

The following is a conversation with Randall Kennedy, professor at Harvard Law School and author of many seminal books on race, law, history, culture, and politics, including specifically on affirmative action, criminal justice, policing, and the topic explored extensively in this conversation,

the single most powerful word and slur in the English language, the N-word, with a hard R at the end.

Randall has written a book with this word as the title N-word, the strange career of a troublesome word. Please be warned that Randall uses this word throughout this conversation deliberately and skillfully to discuss its power and its role in the history of the United States.

I don't intend to shy away from controversial topics like these and I'll work hard to handle them thoughtfully and thoroughly with respect and with empathy, often with several guests who have very different perspectives on the topic. In the end, I believe in the power of long-form conversations that he'll divide by furthering understanding of human nature, of human history, and the full diversity of the human experience. And now, a quick few second mention of his sponsor. Check them out in the description. It's the best way to support this podcast.

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There was a time when I used to love coconut ice cream and there was a time when I would use gentoo, but that time is long gone. I've grown up a little bit, still young in a heart, but practical enough to be using Ubuntu and my favorite flavor of Ubuntu is Monte. Anyway, all of that doesn't matter. The point is Linux is Linux and you can use Linux in the cloud in a way that's super easy for small personal projects and for huge systems, great customer support, lower cost than AWS. I love Linode, now called Akamai. I need to get used to saying I love Akamai. A rose by any other name will smell a sweet. Shakespeare has some wisdom on that one. Anyway, check out this beautiful, sweet smelling rose that is Akamai, or linode.com slash lex for a free

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I think using data that comes from your own body to make decisions about your life, health decisions,

medical decisions, career decisions, all that kind of stuff. Obviously, when you look at the power of large language models, it's clear that when paired with great data, large neural networks can help do incredible predictive work. This is the future, but it starts with getting data from your body and starts by taking action based on that data. And so, Insight Tracker is a pioneer that I support in this effort that I think will define a great quality of life in the 21st century.

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You wrote a book whose title is the N-word spelled out with a hard R at the end. So, let's start with the history of this word. What is the history of the N-word?

The word you're referring to is nigger. The book that you're referring to is nigger, the strange career of a troublesome word. The word dates back to the 16th, 17th century. It's got a long lineage, in other words. Basically, Latin, basically, Spanish, basically, N-I-G, black in various formulations. We don't know actually how the term nigger became a slur. So, there were words that were close to N-I-G-G-R that were used in various ways. For instance, N-I-G-G-U-H was used. N-I-G-G-U-R was used. And sometimes, it was used in a way that seemed

to be just purely descriptive. We do know that by the early 19th century, it had become a slur. It had become a derogatory word about which people complained. But exactly how that came about, not altogether clear. So, it's been 20 years since you've written the book. What wisdom have you gained about this word since writing the book and maybe having to interact with people, having to read, having to see, having to feel the response to the book?

This book has generated a lot of controversy. I thought it would. It's probably generated more controversy that I had anticipated. It has certainly generated more different sorts of experiences than I had anticipated. So, for instance, I did not think that writing this book would prompt people to ask me to be an expert witness in cases. And over the past 20 years, I've been an expert witness in a number of different cases. I've been an expert witness in a murder case, in various cases of assault. I've been an expert witness in cases involving tort cases, intentional infliction of emotional distress. I've been an expert witness in a number of employment cases. I had not anticipated that, nor had I anticipated the extent to which people would get in trouble for using my book. Every year, there are teachers who are suspended or who are fired because they will excerpt a chapter of my book. Let's imagine a, and this is not, I'm not imagining things, this has happened. A teacher is teaching, for instance, the Mark Twain's Huckleberry Finn. The word nigger appears in that book over 200 times. The teacher, trying to be earnest, trying to be sensible, trying to be serious,

will excerpt a part of my book to acquaint students with the history of the word and maybe the history

of controversy involving the use of the word in this particular novel. The teacher will give it out, hand it out to the teachers, hand it out to students, and there have been a number of teachers who've been suspended or worse because of that. Students will get upset, go home, tell their parents, their parents will storm to the school and say that this is terrible. The teacher is, quote, using the word nigger in an offensive way, and oftentimes administrators will basically abandon the teacher. Whenever this comes to my attention,

I write, I'll write the superintendent of schools or I'll write the principal or sometimes I'll write an opinion editorial piece for the local newspaper, but every year there are teachers who are disciplined for using my book. I had not anticipated that.

And what is the nature of the letter or the op-ed that you write on why they shouldn't be disciplined or to the degree they should be or shouldn't be? There's not been one case that has come to my attention in which it was even remotely sensible for the teacher to be disciplined.

And what I say is that, number one, frankly, I go through, what I write is almost a synopsis of my book. Number one, this is an important word in American history. It is a word that is explosive. That's why people get so upset. It's a word that's volatile. It's a word that has typically been used in a terrible way. It's a word that is part of the soundtrack of racial terrorism in the United States. So people ought to know about this word.

I mean, if you're interested in knowing the real history of the United States, if you're interested in knowing about lynching, if you're interested in knowing about the way in which black people have been terrorized in the United States, you need to know this word.

You need to know that history. So you need to know why it is that people are upset about the word. But it doesn't end there. You have to know that. And if you know that, then that knowledge should equip you to be careful. It should equip you to know that, to know the range of context in which this word appears. But again, it doesn't just end there because especially young people, you tell that to young people, they nod, they read, they understand that. But then,

what? But then they turn on their radios and they turn on, they listen to Spotify, they listen to some of their favorite entertainers. They listen to Dr. Dre, they listen to the ghetto boys, they listen to Snoop and they listen to NWA. What are they here? They listen to stand-up comedians. They listen to Dave Chappelle. They listen to Cat Williams. What do they hear? They hear the word nigger or niga being used in a lot of different ways.

And so, they need to know about that as well. What are people doing? How does one explain the fact that Dick Gregory was a comedian, activist, friend of Martin Luther King Jr., a true activist? I mean, he had a flourishing

career as an entertainer that he abandons in order to struggle for racial justice throughout the United States and including the Deep South. How does one explain the fact that he wrote several memoirs, but his first memoir is called Nigger, a memoir. How does one explain that?

How does one explain the way in which, how does one explain Richard Pryor?

And Richard Pryor's best album is That Nigger's Crazy. Well, was Richard Pryor trying to put down black people? How does one explain that? One can only explain that by getting deeper into the word by understanding that, yes, this is a word that has been used in a derogatory way. This has been,

this is a word that has been used to put people down. This is a word that has been used to terrorize people. You've got to know that. But you also have to know that this is a word that has also been put to other uses. There are artists, there are entertainers who have used this word like Dick Gregory used it to put up a mirror to American society and say, look at this word and look at the terrible way in which it's been used. We don't want you to look away. No, don't look away.

We're not, no euphemism, no asterisks, no, no N word, no, nigger. Now we want you to look at that and we want to talk about that. James Baldwin, James Baldwin, there was a, there was a documentary about James Baldwin a couple of years ago, a highly lauded documentary.

The title that was given this documentary was, I am not your Negro. That's not what James Baldwin said. Anybody can go to YouTube right now, take a look. James Baldwin said, I am not your nigger. And then he went on to talk about that. Well, you know, James Baldwin wasn't, again, he wasn't starting to cover up anything. He wanted people to face the facts of American life. And it seems to me that if you're a teacher and you want to have your students face the facts about American life, well, you've got to grapple with the word nigger. Now let me just quickly say, you know, teachers have a tough job. And if we're talking about students, of course, there's a wide range of students. Am I saying that one ought to give my book to kindergartners? No, you know, kindergartners are probably not ready for such a book. Third graders, probably no, not third grade. If we're talking, however, about people in the 10th grade, do I think the 10th graders can read my book? Yeah, sure, absolutely. 11th graders, 12th graders, people in college, there are people in college. There are people in college, there are people in law schools. Teachers in law schools have been disciplined for, because the word nigger has come out of a teacher's mouth.

Why? In a couple of cases recently, teacher would be reading a court opinion. The word appears in the court opinion, the teacher pronounces the word, ah, you know, students get up, leave, in a huff, report the teacher. There's some instances in which teachers have been under those circumstances, have been disciplined. In my view, that's bad. And people ought to say it's bad. It's bad pedagogically. And frankly, in many of these instances, it's not only, it's stupid. And I don't mind saying that. I think that some of these instances in which teachers have been disciplined, absolutely stupid. People say, well, the teacher used the word, excuse me, used the word. It'd be one thing, it'd be one thing if a teacher looked at a student and called the student nigger, you know, get out of here nigger. That'd be one, that'd be, you know, fine, disciplined, that's teacher, that's bad. But that's not what's going on.

You don't have this, these, none of these are cases in which you have an individual who is a stranger to another individual, and this word just sort of comes out. No. What we have here is a class involving a person who is a teacher interacting with students, talking about subjects in which it would be perfectly understandable why this word would emerge as a subject of conversation. Now, under those circumstances, it's somehow wrong for a teacher to utter this word. In my view, the answer is no. And, you know, I said that 20 years ago, I say it even more emphatically now. Still, it is one of the most powerful words in the English language.

And there's a kind of responsibility that we assume it should have with words, with statements. That word, if not used skillfully, if not used competently, even when just read from a legal transcript, can do more harm than good.

I agree with what you say. Yes, words are powerful. Words do matter. And so I'm certainly not

suggesting that people be lax. I'm not suggesting that people be irresponsible.

It's precisely because words matter, however, that we need to be willing to face words and grapple with words and talk about words and talk about the history of words precisely because words

matter. And among other things, it seems to me it's important to understand that words can mean different things in different contexts. It's not the case that a word means the same thing in every context. The word discriminating. Sometimes it's a very bad thing. That person discriminates.

And when you, again, intonation of voice means something. If I say that person discriminates, and I'm obviously being disapproving, implicitly what I'm saying is that person distinguishes between things on an unjustifiable basis. And that's a bad thing. On the other hand, that person has discriminating taste. That means something very different. That means that the person differentiates in a way that shows that they understand the difference between excellent, good, and not so good. And we think that that's a good thing. So words can mean different things in different contexts. It seems to me that that's something that actually we ought to recognize and talk about. Well, some words enter this territory of being a slur. And it seems like when they cross the line into being a slur, the number of contexts in which it's okay to mention exponentially decreases. Right? No, no, I'm going to resist that a little bit because the whole idea of slurs, slurs change. Yankee was a slur. Yankee was a slur in 18th century United States. Slur today. New York Yankees. I'm a Yankee fan. I'm a Yankee.

Queer. Queer. In my lifetime, there was a time that you queer and people would really run away from it. And that was, you know, a bad thing. And then thank goodness, gay liberation movement, gay liberation movement. Basically, we're not going to run away from this. We're going to grab this quote, slur. And we're going to affix it to ourselves. And we are going to repurpose it.

But now the word queer is, again, you know, can it be a slur? Yeah, it can be a slur. It doesn't have to be. And it seems to me that it's important for people to know about how a word, a symbol, in some context, can be a slur and some context doesn't have to be. So the whole idea of what's a slur, that's a complicated idea in and of itself. That's very complicated. It's,

if I may say, almost fascinating how language evolves. But if we were to kind of have a minute by minute evaluation of the most powerful, intensely slur-like words in the world, I think the N word with a hard R at the end, which is the title of your book, is number one on that list.

Well, I probably so. And of course, that's one of the reasons why I wrote a little book about it.

Yeah, but it hasn't, even since you wrote a little book about it, it seems like it's maintained its number one status. You mentioned queer. It maybe queer was in the top 20, I don't know, for a while. And now it's sliding into the top 1000. And the N word is at the top.

You're absolutely right. The origins of this book, I clearly remember. I was at my office and I was thinking about lecture topics. And I get invited to give lectures from time to time.

And I was thinking, well, what might make for an interesting lecture? And all of a sudden, the word nigger popped into my mind. Now, this is a word I've grown up with this word.

I mean, there's never been a time in my life when, at least in my conscious life, in which this word's been absent. I mean, in my household, for instance, in my household, my parents are black people. My parents were refugees from the Jim Crow South.

