Yes. I would say that Professor Badgett, to my knowledge,
13 is well regarded in her field. In the area of studies related
14 to sexual orientation, she is certainly well regarded.

15 As a non-economist, I can't speak to how she is
16 regarded among economists.

17 **Q.** All right. Thank you.

18 **MR. NIELSON:** I believe that's ample foundation. I
19 can move this into evidence.

20 **THE COURT:** What are you moving into evidence?

21 **MR. NIELSON:** I'm moving in the book.

22 **THE COURT:** The whole book?

23 **MR. DETTMER:** Your Honor, we would like an
24 opportunity to look at the book, so maybe we can have a chance
25 to look at that.

1 **THE COURT:** Reserving that objection, but I will
2 admit the portion that witness was examined about.

3 **MR. NIELSON:** Yes, your Honor, if for some reason
4 opposing counsel has an objection to the book as a whole, I
5 would at least like to admit the chapter in the book that these
6 pages are drawn from.

7 **MR. DETTMER:** Your Honor, the chapter that we have
8 been discussing was, obviously, the only one that Professor
9 Herek has made any statements about. So I don't know that
10 there is anything else he can add to the rest of the book.

11 **THE COURT:** I certainly will admit the excerpts --
12 excerpt singular, that is contained in tab 10.

13 With respect to the whole chapter or the entire book,
14 let's reserve on that and see whether there is an objection;
15 and if there is, I will rule on that.

16 **MR. NIELSON:** All right. And, in fact, I would like
17 to modify my request to limit it to the chapter. I believe
18 opposing counsel made a reasonable point.

19 **MR. DETTMER:** That's fine, your Honor.

20 **THE COURT:** So there is no objection to admitting the
21 chapter; is that it, Mr. Dettmer?

22 **MR. DETTMER:** I'm sorry. I didn't realize, we don't
23 even have the whole chapter here.

24 **MR. NIELSON:** I believe that opposing counsel is
25 requesting the opportunity to inspect the chapter and the

1 actual physical copy of the book first.

2 **THE COURT:** That's what I first understood, but it
3 seemed to change.

4 **MR. DETTMER:** I'm sorry, your Honor. I was under the
5 impression that we had the whole chapter here, and I understand
6 now we have only an excerpt of the chapter, as opposed to --

7 **THE COURT:** There's only two pages.

8 I will admit the two pages, pages 021 and he --

9 **MR. NIELSON:** Your Honor --

10 **THE COURT:** Well, I guess it's 23, 21 -- I see how
11 this is. It's pages 20 to 23. That will be admitted. We will
12 reserve on the entire chapter and give counsel an opportunity
13 to review it, and then we'll deal with the matter.

14 (Defendants' Exhibit 2654, Pages 20-23, received in
15 evidence)

16 **MR. NIELSON:** Thank you, your Honor.

17 **BY MR. NIELSON:**

18 **Q.** And, again, I would like to -- Professor Herek, could you
19 turn to tab nine in the witness binder?

20 (Witness complied.)

21 **Q.** And, again, you will find selected pages from a book we
22 have designated as DIX-950.

23 And, again, I have a physical copy of the book here
24 that I can provide, if you would like to inspect that.

25 Are you familiar with this book, Professor Herek?

1 **A.** I'm somewhat familiar with this book. I have read
2 portions of it, I believe.

3 **Q.** And, in fact, if we look at -- again, this is by Professor
4 Badgett, correct?

5 **A.** I believe so, yes. In my binder it doesn't actually have
6 a full...

7 **Q.** The very first page, the cover of the book is reproduced.

8 **A.** It's black.

9 **Q.** Is that right? I apologize.

10 **A.** I can see the title in white and that's all.

11 **MR. NIELSON:** Your Honor, may I approach the witness?

12 **THE COURT:** You may.

13 (Whereupon, document was tendered
14 to the witness.)

15 **A.** I see. Only the subtitle was visible on this. Yes.

16 **BY MR. NIELSON:**

17 **Q.** Could you read the title and the subtitle?

18 **A.** It's called *Money, Myths and Change, The Economic Lives of*
19 *Lesbians and Gay Men*, M.V. Lee Badgett.

20 **Q.** All right. Thank you.

21 And if you could turn to the first page of the
22 acknowledgments, it's reproduced in the binder.

23 **A.** Uh-huh.

24 **Q.** And in the middle it says:

25 "Over the years I have also been lucky to

1 have received suggestions, ideas and much
2 support from..."

3 It lists a number of names, including "Greg Herek."

4 Do you believe she is referring to you, Professor Herek?

5 **A.** I believe so.

6 **Q.** Thank you.

7 Okay. Please look at page four in the book. And,
8 again, that's reproduced in the binder.

9 (Witness complied.)

10 **Q.** And in the second full paragraph you will see that it
11 says, quote:

12 "Defining the book's boundary around the
13 sexual orientation of gay men and lesbians
14 does not address exactly what gay or lesbian
15 means, however. Does it mean someone who
16 engages in same-sex sexual behavior? Someone
17 who fantasizes about such acts? Someone who
18 will identify himself or herself as gay or
19 lesbian?"

20 Do you believe those are all reasonable ways to
21 define gay or lesbian?

22 **A.** Well, I believe that earlier I said that we define it in
23 terms of attractions, behaviors and identities. And I would
24 say that that's the -- those are the three dimensions that
25 she's describing in these questions.

1 Q. All right. Thank you.

2 And, please, turn to page seven. That's, again, also
3 reproduced in the binder.

4 (Witness complied.)

5 Q. And in the second full paragraph on that page, the first
6 paragraph being the one that starts at the top and this being
7 the next one, she says:

8 "All of these historical analyses suggest
9 that what it means to be gay or lesbian in
10 the United States in the 20th century has
11 been shaped by a broad social context that
12 includes economic development."

13 Do you believe that what it means to be gay or
14 lesbian in the United States today has been shaped by a broad
15 social context that includes economic development?

16 A. I would say that everyone in the United States, that their
17 understanding of themselves has been shaped by a broad social
18 context that includes economic development.

19 Q. Thank you.

20 And please turn to page 29. Again, that's as
21 reproduced.

22 (Witness complied.)

23 Q. And the sentence that starts at the very bottom of that
24 page and carries over on to the next page says:

25 "As mentioned in chapter one, the sexual

1 orientation definition issue has provoked a
2 heated theoretical debate about how to think
3 about the meaning of sexual orientation and
4 who we think of as being gay."

5 Do you agree with that statement?

6 **THE COURT:** I'm sorry. Where on page 29?

7 **MR. NIELSON:** It's the very bottom. The sentence
8 that starts about halfway on the last line and carries over on
9 to the next page, your Honor.

10 **THE COURT:** Ahh.

11 **A.** Well, I'm honestly not sure exactly what she means by
12 "heated theoretical debate."

13 I know that there's certainly been a great deal of
14 discussion and writing about different aspects of sexual
15 orientation and concerns about defining it. For example,
16 solely in behavioral terms or in other terms.

17 I'm afraid that without having the context of having
18 read this book and having read it recently, I -- it's possibly
19 even that I have read some of this in the past, but I honestly
20 don't recall, but it's difficult to comment on that sentence
21 and know exactly what she meant by it.

22 **BY MR. NIELSON:**

23 **Q.** Thank you.

24 **MR. NIELSON:** And if I may make a brief aside, your
25 Honor.

1 I've just received confirmation from my co-counsel
2 that we, in fact, gave the plaintiffs the whole sexual
3 orientation book, the one we were just talking about a moment
4 ago, and we have an email confirming receipt of that.

5 So they have been given that book, and I believe
6 that's the case of this book as well.

7 **BY MR. NIELSON:**

8 **Q.** Now, back to where we were. And I apologize for that
9 interjection, Professor Herek.

10 So do you believe Professor Badgett is mistaken when
11 she says, "The sexual orientation definition issue has provoked
12 a heated theoretical debate"?

13 **A.** No. What I said was that I don't think I can comment on
14 that without having read the context in which she discusses it.

15 **Q.** You believe, depending on context, that might be a
16 reasonable thing to say?

17 **A.** I have to read it.

18 **Q.** So it might be unreasonable?

19 **A.** I really just can't comment on it without having read -- I
20 just honestly don't know exactly what she is referring to.

21 I think that Professor Badgett is a very reasonable
22 person. She is a good scholar. But as far as commenting on
23 that particular observation, I just can't do it without having
24 the context for it and knowing exactly what she was saying.

25 **Q.** Well, leaving aside the context and Professor Badgett,

1 just take the statement, "the sexual orientation definition
2 issue has provoked a heated theoretical debate." Do you
3 believe that's an unreasonable statement?

4 **A.** Well, there are many heated theoretical debates in the
5 social sciences and some of them revolve around sexuality.

6 Which particular heated theoretical debate she is
7 refusing to, I'm not certain. And whether I would also
8 characterize it as "heated," might be -- might be a difference
9 of opinion.

10 But as I said, I don't know the context of what she
11 is talking about. If you could explain to me exactly what
12 debate she's referring to and what it's -- you know, who are
13 the writers on each side and what it is that they are saying,
14 then, perhaps, I could comment on that.

15 **Q.** All right. Thank you.

16 Now, please look at the next paragraph, and this is
17 on page 30.

18 And she talks about, in the second sentence she says:
19 "The simplest way to categorize people would
20 be to label as gay or lesbian those who have
21 ever had a same-sex partner. Since bisexual
22 people will also fall into that category
23 using the behavioral measure, this analysis
24 compares heterosexual people with gay,
25 lesbian or bisexual people.

1 "Unfortunately, the data allow no way to know
2 whether having a same-sex partner was recent
3 or frequent, obviously, a disadvantage in
4 identifying a characteristic thought to have
5 some social and economic influence over a
6 lifetime and career."

7 Do you believe that that is a reasonable way to
8 assess sexual orientation, to look at those who have ever had a
9 same-sex partner?

10 **A.** I believe that what she's doing here is, again, talking
11 about some specific research studies in which she analyzed
12 data, perhaps from the general social surveys as we were
13 discussing in reference to the earlier passage, but I don't
14 know the context of this. But I believe that what she's doing
15 is talking about the strengths and weaknesses of that approach.

16 So as I was saying earlier, this is what researchers
17 do. They explain the strengths and weaknesses of taking
18 various approaches to operationalizing a variable.

19 **Q.** Thank you.

20 And depending on context, could that be a reasonable
21 approach?

22 **A.** For purposes of the study she was conducting, it could,
23 yes.

24 **Q.** All right. Thank you.

25 And then she writes, continuing on:

1 "But a second categorization that might
2 capture the usualness of same-sex partners is
3 to compare the number of same-sex partners to
4 the number of opposite-sex partners. If
5 someone has had at least as many same-sex as
6 opposite-sex partners, it seems unlikely that
7 he or she would have a strictly heterosexual
8 orientation."

9 Do you agree that if someone has had at least as many
10 same-sex as opposite-sex partners, it is unlikely that he or
11 she would have a strictly heterosexual orientation?

12 **A.** Well, I believe that, for example -- and, again, keeping
13 in mind, this is Professor Badgett talking about a way to
14 analyze these survey data and just trying to come up with a
15 proxy definition for what might constitute a lesbian, gay or
16 bisexual individual.

17 I think it would probably depend upon the number of
18 sexual partners they have had in each group. If a person
19 reports having had one same-sex partner and one other-sex
20 partner throughout the course of their life, then it might be
21 difficult to make a clear distinction, especially if you don't
22 know which is their current partner and if one of those
23 partners may have been in the far distant past. So it could be
24 difficult.

25 But I think with the sort of data that Professor

1 Badgett is probably dealing with here -- and, again, I don't
2 know the exact context in which she is making these statements.
3 But in terms of the sorts of data sets that she is dealing
4 with, that at least is a defensible strategy for trying to
5 identify lesbians, gay men and bisexuals in the data set with
6 the understanding that there probably will be some error there.

7 **Q.** All right. And leaving aside the data set and the
8 context, do you agree that if someone has had at least as many
9 same-sex as opposite-sex partners, it is unlikely that he or
10 she would have a strictly heterosexual orientation?

11 **A.** Well, first of all, I don't think you can leave aside the
12 data -- you know, the context here because she is talking
13 methodology, I believe, in this passage. So that's what that's
14 all about.

15 In terms of just knowing about an individual, I think
16 that if you are speaking of actually being able to talk to the
17 individual and ascertain information about them in a detailed
18 way, you would want to know more than simply the number of
19 sexual partners they've had; number of male sexual partners,
20 number of female sexual partners.

21 But that would be in a more ideal circumstance, which
22 is most likely not the situation Professor Badgett was facing
23 in trying to analyze the data from this large national survey.

24 **Q.** All right. Thank you.

25 Let's continue on because she does explain how these

1 definitions work with the survey data. And she writes:

2 "The more complete set of options in the
3 NHSLs allows a comparison of the two
4 definitions to measures of self-identified
5 sexual orientation for the 1992 survey
6 respondents.

7 "Of the people who have had one or more
8 same-sex partners 46.3 percent, 50
9 individuals, classified themselves as
10 heterosexual, suggesting a poor match between
11 the simple classification by behavior and
12 self-identity.

13 "Of the people in the NHSLs with at least as
14 many same-sex as opposite-sex partners,
15 however, only 15.7 percent considered
16 themselves heterosexual, while 56.9 percent
17 considered themselves homosexual,
18 11.8 percent called themselves bisexual, and
19 13.7 percent considered themselves something
20 else."

21 Have you seen those statistics before?

22 **A.** Well, I'm familiar with the National Health and Social
23 Life Survey. This is a particular way of breaking out the
24 data, and I'm generally familiar with the way the data came out
25 in this study.

1 This particular way of breaking it out, I think, is
2 something Professor Badgett did, but I am generally familiar
3 with these data, with this study.

4 **Q.** Thank you.

5 And does her break-out of that data in any way alter
6 your opinion regarding the definition of sexual orientation?

7 **A.** Does it alter my opinion about the general definition of
8 sexual orientation as referring to attraction, behavior or
9 identity?

10 **Q.** Correct.

11 **A.** Umm, her discussion of these data doesn't affect my
12 impression. As I said before, in these data approximately
13 90 percent of the respondents in the survey were consistently
14 heterosexual in their behavior, identity and attraction.
15 Another core group were consistently lesbian, gay or bisexual.

16 And what Professor Badgett seems to be talking about
17 here are some of the people who weren't in those two groups
18 where you see the consistency, but, in fact, perhaps had
19 engaged in some instance of same-sex sexual behavior without
20 identifying themselves as lesbian, gay or bisexual.

21 **Q.** All right. Thank you.

22 Now, please turn to page 47, and I want you to look
23 at the first full sentence at the top of the page. It's in the
24 carry-over paragraph from the previous page.

25 **Q.** It says:

1 "Sexual orientation is not an observable
2 characteristic of an individual as sex and
3 race usually are."

4 Do you agree with that statement?

5 **A.** As I said earlier, you typically cannot tell what a
6 person's sexual orientation is just from looking at them.

7 I would qualify that as well by saying that sometimes
8 you can't tell what a person's race or ethnicity is simply by
9 looking at them either.

10 But, certainly, it's the case with sexual orientation
11 that simply looking at a person typically does not reveal what
12 their sexual orientation is.

13 **Q.** All right. So do you agree with that statement or not, or
14 just you can't without that qualification?

15 **A.** As I just said.

16 **Q.** Okay. Thank you.

17 **MR. NIELSON:** And, your Honor, I would like to admit
18 this -- I would like to admit Exhibit DIX-950, which is the
19 book, *Money, Myths and Change* into evidence.

20 **MR. DETTMER:** Your Honor, I don't believe that
21 Professor Herek has laid any foundation for this book. He said
22 he hasn't read it, maybe ever. He is not sure if he has read
23 these particular portions.

24 And I do note that Professor Badgett, I believe, was
25 on the stand earlier in this trial. I just don't think there

1 is any foundation for it.

2 **THE COURT:** I will certainly admit the excerpts that
3 you have questioned him about. That, apparently, is what you
4 are interested in.

5 **MR. NIELSON:** Okay. All right. Thank you, your
6 Honor.

7 **THE COURT:** Tell me when would be convenient for you
8 to move on to another point.

9 **MR. NIELSON:** Okay. Your Honor, this is actually
10 very important to our theory of the case, the definition of
11 sexual orientation. So I do intend to continue to question the
12 witness.

13 **THE COURT:** Well, that's fine --

14 **MR. NIELSON:** Thank you.

15 **THE COURT:** -- but tell me when would be a good time
16 to take a break.

17 **MR. NIELSON:** Oh, I would be happy to take a break
18 whenever the Court -- it's in the Court's convenience.

19 **THE COURT:** Why don't we do it now then?

20 **MR. NIELSON:** All right. Thank you.

21 **THE WITNESS:** How long break do you usually take?

22 **THE COURT:** Can we resume in 15 minutes?

23 (Whereupon there was a recess in the proceedings
24 from 10:36 until 10:57 a.m.)

25 **THE COURT:** Very well, Mr. Nielson. You may continue

1 your examination of the witness.

2 **MR. NIELSON:** Thank you, your Honor.

3 And before I do that, I want to mention that we have
4 an email confirming receipt of the sexual orientation
5 employment book that is at tab 10 from counsel.

6 And with respect to the *Money, Myths and Change* book
7 at tab nine, they designated that book on their exhibit list,
8 too. So they plainly had it and are aware of it.

9 **THE COURT:** Mr. Dettmer?

10 **MR. DETTMER:** Your Honor, the only response that I
11 have is that I don't believe Professor Herek as really laid a
12 foundation for the admission of those documents and Professor
13 Badgett was here and, obviously, that was an ideal opportunity
14 to question her about those books.

15 **THE COURT:** Well, tell me, is there an objection to
16 the admission of these exhibits?

17 **MR. DETTMER:** On that same basis, your Honor, we do
18 object to the admission of these two books.

19 **THE COURT:** Lack of foundation.

20 **MR. DETTMER:** Well, lack of foundation by this
21 witness and, also, the opportunity with the actual author of
22 the books to put the books into evidence.

23 **THE COURT:** What do you need from the books,
24 Mr. Nielson, that is not contained in these excerpts?

25 **MR. NIELSON:** The main thing I'm interested in are

1 the things that are contained in the excerpts.

2 **THE COURT:** What's that?

3 **MR. NIELSON:** Mainly I am interested in the excerpts,
4 your Honor.

5 **THE COURT:** Then why don't we simply admit the
6 excerpts?

7 **MR. NIELSON:** All right. To clarify, your Honor, so
8 the excerpts are in?

9 **THE COURT:** Yes.

10 **MR. NIELSON:** Okay. Thank you.

11 (Defendants' Exhibit 950, Pages 4-7, Pages 29-30 and
12 Pages 46-47 received in evidence)

13 **BY MR. NIELSON:**

14 **Q.** All right. Professor Herek, could you please turn to tab
15 11 in the witness binder? And you will find a document
16 premarked DIX-1108.

17 (Witness complied.).

18 **Q.** Can you identify that document?

19 **A.** The title of it is, "Best Practices For Asking Questions
20 About Sexual Orientation On Surveys."

21 **BY MR. NIELSON:**

22 **Q.** Thank you.

23 **MR. NIELSON:** And, your Honor, this has been admitted
24 and we did cross examine Professor Badgett about it, so I won't
25 spend much time on it.

1 **BY MR. NIELSON:**

2 **Q.** But I do want to ask you one question about it, Professor
3 Herek. Please turn to page 28.

4 (Witness complied.)

5 **Q.** And under "Measurement" -- there is a heading that you
6 will see that says "Measurement."

7 **A.** Yes.

8 **Q.** It says:

9 "Differences in relationships and sexual
10 practices around the world call into question
11 the cross cultural equivalence of sexual
12 orientation as a social construct,
13 independent of how the construct is
14 operationalized or how well items intended to
15 measure the construct have been
16 linguistically translated."

17 Do you agree with that observation?

18 **A.** Well, I would say that that is generally an accurate
19 observation about most constructs that we ask about in survey
20 research. You always want to be aware that there are cultural
21 differences in how different concepts and different terms are
22 understood, apart from simply the language, you know,
23 differences in language, but the meaning behind the terms as
24 well.

25 And so that certainly fits well with the construct of

1 sexual orientation, as well as many others.

2 **Q.** But you specifically agree that it fits well with the
3 concept of sexual orientation?

4 **A.** Yes.

5 **Q.** Okay. Thank you.

6 **THE COURT:** You used the term "operationalized," and
7 I see that that term is used in the excerpt that you have just
8 read. What does it mean in lay terms?

9 **THE WITNESS:** Well, your Honor, when we approach a
10 research project, we think in terms of variables, phenomena
11 that somehow can change. And we usually start with a
12 theoretical definition of the variable, the ideal definition,
13 sort of definition you see in a dictionary.

14 But then comes the hard part, which is how you
15 actually measure that variable; how do you put it into
16 operational terms?

17 So one might have a general definition for what
18 socioeconomic status means in a textbook sense, but when you
19 actually get to a survey question, you can't say, "What's your
20 socioeconomic status?" You have to figure out a way to ask the
21 question of the individuals. For example, "What was your
22 household income during the last year?" And then that answer
23 is used as the operational definition of socioeconomic status
24 for that study.

25 So when we operationalize something, it means that we

1 are putting it into measurable terms and we are defining how we
2 are going to measure it in a particular study.

3 **THE COURT:** Would it be fair to characterize that as
4 a proxy for some variable?

5 **THE WITNESS:** Yes. Because the idea would be that
6 you are always going to be missing something from the
7 theoretical definition, at least I -- maybe I could come up
8 with an example where you didn't, but typically, yeah, it is
9 going to be a proxy for the theoretical variable.

10 And, of course, some operationalizations are better
11 than others; meaning, they get closer to that theoretical
12 definition.

13 **THE COURT:** Thank you.

14 **BY MR. NIELSON:**

15 **Q.** All right. Thank you.

16 Professor Herek, could you please turn to page 12 in
17 the witness binder -- or tab 12, excuse me.

18 (Witness complied.)

19 **Q.** You will see a document premarked DIX-1249. Can you
20 identify this document?

21 **A.** This is a paper called "Sampling Lesbian, Gay and Bisexual
22 Populations" published in the *Journal of Counseling Psychology*
23 in 2009 authored by Ilan Meyer and Patrick Wilson.

24 **Q.** Thank you.

25 **MR. NIELSON:** And, your Honor, I believe this

1 document has already been admitted into evidence.

2 **BY MR. NIELSON:**

3 **Q.** Are you familiar with this document?

4 **A.** I am reasonably certain I have read this paper. I haven't
5 read it recently, but I'm pretty sure I read it.

6 **Q.** And you're familiar with Professor Meyer, of course,
7 correct?

8 **A.** I'm familiar with Professor Meyer and his work, yes.

9 **Q.** And he is one of the plaintiffs' experts in this case,
10 correct?

11 **A.** I believe so.

12 **Q.** All right. Thank you.

13 On page 24 -- and I'm using the internal pagination
14 of the article. There is a -- the first full paragraph
15 starting with the second sentence it reads:

16 "Researchers have distinguished among sexual
17 identity, sexual behavior and attraction."

18 And we have discussed that. And going on:

19 "Although these overlap -- that is, a person
20 who is attracted to same-sex individuals, may
21 also have sex with same-sex individuals --
22 this overlap is not great. Only among
23 15 percent of women and 24 percent of men do
24 the three categories overlap."

25 Have you seen those statistics before?

1 **A.** Well, those statistics are drawn from the Laumann study
2 that I was describing earlier. And, as I said, what they found
3 was that there was a core group, and it was typically the
4 people who said that they were lesbian or gay or bisexual for
5 whom these three categories did overlap substantially.

6 However, there were many individuals who said --
7 well, they were categorized as having some sort of same-sex
8 attraction, and that was based either on their response to a
9 question about whether they were physically or sexually
10 attracted to people of the same sex or if they even said that
11 found the idea of sex with another person of the same sex at
12 least somewhat appealing, they were put into the category of
13 having some same-sex desire.

14 And those individuals, it turns out, were among the
15 largest group in this minority that wasn't heterosexual and
16 wasn't exclusively lesbian, gay or bisexual. It was those
17 individuals who said they had the -- some attraction or found
18 this idea somewhat appealing.

19 And then there were other individuals who said that
20 they'd engaged in behavior with someone of the same sex, but
21 were not, themselves, lesbian, gay or bisexual or -- and in
22 some cases didn't even say that they had attractions.

23 So that's where these numbers come from.

24 **Q.** So you are familiar with the numbers?

25 **A.** Yes.

1 Q. And do you believe Professor Meyer accurately portrayed
2 them here?

3 A. Well, you know, I -- I always have trouble remembering the
4 specific percentages, but I'm certainly willing to assume that
5 he has stated them accurately here.

6 Q. All right. Thank you.

7 Now, continuing on, it reads:

8 "Even within these categories varied groups
9 can be identified. Identity labels (and even
10 whether a person uses an LGB identity label
11 at all) vary across generations, racial
12 ethnic groups, geographical regions,
13 education levels and other group
14 characteristics."

15 Do you agree that identity labels for sexual
16 orientation vary in this manner?

17 A. You know, I'm honestly not sure exactly what he means when
18 he says "identity labels vary."

19 I am aware in the parenthetical clause there that
20 says, "even whether a person uses an LGB identity label at
21 all," that we certainly have seen differences there across
22 racial and ethnic groups.

23 For example, in my -- one of the studies I was
24 talking about earlier which showed that, you know, 95 percent
25 of gay men said that they don't experience a choice about their

1 sexual orientation, that study was based on a nationally
2 representative sample of lesbian, gay and bisexual adults. And
3 one of the patterns that I observed in those data was that the
4 -- the category of bisexual men, self-described bisexual men,
5 was much more likely to include Hispanics and non-Hispanic
6 blacks than were the categories of gay men, lesbian or bisexual
7 women. So we certainly do see variations across racial and
8 ethnic groups.

9 I'm not exactly certain how you interpret the
10 statement without that parenthetical clause to just say
11 "identity labels vary". Unless, of course, he means something
12 along the lines of what I was referring to earlier. He says
13 "across generations." Maybe what he means there is, for
14 example, that use of a word like "queer" as a self-descriptor
15 is more common among younger individuals than among older
16 individuals.

17 I'm honestly, though, not quite sure about the
18 reference to geographical regions and other group
19 characteristics.

20 So I would assume -- and, again, I haven't read this
21 paper recently. Perhaps he lays that out in greater detail at
22 another point in the paper, but I'm not honestly sure, just
23 taking this sentence out of context, exactly what he means by
24 that.

25 **Q.** All right. Thank you.

1 Now, continuing on, Professor Meyer states:
2 "Behavioral definitions, which rely on
3 seemingly objective and clear criteria, often
4 asked as, 'Have you had sexual relationships
5 with men, women, or both men and women' also
6 vary. For example, researchers have referred
7 to different time periods for assessing
8 sexuality; past year, past five years, since
9 age 18 and ever.

10 "Because more people have had same-sex sex in
11 adolescence, defining sexual orientation as
12 'sexual behavior ever,' includes more people
13 than defining it as 'past year.' This can
14 lead to significantly different estimates.

15 "Laumann, et al, found that 42 percent of all
16 men who had ever had sex contact had none
17 after age 18."

18 Do you agree that behavioral definitions of sexual
19 orientation can vary in this manner?

20 **A.** You know, I teach a course on survey and questionnaire
21 methodology, and this is something I always explain to my
22 students; that whenever you are asking about past behaviors,
23 you absolutely have to specify the time period in which you are
24 asking about.

25 Any behavior that is something that might be repeated

1 is going to be more likely to have occurred in -- if you -- I'm
2 sorry.

3 If you specify a broader range of time, you are going
4 to get a higher level of that behavior. So if you ask people,
5 Have you done such-and-such in the past year, and you also ask
6 them, Have you done such-and-such in the past 20 years, or how
7 often, you are likely to get a higher number if you ask about
8 20 years than if you ask about one year.

9 Q. All right. Thank you.

10 Now, please turn to tab 13 in the witness binder, if
11 you would, sir?

12 (Witness complied)

13 Q. You will find a document premarked DIX-1248.

14 And I apologize, Professor Herek, the exhibit appears
15 to be missing it's title page, but I'll represent to you that
16 this is a copy of an article entitled "Lesbian, Gay, Bisexual
17 and Transgender Health, Findings and Concerns," written by a
18 group of scholars including Lara Dean, Ilan Meyer, and
19 published in the *Journal of Gay and Lesbian Medical Association*
20 in 2000.

21 **MR. NIELSON:** And, your Honor, this DIX-1248 has
22 already been admitted.

23 **BY MR. NIELSON:**

24 Q. But are you familiar with this article?

25 A. I'm honestly not sure if I have seen this article before.

1 Q. Are you familiar with Lara Dean?

2 A. I know Lara Dean, and I know some of her research.

3 Q. All right. Thank you.

4 And you're familiar with Professor Miller, correct?

5 A. Professor who?

6 Q. Meyer.

7 A. Meyer? Yes.

8 Q. Thank you.

9 All right. Please look at page 102.

10 (Witness complied.)

11 Q. In the second paragraph the second sentence reads:

12 "The degree to which sexual orientation or
13 gender identity is central to one's
14 self-definition, the level of affiliation
15 with other LGBT people and the rejection or
16 acceptance of societal stereotypes and
17 prejudice vary greatly among individuals."

18 Do you agree that the degree to which sexual
19 orientation is central to one's self-definition varies greatly
20 among individuals?

21 A. I'm sorry. I'm just trying to catch up with you here.

22 Q. The question is: Do you agree that the degree to which
23 sexual orientation is central to one's self-definition varies
24 greatly among individuals?

25 A. I would say that, yes, in the context of this sentence.

1 In the same way that rejection or acceptance of stereotypes and
2 prejudice also varies greatly, I would say that all of those
3 things do show variability from one individual to another.

4 **Q.** All right. And on the same page underneath the next
5 heading it says:

6 "Lesbian, gay and bisexual (LGB) people are
7 defined by their sexual orientation."

8 **A.** I'm sorry. Where are we?

9 **Q.** It's same page, same column. It's under "Lesbian, Gay and
10 Bisexual Population," that next paragraph.

11 **A.** Okay. Thank you.

12 **Q.** Do you see that?

13 **A.** Yes.

14 **Q.** Okay.

15 "Lesbian, gay and bisexual (LGB) people are
16 defined by their sexual orientation, a
17 definition that is complex and variable.

18 Throughout history and among cultures the
19 definition of sexual orientation shifts and
20 changes."

21 Do you agree that the definition of sexual
22 orientation is complex and variable?

23 **A.** Well, I think we've been discussing the fact that it's
24 complex. And variable here, I think, is making the point that
25 I made earlier; that, for example, it seemed as though the

1 emergence of some of the categories of homosexual and
2 heterosexual are evident in the medical literature only since
3 the nineteenth century.

4 So I assume that that's what they are meaning, when
5 they say, "Throughout history and among cultures the definition
6 of sexual orientation shifts and changes."

7 **Q.** All right. Thank you.

8 And do you agree that throughout history and among
9 cultures the definition does shift and change?

10 **A.** I would say that it has changed.

11 **Q.** Has shifted, has changed?

12 **A.** Yes.

13 **Q.** Okay. Thank you.

14 **MR. DETTMER:** Your Honor, I'm sorry to interrupt.
15 Just as a matter of completeness the quotation does go on to
16 say that:

17 "While sexual orientation is not easily
18 defined, the generally-accepted definition of
19 an LGB person is one with an orientation
20 toward people of the same gender and sexual
21 behavior, affection or attraction and/or
22 self-identity as gay, lesbian or bisexual."

