

Barb McQuade:

Welcome back to #SistersInLaw. I'm Barb McQuade. This week, we'll be talking about the charges against Derek Chauvin, filling you in on the latest in the fight for pay equity and weighing the case for gun control. And as usual, we'll be answering some of your questions at the end of the show. This week, we're sponsored by HelloFresh and Cameron Hughes Wines. Please check out their special offers for you in our show notes. As usual, I'm joined by Kimberly Atkins, Joyce Vance, and Jill Wine-Banks, and Jill, some big news about you this week, I am thrilled to be able to share, maybe we should let you share it about the movie option for your fantastic book *The Watergate Girl*. Tell us more about that.

Jill Wine-Banks:

I know. I can hardly believe it's true that I've been in conversation with movie stars and that Katie Holmes has optioned the book. And hopefully, it will end up a film or a television series. It's not clear that anything will happen because a lot of books get optioned that don't get made into movies, but she wants to play me, and that gives it added impetus to getting actually made. So I'm really excited about it. It's just super terrific. And I get to be a consultant on the movie. Maybe I can get us all parts, walk ons or something. Unfortunately, because of the era that's portrayed, there aren't a lot of women in it. So other than Rose Mary Woods and me, there aren't a lot of women in it.

Barb McQuade:

We all want cameos. I want to be a juror or something.

Joyce Vance:

We do.

Jill Wine-Banks:

Okay. All right. You could all be jurors, that's perfect. Do you want to be grand jurors or you want to be petit jurors?

Barb McQuade:

I've always wanted to be a grand juror.

Jill Wine-Banks:

Okay.

Kimberly Atkins:

That's just really exciting, Jill. I feel like you're underselling it a little bit. But to have, you've just been casually on the side having conversations with Katie Holmes and discussing how she's going to play you and option to your film, that is just such fantastic news and very, very well deserved.

Barb McQuade:

Katie Holmes, former wife of Tom Cruise.

Jill Wine-Banks:

No, we aren't talking about that. But I have talked to her about her daughter and she's discussed my book with her daughter. Katie is very smart. And I mean, I have to admit, of course you love someone who loves your book, of course. But talking to her and hearing her say, "Here's how I see this. And here's what I think about this particular scene.", has been really extraordinary. And I of course, have watched almost all of her movies now, probably all of them. And she played Jackie Kennedy, which a lot of people don't know, in a mini series, and she was terrific. And she has played a number of roles early in her career that were amazing. The Wonder Boys with Mike Douglas, Ice Storm. She's been in terrific movies and she's a great actor. And I'm enjoying this enormously. It's really, really fun.

Barb McQuade:

Jill, you're already so Hollywood, Mike Douglas. I love it.

Joyce Vance:

I absolutely love that the history of Watergate is going to be told through your eyes though, Jill, because as you point out, there weren't a lot of women around. And so for people in my daughter's generation and my son's generation who didn't live through it like we did, I think it's important. It's going to be a great movie, and I'm really looking forward to it.

Jill Wine-Banks:

Oh, thanks. We'll all go to the premiere. How's that?

Joyce Vance:

Yay.

Kimberly Atkins:

Oh, yes. Can't wait.

Jill Wine-Banks:

And we'll have our own custom designed gowns like mannequins.

Barb McQuade:

I will get started on that now.

Jill Wine-Banks:

Okay.

Barb McQuade:

Well, I think it's very cool that Katie Holmes is playing you, Jill. I know my childhood friends have often said if I would ever have a movie made about me, I would probably be played by Michael J. Fox, so not nearly as glamorous. Kudos to you. Let's get on with our topics for today, shall we? Jill, I know you are going to lead us in a discussion about the tragic shooting that we saw this week in Boulder, Colorado, and some of the issues around assault weapons, background checks and gun control issues.

Jill Wine-Banks:

Absolutely. It's a really important issue, Barb. I'm so glad we're talking about it, because last week, we talked about a mass shooting in Georgia that killed eight. Our focus then was not so much on the guns and gun control. It was more on the fact that it could be a possible hate crime, either against the Asian American Pacific community or that it could have been against a hate crime against women. But the second shooting at a grocery store in Boulder, Colorado certainly raises the issue and makes me think about what can we in America do to reduce the amount of gun violence and mass murders. And there have been so many that it's important to talk about. So let me start by asking though, a fundamental question that maybe our audience should have some background on, which is what the Supreme Court has said about gun control laws. So I thought we could start with talking about Heller and McDonald. And since we have two law professors here, which of you would like to start on those cases?

Barb McQuade:

Well, I can tell you a little bit about Heller. That was a Supreme Court case, that is kind of the seminal case that stands for the proposition that although the Second Amendment says that the right to bear arms is tied to there being a need for a well regulated militia, there is an individual right to bear arms, because the notion was that all the townspeople would show up for the militia with their own gun. And so it is an individual right, which is an important part of that decision. But I think an equally important part of that decision, and one that is sometimes overlooked, is one that gives a lot of room to still regulate guns. I think there are sometimes people who are big advocates for open carry, for absolute gun rights.

Barb McQuade:

But a really important part of it is where Justice Scalia, certainly a conservative textualist justice, said that the rights secured by the Second Amendment is not unlimited. And he said nothing in our opinion should be taken to cast out on long standing prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places, such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of firearms. And we also recognize another important limitation on the right to keep and bear arms about the kinds of weapons that were in common use at the time. And so the idea that the government could not restrict assault weapons or have background checks for mental illness and all of those other things, that that in some way violates the Second Amendment is just absolutely not the case.

Jill Wine-Banks:

So Joyce, do you want to mention McDonald?

Joyce Vance:

Well, I was going to say, Jill, that I agree with Barb. And I think that there's a lot of room left to play after Heller in imposing sensible restrictions on gun ownership, because I live in a state where people cherish their guns. When you think about Alabama, you think about people saying, "You can have my guns when you pry them out of my cold, dead hands." But interestingly enough, in Alabama, when there was a lot of advocacy around open carry, I had a lot of, I was still the U.S. Attorney, I had a lot of conversations with law enforcement leaders, with business owners, with people who were the administrator for public facilities. And they were calling me saying, "Listen, we cannot have people bringing guns into our facility. What can we do?"

Joyce Vance:

And of course, under Alabama law, there was an out where you can post signage saying that guns weren't permitted in a particular facility. And of course, you're able to keep them out of places like federal courthouses. But there's always this tension. It's sort of like, we want there to be public access to carrying firearms, as long as it's not in our house, as long as it's not in our building. And that tells me especially as the NRA has been weakened over the last four years, that we may finally be in a space where we can put some restrictions on types of weapons, on things like high capacity magazines. And certainly, we can restrict open carry because thinking about the Colorado shooting, how do you know? How do you know if the guy carrying the gun into your grocery store is an open carry nut, or if he's an active shooter? We need to do more to protect people. And I think Heller gives us the opportunity to do that.

