

Joyce Vance ([00:09](#)):

Welcome back #SistersInLaw, I'm Joyce Vance. After last week's talk about grand juries, we've received a lot of great feedback, and more questions about the processes that keep our legal system running. With the trial of Derek Chauvin starting this week in Minneapolis, we'll be taking an in depth look at how jury selection works. We'll also explain what's going on in states regarding the rights of transgender people, and then we'll celebrate Merrick Garland's confirmation as Attorney General. And as usual we'll be answering some of your questions at the end of the show. Before we get started this week, we are going to start with some amazing news. Kim, why don't you tell us about the dress?

Kimberly Atkins ([00:58](#)):

So, I don't know how amazing the news is, but I decided to design my own dress for my wedding. I had been going back and forth about whether to buy one or to make one, and I was putting a lot of pressure on myself, and I had accumulated some really beautiful silk over the course of the pandemic and also some really lovely lace, and lace is normally not my style but I really like this lace. And so I have actually begun draping and cutting and pinning together what will ultimately be what I wear. But I have to get it together, I had to make a decision because the wedding is the month after next, but I'm inspired by Joyce and her creativity with her knitting and so I wanted to get in on it. I hope it lives up to your expectation.

Joyce Vance ([01:43](#)):

I love it that the big news isn't that Kim's getting married and that there's going to be a wedding and it's in May, but it's the dress, that we have to focus on the dress. But, no, it sounds very beautiful and what a nice gesture, what a fun thing to do to make your own dress for the wedding.

Barbara McQuade ([01:58](#)):

I hope all our listeners know that Kim is a very good designer and actually has available some of her designs online.

Kimberly Atkins ([02:07](#)):

You're very kind, you're very kind. Thank you, yes, it's something I've been doing on the side for about 10 years and so, yeah, some weeks later when we do an episode, if I'm tearing my hair out, you can remind me whether or not this was a good idea for me to do this.

Barbara McQuade ([02:21](#)):

What is your design line called, Kim?

Kimberly Atkins ([02:23](#)):

It's Kim Elleen, it's my first and middle name, E-L-L-E-E-N. I'm relaunching, so it's not up at this very moment, I sort of closed it down during the pandemic, but I'm relaunching soon, so keep an eye out for that.

Barbara McQuade ([02:38](#)):

All right, well, let's get into it. As Joyce said, with the start of the trial of Derek Chauvin and the other officers in the death of George Floyd, we thought we would talk a little bit about jury selection and how that works. Who serves on a jury, how they're selected, and some of the strategies that lawyers use in

selecting a jury. And while we're talking about this, Kim, you told us that you've actually served on juries and been a foreperson before, so maybe you can start by telling us how people get selected to serve on a jury.

Kimberly Atkins ([03:06](#)):

Yeah, I mean, I'm a former litigator but I think I've had just as much actual courtroom experience with juries actually being on juries as I have been in court arguing to juries. There was a period of time that I served in quick succession on three juries, two in Boston and one in New York City. And the first was when I was still a law student at Boston University and I got called for jury duty at Roxbury District Court in Boston, I'll never forget this. And I was thinking, there's no way they're going to seat me, right? I'm a law student. In Boston, landlords don't even like renting apartments to law students because they're so known to try to practice the trade before they're licensed and try to sue everybody and think they know more about the law than they actually do, so I thought that's going to totally get me kicked off this jury.

And we went through and brought the jury pool in, and we were questioned by the judge. And so then the judge starts calling the names of jurors, "Juror number seven, you're dismissed, juror number 14, you're dismissed." And I thought, okay, I'm out of here. And he called my number, and I start picking up my purse and thinking, okay, this is done. And he said, "Go sit in seat number one." And so I get up and I move seats. And he says, "You are the foreperson and this is the jury", and I thought, what? This can't be true. So, yeah, that was my first and a really important lesson about juries, it was a criminal case, it was a case of drug possession with the intent to distribute.

And what I remember most about it was, A, that the prosecution didn't make its case, they just didn't have what they needed from the police, from the investigators, to make the elements of the case. And it was definitely for a charge for intent to distribute, it wasn't just mere possession, and maybe that would've made a difference. But that wasn't it. But we go in to deliberate and I was talking to the other jurors and we went through and deliberated, and then we took a vote and it was 11 to one to acquit, one person voting guilty, 11 voting not guilty. And so we deliberated some more, I'm trying to be thorough and make sure I'm doing my job correctly. Again, 11 to one.

And it seemed strange because it seemed that we were in agreement. But I talked to the one woman, she was an older woman, and I said, "Well, you realize that the prosecution has the burden of making this case", she says, "Yes." And I said, "Do you think that the prosecution made the case?" She goes, "No." And I said, "Okay, then you have to vote not guilty", and she goes, "No, but I think he did it." And you're not supposed to bring in, you should know, you're not supposed to consider anything other than the evidence presented to you at trial, right? And I felt like I was breaking the rules but I turned into a little mini lawyer and said, "Look, that's not how it works, we are done here. The burden is on the prosecution. If you say that they didn't make it, we have to go. You may believe that he actually did it but that's not what we're here to do and so I'm going to sign this jury form now and notify the court officer that we are done and this trial is over."

But, yeah, that was the first of several times I was on a jury, and also served as the foreperson. I don't think I was quite as pushy subsequently, but I also thought, I was a lawyer both of those times, a practicing lawyer, and I thought if anybody that particularly the prosecution might want to not have me on those juries, but I was seated every time. It was really incredible. But like I said, it was a great lesson, and when I became a litigator, understanding what the people on the other side were feeling.

