Mark Tushnet: A Personal Reminiscence

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Justice, Democracy, and Humanity: A Celebration of the Work of Mark Tushnet

Mark Tushnet: A Personal Reminiscence

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The papers in this Symposium pay tribute to Mark Tushnet’s astonishing energy, influence, originality, and sheer brilliance as a scholar. As important and interesting as they are, they do not come close to capturing the breadth of his work. How could they? My most recent check of the online version of the Index of Legal Periodicals reveals 242 articles and book reviews published by Tushnet since roughly 1980.¹ Georgetown’s Edward Bennett Williams Library online catalogue lists an additional forty books and book chapters written by Tushnet.

In this short Essay, I will not try to summarize this incredible output or detail the ways in which it has influenced the development of legal thought. I wish the others who attempt that task the best of luck. Instead, I feel much more confident in my ability to say something about a topic that is in some ways more important—the kind of person Mark Tushnet is.

I have known Mark Tushnet for a very long time. It is impossible for me to imagine what I would think about constitutional law, or about a wide range of other topics, if I had never met him. Indeed, I sometimes wonder whether I have ever had an idea about constitutional law that he did not teach me. Our careers, and our lives, are inextricably intertwined.

A specific example illustrates the point. Recently, I spent a semester as a visiting professor at Harvard Law School. On my first day on the job, I was wandering around the halls, slightly disoriented, when I ran into Professor Charles Fried. In the course of the very awkward conversation that followed, we engaged in the following exchange:

Fried: How is your daughter doing?
Seidman (somewhat puzzled, but trying to keep his cool): Just fine. Thanks for asking.
Fried: I’ve been in correspondence with her, you know.
Seidman: Great. Please say hello to her the next time you write her.

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¹ This number substantially understates Tushnet’s total output. By 1980, he had already been a legal academic for seven years and had published many, many articles not listed in the online version of the Index of Legal Periodicals.
Of course, my daughter, then a college sophomore, was not in secret correspondence with the former Solicitor General of the United States. The next day, the solution to the mystery suddenly struck me: Tushnet’s daughter, Rebecca, was on the law school teaching market, and in the world that Charles Fried inhabits, Mark Tushnet and Mike Seidman aren’t worth distinguishing between. I’m deeply flattered by Fried’s confusion. For that matter, so is my daughter.

I first met Mark Tushnet during another awkward first day at work almost thirty years earlier. The two of us had been selected to clerk for Justice Thurgood Marshall. Both of us were very young and very inexperienced. I do not remember the specifics of my first meeting with Tushnet, but I remember very well the first time that we met with Justice Marshall. This was the occasion on which Marshall explained to us his own peculiar conception of the “neutral principles” requirement.

Marshall had been in a traffic accident that summer, and when he returned to work, he had not yet fully recovered from his injuries. A huge man, he lumbered into his chambers on crutches that barely sustained his weight, plopped into his chair, and began explaining our new job to us with his characteristic crusty good humor. In the course of describing the details of office routine, apropos of nothing at all, he said something like this: “And by the way, I don’t want you knuckleheads telling me to uphold any patents. I haven’t voted to uphold a patent in all the years I’ve been a judge, and I don’t plan to start now, so you can save your breath.”

And that, apparently, was what Justice Marshall thought of neutral principles. Black or white, rich or poor, man or woman, all patent holders were equal before the law so far as he was concerned. At the time, I hardly knew whether I was supposed to take this seriously. When I got to know Justice Marshall a little better, I realized that he loved to shock his clerks with outrageous comments like this one. I also came to realize that there was often a serious point to these comments—here, about the emptiness of the neutral principle requirement. Justice Marshall could hardly have guessed that some fifteen years later, one of the young men listening to him that morning would articulate essentially the same conception of neutral principles in one of the most famous law review articles ever written. Nor could he have guessed that the same young man would become his most distinguished and insightful biographer.