Kimberly Atkins:

I just wanted to sort of jump in on that. And I mean to your question, Jill, the McDonald case just extended Heller to states and have that same individual right ruled with respect to state laws, but on the issue of what may happen now, since Heller and McDonald, the Supreme Court has played hot potato with gun rights cases. Yeah, there has been the opportunity for several cases, including challenges to gun laws in places like Massachusetts, to take it up to the court and they haven't done so. So this is before Justice Barrett was installed to the court, I should say.

Kimberly Atkins:

So there at least seemed to be a reluctance of the court to really jump into this issue to really say how far this individual right extends. Perhaps with Justice Barrett on the court, that might change. We don't know but the court has an opportunity to see. Just this week, the Ninth Circuit ruled in a case of holding a open carry ban out of Hawaii. That seems to be getting a lot of attention and will almost certainly, it's only one of several cases that are pending, that the Supreme Court could take up. And it seems that that's almost certainly to get more attention. So as we're talking about the political side of the gun control law, which we know that was going to happen whenever there's a big mass shooting, you have Democrats who are pushing for increased gun laws, and you have Republicans who are pushing increased gun access and saying things like, "The only thing that stops a bad guy with a gun is a good guy with a gun."

Kimberly Atkins:

And you see this just political divide, where people go to their corners, and it's really going to be the courts that outlines just how far the ability of people to regulate guns. I want to point out too, we're talking about the Second Amendment. And I want to remind our listeners that literally, the first few words of the Second Amendment is a well regulated militia, well regulated are literally the second and third word in the amendment. But there's this idea that regulations are somehow unconstitutional. And it doesn't make a lot of sense to me.

Joyce Vance:

You know, Val Demings, the Florida Congresswoman tweeted about that yesterday sort of making fun of the notion that some of these folks who show up with guns are a well regulated militia. And I guess Heller takes us down that path. But when you think about it, there's really not a need for me, the average citizen to own an assault weapon. So maybe we are living in an era where something sensible can happen.

Jill Wine-Banks:

And let's talk about the type of guns that were used in these last two mass shootings, because I think everybody knows they were assault weapons, but things that they were, AR-15s, one of them is actually classified as a pistol. It is a short muzzled AR-15. But it's not an AR-15. And so there are fewer restrictions on it. The other was actually a 9 mm handgun. So I certainly had the impression that they were both weapons of mass assault. And in the Georgia case, the question is, there was no waiting period in Georgia. And do you think that if there had been a waiting period in Georgia, and he hadn't been able to get the gun the same day that he committed this crime, that there might have been a difference in the outcome?

Barb McQuade:

You know, I don't know. And I think one of the rhetorical tricks that people often use is even if we had certain rules, you would never have stopped all of the shootings. And it's impossible, I think, to know whether that particular shooting would have been prevented, but we would certainly have fewer. Mass gun violence, the way we have it, is a uniquely American problem. And if you look at what is different about our country from other countries around the world, it is our abundance of guns. And like Joyce, I live in a state where people love guns, it's used for recreational purposes for hunting, it's used by people for protection in their homes. And I don't think most people have a problem with that. But the assault weapons that are used in some of these instances are weapons that are designed for killing people. They're machines of war.

Barb McQuade:

Similarly, these background checks are designed to find people who are prohibited under law. There are laws that prohibit people from possessing a gun. If you have a felony conviction, a conviction for domestic violence, if you're a drug user, if you have mental illness. And so it seems reasonable to wait a short period of time to determine whether you are someone who should or should not possess a gun. It doesn't mean that person will never be able to get their hands on a gun. No, but it's a little bit harder. And I think any of these things that make it a little bit harder for people to kill other people is probably a good thing.

Kimberly Atkins:

Yeah, I would agree with that, particularly with laws like the ones that Barb was outlining, which really talks about who has access to the guns as opposed to what kind of guns that people use, because as Jill rightfully points out, a pistol can be just as deadly. But when you're talking about people who have records of domestic violence, when you're talking about people who have past records or you're talking about people who are associated with potential domestic terror groups, it seems that laws that really target limiting access to guns or making people go through background checks are making it just a little difficult for people to pick up a gun on impulse here, given that in America, there is this culture. I mean, I think it comes back to me as a culture issue. We can legislate this and legislate this. But in America, the idea of the Second Amendment has been sort of conflated to make it seem as if there is this God given right to own guns and if anyone ever challenges that, it is really challenging a core American principle, and that is what leads to this kind of carnage.

Kimberly Atkins:

I visited Iceland, and it's a beautiful country and it's a place where one in three people own a gun. It's one of the highest gun ownership countries in the world, and there is no gun violence there. And it's

because it's a lack of a culture. You don't see gun ranges and shooting ranges along the highway as you do a lot of parts of America where I've lived. It's just not a part of the fundamental culture. And one thing that's different in Iceland as well is that the one group of people who do not carry guns are police officers, and there is very little crime there. It seems that they figured out how to do everything right that America seems to be doing wrong in the way that we think about guns and the way we glorify guns and the way we think about violence and the way we think about policing. So I think there's a lot of things that we can learn from the rest of the world if we take an open eyed look.

Joyce Vance:

I agree with that, and the culture that you talk about, Kim, I think is really important. We all hear the slogan, God and guns in some parts of the country, I suspect in both Michigan and Alabama when politicians are running for reelection and they make their TV ads, they're almost always at some point duck hunting or target shooting. Guns are a powerful part of those ads, and I'm reminded in the '80s, my husband and one of his senior partners represented an Austrian company that had some of their guns stuck in Customs when one of the bans on certain types of weapons went into place. And I asked his senior partner, Mr. Barton. I said, "What are you going to do to get the guns loose from Customs?" And he said, "I'm going to argue that they're hunting weapons.", and I said, "Well, what do you hunt for with a fully automatic gun?", and without missing a beat, he said, "Wild boar, 40 feet.", and I think that that's really what it comes down to with these guns. There is no legitimate purpose for us as private citizens having them. We need to overcome the God and guns culture and say, "Look, keep a gun for your own self protection at home but you don't need to have an assault style weapon."

Barb McQuade:

I think there are those who would argue, Joyce in response to that, that there is no reason. Here are two reasons I've heard advocated by people who are supportive of the idea of individual ownership of assault weapons. One is there is a classification of sports that uses these high powered weapons. They compete with them, they train with them and they do not want to be denied their ability to engage in that sport. And the other one is that we should always have the right to overthrow our government, and you can't overthrow the government with a small pistol. You need the same kind of weapons the military has if you're going to fight the military. I think that's a crime. I don't think it is legitimate to be able to say to people you should have the firepower to be able to overthrow our government. That is seditious conspiracy. That is a crime we prosecute people for that but I have heard both of those arguments made by people and I think that motivates at least some of the thinking behind why people believe that they have a right to those guns.

Joyce Vance:

I think that's right, and I wonder if with the NRA a little bit diminished as an entity, whether some people in Congress will peel off from worrying about how the NRA says their record on voting on guns issues is because like you, I think those arguments don't hold water. It will take a little bit of moral courage from our elected representatives figuring out whether they want to trade off some human lives for some of the more fringe areas of gun ownership.