Barbara McQuade ([06:51](#)):

And it's exactly for that reason that I've always been reluctant to have lawyers on my juries or experts in subjects that might come up in the case, because I didn't want all the other jurors to just sort of rely on that person. That person becomes kind of the super jury, it becomes a jury of one because people are likely to defer to the person with expertise. Would you say, Kim, based on your experience you have more or less confidence in the justice that is served by juries?

Kimberly Atkins ([07:21](#)):

I have more respect for jurors, because that's a tough job, especially if the case is complex and it's hard to keep your concentration in a courtroom, it's not a great environment. And it's so important in criminal trials, somebody's liberty is at stake, and it's so important. So I have a lot of respect for juries, and understanding that it is really, really hard and understanding that you can put on a good case. I mean, I was a civil litigator, not criminal, but I know that there were times that we put on a really good case and we should've won a trial and we lost for reasons that it was clear the jury didn't like my client, or it was something else going on that distracted them. And so you know that it is an imperfect system, it's an important system for someone to be tried by a jury of their peers but it certainly doesn't always work the way it's intended.

Barbara McQuade ([08:10](#)):

Yeah, well, and there's the whole concept of jury nullification, right? Where, as you say, even if the evidence looks like it makes [inaudible 00:08:17] case, that's a power that jurors have to say, "We don't think that justice is served here by bringing a guilty verdict", and so it is a power that we give to jurors. All right, so, say you get your summons in the mail and it asks you to come show up to court, to appear for jury duty, and there you are. Jill, can you take us through the next step. The lawyers go through a process for jury selection, and just to be multicultural here, I'll ask Joyce what they call it in Alabama, what they call that selection process in Alabama?

Joyce Vance ([08:49](#)):

We call it voir dire.

Barbara McQuade ([08:51](#)):

Voir dire, or to translate for the Northerners, voir dire. Tomato, tomato. But maybe, Jill-

Kimberly Atkins ([08:59](#)):

[crosstalk 00:08:59] I took French so I say voir dire.

Joyce Vance ([09:02](#)):

It's very elegant, very elegant.

Barbara McQuade ([09:04](#)):

But I think it's Latin for something like to speak the truth, right? It's the process where prospective jurors are asked some questions to determine whether they might have some bias in this case, but, Jill, maybe you can talk about the process that lawyers go through in that voir dire process to select jurors.

Jill Wine-Banks ([09:19](#)):

Sure, and I think it actually means to see and to speak, so that's my French interpretation, but, Kim, maybe you can tell me for sure since you speak French.

Kimberly Atkins ([09:29](#)):

[French 00:09:29].

Jill Wine-Banks ([09:29](#)):

Okay, so, it is. Yes, so the next thing that happens after you get the summons and you show up at court is, at least in many jurisdictions, you fill out some kind of basic background information and then you're called in in panels. And the lawyers will ask questions. In some cases, the judge may even ask questions, and sometimes only the judge will ask questions. But the questions are basically to determine whether you can decide the case based on the information that's presented in the courtroom that even if you know something about the case, that you can set that aside and be guided only by what's presented as admissible evidence in the court.

And they will ask all kinds of questions depending on the type of case. And then, after they hear your answers, they can move to strike or accept. They can strike you for cause, which means you've said something like, "I cannot be unbiased in this case, I have a firm opinion of the guilt", and then you'll be excused. Or it could be something else that they think has a conflict of interest or that you have a relationship in a way to someone involved in the case. That would be cause.

Then there are what's called peremptory challenges, which are just, "I as the trial lawyer decide you don't fit into my strategy and I'm going to strike you. I don't have to say why", you have a limited number of those available in a case. In the Derek Chauvin case, the defense has more than the prosecution, and they have more than is usually granted, but there's an assigned number and you have to dole those out to make sure that you don't run out of peremptories before the jury pool has come before you. And the peremptories cannot be used for illegal reasons, like you cannot, in this case, strike all African American potential jurors because you think they won't be good.

I have one case that fits something you said, Barbara, which is the chief of police was in the jury pool, which of course I as a prosecutor was like, "Yeah, that's good." And I was shocked when he wasn't struck from the jury by the defense. And then the jury hung. And he was the one who caused the hung jury, he was actually against conviction. And so you never really can predict, although normally you would say the chief of police would be great for a prosecutor to have on the team. And I agree with what you said, Barbara, about you don't want to have normally someone who's an expert, because then if you don't win that one juror, you're lost. And you want to make sure that the jury is fully even and can all express their opinions. So that's what peremptory and for cause is. So that would be the next step.

Barbara McQuade ([12:35](#)):

Yeah, and the kinds of people that I would strike mostly were people I perceived didn't want to be there, because I wanted to make sure jurors were going to fully deliberate. And it might take some time to do that. But you would sometimes get the sense in their answers that people would say things like, "I own a business", or, "I care for small children", and for those people I didn't want them to be distracted. So those were people I might use a peremptory challenge on. One juror who made it through that was very surprising to me occurred when I was a law clerk, my first job out of law school, for a judge in Detroit.

And word got around the building that in one of the courtrooms, on a jury, one of the jurors was Bob Seger, the rockstar. And this was in the early '90s, he was still a rockstar then, so we all took turns going into the courtroom just to watch Bob Seger sitting as a juror. And we'd come out very excited and

say, "I saw Bob Seger", "Really, what was he doing?" "He was watching trial." "Wow." So we considered that very exciting, a brush with fame.

