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RESEARCH AND THE JUSTICE MISSION OF LAW SCHOOLS

MARK TUSHNET¹

There are some obvious things to say about research and the justice mission of law schools, and many other contributors to this discussion have said them. For example, jurisprudence lies at the core of the classical legal curriculum, and—at least in the contemporary law school—definitions of justice are part of the jurisprudence syllabus.² Because the concept of justice is not self-defining, conceptual inquiry into the meaning of justice, a traditional mode of legal research, is recurrently needed. In this way, research is tightly linked to the justice mission of law schools.

Jurisprudential research, though, tends to be conducted on a rather high level of abstraction. We could refine the definition of research to incorporate inquiry into whether particular reform proposals (or the status quo) promote justice. I am skeptical about how useful such a redefinition would be, however. Reform proposals deal with complex institutions, and changes in their operation are likely to have equally complex ramifications. I suspect that jurisprudential inquiries into justice are likely to do no more than point out areas of empirical inquiry: "You ought to think about whether modifying this institution in that way will make the worst off materially better off, adversely affect incentives in ways that will reduce substantially the overall level of material well-being in society, and so on."³

In mentioning empirical inquiry, I have indicated how another form of research is part of the law school's justice mission. We could simply stipulate that something—improving the material condition of the worst off, for example—would advance justice, and then ask whether a proposed reform—residential rent control for low-income tenants, for example—will actually serve the stipulated goal. I use the example of residential rent control because there is substantial literature on the question I have raised.⁴ Much of the literature is polemical and relies overly heavily on economic models. But, the best scholarly writing on the subject has shown that the underlying question is fundamentally empirical. The consensus among economists is that residential rent control does not improve the material conditions of the worst

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² A generation ago, perhaps the syllabus dealt exclusively with the question, "What is Law?," but no longer.

³ These questions are regularly raised in connection with John Rawls's theory of justice.

⁴ See, e.g., Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741 (1988); Lawrence C. Becker, *Responses, Rent Control is not a Taking*, 54 BROOK. L. REV. 1215 (1989).

off, because—their models show—it reduces investment in expanding the stock of housing or in maintaining the existing stock. Yet, closer examination of the models shows that, even on the standard versions, under some circumstances residential rent control can indeed "work" in the justice sense.⁵ Sophisticated economists reply that the conditions under which this will happen are unusual and rarely encountered.⁶ At this point, though, the need for empirical inquiry should be apparent.

A second example is the so-called "critique of rights." The version of the critique that I prefer contends that in the contemporary United States, recourse to the rhetoric of rights, with its concomitant appeal to courts for redress, is unlikely to advance the cause of what I have called the "party of humanity"—the interests of the worst off.⁷ The most powerful responses to the critique of rights, by Patricia Williams and Elizabeth Schneider, have relied on the experience of the civil rights and women's movements in the last half-century in contending that, as a matter of historical fact, the rhetoric of rights did advance the cause of the party of humanity, and that, when combined with other appeals which activists always have available, it continues to be worth articulating.⁸

Of course I have my own views on these claims, but for the present my point is only that they are intensely empirical on both sides. To some extent, research into the ways in which rights rhetoric and appeals to the courts interacted with other forms of activism, and into the outcomes of different strategies, will be historical and sociological.⁹ Yet, an important component will almost certainly be "legal," because the inquiry will have to examine precisely what legal arguments were made and what ones were "available" within the legal culture at particular times. Although this sort of research may have to be interdisciplinary, it seems an integral part of the justice mission of law schools.

⁵ See, e.g., Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485 (1987); Note, *Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market*, 101 HARV. L. REV. 1835 (1988).

⁶ The most sophisticated version would, I suppose, argue that the conditions under which rent control works are rarely encountered in political settings where rent control is a reform that has some chance of being adopted.

⁷ For my most recent discussion, see Mark V. Tushnet, *Rights: An Essay in Informal Political Theory*, 17 POL. & SOC'Y 403 (1989).

⁸ PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 146-65 (1991); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

⁹ For one of my works that can be interpreted in this way, see MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987).

