

BRING TEASE MUSIC IN (Soundstripe - Wicked Cinema "Coat of Arms Instrumental")

LESLIE KENDRICK: Good policing should help us feel secure in our homes and safe in the streets. But as we've seen more vividly through videos in the past few years, that's not always been the case.

RISA GOLUBOFF: This summer across the nation, many Americans called for more accountability for police actions.

LESLIE KENDRICK: What can we do to ensure that every officer enforces the law fairly?

RISA GOLUBOFF: And what kinds of laws and policies would make policing more equitable across a range of communities?

LESLIE KENDRICK: That's what we're exploring in this episode of Common Law.

BRING THEME MUSIC IN AND UP

RISA GOLUBOFF: Welcome back to Common Law, a podcast from the University of Virginia School of Law. I'm Risa Goluboff, the dean.

LESLIE KENDRICK: And I'm Leslie Kendrick, the vice dean.

BRING MUSIC UP, THEN UNDER

LESLIE KENDRICK: In this season of Common Law, we're diving into issues of law and equity.

RISA GOLUBOFF: In our last episode, we talked with New York University law professor Melissa Murray about the limits of decriminalization.

MELISSA MURRAY: There are other civil contexts that can be as pernicious even if they're not as obviously violent in the way that criminal law is.

RISA GOLUBOFF: If you missed that episode, we hope you'll go back and listen.

BRING MUSIC UP, THEN UNDER

LESLIE KENDRICK: Today, we're looking at the law of the police with UVA Law professor Rachel Harmon.

FADE MUSIC OUT

RISA GOLUBOFF: Rachel Harmon spent eight years as a federal prosecutor in the U.S. Department of Justice's Civil Rights Division, where she investigated and prosecuted civil rights crimes across the nation, including hate crimes and cases of excessive force and sexual violence by police officers and other government officials. She's also director of UVA Law's Center for Criminal Justice. And she has a new casebook out: "The Law of the Police." Rachel, we are so happy to have you here!

RACHEL HARMON: Thanks so much!

LESLIE KENDRICK: Rachel, you worked for the Justice Department under both Presidents Clinton and George W. Bush, and then you made the leap from government to academia, joining us here at UVA in ... 2006?

RACHEL HARMON: Right.

LESLIE KENDRICK: I know that part of the reason you did that was because you had become a little disillusioned with the efficacy of prosecuting individual police officers for criminal conduct. Can you tell us about that?

RACHEL HARMON: One of the problems with individual prosecutions is that it can make it look like the origins of police violence are largely in individual decision-making. That they're caused by an individual who goes out there and says, 'you know what I want to do today? I want to do something wrong.' But when we look at police decision-making, so much of it is controlled by departments that criminal prosecution sometimes can distract attention from the origins of the problem or the solution.

LESLIE KENDRICK: Yeah.

RACHEL HARMON: The other thing was watching a press conference in which a police chief had basically said, after a criminal prosecution, 'they got the bad apple, we're good to go, we're going back to business.' And I'm thinking, well, departments create bad officers, and this became a way that they could obscure their problems.

RISA GOLUBOFF: Right, so we got the one bad officer and now we go back to business as usual and ...

RACHEL HARMON: Yes.

RISA GOLUBOFF: ... no systemic change is necessary.

RACHEL HARMON: Right.

RISA GOLUBOFF: So you say when you're using criminal prosecutions, you're not getting at systemic problems. And that's partly because with more than 400,000 police officers working out of 18,000 different departments, the rules and regulations that govern them can really vary. So, what would you say is at the root of bad policing?

RACHEL HARMON: Policing creates a fundamental challenge that we cannot get around.

BRING MUSIC IN (Soundstripe - Wayfair "Spider Web")

RACHEL HARMON: Every one of us wants to live free from fear, from violence. You don't want to be mugged, no one wants their house burgled. And if you think that it's legitimate for the government sometimes in order to prevent those kinds of problems to require people to do things that they don't want to do, or punish them when they break the rules, then you're going to need some sort of system for achieving that end. And the way we've done that is largely through policing.