Jill Wine-Banks ([13:35](#)):

So, I just want to say one thing about what Kim said, which is every time I have been in a jury pool, I am excused. I have wanted to be on a jury, I thought it would be fascinating to be able to be on the jury. And sometimes when I sign in, the clerk will look at my form and look at it and go, "Former prosecutor, former defense lawyer, former this, former that. You may as well go home now because no one will put you on a jury." And I have begged to stay and they say, "It's ridiculous, please leave."

Barbara McQuade ([14:06](#)):

Yeah, same. I've been excused too. But, Joyce, I think you got close once, right? You got in the room, into the venire, and were excused?

Joyce Vance ([14:14](#)):

I was in the venire in a state case, and it was a big venire, maybe 80 people and the state court judge who I knew pretty well looks out at the room, looks at me and says, "Well, Mrs. Vance, I don't suppose you'll be with us here for very long." And I had been very low key in the room with the other jurors, in fact I was just knitting and keeping to myself. So when he said that, I think that they just all assumed that he knew who I was maybe because of some criminal association, and the people on either side of me sort of shrank away from me, I felt really bad. And I was excused from participating in the jury very promptly.

Barbara McQuade ([14:56](#)):

Well, why don't we pick up on what Jill was talking about. She mentioned that you can use peremptory challenges to strike jurors, as I said, for maybe people who don't want to be there. But you can't use it in a discriminatory way. And there's some case law about that, maybe you can talk about that.

Joyce Vance ([15:11](#)):

There is, there's a 1986 Supreme Court state called Batson that every lawyer who tries jury cases knows about. And Batson essentially holds that prosecutors cannot strike jurors because of their race. You can't discriminate against a juror because they're Black. It has since been expanded to include gender, beyond that there's sort of a lot of open questions. But it is well established that, for instance, if the defendant is Black and believes that the prosecution is striking Black jurors not for any reason other than their race, the defense can challenge those strikes and force the prosecutor to account for their behavior. And in some cases, that can even be reversible error on appeal after a conviction, if the prosecutor in fact was discriminating.

Kimberly Atkins ([16:06](#)):

Yeah, I mean, I just want to jump in on that because we hear a lot about Batson challenges and how important they are and the fact that jurors can't be struck for their race, but what Batson actually holds in real life is that when a juror is struck, and the opposing attorney raises a Batson objection saying that it was because of their race, what the other attorney has to do is essentially put forth another reason. And because there is such broad leniency when it comes to peremptory strikes, a lot of times you will

say, "Well, no, it's because he was wearing a red shirt, and I really don't think that someone with a red shirt is the kind of juror that we need on this."

And in some cases the judge will say, "Well, all right, that's good with me." And, yes, on appeal that could be an appealable grounds to overturn, as Joyce points out, but I think that law in itself does not give the protections, the full protections, against the practice of striking Black jurors, particularly in criminal trials that involve Black defendants, that happens not just in the South. I mean, the case in Batson, I believe that was out of Kentucky.

Joyce Vance ([17:22](#)):

Kentucky.

Kimberly Atkins ([17:23](#)):

But it happens all across the country, this practice, and it was really prevalent. Which is evidence of how prevalent it was was put forth in that Batson case, and so I have mixed feelings about Batson, I think it doesn't set the standard strongly enough for someone trying to strike someone to prove that that was not the actual reason.

Joyce Vance ([17:47](#)):

One thing I will say in support of Batson is that the Supreme Court takes it seriously, and there's actually a three step process that happens. First, if it's the defense lawyer objecting to the strike, they have to put on what's called a prima facie case for why it's discriminatory. That's a pretty low threshold. And then as Kim says, the prosecution can come back and they suggest a non-discriminatory reason, and the ultimate burden falls on the defense lawyer to establish that the reason that the prosecution has set forward is pretextual, that it's actually a cover up for discrimination.

And so, while I take your point, Kim, I think something that doesn't happen here that should happen more is that lawyers aren't prepared to vigorously litigate Batson challenges and to preserve the record so that if there is a problem, it can be taken up on appeal. And we have an example out of Mississippi that I think is a tragic example, a case involving a man called Curtis Flowers, he gets convicted six times. The case goes up on appeal every time, sometimes it gets reversed, it's just an absolute nightmare, and he's accused of killing four people. It's a capital case. And on the last appeal, it comes to light that over all of these trials, 41 out of 42 times the prosecution has struck Black jurors.

And in the case under consideration, Flowers is convicted by a jury that has only one African American on it. He lives in an area where the population mix is roughly 50-50. And even the Supreme Court has had too much and they say this is an absolute violation, they reverse the conviction, and the State of Mississippi finally decides it's not going to put him on trial again. So one thing, Kim, that I think really weighs in favor of the argument that you're making is this is a torturous process. He's in prison for a long time. He loses many years in his life before he's ultimately released, and perhaps we do need stronger standards and lawyers need to be better versed in how to deal with these issues.

Jill Wine-Banks ([20:06](#)):

This week's episode is sponsored by Audible, the number one source of spoken word entertainment, with the largest audiobooks collection out there. I'm listening to Trevor Noah's Born A Crime right now, and find it absolutely wonderful on Audible. It couldn't be better reading it and of course I feel like I also have to mention that everyone should listen to The Watergate Girl on Audible. Joyce, what are you listening to now?

Joyce Vance ([20:34](#)):

Well, right now I'm actually listening to a book that I've read before, it's our MSNBC colleague Paul Butler's book Chokehold. As issues about police violence and police reform are important right now, both for us in our public conversations and for me as I teach, I wanted to have the opportunity to listen to Paul's really excellent book which I highly recommend again. But you all know that I'm really a fiction listener, this is how I think get my guilty pleasure relaxation time, and I'll tell you all, I had this great Audible moment, it's been many years now.

