

Friends see the country's most brilliant legal scholar,  
enemies see a shrewd political animal. But everyone agrees ...

# Nobody Messes With Larry Tribe

By John Sedgwick

**N**ORMALLY, LAURENCE TRIBE IS THE MOST ENVIABLE OF MEN. A popular law professor at Harvard, he has written, or cowritten, a dozen scholarly books, is a perennial contender for the Supreme Court, and makes, according to one recent estimate, \$1 million to \$3 million annually working on cases just one day a week.

Yet, half the cases that Tribe works on he takes for free, and those occasionally end up shaping the culture, as did the 1992 case of *Cipollone v. Liggett*, which forced tobacco companies to take financial responsibility for their product's health consequences and started the anticigarette crusade that is in full gallop today. Tribe has argued 21 cases before the Supreme Court and won 15 of them, giving him one of the highest winning percentages of any lawyer in the country.

"It's common Supreme Court bar gossip that even justices who don't agree with him think that Larry gives the best performance year after year after year," says Tribe's former Harvard colleague Kathleen Sullivan, now a professor at Stanford Law School.

Lately, however, there have been signs that the dazzlingly multifaceted Tribe may be suffering from role strain. Last March, the *Wall Street Journal* revealed that Tribe was involved in a nasty fee dispute with, of all things, a New Jersey quick-lube franchiser named Ralph Venuto, who claims that because Tribe did not give the appeal his full attention, Venuto lost out on a chance to collect the \$50 million in punitive damages that had been awarded by a New Jersey jury.

Venuto had hired Tribe to handle the appeal of his case against a parts supplier named Witco Corporation, which Venuto claims



ruined his business by spreading malicious rumors about his company, Lightning Lube. Although Tribe did manage to preserve the jury's final award of \$11.5 million in actual damages, Venuto has refused to pay Tribe and his two associates the whopping \$2.75 million they'd settled upon. That price, which was supposed to be kept confidential by the terms of the deal, has met with envy in the legal community and has raised eyebrows elsewhere. "It is not pleasant for all of this to be publicly aired," Tribe says, obviously irked. "I don't like the fact that someone wants to quarrel with a fee that was agreed upon at the outset."

In a related suit, Venuto's trial lawyer, Steven Kramer, went after Tribe for \$5 million for failing to make the oral argument as allegedly agreed. That one was thrown out of court, but not before Kramer dinged Tribe by publicly claiming that Tribe's hourly rate on the case was an astronomical \$18,000. He also claimed that, shortly after Clinton was elected, Tribe had told Kramer and Venuto that he'd have to skip out on their case if the new president placed him on the Supreme Court or in the office of the Solicitor General. In July the U.S. District Court in New Jersey called Kramer's suit extortionate and ordered him to pay Tribe \$70,000 for legal expenses incurred in response to Kramer's complaint.

"He is not well known for saying anything that is true," Tribe says. "I hope you don't dignify these allegations by repeating them further." Tribe adds that Kramer has been sanctioned "nearly 40 times" by courts around the country for his unprofessional conduct.

Then came another indignity. In April, Justice Harry Blackmun declared that it was time for him to step down from the Supreme Court, putting the spotlight once again on Tribe, long the champion of the liberal left, as a possible successor. Whatever Steven Kramer might say, Tribe usually offers a polite demurral to queries about his interest in a seat on the Court—a response that would be appropriate, of course, whatever his actual sentiments.

"I don't think of myself in the context of the Supreme Court," he says. Then why all the talk? "It's clear that people write about me as a potential justice, but I don't know where they get it from," he grumbles. "I don't know why they find it amusing to do so."

It may be that Tribe's actions encourage such speculation. He has held fundraisers for Gary Hart and has worked for Michael Dukakis. Ever since Tribe weighed in so heavily against the Robert Bork nomination in 1987, the right wing has assumed he was positioning himself for his own spot on the bench. In 1990, the conservative law journal *Benchmark* devoted an entire issue to making a preemptive strike against that very possibility, at one point attacking his Supreme Court ambition by lampooning his book *God Save This Honorable Court*, as "God Save This Honorable Court—and My Place on It."

