

Barb:

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Welcome back to SistersInLaw with Kimberly Atkins Stohr, Jill Wine-Banks, and me, Barb McQuade. Joyce Vance will be back next week. As you all know by now, we are going on tour in May to Portland, Oregon on May 12th, New York City on May 19th, and Washington, DC on May 21st. You can go to [politicon.com/tour](https://politicon.com/tour) to get your tickets. They're selling fast and there really only a few left and we really want to see you there. So please hurry and get your tickets while they last.

Without further ado then, let's get onto today's show when we'll be discussing the lawsuit against Fox News by Dominion voting systems, the latest in the abortion wars, and DOJ's investigation into the Louisville Police Department. As always, we look forward to answering your questions at the end of the show.

Before we get started though, I got to ask you guys, I recently suffered through a four-day power outage and it was pretty rough. I would love to hear your advice for getting through it. I know some people rented hotel rooms. It was cold, but it never got quite that bad. So we slept here and we're fortunate enough to have access to some resources. I could charge my devices up at the law school and do some work there. We showered at the Y, and we went to Starbucks for a lot of long coffees, and I never ate out so much, which was nice. We would see all our neighbors out at all the neighborhood restaurants, which was fun like, "Oh, hey, power's still out." Have you guys had any? That's probably the longest power outage I've endured, four days. How about you, Kim? Have you had any experiences with power outages?

Kim:

Yeah, I have. So the last time I had an experience that long with a power outage, it was a while ago. I think it was a little bit over a decade ago. It was not long after I moved to the Washington, DC area, but instead of a winter storm, ours came in a blackout in the middle of a heat wave in summer. So it was a hundred plus degrees, I was in a brick house, and I understand now why they bake pizzas and bricks because it got so hot, and I had just adopted a dog, Boogie, who I've spoken about on this podcast before, the late great Boogie, but he was pretty new and I thought, "All right. I might have been able to suffer this out alone, but I can't do it with the dog."

So I found a hotel that would take dogs, which was new. That's a fairly new development. At that time, there weren't very many, but we found one, and let me tell you, I was little worried about how the shelter dog was going to get on in a hotel. He loved it. Once he realized that every time he comes in the lobby, everybody's like, "Oh, look at the cute puppy," and he got all this attention. They gave dogs in this hotel a little fluffy bed and dog treats and stuff. He learned that every time someone knocked on the door, it was room service, that they were bringing food. He did not want to leave.

When we would come in for walks, he knew exactly where our hotel room was. He could walk. He was like a celebrity in that place, and he didn't want to go home. He was super disappointed. So it was disruptive for me, but Boogie loved it.

Jill:

So I have a similar story, but mine was also during the summer, just like yours, Kim, when it was over a hundred degrees and the power went out. We tufted it out for the first day, and on the second day, I thought, "Oh, my gosh, we cannot possibly survive this." At the time, we had two dogs, and I couldn't

find a hotel that would take us with even one dog. Then finally, I found one that would take us. Luckily, just before we were leaving, the power came back on and so we didn't have to go. We were saved, but I did have a winter storm problem.

I was flying from Chicago to a fishing camp in Mexico, and my husband and I, of course, had our fishing gear and shorts and sandals, and we were all set for getting out of Chicago's winter, and then a storm hit Texas and forced our plane to land. We couldn't take off again. They put us up in a hotel and I had nothing with me that was at all appropriate. So we ended up going to some local, I don't remember if it was a Walmart or a Target or something to get sweatshirts and sweatpants and socks and stuff so that we could survive until we could get to Mexico, but other than that, I haven't had too many terrible times.

Barb:

Well, it was a good reminder of how good we have it, most of us, in this country. I think about some of the people who are suffering through a year of war in Ukraine and dealing with some of the things. So it's a good reminder of how fortunate we are and a good reminder of the suffering that some people undergo. So four days is nothing compared to what others endure.

Kim:

So you know what, Jill? I was thinking about booking a mani-pedi appointment, and then I looked at the prices and I thought, "I think I'm just going to stay home and use Olive & June." Have you used Olive & June?

Jill:

I have, and I love their colors, and I love how long they last. It's a really good quality product. Nothing is better than giving yourself the perfect home manicure with Olive & June, and it does save you time and money of going for a appointment. They have everything you need for a salon, quality manicure in one box, and you can customize it with your choice of six polishes. We all love how their polish doesn't chip. It lasts seven days or more, and when it comes down to you're getting great savings because it breaks down to just \$2 a manicure.

Kim:

Not only do you get salon worthy nails at home with Olive & June, you'll immediately notice the difference you get when you craft your perfect nails with their mani system. That means no appointments, no traveling to find a suitable salon, and it saves you money while putting your nails on your schedule. Your friends, family, spouses, and coworkers will be amazed. I wouldn't think of using anything else before going on air because I do gesticulate, as I've mentioned in the past. So I have to make sure my nails look good. Plus, they have amazing looking press-ons that go on quickly. They look so real, lasts so long, and have any size you can imagine so you're going to get the perfect fit.

Jill:

That means a non-damaging mani in less than 10 minutes. It goes on much better than with gel, and it's certainly much healthier for your nails. They're even an Allure Best of Beauty winner, and with their quick dry, you only have to wait a minute and you can feel confident knowing they'll last for five or more days, definitely more than five days for me, with only one or two coats. So visit [oliveandjune.com/sil](http://oliveandjune.com/sil) for

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When Dominion filed a defamation case against Fox News, and I say that with quotes around the word news, I predicted that it could be the end of Fox, but I didn't foresee the overwhelming evidence we're now seeing. Both sides have filed summary judgment motions asking for a verdict without trial, and in support, Dominion has filed briefs that include what I would call direct evidence that Fox knew that the various pro-Donald Trump conspiracy theories about the election technology company were false, but pushed them anyway because the lies were good for Fox's business.