But I was on a flight that was delayed, and I was out of stuff to read, and I was out of knitting which is really unusual for me. And I realized that because I had Audible, I could just in the moment download a book and I would have something to listen to and I have to say, that changed my life. I love the notion that I will never run out.

Barbara McQuade ([21:29](#)):

Well, I'm also reading Born A Crime, Jill, good taste. One of the things that I think is so fun about the book is it's read by Trevor Noah himself, and so he talks about his upbringing in South Africa, he does voices of his mother and other people in his life, and I think it's just terrific. He's a comedian, so you expect him to be funny and he is, but, boy, he is also very thoughtful about issues of race and his descriptions of growing up, Born A Crime is the fact that he was the product of an interracial relationship, which was illegal at the time in South Africa. Such an interesting thing to listen to, a racist structure that's different from the one that we all know in the United States. Really fascinating.

Kimberly Atkins ([22:13](#)):

Yeah, I love Audible too, I've been a fan for a long time. I am actually listening to The Watergate Girl, I'm not just saying that because Jill's here, that's actually the truth. But one of my favorite things about Audible, honestly, isn't even a book, it's the fact that a lot of news organizations, newspapers, will have their daily digests of their front pages and stories that are in the paper that morning. And so when I'm getting ready, if I'm walking my dog or if I have an early morning TV hit and I have to put makeup on and stuff and my hands and eyes are busy, it's a really, really great tool to be able to hear the headlines, know what's going on and sort of get a jump on the news of the day by having it read to you.

Barbara McQuade ([22:57](#)):

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Jill Wine-Banks ([23:18](#)):

And for following up on what Kim said, it also means that you don't wake your husband up while you're listening. So you can even go to bed in the same bed and listen without waking him up.

Joyce Vance ([23:30](#)):

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Kimberly Atkins ([23:47](#)):

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Jill Wine-Banks ([24:12](#)):

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Barbara McQuade ([24:21](#)):

All right, well maybe we can move onto our next topic.

Kimberly Atkins ([24:23](#)):

Yes, and it's a weighty one. Right now there is a lot happening at both the state and federal level when it comes to LGBTQ rights. State's like Mississippi are passing laws that essentially take rights away from LGBTQ folks, the law in Mississippi would, for example, ban transgender athletes from participating in sports that are consistent with their gender identification. And this feels like a very different move in direction in the contrary than what we have seen, what we saw leading up to the Supreme Court ruling, for example, in same sex marriage. We saw a really strong support and growing support for granting more rights for LGBTQ folks.

In fact, I wrote a column about this that was in The Globe today, and I note that 83% of Americans overall support non-discrimination laws that protect gay, lesbian, bisexual and transgender people from discrimination, and that's a majority of Democrats, a majority of Republicans, a majority of independents. So it's not and it shouldn't be a partisan issue, but it's being used as such, and so in the Senate they are now considering the House passed Equality Act, which would essentially extend the current federal law protections to LGBTQ of the laws that are already in place that ban discrimination on the basis of things like race or gender or religion and other protected categories.

And the number one, and I want to get you guys take on this, because the number one objection that people like Senator Mitt Romney have to this bill is that they say that it tramples on religious liberty. In my piece I point out that there are few rights that are better protected by the Constitution and laws on the federal and state level than the right to worship as one sees fit, to practice as they see fit, and an inability for the government to get on the way of people's practice of religion. That's very well protected and I think that's very much a false flag here.

But that's this tension that's being created in the political venue saying that these laws make it difficult for people, will force people to do things that are against their religion. I will note that the Equality Act specifically keeps in place an exemption that already exists in state law for employers that will not make them do any such thing. They can decide they will only hire people who are within their religion, they can deny housing to people who don't worship and believe that they do, there's a lot of federal protection built in that this law doesn't even take away. But we're still seeing that tension, and I want to get you all's take about where you think this is going, Joyce, what do you think?

Joyce Vance ([27:18](#)):

Well, I tend to agree with you, Kim. This is a very unfortunate development, it's in many ways a backlash to Obergefell, the marriage equality case. But I think it signifies something else, and it's an effort to drive

a wedge between people, something that sets up a dichotomy, us versus them. Religious rights versus gay people. And it's another one of those moments of cultural divisiveness that politicizes issues in a really unnecessary way. So I'll just tell you all briefly, I wrote a piece this week for Café about a bill that is making its way through the Alabama legislature.

It is almost certain to pass, and what it does is it denies medical care to transgender people under the age of 19, even if both they and their parents want it, purely because they're transgender. And there was a moment when the bill was being discussed in the legislature where a dad who's a police officer in a small Alabama town testified about how when his 16 year old came out, this medical care was life saving for the child. And he says to the legislature, which will criminalize the provision of medical care when the act passes, "Please don't make me as a police officer go out and put handcuffs on the people who saved my child's life."

It seems to me that this is not about religion. This is about people, this is about respect, this is about fundamental civil rights, and I hope by taking this up we can change the conversation a little bit.

Barbara McQuade ([28:59](#)):

Yeah, here in Michigan there's a similar bill that has been put forth, Kim, to the one that you mentioned in Mississippi about requiring high school athletes to play on teams that match their birth gender, and using birth certificates to prove it. And it's being touted as a pro-girls' sports bill. But to me it seems that it is very much a solution in search of a problem. I am not aware that we have all of these transgender girls taking the slots of other girls on sports teams, and I just think that's the wrong way to think about it, right? I mean, girls are girls whether they're born girls or they're transgender girls, and I think that it feels to me that religion is being used as a pretext.

