the Romantics

The California trial to legalize same-sex **marriage** *was a* **Scopes** *trial redux, pitting* **science** *against* **religion**. *It also dramatized the defining* **civil rights** *battle of our time.*

by **Katrina Dewey**

Illustration by Shannon Freshwater

The nation's most famous trial lawyer contemplated his foe, a man who had whipped public opinion into such a state that citizens passed a law requiring others to conduct themselves according to religious belief rather than scientific knowledge.

The threshing machine of a lawyer bore in on the man's beliefs, the depth of his knowledge and comprehension of their foundations. Far from lecterns and populist pulpits, the man was now confined to a witness stand, where his testimony laid bare that his faith in God and the teachings of the Bible were the reason children could not learn evolution.

"You have given considerable study to the Bible, haven't you?"

"Yes, sir, I have tried to," the witness replied.

"Well, we all know you have, we are not going to dispute that at all," said the lawyer. "But you have written and published articles almost weekly, and sometimes have made interpretations of various things?"

The witness was not a stupid man. If he acknowledged that he interpreted some biblical passages, he knew it would be hard to quarrel with an opposing interpretation.

"I would not say interpretations, … but comments on the lesson."

And so the lawyer turned to the Old Testament. "Do you believe Joshua made the sun stand still?" he asked.

"I believe what the Bible says. I suppose you mean that the earth stood still?" the witness countered.

"I don't know," the lawyer responded. "I am talking about the Bible now."

"I accept the Bible absolutely," the witness said. "I believe it was inspired by the Almighty, and He may have used language that could be understood at that time instead of using language that could not be understood" until you were born.

"If the day was lengthened by stopping either the earth or the sun, it must have been the earth?"

"Well, I should say so," the exasperated witness sighed.

" … Have you ever pondered what would have happened to the earth if it had stood still?"

"No."

"You have not?" the lawyer asked.

"No; the God I believe in could have taken care of that," the witness retorted.

"Don't you know," the lawyer asked, "it would have been converted into a molten mass of matter?"

In 1925, Clarence Darrow defended John Scopes, a schoolteacher charged in Dayton, Tenn., with teaching evolution, and thus violating the nation's first law to prohibit children from learning science. The Scopes Monkey trial was a show trial cooked up in Robinson's drugstore by businessmen and civic boosters hoping to strum up business for the local economy. The contest between Darrow and William Jennings Bryan, a failed presidential candidate whose later years were devoted to Florida land development and the spread of religious fundamentalism, became legendary, embossed in our public consciousness through "Inherit the Wind."

Its legend endures not so much because of its cinematic preservation, but because its conflict is that of the American people. Eighty-five years later, we are still torn between faith and knowledge, with many struggling for coexistence. Even today, 40 percent of Americans say they believe humans were created by God in the last 10,000 years. Fortunately, children are now allowed to learn that the earth is roughly 4.5 billion years old and the apes from which we evolved have been upright for around 6 million years.

That's how, on Jan. 25, 2010, I found myself watching as David Boies dismantled a man whose published thesis was in 19th century cabinetry, but whose professed expert field was the family, specifically the need for a father and a mother, as God intended. California voters had enshrined his beliefs into law.

THE CALIFORNIA TRIAL TO LEGALIZE SAME-SEX MARriage, *Perry v. Schwarzenegger*, was, in many ways, *The State of Tennessee v. Scopes* redux. One was a criminal trial and one civil, one rendered a conviction and the other an historic equal rights decision. But each, ultimately, showed the romanticism of the law, and its ability to transcend populist will rooted in moral and religious beliefs. Not incidentally, each involved a law coerced by fundamental religious forces as necessary to protect children but that, as the trial showed, had no basis in fact.

"God's definition of marriage [would] be permanently erased in California" if we lost the battle for Proposition 8, Hak Shing William Tam testified to U.S. District Judge Vaughn Walker, who presided over the *Perry* trial in San Francisco federal court. Tam, one of five original proponents of Prop. 8 and the secretary of a coalition member, 1man1woman.net, was called as a hostile witness by the plaintiffs. He supported Prop. 8 because he feared same-sex marriage would erode traditional Asian family culture, increase child molestation and lead to the legalization of sex with children.

The campaign to pass Prop. 8 was nasty. Fearful of a rising tide of acceptance for gay civil rights in the courts and society, an umbrella group called Protect Marriage crocheted a

Ted Olson (left) and David Boies talk with their clients, Sandra Stier and Kristin Perry, between court sessions.

coalition of churches and their offshoots, like the Traditional Family Coalition, Focus on the Family and the California Family Council, to convince California voters that gay marriage would diminish heterosexual marriages, require schools to teach same-sex marriage, and foster pedophilia. One of the most effective strategies of the Protect Marriage campaign was its reliance on support from church pulpits to spread its message. The power of churchgoers in passing Prop. 8 cannot be overstated: 84 percent of those who attended church weekly voted for it; 83 percent of those who never attend church voted against it.

January 21, 2010. David Boies cross-examines Tam.

Boies: Okay. And you know that somebody from your organization had typed the words "Homosexuals are 12 times more likely to molest children," and put it on the Internet --
Tam: Yes.
Boies: -- correct? Now, do you believe that homosexuals are 12 times more likely to molest children? Do you believe that?
Tam: Yeah, based on the different literature that I've read.
Boies: Oh. And what literature have you read, sir, that says that?
Tam: Uhm, I've read what is posted here.
Boies: And what is it? Tell me what it is that you read.
Tam: I don't remember now.
Boies: Who -- who authored it?
Tam: Some from, apparently, academic papers.
Boies: What academic papers, sir?
Tam: I don't remember.
Boies: Well, do you remember any of them?
Tam: No.
Boies: Was it in a -- a journal, or was it in a book that you read?
Tam: Some could be news. Some could be from journals.
Boies: It could be. I'm not asking you what it could be. You told me you'd read something that said that homosexuals were 12 times more likely to molest children. You told me that, right?
Tam: Yes.
Boies: Okay. Now, I'm asking you what you read. Was it a book?
Tam: I don't remember.
Boies: Was it an article?
Tam: I don't remember.
Boies: Who wrote it?