I was born in the Deep South, South Carolina. In my household, I heard the word nigger used

in every possible way. I heard it used as a slur. I also heard it used with respect to people who praised my father. I clearly remember my father, whom I revere.

That's the smartest nigger in the world. That's the bravest nigger in the world.

That's the baddest nigger I know. He wasn't putting people down. This is the way he talked.

And I grew up hearing this word in various ways. And so I was thinking to myself, where did this word come from? And one of the first things I did, I clearly remember just jumping up on my seat, running up to the library, Oxford English Dictionary. When did this word first appear in English? What was the history of the word? And then what really grabbed my attention

is I get my computer going and I asked the computer system, give me every case, every federal court case in which this word appears, thousands of cases. And then I said, oh my goodness, this is really interesting. And then I started just cataloging all the different cases. There came a point, I'd say probably about a month into this, I compared the usage, I compared the number of times nigger came up with other sorts of slurs. So for instance, kike, k-i-k-e, long time, derogatory word for Jews. How many times does this word come up? There was a time in which the word appeared, but nothing like the infamous n word, nothing. And then I, you know, what about wetback? What about, and then I just, you know, let me just take a look at all the other slurs. Nothing came close, not even remotely close to nigger. And I think it has something to do with, I think it has something to do with the uniqueness of the color line, particularly as it pertains to African Americans. I think that the fact that nigger sort of occupies such a unique status among slurs, I think that's a reflection of the unique stigma that has been imposed on African Americans. It's hard to know the chicken or the egg, why one word is able to so distinctly and clearly encapsulate this struggle between races that is throughout American history. I mean, they didn't have to probably be so, but it came to be that way. It became that, not only that, not only that, but of course the nigger spurred other slurs, so Arabs, sand niggers, the Irish, the niggers of Europe, women, the niggers of the world. John Lennon even has a song. That's right. Well, I think Yoko Ono, I think, had something to do with that song.

So, I mean, it is a slur that has spawned other slurs. And again, that's why, as you indicated a moment ago, this is a quite unique term. But are you conscious, are you deliberate in you saying this word? So, let me just say from a personal experience, maybe my upbringing, where I came from, in my daily life, I don't think I've ever heard that word with a hard R, said as often, used clearly in my life. I've heard it today more than I have ever heard in my entire life. And I think there's a few people who listen to this, they'll be listening to this, and be very uncomfortable. I would say not in a bad way, probably in a good way. I'm uncomfortable now, and I am almost introspecting and trying to figure out why I'm uncomfortable. And I think even the title of your book is making me think that. Just looking into my own mind and trying to understand, wow, words of power, and why does it have so much power? But are you deliberate in that

action? And by the way, not only are the people listening to this sweating, this will be on YouTube in part. And YouTube, the people on the other side will be sweating. What do we do with this? Yeah. Well, am I deliberate? The answer is yes. And let me unpack that a little bit. First, that's right. I mean, am I deliberate? Yeah. I deliberately wrote a book called

Nigger, The Strange Career of a Troublesome Word. And was that deliberate? Yeah, that was quite deliberate. But the title could have been N-word. The title could have been, the title could have been N-word. Sure, the title could have been N-word. The title could have been a book about a word that causes pain to many people. I could have named it that. There are many titles I could have used. Did I want a title that would be provocative? Did I want a title that would grab people? The answer to that is yes. I'm a writer. I want people to read what I write. Was I being sensationalistic? Well, I mean, if you want to put it like that, yes. I'm not embarrassed to say that. I mean, I'm sure that when people write books, they think really hard about their titles and they try to get a title that will grab people's attention. I know people, respect people very deeply who never, it's a matter of principle, never utter this word. And I've talked with people. I've had people say, you know, I read your book. Let's talk about it. But let's be very clear. I'm not going to use the word. I've had many conversations with people who've asked me not to use the word. I was on a, I was on a, the first time this came up was a book tour. It was 20 years ago when the first came out. And I was on one of these call-in shows early in the morning. Time came to call in. Seven o'clock, I call it five o' seven. Right before I go on, the host of the show says, oh, by the way, we have a strict policy here at the station. We never use this word. And I said, well, gosh, I wish you had told me this earlier. Does this mean then that you're never going to pronounce fully the title of my book? And she said, that's right. And I had to make up choice right then and there. Am I going to go on or am I not? What'd you do? I went on and I abided by the station's rules. And fine, we had a perfectly fine conversation. And there is a place for euphemism. The American language is a very supple language. There are lots of words that one can use. I do not get angry with people who don't, they say as a matter of principle, they're not going to use the word fine. I'm willing to, I understand where they're coming from. And often I will defer to their wishes. All I say is, I want people to understand where I'm coming from. I'm not just using this word willy nilly. There's a pedagogical reason. There is a reason for why I'm saying what I'm saying. There is a reason why I use the word. Can you make the case why using the word is a good idea? And can you make, can you still make the case why it's a bad idea? Maybe you've heard from some critics. Yes. Who said that you saying this word out loud is actually causing a lot of harm. Not like harm because people's feelings are hurt, but increasing the amount of racism and hate in the world. Yeah. Critics. Let's start with the critics. One, again, going back to the, when the book was first published, I remember going to the first bookstore I went to. And I talked about the book, had a very, you know, talked, asked questions. And the last comment wasn't a question, but the last comment was made by an elderly black man. I called on him and he said, I've listened to what you've had to say and I appreciate what you've had to say. But he said, but I remain unconvinced. And I remain unconvinced because when I was coming up, this word was used to put me in the back of the bus. And this word was used to prevent me from voting. And this was the word that was used to justify me never being called as a juror. So to me, this word has only one meaning. It's a terrible meaning. I'm never going to use the word. It hurts me when I hear people use the word, especially those who don't know anything about the, you know, really about the history of

it. And he went on to say, I think that your book, though well intended, is probably going to be seen by some people as giving them permission to use the word. And then he stopped. And I thought that there was a lot of power behind that gentleman's comment. I think that what he said is probably correct. And so far as there are probably some people who read the, you know, read the book, there are probably some people who are listening to our conversation right now who will think that I'm giving people permission to use the word.

You know, I have said that I'm not. I want people to understand the word. I think that there is a burden that comes from whenever, you know, whenever you utter a word like this.

But that's, you know, that that's a critique. And I think there's, I think there's strength to that critique. I'm not going to say that that's a ridiculous critique. I think that there is something to that. And by the way, I should say, and that's why I would say to anyone, that's right. If this word comes out of your mouth, you are taking on real responsibility.

So for years, it doesn't happen so much now, but they were, I'd say for about the first five years after this book was published, I would get an email at least once a week.

And it would begin like this, you know, Dear Professor Kennedy, I read your book and I'm calling to ask you a question. And as soon as I saw that, I knew what the question was going to be. And then what the person would say is the following. I like rap.

And then I knew, I knew what was coming. I like rap. I'm white. And I have black friends and we listen to rap and we're, you know, we're driving the car and we're, you know, we're, we're listening to the song. We start, you know, we start humming along and sing along, singing along.

And my black friends sing along and when nigger or nigga comes up, they sing and I don't know what

to do. Is it wrong for me to sing along? This happened so often that I'd say about after the, about the 10th time I got in such an email, I wrote a form letter because I didn't want to just, you know, take up time writing, you know, sort of crafting letter after letter after letter.

So I wrote a form letter and basically what I said was, listen, number one, you know, I'm flattered that you're asking me, but number one, you should have a conversation with your friend.

Number two, no matter what your friend says, let me put something else

for you to consider. Let's suppose for the sake of discussion that your friend says, oh, it doesn't bother me. I know where you're coming from. We're just enjoying the music.

I don't think that this is a, you know, a racist utterance, you know, coming out of your mouth.

Let's suppose that your friend says that that doesn't in matters because let's imagine the following. Let's imagine that you're in a theater and you're waiting for the,

you know, a film to start and you're just, you know, talking with your friends or singing with your friends or just, you know, kicking back with your friends and they're talking about nigger this or nigger this and you say it, you, the white boy say it. And the next thing you feel is a fist, a big fist in your mouth that has been launched by a person that you did not see who was right behind you. All this person saw was a white person saying nigger. And the next thing, pow! That's not, you know, some sort of overheated scenario coming from some law professor's mind.

That is a very plausible scenario. So you have to be worried about lots of things, including mistake. So my advice to you, my is be prudent. I would stay clear of the word unless, unless you're very certain and unless if you're called on it, you feel you're in a position to defend

yourself, defend what you're doing. But the prudent thing would be to stay clear.

There's so many questions I want to ask there. One is about the violence and the legal aspect of that. It's very interesting. You raised that in the book. But, you know, I do want to bring up something I probably disagree with you on, which is you say that there's not a significant difference between the different variations of the n word. The one the, or maybe, maybe you don't, I just listened to a bunch of your interviews. So there's the version with the

ER at the end, version with a GA at the end, and then GRO at the end. These are all different versions. And I feel like in that list of powerful words, you know, I feel like there's a distinction. Yes. I feel that the number one spot is the one with the hard R. And I don't know, maybe you can try to shed light, but I feel like the one that ends in GA is really far down the list.

In terms of modern culture. So this is, we talked about the evolution of the words and the word queer, for example, it feels like, because maybe because of rap, because of comedians, because it's become much more, it lost so much of its power. Well, you don't think so.

No, I think there's a difference between nigger and nigger. I mean, people make a distinction between them. And I think that to the extent that lots of people make a distinction between them, I think, you know, just as a sociological fact, they are different. I think that people who get upset if somebody, especially white people. So, you know, if a white person says nigger, and they're, you know, and they're, you know, sort of criticized about it and they say, well, I didn't say nigger. I said nigger, I believe me. I think most people, you know, most people who are mad at them are going to stay mad at them. Now, you raised the word, you know, so nigger and nigger,

I would put in a very different category than negro educated me here. Well, yeah, sure. I'm happy to. Negro is a, also controversial. It's also controversial. But

Negro has never been viewed by a substantial number of people as a derogatory term, at least with the same amount of animus, the same amount of, it's a very different kind of word than nigger or nigger. I mean, after all, I mean, you know, negro, negro, Martin Luther King Jr.,

you know, all of his great oratory, negro. You read the work of, you know, the great W.B.

Du Bois, negro. You read the work of my boss. So, for instance, I use the word negro.

Now, I use African-American, black, Afro-American, but I also use the word negro. Now, there are some people who get really mad at me because of, you know, when I use the word negro. And so, for instance, they're students who've gotten really quite exercised and they'll say, you know,

I'll be giving a lecture and, you know, a hand will go up. I'll call on somebody and they'll say, listen, are you using the word negro in its purely because of the historical time period that you're using? So, you know, is that why you're using it or are you using it in your own voice?

And often, I'll say, well, I'm using it in my own voice and they'll say, well, I'm offended.

We think that this is, you know, that's old-timey. It's derogatory. When this first came up, I said, let's pause for a moment and I'll take that under advisement and let me look into this. And I ended up writing an essay about it, an essay about the history of the terms that black people have used to describe themselves. And it's a long list, you know, black, colored, Afro-American, African-American, negro, etc. So, I go through all that and I said, now, let me just tell you, I know for certain when I started using the word negro often in writing. I can date it.

1983, the summer of 1983 is when I started using the word negro in my professional life.

As a lawyer. And I did it for a very specific reason. I did it because my boss

demanding that I use the capital N. Now, who was my boss? My boss in the summer of 1983 was associate justice of the United States Supreme Court, Thurgood Marshall, known as Mr. Civil Rights. Now, it seems to me, you're telling me that this word is so out of bounds, that this word is derogatory, nobody should ever use this word. Does the fact that Thurgood Marshall

demanding that I use this word, does that complicate things a little bit? And so, I think that people, again, ought to know more. I mean, I've encountered students who don't know very much, but who want to lecture me on word usage because they know three sentences about current fashion. And hold it, you know, hold it. By the way, I push it further. I sometimes use the word colored. And then some people really don't like that. Colored? Well, you know, there's an organization still very much alive in American life and law. The National Association for the Advancement of Colored People, the NAACP. They haven't changed their name. And as far as I'm concerned, it's a wonderful organization. There are people who have used the word colored, that's what my grandmother used, colored, perfectly fine as far as I'm concerned. So, again, there are lots of different words that one can use. You can use different formulations. I understand that people have different preferences. Fine. I have my preferences at least know where I'm coming from. Still, words have power and they have power to hurt. And there's a lot of reasons that I could see to justify the use of the word in its full form, as you're saying, in this conversation as you're using it. One of them is perhaps fighting for the freedom to be able to use those kinds of words. So, let me ask you about the freedom of speech and the censorship of the word. Should the use of the N word be censored, for example, on social networks? So, we can come up with different places. We can say university campuses, maybe in op-eds or I don't know, but I think social networks currently is a very interesting place. There's a lot of conversations that are happening on them. There's the ability, the technical capability to sentence, to remove the ability of people to use the word. Do you think they should be allowed to use the word on Twitter, for example?