Kimberly Atkins ([29:49](#)):

I think that the focus on things like sports and public accommodations helps to push forward this really tired trope that a lot of people and religious groups who oppose this law keep bringing up is that, "Oh, this law would force you to allow a man to dress up in a dress and go into a women's room and menace everyone in there." First of all, that doesn't happen, can we just be really clear about this?

Barbara McQuade ([30:15](#)):

It always comes down to bathrooms, doesn't it? People are freaked out about the bathroom.

Kimberly Atkins ([30:16](#)):

Exactly, it's always focused on bathrooms, and this is not a problem. We don't see a lot of men dressing up as women and menacing girls and women in women's rooms. And, honestly, trans folks have been in this world for a long time and they've been using the bathroom, but one thing that is important if you're thinking about going to the bathroom, is that a friend of mine once explained to me just what a horrifying experience it could be as a trans woman to try to use a public restroom where you could face harassment, where you could be chided. If you're in a popular restaurant where, as women know, we often have to wait in line to get into a bathroom.

And as they're standing there, they're so self conscious because they have been the victim of harassment, threats, really horrific treatment in public to the point that my friend said when she goes out for dinner with her friends, for the longest time she wouldn't drink anything, because she just didn't want to go through that. She couldn't even relieve herself in public. We need laws to protect people, not

laws to protect against some non-existent threat of a man dressing up in order to do that. So it's really a disingenuous argument, I find.

Jill Wine-Banks ([31:35](#)):

It also seems like if that's the argument, that it is not only a silly argument, but that it's the best they can do, it makes you realize that they don't have a good argument against it. And bathrooms was one of the big objections to ERA back in the day, and so it is, again, one of those things. But my question is why are politicians so far behind the public? Kim, you just said, 83% of Americans are in favor of equality laws. What's wrong with the politicians who are trying to pass these horrendous laws and stop the rights? So, we need to look at where that diversion comes from.

Kimberly Atkins ([32:21](#)):

And I want to underscore here, because any time I write about religious rights my inbox is just filled with people who are saying that I came up from the devil to try to deliver an anti-religious message. I am myself a person of faith, I do believe that faith is important, I think that it is a wonderful and very important thing that the First Amendment and federal laws give such strong protection to religious rights. In fact, the very law that the Equality Act will seek to expand to apply to LGBTQ folks also protects you from discrimination on the basis of your religion, and that's important.

But the First Amendment already gives such broad protection, the legal part of this is so important, such broad protection to everybody's ability to practice their religion as they see fit. Federal laws give such broad protection, and although I think part of the reason that this is happening, Jill, this pushback against this is because of these cultural wars. They're wars that make it so that churches are purposely gathering in the middle of a pandemic just because they want to file that legal challenge against their Democratic local official to try to push back against COVID restrictions on the number of people who can gather.

That's a great cultural inflection point, and it's terrible, because not only is it not really about what freedom of religion is about, but it puts people in danger. But that's the climate that we're in, where people think that that is a positive thing, that that helps them. And I think that's why it's so important to me to say, "No, the law already protects you." Some people may think that this law might trample on religious rights, I think it's important to explain that it doesn't.

Joyce Vance ([34:12](#)):

Well, and this effort to divide us among religious lines, it's both reprehensible but I think it's ultimately doomed to fail, because so many people will see through this. And I'm reminded that during the Obama administration when Vanita Gupta, who is now the nominee to be the Associate Attorney General, ran the civil rights division. She commissioned a series of round tables that were held across the country on issues of religious freedom, and I co-chaired one with her in Birmingham-

Barbara McQuade ([34:42](#)):

[crosstalk 00:34:42] Yeah, same in Detroit.

Joyce Vance ([34:42](#)):

On religious freedom in the workplace. That's right, I had forgotten you did that too, Barb. It was an uplifting experience, we had people around the table from a lot of different faiths. We have a very diverse community down here. So we had Muslims and Sikhs and Hindus and Jews and a whole bunch of

different varieties of Christians sitting around the table. We also had representatives from a community that described itself as people who have not been blessed with the gift of faith. And so it was a very robust conversation.

What I heard was people talking about the support they felt from the diverse religious community in the workplace, and that when there were issues, for instance a workplace where there was Christian prayer at lunch or something like that, that folks were very open to working out a solution among themselves. So my optimistic hope here is that people will see through efforts to divide us that are nothing more than political tricks, and that we'll be our best selves.

Barbara McQuade ([35:40](#)):

You know, one case that I think mucks up the debate a little bit, and might be the kind of thing that gives Mitt Romney cover for these kinds of arguments is that case that the Supreme Court decided a couple of years ago called Masterpiece Cakeshop. You may recall, this was a case brought by two men who were getting married, and they went to a fancy cake shop and asked them to bake them a wedding cake, and the cake shop refused because they were gay and said, "We don't make cakes for gay weddings, as a matter of our religious rights, our religious freedom." And this is a store that is otherwise open to the public.

And the Colorado Civil Rights Commission said, "No, you cannot deny them, you have violated the Colorado civil rights laws", and that case went all the way to the Supreme Court. And the court held in favor of the Masterpiece Cakeshop, but what's really important is the basis of their ruling because I think people in our soundbite world use it to say, "See, you get to discriminate against people based on their sexual orientation." But in fact, what they found there was the reason that it was protected as their religious rights was because it was a creative expression, and the Supreme Court, I don't know, bought this argument that if you are expressing your religious faith in a creative way, that is different from other services.

