

BRING TEASE MUSIC IN (Soundstripe - Wayfair "Spider Webs")

RISA GOLUBOFF: In 1967, the Supreme Court struck down a law barring interracial marriage in Virginia ...

LESLIE KENDRICK: ... in 1973, it constitutionally protected abortion ...

RISA GOLUBOFF: ... and in 2015, it invalidated laws prohibiting same-sex marriage.

LESLIE KENDRICK: In each case, the court contributed to cultural change ...

RISA GOLUBOFF:... and in each instance, those who opposed that shift found ways to limit, and even punish, the newly legal behavior.

LESLIE KENDRICK: Can decriminalizing conduct help reduce injustice and expand equity ... or are there limits to what law can do?

RISA GOLUBOFF: That's what we're exploring in this episode of Common Law.

FADE MUSIC OUT, AND 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 Columbia University law professor Michael Graetz about the damage economic insecurity is causing American families.

MICHAEL GRAETZ: They no longer have faith that they can maintain good paying jobs and the consequences of that are devastating to families across America.

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

LESLIE KENDRICK: Today, we're talking about the regulation of private lives with New York University law professor Melissa Murray.

RISA GOLUBOFF: Melissa has written extensively on the intersection of criminal law and the private sphere, on regulation, intimacy and equity. She's also co-host of another great law podcast, Strict Scrutiny.

MELISSA MURRAY: Thanks for having me, guys.

RISA GOLUBOFF: Thanks for being here.

LESLIE KENDRICK: We can't wait to talk with you about your work. So, one question I had was traditionally we've thought about criminal law and family law as kind of separate spheres, but you've said there are many ways in which criminal law has really functioned as family law's muscle. Tell us a little bit what you mean by that.

MELISSA MURRAY: You know, historically there've been procedural requirements that you have to fulfill in order to get married and there've been substantive restrictions on marriage. So it's not that you can't marry your cousin, it's that it's actually a crime to do so. It's not that you can't marry three different people; it's a crime to engage in bigamy. So in that sense, criminal law is kind of the muscle behind family law.

RISA GOLUBOFF: And of course, up through 1967, it was a crime in some states to marry a person of a different race. That brings us to your article "*Loving's Legacy: Decriminalization and the Regulation of Sex and Sexuality.*" There you argue that *Loving versus Virginia*, the Supreme Court case that constitutionally protected interracial marriage, was a watershed, sure, but maybe not as transformative as most people think it was. But, first off, tell us a little bit about the Lovings.

BRING MUSIC IN (Audioblocks - "Dream of Beauty")

MELISSA MURRAY: It's a beautiful story. Richard and Mildred Loving grew up together in Caroline County, Virginia, and found themselves in a situation where Mildred was pregnant and they wanted to get married so that their children could be legitimate, but they could not do so in Virginia. So they left the state of Virginia, went to Washington, D.C., where interracial marriages were permitted, they got married, and then they returned to Caroline County to live.

[ABC NEWS REPORT ON LOVING CASE 1967](#)

REPORTER: "Ms. Loving recalls how the ordeal began one night in 1958."

MILDRED LOVING: "The night we were arrested? It was about 2 a.m. and I saw this light, you know, and I woke up and it was the policeman standing beside the bed, and he told us to get up, that we was under arrest."

MELISSA MURRAY: Mildred Loving talks about pointing to the marriage license that they had above their bed. And one of the officers told her, you know, 'That's no good here.'

LESLIE KENDRICK: Yes, under Virginia's so-called "Racial Integrity" laws, it was not only illegal to marry someone of a different race in Virginia, it was illegal to marry them out of state and then LIVE in Virginia.

MELISSA MURRAY: They were actually taken to jail, fingerprinted, put in a cell, they stood trial, they were convicted. Their convictions were upheld on appeal at the Virginia Supreme Court, and the court told them that they had two options: to be formally punished with imprisonment, or alternatively to leave the state and to live elsewhere, at least for 25 years.

RISA GOLUBOFF: So, initially, the Lovings DID move, and I suppose that might have been the end of the story, but five years later, they were desperate to get back to their hometown, right?

FADE MUSIC OUT

MELISSA MURRAY: The Lovings at this point are living in D.C. and she writes to Attorney General Robert Kennedy saying, can you help our family? We want to go back to Virginia to live. We obviously can't do so as long as this law is in place. Robert Kennedy's office passes it on to the ACLU.