23 Just as a matter of completeness, your Honor.

24 **MR. NIELSON:** Your Honor, I believe comments of that
25 sort would be better reserved for redirect.

1 **THE COURT:** I agree.

2 **BY MR. NIELSON:**

3 **Q.** All right. Please turn to page 135?

4 **A.** Page? I'm sorry.

5 **Q.** 135. Again, I'm using the internal pagination of the
6 article.

7 (Witness complied.)

8 **Q.** And I'm going to start with the second sentence in the
9 paragraph under "Defining the Populations."

10 Do you see that, Professor Herek?

11 **A.** Yes.

12 **Q.** It says:

13 "In fact, many different terms were used to
14 label sexual orientations before the terms
15 heterosexual, homosexual, bisexual, gay and
16 lesbian solely came into widespread use from
17 the 1920's through the 1960's."

18 Do you agree with that?

19 **A.** That there were different terms? Well, yes. I think,
20 actually, when they say "widespread use," I assume that they
21 mean in common parlance.

22 The term "homosexual" and -- well, the term
23 "homosexual," I believe, started to appear in medical
24 literature in the late 1800's and "heterosexual" followed soon
25 after that.

1 "Gay" and "lesbian" as terms to describe lesbians and
2 gay men are more recent and have become popular in the general
3 culture, I think, really, since the 1960's.

4 So -- and prior to that there were other terms that
5 were used to describe these phenomena of sexual orientation.

6 **Q.** All right. Thank you.

7 And they go on to write, the authors go on to write
8 in the next sentence:

9 "Unfortunately, there is still no general
10 consensus on the definition of these terms,
11 although each includes components of at least
12 one of three dimensions. One, sexual
13 orientation identity; two, sexual behavior;
14 and/or, three, sexual attraction."

15 Now, we have discussed those three dimensions, but do
16 you agree with Professor Meyer and Professor Dean's statement,
17 that there is, quote, still no general consensus, close quote,
18 on the meaning of those terms, which would include homosexual,
19 gay and lesbian?

20 **A.** Well, I'm not exactly sure what they mean by "consensus,"
21 but I think that what they are getting at is that these terms
22 are used in different ways, depending upon the -- and we are
23 talking about researchers here -- depending upon the study.

24 So, for example -- well, in fact, continuing the
25 paragraph they say:

1 "For example, one study might define sexual
2 orientation as a form of identity as
3 self-identified heterosexual, homosexual,
4 bisexual, gay or lesbian, while another
5 defines it as a gender choice in sexual
6 partners and, yet, another as the gender of
7 those to whom one is sexually attracted."

8 So what they are saying is some studies might define
9 it in terms of identity, some in terms of attraction, some in
10 terms of behavior.

11 In that sense, you know, as I think we have been
12 saying, researchers end up using different operational
13 definitions of the term depending upon their research needs and
14 depending sometimes on the data set.

15 So I'm -- I don't know that I would phrase it as
16 saying there is no consensus. I think there is consensus that
17 these are the different ways that we use these terms.

18 It's just that depending upon the research needs, you
19 sometimes define it one way, say, in terms of behavior; other
20 times you define it in terms of identification; other times in
21 terms of the patterns of attraction.

22 **Q.** Now, do you believe that -- now, you said you wouldn't say
23 it that way, but do you believe that the statement, "There is
24 still no general consensus on the definition of these terms" is
25 an unreasonable statement?

1 **A.** Well, if by "consensus" they mean that there is no single
2 definition that is always used by all researchers, if that's
3 what they mean by "no consensus," then I would agree with that.

4 I would say if -- if what -- if we are interpreting
5 that to mean that there is no agreement that these three
6 dimensions are the main ones of sexual orientation, then I
7 would disagree with that.

8 This, of course, makes me tend to think that what
9 they mean is that people use these terms in different ways
10 depending upon the research context, rather than having one
11 single definition that is always used throughout all research
12 studies.

13 **Q.** So you believe that if they used it in the second sense,
14 that would be unreasonable?

15 **A.** I think I just said that --

16 **Q.** You said you disagreed with it. I'm asking whether you
17 think that would be unreasonable?

18 **A.** Well, by the second sense -- I may be forgetting which was
19 the second sense.

20 I thought that the idea that different researchers
21 define it differently depending upon the study. And if that's
22 what they mean by there not being consensus, then, of course,
23 that's accurate.

24 **Q.** The other one. The other one you said, if they mean it --

25 **A.** That there is a single definition that is used uniformly

1 by all researchers in every situation, and that that's how the
2 term is -- that's how the construct is always operationalized,
3 I would say there is not that sort of consensus.

4 **Q.** And you believe if they used the term more broadly, just
5 to mean that there is no general consensus without the
6 qualifications you gave, that it would be an unreasonable
7 statement?

8 **A.** Well, I have got to admit, I'm a little bit lost.

9 I think it would be a reasonable statement to say
10 that there is no one definition that is always used
11 consistently in every research study by every researcher. And
12 so if that's the meaning of "there is no consensus," then I
13 would agree with that and say that's an accurate statement.

14 If they mean -- and I think this is probably not what
15 they mean -- to say that -- well, now I'm getting lost myself.

16 As I've been saying, the term is defined differently
17 in different research studies depending upon the operational
18 meanings of the study. And if that's what they mean by there
19 being -- well, I don't think that's what they meant. I just
20 can't imagine that that's what they were thinking of here.

21 **Q.** All right. Let's move on to the next -- skip a paragraph
22 to the paragraph that starts, "Recent National Studies." We
23 are still on the same page. And it says:

24 "Recent national studies estimating the
25 percentage of the population that falls into

1 each of the three broad dimensions of
2 identity, behavior and attraction show that
3 one to four percent of the population
4 identifies as lesbian or gay; two to
5 six percent of the policies reports some
6 same-sex behavior in the previous five years;
7 and up to 21 percent of the population
8 reports same-sex attraction at least once in
9 adulthood."

10 And then there is a series of citations.

11 "Therefore, depending upon how it is defined
12 and measured, 1 to 21 percent of the
13 population could be classified as lesbian or
14 gay to some degree, with the remainder
15 classified as bisexual or heterosexual to
16 some degree."

17 Are familiar with those statistics, Professor Herek?

18 **A.** I think I'm generally familiar with the studies that they
19 are citing here. Yeah, I haven't reviewed most of them lately,
20 but I think I'm familiar with these studies.

21 **Q.** But you believe those statistics are fully consistent with
22 the opinions you've offered in this case, correct?

23 **A.** Yes. That, in fact, what we see is that if you simply ask
24 about same-sex attraction or simply the idea that someone might
25 find an interaction -- sexual interaction with someone of the

1 same sex at least somewhat appealing, you do get a very
2 broad -- you get large number of people saying that, who would
3 not necessarily also say that they have engaged in same-sex
4 behavior or identify as lesbian, gay or bisexual.

5 So, yes, I would say that those numbers probably are
6 accurate.

7 **Q.** All right. Thank you.

8 And please turn to the next page, 136.

9 (Witness complied.)

10 **Q.** I want you to look on that page. The authors have
11 switched, as you'll see looking at the back page, from defining
12 the populations to measuring the populations.

13 **A.** Uh-huh. Yes.

14 **Q.** And they say:

15 "Existing measures of sexual orientation
16 range in complexity from simple dichotomous
17 measures in which subjects report that they
18 are or are not heterosexual or homosexual, to
19 more complex scales as developed by Kinsey"
20 -- and I'll will skip the apparatus --
21 "Kline, Shively, DeCecco and Sell. There
22 exists no consensus and virtually no
23 literature discussing when/where each of
24 these members should be used."

25 Do you agree that existing measures of sexual

1 orientation vary in this manner?

2 **A.** Well, it only makes sense; that if you are defining sexual
3 orientation in terms of attraction, are you are going to
4 measure it differently than if up define it in terms of one's
5 sexual behavior history.

6 So, yes, it is the case that there are a variety of
7 different measures.

8 And I believe that actually the document that you --
9 that we were looking at earlier, the one about the best
10 practices, contained recommendations for survey researchers on
11 the best ways to ask questions about those different facets of
12 sexual orientation.

13 **Q.** Yes, I believe that's correct.

14 Now, it says:

15 "There exists no consensus and virtually no
16 literature discussing when and where each of
17 these measures should be used."

18 Do you agree with that?

19 **A.** Well, there's that word "consensus" again. I'm not sure
20 what they mean by that.

21 I would say that there certainly is variability in
22 how researchers have measured sexual orientation, and that a
23 study might very well be criticized on the grounds that the
24 measure of sexual orientation that they used was not the best
25 one for the purposes of their research study. And so in that

1 sense I guess you can say that there would not be consensus on
2 when and where each of these measures should be used.

3 And I would say, also, that -- I don't know that
4 there is virtually no research literature, but there certainly
5 has not been an extensive research literature on the various
6 strategies. You know, specifically discussing the various
7 strategies, all in comparison with each other. Certainly,
8 these different references that they are citing are all
9 instances where researchers were developing ways of measuring
10 sexual orientation.

11 And if we go back to that earlier paragraph where
12 they were citing the national studies that came up with these
13 different percentages, certainly, all of those researchers
14 discussed at some point how they measured sexual orientation.

15 So I think what they must be referring to is
16 literature that somehow is putting all of these different
17 measures side-by-side and comparing them.

18 And, perhaps, there is not an extensive literature in
19 that regard, although I believe that Dr. Sell, who is cited
20 here, has published several papers on that topic.

21 **Q.** All right. Thank you.

22 Please turn to tab 14 in the witness binder. You'll
23 find a document premarked DIX-1235.

24 (Witness complied.)

25 **Q.** Can you identify this document?

1 **A.** This is an article Letitia Anne Peplau and Linda Garnets
2 titled "A New Paradigm for Understanding Women's Sexuality and
3 Sexual Orientation," which was published in the *Journal of*
4 *Social Issues* in 2000.

5 **Q.** Thank you.

6 Are you familiar with this article?

7 **A.** Yes.

8 **Q.** And you're familiar with Professor Peplau, correct?

9 **A.** Yes.

10 **Q.** And she is one of the plaintiffs' experts in this case,
11 correct?

12 **A.** That's my understanding.

13 **Q.** Yes, thank you.

14 **MR. NIELSON:** Your Honor, I would like to offer
15 Exhibit DIX-1235 into evidence.

16 **MR. DETTMER:** Your Honor, again, we would just object
17 to the extent that Professor Peplau was here to answer
18 questions about this article when she was on the stand and
19 offering it now, we miss the opportunity for her to talk about
20 that.

21 **THE COURT:** Well, let's see where this goes. I think
22 probably you have some questions about some of the comments --

23 **MR. NIELSON:** I do --

24 **THE COURT:** Why don't we admit the letter or the
25 article.

1 **MR. NIELSON:** Thank you.

2 (Defendants' Exhibit 1235 received in evidence)

3 **MR. NIELSON:** The reason we are using these documents
4 with Professor Herek, rather than Professor Peplau, is that
5 they go to the topics of his testimony.

6 **THE COURT:** It doesn't quite pose the same problem as
7 admitting whole books.

8 **MR. NIELSON:** All right. Thank you.

9 **BY MR. NIELSON:**

10 **Q.** Please turn to page 342, if you would, Professor Herek.
11 You will see a table, table one.

12 The table is entitled "Comparing Old and New
13 Paradigms For Conceptualizing Women's Sexual Orientation." And
14 on the one side, you will see "Old Perspectives;" on the new
15 side -- on the right side "New Perspectives."

16 And the second one from the bottom, the authors --
17 you will see that the authors label it as the "Old Perspective"
18 -- or the old -- yeah, the "Old perspective."

19 "Sexual identity attractions and behavior
20 form discrete categories, i.e., heterosexual,
21 homosexual, bisexual."

22 And then as the "New Perspective:"

23 "Sexual identity, attractions and behavior
24 can be varied, complex and inconsistent."

25 Do you agree with the new perspective, Professor

1 Herek?

2 **A.** Well, I think that what Professor Peplau is doing here is
3 pointing out that -- just as the old perspective was that
4 homosexuals are abnormal and psychologically impaired and
5 gender non-conforming, that's really something we know is no
6 longer the case.

7 I think that what she is pointing out here is that
8 data, such as that from the Laumann study and others, show
9 that, in fact, there are individuals -- even though they may be
10 a relative minority of individuals, there are individuals for
11 whom their behavioral histories, their attractions and their
12 identities don't match up perfectly.

13 **Q.** All right. Thank you.

14 And if you could please turn back to page 337?

15 (Witness complied.)

16 **Q.** And in the third paragraph on that page she writes, in the
17 middle of that paragraph:

18 "More broadly, the phenomena of sexual
19 orientation are not fixed and universal, but
20 rather highly variable across time and
21 place."

22 Do you agree with that statement, Professor Herek?

23 **A.** Well, in the context in which she is saying it, which is
24 pointing to cross cultural and historical studies, meaning that
25 if we are looking at all human beings throughout all time, it

1 would be a mistake to say that the experiences of contemporary
2 women are universal; that they apply to all women at all
3 historical eras and across all cultures.

4 And so certainly -- and I would -- although this
5 article focuses on women, I would say the same is true of men's
6 experiences; that you cannot generalize across all cultures and
7 all historical eras from our experiences in contemporary
8 American society. And I believe that that, that's what she
9 says in this sentence here.

10 **Q.** All right. And please turn to page 344.

11 (Witness complied.)

12 **Q.** And you will see a heading titled "Multiple Pathways" when
13 you get there.

14 Do you see that, Professor Herek?

15 **A.** Yes.

16 **Q.** Okay. And the paragraph under that, the last full
17 sentence on the page that starts, "In contemporary."

18 "In contemporary society a women's assertion
19 that she is heterosexual or lesbian may be
20 based on quite diverse and non-linear
21 developmental trajectories. Women may be
22 drawn to a particular lifestyle for differing
23 reasons. Knowing that a woman labels herself
24 as heterosexual, lesbian or bisexual does not
25 necessarily inform us about the pattern of

1 her life experiences or the nature of her
2 current erotic thoughts and feelings."

3 Do you disagree with any of those statements?

4 **A.** Well, I think that what Professor Peplau and Dr. Garnets
5 are talking about here is the idea that it has often been
6 assumed by people who try to understand the etiology or the
7 origins of sexual orientation, that there's simply going to be
8 a single explanation that's going to apply to everyone.

9 And I believe that what she is suggesting here is
10 that, in fact, it's more likely to be the case that people
11 arrive at their adult sexual orientation through different
12 pathways. And so simply because you know that a particular
13 woman is heterosexual, doesn't necessarily tell you what her
14 developmental history was any more than knowing that she is
15 lesbian or bisexual; that there may be, in fact, a variety of
16 different experiences and, perhaps, even biological factors
17 that work differently in different individuals.

18 And so there is no single pathway to adult sexual
19 orientation. It may very well be the case that there are
20 multiple pathways.

21 **Q.** All right. Thank you.

22 And what about the last part, where she says:

23 "Knowing that a woman labels herself as
24 heterosexual, lesbian or bisexual does not
25 necessarily inform us about the pattern of

1 her life experiences or the nature of her
2 current erotic thoughts and feelings."

3 And what you just said, I think, focus more on the
4 pattern of her life experiences perhaps, but what about the
5 last part? Do you agree that knowing that a woman labels
6 herself as heterosexual, lesbian or bisexual does not
7 necessarily inform us of the nature of her current erotic
8 thoughts and feelings?

9 **A.** Well, again, you know, using the example of the Laumann
10 study, what we see there is that although most people who label
11 themselves heterosexual also described different sex
12 attractions or said they had different sex attractions; and
13 most people who labeled themselves lesbian, gay or bisexual
14 said that they had same-sex attractions.

15 There were some people for whom that was not the
16 case. So there were some people who labeled themselves
17 heterosexual and, yet, said that they had some same-sex
18 attractions.

19 And so I believe that that's the sort of point that
20 she is making here; that you can't assume that because one
21 identifies with a particular label, that that necessarily tells
22 you everything about their sexual attractions or their sexual
23 behavior experience. We know that it does in most cases, but
24 not in every case.

25 **Q.** Do you agree with her statement then?

1 **A.** I agree with what I just said. And I think that -- I
2 think that --

3 **Q.** Do you agree that knowing that a woman labels herself as
4 heterosexual, lesbian or bisexual does not necessarily inform
5 us of the nature of her current erotic thoughts and feelings?

6 **A.** Yeah, in the context of what I just said. I would say it
7 does not necessarily inform us about the -- her current
8 attractions and behaviors as well.

9 **Q.** All right. Thank you.

10 **MR. NIELSON:** Now, your Honor, I think we have laid
11 more than ample foundation for this and I would like to move
12 this exhibit into evidence.

13 **THE COURT:** That's DIX-1235?

14 **MR. NIELSON:** Correct.

15 **THE COURT:** Very well.

16 (Defendants' Exhibit 1235 received in evidence.)

17 **BY MR. NIELSON:**

18 **Q.** Please turn to tab 15 in the witness binder, if you would,
19 Professor Herek.

20 (Witness complied.)

21 **Q.** You will find here a document premarked DIX-1239. And,
22 Professor Herek, can you identify this document?

23 **A.** Well, I can identify the title. I'm not sure of exactly
24 where it's from. It's called "The Development of Sexual
25 Orientation in Women." The authors are Letitia Anne Peplau,

1 Leah Spalding, Terri Conley and Rosemary Veniegas.

2 I believe this was published in an edited volume, but
3 I'm not absolutely certain about that. It's not marked on the
4 exhibit.

5 Q. Thank you.

6 And are you familiar with this document?

7 A. Well, I believe that I have read it. I haven't -- I know
8 I haven't read it recently, but I believe I have read it at
9 some point in the past.

10 Can you tell me where it's from? That would actually
11 help to refresh my memory.

12 Q. I'm not certain at the moment, as I stand here without
13 double checking.

14 A. Is it from a journal or an edited book, do you know?

15 Q. I believe the answer to that question is yes; but if you
16 are asking me which, I don't know.

17 A. I meant which.

18 THE COURT: Which one.

19 BY MR. NIELSON:

20 Q. Now --

21 THE COURT: I don't know want to sustain a compound
22 question objection.

23 MR. NIELSON: Exactly.

24 MR. DETTMER: I wasn't going to object to my
25 witness's question.

1 **MR. NIELSON:** Yes. And I don't think I'm allowed to
2 object to his questions.

3 (Laughter.)

4 **BY MR. NIELSON:**

5 **Q.** Plaintiffs have indicated that they don't have an
6 objection to the authenticity of this.

7 And you are familiar with respect Professor Peplau,
8 correct?

9 **A.** Correct.

10 **Q.** And you believe you are familiar with this work?

11 **A.** I believe I have seen it before, yes.

12 **Q.** Please turn to page 83, if you would.

13 (Witness complied.)

14 **A.** Okay.

15 **Q.** The author writes:

16 "Yet, there is" --

17 Well, in page 83 it's around the middle of the page.

18 It's the first sentence of the paragraph -- second paragraph
19 under the heading there?

20 **A.** Yes.

21 **Q.** It says:

22 "Yet, there is ample documentation that
23 same-sex attractions and behaviors are not
24 inevitably or inherently linked to one's
25 identity."

1 Do you agree that same-sex attractions and behaviors
2 are not inevitably linked to one's identity?

3 **A.** Well, I think that what they say in the next sentence is
4 the example of romantic friendships between women in the
5 eighteenth and nineteenth centuries that were considered to be
6 socially acceptable, but did not have an implication for a
7 woman being identified as a lesbian or a homosexual.

8 So certainly in that context, I think that that's an
9 accurate statement.

10 **Q.** Well, what about genderly? Do you believe that there is
11 ample documentation that same-sex attractions and behaviors are
12 not inevitably linked to one's identity?

13 **A.** Well, without the benefit of reading the entire article
14 again to know the exact contents, I would say that I have
15 already said that in some cases a person's attractions don't
16 match their identity label. Sometimes a person's behaviors
17 don't match their identity label.

18 I -- I do think -- just from being able to scan this,
19 I think they are specifically talking about historical
20 research, but I, you know, certainly would go back to what I
21 already said about the idea that sometimes there are
22 individuals whose identity label is not completely predictive
23 of their behavior or some of their attractions.

24 **Q.** So you shouldn't have -- so you do agree that there is no
25 inevitable link, I gather?

1 What about the second half though, that there is no
2 inherent link. Do you agree with that?

3 **A.** Well, could you -- I'm honestly not sure what they mean by
4 an inherent link here, so I would have a problem with that.

5 I'll go back to how I said it before without using
6 the word "inherent," because I'm honestly not quite sure what
7 they mean here by that.

8 It is the case that for most people there is a
9 relationship, a close relationship, but for some people there
10 is not. And so if that means there's not an inherent one
11 because there are exceptions, then I would agree with that
12 term, if that's what they mean by it.

13 **Q.** Well, you think stated broadly, if someone were to state
14 more generally that same-sex attractions and behaviors are not
15 inherently linked to one's identity, do you believe that would
16 be an unreasonable statement?

17 **A.** Well, I would just want to know what they meant by
18 "inherently."

19 **Q.** And depending on their meaning, do you think that might be
20 an unreasonable statement?

21 **A.** I would just want to know what they mean by "inherently."

22 As I said, I think if you are a betting person and a
23 person tells you that they are heterosexual, the safe bet would
24 be that their attractions are to people of the other sex, but
25 it is possible that they might say they have same-sex

1 attractions as well or even more.

2 But -- but so if what we mean by "inherent" is that
3 there is absolutely no overlap, there is never a heterosexual
4 person who -- in order for it not to -- in order for it to be
5 inherent, it would have to be the case that all heterosexuals
6 report exclusively different-sex attractions and exclusively
7 different-sex behavior, and the flip side of that for lesbians
8 and gay men. Then I would say that, no, you wouldn't say that
9 there is an inherent link between those things.

10 **Q.** All right. Thank you.

11 **MR. NIELSON:** And, your Honor, I would like to move
12 DIX-1239 into evidence.

13 **MR. DETTMER:** Your Honor, we just renew the same
14 objection about the author not being here, but understanding
15 your Honor's position.

16 **THE COURT:** Well, I understand. 1239 is admitted.

17 **MR. NIELSON:** Thank you, your Honor.

18 (Defendants' Exhibit 1239 received in evidence.)

19 **THE COURT:** Take me to the page from which you were
20 quoting in 1239.

21 **MR. NIELSON:** Yes, your Honor.

22 **THE COURT:** 85?

23 **MR. NIELSON:** It was page 87 that we were quoting
24 from, your Honor.

25 **THE WITNESS:** No, it was page 83.

1 **MR. NIELSON:** Did I misspeak?

2 **THE WITNESS:** I was looking at page 83.

3 **MR. NIELSON:** Give me just one moment -- it is page
4 83, your Honor. I did misspeak there.

5 And thank you, Professor Herek, for catching that.

6 **THE COURT:** Beginning at what point?

7 **MR. NIELSON:** It was in the middle of the page, the
8 paragraph -- the second full paragraph on the page, your Honor.

9 **THE COURT:** "In America today"?

10 **MR. NIELSON:** No. The next one below that. "Yet,
11 there."

12 **THE COURT:** I see. All right. Fine.

13 **MR. NIELSON:** Thank you.

14 **BY MR. NIELSON:**

15 **Q.** Professor Herek, could you please turn to tab 16 in your
16 witness binder? And you will find a document premarked
17 DIX-978.

18 And can you identify this document, Professor
19 Herek?l?

20 **A.** It's a photocopy of the cover of the book describing the
21 Laumann study that we have been referring to. The title of the
22 book was *The Social Organization of Sexuality*, subtitle, *Sexual*
23 *Practices in the United States*. And paging ahead it looks as
24 though it's chapter eight from that book, which was the chapter
25 on homosexuality.

1 Q. Correct. And in chapter eight is reproduced in full here.

2 MR. NIELSON: And I believe, your Honor, that this
3 exhibit, 978, DIX-978 is already in evidence.

4 THE COURT: I believe that's correct.

5 MR. DETTMER: Your Honor, it's P-943 as well.

6 MR. NIELSON: It is. I believe that's correct. This
7 is one that both sides designated and, honestly, I don't know
8 which one it came in as. But it's --

9 THE COURT: If it's in, it's in.

10 MR. NIELSON: Yes. Thank you, your Honor.

11 BY MR. NIELSON:

12 Q. Now, you are familiar with this document, correct?

13 A. Yes, I am.

14 Q. And you relied on it in forming your expert opinions,
15 correct?

16 A. Well, I -- yeah, I relied on some of the data from this.

17 Q. Yes. And, in fact, you cited it in your report?

18 A. Yes.

19 Q. And this study, the Laumann study, if I may call it that,
20 it's widely considered to be a very high quality national
21 survey with a large probability sample of sexuality, correct?

22 A. Yes. I -- I was only hesitating over "large" because I'm
23 forgetting exact sample size, but it was a -- it is a respected
24 national survey on sexuality.

25 Q. Right. And if -- do you believe that it was not a large

1 probability sample?

2 **A.** Well, "large" is a relative term. I was just trying to
3 remember the -- I'm remembering that it was somewhere in the
4 neighborhood of a couple thousand people or maybe 3200 people,
5 something like that. And, yeah, that's a good size sample.

6 **Q.** All right. Thank you.

7 And, in fact, no national study in the United States
8 with a large probability sample has addressed questions of
9 sexuality in the way that the Laumann study did. It was a very
10 comprehensive survey and is still considered the authoritative
11 source for data at this point, correct?

12 **A.** I believe I wrote those words.

13 **Q.** You said them in your deposition, sir.

14 **A.** Yes, that's correct.

15 **Q.** All right. And please look at page 290.

16 **A.** Okay.

17 **Q.** Around the middle of the page, right underneath the 8.3
18 subtitle -- subheading. It says:

19 "To quantify or count something requires
20 unambiguous definition of the phenomenon in
21 question and we lack this in speaking of
22 homosexuality."

23 Do you agree that we lack an unambiguous definition
24 of homosexuality?

25 **A.** Well, here what they are talking about is an operational

1 definition. They are saying to quantify or count something
2 requires an unambiguous definition.

3 And I think what they were getting at and what
4 they're leading up to is that sometimes people might use
5 identity as the -- as a basis for their operational definition.
6 Sometimes they might use attraction. Sometimes they might use
7 one's sexual behavior history. And so that creates problems
8 when one is trying to count how many people fit into these
9 different categories.

10 **Q.** And do you believe that if you pick one of those
11 definitions -- attraction, behavior or identity -- at that
12 point you have an unambiguous definition, Professor Herek?

13 **A.** Well, if you pick it and you specify it and it's not
14 ambiguous, then you have an unambiguous definition.

15 **Q.** That's tautological, isn't it, sir?

16 **A.** Yes, it is.

17 **Q.** But is saying, "I'm going to pick attraction," at that
18 point it's still ambiguous, correct?

19 **A.** I think what they are saying is, if you say we are going
20 to measure homosexuality and heterosexuality, that's where the
21 ambiguity is and that you have to specify exactly what it is
22 that you are measuring.

23 So if you say you're going to measure homosexuality
24 and heterosexuality in the American population, what these
25 researchers did was to look at behavior and attraction and

1 identity, and they explain in great detail how they asked those
2 questions and they report their data accordingly.

3 So I think where they are saying the ambiguity
4 emerges is if you use these broad terms, like homosexuality or
5 heterosexuality, without specifying exactly what it is that you
6 are measuring.

7 **Q.** Let's just go back to exactly what they wrote.

8 **A.** Okay.

9 **Q.** As opposed to what they may or may not have meant, which
10 is:

11 "To quantify or count something requires
12 unambiguous definition of the phenomenon in
13 question and we lack this in speaking of
14 homosexuality."

15 Do you agree that we lack an unambiguous definition
16 of homosexuality?

17 **A.** Well, certainly in terms of doing what they say they are
18 doing, to quantify or count. You can't just say homosexuality.
19 That would be an ambiguous term. There would not be a single
20 operational definition for that.

21 **Q.** What about unoperational? Do you think there is a single
22 definition for homosexuality?

23 **A.** Well, as I said earlier -- or you can derive from what I
24 said earlier, homosexuality can be understood as an ongoing
25 enduring pattern of attraction and desire or romantic

1 attraction, sexual attraction or desire for people of the same
2 sex. It can be defined as an ongoing pattern of sexual
3 behavior with people with the same sex. It can be defined as
4 an identifies of one's self as gay or lesbian or belonging to
5 the gay or lesbian community.

6 So I would say there you have a definition of
7 homosexuality that is not ambiguous.

8 Q. It sounded like three definitions, Professor Herek.?

9 A. Well, again, I think that that encompasses the phenomenon.

10 What they show in this, in this report is that for
11 most people who say they are gay, lesbian or bisexuality, the
12 three definitions coincide.

13 Q. Let's actually turn to page 299, if you would.

14 (Witness complied.)

15 Q. And there are two Venn diagrams, one for women and one for
16 men.

17 MR. NIELSON: And I would actually like to put those
18 up on the screen, if I could. I will wait a moment until that
19 happens.

20 The figures on page 299 -- and can we zoom in on
21 those a little bit?

22 (Document displayed)

23 MR. NIELSON: All right. Yes.

24 BY MR. NIELSON:

25 Q. For women, now you'll see it has -- this diagram indicates

1 a circle for desire, a circle for behavior and a circle for
2 identity.

3 And it indicates that for women same-sex desire,
4 behavior and identity overlap for only 15 percent of the
5 individuals studied, correct?

6 **A.** What it shows is that for the women who said that they had
7 a lesbian or bisexual identity, all of them also said that they
8 had same-sex desire and all but one said that they had same-sex
9 sexual behavior.

10 **Q.** All right. And it also shows that of the women who had
11 same-sex desire, 59 percent had neither same-sex identity or
12 same-sex behavior, correct?

13 **A.** Right. And as I said earlier, these included women who
14 simply said that they found the idea of possibly having sex
15 with someone of the same sex at least somewhat appealing.

16 So this is a very broad inclusive sort of definition
17 of attraction, which I believe that the authors of the book
18 explain in some detail.

19 **Q.** And it also finds that 13 percent of the women who had
20 desire engaged in same-sex behavior, but did not have same-sex
21 identity, correct?

22 **A.** No. It's not 13 percent of the women who had desire.
23 It's 13 percent of the entire group of women who are
24 represented in this diagram.

25 **Q.** In the samples. In the samples size, correct. I

1 apologize for that.

2 **A.** It's 19 women basically.

3 **Q.** So 13 percent of the sample --

4 **A.** No. I'm sorry. I didn't mean to interrupt.

5 **Q.** Thirteen percent of the sample of the women had same-sex

6 desire and same-sex behavior, but not same-sex identity,

7 correct?

8 **A.** Thirteen percent of this subsample; not of the entire

9 survey sample, but of the 150 women who are diagrammed here,

10 yes.

11 So 19 of those women -- that's why I sometimes find
12 it easier to just use the numbers rather than the percentages.

13 But 19 of those women said that they experienced same-sex
14 desire and had engaged in sexual behavior with another woman,
15 but did not identify themselves as being lesbian or bisexual.

16 **Q.** All right. As opposed to the 23 women who had all three,
17 correct? If we are talking about numbers as opposed to
18 percentages.

19 **A.** Right. Twenty-three women had all three, and then another
20 one identified as lesbian other gay and, also, expressed
21 same-sex desire, but said that she had not engaged in same-sex
22 behavior.

23 And, you know, we have to say that there are a number
24 of reasons why people might have attractions or identities, but
25 not necessarily act upon them in the sense of actually having

1 sex with someone.

2 **Q.** Right. As you talk about the subsample here, this is a
3 subsample drawn from this large population survey of all the
4 women who indicated any of the three, correct?

