



LAURENCE TRIBE INTERVIEW
THE THREAD SEASON THREE

Laurence Tribe, Legal Scholar
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Interviews by: David Bender
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START TC: 00:00:00:00

ON SCREEN TEXT: Life Stories Presents

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LAURENCE TRIBE:

Mathematical theorems of a beauty that is unparalleled in my universe. I mean, I love gorgeous sunsets, sunrises, mountain views, lakes, rivers, oceans, but e to the i π plus one equals zero, the Euler formula, that is so much more beautiful than any sunset that I've ever seen. And that is an enormous motivator for me. Or Gödel's theorem, the theorem about the unprovability. I mean, that moves me to the soul. The fact that we can prove that there are truths that cannot be proved within any given axiomatic system. To me, that's a way of addressing the question, does God exist? I mean we can't prove that certain things are deeply wrong, but we know that torture is wrong. How do we know that? Where does that come from? It's not just conditioned, I think that's a deep truth.

ON SCREEN TEXT:

The Thread

ON SCREEN TEXT:

Laurence Tribe

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LAURENCE TRIBE:

I'm Lawrence Tribe. I'm the Carl M. Loeb University Professor of Constitutional Law Emeritus at Harvard University. I've taught there for 50 years. I don't think I will ever retire as such, but I'm not teaching, at least not teaching in a classroom with walls, I'm teaching, as I like to think of it, in a classroom without walls, trying to educate people about basic things regarding the Constitution and the values at its best that it represents. I was born in Shanghai shortly before the bombing of Pearl Harbor. My parents came there as Russian Jewish refugees running away from the pogroms and the Holocaust. The Japanese occupied Shanghai and that whole area of China because they were allied with Germany. They were under some considerable pressure to eliminate all of the Jews of Shanghai. We were all to be put on boats, floated out to sea and drowned. I was about one year old. I came to America when I was five and a half, little kid growing up in San Francisco, went to public schools there and had the sense always that I was lucky to be where I was. I was the first kid in my family to get into college. I went to Harvard when I was about 16. Again, I felt enormously lucky. I began to think about the remarkable coincidences, the various forms of serendipity without

which I wouldn't exist. And I kept that in mind as I thought, what is this time that I'm spending on earth? What's it for? And I concluded to the extent I... formulated it, it's to pay it forward. Learning, teaching, trying to make a difference.

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INTERVIEWER:

You have a combination of interests that reflect a passion for both arts and mathematics as well as the law and a sense of justice. And yet you found a way to take those two seemingly disparate inclinations or core motivators.

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LAURENCE TRIBE:

They all come together for me. I mean, sometimes I've thought of it as a kind of double helix in which one strand deals with the aesthetics of the universe, its beauty, the order of things, the inexplicable, amazing character of truth. That strand that I have expressed sometimes in attempts at art, sometimes in mathematics. And then the other strand is about morality, justice, the political universe, the social realities. To me, those strands just wind around an axis of some enormous power. That axis is something about dignity and purpose.

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INTERVIEWER:



Do you remember talking to your mother about these feelings about fairness and justice?

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LAURENCE TRIBE:

In retrospect, I talked to her about it. I sensed that there was some kind of moral order there was some set of ideas out there about what was right and what was wrong. I hadn't known when I was growing up that my father had risked his life, really, by hiding an American flag in the false bottom of the trunk. But when I learned, really at his death, at his funeral, that there was such a flag and when my mother gave it to me, it meant an enormous amount. It was a symbol of the country, everything it stood for. The fact that my father had come to love something about America long before we came back to the United States in the 1940s and 1947. That anchored my own sense of patriotism may seem corny, but to me that flag, which I still have folded in my home office, means a great deal. So I was really torn in the era in America when people who protested the Vietnam War did it partly by burning the American flag. I believed that what they did was grotesque, but I concluded they shouldn't be punished for it because the flag stands for freedom, including the freedom to burn a symbol of the country. But it's paradoxical, and I've always loved paradox. Maybe that's one of the reasons I have such enormous feeling and sympathy for immigrants, especially ones who've done nothing wrong. I mean, that's why I've worked with the Obama administration on the Dreamers. I've been involved in litigation when immigrants are rounded up, when people who just look foreign are assumed



to be non-citizens. When people talk about ending birthright citizenship, all that kind of racism just disgusts me, and I become very agitated and active in developing legal theories about the rights of persons, humans, regardless of their nationality, their ethnicity, regardless of where they came from, how they got here. Of course, I do believe that nations have to have borders, they have to have rules about who can come in, but, in my view, immigrants have made the country what it is. They've built the country. We are a nation of immigrants. That's not just a slogan, and I love the language at the base of the Statue of Liberty. "Give me your tired, your poor, your huddled masses yearning to breathe free. I lift my lamp beside the golden door." I've always thought that Emma Lazarus's poetry just captured what the spirit of America should be and isn't always.