RISA GOLUBOFF: Just as an aside, the ACLU had actually been looking for a test case to challenge anti-miscegenation laws.

MELISSA MURRAY: And here comes this letter from Mildred Loving, the Black wife of a white man, so it's sort of reversing the taboo, which is usually Black men and white women. And they have this remarkable last name Loving. What could be a better test case? And so the ACLU takes this case, takes it all the way up to the Supreme Court.

LOVING V. VIRGINIA ORAL ARGUMENT, APRIL 10, 1967

CHIEF JUSTICE EARL WARREN: "*Richard Perry Loving, et al., appellants, versus Virginia.*"

LESLIE KENDRICK: And Philip Hirschkop, one of the ACLU attorneys on the case, argues that anti-miscegenation laws affect much more than just marriage. So this has echoes of what we talked about with Naomi Cahn in our third episode this season, when she explained that — for better or worse — there are more than 1,100 federal benefits that are tied to marriage.

LOVING V. VIRGINIA ORAL ARGUMENT, APRIL 10, 1967

PHILIP J. HIRSCHKOP: "Their children would be declared bastards under many Virginia decisions. They themselves would lose their rights for insurance, social security and numerous other things to which they're entitled. So we strongly urge

the court considering this to consider this basic question, may the state proscribe a marriage between such individuals because of their race and their race alone.”

MELISSA MURRAY: And the Supreme Court strikes down the Virginia miscegenation laws on the grounds that they are animated by white supremacy and in so doing offend the equal protection clause and also offend the basic principle of substantive due process and the right to marry that, although not enumerated in the Constitution is certainly implicit in the Constitution.

BRING MUSIC IN (Soundstripe: Chelsea McGough - “Up Above”)

[ABC NEWS REPORT ON LOVING CASE 1967](#)

REPORTER: “Today the United States Supreme Court handed down a decision. The Lovings’ ordeal is at last over. Richard and Mildred Loving have won the right to be man and wife, father and mother, in the state of Virginia. Anti-miscegenation laws have been declared illegal not only in Virginia, but in all 16 states that have held such statutes.”

RISA GOLUBOFF: It was really a case where the facts were so compelling on top of the fact that, you know, 1967, this is toward the end of the, you know, main stage of the civil rights movement. It's after the '64 Civil Rights Act, the '65 Voting Rights Act. We finally are getting to intimacy.

MELISSA MURRAY: Sure.

RISA GOLUBOFF: But Loving’s not the end of the story, right? It IS a watershed, it’s a major moment, but it's not actually the end of the story.

MELISSA MURRAY: In Loving, the court makes the Lovings who were once outlaws, in-laws, but that doesn't change the way that people on the ground view interracial marriage. And so you see these other places where that social disapprobation of interracial marriage comes up in these unexpected ways.

LESLIE KENDRICK: Right, and one of those ways is through child custody, which you wrote about in your article. What did you find in your research for that piece?

MELISSA MURRAY: You have these cases where white mothers lose custody of their white children when they subsequently remarry or become involved romantically with a Black man. Custody becomes a place where the law can actually exercise this sort of sense of disapprobation for interracial marriages, even at a time where, as a matter of law, they are allowed to exist and are formally legitimate.

FADE MUSIC OUT

RISA GOLUBOFF: So one of the cases you looked at was *Portnoy versus Strasser*, in which a white grandmother sues her own daughter for custody of her white grandchild, at least in part because the mother had remarried to a Black man.

MELISSA MURRAY: The grandparents tried to stop the marriage and failed to do so. And the mother argued that this custody proceeding was basically their way of punishing her for defying them and marrying this man. The grandmother sought custody of the child on the ground that the mother could not properly rear her or maintain her. The mother was a Communist going to all of these activist meetings, where she met the African American husband that she later married. And the trial court agrees with the grandparents that the mother has neglected her child and her child's training, but they don't say it's because she's married this Black man, but rather it is broadly because of the activities in which she is engaged which take her away from the child.

RISA GOLUBOFF: So that case actually happened 15 years before *Loving*, in New York, where interracial marriages were already permitted, but clearly they were not without stigma. After *Loving*, did things get better?