5 **A.** This subsample consists of people who indicated any of
6 those three involving same-sex desire, attraction or behavior.

7 **Q.** All right. Thank you.

8 And let's turn to the diagram for men, if we could?

9 **MR. NIELSON:** Can you focus in on that? Thank you.

10 (Document displayed)

11 **BY MR. NIELSON:**

12 **Q.** Now, for men, if you look at these diagrams, you'll see
13 that same-sex desire, behavior and identity overlap for only
14 24 percent of the individuals studied, correct?

15 **A.** And here, again, yeah, there were 34 men for whom they
16 overlapped. Two men, additional men who said that they
17 identified as gay or lesbian -- I'm sorry, as gay or bisexual
18 and who also had same-sex desire, but not behavior.

19 And then there are those three men who said that they
20 identified as gay or bisexual, but had no desire or behavior
21 with the same sex.

22 And interestingly in a footnote in this chapter,
23 Laumann and his colleagues explained that they actually believe
24 that those three men made a mistake when they filled out the
25 questionnaire, because they thought it was such an anomalous

1 result, that they believed it was -- it reflected error on the
2 part of the respondents.

3 So here, again, if you accept the researcher's
4 interpretation of the data, it would be the case that all of
5 the men, except those three, who identified as gay or bisexual
6 also exhibited same-sex desire, and all but two of them also
7 had engaged in same-sex behavior.

8 **Q.** Let me ask you some questions about -- do you agree that
9 it would be impossible that those three people did not make a
10 mistake, those two percent?

11 **A.** I would not want to say anything that is impossible, but
12 having done a great deal of survey research, I do know that
13 people sometimes make mistakes when they're filling out
14 questionnaires.

15 **Q.** All right. And we also see that 44 percent of the survey
16 sample had desire, but neither identity nor behavior.

17 That six percent had desire and behavior, but not
18 identity. That 22 percent had same-sex behavior, but not
19 same-sex desire or same-sex identity. Correct?

20 **A.** Correct. And none of those individuals overlapped with
21 the identity category. So these were not individuals who
22 identified as gay, lesbian or bisexual.

23 **Q.** Correct. But they -- that they did engage in same-sex
24 behavior or had same-sex desire depending on which group they
25 fell in, correct?

1 **A.** Right. And I believe that the behavior in this case was
2 lifetime, or at least since age 18, any same-sex sexual
3 behavior.

4 And the desire was a question, again as with the
5 women, that included anyone who said that they were at least --
6 they found the idea of same-sex contact at least somewhat
7 appealing. They would have been included in the desire
8 category.

9 **Q.** Right. All right. Thank you.

10 And let's turn to page 300.

11 **A.** Okay.

12 **MR. NIELSON:** And I don't need it any more on the
13 screen.

14 **BY MR. NIELSON:**

15 **Q.** Just the text, the last paragraph on the page reads:

16 "This analysis demonstrates the high degree
17 of variability in the way that differing
18 elements of homosexuality are distributed in
19 the population. This variability relates to
20 the way that homosexuality is both organized
21 as a set of behaviors and practices and
22 experienced subjectively. It raises quite
23 provocative questions about the definition of
24 homosexuality."

25 Do you disagree with any of these statements?

1 **A.** He says:

2 "While there is a core group, about 2.4
3 percent of the total men and about
4 1.3 percent of the total women, in our survey
5 who define themselves as homosexual or
6 bisexual, have same-gender partners and
7 express homosexual desires, there are also
8 sizeable groups who do not consider
9 themselves to be either homosexual or
10 bisexual, but have had adult homosexual
11 experiences or express some degree of
12 desire."

13 **Q.** Okay. It does say that.

14 Do you disagree that there is a high degree -- that
15 this analysis demonstrates a high degree of variability in the
16 way that differing elements of homosexuality are distributed in
17 the population?

18 **A.** Well, you know, I guess, as I have already said, it shows
19 that there are certainly this core group. There is this core
20 group for whom the identity, the attraction and the behavior
21 are consistent; but there are also individuals who -- who
22 engage in same-sex behavior, but don't experience attraction or
23 identity. Also, individuals who say that they at least find
24 the idea of same-sex sex somewhat appealing.

25 So it -- it does say that there are those sorts of

1 individuals for whom these various dimensions don't overlap.

2 **Q.** All right. And then let's read the end of the paragraph,
3 since we were reading on.

4 The author is right. "This preliminary" -- well,
5 let's start at the sentence right where you ended.

6 **A.** Okay.

7 **Q.** I can't remember where you ended actually. Let's start:

8 "While the measurement of same-gender
9 practices and attitudes is crude at best,
10 with unknown level of underreporting for
11 each, this preliminary analysis provides
12 unambiguous evidence that no single number
13 can be used to provide an accurate and valid
14 characterization of the incidence and
15 prevalence of homosexuality in the population
16 at large.

17 "In sum, homosexuality is fundamentally a
18 multi-dimensional phenomenon that has
19 manifold meanings and interpretations
20 depending on context and purpose."

21 Do you agree that homosexuality is fundamentally a
22 multi-dimensional phenomenon that has manifold meanings and
23 interpretations?

24 **A.** Depending on context and purpose.

25 **Q.** All right.

1 **A.** Yeah. And I think it's key that they are using the term
2 "homosexuality" here. Because as I have said, homosexuality
3 can be understood in terms of attraction or behavior or
4 identity. Am I think what they're doing is affirming that
5 statement and pointing to their data to illustrate how,
6 although it overlaps in many people -- especially people who
7 identify as lesbian, gay or bisexual -- that's not the case for
8 everyone.

9 **Q.** All right. So do you agree that it's a multi-dimensional
10 phenomenon?

11 **A.** That's what I think I have been saying for the last few
12 hours.

13 **Q.** All right. Thank you.

14 Please turn to of tab 18 in the witness binder, if
15 you would.

16 (Witness complied.)

17 **Q.** You will see a document -- actually, for some reason it is
18 not premarked, but it is the same document as PX-940.

19 And are you familiar with this -- can you identify
20 this document, Professor Herek?

21 **A.** Well, this is the title page to the book *Sexual Behavior*
22 *in the Human Male*, authored by Alfred Kinsey, Wardell Pomeroy,
23 and Clyde Martin. I believe it was published in 1948.

24 **Q.** All right. Thank you.

25 **MR. NIELSON:** And, your Honor, I believe this is

1 the -- the same material that was in PX-940, which was admitted
2 into evidence this morning.

3 **MR. DETTMER:** That's correct, your Honor.

4 **BY MR. NIELSON:**

5 **Q.** Now, and you relied on this document in your expert report
6 in forming your opinions in this case, correct?

7 **A.** Yes. Well, at least on portions of it.

8 **Q.** Yes. Thank you.

9 **A.** It's a very massive document.

10 **Q.** Yes, it is.

11 Please turn to page 639, if you would, Professor
12 Herek. And around the middle of the page you will find what I
13 gather is a pretty famous quote, and I will read that. It's:

14 "Males do not represent two discrete
15 populations, heterosexual and homosexual.
16 The world is not to be divided into sheep and
17 goats. Not all things are black, nor all
18 things white. It is a fundamental of
19 taxonomy that nature rarely deals with
20 discrete categories. Only the human mind
21 invents categories and tries to force facts
22 into separated pigeonholes. The living world
23 is a continuum in each and every one of its
24 aspects. The sooner we learn this concerning
25 human sexual behavior, the sooner we shall

1 reach a sound understanding of the realities
2 of sex."

3 And I believe you said earlier that you agree that
4 sexual orientation ranges along a continuum, correct?

5 **A.** Yes, that's how we generally understand it. And as I
6 said, that idea was elaborated by Kinsey in this book.

7 **Q.** And if you look earlier on that page, on page 639 --
8 excuse me. We are there already.

9 But in the first paragraph, the one that's a
10 carryover from the last page, it says:

11 "But the record also shows that there is a
12 considerable portion of the population whose
13 members have combined, within their
14 individual histories, both homosexual and
15 heterosexual experience and/or psychic
16 responses. There are some whose heterosexual
17 experience predominates. There are some
18 whose homosexual experiences predominate.
19 There are some who have had quite equal
20 amount of both types of experiences."

21 And I -- I gather you agree with that, correct?

22 **A.** Well, the only thing I would qualify is that Kinsey will
23 be speaking here about the proportions of men in his sample,
24 and this book was just about sexual behavior in men.

25 And we now know that Kinsey's sample was certainly

1 problematic in the sense that it couldn't be assumed to be
2 representative of the population at large, just because of the
3 various techniques he used.

4 He was a very skilled researcher. He was amazing in
5 getting people to talk about their own sexual experiences at a
6 time when that was not commonly done.

7 So -- but the problem is that his sample, it's very
8 difficult to generalize to the entire population because if you
9 do, what you would say is that roughly half of all men either
10 have homosexual experiences or desires. And that's quite
11 inconsistent with data that we have from other surveys.

12 So I would just say that it's important to look at
13 Kinsey as a source of numbers. He shows that there are large
14 numbers of people with various patterns of experiences, but not
15 to look at them in terms of proportions, which I think he was
16 suggesting in this paragraph.

17 **Q.** So in other words, we should be cautious of precise
18 numbers or proportions from Kinsey, correct?

19 **A.** Well, you shouldn't generalize to the larger population,
20 which is why when I talk about Kinsey, I tend to focus just on
21 just the number of people that he found manifesting this. We
22 don't know to what extent that would translate into a
23 population proportion that's generalizable.

24 **Q.** Right. But that doesn't go to his analysis or his
25 constructs, correct; that goes to the numbers?

1 **A.** Right. It goes to the numbers.

2 **Q.** All right. And on page 638, if you turn back, there is
3 Kinsey's "Heterosexual/Homosexual Rating Scale."

4 **MR. NIELSON:** And I would like to pull this up on the
5 screen, too.

6 (Document displayed)

7 **MR. NIELSON:** I want the table of numbers underneath.

8 Well, all right. We will work with it at this level.

9 **BY MR. NIELSON:**

10 **Q.** All right. First of all, you see this graph that says
11 zero through six along the bottom and then this line which, I
12 gather, reflects a sampling.

13 **A.** No. I'm sorry. That's not -- I don't think that's what
14 it reflects.

15 **Q.** Okay. It doesn't reflect his sampling. It just reflects
16 the degree of heterosexuality or homosexuality for each metric,
17 correct?

18 **A.** I believe so.

19 **Q.** Thank you. I believe that's correct, too. I apologize
20 for that misstatement.

21 **MR. NIELSON:** Now, please go down -- shift this down
22 to the numbers underneath. And can you zoom in on the numbers
23 from -- yes. Thank you.

24 **BY MR. NIELSON:**

25 **Q.** So this is his scale. It's based on both psychologic

1 reactions and overt experiences individuals rate as follows:

2 Zero, exclusively heterosexual with no homosexual.

3 One, predominantly heterosexual, only incidentally

4 homosexual.

5 And they continue on through three, which is equally.

6 And then gradually working up to six, which is exclusive

7 homosexual. Correct?

8 **A.** Correct.

9 **Q.** And do you believe this is a reasonable way to measure --

10 to measure sexual orientation?

11 **A.** Well, Kinsey never wanted to measure sexual orientation.

12 Kinsey was out explicitly to measure behavior and experience.

13 I -- I don't think you will would find Kinsey --

14 well, as he said earlier, he doesn't think the world can be

15 divided into heterosexuals and homosexuals. And if you look at

16 the study, you will find that he never asked people whether

17 they were heterosexual or gay or lesbian or bisexual.

18 So this scale has been used to define or to measure

19 the components of sexual orientation that we have been

20 discussing in terms of attraction and behavior, but not in

21 terms of identity.

22 **Q.** Attraction and behavior are also definitions of sexual

23 orientation that are used, correct?

24 **A.** They are, yeah, components of sexual orientation, and

25 that's what this has been used to measure.

1 Q. Correct. Thank you. Thank you.

2 Now, please turn to tab 18-A in the witness binder.

3 It's -- you will see an 18 and then after that you will see an
4 18-A.

5 A. I see, okay.

6 Q. And you will see a document premarked DIX-1272.

7 A. Yes.

8 Q. And can you identify this document?

9 A. This is a paper that was published in 1977 in the *Journal*
10 *of Homosexuality* titled "Components of Sexual Identity" by
11 Michael Shively and John DeCecco.

12 Q. And are you familiar with this document?

13 A. I am familiar with it. I have to say I haven't looked at
14 it for awhile, but I -- I have looked at it in the past, why.

15 Q. All right. Thank you.

16 Please turn to page 45 using the internal pagination.

17 And under "Sexual Orientation," in the second
18 paragraph under that heading, you'll see that he writes:

19 "Sexual orientation can be viewed as having
20 two aspects. One is physical preference and
21 the other is affectional preference.

22 Physical preference refers to the
23 individual's preference for male and/or
24 female sexual partners. Affectional
25 preference refers to an individual's

1 preference for male and/or female emotional
2 partners."

3 Correct?

4 And then -- that's what it says. And then the author
5 continues on:

6 "Physical preference can be viewed as two
7 independent continua of heterosexuality and
8 homosexuality. For each individual there is
9 one continuum for the physical
10 heterosexuality and another for physical
11 homosexuality. Qualitatively individuals can
12 be seen as heterosexual, homosexual or both
13 heterosexual and homosexual. Quantitatively
14 individuals can be seen as having
15 heterosexuality and homosexuality ranging
16 from very much to very little."

17 And he depicts this in figure three, I believe.

18 **A.** No.

19 **Q.** Or figure -- figure four, excuse me. I apologize.

20 **MR. NIELSON:** Could you zoom up on figure four?

21 (Document displayed)

22 **BY MR. NIELSON:**

23 **Q.** Correct?

24 **A.** That's figure four?

25 **Q.** Yeah. And then he writes, continuing on in the next

1 paragraph -- not after the figure, but after where we were
2 reading, he writes:

3 "Affectional preference in similar fashion
4 can be viewed as two independent continua of
5 affectional heterosexuality and affectional
6 homosexuality."

7 And then this is indicated in figure five on page 47.

8 **MR. NIELSON:** If we could zoom in on that?

9 (Document displayed)

10 **BY MR. NIELSON:**

11 **Q.** All right. And the reason Kline has two metrics each for
12 physical and affectional preference is stated on page 46, and
13 that is -- he writes that:

14 "The bipolar view of sexual orientation is
15 restricted to physical expression and
16 suggests that homosexuality is expressed at
17 the expense of heterosexuality or
18 heterosexuality is expressed at the expense
19 of homosexuality."

20 And he rejects that bipolar view. So that's why he
21 has these two separate continua each for physical and
22 affectional heterosexual -- homosexuality and heterosexuality.

23 And let's put those together. I have a demonstrative
24 that I'm going to put on the screen, and it just combines
25 these graphs together, figure four and figure five, so we can

1 look at them.

2 **MR. NIELSON:** Can we get that up so we see the whole
3 thing?

4 Not the figure, the... All right. I guess we don't
5 have a demonstrative showing them both together.

6 **BY MR. NIELSON:**

7 **Q.** But, in essence, we end up with looking at figure four and
8 figure five together, we end up having four graphs essentially.
9 We have for physical preference a scale of -- ranging from not
10 at all heterosexual to very heterosexual, with numbers from one
11 to five.

12 From not at all homosexual to very homosexual, with
13 numbers from one to five.

14 Then for affectional preference, we have the same
15 thing. We have two graphs. One ranging from not at all
16 heterosexual to very heterosexual. One ranging from not at all
17 homosexual to very homosexual.

18 Now, do you believe this is an unreasonable way to
19 measure sexual orientation?

20 **A.** First of all, I got confused because you were saying
21 Kline.

22 **Q.** I'm talking about Shively. I misspoke. I apologize.
23 This is Shively and DeCecco, correct. And I apologize for
24 misspeaking there.

25 **A.** Okay. Yeah, this actually was developed at a time when

1 psychology was beginning to look at gender and the traits of
2 masculinity and femininity In a new way.

3 Whereas, masculinity and femininity had previously
4 been conceptualized as lying at two ends of a bipolar
5 continuum. You are either masculine or feminine and if you are
6 high on masculinity, you necessarily were low on femininity.

7 Around this time some researchers had proposed that
8 actually you could -- those were independent of each other.
9 Some individuals were high on both masculinity and femininity,
10 and those individuals were labeled androgenous.

11 I believe Shively and DeCecco were influenced by that
12 perspective and what they proposed to do was to take Kinsey's
13 approach, which had that scale that ranged from exclusively
14 heterosexual to exclusively homosexual, and to apply this new
15 way of thinking and say that you could possibly be high on
16 both, in which case I imagine you would be labeled bisexual; or
17 you could be high on one, low on another, or low on both, in
18 which case you would probably be labeled asexual.

19 And I think that's a reasonable way of asking about
20 it. I -- I think that one thing that's missing from this
21 approach is that they are looking at physical preference and
22 affectional preference. They are not asking about a person's
23 actual identification or a person's behavioral history; but as
24 far as looking at the idea of physical and affectional
25 preferences, this is a reasonable way to measure that.

1 Q. Okay. Thank you.

2 So this would be an attraction-based theory of -- or
3 definition of -- or measurement of sexual orientation, correct?

4 A. I would say that that's where it focuses.

5 Q. All right. Thank you.

6 MR. NIELSON: Your Honor, I would like to admit this
7 DIX-1272 into evidence.

8 THE COURT: Hearing no objection, 1272 is admitted.

9 (Defendants' Exhibit 1272 received in evidence.)

10 MR. NIELSON: All right. Thank you.

11 BY MR. NIELSON:

12 Q. Now, please turn back to tab 17 in your binder, if you
13 would.

14 (Witness complied.)

15 Q. And you will see an exhibit, a document premarked 1275.
16 Can you identify this exhibit?

17 A. This was an article that was published in 1985 in the
18 *Journal of Homosexuality*. And the title is "Sexual
19 Orientation: A Multi-Variable Dynamic Process." And there are
20 three authors, the first of whom is Fritz Kline.

21 Q. All right. Thank you. And are you familiar with this
22 document?

23 A. Yes, I am. I am familiar. I haven't read it recently,
24 but I am familiar with the document.

25 Q. All right. Thank you.

1 And please look at page 35 on the first page, if you
2 would, the first page of the article.

3 **A.** Uh-huh.

4 **Q.** And the authors -- and I'm going to refer to Kline, with
5 the understanding that I'm referring to all of them.

6 They write:

7 "Researchers have failed operationally or
8 conceptually to define sexual orientation by
9 not providing clear or consistent
10 definitions. The study gives evidence that
11 sexual orientation cannot be reduced to a
12 bipolar or even tripolar process, that must
13 be" -- it says "most," but I believe that's a
14 typo and it means "must" -- "that must be
15 recognized within a dynamic and multivariate
16 framework."

17 Correct?

18 **A.** That's what it says.

19 **Q.** Do you believe that any of those statements are
20 unreasonable?

21 **A.** Well, you know, they aren't unreasonable to have been
22 writing it in 1985 in this paper, but you know what's happened
23 is that since this paper came out and Kline introduced this
24 sexual orientation grid, researchers have done analysis with it
25 that suggest that -- although they are very careful in

1 separating out all of these different dimensions, most of those
2 dimensions end up all clustering together when we do
3 statistical analyses of them.

4 So it turns out that although this Kline sexual
5 orientation grid separates out many different components of
6 sexual orientation and even social orientation, not simply
7 things we would think of as sexual, the sexual components of it
8 all seem to boil down to one single underlying dimension in the
9 way that people actually complete this grid.

10 **Q.** All right. Let's look at the grid a little bit, if we
11 could. Please look at page 39.

12 (Witness complied.)

13 **Q.** And you'll find that this grid lists several -- it lists
14 self variables on the left: Sexual attraction, sexual
15 behavior, sexual fantasies, emotional preference, social
16 preference, self-identification and heterosexual/gay lifestyle.
17 Correct?

18 **A.** That's it.

19 **Q.** And it includes columns that say "Past," "Present" and
20 "Ideal," correct?

21 **A.** Correct.

22 **Q.** Now, if you look at page 41, you see a figure two.

23 **MR. NIELSON:** I would like to get that up.

24 (Document displayed)

25

1 **BY MR. NIELSON:**

2 **Q.** And this is -- this is a matrix ranging from one to seven,
3 ranging from other sex only to same sex only.

4 And as you will see from the discussion, the
5 appropriate number is placed -- from this box is placed on the
6 grid for each of the first five variables: Sexual attraction,
7 sexual behavior, sexual fantasies, emotional preference and
8 social preference; correct?

9 **A.** Yes.

10 **Q.** And then if you look on page 42, you will see figure
11 three.

12 And this, again, has one to seven, ranging from
13 hetero only to gay only. And the appropriate number is placed
14 in each box on the grid for the last two variables, which are
15 self-identification and hetero/gay lifestyle, correct?

16 **A.** Yeah, I believe so.

17 **Q.** And let's put this all together. I have a demonstrative,
18 I believe -- if this one works -- that combines the three
19 together.

20 (Brief pause.)

21 Okay. Apparently, we don't have the right set of
22 demonstratives.

23 But in short, putting them together, you have this
24 grid --

25 **MR. NIELSON:** Well, let's bring the grid up at least.

1 (Document displayed)

2 **BY MR. NIELSON:**

3 **Q.** And using these two separate tables, you enter numbers
4 into these 21 squares, correct?

5 **A.** Yes.

6 **Q.** Now, you said you don't believe -- you believe this is --
7 is or is not an unreasonable way to measure sexual orientation;
8 which was it?

9 **A.** Well, it turns out that it's proved to be too burdensome
10 because individuals are expected to provide 21 different
11 ratings of their sexual orientation or some aspect at least
12 somewhat related to it in this grid.

13 And as I said, in subsequent research the researchers
14 have found that when they do statistical analyses to see how
15 the data actually come out, you know, how people actually rate
16 themselves, that on most of these variables -- especially for
17 the past and the present, on most of these variables they have
18 all basically correlate very highly with each other, suggesting
19 that underlying the grid there is one unified conception of a
20 sexual orientation based on attraction, behavior and identity.

21 **Q.** All right. And the authors wrote on page 38 -- right
22 before "Sample Characteristics" they write:

23 "In the present study it was postulated that
24 the individual's sexual orientation is
25 composed of sexual and non-sexual variables

1 which differ over time. By studying a large
2 group of individuals, this study validated
3 the theoretical model of sexual orientation
4 as multi-varied and dynamic."

5 **A.** I'm sorry. Where are you reading?

6 **Q.** It's the last two sentences of the last paragraph before
7 "Sample Characteristics."

8 **A.** Okay, okay. I'm there.

9 **Q.** Okay. If you could just quickly read those two sentences
10 so I won't read them again.

11 **A.** Okay.

12 **Q.** They say that their study validated the theoretical model
13 of sexual orientation as multi-variate and dynamic.

14 Do you believe that they mischaracterized the results
15 of their study?

16 **A.** Well, I don't believe they mischaracterized their results.
17 It's just that, you know, in subsequent studies where they have
18 done factor analyses, which is a particular statistical
19 technique of responses to the Kline grid, those studies have
20 shown that, as I said, there seems to be one core underlying
21 dimension here.

22 It's not to say that they were misrepresenting their
23 data, but it just -- whenever anyone proposes something, a
24 measure or whatever, it is constantly subjected to subsequent
25 empirical tests.

1 And so the -- the empirical testing that I have seen
2 of the Kline grid has come up with that pattern. And I think
3 that it's widely assumed by sexual orientation researchers or
4 sexuality researchers that, depending upon what you are looking
5 for, it might be useful to administer the Kline grid, but it's
6 very burdensome to the respondent. It requires all of these
7 questions to be answered. And it probably doesn't get you very
8 far, or much further than by simply asking simple questions
9 about attraction, behavior and identity.

10 **Q.** So 21 boxes is too many, is that --

11 **A.** Well, it's more than is necessary.

12 **Q.** All right. Thank you.

13 Well, okay. Well, we will move on from that. Please
14 turn to tab nine in the witness binder.

15 **MR. NIELSON:** First, your Honor, I would like to
16 offer that, DIX-1265, into evidence.

17 **THE COURT:** Hearing no objection, 1265 is admitted.

18 (Defendants' Exhibit 1265 received in evidence.)

19 **THE COURT:** And when we get a good place to break for
20 luncheon, you might let me know.

21 **MR. NIELSON:** I would be happy to break at the
22 Court's pleasure. If now is a good time, we can break now.

23 **THE COURT:** I don't want to interrupt your
24 examination.

25 **MR. NIELSON:** It's as good a time as any. Thank you,

1 your Honor.

2 **THE COURT:** Why don't we resume then, ladies and
3 gentlemen, let's come back -- see if we can come back at 20
4 minutes avenue 1:00 o'clock. Is that all right?

5 **MR. NIELSON:** Thank you very much, your Honor.

6 (Whereupon at 12:21 p.m. proceedings
7 were adjourned for noon recess.)

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P R O C E E D I N G S

JANUARY 22, 2010

1:24 P.M.

THE COURT: Yes, Mr. Boutrous.

MR. BOUTROUS: Yes, Your Honor. I wanted to just give the Court a progress report and, for scheduling purposes, a prognosis on the exhibit issue.

The two sides have been talking and working through the exhibits. We think that it will prob- -- in terms of introducing exhibits, some of the arguments about the exhibits that -- where we haven't reached agreement, playing some videotape depositions in order to lay the foundation and put the exhibits in, and then to play several of the excerpts of videos, it would probably take about 90 minutes.

And that would be the last thing we do before we rest. And so I just wanted to give the Court a sense of it for planning today. I'm not sure how much more cross-examination there is left, but we were thinking we would be resting our case today.

THE COURT: So if the witness finishes his testimony 90 minutes or so ahead of 4 o'clock, you will be done with your case.

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

1 **THE COURT:** Well, that gives us a target to shoot
2 for.

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

4 **THE COURT:** Mr. Nielson.

5 **MR. NIELSON:** Thank you, Your Honor.

6 And I appreciate that target, though I think it may
7 be unlikely, Your Honor.

8 **THE COURT:** Well, we can always be hopeful.

9 **MR. NIELSON:** Hope springs eternal, Your Honor.

10 **THE COURT:** Yes.

11 **MR. NIELSON:** All right.

12 **CROSS-EXAMINATION RESUMED**

13 **BY MR. NIELSON:**

14 **Q.** Good afternoon, Professor Herek.

15 **A.** Good afternoon.

16 **Q.** Could you turn to tab 19 in your witness binder.

17 Can you identify -- well, you'll find a document
18 premarked DIX1266. Can you identify this document?

19 **A.** Uhm, this is a -- well, this is the text of an article.
20 It's not actually a copy of the article in its original form.
21 But it's the text of an article titled "Definition and
22 measurement of sexual orientation" by John Gonsiorek, Randall
23 Sell, and James Weinrich, that was published in a journal
24 called *Suicide & Life-Threatening Behavior*, in 1995.

25 **Q.** All right. Thank you.

1 And are you familiar with this document?

2 **A.** I believe I read this document some time ago, probably
3 close to the time it was published.

4 **Q.** All right. Thank you.

5 And the first -- the authors discuss a number of
6 difficulties with measuring sexual orientation. And then if
7 you could turn to page 4 of the exhibit. And at the start of
8 the bottom paragraph the authors write, quote:

9 "Given such significant measurement problems,
10 one could conclude there is serious doubt
11 whether sexual orientation is a valid concept
12 at all."

13 Do you believe that is an unreasonable statement,
14 that one could seriously doubt whether sexual orientation is a
15 valid concept at all?

16 **THE COURT:** Where do you see that?

17 **MR. NIELSON:** The top of the paragraph that starts at
18 the bottom of the fourth page, Your Honor.

19 **THE COURT:** Ah, yes.

20 **MR. NIELSON:** Thank you.

21 **THE WITNESS:** I'm sorry. Could you repeat the
22 question.

23 **BY MR. NIELSON:**

24 **Q.** Well, the -- the first sentence says:

25 "Given such significant measurement problems,

1 one could conclude there is serious doubt
2 whether sexual orientation is a valid concept
3 at all."

4 Do you believe that one could conclude that there is
5 serious doubt whether sexual orientation is a valid concept at
6 all?

7 **A.** Well, I think that they're raising that as mostly a
8 rhetorical device in the article. Because if you read down a
9 few sentences, to the end of that paragraph, you see them
10 saying:

11 "Regardless of these philosophical debates,
12 most present-day North Americans tend to
13 label themselves as homosexual, heterosexual,
14 or bisexual, despite the fact that these
15 labels do not capture the full range of
16 complexity of sexual orientation and sexual
17 identity."

18 So characterizing it as a philosophical debate, I
19 think that they're raising it, you know, as a way of discussing
20 some different positions with social constructionists and the
21 essentialists, for example; that they seem to come down to the
22 idea that apart from the philosophical debates, it seems real
23 to most people.

24 **Q.** All right. And let's read about the philosophical
25 debates, as you call them. The next sentence says:

1 "Social constructionism suggests that there
2 is nothing real about sexual orientation
3 except as society's construction of it.
4 Essentialism suggests that homosexual desire,
5 identity, and persons exist as real in some
6 form in different cultures and historical
7 eras. Not surprisingly, social
8 constructionists generally reject the
9 possibility of biological factors in sexual
10 orientation, while essentialists can accept
11 but do not necessarily require biological
12 factors," since we were looking to context.
13 Do you believe that -- first of all, do you believe
14 that it would be reasonable to doubt whether sexual orientation
15 is a valid concept as all?

16 **A.** Well, what would you mean by "valid"?

17 **Q.** Just the words of the authors here.

18 **A.** Well, do you mean is there such a thing as sexual
19 orientation? Does it actually exist?

20 **Q.** I guess is that what -- is that your interpretation of
21 what they mean?

22 **A.** I'm not sure. As I said, I haven't read this article for
23 quite a long time. I think they come down saying that -- as I
24 said, they refer to these philosophical debates. That's their
25 term. And they say most Americas, or North Americans, tend to

1 label themselves according to sexual orientation.

2 So, in that sense, I think you would have to say it
3 is a real construct. I mean, it's something that people
4 actually experience and believe and can report about
5 themselves.

6 **Q.** Do you believe that the position that they describe as
7 social constructionism, do you believe that is an unreasonable
8 position?

9 **A.** Well, you know, I think that they've -- I realize they
10 were doing this in a very summary fashion. But, in a way, this
11 is a -- this is a statement of social constructionism that I
12 think escapes or avoids some of the nuance to the
13 constructionist view.

14 To say that the social constructionists would suggest
15 that there's nothing, quote, real about sexual orientation
16 except as society's construction of it is really to minimize
17 the importance of that construction.

18 When social constructionists are talking about this,
19 I think, for most of them -- and, of course, there are many
20 different schools within that philosophical camp, but I think,
21 generally, when they are talking about this they are referring
22 to the cultural level.

23 They are talking about the construction of these
24 concepts at the cultural level, in the same way that we have
25 cultural constructions of race and ethnicity and social class.

1 All of those are constructed socially.

2 But -- and so, in a sense, you can say there's
3 nothing real about them in that these are not things that might
4 be argued to exist in nature except for society's creation of
5 them.

6 But to say there's no such thing as class or race or
7 ethnicity or sexual orientation is to, I think, minimize the
8 importance of that.

9 And, again, the social constructionists are really
10 speaking at that broad cultural level. They are not saying --
11 or, I would say, at least most of them are not saying that this
12 is a process of the individual's construction of sexual
13 orientation. Rather, they are talking about the way in which
14 the culture essentially defines how people view reality.

15 **Q.** All right. And it goes on to say that:

16 "Not surprisingly, social constructionists
17 generally reject the possibility of
18 biological factors in sexual orientation."