There is another type of research into the justice mission of law schools. This would ask, "To what extent do—or can—law schools advance justice?" Law schools are, after all, professional schools, most of whose students will become participants in the "ordinary"—and therefore status quo oriented—practice of law. The ordinary practice of law includes some elements of moderate law reform, and if the status quo, moderately reformed, will satisfy the demands of justice, then almost by definition law schools can advance justice too.¹⁰

If, however, justice requires more substantial alterations in public and private institutions than are usually on the agenda of the ordinary practice of law, the question I have raised becomes a serious one. Before answering it, though, we would have to know what our graduates do. To know *whether* law schools can perform their justice mission, that is, we must engage in research about *what* law schools do—what sorts of lawyers we produce, and the like.¹¹

As I have suggested, another dimension of this inquiry is, "What are the constraints on the possibility that law schools *can* perform whatever justice mission we believe it appropriate to assign them?" Although there are a number of constraints, I think it important to mention particularly the fiscal ones. Law schools provide notoriously inexpensive graduate educations, in the sense that we have a low cost-per-student compared to other forms of graduate, and particularly professional, education. To the extent that performing the justice mission increases the costs of legal education—either by requiring more expensive forms of teaching, or by reducing the support law schools get from public and private sources—our ability to perform that mission is itself limited. And, again, determining the degree of constraint is a sensible research question.

Research into justice also involves inquiry *within* the law school. Most law professors are aware by now of questions about equity in connection with the distribution of jobs in law schools, and about access to legal education, questions that now go under the heading of "promoting diversity." I want to focus on a different set of questions, which I think of as "justice within the classroom."

Questions of justice within the classroom take a number of forms. At the outset, I should make it clear that in speaking of "the classroom," I mean to refer to all the venues in which law professors educate students: traditional classrooms, clinics, our offices, social occasions on which we meet with students. My primary point here is that, no less than on the fundamental questions of jurisprudence, on questions of justice within the classroom we need the sort of clarification that sustained thinking—"research"—can bring.

I will identify two areas that I find interesting, without claiming that these areas are the only ones worth examining. The first is the supposed tension

¹⁰ See, e.g., Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990).

¹¹ See, e.g., MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991).

between rigor and comfort in the classroom.¹² Those of us who got our legal education before 1970 sometimes have a sense that things have changed in the classroom, and not entirely for the better. We know that the terrorizing associated with the image of Professor Kingsfield obstructed learning at least as often as it promoted learning. Yet, we sometimes have a sense that, to avoid becoming a new generation of Kingsfields, we may be letting students "off the hook" too easily, accepting answers that are more diffuse than necessary and trying to sharpen the answers ourselves rather than pushing the students to sharpen them. To the extent that *producing* good lawyers is part of the law school's justice mission, and to the extent that there is a tradeoff between comfort and the rigor that helps students become good lawyers, we must consider whether there is a conflict internal to the law school's justice mission. I do not know the answers to these questions, which is precisely the point of raising them here. For, surely, examining what happens in classrooms, and the relation between what happens there and the outcome of legal education are questions for serious research.

The second topic about justice in the classroom is related. This is the question of social relations between students and teachers. As we have tried to make students more comfortable in the classroom, we have opened up the possibility that they will see us as friends as well as teachers. Yet, our position as figures of authority—both in the psychological sense and in the material sense that we have the power to confer rewards and punishments on our students—creates a tension within our role. And, of course, there is projection on both sides: They see us as more insightful than we are, and we see them as more appreciative of our insights than they are. Finally, the demographics of law schools matters: Because of changes in the recruitment patterns of law students (they are older on entering than they used to be), and changes in the composition of law faculties (in particular, clinical teachers tend to be younger than non-clinical teachers), the age differences between students and teachers have narrowed.

There are some standard answers to questions about social relations between students and teachers, the most common of which bars close personal relationships (such as those involved in dating) between a student and an instructor currently in a position of authority over her.¹³ I am sympathetic to such an answer, though I believe that it should be taken to state a strong presumption that can be overcome in some circumstances. But, again, my aim here is not to provide answers. Rather, I merely want to indicate that the issues connected with justice in the classroom provide a wide ground for research.

¹² For relevant discussions, see Anthony D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461 (1987); Paul T. Hayden, "Wrong" Answers in the Law School Classroom, 40 J. LEGAL EDUC. 251 (1990).

¹³ Given the demographics of law schools regarding both teachers and students, and the ordinary distribution of behaviors, the formulation in the text does *not* use the grammatical female gender to stand for both social genders.

And, of course, though there may be controversy over defining the justice mission of law schools, surely there can be little controversy that the classroom—broadly defined—is part of the law school.

I have moved from global concerns—jurisprudence in the classical sense—to concern with what happens in law school classrooms. At each level, I have tried to identify aspects of the law school's justice mission about which research is surely needed. In that way, I have tried to show that research is an inevitable part of that mission.