This is not the norm in defamation cases. Fox News, of course, denies the allegations and accused Dominion of distortions. So let's start with what the released internal Fox documents show that Fox executives and anchors were saying to each other and how it differs from what they said on Air. Kim and Barb, I'm going to ask you both to give some examples of what Fox anchors and guests like the recently censored attorney, Jenna Ellis, the pillow guy, Rudy and Sidney said on air versus what we learned from the release of internal text messages and emails. So Kim, let me start with you.

Kim:

What I thought was the most telling from what we learned this week, so we already knew that the Motley crew that you just named had been going on air and stating that votes had been flipped by Dominion machines like so many completely nonsensical things on air and Fox is putting it up there, but what was interesting about these most recent filings is that you saw what the top brass and also a lot of the on-air talent were really thinking.

I think the most telling statement that we had heard before, but we got better context for it, was when Tucker Carlson said in an email that Donald Trump could, quote, "destroy us all if we play it wrong," and we'll get into this a little bit more later when we're talking about what needs to be proven for a defamation case, but to me, it made it very clear and what he meant was destroy us all means as a company, as a business, destroy Fox News. What that says to me is they knew all along that this was absolute baloney and they were putting it on air. They knew what these people would say when they got on air, and I think that's a big problem.

Barb:

Yeah, and Jill, some of the statements, as Kim said, weren't just directed in very general terms. There must have been fraud. It was very specific in terms of these disparaging things about the Dominion voting systems, and the four categories of lies that Dominion talks about in its lawsuit. One is a plan to thwart the election. Another one was the one Kim just mentioned, which is that their machines had algorithms that would deliberately flip votes from Donald Trump to Joe Biden, that Dominion was owned by a company out of Venezuela that was created by their authoritarian leader, Hugo Chavez, which-

Kim:

That was Sidney Powell. I remember that one.

Barb:

Yeah, it is crazy stuff, and that the Dominion voting systems got their machines in polling places by extorting and bribing public officials. So they assert in their lawsuit none of those things are true, they're absolute blatant lies, and as you say ... So people said all these things on air and the host would just nod

and smile and say, "Oh, that's terrible," and now what we're seeing is in their depositions and in other documents and emails and other things where they're saying, "Sidney Powell, what a nut case. She's an absolute nut." They didn't believe any of this stuff at all, that they knew it was all a lie, and yet they continued to promote it on the air because it was good for ratings.

After Fox, their news desk, called Arizona for Joe Biden pretty early on election day, viewers got mad at them and started saying, "Boycott Fox News," and so as a result, they started saying, "Oh, no, we're losing viewers. We're losing them to CNN. We're losing them to Newsmax. We need to recover this." So that was the incentive, that business incentive to continue to push this lie so that they could retain viewers.

Jill:

It's so many amazing things. All of our listeners should read the documents that show what they were saying. To your point, Barb, about it being about business, you have Rupert Murdoch saying, "Oh, it wasn't a Reddit or Blue Choice, it was green. It was all about the money," and he said, "I could have stopped them, but I didn't," and my favorite was Tucker Carlson saying about Trump, "I hate him passionately," and then he goes on air and says all these great things about him, the hypocrisy.

So Barb, some of the evidence was redacted, some of the statements and some of the materials were redacted. Do you expect that the court's going to unredact and release some of that, and when do you think it would happen, and also just so that our listeners know the standard for allowing redactions or for saying, "No, you can't get away with this"?

Barb:

Well, it's hard to know exactly what's behind those redaction bars, Jill, but ordinarily, parties will redact information that might be personal, that's not relevant to the lawsuit at all because it relates to somebody's Social Security number or birthdate or their children, their spouse, something that's personal that's unrelated to the lawsuit or it could be proprietary business information. Sometimes that's something that gets protected.

So it may be, if that's the case, that it never gets unredacted and shared with the public, but there is this idea that information should ordinarily be available in the public domain when it's part of a lawsuit. So a judge will look at that carefully to decide whether it needs to remain redacted, but if it is personal information unrelated to the lawsuit, I imagine it will remain redacted, but sometimes things that were necessary to keep protected at one point and time no longer becomes the case.

So I really don't know if or when those redactions will go away, but when you read it, it's intriguing, isn't it, because you start reading something about some outrageous things somebody said and then suddenly you get to the good part and it's just black bars like, "Ah, I want to know what was there."

Jill:

Exactly, and let's look at the case overall. Kim, what does Dominion have to prove to win the case?

Kim:

So for a defamation case, the elements are that a false statement was made purporting to be fact, I think they got that in spades, that it was published or communicated to a third person, in this case it went out to their millions of viewers, that it was done with at least negligence, and in some circumstances, the standard is raised to actual malice, and that they suffered some sort of harm. It

doesn't have to be massive harm. It could be just any harm at all based on this statement, harm to their reputation or to their business.

Now, there's also a possibility that they could be awarded punitive damages, and both if, A, Dominion is determined to be a public figure based on the fact that they were a part of this controversy involving elections, which I think I know that's what Fox wants to make this claim. I'm not sure that they will, but also, if they want to get punitive damages, they will have to show actual malice in order to do that, and that means that these statements were made by Fox with knowledge that they were false or with reckless indifference as to their truth or falsity.

I think that's what the point of all of this newly released stuff gets to. I know there have been some statements saying, "Oh, you can't defame someone in a private email. These have no relevance to this case. These were all private things. That's not defamation." That's not the point. It's not these statements that are being held out as defamatory. It's the fact that these statements prove that they were made, that they knowingly put these folks on air to make these false statements, let them do it, didn't retract it, and at the very least, did it recklessly.

Not only does that make it easier for Dominion to make this case under any circumstances, whether they're seen to be public figures or not, but it could mean in addition to the 1.6 billion dollars that they're seeking in compensatory damages, it can mean punitive damages that can go much higher. So these revelations are very, very important.