19 Do you believe that the -- you said that for social
20 constructionists it's the same thing as race or ethnicity. Do
21 you think social constructionists would deny the possibility of
22 the biological factors in race or ethnicity?

23 **A.** Well, I think that most social constructionists would say
24 for all of these things, including sexuality, that culture
25 builds on the raw material.

1 So -- and I'm, you know, trying to characterize this
2 very broad, complicated philosophical point of view. But I
3 would say that social constructionists would say race is an
4 entirely constructed category; although, it is based on some
5 physical characteristics. But the definition of which races
6 are which, which ones are separate from each other, what type
7 of skin coloring or what type of ancestry involves a person
8 being of a particular race, all of those things are socially
9 constructed. And I think they would say a similar thing about
10 sexual orientation.

11 Again, it doesn't mean that that individual
12 personally constructs her or his racial identity or her or his
13 sexual orientation in the sense of just making it up and it has
14 no reality and it could change tomorrow.

15 But I think that's -- that's more consistent with
16 what the social constructionists would argue.

17 **Q.** All right. Let's turn to the next page, if we could, page
18 five of the printout. And the -- under the -- a number of
19 specific ideas are recommended at the bottom.

20 **A.** Uh-huh.

21 **Q.** And number 1, it says:

22 "At this point in time it seems to make the
23 most sense to: a) measure behavior and
24 attraction/fantasy separately; b) inquire
25 about change/evolution of erotic interests

1 over time; and c) measure same- and
2 opposite-sex orientations separately, not as
3 one continuous variable."

4 Do you believe that's an unreasonable statement?

5 **A.** Do I believe it's unreasonable to follow that -- to do
6 that?

7 **Q.** Yes.

8 **A.** To measure? No, I think those are reasonable suggestions
9 for conducting empirical research on sexual orientation.

10 One of the limitations that -- you know, that happens
11 in the real world is, sometimes you can't ask that many
12 questions all at once in a particular survey. So it's not
13 always feasible to do that.

14 But I would say that, depending upon the purpose of
15 the study, these could be very relevant approaches to take in
16 measuring sexual orientation.

17 **Q.** All right. And please turn to page 7. And you will see
18 at the bottom there is something called "The Sell Scale of
19 Sexual Orientation." And it starts on page 7, and continues
20 through page 11. I believe we have a 4-and-a-half page,
21 17-part, multiple subpart test for measuring sexual
22 orientation.

23 Are you familiar with this test, The Sell Scale of
24 Sexual Orientation?

25 **A.** I've read about it.

1 Q. Do you believe it's a reasonable way to measure sexual
2 orientation?

3 A. I don't think very many people have actually used this
4 because, as you said, it's an incredibly long instrument. I
5 don't believe it's proved to be a practical approach to actual
6 using in research.

7 Q. Do you believe it's reasonable?

8 A. Well, part of reasonableness is accuracy -- is -- I'm
9 sorry, not accuracy, but just whether it's feasible, whether --
10 you know, if it works, whether it's possible to do it.

11 So I don't think it's unreasonable to think that in
12 an ideal sense it would be good to ask all of these questions.
13 But I don't think very many researchers have actually used it
14 in their -- in their on-the-ground research.

15 Q. Do you think that's because they think it would be
16 inaccurate, or just impractical?

17 A. I think it's because -- and I have to say, I -- I'm not a
18 scholar on this -- this scale. I haven't reviewed it
19 intensively.

20 But I believe it's because it's just, typically, too
21 unwieldy to administer in a real-world setting.

22 Q. All right. Thank you.

23 **MR. NIELSON:** And, Your Honor, I would like to
24 introduce DIX1266, which is the document we've been discussing,
25 into evidence it.

1 **MR. DETTMER:** No objection, Your Honor.

2 **THE COURT:** 1266 is admitted.

3 (Defendants' Exhibit 1266 received in evidence.)

4 **MR. NIELSON:** All right. Thank you.

5 **BY MR. NIELSON:**

6 **Q.** Please turn to tab 20 in the witness binder, if you would.

7 Can you identify this document?

8 **A.** Well, it's the title page from the *Handbook of Applied*
9 *Developmental Science Volume 1.*

10 **Q.** And if you could look inside, can you -- which I gather is
11 a collection of works. And if you could look at the next page.

12 **A.** Uh-huh.

13 **Q.** Can you identify that?

14 **A.** This is Chapter 5, by Lisa Diamond and Ritch
15 Savin-Williams, titled "Gender and Sexual Identity."

16 **Q.** Thank you. Are you familiar with this document?

17 **A.** I don't believe I have ever read this before.

18 **Q.** Are you familiar with Lisa Diamond?

19 **A.** I certainly know who Lisa Diamond is, yes.

20 **Q.** She is a well-respected researcher, correct?

21 **A.** Yes.

22 **Q.** Thank you.

23 What about Ritch Savin-Williams, are you familiar
24 with --

25 **A.** Ritch Savin-Williams, like Lisa Diamond, is a

1 developmental psychologist.

2 **Q.** With a good reputation?

3 **A.** I think that he is held in good repute, yes.

4 **Q.** All right. Thank you.

5 Please look at page 102. That's the next page. And
6 please look in the second column. You'll see in the first full
7 paragraph there, and starting with the second sentence, it
8 reads:

9 "There is currently no scientific or popular
10 consensus on the exact constellation of
11 experiences that definitively qualify an
12 individual as lesbian, gay, or bisexual,
13 rather than confused, curious, or
14 maladjusted."

15 Do you agree with this statement?

16 **A.** Well, you know, I think we have gone over this a number of
17 times, that there are these various approaches that we take to
18 understanding sexual orientation in terms of attraction
19 behavior and identity.

20 I think it's relevant to note that this is a chapter
21 that's published in the *Handbook of Applied Developmental*
22 *Science*. And, in fact, if you look at the beginning of this
23 chapter, they are talking about the experiences of very young
24 people. A 15-year-old boy who decided he was -- or who started
25 fantasizing about males at age 11, or a teenage girl who falls

1 in love with her best female friend.

2 So I think that they are especially concerned -- and
3 I'm guessing this because I haven't seen this chapter before.
4 But knowing both Lisa Diamond's work, and Ritch Savin-Williams'
5 work to some extent, I would say that they are probably
6 especially talking about the fact that for adolescents who are
7 at a phase in their life when they are going through a lot of
8 new experiences, and their identities of all sorts are forming,
9 including their sexual identities, that it's especially
10 difficult to talk about sexual orientation as being clearly
11 defined for those adolescents.

12 **Q.** All right. Well, what they say is:

13 "There is currently no scientific or popular
14 consensus on the exact constellation of
15 experiences that definitively qualify an
16 individual as lesbian, gay, or bisexual."

17 Do you agree with that?

18 **A.** Well, my understanding of the word "consensus" is that it
19 means unanimity. And, so, I would agree, there is not
20 unanimous agreement on this.

21 **Q.** Either popular or scientific?

22 **A.** I would be hard-pressed to find anything on which there is
23 popular unanimity.

24 And in terms of sciences -- we've been discussing
25 this already, I think -- there are those different approaches.

1 Q. Okay. Thank you.

2 And the next sentence says:

3 "The more carefully researchers map these
4 constellations, differentiating, for example,
5 between gender identify and sexual identity,
6 desire and behavior, sexual versus
7 affectionate feelings, early-appearing versus
8 late-appearing attractions and fantasies, or
9 social identifications and sexual profiles,
10 the more complicated the picture becomes
11 because few individuals report uniform
12 intercorrelations among these domains."

13 Do you agree with that statement?

14 A. Well, I would disagree with the statement that few
15 individuals report uniform -- well, to be honest, the phrase
16 "report uniform intercorrelations among these domains" is a bit
17 confusing to me because you can't compute a correlation with
18 just one person. It is something that only works when you are
19 looking at groups and patterns in groups.

20 But if what they mean by this is that few individuals
21 are consistent across their attractions, their behaviors, and
22 their desires, I would go back to what I've said earlier, which
23 is that we know that the vast majority of individuals are
24 consistent in those three areas. But there are some
25 individuals who are not.

1 Q. Do you believe the position that they state here is
2 unreasonable?

3 A. Do I --

4 Q. You said you disagree with it. Do you believe it is
5 unreasonable?

6 A. Uhm, I believe that if I'm interpreting it correctly --
7 and I allow for the fact, since I haven't read this whole
8 article, there may be qualifications or explanations that I'm
9 not familiar with.

10 But I would say that if what this is intended to mean
11 is that very few people demonstrate consistency in their
12 attractions, behaviors, and identity, then I would say that
13 that's not an accurate statement.

14 Q. I didn't ask you whether it was accurate. I asked you
15 whether it was reasonable. Do you believe that's
16 unreasonable --

17 A. Well, I'm a scientist. I try to think of things accurate
18 being reasonable.

19 I guess it's not an unreasonable statement if you
20 don't have data. But we do have data, so we know that there
21 are these large numbers of people who are consistent across
22 their identity, their behavior, and their attraction.

23 So that's where I'm going with it, is by saying that
24 that's what's the accurate statement.

25 Q. All right. And do you believe this is outside of the

1 mainstream of scholarship, that statement?

2 **A.** Well, as I said, I haven't read the entire chapter. So
3 it's quite possible that they will define some terms, explain
4 some of these constructs in ways that I would then understand
5 what they mean by this.

6 So I would be hesitant to judge the statements of
7 some of my colleagues, having just read one or two sentences
8 out of context.

9 **Q.** All right. Thank you.

10 **MR. NIELSON:** Your Honor, I would like to admit -- or
11 to offer DIX2682 for admission into evidence.

12 **MR. DETTMER:** No objection, Your Honor.

13 **THE COURT:** Very well. It's admitted.

14 (Defendants' Exhibit 2682 received in evidence.)

15 **BY MR. NIELSON:**

16 **Q.** All right. Please turn to tab 22 in the witness binder.
17 And you will find here a document premarked DIX935.

18 Can you identify this document?

19 **A.** Uhm, this is the title page of a book by Janice Bohan,
20 titled *Psychology and Sexual Orientation Coming to Terms*, which
21 was published in 1996.

22 **Q.** All right. And are you familiar with this work?

23 **A.** Well, I am familiar with the book, yes.

24 **Q.** All right. Thank you.

25 And please turn to page 13, which is the -- the

1 beginning page.

2 **A.** I have to say, my copy is not very good. It's rather
3 faint. I -- I -- just to let you know, it's a little bit
4 fuzzy.

5 **Q.** I apologize. Are you able to read it?

6 **A.** Well, I think so, but --

7 **Q.** I'm only going to read a little bit from this, then, to
8 avoid straining your eyes unduly.

9 In the very first line it says:

10 "... the concept of sexual orientation is not
11 as straightforward as everyday conversations,
12 media accounts, and political slogans would
13 imply. Rather, the topic is fraught with
14 vagaries, the terminology is ambiguous and
15 ill-defined, and the apparently exclusive and
16 stable categories commonly employed actually
17 disguise complex dimensionality and
18 fluidity."

19 Do you believe that's an unreasonable statement?

20 **A.** Well, I think it's probably reasonable as -- she starts,
21 off, the first clause of the sentence is, "As suggested in the
22 introduction."

23 And I believe that in the introduction she laid out a
24 number of examples that would illustrate what she is referring
25 to.

1 And, again, I think that she -- I haven't looked at
2 this book for a long time but, as I recall, she probably was
3 discussing examples in which there were inconsistencies between
4 a person's identity and their behavior, or their identity and
5 their attractions, as we have been discussing.

6 And, so, in that context, which I believe is the
7 context in which she wrote this, I would say that that's a
8 reasonable statement.

9 **Q.** Thank you.

10 **MR. NIELSON:** Your Honor, I would like to offer
11 DIX935 for admission into evidence.

12 **MR. DETTMER:** No objection.

13 **THE COURT:** 935 is admitted.

14 (Defendants' Exhibit 935 received in evidence.)

15 **MR. NIELSON:** All right. Thank you.

16 **BY MR. NIELSON:**

17 **Q.** Please turn to tab 25 in the witness binder, if you would.

18 Now, you'll find here a document premarked DIX1007.

19 And this is a declaration submitted by Dr. Robert

20 Galatzer-Levy -- and I apologize if I'm mispronouncing that --

21 in a different case. And it was offered as an exhibit in this

22 case by the City and County of San Francisco, in their motion

23 in support of their motion to intervene.

24 Are you familiar with Dr. Robert Galatzer-Levy?

25 **A.** I don't know him. I -- I've seen his name. I don't think

1 I'm very familiar with his work.

2 **Q.** All right. I would like you to turn to page -- it's --
3 well, there's two sets of pagination. Going by the pages at
4 the bottom, which are the document's pagination, pages 3 and 4
5 in paragraph 10.

6 **A.** Okay.

7 **Q.** At the bottom of the page 3, Dr. Galatzer-Levy writes:

8 "The sexual orientation of any given
9 individual falls within a spectrum between
10 same-gender orientation and opposite-gender
11 orientation. Nearly all heterosexual people
12 are capable of some homosexual response, and
13 nearly all homosexual people are capable of
14 some heterosexual response. Hence, no sharp
15 line distinguishes homosexuality and
16 heterosexuality."

17 Do you agree with that statement?

18 **A.** Well --

19 **Q.** Let's take them apart.

20 **A.** Okay.

21 **Q.** That's kind of compound. Let's take the first one.

22 "The sexual orientation of any given
23 individual falls within a spectrum between
24 same-gender orientation and opposite-gender
25 orientation."

1 Do you agree with that?

2 **A.** Well, I think there he's referring to the Kinsey continuum
3 that we've discussed already, that it is possible to think of
4 sexuality as a continuum ranging from exclusive heterosexuality
5 to exclusive homosexuality.

6 **Q.** All right. And then he says:

7 "Nearly all heterosexual people are capable
8 of some homosexual response, and nearly all
9 homosexual people are capable of some
10 heterosexual response."

11 Do you agree with that statement?

12 **A.** Well, the term -- I think the important term there is
13 "capable," meaning that it's at least theoretically possible
14 for all heterosexual people to have some homosexual response,
15 and nearly all homosexual people to have some heterosexual
16 response.

17 And I can certainly allow that that seems like a
18 reasonable assumption to make. I don't know what specific
19 research he would have been relying on to make that statement.

20 I do know that when we look at studies like, for
21 example, the Laumann study it would suggest that most people
22 would say that they don't experience -- and here, again, the
23 word is "response." Does that mean attraction? Does that mean
24 behavior? It's a little bit unclear.

25 But I think in studies like the Laumann study, we

1 would say that many people would say that they don't
2 experience, for example, attraction to people of their same
3 sex. So I'm not completely certain what is meant here by a
4 "homosexual response" or a "heterosexual response."

5 **Q.** Then what about the last sentence:

6 "Hence, no sharp line distinguishes
7 homosexuality and heterosexuality"?

8 **A.** Well, I think that the key, again -- I may have mentioned
9 something like this earlier, but he's using the words
10 "homosexuality" and not het- -- I'm sorry, "homosexuality" and
11 "heterosexuality."

12 And so while there may be -- it is the case that
13 people who consider themselves to be heterosexual do consider
14 there to be a clear line between their own sexual orientation
15 and their attractions to, behaviors with, and identity based on
16 those attractions toward people of the other sex.

17 And, whereas, people who define themselves as gay or
18 lesbian may very well see a very clear line between who they
19 are attracted to and are in relationships with versus people of
20 the other sex.

21 The general construct of heterosexuality and
22 homosexuality, when conceptualized along this continuum, the
23 nature of a continuum is that there is no clear, sharp line
24 that separates it at any particular point.

25 **Q.** All right. Thank you.

1 And, please, turn to tab 26 in the witness binder, if
2 you would. You'll find here a document premarked DIX1268.

3 Can you identify this document?

4 **A.** Uhm, this is titled "Lesbian Health, Current Assessment
5 and Directions for the Future." Edited by Andrea Solarz, and
6 published by the Committee on Lesbian Health Research
7 Priorities at the Institute of Medicine.

8 **Q.** Thank you. Are you familiar with this document?

9 **A.** I'm familiar with it. I have not read this document. I
10 know I have not read the entire document. I believe I may have
11 read portions of the document. It was released about ten years
12 ago. And I believe that sometime back around the time it was
13 released, I may have read portions of it.

14 **Q.** All right. Thank you.

15 Please turn to page 23 of the document, if you would.
16 In the introductory -- there's a section called "Introduction,"
17 you'll see on that page. And in the second paragraph, around
18 the middle of the paragraph, there's a sentence that says:

19 "Lesbians do not constitute an identifiable
20 homogeneous population for research study."

21 Do you agree with that statement?

22 **A.** Excuse me. I'm just trying to read the paragraph that
23 it's in.

24 Well, I think that their point is that the lesbian
25 population is not a homogeneous population. As they say:

1 "Some lesbians may belong to a community of
2 women who self-identify as lesbians. Others
3 may fear identifying as a lesbian, despite
4 having emotional and sexual partnerships with
5 women, owing to the potential stigma or
6 negative consequences of that."

7 And it goes on. And they also say:

8 "Diversity among lesbians also occurs along
9 dimensions of race and ethnicity,
10 socioeconomic status, age, whether or not
11 they have children," and so on.

12 And so, in that sense, I think it is perfectly
13 appropriate to say that lesbians do not constitute an
14 identifiable homogeneous population for research study.

15 **Q.** Right. Now, they didn't just say homogenous or
16 homogeneous. They said "identifiable," as well.

17 Do you agree with the sentence as written with both
18 of those adjectives?

19 **A.** Well, as I said, if I've read this, it's been a long time.
20 And so I'm not sure, perhaps, if they have spoken earlier about
21 what they mean in terms of "identifiable."

22 I believe that they may have talked about the
23 difficulties of -- and this was, again, written in the late
24 '90s, but the difficulties of believing that survey research
25 will -- that all women who are lesbian will report that fact to

1 a survey researcher, because of the stigma and prejudice
2 associated with being homosexual.

3 And so it's possible that this is what they mean by
4 the difficulty of identifying lesbians. It may also go back to
5 that different -- differing components of sexual orientation
6 that we've been discussing over and over.

7 So, you know, with that qualification, I would say
8 that, you know, that that certainly would make sense.

9 **Q.** All right. Thank you.

10 And, please, read the first paragraph of the next
11 section at the bottom of the page. Well, I'll read it to you.
12 It's:

13 "Views of sexual identity and sexual behavior
14 can vary significantly across cultures and
15 among racial and ethnic groups. So it should
16 not be assumed that a lesbian's sexual
17 identity is the same for lesbians of
18 different racial, ethnic, or cultural
19 backgrounds. In particular, it should not be
20 assumed that racial and ethnic minority
21 cultures share views of lesbian sexual
22 orientation identical with the dominant
23 culture."

24 Do you agree with that?

25 **A.** Well, again, it's probably useful to go on further and to

1 see that they're talking about the fact that within different
2 racial and ethnic minority cultures, views about what is the
3 family, the traditional views of family, predominant religions,
4 traditional gender roles, all of these are things that are
5 likely to vary across different cultures.

6 And, so, all of those things -- I assume what they
7 are getting to is that all of those things, since they vary
8 across these different groups, and all of those institutions
9 and traditions, might be related to how one understands what a
10 lesbian identity would mean.

11 That's how you could have variation among racial,
12 ethnic, and cultural backgrounds, in terms of understanding
13 what it means to be a lesbian.

14 **Q.** All right. And please turn to page 25, where it says,
15 "How the Committee Defines Lesbian."

16 And -- well, the first sentence I'll skip. It says
17 that numerous definitions have been suggested. And you can
18 read that and see what it says. But starting with the second
19 sentence, it says:

20 "In general, sexual orientation is most often
21 described as including behavioral, affective
22 (i.e., desire or attraction), and cognitive
23 (i.e. identity) dimensions that occur along
24 continua. That is, women may exhibit
25 differing degrees of same-sex sexual

1 behavior, desire, or identity in combinations
2 that vary from person to person."

3 Now, we've talked about these different components.
4 Here, it says each of those components "occurs along a
5 continua, and that women may exhibit differing degrees of
6 same-sex sexual behavior, desire, or identity in combinations
7 that vary from person to person."

8 Do you agree with that?

9 **A.** And, you know, who they cite here is Laumann, et al. So
10 we are back to those Venn diagrams.

11 And so what they are saying is, I assume -- and,
12 again, I haven't read this in its entirety. But I assume that
13 where they are going with this is to point to the same thing
14 that we were talking about this morning, of there being groups
15 that are consistent, in terms of their identity, attraction,
16 and behavior, but also some individuals that are not.

17 And I would imagine that, for their purposes, they
18 want to be as inclusive as possible, so they are going to
19 consider all of these different dimensions in their report.

20 **Q.** All right. Thank you.

21 And, please, turn to page 33. And at the beginning
22 of the second full paragraph on the page they write:

23 "The committee strongly believes that there
24 is no one right way to define who is a
25 lesbian."

1 Do you agree with that?

2 **A.** Well, I think this is what I was saying earlier. They go
3 on to say that the -- it's going to depend on the goal of your
4 research study. So they say:

5 "For a researcher designing a study on
6 lesbian health, the recommended course is to
7 develop measures that gather information
8 about the aspects of lesbian orientation that
9 are relevant to the specific project at
10 hand."

11 **Q.** Okay.

12 **A.** This is similar to what I was saying earlier. If you are,
13 for example, studying sexually-transmitted diseases, you would
14 probably want a definition that focuses on sexual behavior.

15 If you are studying the impact of experiences with
16 discrimination, you would probably want a definition that
17 focuses on identity.

18 **Q.** All right. They -- excuse me. Are you done?

19 **A.** I think so.

20 I was just going to say, again, I'm at a certain
21 disadvantage from not having read the entire thing and being
22 able to talk about this in its context.

23 **Q.** I understand. Thank you.

24 Now, they do go on to say that sentence that you
25 read. But let's read what they say right after that. They

1 say:

2 "Adopting this approach does not avoid the
3 issue of lesbian definition. Rather, it
4 builds on the need to accept the complexity
5 of sexual orientation and the social context
6 in which it is embedded."

7 Do you disagree with that?

8 **A.** Well, again, I'd say read the next sentence.

9 "In essence, lesbians should be defined to
10 meet the needs of specific research studies,
11 interventions, or programs of care, within
12 generally-accepted conceptual boundaries,
13 with recognition of the three dimensions
14 through which sexual orientation is most
15 often defined: Identity, attraction or
16 desire, and behavior."

17 And I believe that's consistent with what I've been
18 saying.

19 **Q.** Okay. Thank you.

20 **MR. NIELSON:** Your Honor, I would like to admit -- or
21 offer to admit DIX1268 into evidence.

22 **MR. DETTMER:** No objection, Your Honor.

23 **THE COURT:** 1268 is admitted.

24 (Defendants' Exhibit 1268 received in evidence.)

25 **MR. NIELSON:** All right. Thank you.

1 **BY MR. NIELSON:**

2 **Q.** Please turn to tab 27 in the binder. Can you identify
3 this document, Professor Herek?

4 **A.** This is a chapter by John Gonsiorek and James Weinrich,
5 titled "The Definition and Scope of Sexual Orientation."

6 And although it's not -- oh, here it is. And this is
7 from a 1991 book titled *Homosexuality: Research Implications*
8 *for Public Policy.*"

9 **Q.** All right. Thank you.

10 **MR. NIELSON:** And, Your Honor, this is premarked
11 PIX912 -- PX912. And I believe it was on the list of exhibits
12 that plaintiffs offered this morning.

13 **THE COURT:** It is.

14 **MR. NIELSON:** Thank you.

15 **BY MR. NIELSON:**

16 **Q.** Now, please look at page 2. And you discuss in -- the
17 authors, excuse me, discuss in the middle of the first
18 column -- there's a discussion about the words "lesbian," "gay"
19 as opposed to "homosexual."

20 And then skipping to where it's -- to the sentence,
21 the fourth sentence, it says:

22 "It can be argued that the words 'gay' and
23 'lesbian' really describe a particular
24 identity that goes beyond mere description,
25 is not accurate for many homosexually

1 behaving and desiring individuals, and is
2 primarily rooted in the sociopolitical
3 context of the mid- and late-20th century
4 western world."

5 Do you see that?

6 **A.** Yes.

7 **Q.** Do you believe that's an unreasonable statement?

8 **A.** Well, you know, I believe this is the same statement,
9 almost verbatim, that -- John Gonsiorek, the author of this
10 paper, was also one of the authors of the paper we discussed a
11 few exhibits ago, in *Suicide & Life-Threatening Behavior*, in
12 that journal.

13 And I believe that this is roughly the same thing
14 that he said there; talking about, you know, concerns about
15 terminology. So I -- I would say it is accurate that you can
16 make that argument.

17 It can be argued that the words "gay" and "lesbian"
18 really describe a particular identity that goes beyond mere
19 description. Meaning, that it's not simply a descriptive term
20 as they would -- I assume, would say the word "homosexual" is
21 more of a descriptive term, describing simply a type of sexual
22 attraction or behavior.

23 It could be argued that it is not accurate for many
24 homosexually behaving and desiring individuals. And we've
25 talked about the Laumann and Gagnon study repeatedly. And it's

1 primarily rooted in the sociopolitical context of the mid- and
2 late-20th century Western world, although, the use of both
3 words to describe homosexuality has a venerable history. And,
4 there again, I think that's consistent with what we've been
5 saying all along.

6 So I would say that the statement that all of those
7 positions can be argued is reasonable.

8 **Q.** All right. Thank you.

9 And the paragraph at the bottom of that page, again,
10 it starts with "bisexual" -- it says:

11 "Bisexual experience is common both
12 historically and currently among individuals
13 who self-identify as less began or gay. A
14 cross-cultural study of male homosexuals in
15 the United States, Holland, and Denmark ..."
16 I'll skip the citation. You can read that.
17 "... found that 36 percent to 59 percent of
18 homosexual individuals studied, depending on
19 the country, had had heterosexual
20 intercourse. Yet these men thought of
21 themselves as gay and were drawn from gay
22 communities."

23 Do those statistics surprise you?

24 **A.** Well, they cite the Weinberg & Williams 1974 book. And
25 it's been a while since I've looked at that book. But my

1 recollection is that it was not based on a probability or a
2 representative sample in any of those countries; but, rather,
3 these were samples -- we sometimes call them convenient
4 samples, but samples that are not -- who's represented in this
5 of the larger population remains unknown.

6 So I would be very careful in looking at the
7 proportions here. But I would also say that it is, I think,
8 the case that most people are brought up in society assuming
9 that they will be heterosexual.

10 Little boys are taught that they will grow up and
11 marry a girl. Little girls are taught they will grow up and
12 marry a boy. And growing up with those expectations, it is not
13 uncommon for people to engage in sexual behavior with someone
14 of the other sex, possibly before they have developed their
15 real sense of who they are, of what their sexual orientation
16 is.

17 And I think that's one of the reasons why we do see
18 that among lesbians and gay men it is not uncommon for
19 individuals to report that, at one point in their lives, they
20 did experience heterosexual intercourse. Although; it is not
21 part of their identity. It's not part of who they are, and not
22 indicative of their current attractions.

23 **Q.** All right. Thank you.

24 And, indeed, you mentioned lesbians, as well. And
25 the next sentence says:

1 "The sexual experience of lesbians is at
2 least as diverse, and probably more so, with
3 estimates of 81%and 74%, respectively" -- and
4 I gather "respectively" because they're
5 citing two studies there -- "of lesbian women
6 who had engaged in heterosexual intercourse."
7 Again, do those statistics surprise you in any way?

8 **A.** Well, once again, I don't believe they are citing data
9 from representative samples. So these would be the percentages
10 of women in those particular samples.

11 And -- oh, I believe, yes, I was puzzled, too, by
12 that word "respectively." And I believe that one statistic
13 goes with the Bell & Weinberg study; one statistic goes with
14 the Reinisch, et al. study.

15 But, again, I would just point out that the actual
16 percentages are not something we can generalize to the larger
17 population. But it is certainly consistent with what I was
18 saying.

19 And, in fact, I would agree with them, that it may be
20 even more likely for woman to have experienced heterosexual
21 intercourse, partly because of the status of women in society
22 and the fact that young women are often pressured in many ways
23 to marry heterosexually, perhaps before they have really
24 developed a sense of their own sexual orientation.

25 **Q.** All right. Thank you.

1 And on the next page they write, the first full
2 paragraph:

3 "Cultural factors are also relevant. Many
4 societies do not conceptualize diversity in
5 sexual behavior along dimensions of
6 homosexuality/heterosexual at all. In some
7 cultural/ethnic groups both in and outside
8 the Western world, same-sex behavior is not
9 seen as homosexual orientation, which is
10 defined instead by social sex role or
11 participation in specific sexual acts."

12 Do you agree with that?

13 **A.** That there are cultures in which engaging in same-sex
14 behavior is not seen as equivalent to a homosexual orientation?
15 Would I agree with that?

16 **Q.** Yes.

17 **A.** I would agree with that.

18 **Q.** All right. Thank you.

19 **MR. NIELSON:** And, Your Honor, I would like to
20 offer -- well, actually, this is already in the record.

21 **BY MR. NIELSON:**

22 **Q.** Please turn to tab 27A in the witness binder.

23 And here you'll find a document premarked DIX658.

24 **A.** Oh, I'm sorry. I'm getting mixed up.

25 **Q.** 27A.

1 A. I had it upside down. Okay.

2 Q. Do you see that?

3 A. Say the number again, please.

4 Q. It's 27A.

5 A. Yes.

6 Q. And it's DIX658.

7 A. Yes.

8 Q. Can you identify this document?

9 A. This is an article from *The Journal of Pediatrics*, from
10 1992, by several authors. The first one is Gary Remafedi. And
11 it is entitled "Demography of Sexual Orientation in
12 Adolescence."

13 Q. All right. Thank you.

14 And are you familiar with this?

15 A. Well, this is another one that I suspect I read back in
16 the early '90s. I'm not sure if I've looked at it more
17 recently.

18 Q. All right. Thank you.

19 Please turn to page 719. And look at the second
20 column under the discussion. It reads, the first sentence
21 reads:

22 "Sexual orientation has been defined as a
23 consistent pattern of sexual arousal towards
24 persons of the same and/or opposite gender,
25 encompassing fantasy, conscious attractions,

1 emotional and romantic feelings, sexual
2 behaviors, and possibly other components."
3 Then the next sentences goes on to say:
4 "Since the heterosexual or homosexual
5 direction of the individual events mentioned
6 may be at variance with another, numerous
7 permutations of orientation are possible and
8 probable in human populations."

9 Do you see that?

10 **A.** Yes.

11 **Q.** Do you agree that the individual dimensions of sexual
12 orientation may be at variance with one another for an
13 individual --

14 **A.** I'm sorry. I didn't mean to interrupt.

15 **Q.** No, go ahead.

16 **A.** Well, as I've been saying, the data indicate that for most
17 people they are not, but for some people they are.

18 **Q.** Okay. And do you believe that numerous permutations of
19 orientation are possible and indeed probable in human
20 populations?

21 **A.** Well, I think this is where we might go back to that Klein
22 grid, where they had the 21 different squares that people could
23 fill in. There's a very complex set of combinations you could
24 draw from that, those 21 boxes.

25 It turns out that when factor analyses of that grid

1 have been done, they boil down to, in terms of sexuality, at
2 least one major underlying dimension.

3 So I would say that, in theory, it would seem that
4 you could have a very large number of permutations and
5 combinations. But, in reality, that's probably not very
6 common. That most people do, in fact, maintain or do report
7 some consistency in these different dimensions of their sexual
8 orientation.

9 **Q.** All right.

10 **MR. NIELSON:** Your Honor, I would like to offer
11 DIX658.