MELISSA MURRAY: Post-*Loving*, prohibitions on interracial marriage had been linked by the court to white supremacy, so they're very careful in sort of avoiding talking about the interracial marriage, but they nonetheless talk about all of these other reasons. So you hear about mothers who are now in subsequent relationships with men of a different race, and it's really about her sexual behavior, like the fact that she's engaged in this relationship and maybe they're not married, or alternatively, she has become so besotted with her paramour that she doesn't care about the children or doesn't care for them as much as she should. She's sort of shirked her responsibilities as a mother. So they're very careful about skirting the question of race, but race shadows, obviously, all of the proceedings in really different ways.

LESLIE KENDRICK: It's really shocking to think about that level of regulation of women's decisions around intimacy. First of all, the state being that invasive, and then the penalty for that being such an enormous one, the loss of someone's children. As you said, you know, this is not criminal law, but it is hard to think of anything as enormous as that. Was this something family law could kind of always do, but now it was doing it kind of on steroids, or do you think that this was something new within the context of family law?

MELISSA MURRAY: So I think family law has always exercised an unusual level of inquiry and scrutiny in the context of custody. This is sort of a place where the law can really get into family lives that, you know, ordinarily, you just don't see, like in intact families, you know, we do what we like for the most part. And unless someone is calling the police on you, like, the law really has nothing to say about how you live your family life, but when you get divorced, you open yourself up to a kind of public scrutiny by the law that you know, is really unparalleled in, in other contexts.

BRING MUSIC IN (Soundstripe - Wild Wonder "Headwind Reprise Instrumental")

MELISSA MURRAY: So, you know, in one case where a Black stepfather seeks to adopt his white stepson, the court openly worries that this child will lose the trappings and privileges of being white by having a father who though obviously not biologically related to him, is nonetheless socially understood to be his father. So, I mean, it's a kind of inquiry that, you know, you really couldn't imagine in other contexts, but the fact of custody gives the law an opening to be perhaps more intrusive than we might imagine.

LESLIE KENDRICK: So in talking about this phenomenon, you use the term “regulatory displacement.” Tell us a little bit what you mean by that.

MELISSA MURRAY: When one regulatory domain closes, the interest in regulation doesn't dissipate or evaporate, it simply moves to another place. So for example, after *Loving*, it's not as though everyone in the South or around the country, is like, ‘You know what? I really like interracial marriage. Like, all of those reservations I had, you know, five minutes ago are gone.’ That's not what happens after *Loving*.

LESLIE KENDRICK: So this is kind of family law developing its own muscle, to some extent — that there's this displacement, once the criminal law can no longer regulate marriage, family law steps in to start to regulate custody, to pass judgment on people for their choices in relationships.

MELISSA MURRAY: And, you know, and it's not just a lesson for family law. I think, you know, we often think of decriminalization as sort of the paradigmatic opportunity for liberalization of a legal regime. And I think what these cases show is that there are limits to what we can do simply by withdrawing the force of criminal law. 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.

FADE MUSIC OUT

RISA GOLUBOFF: So the stepfather case you mentioned occurred back in 1955, but race-based custody cases continued for decades beyond that right? One of the cases you wrote about is *Palmore versus Sidoti*, a 1984 Supreme Court case, which you said was another seemingly watershed case in the realm of interracial relationships. Can you tell us about that?

MELISSA MURRAY: *Palmore* is a case from Florida, where a white mother divorces her white husband, has custody of their white child, and then she becomes involved in a relationship with an African American man and ultimately marries him.

BRING MUSIC IN (Audioblocks - “Singularity”)

MELISSA MURRAY: And the father sues for custody and is given custody by the trial court. And the judge is, you know, very explicit in thinking holistically about the circumstances of the custodial arrangement. He worries that the fact of this interracial

marriage will expose the child to unnecessary teasing at school, social disapprobation — and it is just better for the child's psychological health and physical health, he says, to be with the father. So, you know, the trial court divests the mother of custody.

BRING MUSIC UP, THEN FADE OUT

MELISSA MURRAY: She sues, it gets eventually to the United States Supreme Court.

[PALMORE V SIDOTI - ORAL ARGUMENT, FEB. 22, 1984](#)

JUSTICE BURGER: “Thank you gentlemen the case is submitted. We’ll hear arguments next in *Palmore* against *Sidoti*.”

LESLIE KENDRICK: At this point, the mother, Linda *Palmore*, hasn’t seen her 6-year-old daughter *Melanie* in over a year. *Palmore*’s attorney *Robert Shapiro* argues that there’s “not one scintilla of evidence” that the mother’s interracial marriage has had any adverse effects on the child and he says this ...