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INTERVIEWER:

Well, this is a moment actually to do a little teaching. You made a connection with something that had not been identified to be relevant in many cases with the Ninth Amendment.

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LAURENCE TRIBE:

When the Bill of Rights was proposed, some of the opponents of listing down certain rights like speech, religion, the right not to have your home searched without a warrant. Some of the opponents of listing those things said, if we list the rights, then somebody will come along and say, those are all the rights



people have. That's dangerous. We're not omniscient. We may miss some. There may be rights that exist that we haven't thought of yet. The world is gonna change. And sure enough, it did from 1789 to now. But the answer to those people was given by those who said, well, let's put in an amendment that says this list isn't exhaustive. That was gonna be the Ninth Amendment. It was a strange part of the Constitution. It sort of lifts itself off the page and talks directly to you, the reader, the person who is construing the Constitution, and tells you. Don't read it this way. Don't read the list as exhaustive so that when a woman comes along and says, well, I have a right to control my body. You can't make me become a mother. It's not an answer to her to say, where do you find that in the list? It doesn't say that. It doesn't say the right to your body, the right, to decide whether or not to have a child. And part of her answer has got to be, yes, it doesn't say that, but you know it when you see it. And the Ninth Amendment reminds you that it's perfectly legitimate to infer certain rights and illegitimate to deny their existence just because they're not listed. And part of the reason it became more important is that in the first case I ever argued in the Supreme Court, a case called *Richmond Newspapers Against Virginia* in 1980, it wasn't enough to rely on the First Amendment.

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Speaker 3:

Mr. Chief Justice, may it please the court. This is an appeal by the *Richmond Newspapers* and two of its reporters who were expelled along with all other members of the public from an entire murder trial in September of 1978.

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LAURENCE TRIBE:

The case involved the question of whether the press and the public has a constitutional right to watch a criminal trial. Not the accused to make it public. That's a different right. That's enumerated in the Constitution. And I thought, yes, they could. And that was the first case that I argued in the Supreme Court. And a lot of the mavens of the media said, Larry, don't mention the Ninth Amendment. That's so weird. Just stick to the first. And I said, well, the trouble is the First Amendment doesn't quite do it because the First Amendment requires a willing speaker. If you're willing to speak and someone's willing to listen, the government shouldn't stand between you. And against the advice of those media mavens, I made quite a big deal of the Ninth Amendment and Chief Justice Berger's opinion for the court in *Richmond Newspapers* relied heavily on the Ninth Amendment.

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INTERVIEWER:

And Chief Justice Berger agreed.

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LAURENCE TRIBE:

Right, and it was not unanimous. There were dissents, but it's become a very leading opinion. And even now, I think that it implies that there is a First Amendment right. There should be a First Amendment right to have cameras

in the courtroom non-obtrusively. And the judges who don't like this can just shove it.

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INTERVIEWER:

Well, when you weren't letting your clients think you were an experienced practitioner before the Supreme Court, you were teaching at Harvard Law and you've had a remarkable group of students, but you have mentored or been an influence on a very diverse list.

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LAURENCE TRIBE:

You're thinking about Ted Cruz, I suspect. He was, I have to admit, very smart. He was very outspoken in the constitutional law class that he took with me, so much so that he bragged to everybody in the class. I learned only years later that he was going to get the top grade in my course. He said he'd get the only A-plus that I was likely to give. He was disliked by everybody in the class. I didn't particularly dislike him. I suspect if I'd gotten to know him, I would have. He had very conservative views, but that wouldn't have prevented him from doing really well. The way I grade constitutional law exams, there's really no ideological component. You can make a really terrific argument for a really terrible point of view, or at least point of view you that some people might think is terrible. He did very well in the class, but he wasn't first. He was second. The woman who was first, very, very articulate, wonderful woman named Tanya Tetlow, I still remember. She is now president of, I think

it's Fordham University, and she was always proud of the fact that she had beaten out old Ted Cruz, and that he had not succeeded in his ambition to do the best in my class.

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INTERVIEWER:

I'm gonna talk about two more, if I may. We'll start with the current Chief Justice.

