San Diego Law Review

Volume 42 | Issue 3 Article 5

8-1-2005

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Upon reading Brian Bix's contribution,[1] I decided to bring several decks of cards to the conference. While Professor Bix offers several areas in which lawyers and legal academics might offer special insights into the discussion of marriage,[2] those areas seemed largely descriptive or ministerial,[3] not at all the kinds of questions the conference organizers asked us to explore. My offer to deal the cards met a silent rejection—perhaps out of loyalty to the organizers, perhaps out of a desire to discuss the topics regardless of expertise, but perhaps out of a sense that we may have something more to offer than Professor Bix suggests. These remarks seek to identify what, if anything, that special expertise might be.

At the outset, let me acknowledge that I do not intend to contradict any argument Professor Bix raised. For most of the questions raised in this conference, one could point to another academic discipline that might provide better research and analysis. If the goals of marriage law turn on normative issues, philosophy (and theology) departments might provide more disciplined and informed reasoning on those questions.[4] If

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1. Brian Bix, *Everything I Know About Marriage I Learned from Law Professors*, 42 SAN DIEGO L. REV. 823 (2005).

2. *Id.* at 831–33.

3. Descriptive expertise included evaluating the interpretation or application of existing laws or constitutional limitations upon law. Ministerial applications included ways in which changes to the law might be crafted—not quite a scrivener's function, though tending in that direction. To be sure, each of these tasks poses it challenges. But legal academics striving for legitimacy among the scholarly departments of a university tend to see these aspects as the province of a trade school. Our ambitions drive us to address the more interesting and complicated normative issues the organizers posed.

4. These comparisons assume the best contributions of each field.

the goals turn on historical issues, history departments seem the logical source of sound reasoning and research. If the goals turn on empirical questions about modern society, then psychology, sociology, economics, and even political science departments seem likely to bring more to bear on the issues than legal academics can muster.

Nor are these concerns in any way limited to marriage or family law.[5] Labor law, antitrust law, consumer protection law, and any number of other subclassifications pose issues where the empirical, historical, and normative work of other departments might surpass that of legal academics. The criticism, then, may be an indictment of the entire enterprise of law school, at least as a source of serious prescriptive scholarship.

Rather than accept a seat in the gallery at these debates, however, I offer two roles that legal academics (and the professionals they teach) might play in addressing the issues raised at this conference. In doing so, I do not contend that legal academics are uniquely well situated to serve these roles. At a minimum, however, legal academics seem no worse than other disciplines at performing these roles. While these roles may not entitle legal academics to dominate the table, at least they justify offering us a seat.

Legal academics may help set the agenda for research in other disciplines. In addressing any serious policy issue, the first question may be: "What do we want to know?" What facts—historical, empirical, or normative—are pertinent to the issue? Perhaps legal academics can raise the issue, can begin asking the questions that matter. This conference could become an effort to identify the kinds of things we would like to know in deciding what the state's interest in marriage really is and how best the definition of marriage might advance those interests. Armed with the questions upon which policy depends, each discipline can proceed to produce the best answers available.

Other disciplines, of course, can raise the issues on their own. In some circumstances, other disciplines will recognize a problem long before lawyers or legal academics realize there is a question to be asked. Often, they will ask the right questions and generate sound research in response without a whisper from the law. For two reasons, however, legal academics may add to this process.

First, lawyers may help overcome parochialism in approach. The data generated by any one discipline seems likely to emphasize the methods and outlook of that discipline. Perhaps a voice outside the discipline might help broaden the inquiry. By asking questions from a different perspective, legal academics may identify gaps in the knowledge

5. In this, too, I echo Professor Bix's paper. *See* Bix, supra note 1, at 827.

generated so far, encouraging additional research in areas that ultimately prove helpful.

Second, lawyers may be among the first to recognize the need for investigation. Particularly in family law, many changes (whether advances or not) have emerged from problems easily (perhaps first) identified in the study and practice of law. For example, the impetus for no-fault divorce emerged in part as a response to all the ways lawyers devised to help clients divorce without legitimate grounds.[6] Legal academics soon were aware of the farce,[7] perhaps teaching the techniques to obtain a divorce without grounds. Before long, the academy raised concerns about the nonsense created in an effort to prevent collusive divorces.[8] Perhaps other academic disciplines noted disingenuous techniques devised to help people sever unhappy marital ties. Lawyers may not have been able to keep up the facade to the world, even if they could keep the court from penetrating far enough to deny relief. But lawyers and legal academics likely were among the first to recognize the inconsistencies that entered into the law in an effort to maintain strict limits on divorce. This seems likely to be true in many areas of family law. The first signs will be noted by lawyers, professionals to whom people turn for help coping with the difficulties they face. Legal academics, then, might be in a better position to set the agenda. Even if all the data came from other departments, legal academics might have a role to play in setting the stage for reform.