Jill Wine-Banks:

What's interesting is that most American citizens are in favor of having gun control, safety controls, and yet the Congress members do not go along with that, and I do want to point out that the pistol was an automatic, semi automatic so even though it was classified as a pistol and it had a capacity for 30 rounds

in a chamber. So it was a dangerous thing. Let's just talk very briefly about background checks which you've all mentioned because the shooter in Colorado did pass a background check and legally bought the gun right after Colorado's or at least the city of Boulder where the shooting happened. Boulder's law was overturned by a judge in Colorado, saying that they could not ban assault weapons and he immediately bought this gun, passed the background check despite the fact that he had a misdemeanor record and is now basically raising an issue of his mental stability. So can background checks work? What could be done to make them more effective?

Barb McQuade:

Well, I think you'll never have 100% safety net with background checks, but I think that you can prevent guns from getting into some people's wrong hands. People who have mental health issues, drug addictions or otherwise are dangerous people to carry guns. I think domestic violence survivors will tell you that they would be very happy to have their assailant have their ability to have a gun restricted in some way. So it's not a perfect system, Jill. But I think you can reduce the number of fatalities by having a system in place, and a system that's robust and a system that works and is well funded. So all of those things are really important.

Kimberly Atkins:

And a system that's not too overly broad. I mean, it's important to note that the background check legislation in Congress right now has exemptions carved out. Gifts from family members would not be required to go through the same kind of background checks. Guns that are designated only for use at firing ranges or for instruction would be exempt. So this idea, I think this narrative that this legislation is meant to take guns away from people is just so wrong. And it's really important to speak truthfully about what it is because I think a lot of the opposition to this is spawned by fear and disinformation.

Barb McQuade:

I think so much today, and then we should move on to our next topic. But can we raise it to the point because I think so much today, one of the reasons we have such division in our debates is not that there's not enough information, but there's too much information out there. And because there's so much clutter, it is the largest, shrillest soundbite that gets heard. And so we have kind of all fallen down to the lowest common denominator. We listen to the one shrill voice, you're either for guns or against them, and there's no room for nuance, because there's just too much information to process. I think that's such a good point. Well, I'm sure this won't be the last time that gun control is something that we want to be talking about. It's a sad reality of American life that we have mass shootings, and I hope the day will come when our fetish with guns is overshadowed by our respect for life.

Jill Wine-Banks:

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Kimberly Atkins:

Cameron Hughes sources top rated wines directly from the best wineries around the world. Exclusive wineries over produce and keep official quantities low to keep prices high. The surplus is acquired and relabeled by Cameron Hughes and the savings are passed on to you. Jill, I have to say I don't like Chardonnay normally. But the Chardonnay, the Arroyo Seco Chardonnay is so good. I had it. My fiance and I made this wonderful shrimp dish and it wasn't overpowering. I feel like Chardonnays are usually

very heavy for me and kind of chemically. And this was really light. It was perfect for spring. And it was really, really great.

Jill Wine-Banks:

So I agree with you normally on Chardonnay, so I'm going to look forward to testing that one. It was the one I got was lot 746. But I tested lot 765, a zinfandel from Sierra Foothills. And it's just \$13 a bottle and it was the perfect dry wine with a little bit of sweetness that I like in wines. It had a fruit and vanilla taste and it was really delicious. Today, Cameron Hughes offers our listeners an exclusive deal, 20% off and free shipping on three or more bottles. All you have to do is enter our code SISTERS at checkout.

Kimberly Atkins:

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Jill Wine-Banks:

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Barb McQuade:

Why don't we move on and talk about pay equity? That's been in the news this week. We are at the time of year when women have earned as much as men. They have caught up. Joyce, you want to talk about that topic a little bit?

Joyce Vance:

Sure. So Wednesday was Equal Pay Day. That means it took until March 24 of 2021 for women on average to make as much money as men made in 2020. And it's so blatantly wrong. It's really hard to understand how that could still be the case, that as women's soccer team superstar Megan Rapinoe put it at the White House event on Wednesday, "Despite all the wind, I am still paid less than men who do the same job that I do." So it's worse than that for some women, that the aggregate date is March 24 is the date that women catch up with men. But it's worse for some women. Kim, why don't you talk about how it plays out in communities of color?

Kimberly Atkins:

Yeah, it's that intersectionality that we talk about a lot. I mean, when you look at what different groups by race and ethnic background, you have AAPI women make 85 cents to the dollar that every white man makes. White women make 75 cents on the dollar. Black woman makes 63 cents on the dollar. I looked it up on the calendar, I marked it on my calendar. My Equal Pay Day is August 3, to reflect that. And Native American women 60 cents and Latino women only 55 cents, just over half of what white men make. And to me, there's so many things at play here. One thing that just comes up to me that seems really obvious is the fact that despite all the laws that have been passed, to try to bring more equality, more gender equality to bear, a reality is in life, and we've seen it play out in the pandemic is that the responsibility for childcare always, always, always disproportionately rests on women, and that affects their job choices. That affects the hours they are able to work. It affects their ambition, what they want to try to be if they have to manage childcare too at a disproportionate extent than men do.

Kimberly Atkins:

Men just don't have that consideration. And I know, I don't have children, but I certainly have applied for jobs or been in jobs where I've been asked questions that sort of tiptoe around what's legal, just informal questions about whether I'm dating or my status or whether I'm engaged, whether I might, just trying to get to whether I might be having children at some point, or if I have children. And we've all felt this, and that's a part of what really makes that pay difference so stark. Women are also more likely to have multiple jobs just to try to make ends meet and it makes it even harder to get to that equity with men. So it's a really, it's such a difficult problem to untangle to get to solutions to even though progress has been made, not nearly enough.

Joyce Vance:

You know, it's clear that this impacts women who are on some of the lower rungs of the economic scale, but Kim, it even impacts women like us, well educated women with professional jobs. How do we see that playing out?

Kimberly Atkins:

Well, look, I see it playing out with me. Just anecdotally, I was joking as my fiance and I were doing our taxes. And he has one job. He has one job that pays him pretty well. And I make a decent earning. I've come pretty close, but it's from four jobs. It's literally me taking on job after job after job, which I've done for most of my career right now. It's because I enjoy it. I enjoy doing things like join you ladies for a podcast. But there were times that I needed, I was a practicing attorney and I had to moonlight as a column writer for an attorney in Massachusetts to pay my bills. It happens even when you're well educated, even when you're at the higher rungs. There are so many fewer women billionaires than men. It's at every aspect of the economic spectrum. You're absolutely right.

Joyce Vance:

You mentioned a story to me earlier today about Sandra Day O'Connor.

Kimberly Atkins:

Yes, Sandra Day O'Connor, it's her birthday today by the way.

Joyce Vance:

Happy birthday.