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LAURENCE TRIBE:

Well, John Roberts was a student of mine whom I was very impressed with in the constitutional law course. In the few comments he made, he was always very on target, very precise, analytically very sharp, but I never got to know him very much, very well as a human being. I have to say I've been disappointed by the fact that he has taken so passive a role in addressing the court's growing crisis of credibility, the way some of the justices have acted, the things they have done that have involved blatant conflicts of interest that have brought discredit on the court. I would have hoped that the John Roberts that I thought I knew would see through that and would play a much more active role in somehow corralling those justices who have gone off the reservation in ways that have done, I fear, permanent damage to our judicial system and to the rule of law. So John Roberts, though he's a very nice man, has been a real disappointment to me.

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INTERVIEWER:

There was someone who went on to become the President of the United States.

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LAURENCE TRIBE:

Well, this lanky kid in jeans and a sweatshirt comes wandering into my office at Harvard Law School, introduces himself, Barack Obama, and I say, hello, Barack, and he sits down on the floor, as I remember, and we start talking. He's a first-year student, but he's interested in constitutional history and constitutional law. And at the end of a very long conversation, I'm convinced that I've never met a student like him. He was quite unique, very mature, as it turns out he was a good bit older than some of his classmates, very knowledgeable about history, about politics, about the legal system, and he asked whether I could use an additional research assistant. Ordinarily, for a first-year student who hadn't yet taken constitutional law, whether in my class or another, I would have said, why don't we wait until you've taken constitutional law, see how you do. But I was so blown away by this kid that I immediately said yes. And ever since then, throughout his career in law school, he was just an amazing research assistant. His memos, I wish I had kept them all. I mean, they were finished pieces of work, really. They were amazing. Barack Obama and I struggled over the question of how one could understand the responsibility of government for what individuals do by thinking of government as not so much exerting a force on them, reaching the long arm



of the state, but as sort of curving the social space, changing the circumstances surrounding people, and thereby becoming responsible. And that idea, as well as ideas about changing reality by observing it, figured in this fairly important article in the Harvard Law Review that Barack Obama worked on with me.

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INTERVIEWER:

The fact that even past the role of teacher-student, they're coming back to you for counsel, must be enormously gratifying.

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LAURENCE TRIBE:

It's very gratifying. I mean, but actually, almost as gratifying, or maybe as gratifying, are the letters that I get from students that I taught 30, 40, 45 years ago, telling me how much difference I made in their lives, in their self-confidence, in their sense that the law could be put to noble purposes. When I get letters like that, they really move me sometimes to tears. And some of the people who have become my best lifelong friends are students from decades ago who you won't have heard of. They're not Barack Obama, Elena Kagan, Jamie Raskin, Adam Schiff. But they came to mean a lot to me because in my teaching, there is a sense of reciprocity. I mean, I learn from my students. I come to care about them. They very often ask for letters of recommendation. For career advice, counseling and personal situations. And it's like having thousands of children. You sort of see them take flight with

wings of their own and seeing the independent directions in which they fly.
That's quite wonderful.

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INTERVIEWER:

Well, we talked about the things that have given you passion. One area of social justice that you championed at a time when a lot of people wouldn't come near those cases. Cases that involved what were then only called gay rights and sometimes not even that.

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LAURENCE TRIBE:

Well, when I was trying to synthesize all of American constitutional law in a single volume, treatise called *American Constitutional Law*, which is really the main academic work for which I'm known, I had a section on sexual orientation and why, like race, it was both an artificial thing and a deeply real thing. It had a lot to do with identity, but treating people badly, because of their race, their ethnicity, their nationality, or their sexual orientation or whether they were straight or gay or trans, that was all part of the same thing. It was a matter of exercising power unjustifiably over people because of who they are rather than what they have done. It's okay to make rules about, you know, you drive on this side of the street, you don't do this, you don't do that. But taking people because of their identity and marginalizing them and marginalizing the communities to which they belong, saying that



because of who they are, there's something wrong with them, that always hit me in the gut.

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INTERVIEWER:

There are people who say you can choose not to be gay and it's a choice. Well, how do you address that?

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LAURENCE TRIBE:

It's always been a problem I gather for the gay community, whether to think of it as an inborn characteristic or a choice. In my view, we don't necessarily know what the mix is of something that you are just born with and something you choose, but it shouldn't matter. My notion was whether you're born this way or not, you have a right to be that way if that's what makes you feel whole. When I talked about the double helix, I think of liberty and equality surrounding an axis of personal dignity. It's part of the dignity of a person to be who they say they are. And it's not up to the society, much less the state, much less, the government to tell them, oh no, that's not who you are. When I was teaching, I really had no idea, gay people weren't out very much, at least not to professors like me, they're straight professors. And yet I knew somehow that there must be people out there who are suffering because of these rules and so I, against the advice of some of my colleagues who read drafts of my treatise and said, you won't be taken seriously if you say that sexual orientation is a suspect classification and that gay people have rights analogous to racial minorities, that's gonna destroy the reception of your



whole treatise. I said, who knows? I don't know what the consequence will be, but this is about what I see as true. So from the beginning, I thought that the rights of the LGBTQ community are absolutely central. One case that I argued that meant a great deal to me involved the rights of a gay man who was not sentenced to any prison term, but who was harassed for having sex with his boyfriend. And I always thought that the central issue in that case, which I argued and lost five to four, the central issue was not what was Michael Hardwick doing with his boy friend in that bedroom in Georgia, but what was the state of Georgia doing in the bedroom? What was its business telling him whom to have sex with? I thought, we're not gonna win, but there will be powerful dissents that will someday become the law. And sure enough, the four dissenting justices ended up prevailing later on. I was teaching my students, who were quite upset by that decision, most of them, that it's going to be overruled in your lifetimes and probably in mine, and sure enough it was. And that made me feel very good.

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INTERVIEWER:

One of the things that did happen early on was sort of a quasi move in the direction of something a lot of people thought shouldn't have been the most important part of this fight, but from the grassroots up, from young people, they said it's marriage.

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LAURENCE TRIBE:



My memory was that those people who thought that marriage should not be something that gay and lesbian people should seek were completely wrong, not because those who are unmarried should be treated less well than those who were married. I believe that people who choose not to marry have a right to live together the way they choose, but marriage in our society has long had very special symbolic significance. And saying that you don't have a right to it because the person that you love is of the same sex as you struck me as completely wrong. *Loving v. Virginia* always struck me as a wonderful and important and aptly named case about the rights of people to marry those of a different race. And it's interesting that when he undertook to list the various cases that he thought should be reconsidered, from the panoply of civil rights cases in the Supreme Court, Justice Thomas managed to skip over *Loving*. He mentioned *Griswold*. He said maybe that was wrongly decided. *Obergefell* involving same-sex marriage, maybe we should reconsider that. But the rights of Blacks and whites to marry one another, he didn't think that should be reconsidered apparently. And the fact that he's married to a white woman, Ginny Thomas, surely that had nothing to do with it.

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INTERVIEWER:

I do wanna ask you about a moment that caused me to question the Supreme Court as an institution for which I'd had nothing but reverence. And that was 2000 and the decision to stop the counting in Florida. Talk about that period.

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LAURENCE TRIBE:

Well, when the Supreme Court in *Bush v. Gore* decided five to four to stop the counting of ballots in the state of Florida, in the name of equal protection of the laws, saying that it was not consistent with equal protection for the state to conduct a recount that was done in different ways in different parts of the state, struck me as profoundly self-contradictory as well as deeply disappointing. Self-contradictory because if there is a right to have ballots counted the same way when there's a recount, the most conspicuous and unjustifiable discrimination is that between those that you count and those that refuse to count because of an arbitrary deadline. *Bush v. Gore* reached the court twice. The first involved a case that I argued in which the Supreme Court asked the state of Florida to explain in more detail what the hell it was doing. It looked like chaos. It's bad enough to count ballots in one part of Florida by looking for hanging chads and in another part of Florida by applying strict rules. If that's constitutionally impermissible, then counting some of them and then counting none of them that haven't been counted yet as of midnight, that's even worse, right? Just think of what it would have changed. Not only would Iraq and Afghanistan have gone differently, but also just focusing on the Supreme Court, we wouldn't have John Roberts and Samuel Alito on the court. Two of the justices who form a solid phalanx of reactionary views. And by the way, I do think it important to say that *Bush v. Gore* was hardly a one-off. Throughout its history, the Supreme Court has done some pretty terrible things, more terrible things than great ones. The Warren era with *Brown v. Board* and the criminal justice revolution was the

exception rather than the rule. If you look at the long history of what the Supreme Court has done, it's been quite reactionary. They decided not only Dred Scott and *Plessy v Ferguson*, but Korematsu and Shelby County, invalidated the civil rights acts after the civil war. On the whole, the Supreme Court has been not the friend of rights and equality and liberty. So really we ought to get used to the fact that the Supreme Court is not necessarily the friend of justice.

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INTERVIEWER:

Lastly, how would you like the legacy of your life and work to be described to people who don't know you?

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LAURENCE TRIBE:

It's so difficult. I mean, I care more really about what the people I love think about me than I do about some grand synthesis of my life. I want people to think he was a good man, that he was kind, that he made the world a better place. I don't know. I don't think I can write that very well.