Jill:

The evidence is extraordinary. I mean, you seldom have such clearcut evidence that they knowingly made false statements, and basically, they've admitted they were false. That's not an issue for trial, but they do have to comply. Dominion has to comply with New York Times versus Sullivan, which Republicans have been against, but Fox is, of course, now very grateful to have that higher standard. So Barb, what is New York Times v Sullivan and will Fox lose even under the stricter and higher standard of proof that is required by that case?

Barb:

Yeah, that's the case that set this higher standard. It's a balancing with the First Amendment designed to avoid a chilling effect on a vigorous press that wants to report about public officials and public figures. So when the subject of a report is in that category of public official or public figure, it allows a little bit of grace for reporters to get things wrong. If they make a mistake and they report something that's false, that alone is not enough. As Kim said, you have to show this idea of actual malice, and that is either that the publication knew that what they were reporting was false or they acted with reckless disregard as to whether it was false.

Oftentimes, that's a really high bar to reach, almost unreachable because how do you ever prove what was in someone's mind, and that can be very difficult unless you see all of their smoking gun emails. Wow. All of this stuff shows that they knew. There's one where they say, "These claims are BS." One of them even referred to Lou Dobbs as reckless like, "Do we win? Is that it? Do we win there?" and they said reckless. That's the standard and they said they were reckless.

So I think even Tucker Carlson said that of Sidney Powell, that what she was saying was cruel and reckless. I mean, my gosh, I think they do have it. So it seems like this is going to be a good case because it is so often difficult to withstand and surpass that standard. When Sarah Palin lost her lawsuit for defamation where she took the case to trial, it was that actual malice standard that made it difficult for

her to prove her case, but I think this one is so egregious that Dominion is going to prevail even under that very high standard of actual malice.

Jill:

So Kim, what Barb is saying is certainly true, and it raises the question of, should Fox have settled this case before Discovery made it so blatantly clear that they lie to their audience, that they knowingly put on these fake stories, and even though the damage is done by the fact that this is out there, should they settle now and will they?

Kim:

So to me, Jill, as a former civil litigation attorney, and I don't know, I'm not involved in this case, obviously, the fact that we got this evidence and we're seeing this and it's moving forward, what it says to me is that it's not up to Fox. It says to me that Dominion is probably uninterested in settling because among other things that they said in their filing is, "Fox, to this day, to this day, has not retracted a single thing. They could have retracted this." We saw when the lawsuits, when defamations lawsuits started being filed by Dominion, other networks immediately, immediately get on air and read a script retracting what they had said. Fox did not. So I think at this point, even if they do offer a settlement, my guess is Dominion is telling them to go scratch.

Jill:

Barb, what do you think?

Barb:

Yeah. I tend to agree. In their complaint, they do seek 1.6 billion dollars in damages for the reputation. I mean, what's the worst thing you can say about a voting machine company that not only do they fail, but they inaccurately tally votes? That's pretty bad. They actually alleged too that there is defamation per se in this case. Defamation per se means that you have defamed me about a topic that is so central to my business that I don't even have to prove I was damaged. I don't have to show the numbers that last year my profits were X and this year my profits were Y, so much lower, because the topic is so instrumental to their business model that we can just assume that they have been damaged by that, but it does seem that if they were going to settle the case, they would've done so by now.

I don't think they're in it to settle it. I think they're in it to make a point with Fox News and to really clear their name. The one hazard of settling a case, most cases do settle because parties recognize that there's litigation risk that they could lose, that it costs a lot of money to proceed all the way through a case, so most do settle, but I think one downside to a settlement is it allows the other side, Fox in this case, to say, "We didn't do anything wrong. We just paid a lot of money to make this go away because it was such a nuisance." I think Dominion is doing everybody in the country a great service. They have the resources to be able to go all the way here and prove what Fox did. So extracting these emails and all of this serves a very important point.

It may be that the court grants summary judgment here, which is to say that Dominion has shown that there's no way Fox can win this case. We've seen all the facts and they all favor Dominion, and so therefore, there is no genuine issue of material fact at stake. Dominion, you just win. That could happen even short of a trial. That might very well happen, but I think it has given Dominion the opportunity to really publicly display just how wrongful Fox's conduct was.

Jill:

Yeah, unfortunately, Fox viewers don't know anything about this-

Barb:

Yeah, they haven't heard any of this.

Jill:

... because isn't covering it, and so they don't know that they're being lied to and that the lies are being concealed. It's really horrible. I still think they may end up having to be forced to go on air and say, "We've lied to you. Here's the facts." That is part of any verdict in this case. That's one of the things that I think Dominion will ask for, but could this actually be the end of Fox in one of two ways? One is it's not just the 1.6 billion that they might have to pay, but it's that if they keep on lying, there's going to be more lawsuits like this, and there'll be another 1.6 billion, and eventually, that's going to bankrupt them, but in addition, if they stop lying to avoid that consequence, they're going to lose their audience because their audience, obviously, as they said, wants to hear these lies. So what do you think? Is it a lose-lose for them no matter what? Kim, you want to start?

Kim:

I don't know. I mean, I can't pretend to understand the psyche of the Fox viewer and what they want in a network or what this means, and that, obviously, as we said, that's not the purpose of this lawsuit to end Fox. It's for both Dominion to be compensated for the damage that was done to them and also potentially punitive damage to punish Fox, and that can come in the form of a large punitive damage award, but I think it's more important to get the truth out there and to put on record, "Hey, this was a wrong that was done," and to force Fox to come clean about what they did is really the outcome.

So if it ends Fox, I don't know. I don't know. It's tough because usually when there is litigation involving a media organization, as a journalist I'm on the side of the media organization, but in this case, I am clearly not. We are all subject to defamation laws if we publish things that are false and we know that they're false. So I think in this case, they should be held accountable.

Barb:

Kim, it's like when a bad cop shoots somebody. It taints everybody's badge, right? So you don't want people, news media outlets out there acting so irresponsibly.

Kim:

Of course.