BRING MUSIC UP, THEN UNDER

RISA GOLUBOFF: So, when you authorize a monopoly over force, you then create the possibility for solutions, but you also create the possibility for abuse of that force.

RACHEL HARMON: That's definitely true.

BRING MUSIC UP, THEN UNDER

LESLIE KENDRICK: Rachel, when it comes to balancing the benefits of policing with the potential harm, you've coined a term called "harm efficiency." What is that?

RACHEL HARMON: That's a way of describing the kind of policing we want to achieve. We have other goals in policing too, we want it to be responsive to communities, we want it to be equal, but one thing we definitely want is it not to exceed the costs and for us to minimize those costs as much as possible.

LESLIE KENDRICK: And by 'costs,' you primarily mean the societal or even psychological burdens of policing, right?

RACHEL HARMON: Right. The two biggest problems in policing are harm inefficiency, which is to say we do too much harm for the benefits we're getting. And inequality, the inequitable distribution of both the costs and the benefits of policing, and in particular, the racism that policing reinforces as well as creates.

BRING MUSIC UP, THEN FADE

RISA GOLUBOFF: Just so we're clear, when you say the benefits haven't been equally distributed, what you're referencing there is the idea that for poorer communities and communities of color, police don't provide enough of the services that would actually enhance safety and public order -- that they're less responsive to those needs in those communities.

RACHEL HARMON: And they're literally not as responsive, the reaction times are slower. And so when they have problems, they don't perceive the police as people they can call on. And when they do call on them, the risks to them are too high.

LESLIE KENDRICK: Another way you've said under-policing affects communities of color is with respect to criminal investigations, particularly homicides.

RACHEL HARMON: If you look at homicides against people of color and in communities of color, you see that our clearance rates are much lower. And most people want people who have harmed them or their families seriously to be brought to justice.

LESLIE KENDRICK: Yes, of course.

RACHEL HARMON: Policing helps make that possible. And when that's not done that contributes to alienation.

BRING MUSIC IN (Audioblocks - "Nostalgic Cinematic Piano Very")

[MICHAEL BROWN SHOT TO DEATH BY POLICE - NBC NEWS](#)

PROTESTORS: We want answers! We want answers!

REPORTER JOHN YANG: On the streets of Ferguson, Missouri, outrage and anger.

PROTESTORS: No justice, no peace!

REPORTER JOHN YANG: Protestors of different ages and races demanding answers in the shooting death of 18-year old Michael Brown at the hands of a policeman ...

[PROTESTS IN FORT WORTH AFTER ATATIANA JEFFERSON KILLED IN HER OWN HOME](#)

REPORTER BRADLEY BLACKBURN: Tonight there was grief and outrage. Atatiana Jefferson's family coming back to the home where she was shot and killed by a Fort Worth police officer.

[OUTRAGE AFTER RAYSHARD BROOKS KILLED BY ATLANTA POLICE AS PROTESTS CONTINUE - NBC NIGHTLY NEWS](#)

REPORTER MORGAN CHESKY: Anger and frustration in Atlanta, protestors gathering outside the fire-gutted Wendy's where 27-year old Rayshard Brooks was shot and killed by police during an attempted arrest.

FADE MUSIC OUT

RISA GOLUBOFF: Under-policing is clearly a really important problem, but over-policing is the one that has been really dominant lately, and in particular, the disproportionate harm that the police do to communities of color. And as we can hear in

those clips — each new tragedy brings fresh pain and outrage and new calls for police reform. But it seems so often that they just don't result in much change.

RACHEL HARMON: Yeah, we have Breonna Taylor and we start abandoning no-knock warrants. We have George Floyd and we start banning chokeholds. And I'm not saying that those kinds of reactions can't do a little bit of good, but really we need to step back and think about the bigger picture. So, Breonna Taylor had a marginal relationship to a drug suspect. And the question is, do we really, as a society, think that that means we should go in in the middle of the night into her home, and effect a search even after it's clear that the people inside are armed and don't realize that they're being policed?