PHOTO BY: GABRIELA HASBUN

Bruce Ivie (left) and David Bowers have attended each court hearing of the six-year legal saga of gay marriage in California.

Tam: I don't know.

GAY RIGHTS IS THE CIVIL RIGHTS BATTLE OF OUR TIME. It has worked its way in, around and through the courts for more than three decades. The lodestar of progress was the decriminalization of consensual sodomy, as *Bowers v. Hardwick* of 1985 yielded to *Lawrence v. Texas* of 2003. Criminalization of sodomy (or deviant sex, as it was called) had laid the foundation for stereotypes that gays and lesbians were criminals. The U.S. Supreme Court upheld that view in *Bowers*, finding a state interest in moral disapprobation of homosexual conduct. Justice John Paul Stevens dissented, writing, that "[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." He would have equally protected the intimacies of same-sex couples.

Eighteen years later, the Supreme Court agreed with Stevens and overturned *Bowers* in the *Lawrence* case, which again involved state laws forbidding sexual conduct between homosexuals. Justice Anthony Kennedy wrote for the 6-3 court, which extended the liberty protected by the Due Process Clause of the 14th Amendment to intimate consensual sexual conduct between homosexuals. Two interesting opinions accompanied Kennedy's. Justice Sandra Day O'Connor would have struck down the laws as an equal protection violation, while Justice Antonin Scalia criticized the majority for signing on to "the homosexual agenda."

"If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct...what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising 'the liberty protected by the Constitution'?" Scalia wrote in dissent, in an opinion joined by Chief Justice Rehnquist. "Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry."

But intimate sexual conduct was only one front of the battle for gay rights. The workplace, military, domestic relations, AIDS and adoption were all the focus of efforts to expand protections and equal rights beginning in the 1970s. Gay marriage was an issue on the far horizon. A few same-sex couples sought marriage licenses in those early days, but they were routinely denied; pie-in-the-sky lawsuits faced the same fate.

The discussion changed in 1993, when three same-sex couples won an equal rights ruling from the Hawaii Supreme Court, *Baehr v. Lewin*, that a state needed a compelling interest to prohibit same-sex marriage. The *Baehr* case was sent back to trial court to determine whether the state could show a legally valid reason for the prohibition. On Sept. 10, 1996, Judge Kevin S.C. Chang opened the first substantive trial to determine whether same-sex couples were denied equal protection by a prohibition on same-sex marriage. The state defended *Baehr*, claiming five compelling governmental interests in the traditional definition of marriage, including the health and welfare of children, and the need to foster procreation in traditional heterosexual marriages. In December, Chang ruled against the state and enjoined Hawaii from refusing to issue licenses to same-sex couples.

Even as Judge Chang prepared to hear the case, a push-me

PHOTO BY: GABRIELA HASBUN

pull-you of efforts to turn back same-sex marriage overcame the nation. A congressman from Georgia introduced a measure in May of that year that became known as the Defense of Marriage Act, limiting marriage to one man and one woman. It was legislatively fast-tracked, passing the House in July, the Senate in September, and was signed into law by President Bill Clinton on Sept. 21, 1995. Hawaiians passed Amendment 2, restricting marriage to straight couples, in 1998, effectively ending the *Baehr* litigation. Voters throughout the nation took their turn, with 31 states confining marriage to opposite-sex couples. California voters passed the first of two such prohibitions, Proposition 22, in 2000.

And still, knowledge grinds forward. It may have been inevitable that San Francisco would produce a strikingly handsome and successful young wine merchant who would make his way onto the Board of Supervisors, and then into the mayor's office. Gavin Newsom was sworn in as mayor of San Francisco on Jan. 3, 2004, and wasted no time with an audacious, bold stroke. On Feb. 12, with Valentine's Day looming, he instructed the county clerk to issue marriage licenses to same-sex couples. Newsom's decision electrified gay and lesbian couples, who rushed to San Francisco to take part in the revolution.

The first to receive their marriage license was an 80-year old lesbian couple together more than 50 years; one of them had been fearful that marrying would undermine women's rights. The 79th couple was Bruce Ivie and David Bowers, silver haired after 24 years together. They would become the quiet sentinels of this misunderstood revolution, dutifully attending each court hearing of the six-year saga while enduring a ping-pong marriage, in which they have married, been unmarried, then allowed to wed again, though their same-sex friends cannot.

If you're now thinking "a straight couple would never tolerate that," you may have a point.

BRUCE AND DAVID WERE SITTING IN A DARKENED hallway outside the 17th floor courtroom of San Francisco Federal Judge Vaughn Walker at 6 a.m. on Jan. 11. They could barely sleep the night before, eager for opening statements in *Perry v. Schwarzenegger*. They sat side by side on a wooden bench, under historic photos of old San Francisco as we waited more than three hours for the few seats available for the public in the courtroom. Their quiet dignity was transformative.

I was assigned a seat behind them in court, and listened to the two plaintiffs couples, Kristin Perry and Sandra Stier, and Paul Katami and Jeff Zarrillo, testify about their love for one another and their desire to wed. A marriage cynic, I wondered if this was a case of being careful what you ask for.

Bruce and David held one another tight, barely moving a muscle as Stier, a pretty soccer mom with four children, testified that the Prop. 8 campaign tried to educate people "that there was a great evil to be feared and that evil must be stopped and that evil is us, I guess." As the no-nonsense Perry talked about her love for Stier, whom she considers the "sparkliest person" she ever met, I was oddly transfixed by Bruce's ears, which have come to be alighted like little butterflies on his head swollen by HIV drugs. And by David's quiet way of reaching over to touch Bruce's knee as the handsome, young Katami talked about the foundation marriage would provide he and Zarrillo to raise a family, since his timeline has always been "marriage first, then family."