Kimberly Atkins:

We should wish her a happy 91st birthday. But Justice Sandra Day O'Connor, when she became the first woman on the U.S. Supreme Court, faced a little issue when she arrived to the court. I'm going to read this little bit of it from an interview she did in a 2013 NPR interview. She said, "In the early days when I got to the court, there wasn't a restroom I could use that was anywhere near the courtroom. It was a long way down the hallway so it wouldn't have been convenient. And I wouldn't have been able to use it when we were back there in the room or in the courtroom or where we discuss cases. And I think I borrowed a restroom in the nearest chambers there at the court. I think I just borrowed one there. That kind of became the one that I could use. They didn't have a woman justice. So that's what you'd expect in those circumstances."

Kimberly Atkins:

So there wasn't even enough thought to have a place, and all I can think of is yes, she was the first justice. But I'm sure there were other women working in that court and that it just never occurred to people that they may need a restroom was really, it was quite shocking. So that story in honor of Justice O'Connor's birthday.

Jill Wine-Banks:

When I started practicing, I remember one of my early arguments in the Second Circuit, I went into the lawyers' cloakroom and I needed a restroom. This was after the argument, and there is a men's room, but there is no women's room. And I had to go take an elevator to a different floor to get a ladies restroom, because they just weren't built. There weren't women arguing and so they didn't have it. And I also can remember when we were talking about the amount of money, 85%, 50%, 60%, when I started, it was at 49 cents. And so women were getting substantially less in the workplace. There's a wonderful movie that hasn't been widely known, called Made in Dagenham, and it's about a Ford plant in England. And it came out in I think, maybe 2015, 2017. And after we saw it, my husband said, "I can't believe that that was going on so recently in England." And I went, "Honey, what do you think is happening here in America?" The first piece of legislation that passed under President Obama was the Lilly Ledbetter Fair Pay Act.

Joyce Vance:

Alabama native.

Jill Wine-Banks:

Was she really?

Joyce Vance:

Yeah, Gadsden, Alabama, the Goodyear Tire plant. She is an American hero.

Jill Wine-Banks:

Yes, absolutely. And so if in America, our first equal pay came in '63, the Equal Pay Act. But I mean, we're still fighting the same battle. And when you were talking about them hinting around Kim about whether you were going to have children, when I first got out of law school, they didn't have to hint. It wasn't illegal. And they would say, "How many children do you plan to have? What kind of birth control do you use? What would you do if you were having a dinner party and a client had a problem?" I mean, questions that no man would be asked were questions I had to answer. So a friend who was applying for a clerkship was asked how would her mother feel about her coming home late at night when it was dark out? I swear to God, and she's now a federal judge. But she didn't get that clerkship, as you could imagine, because she actually answered him in a way that was honest. And she told him it was none of his business. But yeah, I mean things have improved. But look where we are, we're not at parity, and we need to get to parity. Equal pay is what we need.

Joyce Vance:

There's a lot to be said for making progress. But frankly, at some point, making progress just isn't enough when you're still so far behind. Hey, Barb, let's talk about something that came into focus for us last week, when we saw the really inadequate weight room facilities that the women basketball players

had at the NCAA games. We saw the comparison, we talked a little bit about that, how incredibly inferior it was to what the men's athletes had. So it's not just pay, right? I mean, this sort of inequality really permeates throughout the culture. And I know you and I are both old enough to remember Billie Jean King, winner of 39 tennis Grand Slam titles. And she wins the Battle of the Sexes between Bobby Riggs in 1973. She pioneers equality for women in sports. So what's going on? Why is it 2021 and women are still treated so differently?

Barb McQuade:

Well, I remember vividly watching the Battle of the Sexes with Bobby Riggs, don't you? Gosh-

Joyce Vance:

It was awesome.

Barb McQuade:

I'm often struck as a 50s year old person, that we've come such a long way since my childhood. And yet we still have so much ways to go. And I agree with you, Joyce, this week, we saw a couple of things. One was Megan Rapinoe testifying before Congress and appearing at the White House to talk about the disparities between the women's national soccer team and the men's national soccer team. And it's not just pay. They filed a lawsuit that was partly dismissed and the dismissal of their lawsuit came under pay. They are paid less, but they negotiated a different pay structure from their male counterparts, in part because they wanted some job security to be paid more by salary than per game.

Barb McQuade:

And so the judge said, "These are apples and oranges. We really can't compare this and say there's discrimination here." But the judge permitted the case to go forward on those other things that you talk about, things like travel, accommodations, the venues where they play, the medical personnel that comes with the team, all of those kinds of things. And when you're talking about professional sports teams, you sometimes hear this argument that well, if a team generates more revenue, then it is appropriate perhaps that there'll be more expenditures made on them. They would earn more. So for example, the NBA and the WNBA, which are private for profit enterprises, if there's more money in the TV contract for the NBA, then they get paid more than the women in the WNBA, just like NBA players get paid more than NHL players, because there's more money generated.

Barb McQuade:

But when it comes to nonprofit like the national soccer team that receives a lot of government subsidized money, now you're talking about discrimination that is impermissible under the 14th Amendment. And I think it's an even stronger case when we talk about what's going on at colleges and universities. Last week, there was a great social media posting by one of the women who's playing women's basketball in the NCAA tournament, and she compared the weight room accommodations that have been provided for the men playing in Indianapolis in the NCAA basketball tournament, a huge beautiful weight room with all kinds of amenities safely spaced for COVID-19. And the women who are playing in San Antonio got one weight rack of small dumbbells, I mean just a ridiculous and absurd disparity between those two things.

Joyce Vance:

It looked like the little weight rack that I keep in my bedroom, with one, two and three pound weights so that I can occasionally pick it up and do curls before I get going in the morning. It was so inferior.

Barb McQuade:

Yeah. Now to their credit, Dick's Sporting Goods came through with a big donation and outfitted the women's tournament site with similar weights that the men had received. But shame on the NCAA for providing this incredibly disparate set of amenities for men and women, because the colleges and universities are bound under Title IX to provide equal opportunities for men and women in education, and that includes sports. So they are in absolute violation of Title IX, by providing inferior subpar equipment to women as opposed to men. And I think when you talk about that revenue generating argument, that just doesn't fly when it comes to sports. It may fly in the NBA, in the WNBA. But in college, no, this is really, I think, exposing the big lie of college sports that this is all about giving people opportunities at competition and building self esteem and discipline and all the great things that come with sports. If you focus on revenue generation, then that is not how Title IX is set up. It is all about providing opportunities for athletes. And so I think that argument quickly falls away when you're talking about college sports.

Jill Wine-Banks:

I don't often get to say something good about Richard Nixon, but Title IX was passed by Richard Nixon. So we have to give him credit. And I also have to note that in the UK, their teams are paid men and women are paid equally. And that's also true in Australia, New Zealand, Brazil, and Norway. So why is the U.S. not catching up and getting into equality?