Barb:

To answer your question, Jill, I don't know. I think I've been researching this book on disinformation, and there's a huge segment of the population that doesn't care what is true and what is false. They just want to hear their own views echoed back to them. I think that's why their viewers got so mad when Fox News accurately called Arizona for Joe Biden and they started losing viewers who started flipping over to Newsmax and other channels. So I think there are people who just want to hear that reinforcement of their worldview. So I don't know. I think we'll see a shake up. I think we'll see some people leave. It's always easy to throw a couple people under the bus and say, "Oh, we're better now. We got rid of that one executive and now everything's fine."

1.6 billion dollars is a lot of money. I don't know if it'll break the bank, but I don't know if it will cause them to change the way they do business because I think they pander to a certain viewer that tunes in and that there are advertisers who want to reach those viewers. So as long as we have that model, I think that's a risk.

Kim, it has been a cold dry winter and my hands are like sandpaper. You got any advice for me? What can I do about that?

Kim:

I do. I have been using this wonderful body butter by OSEA that has kept my hands from being chapped all winter long, and it smells really, really good. I love it. If you're like us, your body needs a little love this winter season, and when it comes to replenishing your skin's moisture barrier, OSEA is your one-stop shop for clean, nourishing, clinically proven products for both face and body. Even better, they've been making seaweed-infused products that are safe for your skin and the planet for over 26 years.

Jill:

Using OSEA is a habit worth keeping all year round, and you should know that all of OSEA's products are clean, vegan, cruelty-free, climate neutral, enriched with seaweed, and made in California. That means you can feel good about what you're putting on your skin. Plus, they're clinically proven and consumer-tested so you know they work. We strongly support their clean, seaweed-based skin and body care products. Not only are you getting the best, but you're supporting a woman-owned company that is drawing from the wonders of nature to give you an unforgettable experience.

Kim:

Our current favorite is OSEA's Undaria algae body butter. That's what I was telling you about, Barb. It's a buttery rich body butter that is clinically proven to hydrate for 72 hours, plus smooth the look of crepey skin. The texture is amazing, and you feel your skin soften as you rub in its unique combination of nutrient-rich seaweed, whipped shea butter, and ceramides.

Barb:

It's just fun to say buttery rich body butter, isn't it? OSEA's TikTok famous Undaria algae body butter is next level body care that transforms dry skin so it's smooth, soft, and unbelievably supple. It's thick, unbelievably rich texture, absorbs instantly, and feels fantastic on skin. Plus, it smells so good. So protect your skin from winter dryness and sandpaper hands with clean vegan skin care and body care from OSEA.

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Kim:

So there have been lots of developments on the legal front in the battle over abortion access. Barb, tell us about a lawsuit that was filed in Texas by women who claim it's nearly complete abortion ban harm them. What do they alleged and what kind of relief are they seeking?

Barb:



Yeah. This is such a sad case and so predictable, right? When Texas put in these very restrictive abortion laws, you could just see cases like this coming, where women who had pregnancies, who were either high risk pregnancies or had some sort of complication, and in ordinary circumstances, the doctor would say, "What's best for the health of you," or, "Maybe one out of two twins is to abort this pregnancy, and that's what's best," but because this law is so severe and is so vague, doctors are afraid to perform abortions even when their patients need it.

So in some of these instances, we had people leave the state to get abortions that they needed. Just awful suffering that seems needless. So all they're asking for is to clarify the law, Laws are unconstitutional when they are vague, that is, they fail to put people on notice as to exactly what is permitted and what is not.

I think it was written in a way to be deliberately vague because they wanted doctors to air on the side of not performing abortions. They wanted there to be a chilling effect, but I think the reason these five plaintiffs have come together is to tell their stories and so that the public can understand that I think there's sometimes this spin of abortion as irresponsible sexual behavior, someone gets pregnant and wants the phrase, quote, "abortion on demand," which in my view is reproductive freedom, and yes, it is, but this is so much more than that.

These are people who wanted to be pregnant but had some unfortunate circumstance, and then rather than be able to abort their pregnancy at the advice of their doctor, the doctor said, "Sorry, there's nothing I can do," and they were stuck. So they just want clarification so that doctors have clear lines about what is and is not permitted.

Kim:

Jill, how likely do you think that these lawsuits will be effective, particularly in states like Texas where the ban is so broad and has very few, if any, exceptions?

Jill:

I actually think this has a good chance of being effective for two reasons. One, because these are women who are extremely sympathetic, I'm sure some of our listeners have seen them on air talking about the horrors that they encountered about some of them had to go out of state, one of them ended up in sepsis and has severe scarring that may prevent her ever becoming pregnant again, and this is a woman who spent 18 months trying to get pregnant, who was ecstatic, who wanted to save this baby, but whose life was at risk, and whose doctor was unable to intervene until she was almost dying.

All they're asking for, as Barb said, is that there is a clarification and that it go back to a doctor's judgment being the determining factor. They have suffered damage. They have a right to have their doctors be able to make a judgment about when is the harm sufficient to terminate this pregnancy, when is the risk either to one or in the case Barb mentioned of twins where the doctor says, "I can save one, not both," and you have to make a hard choice of terminating the pregnancy for one of two twins or, "I can save your life, but that means ending this pregnancy."

So I think that they are sympathetic and that there will be some consequence. I believe that the attorney general of Texas has already responded to this by saying, "I'm going to write a letter that explains more." Well, that could go some way in clarifying. It's not enough for him to write a letter saying what he means. It has to somehow become official law of the state of Texas to make it clear that doctors can use their discretion and judgment, but I'm optimistic that this case will have some good consequences.

Kim:

Yeah, I hope so too because the point you make is so important. When we're talking about things, I think for years we've talked about exceptions for the health of the mother or the life of the mother and just in dry terms. The difference between those two, an exception only for the life of the mother and you say, "Oh, well, that's there. It's okay." No, that means that a woman needs to be on death's door, officially deemed by a doctor on death's door before a doctor can intervene. Can you imagine putting people, putting doctors, putting anyone, their families in that position? It's very hard to think about but, Jill-

Barb:

I have-

Kim:

Go ahead, Barb.