Intellectually, I had come to the trial fully supportive of gay marriage as a simple issue of equality and dignity. But, a lifetime of images of happy brides and grooms had left me with stereotypes of what a marriage is and little true understanding of its nature. Sitting with Bruce and David, I learned from a trial presentation notable for its history and power, and most of all for its humanity.

The Perry trial was a coming together of long brewing political, societal and legal forces accelerated by the addition of Olson and Boies – who believe in Justice with a capital J and Lawyers with a capital L.

The 17th floor became our home for most of January 2010. We would arrive by 6 a.m. and often leave at 5 p.m., sometimes not straying to the cafeteria at lunch for fear of losing our place in line. Professional caterers, Bruce and David brought food for us to share.

Through the doors of Courtroom 6, we learned about love and marriage; God and procreation; hatred and discrimination. We learned that most of what we thought we knew about marriage was wrong. We learned, too, that a lot of what we know of love and family is just about right, if not sufficiently inclusive.

LIKE THE 1960S, THIS LEGAL LOVE-IN DIDN'T JUST leap unformed from Lesbos' head. It was a coming together of long-brewing political, societal and legal forces accelerated tremendously by the addition of Olson and Boies, bringing a much broader legitimacy to the view that gay rights are civil rights, and civil rights are not liberal nor conservative. They are American.

Just a month after same-sex marriage began in California in 2004, the California Supreme Court halted it, saying Newsom had overreached. The court invalidated the 4,000 marriages that had been conducted, but invited a challenge to same-sex marriage on equal protection grounds. That decision precipitated four years of litigation, in which the San Francisco city attorney's office and the public interest

community dueled opponents of gay marriage, initially led by the Prop. 22 Legal Defense and Education Fund, the Campaign for California Families and joined by then Attorney General William Lockyer. The litigation culminated in the historic California Supreme Court decision in *In re Marriage Cases* holding Prop. 22 unconstitutional. Chief Justice Ronald George led the court in becoming the first to hold that sexual orientation is a protected class, like race and gender, and to apply strict scrutiny under the Equal Protection Clause of the California Constitution. "Equal respect and dignity" of marriage is a "basic civil right" that cannot be withheld from same-sex couples, he wrote.

Same-sex marriages resumed on June 17, 2008, with more than 18,000 same-sex couples saying "I do." On Nov. 4, voters said "I don't," with 52 percent casting their ballots for Prop. 8, adding a new provision to the California Constitution, that "Only marriage between a man and a woman is valid or recognized in California."

San Francisco and the public interest community sued again, but after five years of battling on equal protection claims, they switched legal tactics. Instead of continuing a constitutional battle, the ACLU, Lambda Legal, the National Center for Lesbian Rights, GLAD and the San Francisco city attorney's office challenged Prop. 8 strictly on technical grounds, arguing that Prop. 8 was a procedural revision rather than an amendment, and thus should be voided because it needed the approval of two-thirds of the California legislature.

The case, *Strauss v. Horton,* was heard directly in the California Supreme Court, which rendered its decision on May 26, 2009. With only Justice Carlos Moreno dissenting, the court upheld Prop. 8, finding voters could lawfully take away fundamental rights through the initiative process. "Proposition 8 must be understood as creating a limited exception to the state equal protection clause," wrote Justice Kathryn Mickle Werdegar for the majority. As a small concession, the court left intact 18,000 same-sex marriages.

While supporters in San Francisco dealt with the shock of again losing the right to gay marriage, a press conference was about to be held in Los Angeles. And it was a game changer.

"Creating a second class of citizens is discrimination, plain and simple." Ted Olson

"Ted and I, as everybody knows, have been on different sides in court on a couple of issues." David Boies

The tale of how Olson and Boies came to lead the broadest challenge made on behalf of gay rights is a tale straight from Hollywood. The Polo Lounge, to be precise. There, in the post-mortem days of Prop. 8, a big lawsuit was conceived by three people who knew how to think Big: Hollywood publicist Chad Griffin and director Rob Reiner and his wife, Michelle. And, like the discovery of Lana Turner at Schwab's drugstore, a former sister-in-law of Ted Olson stopped by, and *Perry* was born.

It's hard to say what Protect Marriage supporters thought would happen once Prop. 8 passed. Certainly, they anticipated a legal challenge from the same battle-hardened public interest community that had been waging a glacial, state-by-state ground war inspired by *Lawrence* in hopes of transforming public opinion and ultimately winning the right to same-sex marriage.

They could not have foreseen two lawyers who would enter the battle and transform the legal strategy for gay marriage – elevating it from splinter cause to civil right. David Boies and Ted Olson. The Butch and Sundance of the U.S. legal profession draw headlines as polar opposites after serving as opponents in *Bush v. Gore*, the legendary vote counting battle in which Olson bested Boies before a friendly Supreme Court. But they share a foundation miles deep. Born in Illinois, both spent their formative years in California and reflect the rough-hewn individualism and embrace of unbridled hopes and Golden dreams. Both came of age in the law in the late 1960s, Boies in New York and Olson in Washington, D.C. And both are sufficiently seasoned in the law to be post-ideology: Olson, 70, the conservative is actually more of a libertarian, and Boies, 69, a true liberal, is made of steel.

Mostly, they are Romantics. Not about their opponents, whom they will joyously slay. But, about what it is they do in this system we call Justice. They believe in Justice with a capital J and Lawyers with a capital L, who aim for a higher law than the natural law of our baser selves. They laugh loud, love large, and have marrow in their bones. Each has married and divorced, and come to cherish love, loss, family and life's whole damn Valentine more fully than their clients are permitted.

Olson's role in the litigation is one of those star-crossed moments, born in part of the tragic death of his wife on 9/11 in the plane that hit the Pentagon and the springtime that had returned with his new wife, Lady Booth, a former Simpson Thacher tax attorney from Kentucky. That was the Olson who signed on without hesitation to lend his appellate and conservative cred to same-sex marriage. He tapped as his field strategist his Gibson Dunn partner, Ted Boutrous, who has overturned more than a billion dollars in damages on appeal for clients including Ford Motor Co. and the Wall Street Journal, and is defending Wal-Mart in the largest employment class action ever. The organizer, Chad Griffin, meanwhile, formed a new public interest group to fund the litigation, the American Foundation for Equal Rights.