[PALMORE V SIDOTI - ORAL ARGUMENT, FEB. 22, 1984](#)

ATTORNEY ROBERT J. SHAPIRO: “Racial hatred and prejudice have no place in our system of law, but when this trial court held that *Melanie*, the child, would suffer social stigmatization as a result of the interracial marriage, he gave the racial bias of few the force of law.”

RISA GOLUBOFF: The opposing attorney *John Hawtrey* seemed to be on shakier ground with the justices. Here he is talking to Justices *John Paul Stevens* and *Sandra Day O’Connor*.

[PALMORE V SIDOTI - ORAL ARGUMENT, FEB. 22, 1984](#)

ATTORNEY JOHN E. HAWTREY: “This is ... we don’t have a case here we have a state action that’s going to throw the mother in jail or fine her. We have to read into ...”

JUSTICE JOHN PAUL STEVENS: “No. All you’re going to do is take her child away.”

ATTORNEY JOHN E. HAWTREY: “We have to read into it that that is a penalty or coercion ...”

JUSTICE SANDRA DAY O’CONNOR: “And that’s not as important, is it? Taking the child away from the mother? Are you suggesting that’s not an important interest?”

MELISSA MURRAY: And the court makes clear that the consideration of an interracial relationship without more is insufficient to constitute a modification of custody.

LESLIE KENDRICK: So this decision in *Palmore versus Sidoti* was pretty resounding — a unanimous decision in favor of the mother, saying the lower courts had permitted an unconstitutional denial of rights under the 14th Amendment. It seems like it might have finally closed the door on the possibility of using race in custody decisions. But you say

that, sure, it may have closed a door, but it left open a window. What do you mean by that?

MELISSA MURRAY: The window is that, in practice, courts have interpreted *Palmore's* language, very narrowly, more narrowly, perhaps than people appreciated. Courts have concluded that although *Palmore* condemns the use of race, it does not preclude entirely the consideration of race. So you have to be a pretty dumb judge to craft a ruling that runs afoul of *Palmore*. I mean, you have to be very explicit. Like I'm making this decision entirely because of race and most courts would not do that.

RISA GOLUBOFF: It's so interesting, right? One of the lessons I think you could take from both the Loving story and the *Palmore* story is really the limitations of courts, right? And the ways in which you look at cases that seem maybe at the moment of their decision, like they're going to be watershed cases and yet they can only do so much, right? And part of that is that the Supreme Court only intervenes in so many cases a year, and then other courts are interpreting what they do, but also because when the court does intervene, it intervenes in a particular case, under particular circumstances, and then as new circumstances come up, what the court says gets narrowed and displaced in various ways. And I think your work shows that we see that not only in this context, but in so many other contexts, right? And so I wonder if you might talk about the other ways that you see this operating.

MELISSA MURRAY: Take, for example, another place where we've seen decriminalization doing a lot of work and that's in the LGBTQ context.

BRING MUSIC IN (Soundstripe: Wild Colors - "Secret Corners")

MELISSA MURRAY: *Lawrence versus Texas* is the paradigmatic case from 2003. It decriminalizes same-sex sodomy.

LESLIE KENDRICK: And that six-three majority opinion was written by Justice Anthony Kennedy.

[LAWRENCE V TEXAS - OPINION ANNOUNCEMENT, JUNE 26, 2003](#)

JUSTICE KENNEDY: "The petitioners are entitled to respect for their private lives. The state cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is the promise of the Constitution that there is a realm of personal liberty which the government may not enter."

MELISSA MURRAY: And as the argument goes, in decriminalizing same-sex sodomy, the court sets a path whereby in time, same-sex marriage is likely to be legitimized and recognized.

RISA GOLUBOFF: Yes, and although the majority opinion makes clear that they're only talking about decriminalizing a private act, not talking about opening the door to same-sex marriage, one of the dissenting justices vehemently disagrees.

MELISSA MURRAY: Justice Scalia pens that very famous dissent in which he's like, what do you mean same-sex marriage is not on the table?

LAWRENCE V TEXAS - OPINION ANNOUNCEMENT, JUNE 26, 2003

JUSTICE SCALIA: "Do not believe it. Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions."

MELISSA MURRAY: I think Justice Scalia is right. What do you mean same-sex marriage is not on the table? That's the way this has always worked. If it's not criminal then it must be marital. If it's not marital, it must be criminal.