Joyce Vance:

Well, and similarly in Iceland, our second reference to Iceland, my favorite vacation location for hiking, I should add. But in Iceland, they found this sort of fast and effective way for closing the gender pay gap, the first country to do this. They require any company that has 25 or more employees to prove that they're paying equally. And so there are proposals like that, that it may be more workable in Iceland than in the U.S. But we've identified a lot of problems here. Some have legal remedies, some might require innovative thinking, sometimes it takes a company led by a woman CEO like Dick's Sporting Goods to step into the breach. But Jill, the first time we celebrated equality in pay day, it was 1996. And so it's great that the Biden White House had this event, but other White Houses have had events too, and we're still here. What does the path forward look like?

Jill Wine-Banks:

I think we need, obviously to talk about more laws and more enforcement. The EEOC itself didn't exist until 1965, so a lot of time has passed since then but we haven't gotten there. The Lilly Ledbetter Act only allowed a slight amendment of the original act that you could bring it after you discovered the discrimination because most people don't know how much their colleagues are earning. And so unless you know that someone is earning it, you can't file a lawsuit and it made it possible that every time you get a paycheck or a pension check, if you find out at that point, it could be years after you stop working, if it's your pension check. You can then collect for all of that time prior to that. So it's an important addition to our law. But I think it is also possible, we were talking about culture change, and how that affects gun control.

Jill Wine-Banks:

The same thing is true here. When you now have a workplace that is half and half in terms of many jobs, it gets to the point where the men who work with you also have wives or daughters or sisters who are working, and they now are seeing the discrimination and the inequity and pay that their own relatives are facing. And so it is possible that the culture will change along with that, and it's a question of how do you define what is equal work under equal circumstances? That was the issue in Made in Dagenham is how hard physically is the work? How long do you work?

Jill Wine-Banks:

And it's possible in Europe. The European Parliament has laws that require equal pay. And they have defined what is the same job, even though it's not exactly the same job. So it's all very doable. We just need to have the impetus to do it and the moral courage. The Equal Rights Amendment would certainly help. But there are laws and constitutional provisions that protect women now, but it's not obviously enough. So I'm still for let's pass the ERA. I've been campaigning for that since, I think my first actual campaign was in 1976. I mean that's long enough ago that we should be able to say, "Let's get this done." So I think laws can change. But I think it is also, we have to change our attitudes in the same way we have to recognize the attitudes on guns.

Barb McQuade:

Yeah, I agree, Jill, about changing the culture. I think it's so important. And if you think about all of these workplace norms that we have and the nine to five job, that was created by men for men, when they had a wife at home to raise their children. And so that construct made sense. I think it no longer makes sense. And in fact, as Joyce said, It is often men who want just as much as women do, to be able to spend time with their kids. When I was managing the U.S. Attorney's Office, there would be many men who wanted to go home to be with their kids, who wanted to coach a sports team, who wanted to do all kinds of things with their kids. Everybody wants to be with their kids. And they also have perhaps a spouse who is also working. And so they're trying to juggle all of these things. And so why do we have to have a nine to five workday? Why can't we structure our workday so that people can be home with their children or do other things?

Barb McQuade:

And I think one of the lessons of COVID is that we absolutely can. Now certainly, there are certain jobs, jobs that are public service jobs and other things where you need to be available to the public. But even those jobs probably shouldn't be nine to five. If you want to go renew your driver's license, you don't have time from nine to five to go do it. You want the office to be open in the evenings. And so I think reimagining the workday as something that does not go nine to five is really valuable.

Barb McQuade:

I think the other point about why women make less money than men is because we treat certain work as women's work. Nurses make less money than they deserve because that's women's work or teachers. There's so many jobs traditionally filled by women who are underpaid, because we immediately discount it as women's work. But just to think about the ways we can reimagine things that we've always done, I'll bring it back to Sandra Day O'Connor. When she first took the bench one of the litigants who was about to address her to respond to a question, it had always been the case that litigants would refer to the justices as Mr. Justice this. Mr. Justice, Marshall. And he asked, "How should I address Your Honor? I certainly can't call you Mr. Justice." And she said, "Justice has no gender. You may simply refer to me as Justice." And to this day, that is the way we refer to justices. So culture can change. I have a lot

of optimism from the things that we have seen change since the Battle of the Sexes in the 1970s. But it requires people to push it and so I think people like us and others need to not be satisfied with pay disparity. We need to push for those changes.

Joyce Vance:

So I'll close our conversation on this topic with two statistics. The National Women's Law Center says that women on average during the course of a 40 year career will lose \$407,760 compared to men in similar professions. And in a recent 2020 survey by the Conference Board, they found that the issue of pay equity ranked at the bottom of CEOs hot button issues. That's not very promising. But like Barb, I'm an optimist. I think it's on us. We need to be allies for other women. We need to bring men into the ranks of our allies. This is something that's gone on for way too long.

Barb McQuade:

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Joyce Vance:

They have over 25 recipes to choose from each week, all designed by nutrition experts and tested by professional chefs, and there's something for everyone to enjoy, including low calorie, vegetarian and family friendly recipes.

Barb McQuade:

You know, Joyce, during COVID, I have endeavored to do a few self improvement things and one of them has been to finally learn to cook. I've always been a terrible cook. We are fortunate to live in a college town that has a lot of takeout options but HelloFresh has changed my life. I have been ordering boxes of dinners. They're healthy. They're easy to make, and I have to say my family has been incredibly impressed with my new culinary abilities.

Joyce Vance:

Well I'm proud of you, Barb, and the person in my house who feels the same way is my husband. We've been sharing cooking duties during COVID. Whoever's the least busy a given day tends to cook, and Bob fell in love with the first box of HelloFresh and he is sort of legendarily cheap. He's always happy to let me be the one to buy groceries but he reordered a second time and a third time and was asking all the kids, "Well, do you want this or do you want this?", and we have loved the pasta dishes. We've reached the part of the pandemic where we're trying out the low calorie recipes next week because that's what we really need to have. But Bob loves it. I mean he has had a great time cooking from it and his favorite thing is he doesn't have to figure out what's for dinner.

Barb McQuade:

Yeah, my husband and I have a thing too where we say at about 6 p.m., we say, "What do you want to have for dinner?", and the other one says, "I want to not have to decide. That's what I want for dinner." So no it's great, and we're eating more fish, which is all good.

Joyce Vance:

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Barb McQuade:

That's [hellofresh.com/sisters12](https://hellofresh.com/sisters12) and use code SISTERS12 for 12 free meals, including free shipping. HelloFresh is America's number one meal kit. Look for the link in our show notes.

Barb McQuade:

Well, why don't we move on to our third topic? I know Kim, I think you were going to lead us in a discussion about Derek Chauvin. The trial starts next week. Why don't you tee that one up for us?

Kimberly Atkins:

Yes, as the journalist here with three former prosecutors, I'm going to grill you ladies on many of the questions that I and I know a lot of our listeners have as the trial for Derek Chauvin begins on Monday. He is charged with three crimes under Minnesota law, one being second degree murder, one third degree murder and manslaughter. And I'll start with this one. That second degree murder charge is something that is called felony murder. What is that and why is that in play in this case? I will start with Joyce and I want you guys just to jump in.