Barb:

I was just saying, I have some friends who work in obstetrics and cancer treatment at the University of Michigan Hospital, and they have talked about how difficult these issues are. People think, as you just said, Kim, "Well, there's an exception for the life of the mother, so therefore what?" They said it's the application of that in real life that's so difficult. So if someone during a pregnancy gets cancer, for example, it might be their best medical advice to terminate the pregnancy and treat the cancer, but is it 100% certain that the person will die if they delay the treatment by nine months, six months, whatever it is? No. Is it 50%? Is it 70%? What percent does it have to be? There's some uncertainty in all of that. So that's why it's overly simplistic to say only if the life of the mother is at stake. It's really pretty rare that you can say with 100% certainty that death will result unless we complete this abortion.

Kim:

It's really awful. Well, Jill, there's another lawsuit, one that is brought by State Attorney's General in Oregon and Washington and elsewhere about the abortion pill. Can you tell us what that's about?

Jill:

Absolutely. My Attorney General Illinois, Arizona, and many others, I think Michigan, Barb, has also joined in on this lawsuit, and it's basically a counter to the Texas case that's pending where everybody expects a federal judge who was specifically selected as the person who this case went to because they're expecting him to say that the FDA's approval of one of the two abortion drugs was wrongly approved. Even though it's been approved 23 years and has been used successfully and safely for all 23 of those years, that, no, it should be unapproved.

This is one that says not only should it not be unapproved, but to the extent that there have been harsher restrictions put on the prescription of this drug, including that the doctor prescribing has to have a special certification to give it, that those are unnecessary, that this drug is safer than Tylenol, and therefore, it should be allowed to be prescribed without any problem and dispensed in retail pharmacies, and that makes total sense to me.

I do want to point out that there are two drugs, and this is for mifepristone. There is another one called misoprostol, which is taken in conjunction with the other drug that is the one being challenged, and it can be used on its own in a slightly different dosage. It can cause more side effects. It can cause heavier bleeding and some cramping and diarrhea and nausea, but it is in many countries used as the sole pill to

terminate a pregnancy. So I don't think medication abortion is going to go away, it's just that there will be fewer options if these lawsuits should succeed.

Kim:

So Barb, relatedly, there's another abortion battle brewing out of California, and this one, it may not be strictly a legal issue, it's certainly a policy one and a political one. What's the deal with Walgreens?

Barb:

Yeah. This is such an interesting situation. So Walgreens, of course, massive drug distributor pharmacy has said that it is not going to sell these abortion pills in states where they are banned. So in response to that, California Governor Newsom has said, "Well, then we're not going to do business with Walgreens anymore because they are caving to these lowest common denominator states, and we don't intend to support that. We're going to take our 54 million dollar business to other pharmacies. Thank you very much."

So it's interesting, from Walgreen's perspective, I think most lawyers would give their client the advice that you should avoid risk, and so there is a risk that if they are to continue to distribute drugs in those states where state law has banned them, they will face repercussions and they most certainly would in the short term, but they have another option, which would be to file a lawsuit in those states because I think it seems likely to me that they could prevail. If the FDA has approved these drugs, which it has, it seems that a state ban likely violates the supremacy clause and maybe even the commerce clause, which are the province of Congress and the federal government and not state governments.

In fact, there is a lawsuit brewing right now, we talked about this a few weeks ago, pending in West Virginia where they have one of these state bans on abortion pills, and one of the manufacturers of the pill has filed a lawsuit to say it's illegal for these various reasons. So I imagine that at some point the law will shake out and we will know whether states have the authority to enact these bans, but in the meantime, I think Gavin Newsom is taking a stand scoring some political points, I suppose, by saying that, "We're not going to do business with you anymore, Walgreens," but Walgreens is being, I think, a little wimpy here and just trying to avoid legal repercussions instead of taking a strong stand on behalf of its customers across the country.

Kim:

This is very, very similar to the-

Jill:

Can I just add to that?

Kim:

Yes, please.

Jill:

I want to just add because I think Walgreens is the second largest pharmacy in the country. They have the resources to stand up to this kind of threat of lawsuit. I can't imagine that someone's going to now come in and say, "Well, we think Viagra is an awful thing and that no man should be able to get that." Will they cave for that or is it only when it's a woman's rights that are involved? I don't think it's just a

woman's rights because this is something that it took a man and a woman to create, but I think that Walgreens is really wrong. I'm not shopping at Walgreens until they change their policy.

I think a lot of the groups that are for reproductive healthcare freedom are urging people to say, "I'm not going to go to Walgreens anymore if they don't start living up to what they could," and as Barb said, they could win this lawsuit. I think there's a very good chance they could win it and they should have taken it on. They shouldn't cave in, and they did it in states where abortion is legal, not just where it's illegal. So I think Walgreens is completely wrong.

Kim:

So Jill Wine-Banks is voting with her pocketbook in doing that, but we talked last week or the week before about Disney. So there's one thing, you can have a legally sound argument, which I think Disney has a very strong First Amendment defense in what Ron DeSantis and state Republicans are doing to them, but they're choosing not to engage in the fight, to deny him that fight. Do you think that this is a different case here in Walgreens? Clearly, Walgreens does not want the smoke. They're getting it from both sides, but clearly, Walgreens does not want the smoke and that's why they're doing what they want. So you think that this is different or is it the same?

Jill:

No, I don't think it's different. I think both of them caved in. First of all, I think Disney has also an economic interest that is even greater because they are being deprived of some economic benefits that they were granted for building in Florida, and now, all those rights are being taken away, and that seems at least contractually to be something that gives them an extra reason for they should have defended against what's happening.