My response is, it all depends on the way in which the word is being used. If the word is being used to intimidate, if the word is being used to terrorize, then no, along with lots of other words, by the way, I could use the word, I suppose, gentlemen. I'm sure that I could conjure up a way

in which that word could be used in an intimidating way. So, would I be happy if there was a technology

that always blanked this word, N-I-G-G-E-R? I would be against that. For one thing, it would erase the name of one of my books. And I think that the book actually has a lot of useful information, makes some useful points. And by the way, let's imagine a world in which there was a technology that blanked every time N-I-G-G-E-R appeared. You would have, what would that do to novels by James Baldwin, by Toni Morrison, by, what would that do to the speeches of Malcolm

X, Martin Luther King Jr.? What would that do to the comedy albums of Richard Pryor, Cat Williams, Dave Chappelle? If one plays that out, would one want to have all of those blanks in important literary and political performances? No, I don't want such blanks. What I want, I would want the word to be there and for people to understand how to deal with this word. And by the way, you've used

the word hurt an awful lot. So, let's talk about hurt. I think we need to be more careful with the way in which we deal with hurt because people can be justifiably hurt. You can have justifiably hurt feelings. And if somebody has justifiably hurt feelings, I then think that we should turn to the person who has hurt those feelings and say, you have acted wrongly because this person's feelings are justifiably hurt in relationship to what you've done. On the other hand, there are people who have hurt feelings and frankly, it's unjustified. So, just imagine the following. Let's imagine that I give a talk about the greatness of Martin Luther King Jr. And then let's imagine that a Ku Klux Klansman comes up to me after my talk and says, oh, you have now hurt my feelings. What am I supposed to be? Am I supposed to apologize? Am I supposed to be regretful that my talk about the greatness of Martin Luther King Jr. has hurt the feelings of the Klansman? No, my response is going to be, you know, you need to reevaluate your feelings because actually your feeling of hurt is unjustified. And no, I'm, you know, no, there's no apology coming from me. But there's the kind of line and perhaps the gray area. And maybe the word hurt has been overused because if you try to avoid hurting a small fraction of society that is mentally weak in a way where everything hurts them, that's the wrong way to build a society. But if we flip that upside down and say trying to maximize the amount of love in the world and think about decisions we make in terms of language we use to try to maximize the amount of love and not just short term, but long term. And that's where freedom of speech is very powerful because it's a short term painful thing often, but long term beneficial thing, just having freedom. And so there's where the question of the N word starts to come in. How much, how do we think about its use on the internet on college campuses in a way that maximizes the amount of love and compassion and camaraderie in the world? I think that's good. And I'm, you know, I would associate myself with your vision, how can we maximize love? No, I love that. I think that's great. So let's take that on. I doubt that the way of doing that is to erase the infamous N word. I doubt that the way of doing that is to say to people we understand that your feelings are really hurt and we're going to do all that we can to avoid this symbolic action, you know, maybe this word or maybe this symbol. We're going to really, we're going to do all that we can to suppress it so that we can have a more loving universe. I doubt that that's the way to do it. I think a better way to do it. I think a better way to do it would be to fully educate people, including educate people such that you see that over there, that is the uniform of the Ku Klux Klan. I want you to be educated about the uniform of the Ku Klux Klan so that you can look at the uniform of the Ku Klux Klan and know what it's about. You're not terrorized by it. You're not immediately, you're not, you don't see it and sink to your knees and start wailing and crying. You don't see it and say, I'm traumatized. No, you don't do any of that. You see it. You understand it. If somebody asks you about it, you're fully prepared to talk about it. It seems to me that that attitude, that poise, that strength, that knowledge would be a better way of equipping us to have a more loving world. By the way, just so I would say that about the swastika. I would say it about the infamous inward. I would say it about all of the things that we're talking about. It would be better for people to be educated so that they are not traumatized. So do you, you know, the end word should not be removed from

Huck Finn, Adventures of Huck Finn or from the works of James Baldwin and Tony Morrison?

Not at all. In fact, it seems to me that the bolderization of these great artists, literary work, as far as I'm concerned, highly objectionable, highly objectionable.

When is it okay for a white man to say the N word with a hard R?

Well, you know, here we need to focus on the word say. Is it ever okay for anyone, you know, black, white, pink, yellow, I don't care, red, orange? Is it okay for anyone to use this word in a way to put down people, to terrorize people, to intimidate people, answer no.

But, you know, and I'd say that black person, I've seen, I mean, by the way, I've seen black people use this word to try to intimidate, put down other black people bad. So I'm against it with a black person, white person, doesn't matter. On the other hand, on the other hand,

imagine, imagine a white person who is

giving a lecture on the history of American racism,

a lecture on the history of American racism. And in giving that lecture,

quotes the, you know,

white racist politicians who, until fairly recently in American life,

use the infamous N word. So imagine a white history professor giving a lecture about the history of American racism and says, in 1948, this is what so and so running for the

presidency of the United States said, and then quotes a paragraph or two in which the infamous N word is featured. Is that bad? No, that's not bad. No, that's not bad. It sounds like a perfectly

good lecture. And I'm glad that you put the infamous N word in there so that we can see that as recently as 1948, people who were running for the presidency of the United States

openly use the word. That does not bother me. I'll say this too. Now, you know, somebody says, well, you know, nice job, Kennedy, but you've, you've, you've, you know, you've limited it

to over here. You've put it in an academic setting. What about other settings? It does not

bother me. Let's imagine somebody who's a comedian, a white comedian who is

satirizing word usage. Let's imagine a white comedian who is satirizing our current practice

and wants to poke fun at the way in which, you know, let's imagine you have a black rapper

who invites people on stage and let's suppose they invite a black person on stage and they're

perfectly happy when the black person is full out with, you know, their lyrics. They invite a white

person on stage. The white person is, you know, that doesn't really, you know, sort of mystified,

but it comes on stage and full out with what the rapper says, including the infamous N word. And

then the black rapper gets mad. Imagine the white comedian who satirizes that pokes fun at that.

And in poking fun at that says the infamous N word. Am I angry? No, I'm not angry. Not angry

at all. What if in the process of satirizing that comedian is not very funny? You say that

bad joke, you were not funny. Okay. I don't object to the use of the infamous N word. I just say,

you know, you're not very funny. But because there's a line when the joke is not funny,

it just seems like the comedy is used as a cover to actually say something hateful. It's

interesting thing about comedy. I feel like the funnier you are, the more you can get away with.

Probably. And that's something to do with the thing we said earlier, which is when you use

words that have power, you should do so with skill and competence and the responsibility

those words carry. Again, the cases that I'm most familiar with are the cases involving

teachers, professors, you know, academic. And it is said sometimes, oh, you know,

why do I object? I object sometimes people say, because, you know, I suspect that this teacher

just wanted to say the word and that all of this is a cover, a pretext. Do I, you know, in my sense, my sense of it is no, I don't think it's a pretext. If, you know, if it's pretextual, that's bad. But in my experience, I have not seen that. I don't believe that's what's going on. I agree with you on that. But sometimes I do see people that kind of have this fly flying towards the light, desire to say something controversial and edgy. And they don't realize that there's a responsibility there. There's a skill. You shouldn't just say, I mean, actually, when comedians first start out, they'll sometimes go into that territory, they'll say edgy stuff. That's totally not funny. And then you realize this is not, like the edgier the thing, the more skills are required to really serve. Like, if you're cooking as a chef, a poisonous fish, there's a responsibility on how to cook the damn thing so you don't poison the people eating it. I would agree. But to get back to your question, let's imagine that somebody produces a new set of Lenny Bruce albums. So Lenny Bruce was white. Lenny Bruce used the term nigger in his sets. Sure did. Question, would I want Lenny Bruce's albums now to be purged of the infamous n-word? My response, absolutely not. As another follow on sort of question, what you think, I've seen interviews you've done about this particular book, the title of those interviews on YouTube and elsewhere would use the full word. Mm-hmm. What do you think about that? Should I use this word in the title? In my view, the answer would be yes. Again, there are people, I've been on interviews, I've been on stage with people who had a different conclusion reached. And I respect a different way. Again, there is a place for euphemism. Again, it all depends. I'm not offended. Let's imagine that you posted this and you had asterisks instead of spelling it out. Would I be offended? No, I wouldn't be offended. I would prefer the full spelling, but I would understand where you're coming from. Would it offend me? No, I wouldn't offend you. Well, here's the weird calculation is which version of the word in the title, as silly as that is, brings more love to the world. Mm-hmm. It's hard and basically your answer is, I don't know. Mm-hmm. Your answer is kind of, you have to do it and find out. I'm not sure. Again, there are certain questions in which there are certain questions you're not we're not really going to know. There's no sociologist who's going to be able to tell us that. So what do we do then? Then we go to secondary positions. And my secondary position is I don't know. One thing that I hold on to, however, very strongly is the virtue of openness, the virtue of transparency, the virtue of freedom. And I feel as though if I'm holding on to those things, if I'm trying to engage in a serious conversation in which I'm trying to make other people understand me and I'm listening carefully to other people, I feel at ease. I feel at ease. I feel this is going to eventuate in something positive. And I feel okay. You are at Harvard. You're one of the most respected people in the history of Harvard. That said, you did write a book with the n-word in it and you also have a lot of opinions that challenge the mainstream perspectives on race from all sides. I'll hope we'll get to talk about some of them. But what's your view on Harvard and universities in general and speech? Did you feel pressure from any direction on, first of all, the title of this book, the content of the book, and in general, your views on race? I am very laudatory of Harvard University. I've been at Harvard since 1984. I think it is a wonderful place to work. In the various positions I've taken, particularly with respect to this

book or all my other books, what has Harvard University done? Harvard University has done nothing but provide support, sustenance, encouragement. I think that people get down on Harvard University. I would say to anybody, imagine the following. Imagine that the ethos of Harvard University became the governing ethos of the United States overnight. Tomorrow, we would wake up in a much better United States of America. I have been supported by Harvard University. I think well of Harvard University. That's not to say that I don't have criticisms of it. But by and large, Harvard University, more than by and large, overwhelmingly, it has provided me and I think it overwhelmingly provides my colleagues with a work setting in which they can do their work without fear. That's a good thing. Are there certain aspects of Harvard University about which I'm critical? Yeah, sure. By the way, I think a few people rightfully, wrongfully would disagree with you that if the ethos of Harvard University took over the country, it'd be a better place. But there's a lot of interesting ways to break that down because Harvard is not one ethos. There's a lot of things going on that are very interesting. But one of the things that's happening is the disproportionate and aggressive growth of the administration versus faculty and students. I think the power of university should always be with the faculty and the students. That's where the beauty is. That's where the flourishing happens. And the more you have rules and bureaucracy and all this stuff, the less powerful the university is. I think that at my university and at many universities, that's right. There's too much bureaucracy, too much regulation. Are there dangers to freedom of expression at my university and at other universities? Answer, yeah, there are. There are. This has really hit home for me. There was a period of time in which I was getting off of, I'd gotten off of all boards. I was just doing my work. Forget it. I'm just going to do my work. I'm not going to be associated with any organizations. In the last five years, that has changed quite dramatically. I have gotten on various, I've re-associated myself with various organizations, mainly organizations involving academic freedom because of what's going on at university campuses. Again, I have been at least thus far, thus far. This hasn't pinched me where I live. You mean in the space of ideas?

