

PROP 8 TRIAL: A TALE OF TWO LAWYERS

As I've been processing the three days I spent at the Prop 8 Trial last week, there's been a lot to think about: how much I learned about gay experience, both historically and psychologically; how odd a role I had as an observer (the journalists present appeared to be largely split between "objective" journalists and gays and lesbians; but as a "barren" straight married woman, the Prop 8 proponents were effectively making an attack on my non-procreative marriage along with their attack on the humanity of the gay men and lesbians around me); and the dynamics of the court room.

But the most salient observation on the trial, for me, is a reflection on two of the lawyers arguing the case: for the Defendant-Intervenors, David Thompson, and for the Plaintiffs, Matthew McGill. Both appear to be highly accomplished lawyers and their schooling (Harvard; Harvard in Thompson's case, Dartmouth; Stanford in McGill's case) suggests both are highly intelligent. Which is why the difference in their questioning (one, two, three) of Professor Michael Lamb was so striking to me.

Matthew McGill

After establishing Lamb's credentials in childhood development and, through Lamb, establishing the many different kinds of studies that support the consensus that lesbians and gay men make as good parents as straight women and men, McGill organized his questioning around the pamphlet 21 Reasons Why Gender Matters, basically having Lamb pick apart the attacks that pamphlet makes on gay and lesbians—particularly its treatment of the bogus "gender disorientation pathology"—calling them things like "very old canards."

McGill also had Lamb carefully explain how his own thoughts evolved from when—early in his

career—he believed fathers as such were important to healthy child adaptation, only to discover with more research that it is not so much the father, but a lot of the factors (like adequate material resources) that father absence might entail.

Through this all, McGill wasted neither time (something sure to ingratiate him to Vaughn Walker, who clearly likes to keep a timely courtroom) nor any emotions and/or body motions on his delivery. He was the most in-control lawyer of any I saw last week (acknowledging that I missed Ted Olson, Boies did nothing yet, and Theodore Boutrous' role was limited to housekeeping).

David Thompson

For those who followed along the Libby trial, Thompson's manner reminded me of Bill Jeffress'—his bullying manner, his use of mock indignation, alternating with calm politeness. However, as you'll see, Thompson had none of the incisive exposure of detail that Jeffress had, and as a result the bullying comes off as farce, not believable outrage.

Thompson started his cross-examination of Lamb in the same way the D-I's started with most plaintiff witnesses, by trying to pin him as an advocate. Though it got rather ridiculous when Thompson painted Lamb's donations to the ACLU, NOW, NAACP, Amnesty International, the Nature Conservancy, and—shockers!—PBS as proof that Lamb was a "committed liberal."

And over the course of hours of questioning, Thompson invoked several other tired assaults on science: the suggestion that all university research was ideological, the accusation that "science was wrong" because it challenged and revised earlier hypotheses. A favorite, among all the D-I lawyers, was to insist that all the studies on gay or lesbian married couples did not use a large enough sample size—which of course, is artificially limited because people like the D-Is themselves insist that no more

people should have the right to join that sample.

What truly disturbed me, however, were two tactics Thompson used just before lunch on Friday.

The first was, twice, having Lamb read from a passage in one of his papers in which he reviewed the earlier stance arguing that fathers, as fathers, were important to child adjustment.

Thompson: [Directs Lamb to one of his articles] "Father's predispose them"

Lamb: This is referring to David Popineau. It was trying to describe his position. We were supposed to be reviewing contributions to the field.

Thompson: You thought his contribution was significant enough to be named in review.

Lamb: Scholars like to be sure they don't leave out things.

Both times, Thompson seemed unable to distinguish between Lamb reviewing the views of another and Lamb espousing such views. That is, Thompson at least pretended to be unaware of the difference between Lamb reporting his own conclusions and Lamb reporting the views of others (he later confused a literature review with other kinds of studies, which would be consistent with this problem).

And then Thompson directed Lamb to the hard copy of a chapter of one of his books and pointed out Lamb's own argument that fathers were important. In response to which, Lamb pointed out that the hard copy in the witness binder was a very early edition of his book, it had gone to a number of later editions, and in those editions, he had specifically updated those references to reflect the new understanding of why fathers were important.

Thompson: Nurturing fathers may contribute to wellbeing of daughters. Disturbed father child relationships and failure to achieve same sex identification may be pathogenic.

Thompson: 1976, role of father in childhood development.

Lamb: Citations are to 1961, two from 1950s, one from 1965. We've had a lot of research since that was written. As you've pointed out, there have been subsequent editions of this book, that have updated these citations.

