TRIBUTE TO LAURENCE H. TRIBE

It is an honor and a privilege to pay tribute to my teacher, my mentor, my colleague, and above all, my friend, Laurence H. Tribe. To this day I remain thankful to the computer program in the Harvard Law School Registrar's office that assigned me to his perpetually oversubscribed constitutional law class in the fall of 1979. His dazzling teaching made that course a magical experience. It also changed my life, as it led to a research assistantship with Larry and then two years of work with him in the world's best appellate constitutional law practice.

When Larry became sought after as an appellate constitutional lawyer after his treatise was published in 1978,[1] and did me the great honor of asking me to work with him, I told him I would work on his cases and not his articles, for after all, I had decided to be a litigator, not a law professor. (Life later serendipitously changed that.) And indeed, our practice involved some terrific cases. There was a period when we practiced island law, representing the bar association of Puerto Rico[2] and the State of Hawaii[3] in the same year. These cases, needless to say, necessitated considerable travel to consult with the clients on site. We represented a number of other governments from the City of Boston[4] to the City of Berkeley.[5] We also represented religious organizations from Hare Krishna[6] to the Unification Church.[7] We won some; we lost some; either way, we always had great fun.

In our first case together, when I was still a third-year law student, we represented Hare Krishna devotees seeking to proselytize at the Minnesota State Fair without being confined to a fixed, rented booth as fair rules required.[8] We argued that the booth rule was not a mere time, place and manner regulation, but rather effectively a form of content discrimination against unpopular speakers. After all, it favored listener-initiated over speaker-initiated speech. Minnesotans might well flock to the booths of the Methodists, the

1. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1st ed. 1978).

2. Schneider v. Colegio de Abogados de Puerto Rico, 742 F.2d 32 (1st Cir. 1984).

3. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

4. White v. Mass. Council of Constr. Employers, 460 U.S. 204 (1983).

5. Fisher v. City of Berkeley, 475 U.S. 260 (1986).

6. Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981).

7. United States v. Sun Myung Moon, 718 F.2d 1210 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984).

8. *Heffron*, 452 U.S. at 644.

Presbyterians and the Episcopalians, but if shaven-headed persons wearing saffron robes, clanging finger cymbals and chanting were confined to a booth, they were likely to have a very long, lonely day at the fair.

The Supreme Court, in an opinion by Justice White, upheld the booth rule as a reasonable time, place or manner regulation, rejecting our argument that it was content-based in a footnote stating that "the argument is interesting but has little force."[9] At the time I thought that was just about the worst thing a Justice could say about one's arguments, until some years later when I served as Larry's co-counsel in *Bowers v. Hardwick*.[10] This one we lost again. And again Justice White wrote for the Court, rejecting our argument that the right to privacy that had been found in the Liberty Clause of the Fourteenth Amendment extended to private, consensual, adult sexual conduct in one's own bedroom. This time, Justice White characterized our argument as "at best, facetious"[11]—at least if it was homosexual sexual conduct that was in question. This, I can assure you, made us long for the days when our arguments were interesting but had little force.

Now in thinking about what I could say about this wonderful man, this wonderful scholar, this wonderful advocate, this wonderful friend, I at first thought I would have to devise something with seven models. After all, Larry's great treatise originally offered seven models of American constitutional law.[12] So I looked back to see if I could possibly use them, but alas, it didn't work.

Could I use the model of separated and divided powers? No, for this is a man who amalgamates and synergizes powers—of teaching, scholarship, advocacy—rather than separating or dividing them. Could I describe him under the second model, of implied limitations on government? No, for Larry's brilliance is that he makes the implied express, the tacit articulate. Could I talk about Larry in terms of the third model, of settled expectations? No, because he believes in unsettling expectations—at least if they are unjust. Could I speak about him in terms of the fourth model, of government regularity? Well, no, for a man who likes to work all hours of the night and day, who had ideas at two or four in the morning and didn't hesitate to share them with all who worked with him, could not be described in terms of regularity.

9. *Id.* at 649 n.12.

10. 478 U.S. 186 (1986).

11. *Id.* at 194.

12. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1st ed. 1978).

Could I describe Larry in terms of model five, preferred rights? Well, I couldn't do that because he likes so many rights, he never preferred some over others. Could I talk about him in terms of equal protection, model six? Well that's getting closer, because he has given much of his career to a quest for equal protection of the law for those dispossessed or politically powerless groups who do not have it. Could I speak about him in terms of his tentative model seven, toward a model of structural justice? Well, that's getting closer too, because since his early days as a topologist, Larry has always seen the world in architectonic or structural form, always looking for a vision of justice that might be as perfect in its continuity as a Mobius strip.

So only two of those models came close to working, and I figured I needed seven. I thought, what else has seven? Seven muses, seven virtues, seven brides for seven brothers—none of those seemed quite appropriate. So allow me to invent my own list of seven—the seven roles of Larry Tribe.

Larry's first role is that of poet. He speaks in stanzas and metaphors. He speaks figuratively and allusively, alliteratively and assonantly. He mesmerizes courts and congressional panels and constitutional law classes alike with his embodiment of the oral tradition.