Neutral observers, however, figured that Tribe had very little chance this time around. With Clinton facing large political battles

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over health care and welfare reform, he didn't have the political capital to push Larry Tribe's name through the Senate. "Rightly or wrongly, people seem to identify me with controversy," Tribe concedes. The Lightning Lube mess made him all the more untouchable. And it must have stung just a little when, in May, Clinton turned to another Harvard Law School-educated Cantabrigian, Judge Stephen Breyer. "I thought it was great news," Tribe insists. "I think he'll be a fine justice and I'm pleased for him personally." Still, he hasn't let his own hopes go entirely—"Maybe 5 to 10 years from now," he says.

AT 53, TRIBE IS FAR more plump than one expects from seeing him on *Nightline*, and he has a thick brush of graying hair. The fat doesn't seem to weigh him down, though. Instead, his girth seems to token an intellectual ferment, as if he were literally swelling with ideas. On the day we met, Tribe had barely slept. The plane bringing him back from a meeting in Texas was delayed and didn't get him into Logan until 4:30 that morning. Yet his secretary reported that Tribe had pulled in at his office promptly at 9 a.m., fresh as ever.

And while he was a half-hour late for our 2:45 appointment, it was only because he'd agreed at the last minute to have lunch with the students from his seminar on the ethics of life and death. Tribe apparently gets on very well with students. "Even people who never went to class, went to his class," says one former student. Still, Tribe was so embarrassed by this rare breach of courtesy that he brought the students back to testify to the fact that they had made him late.

As we sat in his office on the fourth floor of the brand-new Hauser Hall at the Law School—a flight down from the other globe-trotting Harvard Law hotshot, Alan Dershowitz—Tribe seemed determined to show how happy he is with his life just as it is.

"I love teaching, writing, arguing cases," he says. "A member of the Supreme Court has to constrain himself in a number of ways. I agree with what Mario Cuomo said in turning down the nomination—I'm too young to be entombed."

His current position, at least, allows Tribe to offer his judicial opinions on the issues of the day. He declares that, based on what he has read of the case, Paula Jones's sexual harassment charges against President Clinton are "hard to believe," and that no president should have to answer such lawsuits during his time in office. "Otherwise," he says, "sitting presidents are sitting ducks for a potentially endless spate of lawsuits of this kind, all of which can tie a president up in knots until a court renders a verdict." He believes the MIT student David LaMacchia, who was arrested for making copyrighted software available to all, over Internet, probably ought to be punished, but not for "wire fraud" as charged by the government.

"They're trying to adapt an old law that really doesn't fit," Tribe says. "It would make more sense to invoke copyright laws," he continues, "but prosecutors would have to show an intent to profit, which is not evident here. Until the government comes up

with appropriate charges, David LaMacchia should go free. I don't believe you should put somebody in jail just because 'there oughta be a law,'" Tribe concludes. "Either there is a law, or there isn't."

He declares that the Warren Court went too far in introducing largely symbolic protections for criminal suspects that accomplished little beyond antagonizing the right wing. And, despite his reputation as a doctrinaire liberal, Tribe doesn't mind the death penalty, so long as it doesn't "undervalue" black victims. "When John Wayne Gacy was executed," he says, "I didn't feel sad at all."

STILL, AT HIS CORE, Tribe is an eloquent defender of classic liberalism, as defined by demonstrating a concern for the disenfranchised, the unpopular, the downtrodden. He is best known for asserting the existence of the right to privacy, a nebulous concept that is not stated explicitly in the Constitution but is Tribe's foundation for endorsing women's right to an abortion and homosexuals' right to their own sexual practices, as he argued in *Bowers v. Hardwick*, the now famous Georgia sodomy case that he lost 5-4 before the Supreme Court in 1986.