[RADIO MEMORIAL HONORS BREONNA TAYLOR FIVE MONTHS AFTER SHE WAS KILLED BY POLICE - NBC NIGHTLY NEWS](#)

REPORTER: Officers who said they were at the apartment to serve a no-knock warrant returned fire after Taylor's boyfriend Kenneth Walker shot at them, thinking they were intruders.

LESLIE KENDRICK: But in almost all these instances, the police officers maintain that they were following the law. So what does that tell us about the law that governs the police?

RACHEL HARMON: We really have to get beyond the traditional legal approach to problems in policing, which is a focus on the courts and the Constitution, mostly in the form of the Fourth and Fifth Amendments.

RISA GOLUBOFF: Right, the Fourth Amendment being the right of the people to be secure in their "persons, houses, papers, and effects" against unreasonable searches and seizures, and the Fifth barring double jeopardy, self-incrimination, and deprivation of life, liberty or property without due process.

RACHEL HARMON: If you asked any lawyer what's the law governing the police, and they would say, well, Fourth Amendment, searches and seizures, and maybe Miranda, you know. And so we had a very narrow view and when there was a problem in policing, we wanted to expand the Fourth Amendment to cover that problem. And there wasn't a lot of exploration of harms of policing that exist even when policing is fully lawful under the Fourth Amendment. Even police officers often think about the law that governs them as constitutional law and particularly the Fourth Amendment. And in doing so, they actually show the power of law.

LESLIE KENDRICK: Could you say a little more about that?

RACHEL HARMON: You know, your theme for this season is law and equity and that raises a real question: you know, how powerful is law in changing minds and hearts and hands? And my experience with working both as a criminal prosecutor and working with police officers and police departments is that law is really powerful.

LESLIE KENDRICK: That reminds me — you've told a story before about a police officer you prosecuted who adhered to what he considered his constitutional duties. Can you tell us that story?

BRING MUSIC IN (Soundstripe - Lincoln Davis "Skeptical")

RACHEL HARMON: I prosecuted an officer, who in the course of the prosecution had to tell us a lot about his criminal activities. And one of his criminal activities was pulling over people he suspected of being drug dealers, and then robbing them for the drugs and the money that they had on their person. He was pretty good at finding such people.

BRING MUSIC UP, THEN UNDER

RACHEL HARMON: We were talking about this, I asked him what excuse he made up for pulling them over.

BRING MUSIC UP, THEN UNDER

RACHEL HARMON: You know, he says, "Well, what do you mean?"

BRING MUSIC UP, THEN UNDER

RACHEL HARMON: Well, you decide you're going to rob this person and you pull them over, what do you say for a probable cause?

BRING MUSIC UP, THEN UNDER

RACHEL HARMON: And he said, "Oh, no, no, I would wait until they committed a traffic offense and then pull him over."

BRING MUSIC UP, THEN UNDER

RACHEL HARMON: "I didn't make up probable cause, I'm still a cop!"

(Risa and Leslie laughing)

RACHEL HARMON: The idea that, you know, the Fourth Amendment is so internalized into what it means to be a police officer, that it shapes the self-conception of someone who is self-consciously criminal in his police activities struck me as something really fundamental to the power of law.

RISA GOLUBOFF: It's one thing to violate the law against robbery, but it's a whole 'nother thing not to follow the Fourth Amendment! That's quite something.

RACHEL HARMON: That undermines what it means to be a cop!

BRING MUSIC UP, THEN FADE IT OUT

RISA GOLUBOFF: When you say we have to think about the law of the police as a whole, rather than the specific constitutional doctrines that govern the police, it seems absolutely right and totally clear. And of course, if we want to think about why the police behave the way they do and why police systems are set up the way they are, we can't think narrowly about the Constitution, we have to think holistically about the entire regulatory structure in which they operate. So why do you think it's taken so long and why have we been so focused on the Fourth and Fifth Amendments?

RACHEL HARMON: That's a good question.

BRING MUSIC IN (Soundstripe - Chelsea McGough "Up Above Instrumental")

RACHEL HARMON: Why is partly the lawyers who are most interested in and most engaged in policing issues every day are criminal lawyers who engage in the criminal process. So what they are doing is fighting motions to suppress, and they work backwards from that to thinking about the issues of policing.

