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A Response to Professor Bix

ROBERT F. NAGEL*

In asking what special expertise lawyers and legal academics might bring to bear on current debates about marriage, Professor Bix raises an important and often overlooked question. To be clear, I do not take him to be questioning whether particular lawyers—say, the individuals contributing to this symposium—might have useful insights on the subject. Any person, whether legally trained or not, might happen to have significant moral, scientific, or practical knowledge.¹ Rather, the issue is whether, as a *general* matter, legal professionals have qualifications that would justify their exercising any extra degree of influence over public debate and decision making regarding marriage.

Professor Bix considers various possible types of legal expertise, including knowledge of relevant laws, skill at constructing legal formulations, knowledge of legal norms and practices (including the nature of state interests), and the ability to utilize historical or economic analysis.² His conclusion is that while legal thinkers have useful expertise on certain aspects of the marriage issue, these aspects constitute only a small part of the overall set of relevant considerations.³ On some of the most important matters, they have no more, and sometimes they have less, expertise than others.⁴

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1. In my opinion, Professor Bix focuses too heavily on the kinds of expert knowledge that legal thinkers do not possess and not enough on the kind of commonsensical knowledge that they do not possess, but this problem does not affect the point I wish to develop in this Comment. Brian Bix, *Everything I Know about Marriage I Learned from Law Professors*, 42 SAN DIEGO L. REV. 824, 824–26 (2005).

2. *Id.*

3. *Id.* at 826.

4. *Id.* at 829–32.

While this is a valuably humbling conclusion, Professor Bix is too kind. To see why the situation is considerably worse than depicted in his admirable paper, it is only necessary to exercise the kind of expertise that we legal academics do have, or at least should have. What we do for a living, after all, is train lawyers and study the nature of the legal process. At a minimum, then, our professional expertise is in understanding how lawyers think and act.

Before proceeding further, it is necessary to acknowledge that lawyers think and act in a vast range of ways. As the principal paper shows, we utilize intellectual methods as diverse as common law formalism, imaginative story telling, and hard-nosed economic analysis.⁵ Moreover, we act as calm and trusted advisors, as cutthroat advocates, and sometimes as moral oracles. Despite this variety, there are certain underlying mental and behavioral characteristics that can be expected to shape the kind of influence that lawyers will exercise on the marriage debate. Here I shall describe only two of the most obvious.

First, lawyers think and communicate in a relatively professionalized vocabulary. Whether this vocabulary consists of arcane terms like *stare decisis* or somewhat more familiar doctrinal phrases like *strict scrutiny*, it is a vocabulary about which lawyers claim to have specialized knowledge. To the extent this claim is accurate, solutions crafted by lawyers on an issue like marriage will be shaped by and will be expressed in a language that is relatively alien to the general public.⁶ This means that lawyers' influence will ultimately make the institution of marriage less intuitively understandable to the people whose lives are affected. It also means that legalistic reforms will tend not to reflect whatever wisdom and experience is inherent in the common language.

Second, the central intellectual focus of legal education and one of the central activities of the legal profession is participation in adversarial argumentation. This simple fact has a number of ramifications for the way lawyers are inclined to approach social issues. For one thing, the intellectual world of the lawyer rests on the fault line of contested meaning. Thus, without thinking about it much, lawyers tend to see understanding and wisdom as malleable, as the result of argumentation rather than fact or practice.⁷ We overestimate language and underestimate behavior. We do not have the normal inhibitions against untested change because a large part of our job is to destabilize and shift settled understandings.

5. *Id.* at 829–32.

6. This theme is developed in ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* 140–41 (1989) [hereinafter *CONSTITUTIONAL CULTURES*].

7. *Id.* at 7–12.