So yes, I understand that crisis counselors said, "Just walk away from this. It's not worth it." I think it's worth the fight, but then I'm a long time, I was a board member of the ACLU and I still support the ACLU and I support freedom of speech even when it's not convenient. I mean, my ACLU is the one that defended the Nazis marching in Skokie, which is a heavily Jewish area and was deliberately picked to harass and hurt the Jewish population of Skokie. So I mean, believe in the First Amendment in its fullest sense of the words.

Kim:

All right. So just there's also more, if you can believe it, on the abortion legal front. I wrote this week about another issue I'm really concerned about, which is a push for a nationwide recognition of fetal personhood, which seems to be the next frontier for anti-abortion advocates. Jill, how likely do you think something like that could happen either soon or down the line?

Jill:

Well, I'm not one for predicting how likely a political horror is, but I will say that a very dear friend of mine, Civia Tamarkin, was the director and producer of a movie called Birthright: A War Story, which was done in 2017, and back then, clearly predicted that where the Pro-Life, as they are known, group was going was personhood. That was their strategy, and it was for a constitutional amendment that would grant personhood, and they have done things that are in that direction now, which is they've done things like you can use the HOV lanes if you're pregnant because you are two people in the car. They may seem harmless, but it is part of their strategy to get a recognition of an embryo as a person.

They are giving tax benefits to you starting at conception, not at birth when you have a child. The consequences of this, if you start thinking about it, is really terrible. I mean, obviously, if it's a person from conception and you fall down and miscarry, have you done a involuntary manslaughter? Are you guilty of murder if you go and have an abortion? I mean, there's really a-

Kim:

Is someone required to provide child support?

Jill:

Exactly.

Kim:

Is it dependent on your tax? I mean, it's almost nonsensical the extent that this can go to. What I wrote about was the fact that they're making a claim that because there are criminal statutes that provide penalties, for example, to a domestic abuser, if they are abusing a spouse who was pregnant, then the criminal penalties are greater, and in places, even Massachusetts, they can be charged with murder. A criminal statute does not convert personhood in the constitutional sense. No first year law student would think that that's how this works, but they're trying. What I fear is that they're trying to create this narrative right to make people think, "Oh, well, no." If you can be charged with manslaughter in a case like this, and that must be a person and it doesn't make sense and it's crafty, it's neat, but it is not legally sound.

Jill:

Exactly, and we should definitely put a link to your piece, which is terrific, and to Birthright, which is available on streaming platforms all over as something that can really show the consequences, some of them unforeseen, of this movement.

Kim:

Hey, Barb, can you get this ad started because I'm shopping right now.

Barb:

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Kim:

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Barb:

This week, the Department of Justice issued a report of its investigation following the death of Breonna Taylor in 2020, and found that the Louisville Police Department engaged in a far-ranging pattern of discriminatory and abusive law enforcement practices. Breonna Taylor, as I'm sure you'll recall, was shot and killed by police officers when they conducted a search on her home in the middle of the night. They were looking for drugs in a case involving her former boyfriend.

Jill, this is quite a report. Can you share with us maybe just some of the real top line findings of the report because there are a number of different things that go well beyond the Breonna Taylor incident that are really disturbing?

Jill:

It is very distressing, and I will point out that this was a special unit, not very dissimilar to the one just involved in the Tyre Nichols case. Some actions have been taken already by Louisville to correct some of the wrong, but this was a wide-ranging proof of excessive force being used and excessive force without any justification. It was unnecessary. It was violent. There was also, I mean, there was racist rhetoric being used. They also failed to investigate things like sexual and domestic violence allegations, which is just as disturbing as their use of excessive force and particularly targeting people usually in crisis, oftentimes with emotional or psychological problems.

There were so many things about this unnecessary force and their often willingness and even excitement at escalating from a minor situation to way beyond what it needed, and then having no oversight at the higher levels. People were not punished when there were reports. So the leadership of the Louisville Police Department just didn't do anything.

I think it was really a whole series. I mean, it's like a 90-page report, so it's very hard to synthesize them, but it certainly fell into non-response to sexual and domestic violence cases, excessive response, particularly in certain situations, excessive violence and inadequate oversight. So I'd say those were some of the biggest responses.

Barb:

Well, Kim, one of the areas that is included in that report about discriminatory policing was in the treatment of Black citizens of Louisville. Can you tell us about some of the findings regarding that topic?

Kim:

Yeah. It's a real awful stew of awful things, and for our listeners, I think you should actually read it to get a full understanding exactly what happened because it's hard for me just to summarize it here, but as Jill

said, it found essentially that there was selective deployment of law enforcement, particularly in Black communities, and within that selective enforcement, there was not only the use of force that was retaliatory in nature. Meaning, it wasn't just meant to detain someone, to question someone, it was meant to punish them, to inflict pain even when it was not necessary.

There were a host of other things that they found like the frequent use of racial slurs, calling Black people everything from monkeys to animals, to boy, the failure to report encounters with Black residents in which force was used, the use of police dogs sit on people, again, not to seek out evidence but to harm them, and the fact that police seem to enjoy doing this.

Black people were far more likely to be targets of stops and searches and to be cited for traffic violations if they were pulled over. With Black people, arrest warrants were more likely to be served at night, as in the case of the Breonna Taylor incident, which increases the risk of danger because it's harder to judge what people are doing, what their motions are, whether it's dangerous or not. All in all, Assistant Attorney General Kristin Clark called these tactics, quote, "weapons of oppression, submission, and fear". It's really horrific.

Barb:

Yeah. The thing you mentioned about executing search warrants at night, when this story first broke about Breonna Taylor, I remember thinking, "Why on earth are they doing this at night?" and I think they even used a flash bang, which is designed to distract people. It's a big explosion that goes off, and it is something that gets used at times when it's necessary to startle and get everybody's attention so that they can't be lying and wait, but they're going into an apartment.