In the months leading up to the filing, Olson asked Boies to join the team. David Boies is widely considered the leading trial lawyer in America today, having made his name as a partner at the nation's quintessential firm, Cravath, Swaine & Moore, before leaving to form Boies, Schiller & Flexner,

the most powerful litigation turbine in America. In addition to adding the nation's most deadly cross-examination expert to the *Perry* team, Boies' presence quieted the concerns of some in the public interest community, who were openly skeptical of an effort headed by Olson, who had defended Ronald Reagan in Iran-Contra and secured the White House for George W. Bush.

The lawyers drafted the *Perry* complaint as a due process and equal protection challenge, telling the story of gays in California, the discrimination and political prickliness they face, and the toll of that discrimination in mental and physical health. It also details the baseless stereotypes and church-based coalition building used by the campaign to pass Prop. 8 and asks the Court to "construe Prop. 8 and enter a declaratory judgment stating that this law and any other California law that bars same-sex marriage violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment...."

One other thing was interesting, as the *Perry* team announced their lawsuit on May 26, 2009, from the stage of the Biltmore Hotel in Los Angeles.

It had actually been filed four days earlier by a Gibson Dunn associate, just four years out of Boalt Hall. Enrique Monagas had very specific instructions: file at the very last moment on the Friday before Memorial Day weekend, and try to be unnoticed.

The timing of the filing was no accident. The *Strauss* decision was expected on May 26, and many suspected the gay-marriage cause would lose its claim that Prop. 8 had failed because of technical construction.

That was not, at all, the type of claim the *Perry* team had in mind. They would swing for the fence on the biggest equal protection claim yet made on behalf of gays and lesbians, the *Brown v. Board of Education* of gay rights. And from the outset, Olson and Boies were clear they had one goal in mind: A U.S. Supreme Court victory recognizing the right of same-sex couples to wed.

It was hard for Monagas to walk out of the federal courthouse without jumping in the air and levitating once the clerk returned the time stamped (3:25 p.m.) complaint and the designation of the judge who would handle the case.

VRW.

VAUGHN R. WALKER, THE CHIEF JUDGE OF THE SAN Francisco Federal Court, is an elegant, silver-haired Reagan appointee of flinty and witty intelligence. Like Boies and Olson, he was born in Illinois, a small, rural town called Watseka, in the early 1940s. His nomination to the federal bench by Ronald Reagan in 1987 was stalled at the Senate Judiciary Committee, which considered him insensitive to gays because he had represented the U.S. Olympic Committee against the right of the Gay Olympics to use its name. When renominated by George H.W. Bush in 1989, he was unanimously confirmed.

Also, he happens to be gay and from an era when one's sexual

With apologies for a bit of bluster...

We have the highest percentage of Lawdragon 500 lawyers.

So there.

Susman Godfrey, America's finest trial boutique, has 86 lawyers in five cities, including four of the Lawdragon 500.

We prefer to bet on ourselves by aligning our financial interests and yours through alternative fee arrangements where we get paid only if you win.

www.susmangodfrey.com

Susman Godfrey's Lawdragon 500 lawyers: Steve Susman, Bill Carmody, Lee Godfrey and Neal Manne

SUSMAN GODFREY LLP

TRIAL LAWYERS

HOUSTON NEW YORK

DALLAS LOS ANGELES SEATTLE

identity needed to remain private if you were not straight and wanted to make your way to the top of a big corporate law firm (Pillsbury) and the federal bench.

That Walker suffers no fools was never in doubt. Among the most important questions to be answered was who would defend the popular but legally distasteful Proposition 8. The official defendants, including then Gov. Arnold Schwarzenegger and Attorney General Jerry Brown wanted nothing to do with the trial. Brown had repeatedly told courts that he believes same-sex couples are constitutionally entitled to wed. He told Walker the same thing, but took it a significant step beyond, reaching back to the racial discrimination of 1964 to frame the issue of same-sex marriage in historic civil rights terms.

"The United States Constitution is the 'supreme law of the land.' ... Taking from same-sex couples the right to civil marriage that they had previously possessed under California's Constitution cannot be squared with guarantees of the Fourteenth Amendment," Brown wrote. "Accordingly, the Attorney General answers the Complaint consistent with his duty to uphold the United States Constitution, as Attorney General Thomas C. Lynch did when he argued that Proposition 14, passed by the California voters in 1964, was incompatible with the Federal Constitution."

Those who missed the early 1960s in California may be unaware of the racial divides already tugging at the diverse populace. The clashes were particularly acute in housing, with entire communities dedicated to keeping out minorities of all hues. When California's legislature passed a law in 1963 banning discrimination in the sale and lease of real property, voters rebelled and reinstated discrimination through Prop. 14. Brown's father, then governor, and Attorney General Thomas Lynch, defied the voters, and brought litigation resulting in a ruling striking down housing discrimination, from the California Supreme Court. *Reitman v. Mulkey* held that Prop. 14 was an unconstitutional violation of state equal protection and due process provisions. The U.S. Supreme Court upheld that decision, finding the Fourteenth Amendment trumps discriminatory state law provisions, including those in initiatives. Brown's father paid a heavy price for his principles, losing his re-election campaign to a young actor who supported those laws, Ronald Reagan.

Because Brown declined to defend Prop. 8, Walker allowed Protect Marriage to intervene. He declined the bid by public interest organizations to participate on the plaintiffs side, allowing only the San Francisco city attorney's office a seat on their claims of economic harm. Walker sought testimony on a dozen topics – the history of discrimination against gays and lesbians, their political power, the abilities of same-sex couples as parents versus opposite-sex ones – to aid his assessment on the legal standard to apply to the ban on same-sex marriage.

Like Judge Chang in Hawaii 14 years earlier, Walker was seeking the compelling government interest that could justify denying same-sex couples the right to marriage.