12 **THE COURT:** Hearing no objection, 658 is admitted.

13 (Defendants' Exhibit 658 received in evidence.)

14 **BY MR. NIELSON:**

15 **Q.** All right. Now, Professor Herek, I could like to discuss
16 whether, as a matter of fact, sexual orientation does change
17 over time for some individuals.

18 And, now, some people do experience considerable
19 fluidity in their sexual orientation throughout their lives,
20 correct?

21 **A.** Some people experience change and fluidity over the course
22 of their lives. This is something that happens, apparently,
23 spontaneously with the individual, as opposed to some
24 intervention being done to make the individual change.

25 But we do know that these changes do occur in some

1 peoples' lives.

2 **Q.** All right. Thank you.

3 And for purposes of right now, I'm not particularly
4 interested in discussing the intervention aspect versus other
5 causes, but just whether it's a fact changes do occur.

6 So some research data suggests that women are
7 somewhat more likely to perceive their sexuality as fluid and
8 involving some degree of choice, correct?

9 **A.** Yes, I think that when we look at women's histories, we do
10 more often see the idea that their -- their romantic
11 relationships and their experiences of sexuality are more
12 likely to change, or change in more women than is the case for
13 men, over the course of their lives.

14 **Q.** All right. Thank you.

15 Now, on your -- in your direct testimony, you
16 discussed studies that you conducted, in which you found that a
17 great many gay men and lesbians felt that they experienced
18 either no choice at all or very little choice about their
19 sexual orientation, correct?

20 **A.** That's correct.

21 **Q.** All right. And in these studies, you collected data using
22 sexual identity as opposed to sexual attraction or sexual
23 behavior, correct?

24 **A.** Well, I'm not sure that I completely understand the
25 question.

1 Q. How did you identify the sample of individuals that you
2 asked the question to? They were based on self-identified,
3 were they not?

4 A. I see. Okay. Well, these were -- there was a
5 multiple-stage process of -- of obtaining the sample. This was
6 from a -- a survey organization that has basically recruited a
7 very large number of participants to take part in Internet
8 research, and has provided them with the equipment to do that
9 if they didn't already have it.

10 They have asked the participants in their panel in
11 this large group many demographic questions. One of which was,
12 Are you -- I may not be getting the wording exactly right, but
13 it was something to the effect of, Are you lesbian, gay, or
14 bisexual?

15 And so if they had answered yes to that question,
16 they were considered eligible for participation in one of the
17 studies that I did, the one that I was talking about earlier.

18 In that study, there was then an initial series of
19 screening questions that asked them about their sexual
20 orientation. And in terms of -- it was -- we basically gave
21 them five categories. One -- and the questionnaire was
22 tailored to the specific sex of the individual.

23 But I'll tell you, for example, the one directed at
24 men. It would ask them which of the following best described
25 them: Gay or homosexual, bisexual mainly attracted to men,

1 bisexual equally attracted to both men and women, bisexual
2 mainly attracted to women, heterosexual, or straight. So, in
3 that sense, it really was a bit of a combination of identity
4 labels and patterns of attraction.

5 **Q.** Okay. But your initial pool from which you drew were all
6 self-identified -- individuals who self-identified as lesbian,
7 gay, or bisexual, correct?

8 **A.** They had said yes to the question I described.

9 One thing that we came to realize was that,
10 especially for the bisexual individuals, it's possible that
11 they interpreted -- they could have interpreted that as a
12 question about their patterns of attraction or behavior as well
13 as identity.

14 **Q.** Okay. Thank you.

15 And you relied on self-reporting in these surveys,
16 correct?

17 **A.** That's correct.

18 **Q.** Okay. Thank you.

19 And these studies did not ask any questions that went
20 to whether people's sexual orientation had changed, correct?

21 **A.** That's correct.

22 **Q.** And so these studies do not really shed any light on this
23 question, correct?

24 **A.** On --

25 **Q.** On the question of whether people's sexual orientation had

1 changed.

2 **A.** No, we did not ask questions about that.

3 **Q.** Okay. Thank you.

4 And if you are trying to predict for any specific
5 individual whether their identity will predict their sexual
6 behavior in the future, that can be problematic, correct?

7 **A.** I think that if we are talking about general patterns,
8 again, if I were a betting person, I would say that you would
9 do well to bet that their future sexual behavior will
10 correspond to their current identity. But you should also
11 realize that for some individuals that would not be the case.

12 **Q.** All right. Thank you.

13 Please turn to tab 2 in your binder. And this is a
14 transcript of your deposition. And I'd like you to turn to
15 page 105. That's the deposition page. And the page at the
16 bottom of the page is 27. There's four pages per page, so it's
17 a little complicated.

18 **A.** Okay. Say the page again, please.

19 **Q.** The page at the bottom is 27, and the deposition page is
20 105.

21 **A.** Okay.

22 **Q.** And I'd like you to look at lines 15 through 18 on -- on
23 that page.

24 **MR. DETTMER:** I'm sorry. Did you say 27?

25 **MR. NIELSON:** It's page 105 in the deposition. The

1 27 is just the page at the bottom.

2 **BY MR. NIELSON:**

3 **Q.** All right. Now, have you had a chance to look at those
4 lines?

5 **A.** Yes.

6 **Q.** Did you give that testimony at your deposition?

7 **A.** Yes.

8 **MR. NIELSON:** Okay. And I'd like to read that, Your
9 Honor. He said:

10 "Now, that said, if you are trying to predict
11 for any specific individual whether their
12 identity will predict their sexual behavior
13 in the future, especially, that can be
14 problematic."

15 **BY MR. NIELSON:**

16 **Q.** All right. Thank you.

17 And we certainly know that people report that they
18 have experienced a change in their sexual orientation at
19 various points in their life, correct?

20 **A.** I'm sorry. Could you say the question one more time.

21 **Q.** Sorry. We certainly know that people report that they
22 have experienced a change in their sexual orientation at
23 various points in their life, correct?

24 **A.** Some people do report that, yes.

25 **Q.** Okay. Thank you.

1 But we don't know why, in every case, people who have
2 experienced a change in their sexual orientation at some point
3 in their life, exactly why that happened in every case,
4 correct?

5 **A.** That's correct.

6 **Q.** All right. Thank you.

7 And people do not always have a knowledge of their
8 mental processes, correct?

9 **A.** Uhm, that's true.

10 We see that especially in social psychological
11 studies that have looked at prejudice. And it's been
12 repeatedly documented that people are not always aware of their
13 prejudices and biases. And so if you ask them about it, they
14 cannot tell you exactly what -- what's going on. But then
15 other -- other measures have shown that they do in fact have
16 those prejudices and biases.

17 **Q.** All right. Thank you.

18 So you agree that people don't always have a
19 knowledge of mental processes?

20 **A.** I do.

21 **Q.** Okay. Thank you.

22 Please turn to page 27C in the witness binder.

23 **A.** Tab 27 --

24 **Q.** 27C.

25 **MR. NIELSON:** And, Your Honor, I want to bring --

1 this is a transcript of portions of the deposition testimony of
2 Ms. Stier, the plaintiff in the case. And this deposition was
3 provisionally designated as confidential. And plaintiffs had
4 30 days to designate those portions of the deposition that they
5 wished to retain that classification. And they didn't do so.

6 And I -- I would like to read some of this into the
7 record, but -- I think the parts I'm planning to read are not
8 sensitive.

9 But, if there are any concerns, I don't have any
10 objection to clearing the courtroom and turning off the camera,
11 if that's what you would like to do.

12 **MR. DETTMER:** Could I --

13 **MR. NIELSON:** Shall I --

14 (Simultaneous colloquy.)

15 **THE COURT:** Identify which portion you would like to
16 read.

17 **MR. NIELSON:** Yes, I would. I'll identify them. The
18 lines I'm going to read are page 22, 11 through 15. 24, 5
19 through 11 -- excuse me. 22, 11 through 15. 24, 5 through 11.
20 And 198, 24 through 199, 3. So there's just three passages.
21 Though, I'll break them up a little.

22 **THE COURT:** Give me the last again, 199.

23 **MR. NIELSON:** 198, 24 through 199, 3.

24 **THE COURT:** All right.

25 **MR. NIELSON:** Your Honor, if I could ask a question

1 to opposing counsel, through the Court. Is there any objection
2 to my reading these portions of the transcript?

3 **THE COURT:** Mr. Dettmer.

4 **MR. DETTMER:** If you could give us just one moment to
5 look over them.

6 **MR. NIELSON:** All right. And while they are looking,
7 I will note, I believe these are not particularly sensitive.

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

9 **MR. NIELSON:** I said, Your Honor, while they're
10 looking I will note I was careful to try and pick things that I
11 don't believe are particularly sensitive. And I believe they
12 are quite similar to plaintiff's testimony in open court.

13 **MR. DETTMER:** Your Honor, we don't have an objection.

14 **THE COURT:** Fine. You may proceed.

15 **MR. NIELSON:** Thank you.

16 **BY MR. NIELSON:**

17 **Q.** All right. Professor Herek, are you aware that Ms. Stier
18 was previously married to a man?

19 **A.** Uhm, I believe I was aware of that, yes.

20 **Q.** All right. Thank you.

21 And if you look at deposition transcript, page 22,
22 11, at lines 11 and 12 the witness, which is Ms. Stier, says,
23 quote:

24 "When I married Matthew, I did love him."

25 Does that surprise you?

1 **A.** Uhm, I have no expectations about it, so it doesn't
2 surprise me.

3 (Laughter)

4 **Q.** All right. Thank you.

5 And then the next three lines, it says:

6 "The question is, were you attracted to him
7 physically?"

8 And she responds:

9 "I did have an attraction to him."

10 Again, is that something that does not surprise you?

11 **A.** Again, I have no expectations, but -- so I am not
12 surprised.

13 **Q.** All right. Thank you.

14 And page 24, lines 5 through -- well, 5 through 7,
15 Ms. Stier says:

16 "In 1987, when we got married in November, we
17 both -- I'll speak for myself only. It was
18 my goal to have a meaningful marriage."

19 And in response to the question:

20 "Did you have a meaningful marriage for any
21 period of time up until the time that you
22 were separated and eventually divorced?" she
23 answered:

24 "Yes, I did."

25 And, again, is that something that doesn't surprise

1 you?

2 **A.** And I would just give the same response.

3 **Q.** Okay. Thank you.

4 And then, please, turn to page 198 to 199. And I'm
5 going to start reading with line 24. And the question is:

6 "Has it always been the case that you've had
7 an enduring pattern or disposition to
8 experience sexual, affectional, or romantic
9 desires for and attractions to women? Has
10 that always been the case in your life?"

11 And the answer is:

12 "No, it has not."

13 Does that surprise you?

14 **A.** I would say that that's consistent, in part, with what I
15 was saying earlier about the expectation that most people are
16 raised with that they will be heterosexual.

17 And so I think that when you ask people about their
18 entire life, you would be including that period for a number of
19 people who identify as gay or lesbian. And they might very
20 well be able to point to a portion of their life in which they
21 were at least assuming that they were themselves heterosexual,
22 and did experience some sort of attraction for people of the
23 other sex, and, at the same time, did not acknowledge or
24 experience attractions toward people of the same sex at that
25 one point in their lives.

1 Q. So that using the "enduring attraction" definition, which
2 is one of the ones you offered, at that point in her life,
3 Ms. Stier would not have been gay, correct?

4 A. Well, you know, when you asked me about what constitutes
5 an enduring pattern or how long this takes, I said we don't
6 have a specific amount of time.

7 But in this question, you're asking her about that --
8 you're defining that time period. It appears to me, anyway, as
9 being her entire life.

10 And I don't think that that's part of the definition,
11 that people are this for their entire life, that they
12 experience this over the course of their entire life.

13 I would say that experiencing it for what the
14 individual perceives to be a significant period of time in
15 their life is what's referred to here, not that people have
16 been this way for their entire life.

17 Q. All right. Thank you.

18 Now, a 2003 survey of California adults found that
19 approximately 9 percent of gay men and 25 percent of lesbians
20 18 to 59 years of age reported having ever been married. Most
21 of them presumably to a person of the same [sic] sex, correct?

22 A. Was that the -- was that in the report that the UCLA
23 researchers produced from the Williams Institute at UCLA?

24 Q. It's something you cited in your expert report, actually.

25 A. Okay. I didn't footnote it, though?

1 Q. It's note 37. It's -- if you would like to look at it,
2 it's tab 1 has your expert report.

3 A. I believe that's the UCLA report. It would just help me
4 to know that for sure, if you're going to ask about it.

5 Q. It's note 37 on page 18, if you want to review that to
6 refresh your memory. It says, "Carpenter & Gates, 2008, Table
7 3)."

8 A. Oh, okay. So, yeah, that's a different one than what I
9 was thinking of. Okay.

10 Q. All right. And that's consistent with Ms. Stier's
11 experience, correct?

12 A. Well, that -- that some portion of lesbians and gay men
13 report having been married in the past, yes, I believe that is
14 consistent with her experience.

15 Q. All right. Thank you.

16 And, please, turn to tab 28 in the witness binder.

17 MR. NIELSON: Before I do that, Your Honor, I would
18 like to offer the portions of the transcript of Ms. Stier's
19 deposition that I read as -- into evidence as admissions.

20 THE COURT: Very well. I assume no objection.

21 MR. DETTMER: No objection, Your Honor.

22 THE COURT: Very well.

23 MR. NIELSON: All right. Thank you.

24 BY MR. NIELSON:

25 Q. And, as I said, please turn to tab 28. And you'll find a

1 document premarked DIX1009.

2 **A.** 1009 yes.

3 **Q.** Can you identify that document?

4 **A.** This is an -- a report from researchers at UCLA, at the
5 Williams Institute at that university, titled "Marriage,
6 Registration and Dissolution by Same-Sex Couples in the U.S.,"
7 published in 2008.

8 **Q.** And who are listed as the authors of the report?

9 **A.** Gary Gates, M.V. Badgett, and Deborah Ho.

10 **Q.** All right. Thank you.

11 And, please, look at page 10 in the report. And you
12 will see a figure at the bottom that says, "Figure 5." Well,
13 it's not just the bottom; it's half of the page.

14 "Percent previously married among individuals
15 and couples who seek marriage or legal
16 recognition."

17 And from the context, if you read above it, it
18 says -- it's talking of same-sex couples, individuals and
19 same-sex couples who have been previously married.

20 And you'll see for California the percentage of males
21 in couples seeking marriage or legal recognition is 20 percent
22 who were previously married, and for women it was 29 percent.
23 Correct?

24 **A.** That's what it shows, yes.

25 **Q.** Yes. Thank you.

1 And, again, so the fact that Ms. Stier was formerly
2 married to an opposite-sex spouse is not particularly unusual,
3 correct?

4 **A.** That's correct.

5 **Q.** All right. Thank you.

6 **MR. NIELSON:** Your Honor -- excuse me.

7 Professor Herek, could you please turn to tab 28A in
8 the witness binder.

9 And, Your Honor, this is, again, the same thing with
10 Plaintiff Perry's deposition testimony. And the specific lines
11 that I would like to read are on page 152, from 7 to 15. And I
12 guess I'd like to ask, through the Court, plaintiffs' counsel
13 if they have any objection to my reading that.

14 **MR. DETTMER:** Your Honor, if I could just have a
15 moment to look at that.

16 **THE COURT:** Beg your pardon?

17 **MR. NIELSON:** It's page 152, line 7 through 15.

18 **THE COURT:** 152, line 7 through?

19 **MR. NIELSON:** 15, Your Honor.

20 **MR. DETTMER:** Your Honor, subject to some time to
21 obviously supplement with counterdesignations under the rule of
22 completeness, we won't object.

23 **THE COURT:** Well, I was -- apropos that, I wondered,
24 Mr. Nielson, would you object to having the question and then
25 the entire answer read?

1 **MR. NIELSON:** Not at all.

2 **THE COURT:** All right.

3 **MR. NIELSON:** Not at all.

4 But, Your Honor, I'm not sure that for an admission
5 that's the --

6 **THE COURT:** What's that?

7 **MR. NIELSON:** For an admission, I'm not sure that
8 counterdesignations are appropriate.

9 **THE COURT:** Well, no, but completeness certainly is.
10 And that's why I was suggesting you would read the entire
11 answer.

12 **MR. NIELSON:** That would be fine. But I'm just
13 objecting to the idea of some supplemental designation down the
14 road.

15 All right. And I will read the question and, I
16 guess, the complete answer then. Would that be acceptable? I
17 guess I'll be going back to page 151, line 22. Is that
18 acceptable, Your Honor?

19 **THE COURT:** That's --

20 **MR. NIELSON:** Okay.

21 "Could you explain a little bit as to how
22 that" --

23 Well, that's a pretty --

24 **THE COURT:** Hold on a second. Maybe you really need
25 to go back to line 16, on 151.

1 **MR. NIELSON:** Yes.

2 **THE COURT:** Sets the context.

3 **MR. NIELSON:** Yes, Your Honor.

4 **"QUESTION:** Did you go through a process in
5 ultimately arriving at the conclusion that
6 you were going to identify as a lesbian? Did
7 it take place over time?

8 **"ANSWER:** It was a process. It took place
9 over a period of time.

10 **"QUESTION:** Could you explain a little bit as
11 to how that process took place?

12 **"ANSWER:** Well, I guess for me the earliest
13 conscious memory I have wondering if I might
14 be a lesbian was when I felt a strong
15 attraction to a woman in college. And since
16 I wasn't certain that it might just be a
17 single incident or event or a single person,
18 it took a few years after that point in time
19 to continue to date or feel attracted to
20 understand maybe this enduring pattern in me.
21 So I was aware for other people in the world
22 they had made that decision. So there were
23 people in the world who I might be like that
24 were gay or lesbian or heterosexual, but I
25 wasn't certain until I had had enough other

1 experiences to know that perhaps most likely
2 I am a lesbian. And after having a few years
3 of experience, I arrived at that conclusion
4 and adopted that sexual orientation for
5 myself."

6 **BY MR. NIELSON:**

7 **Q.** Does the phrase "I adopted" -- "and adopted that sexual
8 orientation for myself," does that surprise you in any way?

9 **A.** Well, I think that what she's describing in this entire
10 response is that idea that sexual orientation is generally
11 understood by not only researchers but by many lay individuals
12 as involving an enduring pattern.

13 And so I think what she's describing here is that she
14 experienced these attractions as an enduring pattern, and it
15 was after recognizing this pattern in herself that she adopted
16 the label of "lesbian" or that she decided that that was an
17 appropriate way to identify herself.

18 **Q.** All right. Thank you.

19 **MR. NIELSON:** And, Your Honor, I would like to move
20 that portion of the transcript that I read into evidence as an
21 admission.

22 **THE COURT:** Very well. I assume no objection.

23 **MR. DETTMER:** (Shakes head.)

24 **BY MR. NIELSON:**

25 **Q.** All right. Professor Herek, please, turn to tab 29 in the

1 witness binder. And here you'll find an exhibit premarked
2 DIX1010. Do you see that?

3 **A.** Yes.

4 **Q.** Can you identify this document?

5 **A.** It's titled "A New Look at Women's Sexuality & Sexual
6 Orientation." The authors are Linda Garnets and Letitia Anne
7 Peplau. And it is published in "CSW update."

8 I have to confess, I'm not sure what that is.

9 **Q.** All right. And you're familiar with Professor Garnets and
10 Professor Peplau, correct?

11 **A.** Yes.

12 **Q.** Okay. Thank you.

13 And, please, look at page 5, with the page numbers.
14 And there is a subtitle. That says, "The Fluidity of Women's
15 Sexuality & Sexual Orientation."

16 **A.** Yes.

17 **Q.** And I'm going to read starting with the second sentence.
18 It says:

19 "Scholars for many disciplines have noted
20 that women's sexuality tends to be fluid,
21 malleable, shaped by life experiences, and
22 capable of change over time."

23 Do you agree with that characterization of women's
24 sexuality?

25 **A.** Well, I would agree with that statement that scholars from

1 many disciplines have noted that many aspects of women's
2 sexuality tends to be very sensitive to environmental cues.
3 This is not only related to sexual orientation or the sex of a
4 partner, but also the frequency of having sex, the types of
5 sexual behavior that are engaged in and enjoyed.

6 A number of different aspects of women's sexuality
7 have -- the research literature indicates that there is a
8 greater sensitivity among women than among men to environmental
9 influences or situational influences, in many aspects of their
10 sexuality.

11 **Q.** All right. And let's read the next sentence. It says:

12 "Female sexual development is a potentially
13 continuous, lifelong process in which
14 multiple changes in sexual orientation are
15 possible."

16 Do you agree with that statement?

17 **A.** Well, I would say that depending upon exactly what you
18 consider "development," it is a potentially lifelong,
19 continuous process.

20 This is the general view of all kinds of development,
21 that people are developing throughout their lives. So in that
22 regard, sexual development is also probably a lifelong,
23 continuous process.

24 The idea of multiple changes in sexual orientation
25 being possible, I would certainly say that's true. It is

1 possible. And in some cases it happens. But as we've
2 discussed a number of times, for many people, in fact most
3 people, it doesn't seem to happen.

4 **Q.** All right. Thank you.

5 Let's continue then. It says:

6 "Women's sexuality is responsive throughout
7 the lifespan to a wide range of social,
8 cognitive, and environmental influences.
9 Women who have had exclusively heterosexual
10 experiences may develop an attraction to
11 other women and vice versa."

12 Do you agree with that?

13 **A.** Yes, I think that that's an accurate characterization of
14 the -- of the literature.

15 **Q.** All right. Thank you.

16 **MR. NIELSON:** Your Honor, I would like to submit
17 DIX1010 into evidence.

18 **MR. DETTMER:** Your Honor, subject to the same
19 objection earlier, that Professor Peplau has been here and
20 subject to cross examination.

21 **THE COURT:** Very well. The witness has been examined
22 with respect to the substance of this. I think it's
23 appropriate to admit it. At the very least, take judicial
24 notice of it under the evidence rule. But you may proceed.

25 (Defendants' Exhibit 2292 received in evidence.)

1 **MR. NIELSON:** Thank you very much.

2 **BY MR. NIELSON:**

3 **Q.** Professor Herek, please turn to tab 30 in the witness
4 binder. You'll find here a document premarked DIX1229. Could
5 you read that. Could you identify that?

6 **A.** This is an article characterized as a Distinguished
7 Scholar Article in the journal *Personal Relationships*, from
8 2001. The title is, "Rethinking women's sexual orientation:
9 An interdisciplinary, relationship-focused approach." And the
10 author is Letitia Anne Peplau.

11 **Q.** All right. Thank you.

12 And are you familiar with this document?

13 **A.** No. I've never seen this before.

14 **Q.** You are familiar with Professor Peplau, correct?

15 **A.** As I've said, yes, I am.

16 **Q.** And you believe she has a good reputation as a scholar in
17 her field, correct?

18 **A.** I believe she has a very solid reputation.

19 **Q.** All right. Thank you.

20 Please look at page 5 of this article. And halfway
21 down the first column you'll see a -- a subheading,
22 "Within-person variability across time and social setting." And
23 it reads:

24 "Although some may think of sexual
25 orientation as determined early in life and

1 relatively unchanging from then on, growing
2 evidence indicates that the nature of a
3 women's intimate relationships can change
4 throughout her life and differ across social
5 settings."

6 Do you agree with that statement?

7 **A.** Again, I think this is consistent with what I've been
8 saying. This can happen.

9 **Q.** All right. Thank you.

10 And, please, turn to pages 13 and 14. They're
11 together. You can open them up, and you'll be able to read.

12 And in the sentence that starts at the very bottom of
13 the second column on page 13, Professor Peplau writes:

14 "Hazan and Diamond" -- and, again, I believe
15 this is the Professor Diamond that we've
16 discussed -- "Rejected the idea that
17 individuals have specific gender-based images
18 of a suitable partner and suggested instead
19 that the 'search image for human mating
20 is ... inherently flexible.' Just as infants
21 can form attachments to a wide range of
22 potential caretakers, so too adults can
23 become infatuated and bond with a range of
24 partners."

25 Do you agree with that statement? Or let me rephrase

1 that. Do you agree with Hazan and Diamond's position as
2 described here by Professor Peplau?

3 **A.** Well, I actually don't believe I have read the article by
4 Hazan and Diamond, so I don't know that I can agree or disagree
5 with it.

6 **Q.** You --

7 **A.** I honestly -- I don't believe I've read that article. So
8 knowing exactly what is involved in -- in this -- I mean, you
9 have Dr. Peplau making a one-sentence characterization of the
10 article. And it's not that I would suspect her of doing that
11 inaccurately. But as far as deciding whether this is something
12 I agree with or not, I would really need to read the article to
13 get the context for it.

14 **Q.** So if I were to ask you, is the idea that -- okay, that
15 individuals have a -- that the search image for human mating is
16 inherently flexible; and just as infants can form attachments
17 to a wide range of potential caretakers, so too adults can
18 become infatuated and bond with a range of partners, if I just
19 stated it like that, would you disagree with it?

20 **A.** Well, you know, I think that those terms "infatuated" and
21 "bonding" and the use of the terms around attachment, all of
22 this suggests to me -- again, without having read the article,
23 but this may actually be talking more about the experience of
24 love, romantic love, or very strong feelings of platonic love,
25 as opposed to sexual attraction.

1 So, again, I'm just not sure of the context. You
2 know, and I haven't read this article by Dr. Peplau, so I'm --
3 and then she's quoting from this other article that I haven't
4 read. So it's very difficult to try to comment on two things
5 for which I don't really have a good context.

6 **Q.** I'm actually just asking you if you agree with the
7 statement that's written there. And is your answer that you
8 just can't, one way or the other, without knowing more?

9 **A.** My answer is that I don't -- I don't think I can, without
10 having read the entire article.

11 **Q.** All right. Thank you.

12 **MR. NIELSON:** And, your Honor, I would like to offer
13 DIX1229 into evidence.

14 **MR. DETTMER:** Your Honor, again, this is an article
15 that this witness hasn't seen, by a witness who was here last
16 week. So we'd lodge objections on that.

17 **THE COURT:** I think it comes in under 803. At least
18 under judicial notice. So we'll admit it for the record.

19 (Defendants' Exhibit 1229 received in evidence.)

20 **MR. NIELSON:** Thank you very much.

21 **BY MR. NIELSON:**

22 **Q.** Now, please, turn back to tab 14, if you would. And
23 you'll see -- here, you'll find a document that we've talked
24 about earlier today.

25 **A.** Yes.

1 Q. If you could turn to page 333. And under "Within-Person
2 Variation or Change Over Time," the second pull paragraph,
3 you'll see a line that says:

4 "Further, both women's identification as
5 lesbian, bisexual, or heterosexual and
6 women's actual behavior can vary over time."

7 You agree with that, correct?

8 A. I'm sorry. I'm not sure where you are.

9 Q. Page 333.

10 A. I'm there.

11 Q. The second full paragraph under "Within-Person Variation."

12 A. Oh, okay.

13 Q. The first sentence says:

14 "Further, both women's identification as
15 lesbian, bisexual, or heterosexual and
16 women's actual behavior can vary over time."

17 And you agree with that, correct?

18 A. I think I've said that several times, that that can
19 happen, yes.

20 Q. All right. And page 345, if you could turn there.

21 And in the second full paragraph on the page, it's
22 quite near the bottom, actually, it's the last full paragraph
23 on the page. Part way through it reads, quote:

24 "The factors shaping women's attractions and
25 relationships vary across a life cycle. For

1 example, the role of sexual arousal and
2 passion may be different in the relationships
3 of adolescents, middle-aged women and older
4 adults. Although some women remain in the
5 same job throughout their life, other women
6 make major career changes. Similarly,
7 women's erotic and romantic attractions can
8 also shift and change during their
9 lifetimes."

10 Do you agree with that statement?

11 **A.** With the final statement?

12 **Q.** Well, let's break it up.

13 Do you agree that the factors shaping women's
14 attractions and relationships vary across the life cycle?

15 **A.** They can.

16 **Q.** Okay. Thank you.

17 And do you agree that women's erotic and romantic
18 attractions can shift and change during their lifetimes?

19 **A.** It can. They can, yes.

20 **Q.** All right. Thank you. And that's already in.

21 Please turn to tab 34 in the witness binder. And
22 you'll find here a document premarked DIX1270. Can you
23 identify that document?

24 **A.** This is the title page from an edited book called *The*
25 *Psychology of Sexual Orientation, Behavior, and identity*. A

1 *Handbook*. Edited by Louis Diamant and Richard McAnulty.

2 **Q.** All right. Thank you.

3 And if you look inside the document, you'll see that
4 there's a specific chapter here. Can you identify that?

5 **A.** Yes. So this is a chapter in this 1995 book, by Michael
6 Kauth and Seth Kalichman, titled "Sexual Orientation and
7 Development: An Interactive Approach."

8 **Q.** All right. Thank you.

9 Now, please turn to page 82 of the -- of the page.
10 Of the article. Excuse me.

11 And you'll see that it -- in the first column --
12 well, it's actually just page 82, I guess. It says:

13 "By sexual orientation, we mean the
14 cumulative experiences of interaction of
15 erotic fantasy, romantic-emotional feelings,
16 and sexual behavior directed toward one or
17 both genders. These three somewhat
18 independent and parallel dimensions are
19 traditionally conceived as being overlaid on
20 a plane of sexual orientation."

21 And that's similar to what we've discussed, correct?

22 **A.** I believe so.

23 **Q.** And then it says:

24 "This model suggests that sexual orientation
25 is not static and may vary throughout the

1 course of a lifetime."

2 Do you agree with that statement?

3 **A.** As I said earlier, it is possible. And it may vary, yes.

4 **Q.** All right. Thank you.

5 **MR. NIELSON:** Your Honor, I would like to offer
6 DIX1270 into evidence.

7 **THE COURT:** Very well. 1270 is admitted.

8 (Defendants' Exhibit 1270 received in evidence.)

9 **MR. NIELSON:** All right. Thank you.

10 **BY MR. NIELSON:**

11 **Q.** And please turn back to tab 19 in the binder.

12 And this is something we discussed earlier today.

13 And please turn to page 4 in this printout of this article.

14 And please look at the last full paragraph on the bottom of the
15 page.

16 We read a little bit from the paragraph that follows.

17 But in the last full paragraph, starting with the second
18 sentence, it reads:

19 "There is essentially no research on the

20 longitudinal stability of sexual orientation

21 over the adult lifespan. In other words,

22 even if one could satisfactorily measure the

23 complex components of sexual orientation as

24 differentiated from other aspects of sexual

25 identity at one point in time, it is still an

1 unanswered question whether this measure will
2 predict future behavior or orientation."

3 Do you disagree with that statement?

4 **A.** Well, I believe that what they're talking about here is
5 the absence of prospective longitudinal research, where the
6 same individuals are followed over a long period of their
7 lifetime, and where, ideally, you would do this with a large
8 representative sample of individuals.

9 I would say that we certainly do have retrospective
10 accounts from individuals pointing to consistency over the
11 course of their lifetime, in terms of many of these variables.

12 And we can go back, yet again, to the Laumann and
13 Gagnon study, which asked about attractions and identity in the
14 present, but asked about sexual behavior in the past.

15 So this unanswered question about whether the measure
16 will predict future behavior or orientation, I would say, given
17 the way they phrase this, it would be an unanswered question
18 in that they don't even -- are not proposing, I don't think, a
19 particular measure that one would even use in this.

20 And so, again, I would say, as I said before, that if
21 you are trying to predict a person's future sexual behavior,
22 especially if this is an adult, someone who has gotten past
23 adolescence and maybe even young adulthood, that you would
24 probably do best to hypothesize that their behaviors will be
25 consistent with their current sexual orientation, if in fact

1 they engage in sexual behaviors.