Above all, Tribe is a passionate believer in female equality. "He helped me long before it ever occurred to him I was a woman," Kathleen Sullivan says. "He sees people as people, and minds as minds." By all accounts, he is devoted to his wife, the former Carolyn Kreye, after 30 years of marriage. She owns Newbury Galleries, on Arlington Street, and gives 10 percent of the gross profits to local AIDS charities. In Tribe's articles, he often uses the pronoun *she* to stand for either gender, instead of the traditional *he*. And, when I slip up and discuss the president's possible nomination of some "young man" for the high court, he quickly interjects, "or woman."

Asked about the sources of his liberalism, he says that it is really just a case of caring about justice. His ideology, Tribe says, probably goes back to one of his earliest memories, back in Shanghai, where his Russian Jewish parents—his father from Byelorussia, his mother from Manchuria—first raised him. The Japanese invaded the region during the war, and when Larry was two or three, his father was detained in a concentration camp for the crime of being an American citizen. "I remember going on a strange rowboat across a river to see him," Tribe recalls. "We went inside a huge warehouse, and a guard picked me up and held me in the air. I was confused and upset. The picture is very blurry, but it all felt unfair. I remember thinking very strongly that he hadn't done anything. I didn't see why anyone would do anything to him. It was my earliest encounter with gross injustice, not that I thought in those terms then."

Shortly after his father was released, the Tribes moved to San Francisco, where young Larry went to the public schools and quickly developed an interest in both art and science. Tribe still paints occasionally and is not embarrassed to display an oddly melodramatic pastel he has done, of a child set against the backdrop of a mushroom cloud.

"People say to me, 'Isn't that rather morbid?' I say, 'No, I see the child's smile as a sign of hope rather than the mushroom cloud as a sign of doom.'"

Tribe's affection for science developed as a Harvard undergraduate into a passion for two extremely abstruse branches of mathematics—algebraic topology and algebraic-number theory. "I only liked abstract math," he notes. "I hated anything applied."

He graduated summa, picking up a national intercollegiate debating championship trophy along the way, then started a gradu-

ate program in mathematics but stopped after just a year when he realized how isolating such a pursuit would be. He had met Carolyn, and, as he says, "I thought it was very important to do things that I could talk to her about."

So Tribe moved across campus and enrolled in the Harvard Law School. Now, when he looks at his old mathematics papers, he can no longer follow the proofs.

Still, it's a pretty good life he has carved out for himself. "What does Larry do for fun?" muses Kathleen Sullivan. "He does pretty much what you'd expect. He talks. He has a great sense of humor and love of the absurd. I suppose that's the basis of our own friendship."

He enjoys sneakaway lunches in Harvard Square with friends and colleagues. He also loves to walk. "He must have logged tens of thousands of miles around the Charles River and Fresh Pond," says Sullivan, "walking and talking." Books are a common subject of conversation. He recently polished off *The Body of Pain: The Making and Unmaking of the World*, a gruesome book by Elaine Scarry, but his all-time favorite is *Anna Karenina*.

Tribe is devoted to his family. He obviously values his relationship with his wife and cares deeply what his children think. It was his daughter, Kerry, then a teenager, who got him started on the Pennzoil case. She picked up the phone when a *Wall Street Journal* reporter called to ask her father about the verdict of a lower court on the case. Tribe was watching the Patriots on TV and didn't want to be bothered. "But Dad," Kerry persisted, "he sounds really nice!" Tribe relented. One thing led to another and eventually Pennzoil was a client.



AS A LEGAL SCHOLAR, Tribe has continued his interest in the sciences by focusing on the legal issues arising from the rapid developments in science and technology. Not long ago, he addressed the Electronic Frontier Foundation, established by Lotus founder Mitch Kapor and Grateful Deadman Jerry Garcia, on "The Constitution in Cyberspace." Tribe argued that, whatever the view of utopian hackers, there should, in effect, be tolls on the information superhighway:

the world of computers shouldn't be exempted from the principles of the marketplace. He has zigged the other way, too, to consider the impact of science on the law, as he mused on the implications of Einstein's theory of relativity on the practice of law in a 1989 *Harvard Law Review* article, "The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics."