January 11, 2010. Opening Statements.

TED OLSON: Thank you, Your Honor. This case is about marriage and equality. Plaintiffs are being denied both the right to marry and the right to equality under the law. The Supreme Court of the United States has repeatedly described the right to marriage as one of the most vital personal rights essential to the orderly pursuit of happiness, a basic civil right, a component of the constitutional rights to liberty, privacy, association, an intimate choice, an expression of emotional support and public commitment, the exercise of spiritual unity, and the fulfillment of one's self. In short, in the words of the highest court in the land, marriage is the most important relation in life, and of fundamental importance for all individuals.

JUDGE VAUGHN WALKER: Now, does the right to marry, as secured by the Constitution, mean the right to have a marriage license issued by the state?

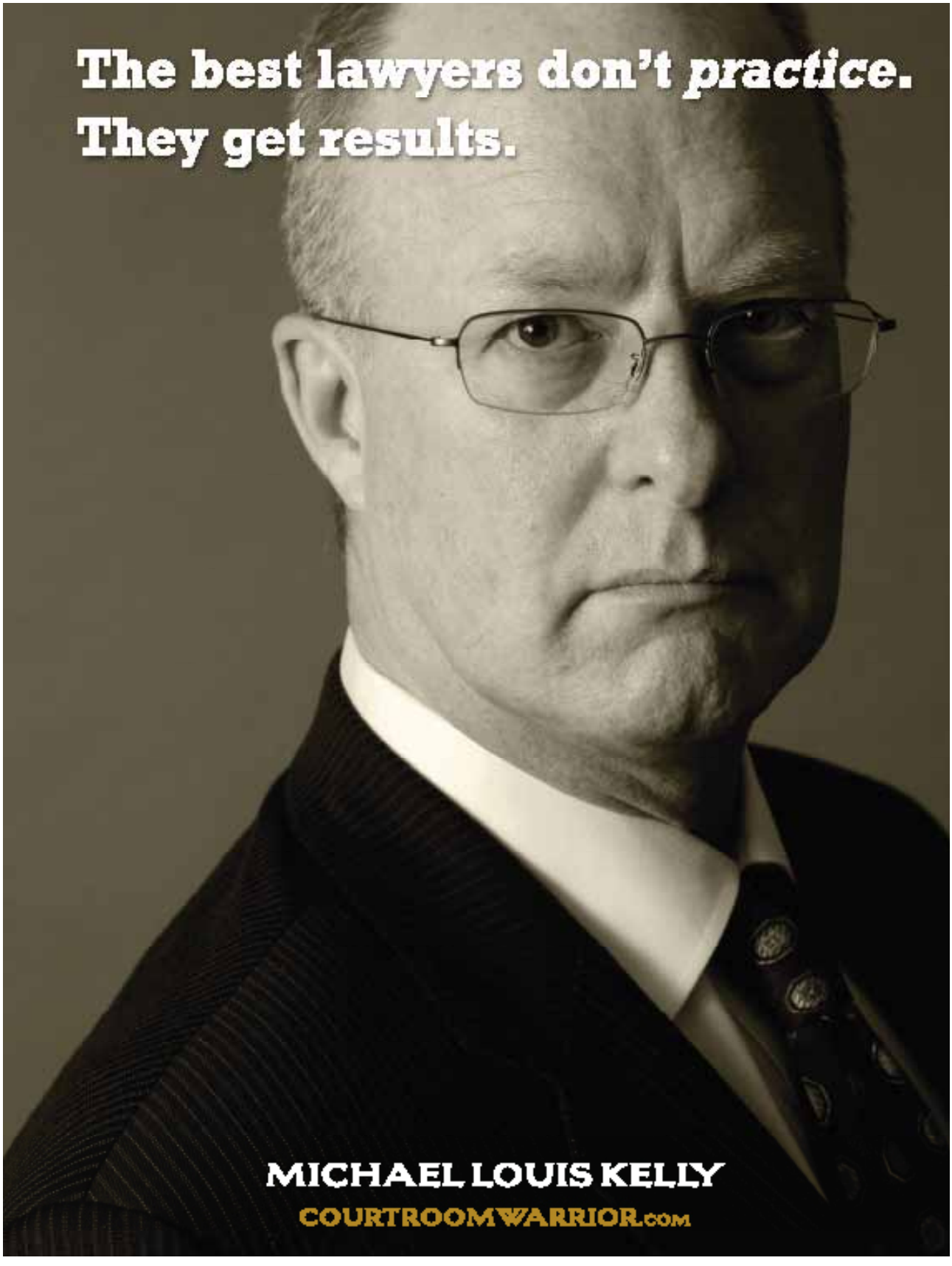
OLSON: Well, to the extent that the state asserts the right to regulate marriage, and it utilizes the form of a license to do so, I would think that would follow.

WALKER: Why?

Walker defined the trial from the start, breaking down the broad, seemingly lofty notion of marriage into its component parts so he could analyze it as a value and a right and from the perspective of the individual and the state. As Olson warmed to his opening statement, Walker hypothesized whether the state could simply get out of the business of issuing marriage licenses altogether. Olson acknowledged that, yes, it probably could, returning to his theme: the Supreme Court has recognized marriage is central to American life and of benefit to married couples, so denial of that benefit to a class of people, specifically gays and lesbians, is unconstitutional discrimination.

Walker allowed Charles Cooper, the attorney for Protect Marriage, just a smidgen more time before teasing out the parallels of Prop. 8 to anti-miscegenation laws that banned interracial marriage.

CHARLES COOPER: Now, against this backdrop the support of Californians, not once in passage of Proposition 8, but twice re-


The best lawyers don't *practice*.
They get results.
MICHAEL LOUIS KELLY
COURTROOMWARRIOR.com

The Prop. 8 campaigns and court hearings in California drew activists from both sides of the gay-marriage debate.

cently in the prior passage of Proposition 22, bespeaks not ill-will or animosity toward gays and lesbians, but, rather, a special regard for this venerable institution. Rabbi Michael Lerner, a staunch supporter of same-sex marriage, has said this: "The fact is there are millions of Americans who believe in equal rights for gays and lesbians, but draw the line at marriage."