RISA GOLUBOFF: Yeah, I can see that.

RACHEL HARMON: That is part of it. And then the way we divide subjects up in law school led that naturally to mean that when you prepare students for criminal practice, they walk away thinking they know a lot about policing when, in fact, they know a small window of what policing is.

BRING MUSIC UP, THEN UNDER

LESLIE KENDRICK: So this is where your new casebook fits in, "The Law of the Police." In the introduction, you write, "The premise of this book is this: Policing should be effective, fair, worth its harms, and responsive to communities. The law sometimes helps policing achieve these goals, and sometimes it is an impediment. Sometimes it is hard to tell." It's a powerful statement, and one that I think will get lots of different communities thinking. So who's your audience?

RACHEL HARMON: It's a resource not just for students and for faculty, but I think for those who want to think seriously about the project of regulating the police, and that means policymakers, that means activists, that means lawyers. There hasn't been a lot available to those who see this as beyond the Fourth Amendment, and I'm hoping that this really will be a resource for those people.

FADE MUSIC OUT

RISA GOLUBOFF: So, Rachel, short of entirely reframing how we govern the police, are there any immediate things we can do TODAY to reduce the harms of policing?

RACHEL HARMON: Yeah, so within the system, I think one thing we could do is re-task traffic enforcement in the same way we've re-tasked parking enforcement.

OFFICER - I SMELL WEED IN THE CAR

POLICE OFFICER: What's up man? How you doing?

DRIVER: How you doing?

POLICE OFFICER: Good man. Hey man, I just stopped you, when you came off the circle, I didn't see any turn signal ...

RACHEL HARMON: And stop conflating traffic enforcement with criminal enforcement, in particular with pursuit of the drug war.

OFFICER - I SMELL WEED IN THE CAR

POLICE OFFICER: I smell weed in the car and everything. We're going to have to search your car and stuff, man.

RACHEL HARMON: There are very few traffic offenses that actually require armed police officers, or that should be the subject of arrests.

RISA GOLUBOFF: In fact, a [recent NPR study](#) found that 25% of police killings of unarmed Black people occurred during traffic stops.

RACHEL HARMON: That's right.

LESLIE KENDRICK: And then you also have the issue of police encounters with people who are having a mental health crisis.

RACHEL HARMON: I think communities are increasingly recognizing that policing people in crisis, both people suffering from mental health crises, and people suffering from problems associated with addiction, are an area where we could re-task a lot of that, or at least co-produce public safety by working with mental health professionals.

LESLIE KENDRICK: You've written also very compellingly about arrest, radically questioning our practices around arrest. Could you talk a little bit about that? And I love the title of the article that you wrote about this: "Why Arrest?"

BRING MUSIC IN (Soundstripe - Chelsea McGough "Liminal")

RACHEL HARMON: Yeah, so this is another area where if you look at the use of force, you say, well, how are these use of force incidents coming about? And many of them are justified because the force is necessary to affect arrest, which raises the question of why we're arresting people.

BRING MUSIC UP, THEN UNDER

RISA GOLUBOFF: I mean, presumably, if you ask the average person ‘why arrest someone?’ They’d say ‘because they broke the law.’

RACHEL HARMON: But we largely do arrests because it was the traditional mechanism for getting people into court and starting the criminal process, but it's not a necessary mechanism for doing that.

LESLIE KENDRICK: Yes, and you’ve argued that we often invite serious offenders, like white-collar criminals, to self-surrender. That means we not only spare them the humiliation of being arrested in front of family or co-workers, but we also avoid the confrontation that sometimes leads to violence.

RACHEL HARMON: Yes, and so I started to just ask the question, well, when are arrests really their most essential? When is this worth what we're doing in imposing harm? And I didn't expect the answer to be what I found it to be, which is very rarely.

BRING MUSIC UP, THEN UNDER

LESLIE KENDRICK: Which is why you’ve suggested that police could, in many instances, use citations or summonses to begin the criminal process, rather than defaulting to arrest.

