

Barb McQuade:

Welcome back to #SistersInLaw. I'm Barb McQuade. This week, we'll be discussing the next phase of the Chauvin case and looking at consent decrees and the future of policing. We'll also talk about our strategies to manage our work and our lives juggling multiple responsibilities without sacrificing what's important. And as always, we'll be answering some of your questions at the end of the show. But first, I think we've got some news in our group, don't we? Jill, I understand correctly that you have finally entered the 21st century and upgraded your mainframe reel to reel computer to a Mac.

Jill Wine-Banks:

Well, I'm dipping my toe. I'm testing the Mac era and I am going to be using it hopefully, once it gets set up, at least for recording our podcast, but maybe I'll grow into using it, but you have to remember I worked for Motorola. And so I'm used to the things I got trained at there, which is using a PC and an Android phone. So I'm going to try and I'm taking on the challenge from Kim that once I get used to the Mac, I'm going to get an iPhone. That would really put me in the modern world.

Kimberly Atkins:

It really would. We want to bring you into the blue bubble, Jill. No more green bubbles on our text message chains. I want to bring you all the way into the 21st century. I think you'll like it. Look, I only switched from a PC laptop to a MacBook maybe two years ago. So it hasn't been that long, but it didn't really take a lot of time. The reason I didn't want to do it was the same as you said before, is I didn't want to learn something new. It takes no time. It's actually more, to me, it's a little more intuitive, but I think you'll like.

Joyce Vance:

We're early adopters in our house. So we went to Mac early in these nice, sleek, slim ones that we have now are a huge advancement over the earliest maps, but it is a lot easier. You're going to have a lot of fun.

Jill Wine-Banks:

Yeah. I'm looking forward to being able to say that I like one of your texts instead of having to actually write an answer because I don't have that option, but I'm really happy. This one is not as heavy as I thought it was going to be. It's not much heavier than the PC I'm using right now. So I'm optimistic and it's very pretty.

Joyce Vance:

It's that beautiful rose gold color, isn't it?

Jill Wine-Banks:

It is. I wish our audience could see it, but maybe I'll take a picture of me holding it up once I get to use it. So maybe we could get started now with our serious discussions. We want to talk first, I think, about what's going to happen now in the Chauvin case. The trial is over, but there's still more to come. And one of the most frequent questions that I'm getting on Twitter is, why does it take eight weeks after the verdict for Chauvin to be sentenced? And of course, we all know that one of the reasons is the pre-sentence investigation and also some hearings about aggravating factors. But let's talk about those, why it takes so long to get this all done. And Barb, can you start with that issue?

Barb McQuade:

Jill, I think unlike when we watch on television, when a defendant is convicted and then immediately sentenced right on the spot, in real cases, a judge needs time to learn more about the defendant. He knows about the case because he has watched the trial, but the pre-sentence report that will be prepared by the court itself, some part of the court, perhaps its probation department will delve into everything about an offender. And this is true in every case, they will investigate things like the person's education level, any substance abuse issues that they might have, abuse they suffered as a child, mental health issues, all kinds of things, and prepare a very detailed report that first goes to both of the parties who have an opportunity to raise any objections to things they find in there.

So it may be that the probation department calculates the sentencing guidelines in a particular way and one party or the other has an objection. And so if those get included, the probation department will attempt to resolve those objections. And then ultimately, once all that is there and the court has had a chance to review that report, they will have the hearing for sentencing, but all of that work takes some time. And so eight weeks for a sentence actually strikes me as fairly quick. In my former district, the Eastern District of Michigan, about three months was fairly typical. So eight weeks seems fairly prompt and reasonable to me.

Jill Wine-Banks:

Yeah, I think people don't realize how many witnesses get interviewed about the prior record of the defendant and his social history. And that all takes time to reach those people and to interview them, to make a recommendation. But there's another part of it, which is the sentencing guidelines recommend a sentence that's generally in all cases significantly less than the maximum sentence allowed for that crime under the statute that created the crime. And in this case, of course, the maximum sentence is 40 years, but the sentencing guidelines are like 12 and a half years. And the prosecution, if they want to go beyond the sentencing guidelines, needs to submit evidence of aggravating factors. And so there will be brief submitted on that. Joyce, do you want to talk about some of the aggravating factors that are present or may be present in this case?