Tribe's main focus has been on the U.S. Constitution. In essence, the Constitution is as abstract as pure math, in that it enumerates our liberties without precisely defining them. It is made real only by the interpretation of the nine men and women who sit on the Supreme Court. To Tribe, that is a wondrous process, and it is possible that no one has ever zeroed in on it quite so powerfully. His 1,000-plus-page treatise "American Constitutional Law" (1978) has been hailed as a "tour de force" by former solicitor general Erwin Griswold and is still the required text on the subject today. Cass Sunstein, a University of Chicago law professor who himself has been mentioned as a potential Supreme Court justice, credits him with an "incredible command" of Supreme Court decisions. But that is not the half of it. (Continued on page 102)

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What makes him such an effective advocate before the Court is that he knows not only its history but the histories of the individual brethren.

"Larry has an extremely intuitive grasp of different justices' predispositions, which he keeps logged in his memory," says Kathleen Sullivan. "Addressing some unexpected objection by Justice Byron White, for example, he might drop in the little nugget, 'just as you argued in *Runyon* against *McCreary*.' Naturally, that gives him a tremendous advantage."

"It's hard to overstate how dazzling he is as a technician," says Mark Tushnet, a law professor at the Georgetown Law School. "When he argues his case, he says, 'The only reasonable interpretation of the statutes leads to my client's conclusion.' Now, it's not hard to show that they can be read that way. What's hard is to show that they *have* to be read that way. And that's what Tribe does. His arguments may have their weaknesses, but if you're not as good as he is, you won't see them. To find a flaw

you have to go five layers down beyond your initial reaction, because he's already dealt with the first four layers."

**T**RIBE CLAIMS THAT it was his respect for the Court and its traditions that compelled him to testify so powerfully—and so fatefully—against Judge Bork. He argued against Bork because he honestly felt that Bork's ideas about "original intent"—that to properly interpret the Constitution, one must understand the framers' intentions in writing it—were outside the mainstream of judicial tradition. Now that the fight is over, he takes some satisfaction from knowing that Bork's defeat meant the preservation of *Roe v. Wade*, since Bork's replacement, Justice Kennedy, voted with the majority to let the precedent stand.

At the time, he says, he was fully aware

that his actions might damage his own Supreme Court aspirations. But he was more concerned that they would hurt his own practice as an advocate before the Court. "I was worried about arguing in front of a Justice Bork," he says. In the end, he believes it was Bork's own words that did him in, not anything that Tribe said about him.

When the hearings were over, Tribe wrote



*One scholar says Tribe has badgered law professors to cite his work more frequently in their articles.*

Bork a note hoping to let bygones be bygones, but Bork would have none of it. He leaked the letter to the press, and more recently, in what was supposed to be a joint appearance at the National Archives, he refused

to enter the building until Tribe had left.

It was during the hearings that Larry Tribe made a telling discovery. Some buzzing on his telephone line led him to call in some counterespionage agents to check his line, and, sure enough, they discovered a listening device had been placed on his wire about 20 feet from his office, where the various office telephone lines converged inside a closet. This was, apparently, the second time his phone had been tapped. According to Tribe, Richard Nixon had ordered a bug in the early seventies after Tribe, then an assistant professor, had voiced some anti-Nixon sentiments.

The remarkable thing about this time was that Tribe couldn't be sure who had done it. Was it the political right, attempting to track the left's moves against Bork? Or was it an arbitrageur who wanted to get advance word on the progress of the \$3 billion

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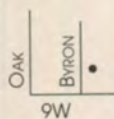
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## TRIBE

case he was working on at the time for Pennzoil against Texaco?

Given the relative crudeness and simplicity of the listening device discovered, Tribe ultimately figured that penny-ante political forces were to blame rather than high-rolling financiers. But the confusion was revealing because it pointed up his contrasting roles as a constitutional scholar and a relentless, highly paid advocate.