But then there were many things that people did not know about Mark Tushnet thirty years ago. Supreme Court clerks are not a bashful lot. The people


we associated with that year were very smart. More to the point, they knew that they were very smart and were not at all ashamed to demonstrate their brilliance before anyone who could be corralled to listen. Amidst all this firepower, Tushnet seemed somewhat out of place. He struck me as shy, retiring, awkward, and even a bit inarticulate. In retrospect, I think I can excuse myself for having this misimpression, which turned out to be completely wrong. His co-clerks could not have known then that Tushnet’s reticence was the opposite of what it appeared to be. It was rooted in a combination of supreme self-confidence and lack of ego. Tushnet has no need to impress other people because he knows what he knows and he has an abiding faith (sometimes misguided, I think) that self-promotion is unnecessary to get done what needs to be done.

Here is another mistake I made in the first few weeks that I knew Tushnet: While the rest of us were deeply impressed by how much work we had to do (another way of saying that we were impressed by how important we were), Tushnet would typically bring out a book (usually a murder mystery) and start reading it at around three o’clock in the afternoon. At the time, it seemed to me that this guy had to be either incredibly lazy or incredibly sloppy or both. Sometimes, he would read the book while the Justice was talking to us, making him not only sloppy and lazy, but also rude. What I could not know then was that Tushnet was neither sloppy nor lazy nor rude. He was, instead, the only authentic genius I have known in my life. He was able to do the work that needed to be done and fully absorb what was being said around him, while still reading murder mysteries.

I haven’t mentioned yet the most important thing that I did not then know about Tushnet: He is a hero. During our clerkship, Tushnet and his wife, Elizabeth, had their first daughter, Rebecca. Throughout this period, Tushnet was also struggling with his own health. None of this slowed him in the slightest. He was (and is) a completely dedicated father who took the time that it takes. He had not the slightest patience with concerns about his health, a trait that he has not lost over the years. Indeed, recently he had an illness that landed him in the hospital. When I went to visit him on a Thursday afternoon, he was in the intensive care unit, hooked up to multiple tubes. By Saturday, he was out of the hospital and on an airplane attending a conference where he was presenting a paper.

After finishing his clerkship, Mark and Elizabeth went off to Wisconsin where their second child, Laura, was born. At birth, Laura had a very serious physical problem, and during her infancy, it was not at all clear that she would survive. A tracheotomy was performed on her, leaving her unable to make any sound, and for months, her parents had to monitor her around the clock. Once, the tube fell out of her throat, and while others stood around too panicked to know what to do, Tushnet calmly jammed it back in place, thereby saving Laura’s life.

Tushnet is famous for reading everything. It turns out that everything includes medical journals. One day, he picked up a medical journal that described
a procedure being performed on children like Laura. So he called the doctor who wrote the article, and soon they were off to the hospital where the procedure was performed, and suddenly Laura became a normal little girl—or at least normal for a Tushnet.

All this is remarkable enough, but it is not what is most remarkable. During this period of crisis, Tushnet was also beginning his academic career. For most of us, the problems he faced would have amounted to a full-time occupation. Tushnet had enough time left over to write some of the pathbreaking work in the emerging critical legal studies movement. Indeed, he wrote more during this period than the faculty of a typical small law school writes in a lifetime.

This early scholarship led to still another misperception about the kind of person Tushnet is. The early Tushnet was famous as a bomb-thrower—a one-man wrecking crew indifferent to the intellectual carnage around him. When people familiar with this scholarship met him for the first time, they were often surprised at how mild-mannered, self-effacing, and kind Tushnet was.

But there was in fact no contradiction. The most attractive aspect of the critical legal studies movement that he helped found was the dual commitment to telling the truth about the hypocrisy and pretensions of conventional legal thought and to producing a revolution that began not with large-scale attacks on government or capital, but with the way each of us lives our lives—with how we treat or family, our coworkers, and our friends.

As Tushnet has grown older, his rhetoric has become a little less inflammatory. He is more tolerant of the foibles of others and perhaps less optimistic about the possibilities for social change. Yet he has lost none of his courage, his kindness, and his decency. More than anyone else associated with critical legal studies, he embodies the ideals that captured the imagination of a generation of law students.

I am proud to know Mark Tushnet. He has been and will continue to be a role model for me, but—Professor Fried’s confusion notwithstanding—I have no illusions that it is a model I will ever be able truly to emulate. Instead, I am content to be touched by his example and tremendously grateful to him for being my co-author, my mentor, and my friend.