Now, they may have believed that there was somebody in there who was armed, but it is considered best practice under than exigent circumstances to execute a search warrant first thing in the morning. You might have to do some surveillance to determine what are the hours the person is there, but the ideal scenario is you get them first thing in the morning after or maybe even still in bed or they've just woken up, you arrest them. Then you've got several hours during the daylight to conduct the search. As you said, Kim, it's much safer when everybody can see everyone and what's going on.

What created so much danger in this case is they broke down the door. There's some discrepancy as to whether this was knock or no knock, and in the eyes of Breonna Taylor's boyfriend who's in the room with her, you've got intruders busting down the door, exploding, shooting their way in like, "What on earth is this?" So it seems very rational that he would've thought it was necessary to use self-defense and fire the way he did.

Imagine a different scenario where it's the first thing in the morning, they knock, he can see that it's police officers, and they can have a rational conversation about how that search is going to go down. Well, Jill, let me ask you about this conduct as you've described, as Kim has described, is certainly illegal. I would argue it's even immoral, but does it also impact the effectiveness of a police department?

Jill:

It does. It absolutely does, and I'm going to quote from Merrick Garland. When they were having the press conference on this, he was talking about a case of the police going against people with behavioral health disabilities and talking about a man who had such disabilities, had 25 encounters with the police, who used unnecessary force and mocked him, and then he eventually died in police detention.

At the conference, Merrick Garland said, "This is heartbreaking, and it erodes the community trust that is needed for effective community policing." So that's where you get down to this is that if the people of a community think that the police are violent and use escalation tactics instead of deescalation tasks,

they will not cooperate with them. They will not trust them. They will not report crimes to them for that reason. So it definitely hurts effective community policing.

Barb:

Yeah. We had one of these consent decrees with the Detroit Police Department, and one of the things that we heard from community members was that they didn't trust the police to report when they were a victim of a crime or a witness to a crime because they weren't very good at their job anyway, and they weren't going to resolve a case, and they didn't trust the police officers to be fair, to be just, to treat them well with respect, and so they saw them as the enemy and didn't want to help.

After we resolved that and got a new police chief, it really turned things around and it made the police department more effective and we saw crime rates go down. So it's really important, I think, that police departments have the trust of the community that they serve. Well, Kim, let me ask you, so what are the consequences here? We've got this report, 90 pages, where they detail all of this awful behavior by the Louisville Police Department. What are the consequences? Is this a civil case, a criminal case? What happens next?

Kim:

Yeah. So I want to be clear that this is separate from the criminal federal charges that are pending against the four police officers who were involved in the Breonna Taylor incident. What happens after this report is that it triggers the beginning of negotiations between the Department of Justice and police and other city officials in Louisville with what should conclude and what you mentioned something called a consent decree, which would have to be approved by a judge, and which would list out a number of systemic reforms that would have to be undertaken under the supervision of a federal monitor. That will have to be worked out, but just from this report, we already know that some of the recommendations that are likely to be included include improving training on the use of force and in the way search warrants are carried out. I have a feeling that more reforms will come forth as this moves forward and these negotiations happen.

Barb:

As you know, sometimes people think of this as an us versus them scenario that you have to either be for the police or against the police. I found with the consent judgment and the compliance process we went through in Detroit, the leadership was eager to embrace the change, and they wanted to have a department that was practicing constitutional policing. They just like the resources and the expertise to achieve it. They're so busy doing so much with so little. Police officers get paid in Detroit, the starting salary is \$35,000 a year. It's a really tough job.

So they don't have the luxury of time of trying to make these improvements. So the consent decree process did make them a model police department. So I'm hopeful that Louisville will become one, and I know that the Justice Department has similar investigations going on now in Minneapolis, New York, Oklahoma City, Phoenix, and a number of smaller cities. So maybe one by one they can affect some positive change.

Kim:

I just want to say this is not about bad cops or weeding out, we've talked about the bad apple myths in the past. When police departments have these kinds of systemic problems, it puts all police officers in more danger too, right? So these are needed not only to protect the people in the communities that



they serve, it's meant to protect police officers themselves because if they're more likely to be engaging in this conduct and having these kinds of interactions, it puts them all at risk. So this is something that is positive for everybody.

Barb:

Hey, Kim, have you been studying up for your Helix sleep quiz?

Kim:

You know what, Barb? I didn't even have to study. I aced it on the first try, and I found my perfect mattress, and you too can find your perfect mattress. Take Helix's two-minute sleep quiz and match with a customized mattress for your body type and preferences for the best sleep of your life. When I took the Helix quiz, I matched with the Helix Midnight Mattress and it was so great. I've slept so well ever since. So buy one tailored just for the way you sleep. The last year has been the best sleep I've gotten in a really long time. Not only is it the best mattress I've slept on, but Helix knows there's no better way to try out a new mattress than by sleeping on it in your own time. So test yours out for a 100-night risk-free trial and see how amazing your rest is. If you don't love it and we know you will, they'll pick it up for you and give you a full refund. Plus, Helix mattresses are American-made and come with a 10 or 15-year warranty depending on the model.

Jill:

Everybody is unique and everybody sleeps differently. That's why Helix has several different mattress models to choose from. Each is designed for specific sleep positions and feel preferences. Their memory foam layer models provide optimal pressure relief if you sleep on your side and it cradles your body for essential support in any sleeping position from back to stomach with enhanced cooling features to keep you from overheating at night. If your spine needs some extra TLC, they've got you covered. Every Helix mattress has a hybrid design combining individually wrapped steel coils in the base with premium foam layers on top. It's the perfect combination of comfort and support.

Barb:

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Well, now is the part of our show that is our absolute favorite, the part where we get to answer questions from our listeners. We always get so many great questions. We do our best to narrow them down to three, but it can be very difficult. If you have a question for us, please email us at [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com) or tweet using #SistersInLaw. If we don't get to your question during the show, keep an eye on our Twitter feeds throughout the week where we'll answer as many of your questions as we can.