For another thing, lawyers' thinking tends uncritically to accept many of the deficiencies of uninhibited argument. We are notorious for exaggerating and simplifying historical evidence, for example. We often adopt a condemning tone.⁸ We are inclined to overstate what is at stake.⁹ Because we are so frequently engaged in proving a point, we concentrate on what can be conclusively demonstrated and we either ignore what is conjectural (but possibly important) or convince ourselves somehow that it is more certain than it is.¹⁰ What is perplexing and even mysterious in our hands vanishes or is transformed into the definite. And we operate by way of indirection: we insist our objectives are quite limited when in fact they are quite ambitious.¹¹

All this means that even where legally trained individuals can claim some special expertise, their impact on debate and decision-making is likely to be destructive. For example, consider Professor Bix's suggestion that lawyers' familiarity with legal analysis and case law might enable them to make some useful contributions to an understanding of the state's interests in marriage.¹² It seems more likely that legal thinkers will distort and impoverish public debate about the nature and importance of those interests. Consider the Supreme Court's treatment of the interest a state might have in racial diversity within the student body of its law school.¹³ In *Grutter v. Bollinger*, the Court described that interest at length and declared it to be "compelling" in the sense that term is used in the relevant constitutional decisions.¹⁴ The Court claimed that the law school's interest was in educational enrichment, an effective labor force, and a leadership class perceived to be legitimate—as opposed to providing compensation for a diffuse history of disadvantage and discrimination.¹⁵ Much can be said about this description, but several aspects are particularly relevant.

8. For examples, see ROBERT F. NAGEL, *JUDICIAL POWER AND AMERICAN CHARACTER: CENSORING OURSELVES IN AN ANXIOUS AGE* 123–29 (1994) [hereinafter *JUDICIAL POWER*].

9. This is true even with highly restrained judges. *See, e.g., id.* at 138.

10. *See* CONSTITUTIONAL CULTURES, *supra* note 6, at 139–41.

11. For a fuller account, see ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* 128–29 (2001) [hereinafter *IMPLOSION*].

12. Bix, *supra* note 1, at 831.

13. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

14. *Id.* at 343.

15. *Id.* at 330–32.

First, the description is plainly inconsistent with the design of the affirmative action program at issue¹⁶ as well as with the actual intentions of many who instituted such programs and some who still support them.¹⁷ Indeed, it is not too much to say that the Court's description of the state's purposes is in significant measure a fiction, and—at that—a fiction that has been adopted and sometimes even internalized by many of the relevant decision makers. At a minimum, it is clear that the Court's depiction encourages a simplified understanding of the public purposes involved. Second, the Court's strong assertions about the educational, social, and political benefits of affirmative action in higher education, while not implausible, are stated with far more certainty than is warranted.¹⁸ Third, the Court's bold prediction that in little more than two decades racial preferences will no longer be necessary to achieve the state's compelling purposes depends on complex and unknowable contingencies.¹⁹ This prediction, therefore, must be seen as a misleading assurance that masks the size and significance of the changes that might follow from the Court's opinion. The Justices may well believe that deeply entrenched entitlement programs can be made to vanish with the wave of a judicial pen, but reality is another matter.

I could go on in this dyspeptic way. I recognize that I have offered very little empirical evidence for my grim and unwelcome accusations. I am certain, however, that a full review of the Supreme Court's record would confirm them;²⁰ this record is significant because, especially in constitutional cases, the Court represents the apex of legal thought and practice. Perhaps more importantly, the accusations are straightforward inferences from commonly acknowledged characteristics of legal education and practice.

Professor Bix sensibly recommends that legal professionals give some thought to where we might defer to others.²¹ Deference, unfortunately, is unlikely from a profession that has long prized assertiveness and self-confidence in its membership and that is accustomed to exercising political power. It is likely, then, that the legal class will have, as it has had over so many other public issues,

16. *Id.* at 383 (Rehnquist, C.J., dissenting).

17. *E.g.*, James Boyd White, *What's Wrong with Our Talk about Race? On History, Particularity, and Affirmative Action*, 100 MICH. L. REV. 1927, 1949 (2002).

18. *See* Robert F. Nagel, *Diversity and the Practice of Interest Assessment*, 53 DUKE L.J. 1515, 1522–24 [hereinafter *Diversity*].

19. *Grutter*, 539 U.S. at 343.

20. *See* CONSTITUTIONAL CULTURES, *supra* note 6, at 140–41; JUDICIAL POWER, *supra* note 8, at 120–29; IMPLOSION, *supra* note 11, at 128–29; *Diversity*, *supra* note 18, at 1522–24.

21. *See* Bix, *supra* note 1, at 823.

disproportionate influence on current debates about marriage. Unfortunately, that influence is likely to distort and impoverish public understanding.