Joyce Vance:

So felony murder at bottom, it's a legal rule that some jurisdictions adopt and it lets prosecutors charge a defendant with murder in the absence of an actual intent to kill when the death occurs while another crime is being committed. It's usually the intent of the defendant that's the defining point between different degrees of murder and manslaughter. So usually, when you hear about murder in the first degree or murder one, that's an intentional and a premeditated murder. Murder two is often an intentional murder that takes place without premeditation and so forth, but every state adopts its own criminal code. It's not consistent across the country. There's a lot of deviation on that. So some states have felony murder, other states don't, and it can look very different. You always have to start by reading the law in the jurisdiction you're in to determine whether there's felony murder and what the triggering felonies are. In some states, it's any felony. In some states, it's just a violent felony and in some codes, like the Federal Criminal Code they define a set universe of crimes, and if a homicide takes place, if a death occurs while you're committing, say treason or a burglary, then you can be charged under the felony murder provision. So I think that's a good starting point.

Barb McQuade:

I was just going to jump in and talk about the particular felony murder charge, in this case in Minnesota. You know, Joyce and I both teach criminal law and in this case, the underlying felony that Derek Chauvin is charged with committing that resulted in the death of George Floyd is assault, assault in the third degree, which under Minnesota law just says, "Whoever assaults another and inflicts substantial bodily harm may be punished for this crime." One of the things we teach is this concept called merger. And it basically says that you need an independent felony to be the predicate felony for felony murder, as Joyce just discussed.

Barb McQuade:

The idea is if you're doing something dangerous, like robbing a bank, and somebody accidentally gets killed while you're robbing a bank, the thought is robbing banks is such an inherently dangerous thing, that if you should have the bad luck of killing somebody, then you're going to be on the hook for that murder, for that death. But assault is so close to the conduct of murder, that a prosecutor could bootstrap every assault into a murder, and it would sort of remove any type of manslaughter crime, which is a death that is either caused during high passions when somebody is excited and has lost their temper or something, or some sort of accidental death. And if you could say that an assault can be the felony that's the basis for the murder, you never have to worry about proving any intent because for felony murder, the intent is presumed. You don't have to prove it.

Barb McQuade:

So most states will say that an assault is too close and it cannot be the basis for felony murder. But I talked with Joyce, our good friend Mark Osler, who is a law professor in Minnesota, former AUSA in Detroit. And I asked him, "What's up with this felony murder in Minnesota?" And he said, "Yes, I've heard this question a lot. And Minnesota is a real outlier here." It's referred to in Minnesota as one punch murder. And I think that there is some risk that even if they win this case at the trial court level, there is this potential that it could be an issue on appeal down the road, if it's based on precedent in Minnesota, but that precedent is based on a prior statute.

Barb McQuade:

So I think there's a little bit of trouble there, which is why I think it was so important for the prosecutor Keith Ellison, the Attorney General there to get a ruling by the court that reinstated that third degree murder charge, because prosecutors like to use a belt and suspenders approach. If they've got one charge that could end up being either lost a trial or on appeal, it's certainly better to have a backstop with third degree murder. Now, the penalties are different. The statutory max for the second degree is 40 years. It's 25 years for the third degree murder. But as Mark Osler explained to me, the sentencing guidelines for both of those, for someone like Chauvin who has no criminal record, is the same, 12 and a half years. And so it may be that that third degree murder charge that was reinstated is a good backstop for the prosecution if something should happen to that felony murder charge.

Kimberly Atkins:

So I want to ask, even though we all saw the video of George Floyd being just essentially suffocating under the knee of Derek Chauvin, and it really shook a nation, this isn't necessarily a slam dunk case, Jill. What might be some of the obstacles that prosecutors may face in trying to prove any of these three charges?

Jill Wine-Banks:

Again, they all require some form of intent. The third degree which Barb just mentioned is called a depraved mind murder. And so it is one where you don't have to have any intent to cause death but you are doing something that is so inherently dangerous, and you are showing complete disregard, a depraved disregard of human life in doing it. And that's why that one is so important, because he will be arguing and has argued that it wasn't his intent to kill. But he certainly intended to keep his knee on the neck of George Floyd for long enough. He was hearing shouts of, "He can't breathe." And George Floyd was saying, "I can't breathe.", so that only in a depraved mind, could you continue to do what you were doing. And one of the problems just I want to talk about a little bit about trial strategy where you have these three different charges. And it could be that he would be convicted of all three. If he does, the

sentence is only what the most severe is, and as Barb had said, the actual sentence under the sentencing guidelines which are mandatory in Minnesota would be 12 and a half years maximum at the most, and less for some of the other crimes.

Jill Wine-Banks:

But if the jury gets confused, sometimes they can compromise. They'll go, "Well, I don't know if it's this, did he really intend? Is it felony murder? And I don't think it should be." But let's say they convict him only on the most serious. And then it goes to court. And it's dismissed because of the argument Barb was saying about merger. Well, that's a problem. So maybe as a trial strategy, they would have been better off just going with a crime that has the same penalty, but doesn't have that legal risk. We don't know that that will happen, but it is a risk.

Jill Wine-Banks:

And I don't know whether in Minnesota, they automatically include lesser included charges, so that it could revert to that. But if he's acquitted of third degree murder or of manslaughter, second degree manslaughter, then he wouldn't... if he's acquitted, he's acquitted. He can't be retried. There's double jeopardy. And so to me, that is something that merger makes a serious problem, I think in the strategy of how you proceed. And the trial starts on Monday. And as of right now, the complaint alleges all three crimes, and the jury could convict. It's not likely that they would convict of only the most serious, but it is possible, and that's a gamble. So it's important that the third degree is there. And I hope that in closing, they would argue that, you must find, if you find this, then you have to convict of both of these offenses or all three of these offenses. So that's I think, where we're at in that case. The jury is in place and they're set for opening statements on Monday.

Joyce Vance:

Here's an interesting legal issue in regards to depraved heart. Typically, that kind of a statute means that you had a depraved heart, that you were reckless about the lives of any number of people. The classic example is shooting into an occupied building, where you didn't intend to kill anybody, but come on, you knew what the likely outcome was. The problem with this case is that Chauvin's conduct was only dangerous to George Floyd. So his defense lawyers sought to knock out that murder three charge on that basis. That issue went on appeal, and Minnesota's appellate courts decided that the murder three charge could proceed even with this limitation. But the problem here then becomes another issue in murder, which is causation. Can you prove that Chauvin's conduct was actually the cause of the death?

Joyce Vance:

So I think we'll hear Floyd's or rather we'll hear Chauvin's defense team turn to an expert witness that they've acquired and they'll look at the autopsy report. They'll say that there was a high level of fentanyl, perhaps illegal, a lethal quantity in Mr. Floyd's system, and they'll talk about his medical history, hypertension, the fact that he may have been COVID positive. So this is another escape route for the defense to try to use to convince the jury not to convict.

Kimberly Atkins:

You know, Joyce, it's important that you point that out, because I've seen in public statements and people talking to me, saying we have to remind the public that George Floyd is not on trial here. And that's what we're getting at. We're going to hear a lot of things about George Floyd in this trial.