Joyce Vance:

Sure. So sentencing in this case has now been set for June 16th to Barb's point about needing enough time to take a look at everything about the defendant. So the judge can sentence the whole person and not just that limited slice that he or she sees in the courtroom during trial. We haven't actually seen pleadings yet from the prosecution asking for the court to apply sentencing enhancements, but we know that they're coming because before Derek Chauvin was taken out of the courtroom, the judge talked with the lawyers and actually set a briefing schedule.

So under the Minnesota Sentencing Guidelines, and that's sort of a book, it's set by a commission in Minnesota that sets guidelines for how court should sentence defendants. And in those guidelines, one of the factors that's suggested for use as an enhancement is when a crime was committed in the presence of a child. We know that one of the bystanders in this case was nine years old. And so the prosecution will likely ask the court to take that into consideration, especially because this is a police officer who's sworn to protect and serve. And he does exactly the opposite to this child, but the guideline factors aren't exclusive, they do set some reasons that can't be used for enhancement. You can't use race, sex, employment status, or even the fact that the defendant insisted on going to trial instead of taking a guilty plea, you can't use any of those sorts of factors to enhance the sentence.

But there are a lot of good reasons the commission has said can be considered. For instance, in addition to this child factor, there's one that suggests that if the victim is treated with particular cruelty and the individual offender needs to be held accountable, that too can form the basis for an enhancement, but important to say enhancements aren't automatic. The sentencing manual in Minnesota is very clear that these are meant to be the exception and the rare exception. And they expect that they're presumptive ranges that 10 and a half, rather 12 and a half years, 150 months that you talked about Jill, that that's normally going to be the presumptive sentence. And the judge can use her discretion to depart, but she still has to issue a sentence that's proportional to the offense and has to memorialize the reasons for the departure in writing. So that's a little preview of what we can expect at the sentencing hearing.

Jill Wine-Banks:

Yeah, it's so interesting to me. And I think there are a couple of others. The prosecution actually mentioned, besides the presence of a child, that the crime represented an abuse of government authority. And that's because the defendant was a police officer and had governmental authority, but there's also a thing called a Blakely waiver, which also happened in the courtroom and was witnessed by everyone. I'm getting questions about that. So Kim, or anyone wants to just mention what Blakely case says and why that matters?

Barb McQuade:

I was just teaching this topic in my criminal procedure class. So I'll take a stab at it. And I thought, I've encouraged our students to watch the trial because they learn so many things, although many of them reported that they found it very emotionally challenging and triggering to watch the trial. So we certainly didn't make it required viewing, but this Blakely hearing was a great illustration of something that occurs in states or jurisdictions where sentencing guidelines are mandatory. That is, a judge is required to follow them. In the federal system, since a 2005 case called Booker, the sentencing guidelines have been advisory. And what the court said in a series of cases, including the Blakely case that came out of the State of Washington, if guidelines are mandatory, then the Due Process Clause requires that every factor that raises the sentence above the base offense level must be found beyond a reasonable doubt by a jury. That is part of the idea that goes back to we have a right to a jury trial to find anything that makes us guilty of the offense. And that by adding these factors, we've essentially changed the offense.

So in Minnesota, where there are these mandatory guidelines, Derek Chauvin has a right to have a jury find those things, but strategically, it might be to his benefit to waive that right to a jury. And that was actually raised in the Booker case that some people might choose to waive it. And you could imagine that a jury that has just found him guilty might be inclined to apply those factors and might do so in a way that is more emotionally charged than is logically reasoned. And so he waived his right, and waivers have to be knowing, intelligent and voluntary. So the judge asked him a series of questions to make sure he understood all of those things and that it was truly voluntary and will satisfy that it was.