FADE MUSIC OUT

LAWRENCE V TEXAS - OPINION ANNOUNCEMENT, JUNE 26, 2003

JUSTICE SCALIA: "What justification could there possibly be for denying the benefits of marriage to homosexual couples exercising what the court in today's opinion calls "the liberty protected by the Constitution."

MELISSA MURRAY: I call this the marriage-crime dichotomy, which is to say that, you know, marriage and crime sort of work in tandem with each other. Something that is not eligible for marriage has often been deemed criminal. And when that criminality is removed, it's usually in allowing whatever the conduct was to be recognized in marriage. And so, you know, many of our most famous cases regarding the regulation of intimacy are actually criminal law cases that I don't think we fully appreciated.

LESLIE KENDRICK: Yes, you also write about the famous 1965 Supreme Court case, *Griswold versus Connecticut*. Estelle Griswold had opened a family planning clinic for married women, and the state said it violated a 19th-century law against contraceptive use.

GRISWOLD V CONNECTICUT - ORAL ARGUMENT, MARCH 29, 1965

ATTORNEY THOMAS EMERSON: "The evidence show that Mrs. Griswold had taken case histories, had discussed methods of contraception with married women who came to the center, and on one occasion, had given contraceptive materials to one of the women."

MELISSA MURRAY: It's a criminal case, like Estelle Griswold goes to jail and gets booked and fingerprinted.

RISA GOLUBOFF: The Court said that violated the constitutional right to privacy. Though the justices disagreed about where exactly that right can be found in the

constitution, the seven to two majority did agree that the states could not ban contraceptive use in marriage.

MELISSA MURRAY: *Griswold* takes the use of contraception by married people and it goes in one fell swoop from being a crime in Connecticut to being something that is part of acceptable marital behavior. In the same way the Lovings go from being outlaws in Virginia to being in-laws.

LESLIE KENDRICK: You also write about the backlash in the wake of another case, *Obergefell versus Hodges*, the 2015 Supreme Court decision that gave constitutional protection to same-sex marriage.

[OBERGEFELL V. HODGES - OPINION ANNOUNCEMENT - JUNE 26, 2015](#)

JUSTICE ROBERTS: “Justice Kennedy has our opinion this morning in Case 14-556, *Obergefell versus Hodges* ...”

LESLIE KENDRICK: In that decision, Justice Kennedy referred back to *Lawrence versus Texas*, so it looks like Justice Scalia might have been right about *Lawrence* opening the door to same-sex marriage.

[OBERGEFELL V. HODGES - OPINION ANNOUNCEMENT - JUNE 26, 2015](#)

JUSTICE KENNEDY: “In *Lawrence versus Texas*, the Court held that private intimacy of same-sex couples cannot be declared a crime, yet it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”

MELISSA MURRAY: We've seen in the aftermath the rise of these religious accommodation claims, which I think you could imagine as another kind of regulatory displacement, you know, for those individuals who may object — whether on religious grounds or just moral grounds — to same-sex marriage, these accommodation claims are essentially an opportunity for them to not only register their displeasure with the change in the status quo, but also to try and reinstate the status quo. Like let's return us to pre-2015, where in my cake shop or in my florist shop, we don't recognize same-sex marriage. And so I think there are lots of different ways you can see this kind of displacement playing out.

BRING MUSIC IN HERE (Soundstripe: Cody Martin - “Revealing Breakthrough”)

LESLIE KENDRICK: You know, just in the LGBTQ context, there's also a whole other constellation of other types of First Amendment claims. So I'm thinking about *Dale versus Boy Scouts* and *Hurley* and the Boston parade, right? There's sort of freedom of speech, compelled speech claims, compelled association claims as well as First Amendment religion claims that are all saying, you know, this conduct isn't illegal anymore, but we don't have to serve these patrons or include these speakers or include these members in our organization, which as you say, does have this kind of hydraulic

effect of, well, this is no longer illegal, but we have rights that permit discrimination of different types.

MELISSA MURRAY: Well, it's not even just like we are exercising our own standalone rights, but our own standalone rights also carry with their exercise a kind of penalization, right? I mean, being kicked out of the Boy Scouts as a troop leader makes clear to the individual that you aren't accepted here, like this is a punishment for living openly in the way that you choose. In the same way refusing to admit gay themed parade floats to your parade also clearly signals that your kind isn't wanted here in the same way that, you know, a prohibition on interracial marriage that was criminal would have done before 1967.