2 I believe one of the reservations I had in my
3 deposition was that you might not even know that the individual
4 is going to engage in any sexual behavior. So people end up
5 being celibate or asexual for various reasons.

6 **Q.** Sure.

7 **A.** But I would just say that, again, we do have these
8 retrospective accounts. The prospective study with the large
9 representative sample, it's true, we don't have.

10 **Q.** All right. Thank you.

11 And, now, I don't think they are talking about
12 celibacy here. I think they're talking about just, you know,
13 if you can satisfactorily -- even if you could satisfactorily
14 measure the complex components of sexual orientation, as
15 differentiated from other aspects of sexual identity, at one
16 point in time it is still an unanswered question whether this
17 measure will predict future behavior orientation. Do you
18 disagree with that?

19 **A.** Well, you know, it's noteworthy that one of the authors of
20 this paper is Randall Sell, who proposed that very complicated
21 way of measuring sexual orientation.

22 So the statement that even if one could
23 satisfactorily measure the complex components, I think,
24 perhaps, he was alluding to what I think was something he was
25 going to be publishing in the future. I don't think he had it

1 at the point that this paper was written.

2 But, yes, as far as, you know, predicting future
3 behavior or orientation, we don't have that sort of large-scale
4 prospective study.

5 **Q.** All right. Thank you.

6 Please, look at tab 16. This is the Laumann study
7 again. And please turn to page 310.

8 And since we're talking about retrospective data,
9 this is not longitudinal, to be sure. Starting at the bottom
10 of 310, last full sentence on the page --

11 **A.** I'm sorry, 310.

12 **Q.** Excuse me. Actually, it's not a full sentence. It's
13 starts on -- it's the sentence that starts at the bottom of
14 310, and doesn't finish until -- until the next page.

15 "Beginning with the distribution of partners
16 by gender in the last year, we find that 2.7
17 percent of the men had a male partner, and
18 1.3 percent of the women a female partner.
19 Of these, about three out of four report
20 having only same-gender partners in the past
21 12 months, while the other quarter had at
22 least one partner of each gender."

23 Okay. Are you familiar with those statistics?

24 **A.** Yes. I -- I'm generally familiar with this. Those
25 specific statistics I wouldn't have been able to quote you from

1 memory.

2 **Q.** All right. So that's for the last year. Then it goes on
3 to say:

4 "In the past five years, 4.1 percent of the
5 men and 2.2 percent of the women had at least
6 one same-gender partner. About half these
7 men had both male and female partners in this
8 time period. The women are more likely than
9 the men to have had sex with both men and
10 women than only same-gender partners. Almost
11 two-thirds of the women reporting a female
12 partner in the last five years also report a
13 male partner."

14 Are you familiar with those statistics,
15 Professor Herek?

16 **A.** Generally, yes.

17 **Q.** Okay. Thank you.

18 "The proportion of the men with male partners
19 since age 18 who report having had only male
20 partners declines to about 20 percent of the
21 total. For women, the comparable figure is
22 about 10 percent."

23 Are you familiar with those figures?

24 **A.** Again, in general, yes.

25 **Q.** So for one year it was 25 percent of men. And --

1 A. What?

2 Q. For both, actually. And then in the past five years, it
3 was 50 percent for men and two-thirds for women. Since 18 it
4 was 20 percent for men and 10 percent for women, who had had
5 exclusively same-sex partners, correct?

6 A. No, I don't think you said that correctly.

7 Q. All right. Let's do it one at a time.

8 A. Okay.

9 Q. For the past year, for both men and women, of the
10 individuals who had same-sex partners or a same-sex partner,
11 75 percent had only same-sex partners; whereas, 25 percent had
12 at least one opposite-sex partner, correct?

13 A. Correct.

14 Q. For the past five years, for all -- for men who had had a
15 same-sex partner during that period, 50 percent had also had an
16 opposite sex partner, correct?

17 A. Yes.

18 Q. And for women during the five-year period -- of the women
19 who had had a same-sex partner during that period, two-thirds
20 had also had a male partner, correct?

21 A. Correct.

22 Q. And looking since age 18, of men who had male partners
23 since 18, 80 percent had also had opposite-sex partners,
24 correct?

25 A. Yes. Apparently, at least one opposite-sex partner.

1 Q. Yes. And for women, that comparable figure since 18 is 10
2 percent. So only 10 percent of the women who had had a
3 same-sex partner since 18, had had exclusively same-sex
4 partners, correct?

5 A. Yes.

6 Q. And then it says:

7 "When the time period under consideration is
8 extended to all partners since puberty, the
9 proportion of men with only male partners
10 declines again, to 10 percent of the men with
11 any male partners."

12 Correct?

13 A. That's what it says.

14 Q. All right. And are you -- again, you're familiar with
15 those statistics, correct?

16 A. Yes. And, as I said, it's not terribly surprising that
17 many lesbians and gay men, at some point in their life, do end
18 up having sexual relationships with the person of the other
19 sex.

20 Q. And not just at some point in their life. In the past
21 five years, at least half -- though, I guess, this is not --
22 this is in terms of behavior, though?

23 A. Yeah, yeah. This is just talking about all the men and
24 women who reported any instance of same-sex behavior, or of
25 same-sex attraction or interest, or of being lesbian, gay, or

1 bisexual.

2 And, again, I think it's just important to keep in
3 mind that in this study the people who identified as lesbian,
4 gay, or bisexual, tended to be very consistent in reporting
5 their current attractions as being to the same sex, and as
6 reporting having partners of the same sex.

7 Although, it is the case that -- that some of them
8 earlier in life did have partners of the other sex, or at least
9 one partner of the other sex.

10 **Q.** This is specifically talking about same-sex partners, not
11 just attraction, correct? This is conduct.

12 **A.** This is about sexual behavior.

13 **Q.** Yes. Thank you.

14 All right. And that is already admitted.

15 Please turn to tab --

16 **MR. NIELSON:** Well, actually, the bad news, Your
17 Honor, is I have another binder. The good news is, it's much
18 thinner than this one.

19 **THE COURT:** It's what?

20 **MR. NIELSON:** It's much thinner than this one.

21 **THE COURT:** I see. So we can put this one aside, can
22 we?

23 **MR. NIELSON:** I may come back to it, so don't put it
24 too far off to the side.

25 **THE COURT:** I see.

1 **MR. NIELSON:** Your Honor, permission to approach.

2 **THE COURT:** Yes.

3 **MR. NIELSON:** Thank you.

4 **THE WITNESS:** Small. Very small.

5 **MR. NIELSON:** Very small.

6 **THE COURT:** Is this the last binder with this

7 witness?

8 **MR. NIELSON:** It is the last binder, Your Honor.

9 **THE COURT:** All right.

10 **MR. NIELSON:** I am happy to report, it is the last

11 binder.

12 **BY MR. NIELSON:**

13 **Q.** Okay. And in the second witness binder, if you could turn

14 to tab 35.

15 **A.** Okay.

16 **Q.** And you'll find here a document premarked DIX856.

17 **A.** Yes.

18 **Q.** And can you identify this document?

19 **A.** Uhm, this is an article from the journal *Developmental*

20 *Psychology*. From 2008. The author is Lisa Diamond. And the

21 title is "Female Bisexuality from Adolescence to Adulthood:

22 Results from a 10-Year Longitudinal Study."

23 **Q.** Thank you.

24 Are you familiar with this study?

25 **A.** I am familiar with this study, yes.

1 Q. Thank you.

2 And, again, you are familiar with Professor Diamond?

3 A. I am still familiar with Professor Diamond, yes.

4 (Laughter)

5 **THE COURT:** You haven't forgotten her yet.

6 **THE WITNESS:** Not yet.

7 **BY MR. NIELSON:**

8 Q. Right. Thank you.

9 All right. Now, this is a 10-year longitudinal study
10 of a group of non-heterosexual women, correct?

11 A. This particular article, I believe, only focuses on
12 non-heterosexual women. In her larger study, there were some
13 heterosexual women. But I don't believe she reports on them in
14 this paper.

15 Q. All right. Thank you.

16 And, please, turn to page 9. You'll see under
17 results in the -- well, just reading under "Change in
18 Identity," starting with the second line:

19 "In all, 32 percent of women changed
20 identities from T1 to T2, 25 percent from T2
21 to T3, 30 percent from T3 to T4, and
22 28 percent from T4 to T5."

23 And those are different points along the 10 years.

24 And then the next section says:

25 "By the 10-year point, 67 percent of

1 participants had changed their identities at
2 least once since T1, and 36 percent had
3 changed identities more than once."

4 So only 33 percent of the women she studied retained
5 the same sexual orientation across the 10-year period, correct?

6 **A.** Uhm, you know, in this study, she began by recruiting
7 about 89 women who did not identify as being heterosexual.

8 And so she recruited women who called themselves
9 lesbians, women who called themselves bisexuals, and also women
10 who said that they were uncertain about their sexuality or were
11 questioning their sexuality. And so what she found were these
12 patterns of women changing the labels that they attached to
13 their sexuality.

14 She, in her book, makes the point that, in her view,
15 this did not reflect a change in the women's sexual
16 orientation. And if you read her articles for this -- this
17 study as -- on a whole, what you see is that the patterns of
18 sexual attraction reported by the women tended to remain fairly
19 stable.

20 And it was the case that most of the change in
21 labeling was among the women who were initially calling
22 themselves bisexual or those who were initially unlabeled. So
23 there was movement back and forth between those two categories.
24 Some bisexual women came to call themselves lesbians. Some
25 bisexual women came to call themselves heterosexual.

1 As I understand it, there were very few women who
2 called themselves lesbian in the first place who called
3 themselves heterosexual at the end. I honestly don't know if
4 there were any who did that.

5 But there were some women who identified as lesbian
6 at the beginning who subsequently, after this study went on for
7 ten years and they had gotten out of college and had -- were in
8 their later 20s, adopted a label of bisexual for themselves.

9 **Q.** All right. Thank you.

10 And so this is a case where the identity was
11 changing, but not the attraction; is that what you are saying?

12 **A.** Well, I think -- yeah. Actually, I think that she often
13 focuses more on the word labeling more so than identity. But,
14 yes.

15 **Q.** All right.

16 **MR. NIELSON:** Your Honor, I would like to
17 introduce -- I would like to offer DIX-856.

18 **MR. DETTMER:** No objection, your Honor.

19 **THE COURT:** All right. 856 is admitted.

20 (Defendants' Exhibit 856 received in evidence)

21 **BY MR. NIELSON:**

22 **Q.** All right. Please turn to tab 35-A.

23 (Witness complied.)

24 **Q.** And here you'll will find an exhibit premarked DIX-626.
25 Can you identify that document?

1 **A.** This is an article with several authors. The first author
2 is Nigel Dickson, D-I-C-K-S-O-N. It's titled "Same-Sex
3 Attraction in a Birth Cohort: Prevalence and Persistence in
4 Early Adulthood."

5 It was published in 2003 in the journal *Social*
6 *Science and Medicine*.

7 **Q.** If you will look at page 1611, you will see this is a
8 longitudinal study that looked at 451 men and 436 women who
9 reported their current sexual attraction at both ages 21 and
10 26, correct?

11 **A.** I'm sorry. Could you say what page you are on again?

12 **Q.** It's on page 1611.

13 **A.** Oh, okay.

14 **Q.** And you will see under "Sexual attraction at ages 21 and
15 26." You will see this is an a longitudinal study with the 451
16 men and 436 women who reported their current sexual attractions
17 at both ages 21 and 26.

18 And then on page 1612, under the discussion in the
19 second paragraph, you see some fairly complex figures over that
20 showing the various permutations of change. But it says:

21 "The findings also reveal a surprising degree
22 of change over time. Ten percent of men and
23 nearly a quarter of the women reported
24 same-sex attraction at any time, but this
25 nearly halved for current attraction at age

1 26. The changes were not just in one
2 direction. The instability was most marked
3 for women, with a greater movement away from
4 exclusively heterosexual attraction from age
5 21 to 26 than among men."

6 **A.** I'm sorry. Could you tell me again where you are reading
7 from? I apologize.

8 **Q.** It's the first full paragraph from the first column on
9 1612.

10 **A.** Oh, okay.

11 **Q.** I will give you just a moment.

12 **A.** I'm there now. Yeah, I found you.

13 **Q.** Do those changes in any way surprise you?

14 **A.** Well, as I -- I don't believe I'm familiar with this
15 paper, but I am familiar with earlier papers that came from
16 this study.

17 And my recollection from the -- one of the earlier
18 papers was that I was concerned because in this rather large
19 sample, there were only nine males and I believe 11 women, 11
20 females, who identified as being lesbian, gay or bisexual. And
21 so there were problems with generalizing from such small
22 numbers.

23 But as I said earlier, adolescence and even into
24 early adulthood are times of identity formation and development
25 for many people, most people. And so in that sense I wouldn't

1 be surprised to see some changes in how people understand their
2 sexuality as they progress through their teens and into their
3 early twenties.

4 Q. All right. Thank you.

5 MR. NIELSON: And, your Honor, I would like to offer
6 DIX-626.

7 MR. DETTMER: No objection, your Honor.

8 THE COURT: Very well.

9 (Defendants' Exhibit 626 received in evidence.)

10 BY MR. NIELSON:

11 Q. All right. Please turn to tab 35-B, if you would.

12 (Witness complied.)

13 Q. Can you -- and here you will find a document premarked
14 DIX-666. And can you identify that?

15 A. I'm sorry. 666?

16 Q. DIX-666. It's at 35-B.

17 A. Okay.

18 Q. Okay. Can you on identify that document?

19 A. Yes.

20 Q. All right. Could --

21 A. I'm sorry. Would I? You asked me -- never mind. I
22 misheard you.

23 Q. No, that's all right. Go ahead.

24 A. This is an article published in the *Journal of Sex*
25 *Research* in 1997, multiple authors, the first them is Joseph

1 Stokes, and it's titled "Predictors of Movement Toward
2 Homosexuality: A Longitudinal Study of Bisexual Men."

3 **Q.** All right. Thank you.

4 And if you look at page 308, in the third column, you
5 will find that in this -- this is a one-year longitudinal
6 study, I suppose. And it says:

7 "On a self-rated seven-point sexual
8 orientation scale, 73 respondents moved
9 towards homosexuality (34 percent), 37 moved
10 towards heterosexuality (17 percent), and 106
11 did not change (49 percent) from Time 1 to
12 Time 2."

13 Correct?

14 **A.** And I'm sorry. I'm just trying to catch up to you. Can
15 you tell me again when you are reading from?

16 **Q.** From page 308, the top of the third column.

17 **A.** Okay. I'm there.

18 **Q.** And so of this sample, 73 percent moved towards
19 homosexuality, 34 percent moved towards heterosexuality, and
20 49 percent did not change. And this is a one-year longitudinal
21 study of bisexual men.

22 Do those numbers surprise you at all?

23 **A.** Well -- and, of course, it's important to remember that
24 this is not a representative sample, but just in looking at it
25 quickly -- and I believe I may have read this paper at one

1 point, but not for a long time -- they were recruiting, as they
2 say, relatively young men, men in their late teens and in their
3 twenties, who said that they had had sex with a man and, also,
4 sex with a woman. They had to meet both of those criteria in
5 the past three years.

6 And so it appeared -- and I'm just doing this very
7 quickly as I glance through it, but it would appear that they
8 were recruiting people based mainly on their sexual behaviors.

9 And so the idea, again, that in early adulthood some
10 people who had engaged in sexual behavior with both men and
11 women would at some point shift toward being exclusively with
12 either men or women does not particularly surprise me, and it
13 appears that roughly half of them did not change during that
14 time period.

15 **Q.** All right. Thank you.

16 **MR. NIELSON:** And, your Honor, I would like to offer
17 DIX-666.

18 **MR. DETTMER:** No objection, your Honor.

19 **THE COURT:** Very well.

20 (Defendants' Exhibit 666 received in evidence)

21 **BY MR. NIELSON:**

22 **Q.** We have talked about change, Professor Herek, and no one
23 in this case is suggesting that gay men and lesbians should be
24 forced to change their sexual orientation or even attempt to do
25 so.

1 But is it your opinion that a gay man or lesbian who
2 wishes to change his or her sexual orientation can never do so?

3 **A.** It's my opinion that the current research does not
4 indicate that interventions that are designed for that purpose
5 have been shown to be effective using the criteria that I
6 described this morning.

7 It certainly is the case that there have been many
8 people who, most likely because of societal stigma, wanted very
9 much to change their sexual orientation and were not able to do
10 so.

11 Whether or not it is something that could possibly
12 happen, I don't know. I think that we simply don't have data
13 that indicate that any of the interventions that have been
14 developed for this purpose are effective or safe.

15 **Q.** All right. And stepping back from the rather technical
16 definition of "effective" that you have offered, which involved
17 generalizability and absence of harm and a variety of things,
18 if I recall, and just speaking in ordinary language, do you
19 believe it's impossible for someone to change their sexual
20 orientation who wishes to?

21 **A.** I would be reluctant to say that anything is impossible,
22 so I -- I would not say it's impossible.

23 **Q.** And there are self-reports of people who say that that has
24 happened, correct?

25 **A.** There are, indeed, self-reports of people who say that has

1 happened.

2 **Q.** All right. Thank you.

3 And is it your opinion that such attempts are always
4 harmful?

5 **A.** That interventions to change people's sexual orientation
6 are always harmful?

7 **Q.** Yes.

8 **A.** No. Again, as I said earlier, we don't have experimental
9 data on either that would suggest that these treatments are
10 effective, nor do we have experimental data showing that they
11 are consistently harmful.

12 We do have some data from experimental studies
13 showing harm to some of the participants, and we do have
14 self-reports of people who believed or perceived that they were
15 harmed as a result of going through one or more of these
16 interventions.

17 **Q.** And you said two things. You said self-reports of harm?

18 **A.** Yes.

19 **Q.** And you said -- before that you said some data?

20 **A.** Yes.

21 **Q.** All right. And what -- what particularly do you have in
22 mind there?

23 **A.** Well, if you read the research reports, most of them
24 published in the 1970's, 19- -- mostly in the 1970's, I
25 believe, what you see is that there are reports in those

1 studies that some people who were experiencing some sort of
2 intervention or therapy or treatment designed to change them
3 from homosexual to heterosexual experienced or were observed to
4 have clinical depression or anxiety or other sorts of negative
5 experiences or negative psychological states, you know, that
6 were -- that happened in conjunction with going through these
7 treatment programs.

8 **Q.** All right. But, again, the data is quite limited,
9 correct, in -- both with respect to whether it can happen and
10 whether it's -- it's harmful, is that correct?

11 **A.** Well, the data that are available don't suggest that these
12 interventions are effective, meaning that they work most of the
13 time with the people they are supposed to work with and that
14 they do so safely.

15 **Q.** Yes. Now, thank you, I believe I understand your
16 technical definition of "effective."

17 Let's turn to tab 35-C of the binder.

18 (Witness complied.)

19 **Q.** And can you -- you will find here a document premarked
20 PX-1503. And can you identify that document?

21 **A.** This is an article by Robert Spitzer, published in the
22 *Archives of Sexual Behavior* in 2003. The title is "Can Some
23 Gay Men and Lesbians Change Their Sexual Orientation? 200
24 Participants Reporting a Change From Homosexual to Heterosexual
25 Orientation."

1 Q. All right. Thank you.

2 Now, you are familiar with the author, correct?

3 A. I don't know the author personally. I know who he is.

4 Q. Right. And he is a very prominent psychiatrist who is
5 certainly considered to be an expert in his field, correct?

6 A. He is a very prominent psychiatrist who is considered to
7 be an expert on clinical diagnosis and, in fact, he was
8 involved in many of the deliberations surrounding changes to
9 the Diagnostic and Statistical Manual of Mental Disorders.

10 Q. And by that you mean the decision to remove homosexuality
11 as a disorder, correct?

12 A. Well, he was involved in many other aspects of the DSM as
13 well.

14 Q. Thank you.

15 And he was very closely involved in the process that
16 led to the removal of homosexuality from the Diagnostic and
17 Statistical Manual, correct?

18 A. I believe that he was chairing or was at least a prominent
19 member of the committee of the American Psychiatric Association
20 convened on that question.

21 Q. And please turn to page 413?

22 (Witness complied.)

23 Q. And please look in the second column, the first full
24 paragraph. And it writes:

25 "This study indicates that some gay men and

1 lesbians following reparative therapy report
2 that they have made major changes from a
3 predominantly homosexual orientation to a
4 predominantly heterosexual orientation."

5 Now, I understand in your work you have raised
6 questions about whether that finding can be generalized in any
7 meaningful way, correct?

8 **A.** Well, you know, that sentence, I think, accurately states
9 what he found, which is that some gay men and lesbians report
10 that they made major changes and they did that after they had
11 been through one of these reparative therapy interventions. So
12 I wouldn't take issue with that statement.

13 What I would take issue with is going beyond that
14 statement to say that this study actually shows that it was
15 those interventions that brought about this self-perceived
16 change in sexual orientation and that these same individuals,
17 who were highly religious and, in fact, belonged to various
18 organizations that were promoting the idea of behavior change
19 for homosexuals, that they wouldn't have changed simply on
20 their own without this intervention. The study doesn't show
21 that.

22 **Q.** All right. Thank you.

23 But you don't question the specific findings that we
24 just read, correct?

25 **A.** People reported to him that they felt they had changed.

1 Q. All right. Thank you.

2 MR. NIELSON: And, your Honor, I would like to offer
3 PX-1503 into evidence.

4 MR. DETTMER: No objection, your Honor.

5 THE COURT: Very well.

6 (Plaintiffs' Exhibit 1503 received in evidence.)

7 BY MR. NIELSON:

8 Q. And, now, do you question whether those reports from the
9 individuals were accurate?

10 A. Well, the problem is that we know that people are not
11 always aware of their mental processes and they are not always
12 aware of why things happen or why they do things.

13 This is the reason why when we are trying to test the
14 effectiveness of a treatment or a drug, we use an experimental
15 design, which means that we randomly assign people to various
16 groups and we then observe, before and after their
17 participation in the group, exactly what has happened on the
18 variable of interest.

19 We also, I think, are generally familiar with things
20 such as the placebo effect; that people will sometimes in a
21 pharmaceutical study get a sugar pill and they will feel better
22 or some of their symptoms will go away, but they didn't
23 actually receive the drug. They just received a placebo.

24 So this is just an illustration of how people are not
25 really necessarily able to tell you why things have happened to

1 them or why things have changed sometimes.

2 **Q.** All right. Now, in your studies haven't you relied on
3 self-reporting?

4 **A.** Yes.

5 **Q.** And do you take individuals at their word, correct?

6 **A.** Well, I try not to, usually anyway, ask questions that
7 would require people to report things that they're not capable
8 of reporting.

9 But I would say that in my research where -- in
10 situations where I have tried to show cause and effect, I have
11 tried to use an experimental design for that purpose.

12 **Q.** All right. For example, when you ask individuals whether
13 they experience little or no choice with respect to their
14 sexual orientation, you take them at their word, correct?

15 **A.** Umm, I take them at their word, that they experience
16 little or no choice, yes.

17 I -- I don't think that's a matter of them saying,
18 for example, how they became lesbian or gay or bisexual. It's
19 rather just simply asking them, have they experienced conscious
20 choice in this regard. And what most of the lesbians and gay
21 men said was that, no, they didn't experience conscious choice.

22 **Q.** All right. Thank you.

23 Please turn to tab 35-D in the witness binder.

24 (Witness complied.)

25 **Q.** And you will find a document premarked DIX-1014. I'm sure

1 you will be able -- you can identify this document, correct?

2 **A.** Well, this is -- actually, it's not on here. This appears
3 to me to be an actual copy of a letter that Sigmund Freud wrote
4 to a woman from the United States that had written to him about
5 her son being homosexual, and it's often referred to as *The*
6 *Letter to an American Mother*.

7 I believe this was published quite a long time ago in
8 a psychiatric journal, but I don't remember which one and the
9 reference is not -- it's not here.

10 **Q.** Thank you.

11 And, fortunately, for us there's a -- a typewritten
12 copy of the letter, if you look to -- on page 787. So we don't
13 have to try and read the handwriting.

14 Now, please look at -- reading from the typewritten
15 version, the first full paragraph on page 787. And this is
16 Freud responding to an America Mother, as you said.

17 **A.** Yes.

18 **Q.** (As read)

19 "By asking me if I can help, you mean, I
20 suppose, if I can abolish homosexuality and
21 make normal heterosexuality take its place.
22 The answer is, in a general way, we cannot
23 promise to achieve it. In a certain number
24 of cases we succeed in developing the
25 blighted germs of heterosexual tendencies

1 which are present in every homosexual, in the
2 majority of cases there is no more possible.
3 It is a question of the quality and the age
4 of the individual. The result of treatment
5 cannot be predicted."

6 Now, do you believe Freud was mistaken when he said
7 that in a certain number of cases we succeed in developing what
8 he described as the blighted germs of heterosexual tendencies?

9 **A.** Well, you know, Freud was writing this in 1935, and at
10 that time there were certainly psychoanalysts who attempted to
11 cure homosexuality.

12 Although it's -- I think it's relevant to note that
13 in this letter in the first paragraph Freud said:

14 "Homosexuality is assuredly no advantage, but
15 it is nothing to be ashamed of, no vice, no
16 degradation, it cannot be classified as an
17 illness; we consider it to be a function -- a
18 variation of the sexual function produced by
19 a certain arrest of sexual development."

20 He goes on to list people like Michelangelo and
21 Leonardo, who were homosexuals, and says:

22 "It is a great injustice to persecute
23 homosexuality as a crime and cruelty too."

24 In the context of him -- oh, I'm sorry.

25 **Q.** So Freud plainly did not have animus towards homosexuals,

1 correct?

2 **A.** Right. And what he was telling the mother who wrote this
3 was that -- in the last paragraph:

4 "What analysis can do for your son runs in a
5 different line. If he is unhappy, neurotic,
6 torn by conflicts, inhibited in his social
7 life, analysis may bring him harmony, peace
8 of mind, full efficiency, whether he remains
9 a homosexual or gets changed."

10 Freud, I believe -- I'm not a Freud scholar, but I
11 believe that Freud actually very pessimistic about the
12 likelihood of psychoanalysis being able to change a person's
13 sexual orientation.

14 His comment there about the germs of heterosexuality
15 are consistent with Freud's general view of human sexuality.
16 His theory was that all people are inherently bisexual and that
17 they become heterosexual or homosexual only in the course of
18 their development.

19 **Q.** All right. Thank you.

20 But -- and that is certainly the other parts of the
21 letter and I -- but he specifically says, "In a certain number
22 of cases we succeed."

23 Do you believe he was mistaken, misrepresenting?

24 **A.** You know, there is a real problem with looking at
25 intervention attempts by psychoanalysts; not just Freud, but by

1 other psychoanalysts. Because typically you have a situation
2 in which the analyst is the person who's, if you will, both
3 administering the treatment and monitoring its success. And so
4 the analyst wants very much for it to succeed. Often the
5 patient wanted very much for this to succeed. And in that sort
6 of situation there is a great possibility for the patient to
7 indicate to the analyst, either consciously or unintentionally,
8 that he or she is changing and that may not, in fact, be
9 happening.

10 So the standards for how we evaluate the
11 effectiveness of an intervention are -- were not followed by
12 Freud or by other analysts to whom he might have been referring
13 in that letter.

14 **Q.** All right. Thank you.

15 So do you think it's impossible that he might have
16 been both accurate and honest in making that statement?

17 **A.** Well, I didn't mean to imply that Freud was dishonest in
18 any way.

19 (Laughter.)

20 **A.** In terms of accuracy, I would say that he might have
21 perceived this as being an effective change, but whether or not
22 that would pass muster with current standards of experimental
23 research would be an open question.

24 **Q.** All right. Thank you.

25 **MR. NIELSON:** Now, your Honor, I have a little bit

1 more, though it's a fairly good breaking point, if --

2 **THE COURT:** Why don't we plow on?

3 **MR. NIELSON:** Yes, your Honor.

4 **THE WITNESS:** Your Honor --

5 **THE COURT:** Let's ask the witness.

6 **THE WITNESS:** I was wondering how long we were likely
7 to plow on. I may request a break otherwise.

8 **THE COURT:** That's a good question. How much longer
9 do you think you have?

10 **MR. NIELSON:** It depends, in part, of the length of
11 the answers, to be honest, but I think probably between --
12 probably about a half hour to 45 minutes.

13 **THE COURT:** Okay. Do you want a break?

14 **THE WITNESS:** I'll stay pat for the moment.

15 **THE COURT:** If the situation changes, we will be
16 happy to take a break. Why don't we just stand up anyway and
17 stretch.

18 **MR. DETTMER:** Your Honor, I obviously will have some
19 redirect. I will keep it as brief as possible, but just for
20 our planning purposes. I'm thinking no more than a half hour.

21 **THE COURT:** I understand.

22 (Brief pause.)

23 **THE COURT:** Counsel, we are going to take a break.
24 Five minutes.

25 **THE WITNESS:** Much appreciated, your Honor.

1 (Whereupon there was a recess in the proceedings
2 from 3:26 p.m. until 3:35 p.m.)

3 **THE COURT:** Very well, Mr. Nielson. Carry on.

4 **BY MR. NIELSON:**

5 **Q.** Now, Professor Herek, I would like to turn to the
6 development and origins of sexual orientation.

7 Now, because the term "homosexuality" encompasses
8 many distinct phenomenon, attempting to identify the origins of
9 homosexuality and, more broadly, sexual orientation is a
10 difference task, correct?

11 **A.** What I have said in my expert report and elsewhere is that
12 there are many different theories about the origins of sexual
13 orientation in general; not just homosexuality, but also
14 heterosexuality. And there really is no consensus on what the
15 origins are of a person's sexual orientation.

16 **Q.** Please turn to tab five in the witness binder, if you
17 would.

18 **A.** I'm sorry?

19 **Q.** Please turn to tab five in the witness binder.

20 **A.** This is back in the old -- the bigger one?

21 **Q.** Yes.

22 (Witness complied.)

23 **Q.** And please look at page 151 in the second column, and
24 please look under "Origins" in the bottom of the first
25 paragraph.

1 **A.** Yes.

2 **Q.** And you are speaking about homosexuality. You say:

3 "Because the term encompasses many distinct
4 phenomenon, however, attempting to identify
5 the origins of homosexuality and, more
6 broadly, sexual orientation is a difficult
7 task."

8 Correct?

9 **A.** Yes, yes.

10 **Q.** And those are your words?

11 **A.** Correct.

12 **Q.** The factors that cause an individual to become
13 heterosexual, homosexual or bisexual are not currently well
14 understood, correct?

15 **A.** That is correct.

16 **Q.** And the origins of sexual orientation, why a particular
17 person becomes heterosexual or gay or lesbian or bisexual, is
18 an area where there has been a lot of discussion, a lot of
19 dispute, correct?

20 **A.** That's correct.

21 **Q.** No compelling evidence has yet been offered to demonstrate
22 clearly the origins of adult sexuality, correct?

23 **A.** That is correct.

24 **Q.** Widely-differing sources for adult sexual orientation have
25 been proposed, but no single theory enjoys unequivocal

1 empirical support, correct?

2 **A.** That is correct.

3 **Q.** Thank you.

4 It seems likely that a wide variety of biological,
5 psychological, social and cultural variables that contribute to
6 sexual orientation will eventually be identified, with
7 different individuals arriving at their adult orientation in
8 different ways, correct?

9 **A.** That's my speculation. And I believe it's accurate, but
10 it is my speculation.