But you can imagine that a judge will apply them in a way that might be a little more even handed than a jury that just found you guilty. Although normally, people prefer to have a jury because your chances of getting a hung jury are one in 12, as opposed to one in one that if a judge can't make a decision. But when it comes to sentencing factors, at least in the case of Derek Chauvin, he wanted to waive that because he likely perceived that it would be more advantageous to him to have the judge make this decision than the jury.

Joyce Vance:

I think it's important to underline how new this is because Blakely happened about a year before Booker, they were in terms one following each other. And this was during the Bush administration. And so when Blakely came down, federal prosecutors like Barb and me breathed a sigh of relief because it only applied to the state system, but we all knew that Booker was working its way through the courts. And to everyone's surprise, Booker really completed what had been started in Blakely and said, you can't use these mandatory sentencing guidelines, right? These sorts of things can't be made mandatory. And that led to a lot of dislocation in the federal system.

I was our appellate chief when Booker came down and had to race across the streets and talk with our judges because we had sentencing hearings that were set that day. And I begged them to sentence in the alternative to say, well, if mandatory guidelines are okay, then my sentence would be X, but if I have to use discretion, and if Booker applies, then my sentence would be whatever it would be, hopefully, the same thing. A lot of defendants had to be re-sentenced. This was really an upheaval in the system.

And the point that I wanted to make is that everyone expected that there would be a legislative fix following Booker that the Congress would go back in the federal system and fix the problems that were identified. And that has never happened. So we've really had this court-created sentencing situation ever since Booker came down.

Jill Wine-Banks:

And there's one other thing that follows this trial, which is there were three other defendants in separate indictments. And that was the other officers who participated with him in this and who aided and abetted his ability to commit this murder by not intervening, by not stopping, two of them physically on the body of George Floyd and the third keeping the crowd at bay and not allowing them to offer assistance. So, Kim, what do you think is going to happen as a result of the verdict in this case with the three other defendants?

Kimberly Atkins:

Yes. So we have these three cases pending. And I want to get to that just a minute. I want to say just a little bit about the sentencing because I got a lot of questions about this after a radio interview that I did where someone else admonished the public, admonished people in the press from repeating this 40 years sentence number, because it's like he's not going to get that. So the more we say that and give the public an expectation of that, the more of a disservice that we're doing. And I really disagree with that because that's what the statute says first of all, that is what is on there. And you are all right when you, and it's a wonderful explanation about sentencing guidelines, how they play out, Blakely and all of that, but I understand that as an attorney, but what the public is going to see is what does or does not feel like justice.

And in this case, I can guarantee you if the judge comes back and sentences Derek Chauvin to 12 years, that is not going to feel like justice in this case. And I really worry that all the nuance about the reasons why we have these sentencing guidelines, the reasons why that this outcome is going to be what it is, is going to get lost out of that gut feeling of justice, because most black people will think to themselves, well, if I am convicted of second-degree murder, I'm not going to walk out of prison in 12 years or 10 with good behavior, or however much time, I'm going to go to prison for the rest of my life. But when you see this black man killed by a police officer, that crime is not looked at as that quite serious as with that seriousness, even though it was done in front of a child, even though it was done in

front of community members who were begging him to stop, even though it was done through this videotape in front of the world.

So I just want to really acknowledge and say that both things can be true at the same time. All of these levers are there in the administration of justice. We don't want judges just willy-nillying, giving people larger, overly harsh sentences or sentences that don't fit the crime that are too lenient either, which is why we have these things like sentencing guidelines. We want to give defendants real reasons to be able to appeal things. So we want to make the rules clear and make the guidelines clear. And that's why all of these things are in place, but at the same time, they can work to feel like the opposite of justice. And so two months from now, that's one thing that I'm very concerned about.