FADE MUSIC OUT HERE

RISA GOLUBOFF: So do you see this as the law's inability to change bias or prejudice or social life, or do you think that you would make a stronger argument that it's not just that the law can't change bias or eliminate it, but even more so, the law creates a backlash, the law engenders it.

MELISSA MURRAY: I think as law professors, we have been conditioned and trained to prioritize legal remedies as, you know, sort of the paradigmatic responses. And I think what these kinds of episodes show is that law is imperfect in dealing with questions of social change. Like, that's what we're actually asking for — not simply a disruption in the legal status quo, but we're asking for a disruption of particular norms on the ground, and that's not a law problem; that's a society problem. And, you know, sometimes law and society work in tandem and there's that kind of feedback loop where what's done in society is then reflected back in law, or what's done in law is then shaping how people interact on the ground. But I think what's really clear here is that it cannot be one or the other. It really has to be both/and. So it was not enough for the court to say that interracial marriage was no longer prohibited, you know, we still see that among Blacks and whites, rates of interracial marriage are actually remarkably low still.

BRING MUSIC IN (Soundstripe: Wild Wonder - "Headwind Instrumental")

RISA GOLUBOFF: One of the things that we've been thinking about a lot this season, and a question that we're asking all of our guests is about the relationship between equality and equity.

MELISSA MURRAY: Yeah.

RISA GOLUBOFF: And I'm curious: in the work that you do and the way that you see the regulation of the family and of intimate relationships, does that linguistic shift make sense to you? Does it resonate? What does it mean to you? How do you think about it?

MELISSA MURRAY: There's obviously a real difference between equality on the one hand and equity. *Roe versus Wade*, for example, could be understood as promoting

equality in that women have greater control over their reproductive capacities, and that will enable them to participate in the body politic in terms of equal citizenship. And that is certainly the way the court has talked about abortion in subsequent cases. But as a matter of equity, having a right to terminate a pregnancy is not the same as being able to do so, right? So it may be the case that reproductive rights can expand gender equality, but they don't necessarily, without more, expand this concept of gender equity.

FADE MUSIC OUT

LESLIE KENDRICK: I'm thinking about *Loving* and, you know, that that's a form of equality, but you see the same sort of issue with inequities. And ironically, those coming up in contexts that are legally considered equity contexts, like the custody determination and the best interest of the child. And these are sort of equitable determinations that are getting made in these really inequitable ways.

MELISSA MURRAY: I think that's exactly right. Maybe the equity question is as important, if not more important than the question of a kind of formal equality. I mean, I think if you ask those women who lost custody of their children, it was important to be permitted to marry their husbands, but at the expense of being divested of custody of your children, being branded the kind of mother who would lose custody of your children, I mean, it's almost like the decision to divest her of custody negates the earlier expression of legal license for the relationship to begin with.

RISA GOLUBOFF: We see a similar dynamic at work in same-sex marriage cases. So, *Obergefell's* behind us, but that doesn't mean there isn't significant resistance to the idea that same-sex couples should be provided all of the same benefits that heterosexual spouses have always had — like adoption rights, for example. And we see this in *Fulton versus City of Philadelphia*, which is a current Supreme Court case that will decide whether a Catholic foster care placement service can refuse to work with same-sex parents. So how do you see that fitting in?

MELISSA MURRAY: It's basically another follow-on to the *Masterpiece Cakeshop* question. It is also, I think, another example of this kind of displacement, because if you allow Catholic charities to exclude same-sex couples as prospective foster parents, it's not the same, obviously as putting someone in jail for their conduct or preventing someone from being married, but it clearly signals a kind of censure that the individual would understand to be a stigmatic mark. And so in that sense, it is a kind of inequity that exists in this public policy landscape that has formally acknowledged equality.

RISA GOLUBOFF: So it brings us right back to the beginning, right, and the relationship between *Loving* and those custody cases that you were talking about. You get to marry and yet the disapprobation continues and gets displaced into these other regimes.

MELISSA MURRAY: I should have written an amicus brief, but I was in the middle of a pandemic and teaching Zoom school and podcasting. And I couldn't figure out how to do it.

LESLIE KENDRICK: Parenting and podcasting.

RISA GOLUBOFF: You just had a little bit to do.

LESLIE KENDRICK: All those things.

RISA GOLUBOFF: Well, this has been a pleasure, Melissa. Thank you so much for joining us.