11 **Q.** All right. Thank you.

12 And so is that your opinion?

13 **A.** Well, it's -- it's my hypothesis, I guess I would say.
14 Subject to revision in the light of different data, but at the
15 moment, yes, I would say that that's my opinion.

16 **Q.** All right. Based on the data currently available, is
17 that --

18 **A.** Correct.

19 **Q.** Okay, thank you.

20 Debates about the origins of sexual orientation have
21 led to a more pluralistic view of human sexuality, correct?

22 **A.** Are those my words?

23 **Q.** They are.

24 **A.** Just can you tell me where they are from, so I have a
25 context for it?

1 Q. It's tab six, if you'd like, and it's page 686.

2 A. Okay. Oh, under the "Origins of Sexual Orientation."

3 This is from the *Corsini Encyclopedia* article, right?

4 Q. Correct.

5 A. Okay.

6 Q. So do you agree with that statement:

7 "Debates about the origins of sexual
8 orientation have led to a more pluralistic
9 view of human sexuality."

10 A. Yeah. I'm just trying to find where you are reading from.

11 I'm sorry. Can you point to me -- point me to the
12 place on the page or just which column or which paragraph?

13 Q. It's the second column, the second full paragraph. Can
14 you find that?

15 A. Oh, the second full paragraph, okay.

16 Q. Yes.

17 A. Okay. Yes, okay. I see it now okay.

18 Q. All right. Thank you.

19 Scientists are increasingly coming to appreciate that
20 homosexuality and heterosexuality are not unitary phenomena and
21 that even in our own culture, different people develop and
22 express their sexual orientation in different ways, correct?

23 A. Yes.

24 Q. Based on these insights, no single theory seems likely to
25 be able to explain the development of heterosexuality or

1 homosexuality in all people, correct?

2 **A.** Correct.

3 **Q.** Indeed, in --

4 **A.** That is my speculation. I mean, I'm saying that, but I
5 believe it's accurate.

6 **Q.** Okay, thank you.

7 Indeed, some researchers have emphasized this view by
8 framing their work in terms of heterosexualities and
9 homosexualities, correct?

10 **A.** Right. And those -- those have been mainly ways of trying
11 to identify this diversity within those groups, along the lines
12 similar to what we discussed earlier, differences in age, race
13 and ethics, location; all sorts of things that contribute to
14 differences and experiences of one's sexuality.

15 **Q.** All right. Thank you.

16 And in this specific context where you're talking
17 about the origins, I assume you are talking about a variety of
18 potential causes as well, correct?

19 **A.** Well, I do posit that. I think that by the time we got to
20 that last section of that paragraph, I was just pointing out
21 that in studying -- in not coming up with a single explanation
22 for what causes an individual to have a particular sexual
23 orientation, this was generating lots of other questions, as
24 well, about sexual orientation and those questions were
25 pointing to variations within the population of heterosexual

1 people and the population of homosexual people.

2 And so I believe that was where I was going with that
3 comment about increasing pluralism -- or leading to a more
4 pluralistic view.

5 **Q.** All right. Thank you.

6 So people arrive at a homosexuality identity through
7 various routes, correct?

8 **A.** Well, that's my speculation, but I believe it's probably
9 true.

10 **Q.** All right. Thank you.

11 Some individuals, for example, identify as gay only
12 after multiple homosexual experiences; whereas, others form a
13 gay] identity without having engaged in homosexual behaviors,
14 correct?

15 **A.** That's correct.

16 **Q.** Some women develop a lesbian identity primarily on the
17 basis of feminist political values rather than erotic
18 attractions, correct?

19 **A.** Well, that's a statement that I believe was accurate at
20 the time that I wrote this.

21 I think that that phenomenon, which is sometimes
22 referred to as the political lesbian -- a woman who identifies
23 as a lesbian through a sense of political solidarity with
24 lesbians and has an embracing of a feminist ideology -- I
25 believe that that was much more common in the 1970's and,

1 perhaps, in the 1980's than it is today.

2 It probably still does occur, but I don't think it's
3 as widespread as it might have once been.

4 **Q.** Is it a true statement for some women?

5 **A.** Well, it was at the time that I wrote this, and I would
6 imagine that there are still some women today who would
7 identify themselves as political lesbians.

8 **THE COURT:** Why do you believe that's less common
9 today than it was 20, 30 years ago.

10 **THE WITNESS:** Well, I'm not sure, your Honor, but I
11 would just say that I -- in a way it's almost because of the
12 absence of seeing a lot of research on those sorts of women.

13 So at one point that concept, it showed up in a
14 number of places in different research studies or descriptions
15 of especially lesbian communities. And I just haven't seen it
16 as much in recent times as it -- as was the case in those
17 earlier times.

18 So that's the basis for my speculation that it may
19 not be as common as it once was.

20 **THE COURT:** Very well.

21 **MR. NIELSON:** Thank you, your Honor.

22 **BY MR. NIELSON:**

23 **Q.** There is increasing evidence from the research that has
24 been done looking at samples, probability samples of lesbian,
25 gay and bisexual people, that it may very well be the case that

1 this is a population that tends to have a higher educational
2 level on average than heterosexuals, correct?

3 **A.** Is this from the same passage?

4 **Q.** No. This is from your deposition transcript.

5 **A.** Oh, okay. Okay. Good. I was just getting lost.

6 Yeah. It may very well be the case that on average
7 lesbians and gay men in the United States have a higher
8 educational level than comparable heterosexual men and women.

9 **Q.** Now, you don't know that we have a rally clear
10 understanding of this correlation with education, correct?

11 **A.** Correct. There are reasons that we can speculate. For
12 example, it seems likely that many women who marry
13 heterosexually may leave school, leave college, or not go to
14 college at all in order to do so.

15 Lesbians are less likely to encounter the situation
16 where a relationship would mean that they had to leave school,
17 move to another part of the country to be with their partner,
18 those sorts of things. So that's, at least, one plausible
19 explanation why we might see higher educational levels among
20 lesbians than among heterosexual women.

21 It's also possible that we might see higher levels of
22 education among gay men for a somewhat similar reason in that
23 they, perhaps, are not likely to get married at an early age
24 and -- at an age where they might have to stop going to school
25 in order to take a full-time job or more than one full-time job

1 to support a family. Those are speculations about why there
2 might be that educational discrepancy.

3 Q. Okay. So those are speculations, correct?

4 A. Correct.

5 Q. But we don't really have a clear understanding of the
6 correlation, correct?

7 A. Well, I'm not aware of other data that would exist to
8 explain that.

9 Q. But the correlation does seem to be a difference that has
10 emerged in the number of different studies, so it seems to be a
11 real difference, correct; the educational?

12 A. Well, it -- it may very well be a real difference, I
13 believe. In my study, for example, we found higher educational
14 levels than would be expected from comparable heterosexuals
15 among lesbians and gay men.

16 So it seems like it may very well be a real
17 difference, yes.

18 Q. All right. Thank you.

19 Please turn to tab 35-E in the witness binder?

20 (Witness complied.)

21 A. This is Volume 2, right?

22 Q. Volume 2.

23 And this is a transcript of the proceedings in this
24 Court in this trial on January 12, and this was testimony given
25 by Professor Cott.

1 Are you familiar with Professor Nancy Cott?

2 **A.** I'm not directly familiar with her. I have some sense of
3 who she is.

4 **Q.** All right. Thank you.

5 You will see on the page I have reproduced of the
6 trial transcript on page 328, line 6 she was asked:

7 **"QUESTION:** Do you believe that behavior is
8 really infinitely malleable by social
9 circumstances and by culture?"

10 And she answers:

11 **THE WITNESS:** Just about infinitely, yes."

12 Do you agree with that statement?

13 **A.** That behavior is infinitely malleable by social
14 circumstances and by culture?

15 **Q.** She qualifies it with "just about infinitely."

16 **A.** "Just about infinitely." How can you be just about
17 infinitely?

18 (Laughter.)

19 **Q.** Well, you can go on. The question after that is:

20 **"QUESTION:** With is the sole exception of
21 self-preservation?"

22 And she says:

23 **"ANSWER:** I think you have to except that,
24 yes."

25 So that appears, to me, to be her qualification.

1 **A.** Well, you know, behavior is certainly a very broad topic,
2 and to say that all aspects of behavior are malleable by social
3 circumstances and by culture, I would be -- I personally would
4 want to think about that one for awhile before I would say
5 "yes" or "no."

6 It seems like it's such an all-encompassing
7 statement, and this isn't really something that I have thought
8 about this these terms.

9 **Q.** All right. As you sit here now, if you are not able to
10 say "yes" or "no," are you able to say whether this -- you
11 believe that's an unreasonable statement?

12 **A.** Well, I would assume that Professor Cott had a reason for
13 making it. I just would say that if you are asking me if I
14 agree with that statement, I -- I would have to think about it
15 for awhile.

16 **Q.** Fair enough. Thank you.

17 Please turn to tab 10 in the witness binder. Again,
18 this is the big one.

19 (Witness complied.)

20 **THE COURT:** I thought we were done with the big one?

21 **MR. NIELSON:** I'm trying to do this topically, your
22 Honor, so I'm having to refer back occasionally to --

23 **THE COURT:** Okay.

24 **BY MR. NIELSON:**

25 **Q.** And this is the --

1 **A.** This is the article I haven't seen before.

2 **Q.** Yes. This is by Professor Badgett. It's the -- and we
3 have looked at it before, as you said.

4 Please turn to page 23, and the paragraph that's in
5 the middle of that page, it's the second full paragraph. She
6 writes:

7 "Further complicating matters, sexual
8 behavior and sexual identities might also be
9 related in some way to economic outcomes or
10 to an individual's socioeconomic class
11 background. From a rational choice
12 perspective, à la Richard Posner (1992), the
13 choice of a same-sex partner is an outcome
14 determined by individual preferences and
15 budget constraints. According to Posner,
16 factors like high incomes that reduce search
17 costs for sexual partners will increase
18 homosexual sex for men."

19 Do you believe that it's possible that Judge Posner's
20 theory is correct?

21 **A.** I actually don't think I understand Judge Posner's theory
22 on the basis of just that sentence.

23 **Q.** Okay. As described here --

24 **A.** Is he saying that men who have strong attractions to other
25 men, if they have a high level of income, might be able to have

1 more sexual partners because that income allows them to travel
2 to places where they might meet more partners or do other
3 things that might let them come into contact with more men who
4 are potential partners? Is that what he is saying?

5 **Q.** What she wrote here is -- it just -- it's on the page. It
6 says:

7 "From a rational choice perspective, à la
8 Richard Posner the choice of a same-sex
9 partner is an outcome determined by
10 individual preferences and budget
11 constraints. According to Posner, factors
12 like high incomes that reduce search costs
13 for sexual partners will increase homosexual
14 sex for men."

15 As written, is your -- are you essentially unable to
16 understand that; is that your testimony?

17 **A.** I wouldn't be comfortable commenting on it without
18 understanding exactly what Judge Posner is saying here.

19 **Q.** Okay. Then she goes on to say:

20 "A more sociological model of behavior that
21 involves sexual scripts and social networks
22 could have a similar implication. A family's
23 economic status might influence the scripts
24 and networks that individuals eventually
25 operate within and openness to homosexuality

1 might vary by economic class or other norms
2 correlated with family background."

3 Do you believe that it's possible that that theory
4 described there is correct?

5 **A.** Well, yeah. I think, if I'm reading this correctly, in
6 the next sentence she is talking about that correlation of --
7 or the fact that it appears that in the Laumann, et al, study
8 that it was the more educated women and men who were more
9 likely to have same-sex partners and to identify as lesbian,
10 gay or bisexual.

11 So, I mean, one possibility is that having the higher
12 education leads one to identify or have more sexual partners of
13 the same sex.

14 The other possibility is the one that I was
15 suggesting a moment ago, which is that perhaps people who are
16 lesbian or gay and perhaps bisexual are more likely to pursue a
17 longer term of education.

18 I think we have a correlation here, and a correlation
19 is inherently a relationship in which we cannot determine the
20 causal direction without further research.

21 **Q.** So that could be correct, this theory as well as the one
22 you posited; is that what you are saying?

23 **A.** The one that's posited here in the Badgett paper or the
24 one that I posited?

25 **Q.** The one posited in the Badgett paper.

1 **A.** I guess it is stated as a hypothesis that could be tested.

2 **Q.** And could it be correct? Do you have any reason, as you
3 sit here today, to say that I it -- you believe that could not
4 be correct?

5 **A.** Well, you know, again --

6 **MR. DETTMER:** Objection, your Honor. Calls for
7 speculation.

8 **THE COURT:** Maybe you could rephrase, Mr. Nielson?

9 **BY MR. NIELSON:**

10 **Q.** As you sit here today, do you have any reason to believe
11 that that statement is not -- could not be correct?

12 **A.** Well, as I sit here today, I have to reiterate that I
13 haven't read this article and so I'm very reluctant to evaluate
14 a particular sentence that's been pulled out of it this way
15 without having the benefit of understanding the context in
16 which Professor Badgett was offering this hypothesis.

17 So I -- I would just say I can't really say whether
18 it's plausible or not. It may be, but I would really need to
19 have read the entire article to understand exactly what this
20 means.

21 You know, I'd say, also, this looks to me like an
22 economist's argument and I'm not an economist. So I would have
23 to -- it would be a challenge, I suspect, for me to fully
24 understand this, especially off-the-cuff like this.

25 **Q.** Right. And you read the next sentence that says:

1 "The finding by Laumann that more educated
2 women and men are more likely to have had
3 same-sex partners and to identify as LGB
4 could fit either theory."

5 And that's, I guess, referring to the Richard Posner
6 theory and the sociological theory, correct?

7 **A.** I believe that's what she is saying.

8 **Q.** All right. Thank you.

9 Please turn to tab 29 in the witness binder.

10 (Witness complied.)

11 **THE COURT:** Where do I find it?

12 **MR. NIELSON:** The big one.

13 **A.** So this is back at the Garnets and Peplau article again?

14 **BY MR. NIELSON:**

15 **Q.** Correct, correct. As you point out, we have looked at
16 this.

17 And let's turn to the bullet points on page four.

18 And the fourth bullet point says:

19 "Women's sexual orientation is shaped by such
20 social and cultural factors as women's
21 education, social status and power, economic
22 opportunities and attitudes about women's
23 roles."

24 Do you agree with that statement?

25 **A.** Well, again, this is another article that I haven't read,

1 and it's a very brief one as well.

2 I would -- before commenting on that statement, I
3 would want to read it in more detail and be sure that I
4 understood what research they are basing that particular
5 statement on.

6 So, for example, the idea that women's sexual
7 orientation is shaped by such social and cultural factors such
8 as women's education, I'm not sure if they are talking about
9 that correlation between sexual orientation and level -- length
10 of education, or if they are talking about some other aspects
11 of education.

12 So, again, it's one that I just really would have
13 trouble commenting on without having read something that
14 elaborated upon this research.

15 **Q.** So as you sit here, you are not able to say whether you
16 agree with that statement or not, is that it?

17 **A.** Yeah, I guess I would say that. It may be partly the
18 hour, but I'm finding that I'm having -- I would need to look
19 at this more and ideally look at it in a context where they are
20 citing some of the research studies they are talking about.

21 **Q.** All right. Thank you.

22 And look at the last bullet point underneath it. It
23 says:

24 "There is no single developmental pathway
25 leading to a heterosexual, bisexual or

1 lesbian outcome."

2 Do you agree with that statement?

3 **A.** Well, as I said earlier, I think that it's very likely
4 that we will discover that people have multiple developmental
5 pathways to their adult sexual orientation.

6 So this is certainly consistent with that hypothesis
7 of my own.

8 **Q.** Okay. Thank you.

9 Please turn to tab 30.

10 (Witness complied.)

11 **Q.** And, again, this is an article by Professor Peplau.

12 **A.** Yes.

13 **Q.** Look at -- please look at page 12, if you would.

14 In the first column towards the top of the page, I
15 believe it's the first full paragraph, she writes:

16 "In summary, the concept of erotic plasticity
17 is the cornerstone of a new paradigm for
18 understanding women's sexual orientation.
19 Women's sexuality is not tightly scripted by
20 genetic or hormonal" -- hormon- -- excuse me,
21 latest of the hour for me, too -- "or
22 hormonal influences. Rather, it is
23 responsive throughout the lifespan to a wide
24 variety of cognitive, social and
25 environmental influences."

1 Do you agree that women's sexuality is not tightly
2 scripted by genetic or hormonal influences?

3 **A.** Well, I believe that this needs to be read in comparison
4 to men's sexuality, which I'm guessing -- again, I haven't read
5 this article either, but I'm guessing that Professor Peplau is
6 offering that contrast, as she has in some other papers, and
7 pointing out that as researchers have found, women's sexuality,
8 defined broadly -- not only in terms of sexual orientation, but
9 in many other aspects -- does seem to be more responsive to
10 situational and environmental factors than is the case for
11 men's sexuality.

12 So I would say if you are thinking of in that
13 comparison between men and women, that this notion of erotic
14 plasticity -- which, again, is broadly defined -- is a more
15 applicable notion to men -- I'm sorry, to women than to men, I
16 believe that that is accurate based on the research that we
17 have to date.

18 **Q.** Right. And she speaks specifically of erotic plasticity
19 as a new paradigm for understanding women's sexual orientation;
20 not just sexuality more broadly understood, correct?

21 **A.** Well, the erotic plasticity concept is about sexuality
22 broadly understood, and I believe she says this is the
23 cornerstone of a new paradigm for understanding women's sexual
24 orientation.

25 **Q.** All right. Thank you.

1 Now, she goes on, as you will see, she talks about a
2 variety of -- she talks about the variety and nature of women's
3 romantic and sexual relationships.

4 And then at the bottom of page 13 in the first column
5 she says:

6 "One implication of this research is that the
7 very concept of sexual orientation may be
8 misguided."

9 Do you think there is any chance that that could be
10 correct?

11 **A.** Well, you know, again, I haven't read this paper before,
12 so I'm very reluctant to evaluate sentences taken out of
13 context.

14 I would say in some of her other work, Professor
15 Peplau has focused on that word "sexual" in orientation and has
16 pointed to the concept that I was talking about at the
17 beginning of the day, of sexual orientation being very much a
18 relational construct.

19 And so it may very well be the case that in this
20 article, where she is going with this is to say the focus on
21 sexuality is, perhaps, something that works better when you're
22 trying to understand men's experiences than women's; and when
23 you are looking at women's experiences, it might be better to
24 take this construct of sexual orientation and understand it in
25 terms of relationships, and that might be a more helpful view.

1 And I believe what she is trying to do here, and in
2 some of her other papers, is to offer an alternative way of
3 thinking about sexuality that might be useful to researchers.

4 **Q.** All right. Thank you.

5 And please turn to tab 15. Again, this is by
6 Professor Peplau.

7 **THE COURT:** In the big one?

8 **MR. NIELSON:** In the big book.

9 **BY MR. NIELSON:**

10 **Q.** And we have looked at this before.

11 And please turn to page 81.

12 (Witness complied.)

13 **Q.** And on page 81 I would like you to look at the bottom of
14 the first full paragraph and she writes:

15 "Available evidence indicates that biological
16 contributions to the development of sexual
17 orientation in women are minimal."

18 Do you agree with that statement?

19 **A.** Well, as she says at the beginning of the paragraph:

20 "More than 50 years of research has failed to
21 demonstrate that biological factors are a
22 major influence in the development of women's
23 sexual orientation."

24 And I would say that we also can say that to some
25 extent about the development of men's sexual orientation.

1 As I have said before, we don't really understand the
2 origins of sexual orientation in men or in women. There are
3 many different competing theories, some biologically based,
4 others based more on culture and individual experience.

5 So I would say that what she is suggesting is that
6 the available evidence doesn't support the idea of there being
7 a strong biological factor that explains the development of
8 sexual orientation in women.

9 **Q.** Do you agree with that?

10 **A.** Yes. I would agree that that is the case.

11 And I would also say that I don't -- I believe that
12 it's the case that we simply don't understand the origins of
13 sexual orientation in either men or women.

14 **Q.** Okay. Please turn to page 87 of the same document.

15 (Witness complied.)

16 **Q.** And under "An Alternative Perspective," that heading, do
17 you see that towards the bottom of the page on page 87?

18 **A.** Yes.

19 **Q.** She writes:

20 "A comprehensive analysis of women's sexual
21 orientation should begin with empirically
22 grounded generalizations about women's
23 experiences. The cumulative record of
24 research on women's sexual orientation
25 supports three broad conclusions.

1 "First, there is no inevitable association
2 between masculinity, variously defined in
3 women's sexual orientation. Associations may
4 exist in particular cultural contexts, but
5 are not a necessary component of sexual
6 orientation.

7 "Second, the impact of biological factors in
8 determining women's sexual orientation
9 appears to be weak or non-existent.

10 "Third, cross cultural and historical
11 analyses demonstrate that women's erotic and
12 romantic bonds can take diverse forms that
13 are shaped by their social environment."

14 Do you disagree with any of those conclusions?

15 **A.** Well, we just discussed the second one about the
16 biological factors.

17 **Q.** Right.

18 **A.** As I was saying, the evidence there is -- frankly, some
19 people would not say it's weak, but it is certainly not
20 conclusive at all.

21 **Q.** Do you have?

22 **A.** The --

23 **Q.** Sorry.

24 **A.** I'm just looking at the three statements again.

25 And the idea that women's erotic and romantic bonds

1 can be affected by their social environment, yes, I think we
2 already talked about that.

3 So, yes, I would say that I -- I would agree with
4 these statements.

5 **Q.** Okay. Thank you.

6 And please turn to page 92. Same document.

7 (Witness complied.)

8 **Q.** The authors write:

9 "In the U.S. Gagnon (1990) suggested that the
10 creation of visible urban gay and lesbian
11 communities made the choice of a same-sex
12 lifestyle more attractive to wider
13 audiences."

14 **A.** I'm sorry where. Are you -- oh, I see you.

15 **Q.** And there is quote, which you can read if you like, but
16 I'm going to move to right after that.

17 After the quote, they say:

18 "Gagnon suggested that one consequence may be
19 to increase the demographic and personality
20 diversity of those participating in same-sex
21 relations."

22 Do you believe the creation of visible urban gay and
23 lesbian communities may have had this effect?

24 **A.** Well, I -- I will say it yet again. This is another paper
25 that if -- I believe I may have read it in the past, but not

1 recently.

2 I believe that what Gagnon might have been saying
3 here is that there may be individuals who have same-sex desires
4 and attractions and, perhaps, even engage in same-sex sexual
5 behavior on occasion, but in the time before the emergence of
6 visible gay communities in cities, may not have even known that
7 there was a label to describe people like themselves and may
8 not have known that this was -- that there really was such a
9 thing as sexual orientation or that it was possible to be gay.

10 And so I would speculate -- and I am speculating
11 because I haven't read this -- that perhaps Professor Gagnon
12 was saying that for those sorts of individuals, the existence
13 of visible gay communities would allow those sorts of
14 individuals to realize that there were other people like them
15 and that it might be possible to find those other people and
16 develop a community with them.

17 Q. Okay. Thank you.

18 Please turn to page -- please turn to tab 14, if you
19 would.

20 (Witness complied.)

21 Q. And, again, this is another article by Professor Peplau
22 that we've looked at.

23 **THE COURT:** How are he doing, Mr. Nielson?

24 **MR. NIELSON:** We are getting there, your Honor.

25 **THE COURT:** Oh, good.

1 A. I'm sorry. Which tab again?

2 BY MR. NIELSON:

3 Q. It's tab 14.

4 A. Okay.

5 Q. And please turn to page 332. And you will find in bold a
6 heading, "The Fluidity of Women's Sexuality" and italics
7 *Influence of the Social Environment*.

8 And under that, in that last paragraph, you'll find
9 part way down it says:

10 "Consider the link between education and
11 sexual orientation. The National Health and
12 Social Life Survey" -- which again is the
13 Laumann survey we have discussed -- "found
14 that completing college doubled the
15 likelihood that a man identified as gay or
16 bisexual, but was associated with a
17 900 percent increase in the percentage of
18 women identifying as lesbian or bisexual."

19 Are you familiar with those statistics?

20 A. Not with the specific statistics, but this gets back to
21 the correlation we've been discussing, which indicates that
22 lesbians and gay men are likely to have had more years of
23 education than comparable heterosexuals.

24 Q. All right. Thank you.

25 And please turn to page 336.

1 (Witness complied.)

2 **Q.** And the very first sentence on the page under heading
3 "Sociocultural Influences on Women's Sexual Orientation" reads:

4 "There is mounting research evidence that the
5 patterning of women's sexuality and sexual
6 orientation varies across time and place."

7 Do you agree with that?

8 **A.** I'm taking a moment to read the paragraph.

9 (Brief pause.)

10 **A.** Well, again, I think this is something we have already
11 discussed in that she's talking about difference cultures, but,
12 also, even within our own culture, different racial and ethnic
13 groups, socioeconomic groups; the experience of being in those
14 different groups having an effect on one's sexuality and how
15 one understands one's self as a sexually being. So I would
16 agree with it in that sense.

17 **Q.** All right. Thank you.

18 And please turn to page 337, and the second full
19 paragraph. Professor Peplau writes:

20 "As another example, living in same-sex
21 institutions also tends to increase the
22 likelihood of romantic and erotic
23 relationships between women."

24 Do you agree with that statement?

25 **A.** Well, as she points out, there was a 1929 study of

1 graduates of women's colleges who -- in which women reported
2 that they had had an intense emotional relationship with
3 another woman in college.

4 And she also talks about same-sex relationships
5 occurring in prison populations, which are sex segregated.

6 So it may very well be the case that in those
7 particular settings, people are more likely to engage in
8 same-sex behavior and possibly to form bonds that are based on
9 that sort of behavior.

10 **Q.** All right. Thank you.

11 And please turn to tab 36 in the little binder.

12 (Witness complied.)

13 **Q.** Can you identify this document, Professor Herek?

14 **A.** I haven't got it yet.

15 Umm, this is an article that was published in the
16 *Journal of Gay and Lesbian Mental Health* in] 2008 titled
17 "Masculinity, Femininity and the Development of Sexual
18 Orientation in Women."

19 The authors are Letitia Anne Peplau and Mark Huppin.

20 **Q.** All right. Thank you.

21 And can you turn to page 156?

22 (Witness complied.)

23 **Q.** And I believe this discusses the survey that you
24 referenced there?

25 **A.** Page 156?

1 Q. 156, yes. And towards the bottom of the carry-over
2 paragraph it reads, "During the same time period."

3 A. Right. And this is referring back to the same thing that
4 was mentioned in the other article that we just finished with.

5 Q. Right. And she found that 42 percent of the sample --

6 "During the same time period, American
7 researcher, Katherine Davis, 1929 mailed a
8 questionnaire about sexuality to 2200
9 graduates of women's colleges in the United
10 States. The questionnaire asked: Have you
11 at any time experienced intense emotional
12 relations with other women? 42 percent of
13 the sample replied that they had. Of these,
14 52 percent said that the relationship was
15 sexual in character. In other words, one
16 woman in five reported a sexual relationship
17 with a best woman friend in college.
18 Although some of these women continued to
19 have intimate relationships with women after
20 college, most did not."

21 And you are familiar with that study, correct?

22 A. The 1929 study by Katherine Davis?

23 Q. Yes.

24 A. I haven't read it. I have -- I have run across references
25 to it.

1 Q. Okay. Thank you.

2 MR. NIELSON: Your Honor, I would like to offer
3 DIX-1237 into evidence.

4 MR. DETTMER: No objection.

5 THE COURT: Very well. 1237 is admitted.

6 (Defendants' Exhibit 1237 received in evidence.)

7 MR. NIELSON: Okay. Thank you.

8 BY MR. NIELSON:

9 Q. Please turn to tab 37 in the witness binder.

10 (Witness complied.)

11 Q. Can you identify this document? It's premarked DIX-1254.

12 A. This is a document from the journal, I believe it's -- the
13 journal is *Health and Human Rights*.

14 The document is a commentary titled "Torture and
15 Ill-Treatment Based on Sexual Identity: The Roles and
16 Responsibilities of Health Professionals and Their
17 Institutions." The authors are Simon Lewin and Ilan Meyer.

18 Q. Okay. Thank you.

19 And are you familiar with the authors?

20 A. I don't know who Simon Lewin is. I'm familiar with Ilan
21 Meyer. I have never seen this article before.

22 Q. Thank you.

23 Please turn to page 163. In the bottom paragraph,
24 part way through the paragraph it says:

25 "Although human rights work requires the

1 identification off a person as a subject of
2 rights, social science research has suggested
3 that sexual identities are socially
4 constructed."

5 Do you agree with that statement?

6 (Brief pause.)

7 **Q.** Well, let's take the second half.

8 Do you agree with the statement that "social science
9 research has suggested that sexual identities are socially
10 constructed"?

11 **A.** That certainly has been suggested.

12 **Q.** Do you think that's an unreasonable suggestion?

13 **A.** Well, as I said earlier, I think that you have to look at
14 the social construction's perspective from the group's
15 standpoint, and in that regard if it points you to looking at
16 cultural influences and cultural variation, that's a very
17 useful perspective.

18 I don't believe that the social construction's
19 perspective works very well when you try to apply it to the
20 specific experiences of individuals.

21 Now, as far as this statement goes, I'm not -- as I
22 said, I have not seen this article before, so I don't
23 understand the context in which they are making this statement,
24 except that they seem to be talking about the fact that -- and
25 I'm guessing this, that people who are lesbian, gay or

1 bisexual, and perhaps transgender as well, face oppression and
2 even torture in some societies and some countries. And I'm
3 guessing that the authors think that's bad, but I don't know
4 the context in which this particular statement was being made.

5 Q. Thank you.

6 MR. NIELSON: Your Honor, I would like to offer
7 DIX-1254.

8 MR. DETTMER: No objection, your Honor.

9 THE COURT: Very well.

10 (Defendants' Exhibit 1254 received in evidence.)

11 BY MR. NIELSON:

12 Q. All right. Thank you.

13 Professor Herek, please turn to tab 38 in the witness
14 binder, where you will find a document premarked DIX-1278.

15 (Witness complied.)

16 Q. Can you identify that document many?

17 A. Well, of the it's a reprint of a web page, it appears to
18 be, from the American Psychiatric Association. The title on it
19 is "Healthy Minds. Healthy Lives."

20 Q. Thank you.

21 And if you turn to the first page of the printout
22 after you have the addresses, under "Gay/Lesbians/Bisexuals"
23 and under "What causes Homosexuality/Heterosexuality/
24 Bisexuality," part way through that sentence -- part way
25 through the paragraph you find a sentence that reads:

1 "However, to date there are no replicated
2 scientific studies supporting any specific
3 biological etiology for homosexuality."

4 And you agree with that, correct?

5 **A.** Well, I would say that I am not sufficiently familiar with
6 the research literature to say that there are absolutely no
7 replicated biological studies.

8 But I would agree with the statement at the beginning
9 of that paragraph which says, "No one knows what causes
10 heterosexuality, homosexuality, or bisexuality."

11 **Q.** Right. And are you aware of any replicated scientific
12 studies that do support a specific biological etiology for
13 homosexuality?

14 **A.** Well, I -- I have a sense that there might be some, but
15 I -- this is not something that I prepared for in terms of
16 coming today.

17 But as I said, I would certainly agree with the
18 statement that we don't know what the origins are of sexual
19 orientation.

20 **Q.** Okay. Thank you.

21 **MR. NIELSON:** Your Honor, I would like to offer
22 DIX-1278 into evidence.

23 **MR. DETTMER:** No objection, your Honor.

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

25 **MR. DETTMER:** No objection.