For the most part, Tribe plays these two parts serially without much problem. But it can be awkward when he plays them simultaneously. That's what happened in the Bork hearing. Tribe testified not as an advocate, but as a constitutional scholar, and his apparent neutrality gave his charged words their power: it was as if a judge suddenly spoke up for one side of a court case.

"Is Larry Tribe a legal scholar dispassionately seeking the truth, or is he providing analysis that furthers a political agenda?" asks Robert Nagel, a constitutional law professor at the University of Colorado. "Opportunism in one role undermines, or at least casts doubt on, his activities in another. In the Bork hearings, he called Bork more radical in his positions than any justice who had ever sat on the Supreme Court. He said Bork was outside a 200-year-long tradition of American constitutionalism. Those kinds of extreme, highly uncertain claims are not the sorts of carefully thought-out, qualified positions you'd expect a legal scholar to make. Those are the claims of advocates."

Tribe's defenders like Kathleen Sullivan concede that lawyers can easily be caught up in being, as she says, "priests and parishioners," but she claims that Tribe is largely the victim of having his constitutional theories reduced to "misleading sound bites." Further, while his critics may complain about his switching from altar to pew, Sullivan argues that it is really his ideas that they object to, especially his reading into the Constitution certain principles that they dislike. "There is a lot of unfair fighting about that," she concludes. "I sometimes wonder if it isn't envy."

However it is explained, Tribe's role strain may simply be the inevitable result of the powerful combination of his eagerness and brilliance. For all of Tribe's many positive qualities—his intelligence, his kindness, his commitment to justice—there is a questioning element that occasionally seems a bit much. One fellow scholar says that Tribe has several times contacted law professors to badger them into citing his work more frequently in their articles, something that this source attributes to "some sort of deficit about ego gratification."

Tribe is mystified by the charge. "My stuff tends to be cited fairly often," he says. "I've never wanted it to be cited any more." Others point to what they see as Tribe's campaigning for the Supreme Court or Solicitor General through his political activism.

IT IS HARD TO WORK UP too much sympathy for Ralph Venuto in his attempt to avoid paying Tribe the money required in his contract. Still, there is something pathetic in the image of Venuto, as detailed by him in a follow-up letter to the *Wall Street Journal*, plunged in personal bankruptcy while Tribe worked out an elaborate scheme for ever-higher levels of remuneration—topping out at \$6.5 million for a victory in the Supreme Court—for himself and his two associates, depending on how well they succeeded with the case.

But for that, as for other aspects of his conduct, Tribe himself offers no apologies. "It would be great if we had a more just society where people who did the really important things like teaching in nursery school are paid more than lawyers," he says. "That would be a better world, but it's not the world we're living in, and I am willing to take advantage of the fact that people are willing to pay me enormous sums of money to achieve legal results so I can do other cases for free."

Tribe insists that he won't take the cases of just anyone. Even in the *Lightning Lube* case, he says, there was an important legal point to make about the ability of the little guy to collect damages from large corporations. And the case of *Pennzoil against Texaco* was, to him, not a \$4 million fee, but an important federalist issue in which Tribe strongly believed that *Texaco* had abused a legal loophole designed to protect the rights of minorities in getting an appeals court in White Plains, New York, to overturn a verdict of a lower court in Texas. "Fortune 500 federalism" is what Tribe called it. Likewise, he defended Reverend Moon's Unification Church in its troubles with the IRS because constitutional principles of religious freedom were at stake. And before taking the *Cipollone* case, Tribe turned down the cigarette companies when they wanted to hire him to argue their side.

Consequently, Tribe argues, he has held himself back. "I could be quite fabulously wealthy," he says, "if I allowed myself to do things—perfectly legal things—that people have asked me to do."

Tribe's response may not resolve the issue to everyone's satisfaction, but it does display the Harvard lawyer's greatest legal asset: Larry Tribe has an answer for everything. **B**