Joyce Vance:

This is the problem that you have as a prosecutor every time you indict a police excessive force case, right? Because no one who's being arrested by the police is an altar boy. And so you have to convince the jury that it's okay for them to convict a police officer and overcome this sort of strange notion that we have just because someone's being arrested. You know, in Mr. Floyd's case, the allegation is maybe that he possessed a counterfeit \$20 bill. There's no death sentence in America for possessing counterfeit money, even if that turned out to be true in Mr. Floyd's situation, but it is a tough burden. I've been there as a prosecutor, and the defense will play to that. They really will put Mr. Floyd on trial in this case.

Barb McQuade:

And the judge is helping in that regard. He made a ruling already that it will be admissible that George Floyd was found with possessing drugs in the past. I think one could argue that his past drug use on a prior occasion has no relevance to this whatsoever. But I think that will play into that theory, Joyce, that you talk about, that the knee was not the cause of death, that the cause of death was actually drug use, or some other kind of thing. On the other hand, though, I do think that the prosecution here has a much stronger case than in many of the police death cases, and that's because the method of death here. So often in these cases, it is a police officer shoots someone who is unarmed because the officer was afraid for his own life. I saw a black shiny object. It turned out to be a cell phone but I thought it was a gun and so I shot or he made a sudden movement or something in that regard.

Barb McQuade:

In this case, as the video shows, Derek Chauvin sat with his knee on George Floyd's neck when he was not a threat to harm Derek Chauvin in any way whatsoever, for nine minutes. If I were a prosecutor, I would be very tempted to do this, to just do something where there's silence in the courtroom for nine minutes for people just to feel how long that is because I think sometimes we think of nine minutes is not that long. In a courtroom, in a quiet courtroom, that's an eternity. I might just say, "I'm going to start my watch now. I'm gonna tell you when it's nine minutes. That's how long this pressure was on this man's neck. For a while, he screamed for help and then didn't make any more noise." And so I think that makes it much stronger. In those other cases, you say, "You should look at this from the perspective of a reasonable officer on the scene and if you can persuade a jury that a police officer may have feared for his life regardless of how irrational that may have been, if the reasonable officer may have felt that way, you can typically prevail on a defense case for a police officer." I think this case is just very different because George Floyd did not pose a threat to Derek Chauvin.

Jill Wine-Banks:

And because of the video, which was so dramatic and where you have witnesses shouting to leave him alone, he can't breathe. It's incredible that the officer couldn't have possibly thought he wasn't killing him. And I want to just follow up on something Joyce said about depraved mind or depraved heart and shooting into an occupied building and just say Breonna Taylor.

Kimberly Atkins:

Yeah, no that's a very important point. And I just want to wrap up with just one reminding our listeners that this is the first trial. There are three other officers that were involved in this incident. How might the outcome of Derek Chauvin's case affect those other cases?

Joyce Vance:

So it's an interesting question whether or not these other officers will be prosecution's witnesses in the trial of former officer Chauvin or whether or not there will be some sort of a joint defense agreement or at least if they'll stay on the same side. I think the best case for the prosecution frankly would be finding an agreement, letting these officers plead to maybe some of the lower charges brought against them in exchange for their testimony. In fact, if they in fact have testimony to offer about Chauvin's state of mind, about his intent but Chauvin is the most culpable actor in this setting. He could be convicted and it's possible that the other officers might not be, but certainly it would not bode well for them going into trial after he had been convicted.

Jill Wine-Banks:

And the reverse is true if he is acquitted. It would be very hard for a prosecutor to feel that it was worth the case against the others who stood and watched, which I believe makes them culpable. They had a responsibility to stop him from doing this when they saw. They were all witnesses to this. There are so many witnesses to it. I don't know that we need their testimony about what his state of mind was. It's apparent from looking at the video and seeing his eyes, other people can testify to that but I think it would be very hard to convict standers by if the person who actually applied the lethal force isn't convicted.

Barb McQuade:

Well, the trial starts Monday and it's expected to last about three weeks so we'll keep an eye on it. Shall we move now to our questions?

Jill Wine-Banks:

Look forward to that.

Barb McQuade:

So I just wanted to mention one briefly before we jump into it, we got a question from Kathleen in Hawaii and some others on twitter last week, and I know Jill you had a chance to answer one of these on Twitter. We talked about the Violence Against Women Act and the fact that it had lapsed and needed to be renewed, and the question that we did not address that has been asked is why does the Violence Against Women Act need to keep being renewed?

Jill Wine-Banks:

Part of that is because the funding for the Violence Against Women Act needs to be renewed and the programs that are under it need to be renewed. So that is what requires it to have a time limit. They cannot be perpetually funded under an initial act.

Barb McQuade:

Yeah, and the other parts of it, you're making certain conduct crimes remain on the books. Those don't need to be renewed as this funding authority that needs to get renewed just like the National Defense Authorization Act. All right. Our first question comes from Kate in Michigan. And she asked why is the Senate delaying the appointment of Vanita Gupta? We saw her and Lisa Monaco testify on the same day. Lisa Monaco has advanced to the full Senate. Why not Vanita Gupta? Joyce, do you have any thoughts on that?

Joyce Vance:

So Vanita Gupta is the nominee for the number three spot at the Justice Department, the Associate Attorney General. During the Obama administration, she held the Civil Rights Division for the second term. I suspect that the failure of the committee to advance Vanita Gupta as they did with Lisa Monaco, who will be the Deputy Attorney General, is because of three things. Vanita Gupta is a woman. She's a woman of color, and she also comes out of the civil rights community. But it seems to me that those are some really tawdry reasons for failing to vote her out. For one thing, she enjoys something that virtually no nominee who comes out of the civil rights community ever gets, and that's the support from every major police organization in the country. And they've written these letters that are really incredible if you follow these sorts of confirmation hearings. Leaders who come out of the civil rights community are routinely almost rejected for confirmation in these posts. And yet organizations like the Fraternal Order of Police talk about Vanita's commitment to getting things done in a way that's fair to everyone. They seem satisfied with her selection. So this was just pure party politics, frankly.

Barb McQuade:

And do you think this is just a hiccup that they're trying to give her a hard time to delegitimize her down the road? Or do they really want to tank her confirmation?

Joyce Vance:

I think they know that they don't have the votes to tank this nomination. She will proceed out of committee. She will get, I suspect, a bipartisan floor vote. It won't be a strong bipartisan vote, but I think she'll pick up a couple of Republican senators. More importantly though, we are at a critical point at DOJ. DOJ faces the most complicated criminal case it's ever done, the January 6 insurrection investigation. We're going to have to deal, DOJ, not we anymore Barb, will have to deal with these systemic police reform issues. I mean, this is within DOJ's bailiwick to take on criminal justice reform, particularly after the George Floyd case, particularly with Breonna Taylor's case still not charged in any meaningful way. It is critical to get people like Vanita Gupta in place so DOJ can do its job. And it's shameful that Republicans are holding her up for purely political reasons.