In the space of ideas, in the space of speech, in the face of teaching, I haven't been pinched, but I am concerned about things. For instance, let's imagine that you're applying for a job. You want to be an assistant professor or let's suppose that you're seeking a promotion on many university campuses, you are asked to give a DEI statement in which you say, I plan to, one of the reasons why you should hire me or one of the reasons why you should promote me is because I'm going to advance the DEI ambitions. People don't know. This is the general set of programs that most universities now have. That's right. You've got to basically what you're being asked to do, whether they say it explicitly or not. They don't say this explicitly, but this is what is up. What you're being asked to do is to say, I'm down with the diversity, equity, and inclusion ethos program, policy, campaign. Here's what I've done that shows that I'm down with this program and therefore I'm okay. A lot of what I do would fit very comfortably within that, but let's suppose that I didn't, just suppose I didn't like this. By the way, there's certain aspects of the DEI industry that I don't like. You mean to tell me that I'm being judged at an academic institution? Let's suppose I want to be a chemist. Let's suppose I want to be a physicist. Let's suppose I want to be out of care, a critic of literature. I oppose this program. I don't think

this is the way in which higher education should be going. Should I have to on pain of relinquishing my ability to be hired? Should I have to sign on to this? Just suppose, let's change it around. Let's not make it a DEI campaign. Let's make it a make America great again campaign.

What would we think then? Let's suppose it was something that said, instead of it saying DEI, let's make it say the advancement of American capitalism as we know it.

We want you to be down with that. What have you done that shows us that you believe in the advancement of capitalism in America? Would I be happy about that? No, I would say this is no.

Well, no with respect to these, as far as I'm concerned, with the DEI statements. Here's

another one. I just learned, and in fact, there are certain things that are happening, and I must say, I'm in academia, but it's news to me. I didn't know until relatively recently about positionality statements. These are statements in which somebody writes an article.

I write an article, and it's not enough for me just to submit my article to some law review or to some other sort of journal. No, in addition to me submitting my article, I've got to give a positionality statement in which I say whether I am gay or straight or what have you,

in which I say my race, in which I say my nationality, in which I say my stance toward this ideological position or that ideological position. Interesting. What?

Is this becoming a standard? I don't know how widespread it is. I know there was a very good article in The New York Times a couple of days ago about these positionality statements, and in fact, that's what sort of tipped me off. Somebody had told me there was a law review at my home institution, and I had a friend who sort of mentioned this offhandedly and who said, well, I submitted an article to this journal, and I was a little bit taken aback in so far as they did have me fill out a questionnaire in which I was required to state my race, state this, state that, state the other, and as far as I'm concerned, well, what does that have to do with a proper assessment of somebody's work? This concerns me.

I'm concerned about the fact, you know, a little while ago, you mentioned, a little while ago, you mentioned the word Negro.

At, I was talking with colleagues a couple of months ago, and somebody mentioned that this word had come up in their class, because what happened was one student was reading from a Supreme Court decision, and the word Negro was part of what they read out, and another student held up his hand and said to the student who was reading,

A, you should be careful, because, you know, I find the word Negro offensive, and you need to be careful about even saying a word that would be offensive to someone, and this person, and then, you know, the teacher was, you know, what should I say in those circumstances, what should I have said, and I volunteered, you know, and I said, well, guys, that's really interesting, because see, if that had come up in my class,

I would have said, well, frankly, I don't, you know, I don't see what the,

I don't even see what the big deal is, because I use the word Negro, and,

you know, Harvard University is not, you know, on some island that is,

you know, apart from everything else that's happening in the world, if these things are happening in other places, if they're happening at Stanford, if they're happening at Yale, if they're happening at Columbia, you know, they're going to happen at Harvard, but thus far, and I am most especially experienced in life at Harvard Law School,

Harvard Law School is an open environment in which ideas are tested, and they are tested fully, and it's because of that that I say I have been fully supported at Harvard Law School, feel that it is an excellent place in which to do work. I'm a fan, I am a fan, and I'm not embarrassed to say it, I am a fan of my workplace, Harvard Law School, very happy to be associated with Harvard Law School. Zooming out in general in education, there's something called critical race theory, can you comment on what are your thoughts about this kind of perspective on race and race in America to the degree that it's becoming a part of the education program? Okay, so the first thing I want to say, what is it? Well, the first thing I want to say about critical race theory is that critical race theory has become a term, so I'm going to put quotation marks around the term critical race theory. In a minute, I'll talk about critical race theory without quotation marks, but to begin with, I want to talk about critical race theory because the reason why people are talking about critical race theory so much now is because politicians, mainly Republican right-wing politicians, have created a boogeyman, critical race theory with quotation marks around it. They have created a boogeyman and they have tried to make it seem as though this boogeyman believes all sorts of ideas that Americans should loathe and that Americans should fear and they've created this boogeyman and they've created it and they've done a very good job of creating the boogeyman and they have mobilized sufficient public support such that there are a number of states that have passed laws prohibiting the teaching of so-called critical race theory. Now, the first thing I want to say about this is that this campaign, these laws, these various policies telling teachers, don't teach this and don't teach that and you can't use this book, you can't use that book, this is a frightening encroachment on freedom, freedom of speech, freedom to learn, freedom to listen, freedom to read, that's terrible and it's one of the most frightening things that has happened in American life in recent memory. So that's the first thing I want to say about so-called critical race theory. Now, I'll say something, I'm going to take the quotation marks off of the term critical race theory. Critical race theory is a sort of a, you could have a nice conversation about actually what it is. One way of viewing it is to say that, well, critical race theory is a community of ideas that comes from a community of people. The community of people would be people in legal academia in the period 1988 starting and probably the middle of the 1980s. It would be associated with people like Derek Bell, it would be associated with people like Kimberly Crenshaw, people like Charles Lawrence, people like Richard Delgado, people like Mary Matsuda and these are folks who held, embraced a couple of, they articulated a couple of propositions. One of their propositions was that liberal race policy was insufficient. They would say that the racial policies of a person like my old boss, Thurgood Marshall, the liberal racial policies were insufficient to grapple fully with the pervasiveness and the depth and intensity of American racism. Their basic claim, and I think by the way it was a good claim, their basic claim was that American racism is more central, more deeply embedded in American life than most people perceived, including liberals. I think there was a lot of strength to that proposition. Then they also took on some other propositions with which I was in very strong disagreement. I think it's perfectly fine to say that racism is a force in American life that is deeper, more pervasive, more stubborn, more resilient than I think people often understand, often perceive. But then some of the folks in critical race theory pushed further. One of the propositions that some

of the people in critical race theory took was the proposition that America was doomed to always be a country that would be governed according to the dictates of white supremacy. Derek Bell, who was a colleague of mine and a friend of mine, took that position. He talked about the permanence of racism in American life. He took the position that the various changes that had been wrought in American life were really mainly cosmetic. They didn't amount to a whole lot. Derek Bell took the position, the second reconstruction, the civil rights movement. Well, it made changes, but at the end of the day, black people were still, after the second reconstruction, were still in a position of almost, I don't know, some of them would even say neo-slavery. Well, I think that's ridiculous. The second reconstruction changed a lot. As for neo-slavery, neo-slavery, what are you talking about? A black American was president of the United States between the years 2008 and 2016. I mean, what are we talking about here? There's been a tremendous change, and I think people ought to understand that. Now, am I saying that everything is peachy keen and all right? No. The United States is still, to a very large extent, still a pigmentocracy, but that doesn't mean that a lot hasn't changed, a lot has. So, I disagree with certain tenets of critical race theory and have been very outspoken in my disagreement. There's another one, by the way, I need to mention, because we've talked so much in our discussion about freedom of speech, freedom to teach, freedom of listening. Another big problem that I've had with some of the people who talk of themselves as critical race theory people has to do with their attitude towards freedom, freedom of speech. Some critical race theory people think that the American legal system is wrong in the latitude that it gives to what they call hate speech or the latitude that it gives to what they would view as racist beliefs. Some of the people who associate themselves with critical race theory think that racist beliefs ought to be expunged with the aid of state power, if need be. Well, I'm against that. I think we are at a moment, an ironic moment, in which actually it's the right wing that has embraced some of the ideas that were championed by some of the people who call themselves critical race theorists. They say, oh, we ought to expunge hate speech. Well, the right wing is saying this critical race theory, that's hate speech, so let's expunge it. Again, I've been very outspoken in my criticism of some of the illiberal dimensions of critical race theory. I've been a critic of certain features of critical race theory. I have applauded certain features of critical race theory. Critical race theory, there's some aspects of it that I think have been useful. There's some aspects of it that I think have been profoundly wrong-headed. That's where I am. Above all, I certainly am against any efforts to remove it from the intellectual universe. It is a part of our intellectual universe. People ought to know about it, and people ought to debate it, and people ought to be free to make up their minds to conclude what they will about the strengths and weaknesses of critical race theory. We'll talk about the pessimistic and the optimistic perspective on race in the history of the 20th century in America. I think you have very interesting perspectives there, but before that, I'd love to look at the current moment. You had a conversation with Glenn Lowry and John McWherder. From there, it became clear to me, I think John made clear how important the conversation about race is policing in today's society, that that's where a lot of African Americans feel is the pinnacle of racism sets, the people that believe there's still racism in America. There's still a lot of racism in America. That's where it is.

To what degree do you think there's widespread institutional racism in policing?

My first book was a book called Race, Crime, and the Law. 1997.

1997, wow. Time flies.

Unfortunately, the impetus behind that book

stands. That book was propelled by a sense that with respect to the administration of criminal justice, African Americans feel deeply aggrieved and they feel deeply aggrieved with good reason.

They feel deeply aggrieved with good reason in at least two dimensions. On the one hand,

on the one hand, African Americans suffer from under-protection. In fact, in that book,

the central theme of that book was that black Americans suffer from under-protection. If you

take a look at the broad trajectory of American history and ask yourself,

in what way have black Americans been most oppressed? Take a look at the antebellum period,

period before the abolition of slavery. Before the abolition of slavery in the

locales where most black people resided, namely the slave states, in a lot of those areas,

question, was there a crime called the murder of a black person? Answer, for a long period,

the answer was no. There might have been a tort of a white person killed a slave.

That person could be sued because they had injured the property of another and would have

to pay money for that, but had they committed a crime? Answer, no. In the antebellum period,

were black women protected against the crime of rape? In most states, the answer was no. There was

no such crime. Let's go to after. Slavery is abolished. Thank God. Slavery is abolished.

Then, let's see what happens. We hear lynching. From 1890 until, let's say, 1930,

well, in 1890, there was probably, I would say, there was probably on average a lynching every day in the United States, well over 300 lynchings. It goes down. That was the case in the 1890s,

probably the first decade of the 20th century, and then it starts going down.

What was lynching about? Lynching was about black people being executed outside the law.

Did the legal system do anything about that? Answer, no. You show me cases in which people

were prosecuted criminally for engaging in lynching. You come up in most places with a null

set. Black people suffered the under-protection of the law. Do black people still suffer the

under-protection of the law? The answer is yes. People talk about the Kerner Commission report,

1968. Black people were asked with respect to the police, what's your main complaint?

In many places, the main complaint was, we don't have police protection.

When things happen to us, when our houses are burgled, when our businesses are

encroached upon by robbers, when our businesses are robbed, when we're assaulted,

you know, nothing happens. The police protect white people. It'll protect us

under-protection. Our society right now, if you take a look at the statistics,

who is most liable to be raped, robbed, the victim of assault? What have you? Black people,

I mean, and it's not even close, under-protection. So that's one way in which the administration

of criminal justice harms black people by not doing what government is supposed to do, which is

protect us. 14th Amendment, you know, equal protection. I underlined protection of the law.

So that was a big theme of race, crime, and the law. Now, second thing, second, and this is a thing

that gets most attention. And it's important, I think, that the under-protection story does not

get enough attention, but then there's a second story. The second story is that black people

have historically and still today, black people are subjects of invidious racial

discrimination when it comes to police action. So, you know, walking down the street, walking down the street, you have a black person who's, let's say, 20 years old, you have a white person who's 20 years old, let's make them men, both just walking down the street. And the question, attitude of the police towards these two. An attitude, you know, is a complicated thing. It can show itself in various ways. It can show itself in a look. It can show itself in who gets the look. You know, black persons, you know, walking down the street or running down the street, white persons walking down the street or running down the street.

