

# **LIVEBLOGGING PROP 8 TRIAL: DAY THREE, WEDNESDAY PM TWO (THIRTEEN)**

[This post is rescued liveblogging materials that the Toobz Godz would not let me include in the last post. It picks up midway through the Defendants' questioning of Letitiia Peplau, a Social Psychologist and an expert witness on the benefits of marriage. Nicole Moss is doing the questioning for the defendants. This overlaps slightly with the last thread to give some context. Moss is trying to introduce data from Belgium and the Netherlands to suggest that not really that many gays and lesbians want to get married. She then tries to attack the MA survey which showed a lot of people did get want to get married.]

[Objection: Ms. Peplau not a demographer]

Walker: Ask the bottom line question?

Moss; Assuming my math is correct. If numbers showed that 5% of gay and lesbian indivs and 43% had taken advantage of marriage, significant difference?

Peplau: Absolutely.

Moss: Data for Netherlands.

Peplau: Can I just make sue I'm with you on these data. You're not saying that only 5% of homosexuals got married. What you're saying is that all married indivs in Belgium, only 5% of them are homosexual.

Moss: No, I'm saying 5% of homosexuals are married. I asked you to assume that 2% are homosexuals.

Peplau: You're saying 5% are married, compared to 43% of homosexuals.

Moss: You would agree that significant

difference in percentage of population that is choosing to take advantage.

Peplau: I'd be struck by difference with analyses about MA that have chosen to get marriage. Americans are one of the most pro-family people around. Americans are enthusiasts of marriage.

Moss shows Netherlands data (after saying that govt "very nicely gave data in English") 5% versus 40-something.

Moss: Would you agree that purpose of marriage to make sure that children not born outside of marriage? So that children born from sexual relations of men and women not born outside of marriage.

[Object, beyond scope]

Moss: Well, she's testified that gay and lesbians are similarly situated, are they similarly situated to accidentally having children out of wedlock.

Moss: Would you agree that gays and lesbians do not accidentally have children?

Peplau: Except in MA, all children born to same sex couples are born out of lesbians. Are you asking whether two lesbians can accidentally impregnate each other? Not to my knowledge.

[hilarity all around]

Peplau: I would agree that same sex couples do not have accidental pregnancies.

Peplau: A book review.

Moss: On romantic marriages. A growing body of research shows asexual lesbian relationships not uncommon.

Peplau: We have documented examples of lesbian relationships not characterized by genital sexual activities. A lot is based on male ideas of sexuality, as if there isn't a penis involved there's not a sexual activity. Many lesbians report that other things that might be

considered sexual, such as cuddling or kissing, but that does not have a genital component.

[I wonder if Moss has a study of how much sexual activity goes down after they get married.]

Moss: You're not an expert in social meaning of marriage?

Peplau: I have cited data from Gallup showing that a large number of Americans say they will get married. I have not conducted studies in which I have tried to assess attitudes of Americans about basis of marriage. It really depends. I have done studies about attitudes of division of labor. By social meaning, if you mean the kind of things sociologists do, I'm not by training a sociologist. I've relied on other sources of empirical data.

Moss: You have not done any research into relative benefits of DPs and same sex or hetero marriage. The only empirical research that you've pointed to on same sex couples is MA survey.

Peplau: I have drawn conclusions on much broader lit. I'm drawing on a great knowledge base. But in terms of studies specifically of effects of same sex civil marriage.

Moss: MA study. It's not a representative sample. What do you mean?

Peplau: A rep sample would mean reflective of entire pop. There may be different or similar opinions among the people who did not get informed about survey or chose not to answer.

Moss: This particular survey recruited by gay rights advocacy group.

Peplau: This was done online. They went to group that had large email list. Assumed that among that list there would be some indivs who had gotten married. The way Department of Health chose to collect info.

Moss; Indivs from gay rights advocacy group, who responded. Top 10 reasons why they go married

was have society know about legal relationships.

Peplau: I'm not sure that's the wording.

Moss: If you turn to tab 12. 4 in 10 reported wanted to have society know about gay and lesbian marriages. That was one of top 3 reasons why got married.

Peplau: They were asked multiple reasons, 93% said love and commitment, Second was legal recognition of their relationship. 40% of unrepresentative sample said social visibility was one of the reasons for them.

Moss; it was 90% white.

Peplau: I don't know what demos of lesbian and gay men in MA.

Moss; Average age was 48 years old.

Peplau: Again, I don't know what to make out of that. That was what they found.

Moss; Significantly higher than most same sex couples in US.

Peplau: I'm trying, there may be data from census about average age of same sex couples is in US, I don't know what those data are. I don't know how to make comparisons that you're driving at. I don't know the answer to that.

Moss; 85% had at least a college, 55% had grad education.

Peplau: lesbians and gay men on average have higher level of education but these are higher.

Moss: 32% earned more than 110,000.

Peplau: when we say not representative. Part of what we mean may differ from state.

Moss; In terms of how the survey was conducted. It was based on self-reporting by these individuals.

Peplau: Survey studies are self-report studies. You ask people a question and they answer.

Moss: And like all surveys, open to self-reporting bias.

[Like the 75% of married men who say they care about monogamy? Do we know whether they practice it?]

Moss: We don't know about self-reporting bias?

Peplau: We don't know about that with this report. In general, researchers have worried about being more likely to get happy couples who want to brag about relationship, or miserable couples who want to complain about partners.

Moss; We do know that recruitment came through gay advocacy. Top 3 reasons was having relationships more visible.