Our first question comes to us from Thor in Canada. Thor, we're answering your question just because your name is Thor, but it's also a good question. The question is, "Michael Cohen recently said he is sure

he'll get his law license back. Is there a process by which a disbarred lawyer can get their law license reinstated, especially if convicted of crimes?" Jill, you want to take that one?

Jill:

Sure, and the answer is yes, there is a process. It differs from state to state. Each state bar association creates its own rules, and I would say there's a high degree of likelihood that anyone who does apply for reinstatement after being disbarred can and will get their law license back. Obviously, they have to admit their guilt and accept responsibility and have done whatever is required to make restitution and compensation, but then, yes, they can get their license back and I think Michael Cohen is quite right that he will probably get his license back.

I will also point out that most of the Watergate defendants were lawyers and they all lost their law licenses, as did Bill Clinton, and I don't think any of them applied for reinstatement. I know John Dean never applied for reinstatement, but I bet he certainly could. He has certainly done a lot of good things since Watergate.

Barb:

Yeah. I agree with you, Jill. I've seen many people convicted of crimes who got their law license reinstated. They, of course, have to apply for it, but interesting scenario. I always thought disbarment, that's the end of it forever. Nope, not that hard to get it back it turns out.

Our next question comes to us from Nicholas in Stuttgart, Germany who asks, "What is the difference, if any, between an Alford plea and a plea of no contest?" Nicholas, this is a great question. In fact, we discussed this in my criminal procedure class just this week. Ordinarily, when you plead guilty, you are required to state on the record what you did that makes you believe you're guilty, and that's to put some integrity into the process so that we don't have people just saying they're guilty so that maybe they can get a break on their sentencing, and we want to make sure that only those who really are guilty are guilty.

There is an ability to plead no low contender or no contest. DOJ tends not to permit it except in extreme situations, and I've never seen a case where they permit it for that same reason that it could undermine public confidence in the idea that really guilty people are pleading guilty to crimes, and that just means, "I've decided no contest, although I'm not going to admit my guilt. I am just going to stand silent, and I'm not going to do either. I'm abstaining. I'm not going to admit guilty. I'm not going to say not guilty, but I'm going to agree there's not going to be any trial. You can treat me as if I have pled guilty. You can sentence me as if I've pled guilty, but I want to be able to tell the world later that I never admitted guilt. So I stood silent." That's no contest.

An Alford plea actually goes a little bit further, and that is where a defendant says, "I'm innocent, but I'm willing to plead guilty for your purposes." An Alford plea, for the reasons we just discussed, is allowed only where the court makes findings that the facts of guilt are very, very strong. It comes out of a case where a defendant did plead guilty, he did so to avoid the death penalty. He pled guilty to a second degree murder, but he said, "But I'm innocent," and that plea was upheld, is not violating due process only because the court said, "The evidence of guilt here was so strong that we think it was everybody's best interest to accept this guilty plea," even though he insisted he was innocent.

So similarly, the Department of Justice does not typically accept Alford pleas or no contest pleas because it undermines public confidence in the criminal justice system, but they exist and they're out there.

Our final question comes to us from John in Seattle and he asks, "What is considered a frivolous lawsuit? Is there some legal standard? What happens or can't happen to those who are judged to have done so?" Kim, what can you say to John in Seattle?

Kim:

So there is, well, I should say there are legal standards for frivolous lawsuits depending on whether it is a state or federal lawsuit. There are slight variations between states, but generally speaking, it takes two things for a lawsuit to be considered frivolous. One is that the primary purpose is determined to be for the purpose of harassing or embarrassing or injuring a party. It's not made to actually seek redress. It's just meant to cause trouble. The second part is that there is no basis for the lawsuit in law or in fact.

Filing frivolous lawsuits can come with consequences. The attorneys who are filing this case could be sanctioned. In the worst cases, there could be motions for contempt of court that are issued in response to filing a frivolous lawsuit, and the litigant, if they do it too often, they can be barred from bringing lawsuits in certain courts. Every now and again covering the Supreme Court, there have been some people who have abused the appellate process and they are forbidden for a period of time for filing any more petitions at the US Supreme Court. So there are repercussions for filing baseless suits in just about every court in this country.

Barb:

Thank you for listening to #SistersInLaw with Jill Wine-Banks, Kimberly Atkins Stohr, and me, Barb McQuade. Don't worry, Joyce will be back soon. You can send in your questions by email to [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com) or tweet them for next week's show using #SistersInLaw.

#SistersInLaw are going on the road. Come and join us as we record the podcast live on stage. We'll be discussing the legal topics of the day and answering questions from you. We're starting off in Portland, Oregon on May 12th, New York City on May 19th, and Washington, DC on May 21st. There are still some tickets available. Hurry because they're going fast. Please go to [politicon.com/tour](http://politicon.com/tour) to get your tickets today. We can't wait to meet you.

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Jill:

Although we almost drowned, and the first clue that we were about to drown was I opened the bait well to take out a shrimp and there were only three left, and it was because there was a hole, and we were out in the middle of the ocean and ankle deep in water and tried starting the motor, finally got it started and then it died. We were with a very, very good friend and just my husband and me, and our friend didn't know how to swim. I'm not a good swimmer. My husband is a great swimmer and he swam competitively in college and high school.

We decided that the only thing we could do was for him to go swim to shore. He swam with his shoes on because there were sharks around. I don't know how that would've helped, but luckily he did. I mean, and of course, once he was out of the boat, I got hysterical.

Kim:

This transcript was exported on Mar 11, 2023 - view latest version [here](#).

Wait, he made to shore?

Jill:

He intercepted a boat that came and towed us to shore. Would you believe that the guy who rented us the boat wanted to charge us? I was like, "Not only are we not paying, you're buying my husband a new pair of shoes. They're ruined because he had to swim with them on." It was really a terrible experience. I mean-

Barb:

It's the worm you're afraid of.

Jill:

Yeah, exactly.