RACHEL HARMON: Most arrests don't seem to be worth the harm that they're imposing.

BRING MUSIC UP, THEN FADE OUT

RISA GOLUBOFF: There's one other recommendation that I know you've talked about in the past and I wonder if you could say a little bit about now, which is requiring reasonable suspicion before allowing a consent search. Can you just say more about why you think that's a really important step to take?

RACHEL HARMON: Sure. I sometimes talk in too academic terms about things like harm efficiency, which sounds very eggheaded, but consent search is a really obvious example when an officer asks for consent ...

[POLICE OFFICER FREAKS OUT WHEN TOLD HE CAN'T SEARCH A VEHICLE](#)

POLICE OFFICER: I'll tell you what. I'm not going to write you a ticket for speeding, okay? I'm going to cut you free on that. But before you take off, would you mind if I took a look through your car?

BRING MUSIC IN (Soundstripe - Outside the Sky “Mystic Wind Instrumental”)

RACHEL HARMON: ... that sounds as if the person's consenting and therefore no harm is done, but in practice, we know that is not how people experience consent

searches. People walk away alienated from not just the police, but the government, they feel mistreated, they feel coerced.

RISA GOLUBOFF: So, wait — in these situations you're talking about — do people actually say, 'yes, I consent' to this search of my car or my bag or whatever, or were the police just proceeding anyway?

RACHEL HARMON: When I was in practice, when I was a baby prosecutor, I worked at the U.S. Attorney's Office in the Eastern District of Virginia, and after I had case after case involving people who consented to a search of the trunk of the car, in which the officer found drugs, I started to ask the defendants myself -- I mean, with their lawyer present -- did you really consent?

BRING MUSIC UP, THEN UNDER

RACHEL HARMON: And the answer was, 'yes, I consented because I thought I had no choice,' or 'I thought he would do it anyway,' or 'I thought he would get around, whatever,' I mean, so we know that consent searches can be experienced as intrusive. And when there's no reasonable suspicion for a consent search, we also know that it's very unlikely to yield significant benefits.

BRING MUSIC UP, THEN UNDER

LESLIE KENDRICK: So with respect to harm efficiency, you're saying that this is a clear area where police are doing something that's imposing a lot of harm without providing a lot of benefit.

RACHEL HARMON: Right. Why wouldn't we look for a way to do that better?

FADE MUSIC OUT

RISA GOLUBOFF: Okay, those are a few things that we could change within policing itself. But what about outside of policing — say at the state level?

RACHEL HARMON: You know, states have largely in the past been inactive regulators of the police. They are the primary governance structure, they determine how police are trained, what powers they have, and who they are, and they've been relatively inactive until recently. Now they're passing laws like there's no tomorrow.

[ILLINOIS STATE LEGISLATURE PASSES SWEEPING POLICE REFORM BILL](#)

REPORTER: Developing tonight, a controversial criminal justice reform bill has passed both houses in Illinois ...

[COLORADO HOUSE PASSES SWEEPING POLICE REFORM BILL, NOW ONE STEP FROM GOVERNOR'S DESK](#)

REPORTER: The bill passed by Colorado lawmakers bringing reform to Colorado police departments is one step closer to becoming law ...

STATE SENATE PASSES AMENDED VERSION OF POLICE REFORM BILL

REPORTER: Late last night, the state senate approved this compromise bill reforming policing in Massachusetts ...

MINNESOTA HOUSE OF REPRESENTATIVES PASSES POLICE REFORM

REPORTER: The Minnesota house passing a major bill on police reform. The decision ...

RACHEL HARMON: They're engaging the questions, but it would be nice if they did so more systemically rather than so reactively. Rather than ban chokeholds, start adopting laws which comprehensively regulate the use of force. No state's done that.

LESLIE KENDRICK: State laws obviously vary widely. Is there something we can or should be doing at the federal level to have a bigger impact, and make policing more consistent and equitable across the country?

RACHEL HARMON: The federal government inevitably plays a role.