What happens with respect to the police? Let's suppose that, you know, who gets the second look, who is followed, who is detained for a moment?

Well, some of it is just on a small tangent. I apologize to interrupt, but attitude is an interesting one because a lot of it, a lot of the interaction doesn't show up in the data.

So, detained, for example, starts showing up in the data. But before then, the second look, the third look, the first look, this is where the gray area of conversation happens because very much so. Culture and society happens in the stuff that doesn't often show up in the data.

Yep. Yep. So, I tell you, this really came home to me several years ago. I was in New York City and it was a time when there was a lot of discussion over the

stop and frisk. Stop and frisk, basically, you know, racial profiling on the street.

I was walking. I was in Harlem. I'm walking down the street and frankly, you know, the police weren't bothering me. I'm just walking. The police weren't bothering me,

you know, I'm of a certain age. I did notice, though, I was looking at the police

and the way that the police attitude, you know, had to do with body posture,

it had to do with, that's right, who got a second look. It had to, I noticed, I'm walking in the

street, I'm walking in Harlem. There, you know, there are white people on the street. You know,

most of the people that were black, some, some Hispanic, the level of contempt,

the level of animus, the level of unfriendliness that was pouring off the cops, the police,

they weren't, they didn't say anything. No, they didn't detain, they didn't say anything.

It was palpable. I could feel the attitude that was being, being directed at the young black men.

And the thing is, see, the thing is, it's not as if this doesn't matter. It matters because

the way I saw it, these young black men knew, they felt the contempt that the police were shedding and this was going to have a consequence. The consequence it was going to have is,

let's imagine that the police did say, excuse me, you know, what are you up to?

Now, if you have been feeling this contempt, if you feel like the officer who was asking this question doesn't like you, doesn't know anything about you, but just doesn't like you on site,

you might answer in a certain sort of way. You're not going to give the cop the benefit

of the doubt and basically think, well, you know, policemen is just, you know, asking me this,

you know, probably just trying to make the neighborhood safe. Well, if that's your feeling,

you know, policemen is just asking me this, trying to make the neighborhood safe.

Well, officer, the reason why I'm here is such and such. And, you know, thanks for your service.

That's one response. Another response is,

I'm not going to tell you anything.

You know, I'm not going to tell you anything. I know that you don't mean any,

I don't know that you don't mean me any good. I'm not going to tell you anything.

Am I free to leave? And then the cop, having heard that, then says something bad, you know,

after five minutes, what do you have? You have an altercation on your hand. And I felt that and that is part, and you're absolutely right. That's not written down. It doesn't get to court. It's there, but it's an important part of street life. It's an informal part of street life. And it has ripple effects because that young black man will probably talk shit about that cop later that day, so the narrative persists and then the cop will also talk shit and then there's these narratives. And I think the contempt is such a powerful thing. It's so hard to disentangle because you're absolutely right. The young man, let's suppose that the story ends quote well. He's going to go and he's going to be talking with his friends and he's going to say, let me tell you what just happened to me. And his friends are going to say, oh yeah, that doesn't surprise me. Let me tell you what happened to me. And you know, for two hours this goes on. The anger, the feeling of humiliation, the feeling of aggrievement grows. It's disseminated and that's part of what we have. But that's an important part of what we have, but we have, it's even worse than that because then you ask the question, what about things we do know? I know this from my teaching. This was brought up. There was a lawsuit in New York City. And notice I didn't say Birmingham, Alabama. I didn't say Atlanta, Georgia. I didn't say Tallahassee, Florida. I didn't say the Deep South. I didn't say Montana. I didn't say Idaho, New York City. You know, Cosmopolitan Place, Metropolis. In New York City, the police were challenged with respect to their policies. A judge wrote a very lengthy opinion and the facts were rolled out and the facts were really quite horrifying. People, there were black men who had been stopped many, many times. It wasn't just once over and over and over again under circumstances in which they ought not have been stopped. And you know, this has real consequences.

It doesn't just show up here though, of course. It also shows up in other places with respect to the administration of justice. And we still have a, you know, a big problem. Now you mentioned, you know, the police. If you ask yourself, who are the state agents that are most consequential? The police. I mean, you walking down the street, what other agents have guns on them? What other agents are authorized by the law to shoot you under certain circumstances? It's the police. The police are the most consequential agents of the state that most people interact with. I mean, there's a pushback a little bit of consequential in a physical sense. But if we return to the power of the psychological sense of contempt, I would say store clerks and stuff like that can also be a source of. They're not agents of the state. Right. But if we look at the landscape of contempt, which throughout the 20th century, you know, or the bus, right, you can experience the same kind of contempt in other aspects of society. But yes, the cops have consequences. I would still put the police, the policeman or the police person is a person walking down the street with a gun. Gun, yeah. And if you think about the way in which the law, the extent to which the police are authorized to use their force, the police have extraordinary authority. You know, you're driving your car and you're speeding. The police can arrest you right then and there and take you to jail. That's an extraordinary power. But they also have, because of that, the leverage, just one human to another, they have more leverage to be an asshole and to show contempt to you. To be the lesser, to lean into the lesser aspects of their nature as all humans can, just to be an asshole to show contempt. You had a bad day. They have the more freedom to do that.

Yes. And that's why, that's why police officers are very important. I recognize, I mean, I, you know, I know police officers, they have a very difficult job, a very important job, very important. Again, remember what I talked about under protection. I want the police to protect me. I want the police to protect me from the rapist, the robber. So I, you know, the police, I'm with the police. We need good policing. We, but we need good policing. And for good policing, we need accountability. And one of the scandals, one of the just absolute scandals of American law is the extent to which the police are not held accountable. It's absolutely remarkable the, the degree to which American law fails to properly hold police accountable. They have an important job, a difficult job. I want them to be very well paid. As far as I'm concerned, you know, we should be, police should make more money. They should be given, given the importance of what they do, they should have more respect, more prestige, more money. With all of that, they should be held accountable. And the way things are now, they're not held accountable. And every day, we see the consequences in our newspapers or just, you know, talking with people. So what do you make of the different perspective on this from to, to bring up a person that I'll probably speak with Heather McDonald, who wrote a book called War on Cops. And we'll often bring up the stuff that does show up in the data to show the disproportionate amount of homicides committed by African Americans. And we'll also justify racial profiling on that basis in stop and frisk programs. And we'll also bring up things like the Ferguson effect, saying that because of this pushback and all the stuff we've been saying about police, in those areas, the police will step back and crime will increase. I was in one debate with her. And one of the things that I said is it was a debate that was, that was sponsored by the Federalist Society, conservative legal group, you know, conservative law students at Harvard Law School. She made a presentation and they asked me to respond. And one of the things that I said was, when we're talking about the police, I'm, I'm disappointed with the reaction of some of my conservative colleagues. And I would consider her to be one of my conservative colleagues. Because what are the sort of the, what are some of the, the important precepts of conservatives? One very important precept of conservatives, limited government, limited government. You know, what a conservative talk about the tendency of government to overreach itself and governmental agents to overreach themselves. And I say, you're right. You're right. I, you know, right on. Why is it that you somehow forget that when you're talking about the police? When you're talking about the police, you're never, you, you seem to be unaware of this tendency that is so much in your consciousness and other places. But now when you're talking about the police, you make it seem as though I'm, you know, other people are being paranoid when they talk about the danger of overreach. We need to be very careful about the danger of overreach. Another thing with respect to the police, what to conserve, conservatives, transparency in government. You're right. You're absolutely right. We need transparency in government. So why is it that so often when we're talking about policing, why is it that conservatives actually embrace police unions and are the enemies of transparency? Why is it that you want to prevent the citizenry from knowing that officers so and so has, you know, there have been ten incidents in the last year in which citizens have complained about officers so and so. Don't you think that the citizenry ought to know that? Why is it that you want to keep that under wraps? So overreach, transparency, the tendency or,

you know, the problem of governmental agent corruption, why is it that those sorts of things are forgotten about when some conservatives, by the way, not all conservatives, not all conservatives, there's some conservatives who have stuck and appropriately so to their guns and have said, hey, we need to make sure that the police stay in their lane.

We need to make sure that the police do not overstep constitutional bounds. We need to be, we need to insist on transparency. There are some conservatives who have taken that line, and I salute them, but there are a lot of conservatives, and I would say Heather McDonald was one of them, who all of a sudden become just, you know, totally uncritical status when they're talking about the police. So the overstepping, overreach, the lack of transparency. Of course, we see this kind of stuff in foreign policy as well, which is starting military conflicts, and a lot of the supporters, at least with the Iraq and Afghanistan wars, were conservatives and hawks and so on. So there's a lot of hypocrisy in terms of principles and so on.

But maybe one question is, in this discussion about racism and policing, there was a lot of cops that might listen to this and feel like they're not being, their profession is not being respected, they're not being heard, not being respected to the difficulty of the problem they're facing. Can I just interrupt, Jack? Remember a few moments ago. I mean, if I were in charge of things, if I were in charge of things, I'd pay police more, in fact, much more than they receive.

I do, police have a very difficult job, extraordinarily difficult job. I mean, for one thing, you know, sort of maintaining the law, the law, that's a very complicated thing, the law.

That's not an easy thing. I mean, I teach law. I spend a lot of hours with very smart people trying to understand the law, very difficult. So here we expect people to understand the law at the same time that they are grappling with people, some of whom are violent.

It's very difficult. I respect police officers. And I said, we need police officers. You did not hear me say, by the way. So let's get down to Brad's text. You did not hear me say defund the police, did you? In fact, to the contrary, I said defund. Actually, I want more funds for the police. I want to hold them accountable. I understand the difficulty of their job.

I respect the police. I want people to respect the police. I also want the police to respect civilians and demand that they do. I am not a police abolitionist, far from it, far from it.

Again, we need good policing. For good policing, we need good people.

To what degree? It's almost philosophically, maybe practically, do you think police should be doing racial profiling? Profiling in general. It's a very difficult

philosophical, moral, human question. Yeah. So first thing we need to do,

and here we get back to the early part of our conversation because we focus so much on first part of a word. Here we have another word, profiling. Question, what is racial profiling?

Now, here we have, in the weeds, we have people talking past one another. I've been in conversations

with police officers in debates, and we talk past one another because we are defining racial profiling very differently. If you ask, I've been in conversations with police officers, and they say, oh, I'm totally against racial profiling. Then I say, well, sir, what do you mean by racial profiling? And here's what they say. Racial profiling is when police officers act against somebody wholly on the basis of race. That gets rid of the issue because most police officers don't act against anyone wholly on the basis of race. You could have the most racist police officer, and that police officer is not going to act adversely against

the 90-year-old black woman walking down the street with a cane. If you define racial profiling that way, you're getting rid of the issue. The proper issue is this. Should the police be able to act against someone taking race into account as a factor? So, let's imagine that a black person who's 25 years old is walking down the street right next to a white person who's 25 years old. Some people would say, you know what, under those circumstances, it's okay for the police

officer to give two looks at the black person and only one look at the white person. Why? Because the statistics tell us that the black 25-year-old, there's much more risk of that person acting in an unlawful way. If you take a look at crime statistics and ask the question with respect to homicide, with respect to robbery, with respect to various crimes, is there a difference between the white 25-year-old and the black 25-year-old? With respect to certain crimes in certain places, the answer is, yeah, there is a difference, and there is a greater risk that the black 25-year-old has engaged in various forms of criminality. Under those circumstances, what do I say? Should the police officer therefore be allowed to take action vis-a-vis the black person as against the white person? My answer is no.

I'm fully willing to concede, let's concede for the point of discussion, that there is more risk. There might be. There might be. But for reasons of constructing the sort of society I want, we should not empower agents of the state to act towards certain people in a way that's adverse to them. Let me try to break this down in a little different way.

Let's go back to, let's talk about what happens when you want to get on an airplane.