Countless people can hear themselves described by these words, your Honor. Among those who have drawn that line is President Obama, who said this during his presidential campaign: "I believe that civil unions should include the same legal rights that accompany a marriage license. However, I do not support gay marriage. Marriage has religious and social connotations and I consider marriage to be between a man and a woman." To be sure, your Honor, traditional marriage, as President Obama noted, has ancient and powerful religious connotations, as Mr. Olson also mentioned. And it is true, that Proposition 8 was actively and vocally supported by many from the faith community, although a substantial number --

WALKER: Mr. Olson made the point if the President's parents had been in Virginia at the time of his birth, their marriage would have been unlawful. That indicates that there is quite a change in the understanding of people's entitlement to enter into the institution of marriage. And so his argument here is that we've had a similar evolution or change in the understanding with respect to people of the same sex entering into the marital institution, isn't that correct?

Cooper, of Cooper & Kirk, is a respected member of the D.C. bar, who followed Olson as U.S. Assistant Attorney General for the Office of Legal Counsel under Ronald Reagan. But his mien in defending Prop. 8 seemed to follow the wisdom of Snoopy: When you don't have the facts, argue the law. When you don't have the law, argue the facts. When you have neither, kick the bench.

The trial of *Perry v. Schwarzenegger* was Waterloo for

PHOTO BY: GERRY BOUGHAN / DREAMSTIME.COM

opponents of same-sex marriage. While the alchemy of a trial is a mystery for the ages, its calculus is rather simple. If the plaintiff presents overwhelming and credible proof, and the defense none, the plaintiffs win. That calculation is multiplied in equal protection cases, which arose following the Civil War as Southern states sought to continue discrimination with local "Black Codes," erasing the rights extended to racial minorities. If a law discriminates against a group of people, the government must show a rational reason for that discrimination; if a law discriminates a protected class of people, for example minorities or women, the judge will apply strict scrutiny and require the state to show a compelling governmental interest. Most famously, in *Brown v. Board of Education*, the U.S. Supreme Court had found school segregation laws unconstitutional under the Equal Protection Clause, finding that having one set of schools for black children and another for white was "inherently unequal."

The *Perry* lawyers presented an overwhelming case of the equivalence of opposite-sex and same-sex couples, etched with personal stories of love, commitment and discrimination experienced by the plaintiffs. They framed the case with the harm suffered when same-sex marriage was disallowed, then brought the case home with expert testimony from nine scholars on the history and purpose of marriage; the equivalence of same-sex couples to opposite-sex couples in raising children; and the stereotypes the Prop. 8 religious backers preyed on to win the measure's passage.

We listened with rapt attention to historian Nancy Cott, a professor of American history at Harvard University, who holds a Ph.D. from Brandeis, and has published eight books, including "Public Vows: A History of Marriage in the United States."

"Marriage," she testified, is a "couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another, and their agreement to join in an economic partnership and support one another in terms of the material needs of life." She explained that marriage in the U.S. has always been a secular institution that the government regulates to facilitate stable households. It has also, she noted, changed as an institution along with society as miscegenation laws fell and women gained equal rights.

Stier's mother enfolded one of her grandsons as Prof. Michael Lamb testified that all evidence shows children raised by gay or lesbian parents are as likely to be well adjusted as those raised by opposite-sex parents. In fact, he noted, the 38,000 California children now being raised in same-sex households are, if anything, likely to have slightly better outcomes than those raised in opposite-sex homes because homosexuals can't accidentally get pregnant. Lamb, too, was a litany of credentials: a Yale Ph.D., he is head of the Cambridge Department of Social and Developmental Psychology and an expert on the developmental psychology of children, including those raised by gay and lesbian parents. He previously headed the section on social and emotional development of the National Institute of Child Health and Human Development in Washington, D.C, for 17 years; he has published 500 articles, edited 40 books and reviews 100 articles a year.

And, if the best offense can be a spirited defense, Protect Marriage at least took the field. David Thompson of Cooper & Kirk, for example, was an especially obstinate cross-examiner, asking repeatedly about studies that seemed to show opposite-sex married couples did a better job raising children. We leaned forward in our seats awaiting the obvious flaw in his analysis: the studies compared opposite-sex married couples to single parent households and step families; same-sex couples were not studied.

One of the most revealing parts of the trial was the plaintiff's portrayal of the inner workings of the Prop. 8 campaign, which repackaged and sold through churches its discriminatory beliefs about homosexuals in a Grimm fairytale of sexual liberation - that gays would adopt or otherwise have children to bring them into their homes and harm them, with marriage somehow the sweets in that tale. But there has never been any evidence homosexuals pose a threat to children, George Chauncey, a professor of history and American studies at Yale, testified. Gary Segura, a political scientist, detailed the effective targeting of Protect Marriage's vote and fundraising efforts toward churches and religion. Segura is an expert on the political power or powerlessness of minority groups in the U.S. and gays and lesbians in particular, and a professor of political science at Stanford University, where he co-heads the American National Elections Studies Center.

The defense presented only one rationale to prohibit same-sex couples from marrying: procreation. Specifically, the need of society to "channel" the procreative function of men and women into opposite-sex marriage to facilitate stable families. Because gays and lesbians can't naturally channel, Cooper claimed, they are somehow disqualified from marriage. This despite the fact that courts have recognized the right of the elderly, mentally disabled, sterile and prisoners to wed.

COOPER: Your Honor, ... the purpose of the institution of marriage, the central purpose, is to promote procreation and to channel narrowly procreative sexual activity between men and women into stable enduring unions for the purpose -

WALKER: Is that the only purpose of marriage?

COOPER: Your Honor, it is the central and, we would submit, defining purpose of marriage. It is the -- it is the basis on which and the reason on which marriage as an institution has been universal across societies and cultures throughout history;

two, because it is a pro-child societal institution. The evidence will show --

WALKER: Where do the other values associated with marriage come in; companionship, support?