1 **THE COURT:** Very well. 1278 is in.

2 (Defendants' Exhibit 1278 received in evidence.)

3 **BY MR. NIELSON:**

4 **Q.** All right. Let's turn to tab 41.

5 (Witness complied.)

6 **Q.** I'm going to skip a little bit here. And you will find a
7 document premarked DIX-642. Can you identify that?

8 **A.** I'm going to mispronounce the names. The first author is
9 A.F., I'm guessing it's pronounced, J-O-R-M. And there are
10 several other authors.

11 The title of this is "Cohort Differences" -- I'm
12 sorry. "Cohort Difference in Sexual Orientation: Results From
13 a Large Age-Stratified Population Sample."

14 This appears to have been published in the journal
15 *Gerontology* in 2003, and these authors are located in
16 Australia.

17 **Q.** All right. Thank you.

18 Now, this study found that women in recent birth
19 cohorts in the United States, Britain and Australia were more
20 likely to report having a female sexual partner during
21 adulthood.

22 And you'll see that on 392 and 393, if you look at
23 the introduction.

24 And on page 393 --

25 **A.** Excuse me. I'm sorry. Again, this is not a paper I have

1 reviewed. When it says, "They were more likely to report
2 having a female sexual partner during adulthood," more likely
3 than what or whom.

4 **Q.** Older-age cohorts.

5 **A.** I see, okay. Okay.

6 **Q.** All right. And if you look at the third -- well, the
7 second full paragraph on 393, in the -- the authors conclude:

8 "These findings suggest a major cohort affect
9 in same-gender sexual behavior and perhaps
10 also in sexual orientation. If a cohort
11 effect in sexual orientation exists, it has
12 implications for purely biological theories
13 of sexual orientation, because there must be
14 historical changes in environmental factors
15 that account for such an effect."

16 Do you believe that's an unreasonable conclusion?

17 **A.** I believe that's a hypothesis one could make.

18 I would offer an alternative hypothesis just -- if I
19 were sitting down to read this oral article, the first thing
20 that would come to my mind is that people who grew up in the
21 1920's and 1930's and the early part of twentieth century would
22 have been growing up in a time where there was very strong
23 repression against people who were lesbian or gay and, in fact,
24 when there wasn't much open discussion of sexuality at all.

25 And so I would say that it would be a reasonable

1 hypothesis to say that these age cohort effects might be due to
2 the differing levels of stigma experienced by people in
3 different age cohorts, such that older people might be
4 extremely reluctant to disclose a same-sex attraction or
5 homosexual behavior or being lesbian, gay or bisexual than
6 would people in newer cohorts, more recent cohorts.

7 **Q.** Okay. So that's an alternative hypothesis.

8 Do you believe that the hypothesis suggested by the
9 authors is unreasonable?

10 **A.** Well, I assume that they are going to test it. Although,
11 again, I haven't read this article.

12 It's not an up reasonable hypothesis to pose and for
13 all I know, again not having read this article, sometimes
14 authors pose a hypothesis that they actually expect to disprove
15 in the course of the study. That may be the case here. I just
16 don't know because I haven't read the paper.

17 **MR. NIELSON:** Your Honor, I would like to offer
18 DIX-642.

19 **MR. DETTMER:** No objection, your Honor.

20 **THE COURT:** 642 is in.

21 (Defendants' Exhibit 642 received in evidence.)

22 **MR. NIELSON:** All right. Thank you.

23 **BY MR. NIELSON:**

24 **Q.** Now, you mentioned in your direct testimony the Williams
25 Institute study about a survey of same-sex couples in

1 Massachusetts, correct?

2 **A.** Well, the Williams Institute -- I believe, researchers
3 from there wrote the report. I believe it was carried out by
4 the Massachusetts Department of Public Health.

5 **Q.** All right. Thank you.

6 Now, apart from that, all of the studies that you
7 relied on in finding that marriage had physical and mental
8 health benefits, in all of those studies "marriage" referred to
9 legal marriage recognized by the state, correct?

10 **A.** Yeah. I -- I'm just pausing because I -- I believe that
11 in many cases they simply asked people if they were married.
12 I'm not sure that they provided that sort of definition to the
13 respondents. They simply asked them their marital status, but
14 that would be implicit in it, yes.

15 **Q.** All right. And in all the studies on which you relied,
16 this has always been heterosexual marriage, correct?

17 **A.** In those studies, yes.

18 **Q.** Thank you.

19 And with respect to the physical and mental health
20 outcomes that you say are associated with marriage, you do not
21 believe there have been studies published that compared
22 heterosexual married couples with same-sex married couples,
23 correct?

24 **A.** That is correct, to the best of my knowledge.

25 **Q.** And can you name any tangible benefits that matter that

1 would be available to married couples that are not available
2 for domestic partnership couples in California? Tangible.

3 **MR. DETTMER:** Objection, your Honor -- I'm sorry.

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

5 **MR. DETTMER:** I'm sorry. I didn't want to interrupt.
6 I'm going to object to the extent the question calls
7 for a legal conclusion.

8 **THE COURT:** Have you finished the question?

9 **MR. NIELSON:** The question is whether the witness can
10 identify any tangible benefits that would be available to a
11 married couple that are not available for a domestic
12 partnership couple in California.

13 **THE COURT:** Objection overruled.

14 **A.** Well, I would say that I -- I'm not a legal scholar, so I
15 don't know about the law. I am vaguely familiar with the fact
16 that there are some differences between domestic partnerships
17 and marital relationships in California.

18 I would say that in terms of tangible benefits --
19 meaning money, inheritance rights, that sort of thing -- that
20 you don't see the difference there. You see the difference
21 more in the intangible and symbolic meaning of being married
22 and the -- what may be intangible and, yet, real consequences
23 of perhaps having a more stable, long-enduring relationship
24 that might be associated with that label of marriage.

25 **Q.** All right.

1 A. For tangible benefits, I would not be able to name them.

2 Q. Okay. Thank you.

3 And you talked a little bit about hate crimes. Are
4 hate crimes illegal in California?

5 A. I think crime is illegal in California.

6 (Laughter.)

7 Q. Correct. And are crimes -- and are crimes committed on
8 the basis of sexual orientation illegal in California?

9 A. Yes, they are illegal in California. And, in fact, they
10 still continue to occur.

11 Q. And do you believe there is a link between denying -- or
12 between defining marriage as a union of a man and a woman in
13 hate crimes?

14 A. Well, I think that it's -- as I said earlier, when we look
15 at structural stigma related to sexual orientation, it provides
16 a context in which all sorts of things happen, all sorts of
17 behaviors toward people in the stigmatized group.

18 And so I would say that a direct relationship between
19 those two is not empirically established, to my knowledge, but
20 that structural stigma, as basically creating the atmosphere in
21 which individual enactments of stigma occur, that there is
22 potentially a relationship there, yes.

23 **MR. NIELSON:** And, your Honor, I believe I'm
24 concluded, but I just want to quickly consult, if I may, for
25 just a moment?

1 binder? If you look at page 24?

2 **A.** Which tab?

3 **Q.** I'm sorry. Tab 12.

4 (Brief pause.)

5 **Q.** I'm sorry. This is the large binder that Mr. Nielson
6 showed you.

7 **A.** Oh, oh. I'm very sorry. I was looking in the wrong
8 thing.

9 **Q.** Actually, if you want to just look at the screen, that
10 would be super. I have put up the tax there as well. This is
11 from page 24 of tab 12.

12 It says:

13 "So what is the correct definition of the LGB
14 population? The answer depends on the
15 purpose of the study. A researcher who is
16 interested in risks for HIV/Aids among men
17 who have sex with men, MSM's, might focus on
18 behavioral definitions because behavior
19 affects risk exposure regardless of personal
20 identity.

21 "A researcher who is interested in
22 developmental milestones of gay youth might
23 focus on identity definitions, because
24 development of a gay identity is a core task
25 facing the youth.

1 "Thus, there is not one answer to the
2 question. It is the researcher's
3 intellectual responsibility to answer this
4 question with reasoned justification. The
5 researcher must define the population on the
6 basis of the study's objectives and its
7 underlying conceptual framework."

8 Is that consistent with your understanding of the
9 technical definition that you've given of "sexual orientation"?

10 **A.** Yes. It's very consistent with that.

11 **Q.** Are there any other examples you can give of how those
12 three different aspects might be applied?

13 **A.** Yeah. Okay. He's got HIV and Aids in there,
14 developmental milestones.

15 Now he's was talking about, for example, if you want
16 to look at discrimination and its impact, you might look at
17 identity definitions.

18 At this hour of the day, I would be hard-pressed to
19 come up with very many more examples.

20 **Q.** Fair enough.

21 **MR. DETTMER:** Now, if I could ask for demonstrative
22 18, please.

23 (Document displayed)

24 **BY MR. DETTMER:**

25 **Q.** And the question is, Professor Herek, that that -- that

1 definitional issue that researchers, social science researchers
2 come up with isn't limited to sexual orientation, is it? It
3 also comes up in other contexts?

4 **THE COURT:** Stop there before it becomes more
5 compound.

6 **MR. DETTMER:** I was just going to refer Professor
7 Herek to the demonstrative, your Honor.

8 **A.** Okay. And I'm sorry, could you repeat the question?

9 **BY MR. DETTMER:**

10 **Q.** Maybe I'll rephrase the question at His Honor's
11 suggestion.

12 Do social science researchers who are researching
13 issues other than sexual orientation have the same definitional
14 issues?

15 **A.** Well, yes. I believe I stated earlier, and I see it here
16 in this, what I guess is a quote from the Dean and Meyer paper.

17 You know, when we talk about race, for example, this
18 is something that can be difficult to define. I mean, some
19 people -- for some people it's very clear, but for other people
20 they may come from a mixed racial background and it's a
21 question of which part of their family or which part of their
22 ancestry they most identify with and label themselves. Their
23 skin color may not be very revealing of them belonging to one
24 race or another. They might -- they may develop an identity as
25 a member of one race or the other race or as a mixed race

1 individual.

2 So, no, sexual orientation is certainly not the only
3 area in which things get pretty messy when we are trying to
4 study them.

5 **Q.** Okay. And just for the record's sake, the last part of
6 the quotation that I have put up from -- its tab 13, pages 134
7 and 135. It says:

8 "Not surprisingly, these difficulties mirror
9 similar problems that have been recognized
10 and examined relating to the classification
11 of people based on race and ethnicity."

12 Is that what you are referring to, Professor Herek?

13 **A.** Yes.

14 **Q.** That same problem?

15 **A.** Yes.

16 **Q.** And, in fact, talking -- we spent a lot of time this
17 morning talking about labels that people apply and whether
18 certain labels apply to different groups of sexual minorities,
19 is that right?

20 **A.** Correct.

21 **Q.** Would the same label issue come up with respect to racial
22 or ethnic minorities?

23 **A.** Well, certainly. If we just look back even in our
24 relatively brief history of just, say, the past 100 years, we
25 see that many different terms have been used or have come into

1 favor and gone out of favor for describing particular racial or
2 ethnic groups. So, again, there has been change and evolution
3 in that area as well.

4 **Q.** And similarly, we talked about the identity that gay men
5 and lesbians may have with the gay and lesbian community. Do
6 you remember that, that discussion this morning?

7 **A.** It seems like a long time ago, yes.

8 **Q.** Would those same issues of strength of identification with
9 a community be present when you're talking about racial groups
10 as well?

11 **A.** Yes. And, in fact, I think that some of the research on
12 lesbian and gay identity has borrowed from previous research on
13 racial and ethnic minority identities as a starting point, a
14 way to try to think about the phenomenon.

15 **Q.** Now, back to sexual orientation.

16 There was a lot of discussion this morning about the
17 circumstances in which the three different aspects that you
18 mentioned, behavior, attraction and identity, a lot of
19 discussion about when those three are not in -- when they don't
20 overlap. Do you remember that testimony?

21 **A.** Yeah. When they don't match up, yes.

22 **Q.** Is it your understanding or is it your opinion that those
23 three definitions overlap for the vast majority of people?

24 **A.** As I think I've said several times today, for the vast
25 majority of people, we do see consistency across those three

1 different aspects of sexual orientation.

2 **Q.** And how do you know that?

3 **A.** Well, I will go back again to the Laumann and Gagnon
4 study, which is a very good study. And, again, they found that
5 roughly 90 percent of their participants matched heterosexual
6 on all three of those aspects of sexual orientation. And
7 another, I believe it was roughly two percent of the sample,
8 matched it on lesbian, gay and bisexual identity attraction and
9 behavior. And then the rest of the sample was where there --
10 things weren't so neat and didn't all match up.

11 **Q.** Now, taking this out of the research context of what
12 research -- how researchers defined sexual orientation, I think
13 you testified earlier that you have asked many people who are
14 not social scientists what their sexual orientation is, is that
15 correct?

16 **A.** Yes, in various surveys and questionnaire studies.

17 **Q.** Do you have any estimation of how many people you have
18 asked that question of, through surveys or otherwise?

19 **A.** Thousands.

20 **Q.** Is it your opinion that most people can answer that
21 question intelligently?

22 **A.** It's my opinion that most people can answer that question
23 based not only on my research, but on other research as well.

24 For example, in the Laumann and Gagnon study, they
25 pointed this out as well; that most people were able to answer

1 the question. They did have a problem. Some people didn't
2 seem to understand the word "heterosexual," but they understood
3 "straight."

4 So part of it is asking the question in the right way
5 with the correct language, but, yes, most people can answer the
6 question.

7 **Q.** Now, there were a long series of questions today about --
8 well, actually, let me ask you a different question first.

9 There were a series of questions about identifying
10 the causes of sexual orientation; do you remember that?

11 **A.** Yes.

12 **Q.** Now, even if you don't know what causes sexual
13 orientation, does that change your opinion that some people are
14 straight, some people are gay, some people are lesbian?

15 **A.** And some people are bisexual.

16 Yes, I don't see those two as being related,
17 inherently related to each other.

18 **Q.** Do you find that -- do you have an opinion about whether
19 most people are consistent in their sexual orientation over
20 time?

21 **A.** Well, again, I would go back to the Laumann and Gagnon
22 study and point out that it suggests that people tend to be.

23 And as I believe I have said, I think if you are a
24 betting person, the best bet is to -- is that a person, if you
25 don't know anything else about them, to assume that they

1 probably will be consistent in the future provided that, for
2 example, they are going to actually engage in having sex; that
3 that -- having sex would be consistent with their current
4 identity.

5 For some people that's not how it works, obviously,
6 but I would say that the pattern is that people tend to be
7 consistent.

8 **Q.** Can you characterize the proportion of people who are
9 consistent in their sexual orientation?

10 **A.** Well, again, I go back to the Laumann and Gagnon and say
11 that there, it's somewhere in the neighborhood of 92 percent.
12 Realizing that there have been instances in the past,
13 especially for lesbian, gay and bisexual people, where they may
14 have had a period in which they did engage in heterosexual
15 behavior.

16 But especially when we talk about identity and
17 attractions, I think that we see a great deal of consistency
18 there for many, many people.

19 **Q.** You mentioned a couple times that there is a continuum --
20 that the concept of a continuum is a useful way to think about
21 sexual orientation? Why do you say that?

22 **A.** Well, because the concept of the continuum alerts us to
23 the fact that we have to be careful about those categories;
24 that there are, in fact, these instances of individuals who
25 don't fit neatly into the category of heterosexual or gay or

1 lesbian.

2 And this is where Kinsey's work was useful, I think,
3 in sensitizing us to the idea that people would have varying
4 levels of sexual attraction and experience toward men or toward
5 women and not to simply think in black and white terms. And I
6 think that gets us closer to reality, so that's very useful.

7 **Q.** Okay. Does that concept that you have just described,
8 does it change your opinion that people do not choose their
9 sexual orientation?

10 **A.** Well, some people in my study said that they did feel that
11 they had some degree of choice about their sexual orientation,
12 but they were certainly in the minority.

13 Among gay men, only -- in the national sample, only
14 about five percent said that they felt that they had any
15 significant degree of choice about their sexual orientation.

16 For lesbians, it was somewhere between 10 and
17 20 percent who said they felt they had some degree of choice.
18 And it was somewhat more for bisexuals.

19 So there are some people who say that they perceive a
20 degree of choice about their sexual orientation, but in my
21 research the majority said they did not.

22 **Q.** Now, I want to ask you about some of the specific writings
23 that you were asked to look at earlier today.

24 **A.** Okay.

25 **Q.** Mr. Nielson referred to a number of studies authored by

1 Professor Diamond. Do you remember those studies?

2 **A.** Yes.

3 **Q.** Do the portions of those studies that you read cast any
4 doubt on your opinion that for the vast majority of people, the
5 three different aspects of sexual orientation -- attraction,
6 behavior and identity -- overlap?

7 **A.** Well, I believe that what Lisa Diamond did in her research
8 was she looked at -- at a sample of people who had a high
9 likelihood of not necessarily overlapping over a period of
10 time.

11 And so I don't -- I don't want to in any way sound
12 like I'm denigrating her research. I think it's very useful,
13 but she also made it very clear in her book and in her various
14 articles that this was not a representative sample; that you
15 couldn't use these data to generalize about the entire
16 population; but what she was trying to do was to document that
17 this plasticity does occur, especially for some women, and I
18 think to try to help us to better understand for those women in
19 whom this occurs exactly how it happens.

20 **Q.** There are also a number of studies that you looked at from
21 Professor Peplau, specifically, I think, in tab 14 of the large
22 binder.

23 I'm not going to ask you to look at it again,
24 although I do want to bring up one portion of that document.

25 **MR. DETTMER:** If I could ask 19, please?

1 (Document displayed)

2 **BY MR. DETTMER:**

3 **Q.** And let me just read this into the record. This is from
4 page 333 of tab 14, which is defendants 1235.

5 It says:

6 "Claims about the potential erotic plasticity
7 of women do not mean that most women will
8 actually exhibit change over time. At a
9 young age, many women adopt patterns of
10 heterosexuality that are stable across their
11 lifetime. Some women adopt enduring patterns
12 of same-sex attractions and relationships."

13 Is that consistent with your understanding of
14 Professor Peplau's theory regarding plasticity?

15 **A.** Yes.

16 **Q.** Is it also consistent with your own understanding?

17 **A.** Yes.

18 **Q.** Now, are you familiar with a person named Daniel Robinson,
19 a college professor?

20 **A.** I became familiar with his name in the course of this
21 case, but I otherwise was not aware of him.

22 **MR. DETTMER:** If I could ask for exhibit -- sorry,
23 demonstrative number 20?

24 (Document displayed)

25

1 **BY MR. DETTMER:**

2 **Q.** This is three lines from Professor Robinson's 's
3 deposition in this case.

4 And just so you know, Professor Robinson was an
5 expert hired by the defendant-intervenors, the proponents of
6 Proposition 8.

7 **MR. NIELSON:** Your Honor, I am going to object to
8 that, at least to preserve our objection. We withdrew him
9 before the start of trial.

10 **THE COURT:** I cannot hear you.

11 **MR. NIELSON:** I am going to object to this. We
12 withdrew Professor Robinson before the start of trial. So I
13 want to state my objection.

14 **MR. DETTMER:** Your Honor, I believe Professor
15 Robinson lives in either England or Maryland and is, thus,
16 farther than 100 miles from the courthouse. And I believe
17 under FRCP 32 we may use his deposition for any purpose.

18 **THE COURT:** Very well, proceed.

19 **BY MR. DETTMER:**

20 **Q.** The testimony I'm asking you to look at, Professor Herek,
21 says -- the question is:

22 **"QUESTION:** Now, do you believe that sexual
23 orientation is readily subject to change?"

24 The answer from Professor Robinson is:

25 **"ANSWER:** No."

1 Is that consistent with your understanding of whether
2 sexual orientation is readily subject to change?

3 **A.** I would give the same response.

4 **Q.** Now, there were a series of questions that you were asked
5 about sexual orientation change therapy or reparative therapy;
6 do you remember those?

7 **A.** Yes.

8 **Q.** And I would like to, again, put up testimony from
9 Professor Robinson.

10 **MR. DETTMER:** This is number 21, please.

11 (Document displayed)

12 **BY MR. DETTMER:**

13 **Q.** And I will read it into the record.

14 **"QUESTION:** Were you aware at the time you
15 did your report that the APA reached that
16 conclusion?

17 **"ANSWER:** Yes. In fact, I have noted often
18 the refractory nature of homosexuality to any
19 kind of therapeutic intervention and,
20 therefore, it wouldn't be at all surprising
21 that enduring changes would not be common."

22 **MR. NIELSON:** Again, just a continuing objection.

23 **THE COURT:** Very well. This deposition was taken in
24 the course of the litigation.

25 **MR. NIELSON:** I guess my understanding is they are

1 offering him as their own witness.

2 **MR. DETTMER:** No, your Honor. We are simply reading
3 his deposition into the record, a portion of it.

4 **BY MR. DETTMER:**

5 **Q.** (As read)

6 **"QUESTION:** And you have not found enduring
7 change as a result of therapy to be common?"

8 Professor Robinson's response:

9 **"ANSWER:** No, it's not common. It's not
10 reported to be common."

11 Is that consistent with your understanding of the
12 state of the research on sexual orientation change therapy?

13 **A.** Yes. It is consistent with my understanding.

14 **Q.** Now, you were also asked several questions about Professor
15 Spitzer's work having to do with this type of therapy; do you
16 remember that?

17 **A.** Yes.

18 **Q.** So let me put up another excerpt from Professor Robinson
19 deposition.

20 **MR. DETTMER:** This is 22, please.

21 **BY MR. DETTMER:**

22 **Q.** The question:

23 **"QUESTION:** Okay. So when you make a
24 statement, homosexuality is no more immutable
25 than those identities one takes on in various

1 walks and works of life, and you don't limit
2 that to a group where there's 93 percent of
3 people deeply religious and 78 percent of
4 people who are on speaking engagements often
5 at churches, is it appropriate in your view
6 to take a finding in that one limited type of
7 sample and apply it generally as you do in
8 your report?

9 **"ANSWER:** If my statement about the
10 immutability of homosexuality were tied
11 exclusively to Spitzer's research or anything
12 like it, then, indeed, it would be an
13 implausible inference."

14 Do you see that?

15 **A.** Yes, I see that.

16 **Q.** Do you know what is referred in the question about the 93
17 percent of people deeply religious and 78 percent of people who
18 are on speaking engagements, often at churches?

19 **A.** Well, I'm not sure that I would recall the exact
20 percentages, but I believe that those are the characteristics
21 of the sample that Dr. Spitzer used in his study, whom he
22 recruited mainly through groups that are supportive of and
23 promoting reparative therapy.

24 And he did comment, either in the paper or in his --
25 he wrote a later response to some of the criticisms, or perhaps

1 even in the press, that he was aware of the -- that the members
2 of this sample, it was a very, very religious group of people
3 and that they were also very strongly involved in these
4 organizations that promote reparative therapy. And he thought
5 that that was an important qualification on his findings,
6 suggesting that these same findings would not be observed,
7 perhaps, for a group of people who didn't match his sample in
8 terms of their religious beliefs and their activities related
9 to reparative therapy.

10 **Q.** Turning to a slightly different topic, Mr. Nielson had you
11 looked at Exhibit PX-912, which is the study by John Gonsiorek
12 and James Weinrich, "The Definition and Scope Of Sexual
13 Orientation."

14 And he asked you questions about a line in that study
15 saying:

16 "There is little unanimity about the use of
17 the words lesbian and gay as opposed to
18 homosexual."

19 Do you remember that questioning?

20 **A.** Sort of, vaguely.

21 **Q.** Okay. If I could ask for 23, please?

22 (Document displayed)

23 **Q.** This is another excerpt from that same document. It says:

24 "We suggested the term sexual preference is
25 misleading, as it assumes conscious or

1 deliberate choice and may trivialize the
2 depth of the psychological processes
3 involved. We recommend the term sexual
4 orientation because most of research findings
5 indicate that homosexual feelings are a basic
6 part of an individual's psyche and are
7 established much earlier than conscious
8 choice would indicate."

9 Do you agree with that?

10 **A.** Yes. Yes, I do.

11 **Q.** Now, you may recall that some of the deposition testimony
12 from two of the plaintiffs in this case was read to you. Do
13 you remember that?

14 **A.** Yes.

15 **MR. DETTMER:** I want to put up 30, please.

16 (Document displayed)

17 **BY MR. DETTMER:**

18 **Q.** And this is trial testimony from our plaintiff, Kris
19 Perry, in this case. She says in this trial -- she was asked:

20 **"QUESTION:** And tell me what that means in
21 your own words. What does it mean to be a
22 lesbian?"

23 The answer that Ms. Perry gave was:

24 **"ANSWER:** Well, for me, what it means is, I
25 have always felt strong attraction and

1 interest in women and formed really close
2 relationships with women, and I have only
3 ever fallen in love with women. And the
4 happiest I feel is in my relationship with
5 Sandy, and -- because I'm in love with her."

6 Is that testimony consistent with your understanding
7 of what it means to be a lesbian?

8 **A.** Well, it seems to have all of those elements of attraction
9 and desire, as well as, apparently, behavior and the
10 relationship and the self-labeling.

11 So, yes, I would say that this is consistent with
12 what I was saying about what constitutes sexual orientation in
13 general and in this case lesbianism.

14 **Q.** And I'm going to put up some more of Ms. Perry's trial
15 testimony.

16 **MR. DETTMER:** 31, please.

17 (Document displayed)

18 **BY MR. DETTMER:**

19 **Q.** She was asked in this trial:

20 **"QUESTION:** Do you feel that in the past you
21 could have developed that same kind of bond
22 with a man?"

23 Ms. Perry's answer was:

24 **"ANSWER:** I was unable to do that. I, as I
25 said, grew up in Bakersfield, California and

1 it was in the 70's and 80's. And all of my
2 friends, as we were getting older and they
3 were beginning to date, became more and more
4 interested in boys. And I recognized that
5 that was something that would have -- would
6 have been the best thing for me to do if I
7 could. And I did date a few boys because it
8 was -- it did make life easier, you know.
9 Then I would have a date to go to the prom,
10 too, or I could go to a party, too. But as I
11 got a little bit older, it became clear to me
12 that I didn't feel the same way my friends
13 did about boys and that there was something
14 different about me."

15 Is that consistent with your understanding of the
16 coming-out process?

17 **A.** Yeah. And I think it's consistent with some of what I
18 said earlier about the idea that many lesbians and gay men at
19 some point in their lives, especially during adolescence or
20 young adulthood, often will try to have a relationship with
21 someone who's of the other sex, and that this may include
22 sexual contact as well.

23 But I think that what this quote suggests is that she
24 may have tried to do that, but it just didn't work for her and
25 she recognized that her attractions were to women.

1 Q. I have one more excerpt from Ms. Perry's testimony in this
2 trial.

3 MR. DETTMER: 32, please.

4 (Document displayed)

5 BY MR. DETTMER:

6 Q. Ms. Perry was asked:

7 "QUESTION: Do you feel that you were born
8 with those feelings, with that kind of sexual
9 orientation."

10 Her answer was:

11 "ANSWER: Yes, I do.

12 "QUESTION: Do you feel it could change in
13 the future? Do you have a sense that it
14 might somehow change?"

15 Her answer was:

16 "ANSWER: I'm 45 years old. I don't think
17 so."

18 Is that testimony consistent with your understanding
19 of the -- of the constancy of sexual orientation?

20 A. Yeah, with -- in terms of the constancy. I would say
21 that, you know, the question about whether one is born with
22 feelings, this is something we don't know. One can have that
23 subjective sense.

24 This doesn't address the question of, really, what
25 are the origins of sexual orientation, but the idea of

1 believing that this is a constant in one's life.

2 And I think it's reasonable to expect that by the age
3 of 45, when one is in a committed relationship, one probably
4 does have a pretty good sense of the constancy of where their
5 life is likely to go in the future.

6 **Q.** Just a couple more questions. And this goes to defining
7 gay men and lesbians.

8 If two women want to marry each other, is it a
9 reasonable assumption that they are lesbians?

10 **A.** I think it's a reasonable assumption, yes.

11 **Q.** And if two men want to marry each other, is it a
12 reasonable assumption that they are gay?

13 **A.** Yes.

14 **MR. DETTMER:** I have no more questions, your Honor?

15 **THE COURT:** Very well. Thank you.

16 And thank you, Professor Herek. I think you of win
17 the long distance award.

18 (Laughter.)

19 (Witness excused.)

20 **THE COURT:** Very well. With respect to the Robinson
21 deposition, Mr. Nielson, you can, of course, offer excerpts
22 under 32(a)(6), if you wish to do so. You can get those in on
23 Monday. That would be fine.

24 And, let's see. Mr. Boutrous, you said you had about
25 90 minutes.

1 **MR. BOUTROUS:** Yes, your Honor.

2 **THE COURT:** I gather that you're prepared to do that
3 on Monday morning?

4 **MR. BOUTROUS:** We'll be prepared first thing Monday
5 morning, your Honor.

6 **THE COURT:** That means -- and then with the exception
7 of, perhaps, organizing exhibits and so forth, the plaintiffs
8 will rest.

9 **MR. BOUTROUS:** Exactly.

10 **THE COURT:** All right. Then who is the first witness
11 we are going to hear on the other side?

12 **MR. COOPER:** Your Honor, we are not sure who will be
13 first, but it will either be Dr. Ken Miller or Mr. David
14 Blankenhorn.

15 **THE COURT:** Very well. And it might be helpful if
16 you could give the other side an idea. Usually that's -- are
17 they both going to testify on Monday, and we will get all their
18 testimony completed.

19 **MR. COOPER:** We will identify 48 fours beforehand
20 which one it will be. We honestly just haven't decided yet,
21 but we will do so tomorrow morning.

22 **THE COURT:** Have a nice weekend, I guess is the
23 comment.

24 (Laughter.)

25 **THE COURT:** Mr. Boies, you are gesturing.

1 **MR. BOIES:** I was just trying to count when 48 hours
2 was, your Honor.

3 I actually thought that the agreement was that for
4 the first witnesses we would have more time, which is what we
5 gave them. So I thought actually we were going to get more
6 than 48 hours notice of their first witness, but it will be
7 what it will be.

8 **THE COURT:** Do I understand you are planning
9 presently only on two witnesses?

10 **MR. COOPER:** Two witnesses, your Honor, two expert
11 witnesses.

12 We may well call another witness primarily for the
13 purpose of authenticating documents.

14 **THE COURT:** Okay. Is that one of the proponents?

15 **MR. COOPER:** No, not one of the proponents.

16 **THE COURT:** Well, I guess on the plaintiffs' team you
17 better be ready for both of those witnesses; Young and -- no,
18 not Young. Miller and --

19 **MR. COOPER:** And Mr. Blankenhorn.

20 **THE COURT:** Blankenhorn, yes.

21 **MR. COOPER:** As I say, I think we will resolve that
22 this evening and let our friends for the plaintiffs know
23 tomorrow morning.

24 **THE COURT:** All right. Well, have a pleasant weekend
25 everybody.

1 Anything further?

2 (No response.)

3 **THE COURT:** All right. Good.

4 (Whereupon at 4:53 p.m. further proceedings

5 in the above-entitled cause was adjourned

6 until Monday, January 25, 2010 at 8:30 a.m.)

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I N D E XPLAINTIFFS' WITNESSESPAGEVOL.**HEREK, GREGORY M.**

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We, KATHERINE POWELL SULLIVAN and DEBRA L. PAS,
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California, et al.**, were reported by us, certified shorthand
reporters, and were thereafter transcribed under our direction
into typewriting; that the foregoing is a full, complete and
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U.S. Court Reporter

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U.S. Court Reporter

Friday, January 22, 2010