9-11 wasn't all that long ago. It was a while ago, but it wasn't all that long ago. This very issue came up with the respect of the profiling of Muslims, and there were some people who said, jeez, in the aftermath of 9-11, profiling of Muslims makes sense. No hard feelings, but the 11 people who were on those planes were all Muslims. Now, there is a rationale. You could just simply say it's not prejudice, it's not animus, it's not invidious, it's just the facts take us this way. Well, the facts never take us this way. There are facts, and then there is our choice of how we want to respond to those facts. Now, you could respond by saying, well, we perceive

Muslims to be more likely to do bad things on an airliner. You could respond in that way.

On the other hand, you could say, no, we want a society in which people do not have to grapple with prejudice on the basis of their religion or on the basis of their race, and to deal with that, we are going to demand, we're going to demand that agents of the state act towards people in the same way. If that means that everybody getting on the airplane, before they get on the airplane, has to open up their luggage, and it slows things down, but everybody has to open up their luggage.

I would prefer that over a system in which we focus on people who are Muslim. And one of the reasons, and I'm going to bring this back to the racial thing, one of the reasons why I want to insist upon that is because if we all have to open up our luggage, what that means is we're all paying a tax for more security, and we're all likely to ask ourselves, hmm, do we want to pay this tax? Whereas if we focus simply on the Muslims and allow the Muslims to be the only ones who were sort of paying the tax, we'll foist that on them. Same in the black person, white person, 25 years old walking down the street. Do we want to impose a racial tax on the black 25-year-old? Some people would say yes. I say that's a mistake. Black people aren't stupid. They know that they're

paying this tax. It is a violation of, it seems to me, the rules that we ought to want to have to govern our society. I say spread the costs, make the police deal with everybody the same, and don't allow a situation to develop in which a group of people can accurately say, we are paying more of a cost than these other people over here.

So it's a better avoiding profile while it may have costs on security in the short term. In the long term, it's the embodiment of the principles that all men are created equal, so it has a much bigger benefit in representing the fairness that is at the core of the ideals of this country.

Let me ask a big philosophical question. Why do you think there is racism in the world?

Now you've asked me a question in which I throw up my hands and I don't know.

Will there always be? Why is there tribalism? Are humans always finding this way to divide ourselves and how bad of a problem is that? It's a huge problem. I'm not going to pretend that I know enough to grapple in a satisfactory way with such a question. To really grapple with that question, one really has to have a very broad knowledge base in which they can make comparisons.

I mean, the world's a big place. Now from the little bit I know about the world,

I read as much as I can. I'm a very privileged character. I mean, I live in a university, so I'm reading constantly and listening constantly. From what I gather, the problem of divided societies is a problem that is worldwide. And it seems as though human ingenuity is such that humans will find something to divide over. It might be texture of hair. It might be complexion of skin. Political ideology. Political ideology. If the texture of skin is the same, it'll then be, well, you wear these sorts of clothes. You speak in this sort of way.

You believe this, whereas I believe that. I mean, it seems like a human ingenuity is such humans will find some way of distinguishing themselves and then they seem to want to embellish the distinction. It's not just a distinction. It's not just you believe this and I believe this. Okay, that makes the world interesting. Let's talk about what you believe and what I believe. No, it's usually associated with you believe this. I believe this. Of course, my belief is superior to your belief and I want to put you down. And now we're headed towards war.

The interesting thing is if I were to step outside of this whole thing from an alien perspective, visiting earth, I think America is one of the greatest if not the greatest countries in the history of human civilization. And I think that the line between white and black, the racial struggle is the thing that in part made it a great nation. There's something about the division and the way you alleviate that division through the struggle for human rights that makes for a great nation. And so it's interesting that the division is almost the fuel for the greatness for our discovery of what it means to be human, what it means to be or what justice means of. And it's interesting that it seems like there's the struggle that you're you're you're elucidating now, but that struggle itself is our search and man's search for meaning and justice and freedom.

I think there's something to that as you were speaking. I was immediately thinking of the person who most jumped to mind was the great Frederick Douglass. So I mean, here you have a person who in my view is one of the great people in the history of the world. And one of the things that ironically enabled him to become one of the great people of the world. He was born into slavery. His overcoming was the very thing that in a sense made him this larger than life figure.

I think there's something to you. I will say this because a minute ago, you mentioned optimism and pessimism. And I'd say in the last few years, my feeling about the United States

has changed. And it's changed in a somber way. For most of my life, for most of my life, I've been in the optimistic camp with respect to my view of American race relations. You know, the optimistic camp, that was the camp. That's the camp that believes we shall overcome. That's Martin Luther King's camp. I mean, Martin Luther King, you know, Martin Luther King, you know, hours before he's killed, I've been to the mountaintop. I might not get there with you, but I've glimpsed the promised land. Optimism. Frederick Douglass would be in that tradition. There would be other people, wonderful, good people who would be in that tradition. Would you, sorry to interrupt, put in the pessimistic camp, would you put Malcolm X in it? Oh, in the pessimistic camp, the pessimistic camp is the more interesting camp. I mean, ideologic, I mean, it is, it's the more interesting camp because in the pessimistic camp, you have, I mean, if I was going to list some of my pessimists, pessimists number one, Thomas Jefferson. Thomas Jefferson, the author, you know, principal author, Declaration of Independence, he was also the author of Notes on the State of Virginia. And he said in Notes on the State of Virginia, basically, we shall not overcome. He talked to, he said, you know, the black people will always know that their forebears were enslaved. And they will always be resentful of that, always be aggrieved by that. Jefferson did not think that we would ever have in the United States a multiracial democracy. He was very critical of slavery. Now, he was a hypocrite. He had slaves, he sold slaves. He was terrible in that way, but he did understand that slavery was horrible. But he did not want, he did not want to free the slaves for a variety of reasons. And one reason was because he thought that it would be impossible to have a society in which blacks and whites were equal neighbors. He was thoroughly pessimistic. Another pessimist, Alexis de Tocqueville, thoroughly pessimistic. So who were some of the other pessimists? Abraham Lincoln, pessimistic. That's why he was so interested in colonization. He basically said, you know, I don't like slavery, but blacks and whites are not going to be able to share the United States. Maybe the best we can do is just, you know, put blacks and ship blacks someplace else. Can you elaborate on that? I think people will be surprised to hear that you will put Abraham Lincoln in the pessimist camp. Oh, Abraham Lincoln's thoroughly pessimistic. He believed, he was anti-slavery, but he did not believe that blacks and whites would be able to share the United States together. And he was always very interested, therefore, in colonization. During the Civil War, he was interested in, you know, maybe all black people would, all black people be interested in maybe going to Panama? Would they be interested in going someplace else? Because, you know, Lincoln was aware of how racist white people were, including himself. And he did not think that black people and white people would be able to share the United States. Now, there's a black nationalist tradition. You mentioned Malcolm X, well, before Malcolm X, you know, Marcus Garvey. My father, my father was a thoroughgoing pessimist. His view was, hey, the United States was born as a white man's country. It's going to remain a white man's country. And that's the way it is. He was thoroughly pessimistic. You mentioned just a brief aside about your dad that when you moved from South Carolina to Washington, D.C., and you asked him why, his response to you was, because either a white man was going to kill me or I was going to kill a white man. So he saw race as an important line that divided people in the United States. He certainly did. And he thought that the line,

my father did not, my father had passed away before Obama was elected. I would have loved to have talked with my dad. What do you think he would have said?

And you've written, you wrote a book about the Obama presidency.

I did, I did. And I never, what would my father have said, my father would have been delighted, my father would have been happy about his election. I do think, though, I do think that my father would have said, I'm happy that Barack Obama has been elected. Hold on to your seats. Let's see how the white people respond.

So he would have predicted. I think that my father, I think that in 2016, I think that in 2016, he would have said, I told you, yes, yes. I think that in 2016, my father would have said, all of you people who are talking about, I don't know what's happened to America and how could this have happened? And you know, no, I think my father would have said, this is America being America. And what has happened is that America has been put off kilter by a black family being in the White House. It has deranged millions of white people. And now this is coming home to Ruth. So I think my father would have absolutely said, in 2016, I told you so. And 2016, as you're saying, is the reason that you have at least dipped your toe outside of the optimist camp into the pessimist camp?

Yeah, I want to be careful here. And I don't want to...

Don't give up on the optimist camp. I don't want to. I don't. You're right. I don't want to give up on the optimist camp. I don't. I have been... My optimism has definitely been dampened, has definitely been tested. I am certainly not as triumphalist as I once was.

I am not as indignant as I once was in my criticism of pessimists. But at this moment, as we speak, you know, am I more in the optimist camp than I'm in the pessimist camp? I'm still probably more in the optimist camp. My optimism has been dampened. But as I speak, I have to say the following things. And I'd say the following things with my father, but again, whom I revere, great man. But if my father was sitting here with us, I would say, listen, Pop, it's absolutely true that the country is more racist than I had thought. That is true. It's also true, Pop, that the vice president of the United States, as we speak, is a black woman. As we speak, it's true that the secretary of defense... Now, secretary of defense, the secretary of defense is the head of the Pentagon. The secretary of defense knows where the button is. This is not a small out of the way thing. This is the secretary of defense is a black man. There are a slew of black generals. There have been black secretaries of state. There are black people who are the heads of police forces. There are black mayors. There are black people who are the heads of some of our foremost foundations. The president-elect of Harvard University is a black woman. And we could go on and on and on and on. This is not... When I was growing up, when I was growing up, when I was, let's say, 10 years old, we got a magazine, Ebony Magazine, every month. And in Ebony Magazine, you could turn to the middle of Ebony and they would have black firsts. The first black person to do this, the first black person to do this, you could read Ebony. And frankly, I could tell you all of those. I knew their names. Now, I read stuff, the leading cadet, the chief cadet at the United States Naval Academy.

I'm reading, I'm reading, then I see a picture. Black woman, I didn't know that. Back in the day, I would have known that. Now, has the United States changed? Yes. Is there racism? Yes. Is it,

you know, a substantial force in American life? Regrettably, tragically, yes. Has the United States changed? Yes. And again, if we want to go international, the United States is not the only country that is a country that has wrestled with deep division. You think about, I don't know, think about India. Think about, you know, the United Kingdom. Think about practically any large nation state. They've all grappled with divisions. If one asks about the United States and the race question, and one puts on the table that, you know, in 1865, now, you know, when I talk with students, I say 1865, they think, oh my God, you know, isn't that when dinosaurs roamed? No, it wasn't when dinosaurs roamed. 1865, frankly, is not all that long ago. In 1865, the great mass of black people in the United States had recently been released from chattel slavery. The great mass of black people in the United States in 1865 were illiterate.

Now, I mean, it's absolutely, it's an absolutely extraordinary story.

And so one of the difficulties I have at this moment is wrapping my head around two stories that are in such tension with one another. One is the continuing story of racism, which is an awful story. But the other story is a story that is encapsulated in the title of a great book of history by John Hope Franklin, From Slavery to Freedom. And, you know, those are two

stories in American life, and it takes an awful lot to put your mind around both stories. And I'm trying to. Well, as an optimist, I think you put more value to the overcoming side of the story, the overcoming of hardship, the overcoming of slavery, of discrimination. Well, since you mentioned illiteracy from what is it 150 years ago, let me ask you about affirmative action.

You wrote a book on the topic titled For Discrimination, Race Affirmative Action and the Law.

First, what is affirmative action? And maybe you could talk about what your view is on it today.

Sure. Well, affirmative action refers to racial affirmative action, because there's various sorts of affirmative action. You can have affirmative action for veterans, you can have affirmative action for in-state residents, let's suppose you have a school, you know, the University of, you know, blah, blah, blah, and we're gonna, we're gonna, we want to reach a, we're gonna, we're gonna give a, reach out a hand to boost help the people who live within this state. We're gonna have a boost for veterans. We're gonna have a boost for, you know, for women.

We're gonna have a boost for men in certain circumstances.

Well, we're, the most, the type of affirmative action that gets most attention, and that's worth noting as well. There are lots of various sorts of affirmative action, but when you say affirmative action, the type of affirmative action that immediately people are thinking about is racial affirmative action. Seems like race is at the core of this American experiment, though, part of, in every part of its... Bingo. Culture. Bingo. You know, why is it that, you know, we, again, you know, there's various, there's various ways in which institutions reach out to help various sectors of our population. Why is it that this is the one that generates all of the pulling out of hair and gnashing of teeth? We can put that to the side for a moment. Racial affirmative action refers to efforts in which institutions, you know, reach out to provide assistance to racial minorities. Now, the reaching out has, you know, can happen in different ways.