Now, those of us watching in the Ceremonial Courthouse complained loudly about such tactics (which Thompson used just before lunch), and Thompson didn't resort to such fraud and/or logical gimmicks after lunch. So perhaps the ProtectMarriage people alerted him to how badly this was playing with rational beings (a group I'd include Vaughn Walker in, of course) in the ceremonial courthouse.

But it was striking the degree to which Thompson—in a bench trial, the functional audience of which is really limited to a very rational Vaughn Walker and a fairly rational Anthony Kennedy—adopted argumentative tactics that violated the very premise of logic. It's one thing to—as Thompson did—attack science itself. But to attack the very logic that lawyers (including, presumably, the Harvard educated Thompson) rely on really seemed either an act of desperation or an admission of how devoid of any logic there is in his argument.

Matthew McGill

On redirect. McGill did two things. First, he rehearsed with Lamb the use of the term “biological” when used in psychology. Lamb explained that is often used to describe intact families—that is, to include families with adopted children. McGill then showed the deposition of Loren Marks, one of the D-I's

expert witnesses who had withdrawn earlier in the week. McGill showed Marks insisting that “biological” should be restricted to genetic families (seemingly supporting the argument the Prop 8 families like to make to exclude gay and lesbian parents). Then, in the deposition, McGill used the same documents that Thompson had asked Lamb to review to show that McGill Marks had specifically misinterpreted how underlying studies he was using used the term.

In other words, McGill used Lamb’s presence on the stand to not only review the deposition of one of the withdrawn experts (though the deposition will probably not be entered as evidence), but also to show that the witness in question had made—and then withdrawn—a specious claim based on fraudulent scholarship. McGill went on to have Lamb discredit the work of two other proposed D-I witnesses (who Thompson had perhaps foolishly introduced in his Cross), to call out the problems in their scholarship.

Finally, thankfully (given how long Thompson had taken in his Cross), McGill ended with the following:

McGill: Did the corporation on public broadcasting affect your opinion in this case?

Lamb: No, it did not.

Now, I raise all this not just because of the striking contrast between science and logic and lack thereof. As I said, these guys are both undoubtedly intelligent (much more intelligent than Thompson came off). In addition, I was struck by two details in McGill’s resume (McGill got his JD from Stanford in 2000):

Prior to joining Gibson Dunn, Mr. McGill served as a **Bristow Fellow in the Office of the Solicitor General at the U.S. Department of Justice** and clerked for the Hon. Joseph M. McLaughlin of the U.S. Court of Appeals for the Second Circuit and the **Hon. John G. Roberts,**

**Jr. of the U.S. Court of Appeals for the
D.C. Circuit.**

That is, early in his career and during the years Monica Goodling was politicizing DOJ, McGill served in the Solicitor General's office (possibly while Ted Olson was still there) and clerked for John Roberts (while he was still an Appeals Court judge). This guy is, almost certainly, a Republican. One who has worked with the current Chief Justice of the Supreme Court. He has also spent a lot of time (not surprisingly, given this experience) worked on appellate cases.

So go back.

You've got two real audiences in this trial. Vaughn Walker. And, ultimately, Anthony Kennedy (and people like McGill's old boss, John Roberts). One side—Thompson's side—is using the kind of theater that might make sense in a jury trial, but is unlikely to appeal to the two main members of his audience. And the other is showing how even when the Prop 8 defenders try to use science, they break the rules of both science and logic.

Ultimately, as a number of people pointed out after watching this testimony, this may end up being another Scopes Trial. It may be that the forces of prejudice will, once again, win out over science. But in a head to head confrontation of two lawyers, it sure looks like science is winning the debate this time.

Update: Shoot. I forgot two points. First, both sides have been going back and forth to spin the withdrawal of the D-I expert witnesses. The D-I argue the cameras scared them off, and perhaps let slip a truth when they add "professional fears" into their claim of other fears. The Plaintiffs argue that the experts have withdrawn because they got beat up so badly in their depositions. In a presser on Friday (in which McGill was at the podium along with Boutrous) Boutrous gave McGill credit for—at

least—persuading Loren Marks (the guy who backed off his “biological” claim) not to testify. So McGill may be the guy who is ripping apart the science of the so-called scientists the D-Is wanted to call.

Also, McGill specifically said they had gotten more evidence in than they had deemed the minimum necessary. It sounds like they’re quite happy at their success getting both anti-gay propaganda (like the 21 Reasons claims) and details about the withdrawn expert depositions before the Court.

Update: McGill/Marks error fixed.