Peplau: Debate about same sex marriage, widely talked about. Wouldn't surprise me that in state that is one of the first states to permit same sex marriage. Part of what they were doing was participating in private activity that would be known to other people.

Moss: Those facts tell us something about those who chose to respond to this survey.

Peplau: They told us about those who responded.

Moss; You said wouldn't harm same sex. You focused on increased divorce rates. You have not offered opinions or undertaken extensive analysis about whether or not it might harm institution of marriage apart from individual marriages.

Peplau: Entry into marriage and existing through divorce or dissolution. Those speak to very important measures of health of marriage. There are certainly others.

Moss: Your statement: Public acceptance of divorce is growing, growing emphasis on personal fulfillment has eroded commitment to marriage. Another thing is that state no fault divorce laws make it easier to end relationships.

Peplau: Try to understand factors that led to enormous divorce rate, peaked in 80s and has

leveled off. Factors during reasonably long period that contributed to fairly high divorce rate.

Moss: those include growing emphasis on individualism and personal fulfillment.

Peplau: Part of what they have suggested is that in earlier time when more important part of marriage is economic unit, to meet basic needs for survival, over time we have come to expect personal fulfillment. Marriage is not only where laundry is done and someone pays the bills. It is a place where we develop personal potential. Increase in emphasis has set very high expectations for marriage. Shifting values may have been one of many factors. None of these factors is due to gay civil rights movement. Increase in divorce rate independent of push for marriage equality.

Moss; Turning to page 13. 4 years of data.

Peplau: 4 years before and 4 years after same sex marriage in MA.

Moss; Not a lot of data.

Peplau: 8 years of data, only 4 years since marriage has begun, only bc those are the most recent govt stats available.

Moss: In 2004, highest divorce rate.

Peplau: What I would say about these data is that there is almost no change.

[Moss looks back at her co-counsel, who is rocking back and forth in his chair]

Peplau: I think this is haphazard variation in the data. I don't take those as serious indicators. Aside from what looks like impact of gay people getting married in first year, numbers look the same to me.

Moss: Comprehensive marriage and divorce rates in neighboring states.

Peplau: Only point I was trying to make was that it would be informative to look at that state. I

don't make any claims beyond that.

Moss; Last two years of data, divorce goes up.

Peplau: And still winding up lower than in years leading up to gay marriage. We could try to make something of difference between 2.2 and 2.3. If we want to look at minor changes in divorce, my interpretation is it's the same.

Moss: it would be helpful to have several more years of data.

Peplau: I'm sure we will have that data soon.

Moss; As to whether gay marriage will affect marriage over time?

Peplau Could you repeat the question?

Moss; Whether same sex marriage would have any effect on individualism over time is something you could only speculate about.

Peplau: The question is whether I think same sex marriage.

Moss [VERY SNOTTY]: Well, really, have you studied that question so you could offer an expert opinion on it? [leaning back on her elbow again]

Peplau: My opinion is based on a lot of evidence. All of the evidence are on the side of no harm. And then on the side of what theory that might do harm, there's nothing. I have no confidence in that conclusion. But it is the case that that is not based on empirical study on how same sex marriage will affect attitudes toward individualism over time.

Dusseault; Enforceable trust. Greater degree of enforceable trust in marriage or DP?

Peplau: Marriage.

Dusseault: Greater barriers to exit in marriage or DP.

Peplau: Marriage.

Dusseault: Ms. Moss, exclusivity. That was done

25 years ago. There was no marriage available for same sex couples.

Peplau: Nor were there domestic partnerships.

Dusseault: Any effect had nothing to do with behavior

Dusseault: In state of CA, any restriction to couples who don't want exclusive relationship to marry.

Peplau: There is none.

Dusseault: Why focus on US?

Peplau: We're focusing on changes to law in CA and US. It seems to me most directly relevant data was from another state.

Dusseault: Any idea whether the 43% of those in Moss' Belgium data included all that were married?

Peplau: Percent of indivs that were married.

Dusseault; How long opposite sex marriage legal in Belgium.

Peplau: I assume for a long time.

Dusseault: Same sex couples have great emphasis on indivs than opposite sex.

It's BEER THIRTY!!!

Walker: SCOTUS has given us guidance, we may have issues beyond remote access. To these proceedings that we'll have to take up. My inclination without hearing from counsel, that we put that aside from time being. We seem to be moving along well. Don't want to do anything to alter how we're proceeding. We will not have remote access. We'll have to deal with other issues in due time.

Walker: Cooper, Understand you asked about the responses to proposed change in local rule. And responses wrt broadcasting or webcasting these proceedings.

Cooper: I believe my colleagues have taken

advantage of that.

Walker: there were quite a number. My understanding from clerk, your team had requested to copy some of them. Maybe you should chat with your colleague. I'll be guided by whatever you advise, you should either copy all or none or make them all part of the record. In view of the volume I wonder what value they may have.

Cooper: Court has selection of comments.

Walker I put all the lawyer comments on. But none from indivs.

Cooper: If we do conclude that something we'd like to ask clerk to make part of public record.

Walker: Stewart.

Stewart: Wanted to make sure that Tam did get into record. I'm told that they weren't transcribed. I'd like to make sure deposition excerpts are part of the record.

Walker: helpful if you give line items. Whose our first witness tomorrow. Eagen. First witness. Suppose we can get through three of these tomorrow.

Boies: We hope those three will not take whole day.

Walker: that would be good progress. We are moving along, which is what we all want to do.