A light form of affirmative action might be reaching out in terms of recruiting, making a special effort to make sure that young people, let's say, in racial minority neighborhoods know about your college, you know, that's, you know, recruitment.

On the other hand, racial affirmative action might take more, you know, might take a stronger form and might take the form of saying, okay, we have a competition. And we think that there will be too few racial minority kids who do well enough in this competition to be admitted to our school. So what we're going to do is we are going to, in various ways, give a boost to the minority kids. If it comes down to you have two kids, they both, you know, I don't know, have, you know, 99 on the test. There's one place left. We only have one spot left, two kids.

One's a black kid. One's a white kid. They both got 99. We're going to give it to the black kid. Why? Well, black kid, all there is to it. Black kid, we want to, you know, maybe, and then our theory, you know, maybe our theory is that black people have been done wrong in the United States and we want our institution to contribute to making amends. That might be a theory. Another theory might be, you know, we think that we'll have a more interesting student body. We'll have a better student body, a more, you know, better discussion if there are more black kids on campus. And unless we make a special effort to bring more black kids on campus, the, you know, our student body will be overwhelmingly mono-racial. We'll just have, you know, white kids, a few Asian kids, a few Latino kids, if there are no black kids here. I don't know, you know, it'll be lacking an important aspect of American life. So that's some sort of, you know, the so-called diversity story. So anyway, there are various theories. Some are grounded, like I said, in reparative justice. Some might be granted in distributive justice. So for instance, when people say nowadays, you know, we want a cabinet. We want a team. We

want a student body that looks like America. That might be a distributive justice theory for why you want affirmative action. Unless we reach out and give a boost to certain groups, they won't be here. And we want a campus that looks like America. And we won't have a campus that looks like America unless we give a special boost to, I don't know, the Latino kids, or unless we give a special boost to black applicants. So reparative justice, distributive justice, or third diversity, we just want to have an interesting student body. And to have an interesting student body, we want, you know, kids from a wide array of places. We think that that will make for a better campus, more interesting campus. Those are three justifications, all of which, however, are justifications for in a competition, giving a special boost to some people based on their race. So what's your sense? Can you make the case for affirmative action? And can you make the case against it? Yeah, I can make the case for and I can make the case against. The case

for, I won't spend much time on this. Like I said, there are three main justifications. Your audience should know that the justification that actually led to affirmative action is a justification that you don't hear about in the courts because the courts have said that that justification is insufficient. So the real justification behind affirmative action was, you know, in the late 1960s, in the aftermath of the civil rights revolution, the aftermath of the civil rights movement, there was a feeling that, well, okay, fine, we're not discriminating against black people anymore, but black people have been disadvantaged by the discrimination that has been put upon them. And this discrimination that was put upon them has disabled them. And so they go into competitions and it's unfair. Yeah, they score less well on the standardized test, but, you know, surprise, surprise, what the heck? They went to schools in which they got the leavings of the white folks. You know, the white folks gave the black folks the old textbooks.

That's what the black kids read. The white kids read the newest textbooks on and on and on. So reparative justice, we're going to try to repair the scars left by past racial injustice. And so it's sort of an effort to overcome the vestiges of past misdeeds. That was one justification for affirmative action. And frankly, I think that's the justification that has always been the predominant justification, whether people owned up to it or not. But that's one justification. The distributive justice justification is there. Like I say, you know, people, we want an integrated America. We want an America that looks like America. In that justification, legitimacy is sometimes mentioned. So for instance, people will say things like, well, you know, if we're going to, in the armed forces, you can't have an armed forces in which the, you know, the sort of the people on the ground are, you have a lot of people on the ground who are people of color, but none of the people calling the shots, none of the generals, none of the maid, you know, colonels are people of color. No, and then, you know, the people on the ground are not going to stand for that. So for purpose of legitimation, we need to, for purposes of buy-in, we need to have a situation in which people get the sense that even if they're sort of low down, they're still part of the story. They're part of the team. So that's part of the sort of, you know, distributive justice notion. Do you think there's power to that? I mean, do you think there's value, there's correctness to that kind of idea? I think there's some. Because for the application process for different universities, I think that there's probably a driving narrative, the justification for for, well, affirmative action, I don't know where we put DEI efforts, because they overlap, but they're not perfectly overlapping. The reason that the school, so yeah, as you know, there is a case, it'll, we'll know about it. It'll be announced sometime in the next month. Well, month, month and a half. It's a case of the Supreme Court of the United States in which the affirmative action program at Harvard and the affirmative action program at the University of North Carolina are being challenged. Most people think, including me, that the Supreme Court of the United States is going to limit if not totally seek to abolish affirmative action. So this is a very burning issue. As things currently stand, my university and other universities embrace affirmative action on the third ground, the diversity ground. And what they say is we need affirmative action because affirmative action is good for pedagogical reasons. Now, frankly, do I think there's something to that? I think there's a little something to that with respect to some subjects. I don't think that's what's really going on for the most part. I mean, if that's what's really going on, why, why, why don't we have more foreign students? You know, why, why, why isn't there a greater effort to bring in more foreign students? Why isn't there a greater effort to bring in more, I don't know, religious fundamentalists? Why isn't there a greater effort to bring in and you could just name various groups that are, you know, you hardly ever see them on campus. So you don't think this kind of effort of driving towards diversity is rigorous enough? I think it's often pretextual. I think, frankly, the real reason has to do with the belief and I think it's a good belief. I associate myself with the belief. It's, it's just that because of the legal rules, the authorities can't say this belief out loud, but it's still the case that a lot of institutions want to help American society overcome its racial past. That's the real animating force. Now this thing about, you know, we'll have better

classroom discussions, you know, some discussions. I mean, you know, with some subjects, yeah, listen, I'm, you know, I'm an ignoramus when it comes to physics. My sense of it is, however, that if you're talking about physics, you're talking about physics and frankly, it doesn't much matter in terms of mastering physics, what the demographics of that classroom are. Well, you either know physics or you don't. The interesting thing I've noticed since doing this podcast is one way it does matter. It's really lonely when you do a thing and you don't see somebody that looks like you doing that thing. Okay. And it's such a seemingly stupid thing. Why does it matter if there's another person that looks like you in this very shallow sense, but it seems to matter to people. And when I talk to, for example, women on this podcast, a lot of women reach out saying how inspiring that is. And that's interesting, right? Like, I think we're still human and we see people that look like us. And this kind of narrow, shallow definition of diversity still matters. Okay. Well, you know, I think, I think, I think you've made a good point. And maybe so. So let's go back to the physics. I mean, let's suppose that under one scenario, there's a classroom and a kid sticks his head in, a black kid sticks his head in the classroom and doesn't see anybody else black there and has to make a quick decision and says, yeah, you know, nah, this ain't for me. Versus they stick their head in the classroom. They see a smattering. Oh, there are black people in the classroom. They say, let me try this. And then they try it. And it turns out, damn it, they're, you know, Albert Einstein. So, you know, to that extent, I can see, you know, under that scenario, maybe it does matter. So, you know, I'll have to recalibrate. Still, those are the three, those are the three leading justifications for affirmative action. You asked me, where do I stand with respect to affirmative action? Oh, no. Before we get to that, are there criticisms? The answer is yes. There are criticisms of affirmative action. Affirmative action is a policy like, you know, any policy, any policy is going to have some downsides to it. And affirmative action is no different. Does affirmative action have some downsides? Yes, it does have some downsides. What are they? Well, let me mention a couple. One, stigma, stigma. So, if you have an institution that says that it reaches out to give a boost to certain people on a racial basis, there are going to be people who observe that and who are going to be thinking to themselves, hmm, if so and so is here and they were given a special boost, doesn't that mean that they were not as proficient as the other people who are here and who did not have that boost? So, if they are not as proficient, that means that they might not be as good. They might not be as up to snuff. Is that part of our affirmative action world? Yes, it's part of our affirmative action world. Yes, I'm a professor at Harvard Law School. One of the subjects I teach is contracts. Actually, that's probably the subject I most enjoy teaching. I think I most enjoy writing about racial conflict and the legal system, but as far as teaching, I most enjoy teaching contracts. Well, on that very first day, on the very first day, when 80 students come, especially the first year students are nervous, I show up. I'm quite sure that there's some students there who are thinking, okay, well, is this guy as good as my other teachers? Because I know that institutions like Harvard have made a special effort to bring in people like this guy, Kennedy. Is he as good? Well, I mean, I'm sorry, if you have an affirmative action regime, people are going to think that. And are they crazy to think that? No, they're not crazy to think that. No, that's a perfectly logical thing for somebody to think. Does it have an effect on me as the

teacher? Yeah, actually, it does have an effect on me. Sure. I'm aware that some people are thinking that. It doesn't, I'm not, you know, it doesn't make me shake in my boots. Am I aware of it? Yeah, I'm aware of it. Does it have an effect? Yeah, it probably does have an effect. It probably does. It probably, it probably makes me, it probably makes me redouble my efforts, because I don't want anybody to think justifiably that I'm less able than my colleagues. So, you know, it's funny, when I was growing up, my father used to tell me over and over again, Randy, tie, tie, you lose. Okay, brother, let me just tell you that. And he was telling me that because when he was, you know, in an earlier time, tie, tie, you lose, it was, you know, if it's even, and there's a choice to be made, the white person is going to get the benefit of the doubt. Now, under affirmative action, there's been a switcheroo. Oftentimes, it's the black person who gets the benefit of the doubt, but I'm still in a situation where- You have to work hard.

Yes, to avoid the stigmatization that is imposed by affirmative action. But is that stigma there? Yes, it's there. It is there. I'll tell you another way in which it comes up from a student's point of view. I'll never forget this. It was in my second year of law school. It was in tax class. We had a very famous tax teacher, wonderful tax teacher on the very first day of class. Professor Bittker, wonderful man, wonderful teacher, Boris Bittker, called on, the very first person he called on was a black student. I remember this as if it were yesterday called on a black student and was a black woman student. And I remember when he called on her, I remember just, I felt, I felt as if the room got quieter. Really, I felt as if the room got quieter. And I know there was a real tenseness within me. He didn't call on me because it was going on somebody else. It was a black woman student. And I felt different. I felt as if I was-

I felt as if I was somehow

at issue. I felt as if my place, I felt as if my status was, you know, some small degree at issue. In the positive direction of the negative. Just at issue. At issue. And so, all of this is happening really quickly. He calls on the student. This is happening like in seconds. And she responded. And she responded really strongly. It was clear. She asked her question. She answered the question. She answered the question, you know, beautiful. I mean, you know,

very strong, comprehensive, wonderful response. Now, you might say, okay, well, you know, smart student. Okay, fine. Next. After class. After class, I went up to her. And I clearly remember this. I said, that was great. Thank you. Why? Because I'm a black student, predominantly white institution, Yale Law School. And I felt some of the, again, you know, affirmative action. I felt some of the burden of this affirmative action stigma. So it was almost like, thank you for showing that we belong here. Yes. Perfect. Boom. Yes. That's exactly what the situation.