For all the Sturm und Drang about the will of the voters and activist judges, Protect Marriage mustered just two witnesses on Prop. 8's behalf. Cooper shelved four witnesses who claimed they feared for their safety if the trial was broadcast (although Boies' handling of the two who did appear belied the more probable fear of death by cross-examination.)

As I listened to Kenneth Miller and David Blankenhorn, I thought of the four witnesses offered by Scopes' prosecutors in their hour-long presentation: the school superintendent, the man who sold *Hunter's Biology* (the offending text) and two students, who testified they were not harmed by learning evolution.

Miller and Blankenhorn both performed poorly under cross-examination. Take Miller, for example. The Claremont McKenna professor specializes in political power, and testified one morning that gays and lesbians have substantial political power in California. He saw evidence of that in support from entertainment, religious and governmental communities and the defeat of two initiatives: one would have allowed termination of public school teachers for supporting homosexuality and the other would have quarantined those with HIV. I sat with Boies during lunch as he prepared to cross-examine the professor. He ate two pieces of apple pie and a banana, returned to court and destroyed Miller with a cross-examination that illumined the fact Miller had not done most of his own research, and had relied instead on crib notes from defense counsel. The most notable part of the exchange was that for 17 minutes, not a word was spoken. We sat quietly, watching the lauded expert furrow his brow and circle with great intent those items he actually discovered himself, unaware that what we noted most were those he did not.

And then there was Blankenhorn, the last hope of showing a compelling governmental interest. Blankenhorn has a B.A. from Harvard and an M.A. in comparative social history from the University of Warwick (the site of his cabinetmaking piece). Blankenhorn holds well-intentioned beliefs, forged as an inner-city counselor, where the Southerner was introduced to fatherless homes. He made the lay study of family and marriage his life's work, authoring two books, "Fatherless America: Confronting Our Most Urgent Social Problem" and "The Future of Marriage."

Blankenhorn was an evasive witness, repeatedly refusing to answer direct questions from Boies about the basis of his belief that same-sex couples should not be allowed to wed. "I have just read articles and had conversations with people, and tried to be an informed person ... But that is really the extent of it. I haven't developed a methodology or a set of expert, you know, findings about the topic ...," he testified.

Despite that, he offered as his definition of marriage "a socially-approved sexual relationship between a man and a woman" whose primary purpose is to "regulate filiation." Boies extracted the problem faced by Protect Marriage in building a rational government interest on what is essentially a religious belief when he asked Blankenhorn about his three rules of marriage: the rule of opposites (man/woman); the rule of two; and the rule of sex. Blankenhorn believes, for example, a polygamous man married sequentially to five wives does not violate the rule of two, because each marriage has just two people.

BOIES: … Is it your view that that man who has married one wife, and then another wife, and then another wife, and then another wife, and then another wife, and now has five wives, and they are all his wives at the same time, that that marriage is consistent with your rule of two? And that is a yes or no question.

BLANKENHORN: I concur with Bronislaw Malinowski, and others, who say that that is consistent with the two rule of marriage.

BOIES: Okay. Now, let me go on to your third essential structure of the institution of marriage. And that is sex.

BLANKENHORN: That's a good subject.

BOIES: It is. And I don't want to fall into the trap of making sex boring.
(Laughter)

BLANKENHORN: Maybe together we can do that.
(Laughter)
No insinuation.

And so it went, until on the 12th day, the defense rested.

IT WAS 5:30 A.M. ON JUNE 16 WHEN I GOT OUT OF A CAB outside the San Francisco federal courthouse. A few news vans were already in place, when I walked to the entrance, eager to see Bruce and David and the others with whom I had watched the trial. There was drama, of course, as we talked our way past security and up to our favorite hallway, where we lined up against the wall just like old times. Today would be different, though, as rallies would be held outside to commemorate closing arguments. The security officer tending the early morning crowd handed out blue tape to the first 12 of us in line, later asking us to write our number; mine was seven.

We were quiet as church mice as Olson and Cooper gave their closing statements, making their final plea for either a

Congratulations to our Partners

Max Berger
Jerry Silk
Blair Nicholas

On being named to the
Lawdragon 500
Leading Lawyers in America

BLB&G Bernstein Litowitz Berger & Grossmann LLP
Trusted advocacy. Proven results.

new era of civil rights, in which equal protection applies to gays and lesbians, or a return to the dictates of the majority on this most personal of issues. And while Cooper predicted a Biblical vision of the end of days should same-sex marriage be allowed, Olson offered a patriotic vision of a better America in which everyone could love equally.

COOPER: So the first question, your Honor, that has to be asked is: Why has marriage been so universally defined by virtually all societies at all times in human history as an exclusively opposite-sex institution? It is because marriage serves a societal purpose that is equally ubiquitous. Indeed, a purpose that makes marriage, in the often repeated formulation of the Supreme Court of the United States, fundamental to the very existence and survival of the human race. … And the historical record leaves no doubt, your Honor, none whatever, that the central purpose of marriage in virtually all societies and at all times has been to channel potentially procreative sexual relationships into enduring stable unions to increase the likelihood that any offspring will be raised by the man and woman who brought them into the world.

WALKER: … Why does the state regulate [marriage]? Why doesn't it leave it entirely up to private contract?

COOPER: Your Honor, again, because the marital relationship is fundamental to the existence and survival of the race. Without the marital relationship, your Honor, society would come to an end.

And then there was Ted Olson, who that afternoon unleashed a closing argument for the ages. He deftly combed through the layers of issues any appellate review would entail, and pinned them securely to the broad framework with which he and Boies had started the case those many months ago.