MELISSA MURRAY: Thanks for having me.

LESLIE KENDRICK: Take care!

MELISSA MURRAY: You too! Bye.

BRING THEME MUSIC IN

LESLIE KENDRICK: That was family law expert Melissa Murray of the New York University School of Law.

BRING THEME MUSIC UP, THEN UNDER

RISA GOLUBOFF: So this idea, Leslie, that Melissa talks about, about regulatory displacement ...

LESLIE KENDRICK: Yes.

RISA GOLUBOFF: That's something that I've written about in my work on vagrancy laws, because the key case in the Supreme Court that struck down vagrancy laws, a case called *Papacristou v. City of Jacksonville* in 1972, is actually about this precise thing. Two white women and two Black men who were out on the town in 1969 in Jacksonville, Florida. The police stop them. They clearly stop them because they are violating norms against interracial dating, and they arrest them for vagrancy because there's not another law for them to arrest them for. So it's still within the criminal law, but it's displacement from the primary conduct itself to this other very vague law that they can use to get at anything they want to, and they turn it to continuing to police interracial sexual intimacy.

LESLIE KENDRICK: Yeah, that's really interesting because that does suggest that kind of displacement, where you're going to find some sort of pretext. And that, you know, that raises questions about racial profiling and that sort of thing where, driving while Black, you know, there's still racial animus that's motivating the way that the law is

enforced in the same way that in *Papacristou*, yeah, the vagrancy law is sitting there on the books, but it's being used in a discriminatory way here and in a pretextual way to get at conduct that the enforcers are disapproving of. And it does seem like that type of enforcement of laws is very hard to eradicate.

RISA GOLUBOFF: It is, partly because you can't eradicate all of the levers and so long as there continues to be bias or prejudice in society, it's going to find outlets. And one of the things I was thinking about in the conversation with Melissa, was our discussion with Randy Kennedy about optimism and pessimism. And there's a way in which the conversation that we just had and this idea of a hydraulic pressure is really depressing. It's really pessimistic. It's a kind of acknowledgement of the law's inability really to get at the underlying relationships. And so what we're seeing is evidence of the continuity of prejudice, not just in race, but in gender, and LGBTQ, right, and all these different places where the law is attempting to intervene into social relationships and I dare say, change attitudes, and failing to do so. And so these displacements that we're seeing are evidence of that failure and are evidence of just how sticky and deeply embedded these prejudices and these biases really are.

LESLIE KENDRICK: I think all of that is right and at the same time, I'm thinking of something a little bit more hopeful that ...

RISA GOLUBOFF: Good! Good!

LESLIE KENDRICK: ... that seems related. Yes! Yes!

RISA GOLUBOFF: Please!

LESLIE KENDRICK: So one thing I think of is what Randall Kennedy said about Thurgood Marshall, which is for a long part of his career, *Plessy versus Ferguson* was the lead case that he had to start with in any argument that he was making. And it just HAS to be that it is a better state of affairs when *Plessy versus Ferguson* is no longer the lead case that you have to start any argument about equal protection with.

RISA GOLUBOFF: Yes.

LESLIE KENDRICK: You know, there is some power in legal change.

RISA GOLUBOFF: And I think Melissa Murray would agree, right? She would say, yes, these custody cases that you see after *Loving* are still showing disapprobation, and they're still punishing women in various ways — and men — for violating racial, sexual taboos. At the same time, it's not criminal and they're not being put into jail. And so, you know, I think you can both recognize the progress that's being made and recognize that it's not full and it's not whole, and it's not over. And that, you know, it's an iterative process of changing equilibriums and not to say that it's always moving in progressive directions either, but that you can both identify where real change is happening and

where the law continues to either reinforce existing prejudice or struggle against it ineffectively. And I think both things can simultaneously be true.

BRING THEME MUSIC UP, THEN UNDER

LESLIE KENDRICK: That's it for this episode of Common Law. If you'd like to learn more about Melissa Murray's work on decriminalization, visit our website, Common Law Podcast dot com. You'll also find all of our previous episodes, links to our Twitter feed and more.

RISA GOLUBOFF: We'll be back in two weeks with UVA's own Rachel Harmon, an expert on policing the police.

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!

RISA GOLUBOFF: We're excited to share that with you. I'm Risa Goluboff.

LESLIE KENDRICK: And I'm Leslie Kendrick. See you next time!

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.