And by the way, I wasn't the only one. I wasn't being idiosyncratic. I wasn't the only one. There weren't many black people in that class, but all of us. And we laughed about it later. We laughed about it. But that was there. So there's the stigma issue. And some people have made a lot of this. Some people have really made a lot of the stigma issue. My attitude towards a stigma issue, yeah, it's there. It's, you know, again, it's part of, you know, it's part of the situation. But I think that the benefits outweigh the burdens. But is that a burden? Yeah, that's a burden. What are some

others? Resentment. Resentment in society. And that's a, you know, so in these, in the fancy schools. And by the way, you know, remember when we're talking about affirmative action, most colleges and universities in the United States, there is no affirmative action issue because they're not selective. Hell, they'll take anybody who, you know, if you can pay, come on in. It's only a fairly small set of schools that are selective. But of course, those are the most elite schools. Those are the schools that people most want to get into. And that's one of the reasons why we have all this, you know, fighting over those schools. Now, you know, there's a whole, how many millions of people are there in America who have applied to various places? They didn't get in. And what do they say? The white person who applied to Harvard, applied to Yale, applied to Columbia, you know, applied to Georgetown, applied to NYU, you could go, you know, didn't get in. What do they say? I would have gotten in if it hadn't been for that racial affirmative action. They're resentful. Well, you know, should they be resentful? No, they shouldn't be resentful, but they are resentful. Does that have a consequence? Yeah, it has a consequence. It has a consequence on how they act towards other people. It has a consequence on how they vote. It has a consequence. And, you know, that's, that's something. Are there other things? Yeah. And, you know, in my book, I have a, you know, I go through various, I think that, I think that there is a, I think that there is a certain sort of denialism that has accompanied the affirmative action debate. So, because, you know, black people like myself want to avoid the stigmatizing burden of affirmative action, there's some people who, to deal with that, have said, oh, actually, there is no difference between, you know, the beneficiaries of affirmative action and the other kids. There is no difference. If the affirmative action kids got, let's say, a 500 and the other kids got a 750, oh, that doesn't make any difference. That's just BS. They're, you know, the only reason the kid who, you know, the 550 kid didn't get 750 is because the tests ask all sorts of, you know, biased, culturally biased things like, you know, what is a yacht? Well, sorry. Yes, there is a difference. There's a 200 point difference. Does the difference matter? Yes, the difference matters. And by the way, if you don't know what a yacht is, you can know what a yacht is without owning a yacht, okay? And there's this denialism that I think has really seeped into, not just, you know, into the various conversations. That can have a slippery slope effect as beyond just this. Yes. And, you know, we see it in various ways. So, you know, this, you know, this attack on testing. It's not like I'm holding the, you know, you know, some tests are not good tests. I think we should be skeptical of everything. But there are a lot of tests that, yeah, they tell us something. All right. They tell us who knows what. And there's some people who are really, you know, dead set against testing because they're dead set against anything that might show a gap. Well, I think by the way, you know, are there gaps? Yeah, there are gaps. And what we need to do is be cognizant of those gaps and do things to make it so that if there's a gap, if you're deficient, no shame in being deficient. Heck, I'm deficient about a lot of things. Let's, you know, let's learn so that I catch up. But others, you know, but I think sometimes there have been people who've been afraid of even acknowledging the gaps. Of course, there's, I guess, a colleague of yours, Michael Sandel, with Terry and Merritt. There's interesting

rigorous ways to kind of challenge ways on the flip side of that, where obsessing with Merritt can go wrong also. Yes, you mentioned Michael Sandel. He's a wonderful colleague and he's a wonderful friend. I've known him a long time. I think he makes very important arguments about meritocracy. I disagree with some of the points that he makes about meritocracy.

So you lean towards the importance of meritocracy?

I think that, yes, I think that there are values in meritocracy extremely important that, in fact, you know, the movement from feudalism, the movement from status, the idea of, you know, I don't care who your father or mother was. I don't care from what part of town you come from. I don't care what your last name is. I don't care what your color of your skin is. Show me what you can do. And then somebody sits down, okay, I'll show you what you can do, you know, what I can do. And they show it, you're in. I think there's a lot to that. And, you know, the impulse to sentiments behind that, I resonate with that. I think that there's a lot there. What I want to do is I want to get rid of those features in society that deprive people of what you need to develop yourself. You know, sometimes those are psychological. Sometimes it's, you know,

you're not around people who've done things that give you the idea that you can do things.

I want to get rid of that. But the idea of, you know, people, the idea, by the way, of, you know, distinguishing, you know, this is excellent. And the people who are excellent, you know, they're here. And then there are people who are good. Are they excellent? No, they're not excellent. They're good. I want to, I want to, I'm not going to, you know, close my eyes to that distinction. And highlight that distinction. And yet at the same time, maintain a sense that their basic worth as a human being is equal. Yes. So, you know, was it Run BMC? One of the rap groups? No. You know, we're all written down on the same list. We're all written down on the same list. Yes, we're, you know, so I want to recognize our fundamental humanity. I don't think that that, I think that one can recognize our fundamental humanity. And one can also recognize, as far as I'm concerned, that we all collectively should make sure that we do all that we can to prevent people from sinking below a certain level and being, you know, in misery, you know, all for that. But I want to be careful about some of the attacks that I hear on meritocracy. So some of the people, including, again, I have all the respect in the world for Michael Sandel. He talks about the arrogance of the winners. Okay, I want to be, you know, I don't want the winners to be arrogant. That's right. Luck has a lot to do with things. You know, you didn't have any control over the circumstances in which you were born in two. You were lucky that you were born healthy and that you were born with a, you know, well-working mind. You didn't have anything to do with that. That was pure luck. There's some people who don't have that luck. So don't, you know, you know, don't be, you know, Mr. Big Stuff. Okay. So I'm, you know, I'm against that sort of arrogance. You know, I'm entitled as if I taught myself how to read. No, you didn't teach yourself how to read. There was people who did all sorts of things for you and you don't even know it. Okay. So, you know, I want to, you know, get rid of the arrogance, have decent humility. I'm all for that. At the same time, you know, I want to be careful about the problem of envy. I want to be, I want to be careful about the problem of resentment. I want to be, I want to be careful about, you know, I've heard, you know, so let's not have, let's not give a trophy to the person who wins the race because to give a trophy to the person who wins the race will make the person who they defeated feel bad.

No, no, no. No, I don't want that. I want to give a trophy to the person who wins the race because I think it's a good thing to valorize the best. Yeah, it's a kind of celebration of this whole human project that we're on is celebrating the best. You mentioned your father several times. So, let me just linger on that. What have you learned from, what have you learned about life from your father?

There's, I've been just such a lucky person. I mean, I feel like I've just lived an absolutely charmed life and I live, I mean, the work that I do is what I love doing. I would pay to do what I am paid to do. Yeah. I mean, it's, you know, it's great and I've been fortunate in so many ways and one way in which I've been fortunate is my parents. My parents, Rachel Spahn Kennedy, Henry Harold Kennedy, my mother born in Columbia, South Carolina, my father from New Orleans, Louisiana. They were refugees from the Jim Crow South. They were people who put their all into their children. I have an older brother of a younger sister. All three of us know beyond, you know, beyond any controversy that we were loved and dearly loved by our parents and they were great people. My father, very interesting man, very independent minded. He was perfectly willing to go his own way and I learned much from him, including I learned,

I learned things from him even when I ultimately disagreed with him. So for instance, again, to go back to his pessimism. Yeah, he was pessimistic, thoroughly pessimistic. But he was also, he was also willing to change in certain ways. In fact, both my parents, I mean, one of the most important things that happened to my parents was that I'd say when I was, let's say 10 years old, I was born in 1954. So in 1964, in 1964, I think my parents would have taken the position that you definitely never under any circumstances trust a white person. If a black person trusts a white person, that person is a fool. Do not trust white people. All right. They are not to be trusted. And it's the highly, highly, highly unusual one who is not prejudiced. Okay. So white people are not to be trusted. And by and large, you're going to be your enemy. All right. So let's just face that. That was their point of view. I'd say that 10 years later, that point of view had been leavened somewhat. You say, well, what happened in those 10 years? Well, certainly in my life, one of the things that happened in those 10 years is I was a student in various schools. And I had a series of teachers. I've had wonderful black teachers. I've also had wonderful white teachers. And my parents paid attention to who my teachers were and how my teachers treated me. And I think that they were affected by the way in which there were white people who really helped me and were on my side and were thoroughly on my side. And I think that that experience changed my parents in their general view. They, you know, skeptical. Yeah, but they were

the possibility, the possibility of a white person genuinely being the friend of a black person, that became alive to them. And I give them a lot of credit because they were adults. And, you know, for an adult to change, that's a big deal. But my parents did change.

In that transformation that was inspiring to you, was formative to you in terms of joining the Optimist camp?

Hugely. And, you know, the school, I mean, again, you know, I said a moment ago how lucky I've been.

Heck, I teach at Harvard Law School. I attended Balliol College, Oxford. I got my law degree from Yale Law School. I got my undergraduate degree at Princeton University. Those are some

pretty good schools. They all were. They all were. The most important school, however, that I attended, the school that made the most difference in my education was my high school, St. Albans School, St. Albans School for Boys. And at St. Albans, I encountered a cadre of teachers. And by the way, St. Albans, when I went to St. Albans, all these teachers were white, all these teachers. So there was one, the head of athletics, very important man, very impressive man, Brooks Johnson was black. Otherwise, white teachers. And these teachers made a huge difference in my life. And, you know, I can call their names boom, boom, boom, boom, boom.

The greatest of them all was a man by the name of Jack McCune. Yeah. We called him Gentleman Jack,

Gentleman Jack McCune. And- What subject did he teach? He taught me history. He was my advanced

placement history teacher. But John F. McCune, and we shared a birthday.

John F. McCune was a fabulously good teacher. And we developed a deep lifetime friendship.

I was with Mr. McCune the day before he died. And, you know, he was a white man.

And I've had other teachers, some of whom have become colleagues of mine,

you know, Sanford Levinson. Sanford Levinson was a teacher of mine at Princeton.

He's become a colleague of mine. I mean, it would be, frankly, it would be impossible for me to,

you know, I hear people, I can't make some sort of, you know, sort of blanket condemnation

of white people with Sandy Levinson in my life. I mean, it would be, seriously, John F. McCune

in my life, with Eric Foner in my life, with my colleague Martha Minow in my life, my colleague

Cass Sunstein in my life. Impossible. You know, that speaks to the power of teachers and mentors.

Oh, yeah. And you're that to a lot of people. Well, I've taken that to, I hope, I hope, listen,

I would be, I would, listen, I would be absolutely overjoyed if there was a student who thought of

me in the way that I think of gentlemen Jack McCune. If that's the case, just one, just one.

If that's the case, I'm overjoyed. That's a life well lived. What do you think of Martin Luther

King's, I have a dream. Do you still share that dream? I think that Martin Luther King,

juniors, I have a dream speech is one of the great speeches, not only in American history,

but in the history of the world. You know, there's a tendency now for people to sort of poo poo

that speech. I think, unfortunately, the speech, you know, has been embraced by, you know,

advertisers and corporate America. It's been, it's been so, you know, it's been heard so many

times that it sort of has been made to suffer from what some people might view as overexposure.

It's so unfortunate. I mean, it's too bad. When, especially when Hollywood rolls in,

they did that with John Lennon's Imagine recently, which I think is one of the greatest songs ever,

and the actors and actresses ruined it by trying to like sing along and do this kind of cliché

Hollywood thing. It has, but people have tried to make it into a cliché. The fact of the matter is

it's the, the, the sentiment, the sentiment behind, I have a dream. Yeah, I'll associate myself with

that. And anybody wants to, anybody wants to see some great oratory, go watch. And, you know,

Martin Luther King, Jr. I mean, he, he gave, he gave, you know, several great speeches,

you know, his first speech, the first speech that he gave as a civil rights leader, the

Holt Street Baptist Church, 1955, at the beginning of the Montgomery Bus Boycott, which was

virtually

an extemporaneous speech, was one of his greatest. And he was, he was, I think, 26 years old, great.

His last speech, you know, his mountaintop speech, great speech, but I have a dream. I love it. I will associate myself with those sentiments any day of the week. Absolutely.

So you still have hope for a deep kind of multiracial, a deep unity in the 21st century?

I have that hope. And I think that the, I think that the sentiments that Martin Luther King, Jr. expressed in August 1963, that represents the best of American life. And I think it's a, you know, do I want to see that come to pass? Yeah, I want to see that come to pass. And we'll, we'll work to, you know, push that project along as far as it'll go.

Well, thank you for carrying his spirit of optimism forward, the spirit of your mother and father. Thank you for all the amazing work you've done. And thank you for just this conversation.

It's a huge honor. This is awesome. Thank you. We really appreciate it. Thank you, Randall.

Thanks for listening to this conversation with Randall Kennedy. To support this podcast, please check out our sponsors in the description. And now let me leave you with some words from Martin Luther King, Jr. Darkness cannot drive out darkness. Only light can do that.

Hate cannot drive out hate. Only love can do that. Thank you for listening and hope to see you next time.

you