BRING MUSIC IN (Audioblocks - "Singularity")

RACHEL HARMON: Why? Cause there are 18,000 police departments in the United States and without some centralized leadership, civil rights enforcement, and insurance that we're doing data collection and transparency and accountability, then we're not going to really be able to minimize the harms and the unfairness of policing.

BRING MUSIC UP, THEN UNDER

RISA GOLUBOFF: So you've written that "what we don't know about policing in the United States swamps what we do know." Why is that, and what impact does that have?

RACHEL HARMON: One of the problems with regulating the police more effectively is we don't know anything about policing. We don't know how many uses of force happen. In fact, we don't have a standardized definition of what the use of force is. We have no data collection mechanisms and no ability to compare across departments, and that's something that both state and federal actors have to get on instantaneously so that we can actually do this right.

BRING MUSIC UP, THEN FADE IT OUT

LESLIE KENDRICK: You've also written that this has a lot to do with what's happening at the local level since it's really local governments that create and fund and control

police departments. That also means that police accountability is, first and foremost, a product of local political processes.

RACHEL HARMON: Now there's a problem there, right, because the harms of policing are concentrated on people who don't have a lot of power in the local political process. I mean, there are people who don't get to vote at all, like young people and, often, homeless people and undocumented immigrants. And then there are people who have inadequate power because of the history of discrimination, like people of color. And so that means that the policies we get out of local political processes don't reflect the true costs of policing.

RISA GOLUBOFF: I feel like this is a conversation that's been ongoing since at least the 1960s, though maybe earlier. You know, we've had police review boards for a long time.

RACHEL HARMON: Yeah.

RISA GOLUBOFF: Do you have a sense of why haven't we succeeded in getting those voices heard yet and how to make sure that we do a better job in the future?

RACHEL HARMON: Traditional mechanisms of civilian review don't work very well and very few communities have been satisfied with their civilian review boards. So why do communities still ask for civilian review or community oversight if it doesn't work? And the answer is because the narrow framing that we often had of what civilian participation meant was in reviewing disciplinary decisions or disciplinary investigations by police departments or in hearing citizen complaints.

LESLIE KENDRICK: So it sounds like you're saying these civilian review boards — or all of us, really — need to get involved in thinking about policing before there's a problem. Right now, they're coming in at the tail end, and looking at individual officers, and perhaps isolated instances of misconduct.

RACHEL HARMON: It's one of the reasons I care so much about political protests. I think one of the things when people take to the streets they're doing is making clear the harms that police are doing that don't otherwise get heard.

BLM PROTESTORS CHANTING WE LIVE HERE TOO

PROTESTORS: Black lives matter! Black lives matter! Black lives matter!

BLACK LIVES MATTER PROTESTORS STAGE MARCHES AROUND THE WORLD

PROTESTORS: We live here too! We live here too!

THEY'RE KICKING IT OFF WITH A CHANT

PROTESTORS: No justice, no peace, defund the police! No justice, no peace, defund the police!

BRING MUSIC IN (Audioblocks - "Smile")

RISA GOLUBOFF: So, in thinking about this moment and especially the protests of last spring and summer, and we're still seeing, you know, a change in the conversation, and I think real changes in the way police departments are doing things as a result of Black Lives Matter activists and social justice advocates. And they've been calling for, you know, defunding the police or 'abolish the police' for many of the same reasons that you've laid out, right?

RACHEL HARMON: That's right.

RISA GOLUBOFF: What do you think about those demands?

RACHEL HARMON: I think it's really important to hear what people are saying.

[STANDOFF IN FERGUSON AFTER DEATH OF MICHAEL BROWN - NEW YORK TIMES](#)

PROTESTOR: "They're mad. I'm mad. We should all be mad. Man, we should all be angry because of what's going on right now."

BRING MUSIC UP, THEN UNDER

RACHEL HARMON: When people call for defunding the police, I think they're really calling for a kind of harm efficiency in policing. They're saying policing to us is not worth the cost and by shrinking the department, what they're hoping is that policing will concentrate on its most critical tasks, especially those around interpersonal violence and bringing serious offenders to justice and NOT engage in the kinds of low-level policing that can often impose a lot of harm without a lot of benefits in terms of public safety. And so I agree entirely with the goal.