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6. For example, a false claim of adultery or cruelty, if not denied in answer to the complaint, might procure a divorce.

7. Brigitte M. Bodenheimer, *Reflections on the Future of Grounds for Divorce*, 8 J. FAM. L. 179, 182 (1968).

> As . . . has [been] pointed out for years, the divorce law on the books is often strict and complex while the law in actual practice is lenient in many states. The story has been told many times. Fictions, subterfuges, and outright perjury are resorted to, and divorce by mutual consent, prohibited by law, is a reality in fact.

Id.

8. As Justice Traynor described the situation:

> Perhaps in no other area has the discrepancy between law in dogmatic theory and law in action, evading dogma by fiction and subterfuge, become so marked as in divorce law. The withered doctrine that divorce can be granted only for marital fault, variously and eccentrically defined from state to state, is rendered still more irrational by the widespread rule that recrimination is an absolute defense. The result has been a triumph, not for dogma, but for hypocrisy. Rules insensitive to reality have been cynically circumvented by litigants and attorneys, with the tacit sanction of the courts.

Id.

Legal academics also might synthesize the results produced by other disciplines. As noted, the ideas that shape the definition of marriage may come from a number of different departments. Someone will need to consolidate all of the useful contributions and make informed policy choices. Of course, people trained in each discipline can discern quality better than outsiders. But reliance on cross-trained scholars remains a dream, not a reality. Professor Bix notes the dearth of academics cross-trained in law and history.[9] Imagine, then, the number of academics cross-trained in law, history, economics, sociology, philosophy, and psychology—all among the departments that might bring serious research to bear on a question as far reaching as marriage. Our policies will not be made by philosopher-historian-sociologist-psychologist-economist kings. People far less expert will make the ultimate policy choices.

Legal academics, of course, are not policy makers. But legal academics train most policy makers. Vast numbers of legislators have law degrees[10]—probably far more than have degrees in any other single discipline. We may bemoan this fact, but at least for the time being we must consider its implications. If policy makers are to learn to recognize good scholarship from bad, and synthesize the good into sound legal choices, they may need to learn it in law school. Legal academics, thus, need to teach it and, presumably, practice it. On this line of reasoning, our place at the table does not stem from our own qualities or special expertise. Rather, it stems from our potential influence on others who also lack special expertise. We teach the generalists how to generalize effectively. Perhaps we had better become the best generalists we can—including through practice of it, such as this conference provides.

A third role seems likely for lawyers and legal academics, though it is one that fits comfortably within the areas Professor Bix has already mentioned.[11] Legal academics bring an expertise in law on the ground: the way courts, juries, clients, and other lawyers work in real legal disputes. I earlier suggested this knowledge—more common in lawyers

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9. Bix, *supra* note 1, at 829.

10. In the 107th Congress, 53 Senators (53%) and 158 (36%) Representatives were lawyers. YourCongress.com, Lawyers in Congress, http://yourcongress.com/ViewArticle.asp?article_id=1671 (last visited Aug. 30, 2005). These numbers are somewhat lower than in 1989, when 63% of the Senate and 42% of the House were lawyers. Mark C. Miller, *Lawyers in Congress: What Difference does it Make?* 20 CONGRESS & PRESIDENCY 1 (1993), *available at* http://www.polisci.wisc.edu/~kritzer/teaching/ls415/Miller1993CP.htm#AN96111 40405-3. It is not entirely clear whether these statistics refer to self-identification (claiming lawyer as their principal occupation) or include all Members of Congress with legal training.

11. Bix, *supra* note 1, at 831–33.

than in legal academics—might help us set the agenda. But it also helps the synthesizing of data into policy. Or rather, it helps when the time comes to reduce policy into language that will affect behavior on the ground. Knowing how people react to the language of legal rules, particularly as the language changes, will increase the ability to craft a statement of law that will effectuate the policy goal. This may be more the scrivener's role, for it lacks the glory of the grand policy discussion. Yet perhaps we need to remember that this skill, too, will be learned in law school or (I fear) not at all.