Larry's second role is that of painter. He has long dabbled in pastels and other artistic media, and he has created beautiful images such as one of his works that depicts three pyramids floating off a desert in three dimensions, aloft in the air, seemingly held up by an invisible force. He speaks, and teaches, in visual images. Who of his students could forget learning about federalism-based limits on national power, during the brief reign of *National League of Cities v. Usery*,[13] through Larry's image of reserved state powers as islands popping up in the "stream of commerce," which he used to draw on the chalk board complete with waves and palm trees? Who could think about state action doctrine without visualizing Larry's chalk drawings of anthropomorphic little governments waving the "arms of the state"? Who could forget his painterly dialogue with his students about the right of privacy articulated in *Griswold v. Connecticut*?[14] Where does the right of privacy come from? It is not exactly in the First, Third, Fourth, or Fifth Amendments but, Justice Douglas says, in the "penumbras" of those amendments. Who

13. 426 U.S. 833 (1976).

14. 381 U.S. 479 (1965).

knows what a penumbra is? It's a little shadow. Well, then, tell me what casts the light.

Third, Larry is a philosopher. He cares about deep normative structures, and he cares about Socratic dialogue with the young. That is, he cares not only about understanding the world of legal ideas and clarifying them analytically, but enabling others to do the same. His love of the classroom has persisted undiminished over the decades of his career.

Fourth, Larry is a prophet. He believes that you can imagine something now that has no resemblance to the world you live in, and work to see it come true. For example, long before it was fashionable, Larry devoted himself to bringing about a world in which gay people could begin to enjoy a life in which sexual orientation was not a suffocating secret and equal protection not a remote and impossible dream. In *Board of Education of Oklahoma City v. National Gay Task Force*,[15] he argued that public school teachers could not be fired for teaching about homosexuality. In *Bowers v. Hardwick*,[16] he argued that gay lovers ought to be free from state criminal proscription of their acts of love. And in *Romer v. Evans*,[17] he wrote a beautifully crafted amicus brief arguing that an anti-gay rights initiative that had been written into the Colorado Constitution was a literal deprivation of the equal protection of the law for gay men and lesbians—an argument that helped lead to a six-to-three decision invalidating the amendment.

Larry's fifth role is that of pragmatist. He spans the worlds of theory and practice. He believes in shaping the world, not just sitting on the sidelines in order to analyze it. In his 1985 collection of essays, *Constitutional Choices*, for example, he wrote that "thinking about possible strategies of constitutional litigation and argument [ ] has enriched my sense of what questions are worth asking, how questions that courts might wish to evade might be recast to make them less avoidable, and what might count as decent answers."[18] The interaction of his practical life with his theoretical life has enriched and informed all his work.

Sixth, with all due respect to the dean of deans, *decanus decanorum*, John Sexton, Larry Tribe is also a kind of priest. We've joked over the years that I became a lawyer because I wanted to be a priest until I found out that the Catholic Church wasn't going to let me, and Larry once quipped to a reporter that if I were a priest I'd

15. 470 U.S. 903 (1985).
16. 478 U.S. 186 (1986).
17. 517 U.S. 620 (1996).
18. Laurence H. Tribe, Constitutional Choices ix (1987).

make a perfect pope—a line I've never been quite sure how to take. A priest, though, is at the core someone who speaks truth to power, who shows compassion to all, who cares deeply about other people's suffering and tries to prevent or palliate it. Larry's compassion is deep. He spent considerable effort on litigation seeking to extend the right of privacy to the right to control the circumstances of one's own agonizing death.[19] He didn't only make the best argument he could, but visibly embodied compassion for the terminally ill people he represented.

Let me close, seventh, with the role that Larry no doubt would have ranked first—his role as parent. He is an endlessly proud and devoted father to Mark and Kerry, now talented young artists. As they left home he missed having them so much that I once found him in Radcliffe Yard pulling a big wagon with a group of tiny day care charges in it. He's also a parent in a sense to all the many students who've been lucky enough to work closely with him, as I was.

Now this alliterative p-word list could continue. I could recall Larry's fascination with metaphors of pigeons and pilgrims: he used to begin his constitutional law course with an anecdote about training pigeons, suggesting that constitutions are hands-tying devices that can train government not to do bad things the way you can train pigeons not to pick at seed, and a joke about pilgrims, who migrated and helped found our constitutional order to escape religious persecution, but then realized there was a lot of potential in real estate. I could mention his commitment to pro bono work, and the great amount of time and brilliant advocacy he's given for free to those who simply asked. I could tell you he is a great pal, who never hesitates to look after his friends or colleagues when trouble or illness strikes. But let me close with one last p-word to say how honored I am to be here, and how greatly touched I am by having been Larry Tribe's student and friend. Precious. He's a gem. We should treasure him. And I love him very much.

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19. *See* Washington v. Glucksberg, 521 U.S. 702 (1997); Vacco v. Quill, 521 U.S. 793 (1997).