In other words, they weren't just selling widgets to people, everybody who comes in the door, this man said he was expressing his religious faith through the baking of cakes. They also said that the Civil Rights Commission in Colorado showed hostility toward the bake shop in their decision. And so I think when you look at it at that level, it is not simply that we all have a right to simply discriminate against people based on their sexual orientation, it should be contained to its facts. I also believe that that case will one day be looked at the way we today look at cases like Plessy v. Ferguson.

Kimberly Atkins ([37:38](#)):

I agree.

Barbara McQuade ([37:39](#)):

Separate but equal, and say, "Oh my gosh, what lengths did they go to to try to preserve this ability to deny a cake because the names were Charlie and Dave instead of Charlie and Dawn."

Kimberly Atkins ([37:50](#)):

I mean, it really is a tortured decision, and I've been thinking a lot. I'm not going to buy a cake for my wedding, if I did, I would want to go to a shop that serves everyone. But it makes me think that not far away from here, a street that was formerly named for a Confederate general is going to be called Loving, because very recently it would have been illegal for my fiancée and I to do what we're about to do the

month after next. So it tells you how tenuous these protections are and how important it is for lawmakers and the courts to act to protect them.

Jill Wine-Banks ([38:28](#)):

So, what do you mean you're not ordering a cake, Kim?

Kimberly Atkins ([38:35](#)):

I'm not a cake person, I'm not ordering-

Barbara McQuade ([38:35](#)):

[crosstalk 00:38:35] Ice cream, are you going with ice cream? I'd go with ice cream.

Kimberly Atkins ([38:36](#)):

I'm not ordering flowers either, I'm not that kind of bride. The first thing I do was buy shoes, that's the kind of bride I am, I care about the shoes.

Barbara McQuade ([38:48](#)):

You're doing it all wrong.

Joyce Vance ([38:48](#)):

You should do exactly what makes you happy, whatever makes you happy is the right way to do it.

Barbara McQuade ([38:48](#)):

Can I have your cake?

Jill Wine-Banks ([38:53](#)):

I had chocolate cake and it made me happy.

Kimberly Atkins ([38:57](#)):

I just don't want to pick up anything or have to worry about it being delivered, that's just hassle.

Barbara McQuade ([39:01](#)):

You're doing it wrong.

Joyce Vance ([39:02](#)):

We had multiple cakes, the cakes were the best part.

Kimberly Atkins ([39:06](#)):

Well, I'll have the reception in 2022, so I'll have cakes there, I'll make sure you all have cake.

Joyce Vance ([39:13](#)):

It's a date.

Barbara McQuade ([39:13](#)):

All right, that's all I care about, do I get my cake, that's all I really care about.

Jill Wine-Banks ([39:19](#)):

So maybe we should look at some very good news besides Kim's wedding, which is that yesterday, Merrick Garland became the official Attorney General of the United States, and went to the Department of Justice and entered through the side entrance and was greeted by applause and cheering. And I think that his messages that day were such that it was really, to me, moving. First of all, my office at the Department of Justice overlooked that exact entrance and so as I saw them in the roundabout and everything, it was like, gosh, I remember when it was a joy to work there and when people cared about justice.

And he reiterated all of the things that we have been missing for the last four years. So I'd love to hear from each of you about your view of what can we expect from Merrick Garland? What did he say and do on his first day? I mean, we know he met with people about January 6th, which means, to me, that gives some priority to what the Department of Justice might do about the insurrection. But I'd love to hear all of your views, you want to start, Barb?

Barbara McQuade ([40:34](#)):

Yeah, I loved watching that. There was a little video clip of him arriving at the Justice Department, as you say, Jill. If you know the Justice Department, there is an entrance for vehicles, and then it enters into a large courtyard and the building is actually an enormous building that fills a whole city block with a courtyard in the middle. So the car pulled in there and there was a crowd of people, employees, waiting for him and cheering for him, which I think shows how he is very much a DOJ guy and very welcome at DOJ, and I was also heartened to see that as he walked in the first person to greet him with an elbow bump was Monty Wilkinson.

Monty is a career DOJ employee who has been serving as the acting Attorney General during this interim since the Biden administration began and so I thought it was a very joyful, I'm passing on the baton to you now boss, here you go, I've been taking good care of the shop here and making sure the trains run on time, but now it's yours. And they exchanged smiles and they were filled with joy, and then he came inside and he spoke to the employees, which I think is so important. And reminding everyone who works there that we have the same standards, we care about equal justice under law, we have the same standards whether someone's a Democrat or a Republican, whether they're rich or poor, whether they're powerful or powerless, it is our job to make sure that everybody gets equal justice.

And, you know, maybe that should go without saying, but it hasn't always gone without saying, and so it's important to say it every day and live it and I thought it was very energizing to hear him say those simple, modest but incredibly important words.

Kimberly Atkins ([42:15](#)):

Yeah, I agree with that wholeheartedly. You know, I think about being a reporter when Bill Barr was nominated to be Attorney General and I was calling around to people who I know who knew of him by reputation or had worked with him, and I was told really almost to a person that this is somebody who is serious, this is somebody who's worked with the DOJ for a long time, he's long time friends with Robert Mueller, they go to church together. He's going to be somebody who protects the institution of the DOJ and we should give him a chance. And then we saw what happened.