OLSON: [Y]ou have to have a reason. And you have to have a reason that's real. Not a post hoc justification. Not speculation. Not built on stereotypes. And not hypothetical. That's what the Supreme Court decisions tell us. We don't have that here. We have a decision that takes -- and there isn't any question -- a group of people who have been victims of discrimination, who are a discreet minority, who have identifiable characteristics, their sexual orientation, and we want to foreclose them from participat-

Proposition 8 passed in the November 2008 state elections with about 52 percent of the vote.

ing in the most fundamental relationship in life. Now, rational basis, strict scrutiny, or some kind of intermediate scrutiny tells you those are basic facts. You are discriminating against a group of people. You are causing them harm. You are excluding them from an important part of life. And you have to have a good reason for that.

And I submit, at the end of the day, "I don't know" and "I don't have to put any evidence," with all due respect to Mr. Cooper, does not cut it. It does not cut it when you are taking away the constitutional rights, basic human rights and human decency from a large group of individuals, and you don't know why they are a threat to your definition of a particular institution.

And one more time, Olson returned to the bat he believes will drive them home in the Supreme Court: the 14 Supreme Court decisions recognizing the elemental nature of marriage in human relationships.

You cannot now, in the face of all those decisions by the United States Supreme Court, say to these individuals, "We are going to take away the constitutional right to liberty, privacy, association, and sexual intimacy that we tell you that you have, and then we will now use that as a basis for not allowing you the freedom to marry."

That is not acceptable. It's not acceptable under our Constitution.

Olson's words rang loud as we filed out of Walker's court for the last time. The air of having experienced history was upon us as Walker took a moment to commend the lawyers on a case well tried. We knew there would be a month or two to wait, as Walker would surely construct his ruling tightly to survive the appellate onslaught almost certain to come.

And on Aug. 12, he made the ruling that seemed a foregone conclusion from the trial we had seen.

"Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages

PHOTO BY KARIN HILDEBRAND LAU / DREAMSTIME.COM

on an equal basis, the court concludes that Proposition 8 is unconstitutional."

Walker's 138-page decision made clear two things about the trial. First, the *Perry* plaintiffs had put on an unprecedented case of vast intellectual reach that demonstrated conclusively that "moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples." And second, the defense barely came to the bar with a presentation "dwarfed" by the plaintiffs.

He recognized the tremendous deference due voters, noting they are seldom outweighed by scholars. But, he said, at some juncture, belief must yield to evidence – particularly when the beliefs "enact into law classifications of persons. Conjecture, speculation and fears are not enough. Still less will the moral disapprobation of a group or class of citizens suffice, no matter how large the majority that shares that view.

"The evidence demonstrated beyond serious reckoning that Proposition 8 finds support only in such disapproval. As such, Proposition 8 is beyond the constitutional reach of the voters or their representatives."

Eighty-five years after the Scopes trial, we are still torn between faith and knowledge, with many struggling for coexistence. The power of churchgoers in passing Prop. 8 cannot be overstated.

WE DON'T KNOW WHAT THE FUTURE PORTENDS FOR *Perry*. *Perry* itself is currently on the ropes in the 9th Circuit, whose most liberal judge led a panel that deferred to the California Supreme Court the issue of whether Walker should have allowed Protect Marriage to defend Prop. 8. In the last several years, gay marriage has become legal in five states and the District of Columbia; in one of those, Iowa, voters ejected three justices from their highest court for approving same-sex marriage.

Still, whether it takes two years or 20, I believe the case presented by Olson and Boies will result in marriage equality throughout the United States. We are, after all, a country founded on religious tolerance and equality. And when populist forces overwhelm reasoned debate, we have courts and lawyers to right the scales.

William Jennings Bryan died in his sleep five days after his examination by Darrow, which is recounted from Edward J. Larson's *Summer for the Gods* and the University of Missouri Kansas City's transcripts of the trial. And while the notion of a fundamentalist leader being cross-examined about his beliefs – where Cain got his wife, or how snakes moved about before God commanded them to crawl on their bellies for eternity – is quaint and amusing, it is also more honest than the case presented by Protect Marriage in San Francisco. The authors of Prop. 8 did not appear in that courtroom and were not willing to be cross-examined on their beliefs, despite the harm those beliefs cause people who want nothing more than to marry the person they love.

Far from its cinematic preservation, the Scopes case itself reached an odd result. Judge John Raulston did not allow the Scopes defense to present live experts on the issue of creationism versus evolution, permitting only written declarations of theologians, anthropologists and zoologists to be filed with the court. The day after Bryan's dramatic testimony, given before 3,000 viewers assembled in a park across from the courthouse, the judge expunged it from the record, saying further examination could shed no further light on any issue that could be taken up on appeal. "[T]he issue now is whether or not Mr. Scopes taught that man descended from a lower order of animals," Raulston said.

Darrow knew his hour was at hand, and asked the judge to direct the jury to enter a guilty verdict. "We have no witnesses to offer, no proof to offer on the issues that the court has laid down here," Darrow said. The jurors returned their verdict in nine minutes, not even taking the time to sit down. One juror, a farmer, noted that the peach crop was about to come in. Following a benediction, the trial was recessed to history, where its retelling became a McCarthy era parable on the threat posed by anti-Communist hysteria to intellectual freedom.

I last saw Olson and Boies in December, at the 9th Circuit argument. It was no small irony to see Boies, whose advocacy for Jamie McCourt in her bitter divorce from Frank had created an extreme counterpoint to the year. Love and marriage, I thought, as Bruce and David and I ascended the gilded elevator to watch two hours of argument. Boies and Olson were brilliant that day, the second leg of a journey they believe will end with a U.S. Supreme Court ruling in which *Perry* will join *Brown* as a seminal equal rights decision.

We hugged at the curb, with rainbow flags in the background, and one religious zealot circling the block in a car declaring "God hates gays."

I don't think God hates gays. And if that lone driver believes God hates gays because of the Bible, he is missing other passages about us all being God's children. And that one about faith, hope and love, with love being the greatest.

Love, too, was in the air in San Francisco, with children being born, and children dying; soccer moms doing the laundry, and handsome young men dreaming of the day they, too, can legally have loads of laundry from little children running about on a field playing games together.

The wheel of justice will let us know when they can do that legally, just like other folks.

I do know this. That day will come. ■