Barb McQuade:

All right, our next question comes from Mary Lynn in San Diego. Why do we impose statutes of limitations when accusing someone of committing a crime? Kim, you want to take a shot at that one?

Kimberly Atkins:

Yeah, so statutes of limitations literally limit the amount of time in which a prosecutor can bring a case in a criminal sense, in which a lawsuit can be filed in the civil sense. And in a nutshell, the reason for that is that over time, the evidence that is needed to prove that case, whether it's in the form of physical evidence, documentary evidence, or eyewitness evidence. It deteriorates over time. It becomes less reliable. And so we don't want an endless period that charges can be brought where people's memories have faded, they may have over time when your family members tell the same story, and it all sounds different, or when documents aren't available when you have someone's liberty at stake in a criminal case, or whether or not they can be deemed a criminal or a felon. It's really important to ensure that that evidence is strong.

Kimberly Atkins:

Now, there are some types of crimes, of course, where there are no statutes of limitation, murder being one of them. The interest being that if somebody has killed someone, it doesn't matter how long it takes to bring the case. If you can, you should. We've seen a growing number of jurisdictions that put other crimes such as rape in that category where in the past, there has been a statute of limitations there. On the civil side, there's the idea that if you bring a lawsuit, and I'm talking about this because I'm the civil attorney in the group, so I like to talk about that. If you bring a lawsuit, you want to incentivize people. If they're going to state a claim that they want to sue someone to get their rights, that they shouldn't sit on it for a long period of time, that they should, if it's that important, they should bring it in an expedient manner and do their due diligence to make sure that it's litigated.

Kimberly Atkins:

When you think about things like bill collectors I think it's a great example of this where people will bundle up debt and sell it to company after company and then someone will get a call like eight years later about some medical bills they had and you have no idea what it's about. Next thing you know you're being sued. Really, statute of limitations are imposed on things like that. If someone has an actual dispute, they really have to get it going in a shorter period of time, usually two or three years.

Barb McQuade:

All right. And our final question comes from Jenna. She writes, "I'm a newer criminal public defender and started practicing law later in life. I've been told by judges and fellow attorneys that I have a great courtroom presence. However, I have also been told that my fierceness can come off as bitchy and sometimes turn off a judge or a jury. How do you handle being tough and female?" Jill, why don't you start with that one?

Jill Wine-Banks:

Well, that's an issue that I faced from the very beginning, when there weren't very many women in a courtroom. And I think there is a way to balance that. One, you have to be authentic, you have to be who you are. But you also have to be authoritative, because the jury has to trust you and believe you if they're going to rule in your favor, whether it's a civil case, or a criminal case, whether you're defending or prosecuting, and it is a fine line. I know it happens. When I first joined a law firm in Chicago, and sat in on an associate evaluation, I could hear the difference in description of behavior that was identical, but in a man, it was assertive. In a woman, it was bitchy, and was used to downgrade their performance review.

Jill Wine-Banks:

And so there is some truth to that I had to decide whether to call myself Miss or Mrs or Ms. That was a new term when I was early in my career. And I ended up with Mrs. because I thought that I would turn off too many jurors as a uppity feminist if I used the word Ms. So you have to be careful, but I think you can often use humor to make the same points as being nasty. And you can talk, I think in ways that are just plain, open and honest and clear in what you're saying. It is something you have to pay attention to. Tone of voice is judged differently. We have to admit that women are judged differently than men, and so you have to be careful. There are books written about this. Deborah Tannen has written several books about how women speak, and whether they will be ignored by not speaking up, or whether they'll be considered a bitch by, and I guess we're using that word because our question-

Barb McQuade:

We're not TV.

Jill Wine-Banks:

That's right. This is all only on audio. So quote marks around that. I think that it is something to pay attention to. Unfortunately, it's one of those things. How you present yourself to the jury is important.

Kimberly Atkins:

I'm going to take a slightly different approach from Jill. It makes me really sad that we're getting this question. I know when I practice law, one thing that was told to me repeatedly, including by a judge, is that I was too nice to be a lawyer, that I just came off as so nice. How can I be a lawyer, particularly a civil litigator? So I actually think that women can't win. I think if you're nice, that's used against you. And I think if you're assertive, that's used against you, and I say at bottom, do your job well and be confident about it. I'll quote Beyonce and say, some call it arrogance, I call it confidence. Be confident and do your job and have the goods.

Kimberly Atkins:

When I was just getting the hang of litigating when I got my first job as a lawyer, my only job as a lawyer, my boss threw me in and I was going to argue motions and going to court right away. And there's a little bit of jitters that come with that. But it's when I got assertive, it's when I got confident. And I argued my emotions in a way that made judges stop asking questions like, "Who is she?" to my boss, when I would show up in court. That made the other attorneys take me seriously. When you do the job, when you bring the goods, when you show your work, that's what matters the most. That's what matters to your clients. That's what matters to your attorneys and that's what matters to you. So I hope that's what you do, and worry a little less about what other people think and worry about the quality of your work the most.

Joyce Vance:

And you know, when it comes to trying cases in front of juries, juries can smell a fake from a million miles away. I think Jill is dead on the money when she says you just have to be authentic. You have to be genuine. Look, this happens on a sliding scale. I think we all to some extent try to make sure that our behavior doesn't offend juries or judges. That's true for men and women as well. But it's just a much bigger issue. It looms much larger in the landscape for women. For me, I always really weighed in on the side of being authentic and maybe I was a little bit bitchy or aggressive in the courtroom. But I was lucky to have men who sponsored my work, people who were colleagues, even judges, who maybe because they had daughters, or maybe because they were just hardwired this way, were less likely to call a woman out in that sense. That made a big difference for me early on. And so I would encourage our questioner to make sure that she not only is authentic, and is her best self in the courtroom, her most competent self, but also that she makes sure to enlist the professional supportive people around her and make sure that the men understand that this is an issue and that they're part of the solution.

Kimberly Atkins:

Absolutely.

Barb McQuade:

Yeah, and Jenna describes herself as fierce and so I think I share the advice all of you have given about being your authentic self, and Jenna, if you're fierce, be fierce, right? But of course you show respect, you act professionally. But I think if you are defending the liberty of your clients as a public defender, you can be fierce. You're fighting about some high stakes there. But of course, you need to do it within certain boundaries, the rules of the courtroom, but if you can do that, I think fierce is often very persuasive. So you do you.

Barb McQuade:

All right, well, that's all we have for today. Thank you for listening to #SistersInLaw with Jill Wine-Banks, Joyce Vance, Kimberly Atkins and me, Barb McQuade. Don't forget to send in your questions by email to [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com) or tweet them for next week's show using #SistersInLaw. And please support this week's sponsors, Cameron Hughes Wines and HelloFresh. You can find the links in the show notes. To keep up with us every week, follow #SistersInLaw on Apple Podcasts, Spotify, or wherever you listen, and please give us a five star review. We'd love to read your comments. See you next week with another episode, #SistersInLaw.