He certainly did not come in, Bill Barr, he didn't come in saying what Merrick Garland said this week. And that's one of the reasons why Merrick Garland spoke the way that he did and said that the DOJ is about protecting the people, that they are the attorneys working on behalf of the people, and certainly by implication not working on behalf of the White House or any one particular person, really trying to restore that independence, or at least trying to restore the faith in the rule of law which I think has been so eroded over the past couple of years.

And so, on the one hand, Merrick Garland has a really low bar, I intend that pun. He has a low bar to clear compared to his predecessor, but at the same time, it's such a daunting job ahead of him, having to reform, restructure, restore the faith of the employees within the Justice Department and really turn around both in policy and in morale a place that was just so decimated before our eyes over the last two years especially.

Joyce Vance ([44:13](#)):

It is going to be a hard job, and I actually wrote against Bill Barr's confirmation during that confirmation process, because of the bias he had exhibited in writing a memo where he sort of pre-promised that President Trump couldn't be prosecuted for obstruction. And I'll share with you, Kim, I had your same experience, I had a lot of people call me up and tell me that I was wrong, and that what I had written was unfair.

Barbara McQuade ([44:40](#)):

I thought you were wrong, Joyce, I'll admit it, and I was wrong. I was wrong for saying you're wrong.

Joyce Vance ([44:45](#)):

I mean, my objection was really based solely on the memo. I think that appearance of propriety, the appearance of impartiality in an Attorney General is so important and we have certainly gotten that from Merrick Garland so far. Something I loved, and like Barb and you, Jill, I have these fond memories of walking through that courtyard at DOJ, you know with those huge American flags whipping in the wind as you walk through, it's such a quintessentially American place to be, I loved watching him walk in and I asked some friends who were still AUSAs, "Well, what did you think?"

And their takeaway from what Merrick Garland said to them was, "He acknowledged that public service is hard, and he thanked us for what we're doing." And that's so important after what the career people have been through with a President who called some of them out by name, because they were involved in investigations that hit too close to him, by an Attorney General who was openly the President's lawyer, not the people. And who, I'm sure that you all remember, at the end of his tenure, Bill Barr gave an interview where he criticized the career people and said that they weren't smart enough to make the difficult decisions that political appointees could make.

So this is a real return to a principled Justice Department. You know, Kim, you're right, it's a tough job, and Merrick Garland will be doing a great job if six months in, people who are now his supporters as well as people who don't like him, if everybody's critical of some part of the job that he's doing, then he'll be doing it right, because it's not a job that you do to make friends or to please people. You do it to uphold the law.

Kimberly Atkins ([46:25](#)):

One thing I was going to say was that I'm sure in the months and years ahead, the four of us are going to disagree with things that he does, because that's normal. It's normal to disagree with decisions that an Attorney General makes, because the job is so hard.

Jill Wine-Banks ([46:42](#)):

It is, but I don't think any of us are going to be doubting his integrity or the reasons for his judgments. We may disagree with his judgments, we'll agree on the facts, and I was very impressed by his remarks which were unfortunately delivered virtually to an almost empty Great Hall, which is one of those places that I can think of so many memories from that and not always from my time but even from after that, where he was talking about being in public service is a calling. And saying that he felt like he was coming home, and just talking about equal justice and the rule of law.

As Barbara said, we shouldn't need to be hearing that, but we do need to hear it because for four years we'd seen the opposite. So, to me, it's really encouraging. Is there anything specific you think? I mean, I think he set some priorities in the things he did on his first day, aside from addressing people to build morale, he clearly was focused on the January 6th insurrection in some of his meetings, he met with Wray, FBI Director Wray, and with the people in the DC office that are looking at the possible prosecution from there. What specific things do you think he's going to focus on in the first 100 days he's in office?

Barbara McQuade ([48:11](#)):

You know, I think we'll see a decided focus on civil rights, we've still got confirmations pending for the associate and for the head of the civil rights division, a woman named Kristen Clarke who if she's confirmed will come to DOJ from the Lawyers Committee For Civil Rights, where she's run a nationwide program of some of the best civil rights litigation that's going on. She got letters I saw, interestingly, this past week from a number of police organizations, including the International Chiefs Association, you don't usually see that for a civil rights lawyer.

But these will be strong leaders, there is a lot of work to be done in restoring the consent decree that's used to help police departments who are struggling get it right, retrain their officers, so that we can avoid this horrific series of deaths like we've seen with Breonna Taylor and George Floyd, that has to be a priority for the new Attorney General.

Kimberly Atkins ([49:10](#)):

Yeah, I agree, I think also it's voting rights is going to be extremely important and that's a lot of work that Kristen did with the Lawyers Committee, and that's come up to be such an important issue right now, so I know that that too will be at the top of the list. And of course, the prosecution over January 6th is going to take a huge amount of space at the DOJ.

Jill Wine-Banks ([49:34](#)):

Can we talk about what some of the objections are to the confirmation of Vanita and Kristen? Does anybody want to just briefly comment on that?

Barbara McQuade ([49:45](#)):

I'll say it, it's the fact that they're women of color.

Jill Wine-Banks ([49:49](#)):

Thank you.

Kimberly Atkins ([49:49](#)):

I concur.

Barbara McQuade ([49:51](#)):

They're immaculately qualified. I mean, people can go online and see their qualifications, you can look at the people who've endorsed them, it's fascinating that they're endorsed by civil rights groups and law enforcement groups. Experience in running big litigation programs nationwide, getting good results, very restrained. Not people who are quick to make decisions that are speculative. So I think that the opposition is shameful.