RISA GOLUBOFF: So what's the catch? Is there a problem that you see?

RACHEL HARMON: Yeah, um, there's a real risk that when we shrink departments, we don't get what we want, which is the most benefit at the least harm.

BRING MUSIC UP, THEN FADE OUT

LESLIE KENDRICK: Of course, you've also pointed out that protesters are arguing for reallocating funds from police budgets to more social services, so that police don't have to be the go-to for mental health emergencies.

RACHEL HARMON: And that actually is quite important. And when we re-task those activities to other actors, you know, we do make police less necessary and that's a good thing and police will tell you so.

RISA GOLUBOFF: Rachel, you've already said that, you know, when you left the Department of Justice, you did so in part because you'd grown a little disillusioned about, you know, how useful it was to prosecute individual police officers, but, you know, I understand that in the fifteen years since then — and especially after watching what happened after Ferguson in 2014 — you've kind of come back around on how important prosecutions can be for victims, even when or if they don't lead to systemic change. So, does your current view that prosecutions *can* make a difference cause you to think differently about your time at the Department of Justice?

BRING MUSIC IN (Audioblocks - "Stumbling")

RACHEL HARMON: You know, when I was at the Department of Justice, I was extremely proud of my government service. It was enormously important to me serving in the Civil Rights Division, in being able to tell victims of crimes by public officials that what happened to them was wrong and that I was there from the government and I could do something about it.

BRING MUSIC UP, THEN UNDER

RACHEL HARMON: One woman who had a felony record had been sexually assaulted by someone who had clear power over her and really could take away her ability to see her children if she didn't go along, was stunned by, you know, me showing up and saying, "Actually, what happened to you was wrong and it doesn't have to happen anymore and you can participate in stopping this from happening to other people." She said, "Yeah, but no one has ever thought that I was worth protecting."

BRING MUSIC UP, THEN UNDER

RACHEL HARMON: And that was a consistent theme in the victims of police violence and governmental sexual assaults that, that I worked with, which was that they hadn't been treated with dignity by the government and that I could offer them that.

BRING MUSIC UP, THEN UNDER

RACHEL HARMON: It was really probably the most rewarding thing about my work.

FADE MUSIC OUT

LESLIE KENDRICK: One question we're asking all our guests relates back to the title of this season's podcasts, which is "Law and Equity." And the choice is intentional to focus on the word "equity" rather than "equality" and I'm wondering in the criminal justice context and from your perspective, do you think the two terms make a difference? Is there one that you prefer over the other?

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RACHEL HARMON: "Equitable policing" is a strange concept in a way. But, you know, when I think about equitable distribution of both the benefits and the cost of policing —

and one of the big problems in policing is that the benefits have also been unequally distributed — then that's right, we are thinking about equity and not equality, though obviously more expansive ideas of equality can capture some of that.

RISA GOLUBOFF: What does the end state look like for you? What is the promised land of policing? If you could articulate this enormous landscape that you see and where the problems are located, and then identify how to begin fixing them, at the other side of that enormous project, what does policing look like?

BRING MUSIC IN (Audioblocks - “Extraordinary”)

RACHEL HARMON: I have to say that I'm not a “promised land” thinker. You know, one of the things about current movements in policing is that they often start with the promised land and move back. And I think I start from the historical perspective and move forward, in the sense that I think that we create policing because of a challenge we face and that we are going to continue to struggle to balance our desire to achieve public safety sometimes through the government and that that means that we're always going to be fighting against the harms that the government imposes. And so I guess I view the struggle and the success in the struggle to achieve better balance as the promised land. I'm not sure that I envision a promised land beyond that. It might be my lack of vision, but it's what I think about.

RISA GOLUBOFF: I'm right there with you.

(Risa & Rachel Laughing)

RACHEL HARMON: Oh good! That actually makes me feel better. (Laughing)

BRING THEME MUSIC IN

LESLIE KENDRICK: Rachel, this has been a fascinating conversation and a really important one. I've learned so much.

RISA GOLUBOFF: It's been great, Rachel.