Joyce Vance ([50:20](#)):

So, now it's time for us to answer some of your questions. Please do send us your questions to sistersinlaw@politicon.com or Tweet them using #SistersInLaw. And if we don't get to your questions during the show, keep an eye on our Twitter feeds throughout the week. We'll answer as many of your questions there as we can.

So, first, you all, we have a question from Jenna in Illinois. Jenna says, "I'm a new attorney, a single mom, and I turn 40 on the 3rd." Congratulations and happy birthday, Jenna. She says, "I'm a natural in the courtroom, however when I have to prepare a written legal argument, I have incredible anxiety about my writing. What encouragement or advice do you have to give for a new female attorney?" What do you all think?

Kimberly Atkins ([51:10](#)):

Well, I'll kick it off in saying that it's good for you, happy birthday, and it's really incredible your ability to juggle everything that you are juggling. When I was an attorney, I did not have a child, I did not even have a dog yet, and it was hard enough to keep up with everything that I had to do, so kudos to you. But I think what you are experiencing in a way I think is normal, I think you can cut yourself a little slack. When I practiced as an attorney, I loved arguing in court, particularly appeals. My firm gave me all of the appeals because nobody else in the office liked doing them and I loved them and I was arguing at the first circuit my very first year practicing law and it was so great.

But ask me to talk, to have a conference, with opposing counsel, and I hated it. My palms would get sweaty and I would feel so inadequate and insecure, and I think we all struggle with different things that we're better at and things that we're not. As time goes on it will become second nature to you, but I think one thing that helped me in thinking about the things that I was less confident in, one of them included writing. And I was sitting and going over a memo with a motion over and over again and I had my Bluebook out for citations. And the partner in the firm walked in one day, saw me in there writing, grabbed the Bluebook from in front of me, walked away and threw it in the trash can and then walked out and he said, "You got this."

And what he was saying is, "You have the goods, I believe in you, you have it, stop worrying about the technicalities, get out of your own head and just do it", and once I started doing that, I started winning motions, so he was absolutely right.

Barbara McQuade ([52:59](#)):

That's great. Having good mentors can be so helpful, right?

Kimberly Atkins ([53:01](#)):

[crosstalk 00:53:01] Super important.

Barbara McQuade ([53:01](#)):

Just somebody who says I have confidence in you. But not everybody has that, and maybe Jenna does or doesn't, but I would say to Jenna that I think all of us to some extent suffer from the impostor syndrome, that is, "What am I doing here? It's only a matter of time before they figure out that I have no idea what I'm doing." And I think it's common for everybody. But the longer you practice, the more confident you will become, it's like anything.

Joyce Vance ([53:27](#)):

Our second question is from Marie in Albuquerque in New Mexico, and she writes, "Is there any way a law could be passed specifically for a President that gave prosecutors an extended statute of limitations?"

Jill Wine-Banks ([53:42](#)):

So, let me start on that one. You can't pass a law that would cover a past President. We don't allow that in America, it's considered extremely unconstitutional to have a punishment created after the fact. But I think maybe you would be encouraged to know that there are exceptions to the statute of limitations, and let's look at New York particularly, since there are cases being investigated against the past President right now in New York. And in New York, part of the statute of limitations that is excluded from being counted is days that you are absent from the state.

So all of the time in the last four years of being the President that Trump did not live in New York and only visited a few days, those days, basically four full years, will be excluded so that the normal five year statute of limitations really becomes any crime that was committed during the last nine years, because it won't run until then. So there are ways to do it in the future for other people, hopefully we will never have this issue come up again where we need to be looking at a statute of limitations for a former president.

Joyce Vance ([55:01](#)):

So I'll move on to our final question from John, "Why are so many lawyers getting away with so much BS? Anything from sloppy work to engaging in criminal conspiracy and more. Where are the disciplinary authorities? Where is the ABA?"

Jill Wine-Banks ([55:17](#)):

As the former executive director and chief operating officer of the ABA, they are not the body that sets these rules. They are involved in creating ethics, but it is the state bars that would have to take action against an attorney. And that requires that someone file a complaint. There are other ways. I have been screaming on Twitter that why hasn't anyone filed for sanctions? Any of the defendants in what I consider to be the frivolous election lawsuits is entitled to file for sanctions against the lawyer and the client for filing frivolous cases that are going to be dismissed, they are entitled to get repaid for any legal expenses incurred, and possibly for other thing.

So, I hope that this will take place. John Dean, since Watergate, has been teaching a course for lawyers which you get continuing legal education credit for, in ethics. He works with a lawyer from Ohio named James Robnenalt, and it's a very effective course because he said, "Look at how many lawyers

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were defendants in this case. Look at how many lawyers did the wrong things. You had one of the defense lawyers taking cash in brown paper bags and distributing it as hush money." So, those are things that obviously are criminal, but also clearly they are violations of ethical rules, and I think we need to be looking at those more and more, and that's one way that we can deal with this.

Joyce Vance ([56:59](#)):

That's it for this week, thanks for listening to #SistersInLaw, with Barb McQuade, Jill Wine-Banks, Kimberly Atkins, and me, Joyce Vance. Don't forget to send your questions by email to sistersinlaw@politicon.com, or Tweet them for next week's show using #SistersInLaw. You'll find the links in the show notes as well.

To keep up with us every week, subscribe to #SistersInLaw on Apple Podcasts, Spotify, or wherever you listen, and please give us a five star review. We love to read your comments. See you next week with another episode, #SistersInLaw.

Kimberly Atkins ([57:39](#)):

I love talking about Rule 11 so much, I'm such a nerd.

Joyce Vance ([57:48](#)):

Me too.