RACHEL HARMON: Thank you so much for having me. It's always fun.

BRING MUSIC UP, THEN UNDER

RISA GOLUBOFF: That was Professor Rachel Harmon, Director of UVA Law's Center for Criminal Justice and an expert on policing the police. Her new casebook is “The Law of the Police.”

BRING MUSIC UP, THEN UNDER AND OUT

LESLIE KENDRICK: Well, it's always really interesting to talk with Rachel about policing. And one thing I love is her command of so many different elements and areas

that come together in this topic. So it's not just about the Constitution, it's not just about the Fourth Amendment, it's not just about local regulation, it's about everything and she sees how all the parts fit together and that real solutions or real progress have to involve all of them.

RISA GOLUBOFF: I agree completely and I think once you see policing through her eyes, you can't ever really go back again. You know, once you realize how many different regulatory schemes and types of incentives and constraints the police have to be responsive to and are responsive to, it's hard to go back to what she presents as really a kind of cramped vision of only, you know, limited constitutional review. And it's not to say that that constitutional review isn't important, but it really is one piece of what makes police departments and individual police officers act the way they do. It's a much bigger assortment of constraints and opportunities.

LESLIE KENDRICK: Yeah. You're kind of a historian of some of the same phenomena that Rachel is talking about.

RISA GOLUBOFF: Yeah.

LESLIE KENDRICK: Do you think there are similarities between the period that you discuss in your book "Vagrant Nation," talking about the evolution toward more constraint with vagrancy laws? Do you think there are lessons from that period for what we're seeing now?

RISA GOLUBOFF: I do. I think there are similarities and I think there are important differences. So the similarities are the recognition of how much power the police have and the ease with which the police can abuse that power and the need for recognition of how to regulate it and constrain it productively, right — how to minimize the harms, as Rachel talks about.

LESLIE KENDRICK: Yeah.

RISA GOLUBOFF: One of the things that I think is really different actually is the calls for transparency and accountability. In the 1960s, you did not have videos of police killings, right, and so the videos have been really critical to raising public awareness of the nature of the problem, or at least of some parts of the problem.

LESLIE KENDRICK: Yeah.

RISA GOLUBOFF: Some of the data that we have today is a result of changes in the '60s. So with stop and frisk, you know, the Supreme Court allows for — in the case of Terry versus Ohio — the police to stop and frisk people, which is short of a search and seizure under the Fourth Amendment. And that creates all sorts of new police discretion, but in many places, it is accompanied by record-keeping of a sort that hadn't existed before. And so in the early 2000s, there were lawsuits that were arguing there was discrimination in stop and frisk that were successful and they had data that they could actually use. And so I think that is something that came out of that moment, that makes this moment look quite a bit different and also has led to calls for that type of

accountability and transparency that weren't part of arguments for criminal justice reform in the 1960s.

BRING THEME MUSIC IN

LESLIE KENDRICK: It's really fascinating how one movement in one moment in time can help to beget another.

RISA GOLUBOFF: I agree.

BRING THEME MUSIC UP, THEN UNDER

RISA GOLUBOFF: That's it for this episode of Common Law. If you'd like to learn more about Rachel Harmon's work on policing the police, visit our website, Common Law Podcast Dot Com. You'll also find all of our previous episodes, links to our Twitter feed and more.

LESLIE KENDRICK: We'll be back in two weeks with Boston University Law School Dean Angela Onwuachi-Willig, talking about the cultural trauma that results from many of the stories of police brutality that we touched on today.

ANGELA ONWUACHI-WILLIG: The acquittal, the legal outcomes are incredibly damaging because it's the government that's supposed to protect you, not protecting you.

LESLIE KENDRICK: We're looking forward to sharing that with you. I'm Leslie Kendrick.

RISA GOLUBOFF: And I'm Risa Goluboff. See you next time.

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CREDITS: Do you enjoy Common Law? If so, please leave us a review on Apple Podcasts, Stitcher — or wherever you listen to the show. That helps other listeners find us. Common Law is a production of the University of Virginia School of Law, and is produced by Emily Richardson-Lorente and Mary Wood.

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