Barb McQuade:

Before you answer the question, Kim, can I just interject one thing, because that's a really interesting point. And the data shows that since Booker was decided in 2005, the whole reason as you just said for sentencing guidelines was to reduce disparities, so you have some kind of uniformity regardless of where the defendant was sentenced geographically and the demographics of the defendants. And what we are seeing now is a return to the pre-guidelines disparities in the criminal justice system. We're seeing longer sentences for black defendants, for example. And so this implicit bias is creeping back in now that discretion is no longer cabined by mandatory guidelines.

Kimberly Atkins:

Yeah. Yeah. So it's something that I'm very concerned about, but Jill, you are right. So there are still three other defendants, J. Alexander Kueng, Thomas Lane, and Tou Thao, who are charged with aiding and abetting second-degree murder and aiding and abetting second-degree manslaughter. So what the Chauvin verdict, does that make this case easier or harder to prove against these other three? I think the answer is yes. I think it can go both ways. On the one hand, it's a conviction for the underlying crime for both the second-degree murder and the second-degree manslaughter. And that obviously, will make the aiding and abetting charge a little easier for prosecutors to make. But on the other side, each of these three defendants now have somebody in pocket to blame, their defense teams can blame Derek Chauvin saying they were just following orders, that it was really Chauvin that was doing this. They didn't want to do it. Every excuse to put it on the convicted person in order to get them off.

What I suspect is going to happen after this conviction of Derek Chauvin is that we are going to see plea deals made for all of these three. I think I don't see any of them the advantage of going to a jury trial in any of these cases given how this worked out, even though they may have that extra defense to blame Derek Chauvin, but I think you're going to see them all plead out out of court before this gets to trial.

Joyce Vance:

It's really interesting that Chauvin himself wanted to plead a couple of days after the murder of George Floyd, but that plea was derailed by then Attorney General Barr, who was in the loop because Chauvin wanted to serve his sentence in federal prison. And so ironically, he ended up in the same position that he is now. But I think you're absolutely right, Kim, that means that these defendants are now on track to plead.

Jill Wine-Banks:

I think we'd probably, well, I agree. Barb, do you too?

Barb McQuade:

I never want to predict anything, but I think that to the extent they were waiting to see how a jury would react to this case, now that they've seen that, I suppose it is a strong factor that will be considered in making that decision.

Joyce Vance:

So after the Chauvin trial, the country is now having this conversation about the future of policing. We've seen the need for change. Some people even want radical transformation or abolition of policing. And while the verdict in the Chauvin trial is an important part of that discussion, ultimately, it's just a verdict in one specific case, and it doesn't alter policing across the country, but there's clearly change of foot. So let's talk about what we can expect going forward.

Barb, close to home for us this week, two of our former colleagues returned to DOJ, Lisa Monaco is now the Deputy Attorney General, Vanita Gupta is now the Associate Attorney General, that makes them the number two and number three ranking officials at DOJ. And last week, Attorney General Merrick Garland announced that he was changing something, that former Attorney General Jeff Sessions had done. Sessions had severely restricted the use of consent decrees. So why don't we talk for a minute about what consent decrees are and what these changes in policy and personnel pretend for policing?

Barb McQuade:

Yes. So consent decrees come from a statute that was passed in the wake of the Rodney King beating. And it says that the Justice Department can investigate police departments for patterns or practices that violate the constitution. So instead of looking to the so-called bad apples and looking for individual police officers who are violating people's rights, instead this looks at department wide systems. And there have been a number of them historically. We had one during the time I was the US Attorney in the Eastern District of Michigan in Detroit, where we looked at the Detroit Police Department. Once we investigated and found findings of constitutional violations, they agreed with us. And that's pretty typical, which means that's why you get the consent judgment, the consent decree. If they were not to agree, you could file a lawsuit and go to court and get the court to enter a judgment after which you would then go about the same strategy of trying to improve those practices.

But when you can get a consent judgment, that's best because it says that the police department agrees with you. Yes, we are having problems in our department, we would like to change. And then resources can come into that department to help them. In Detroit, for example, the issues where excessive force or something like seven fatalities of suspects in custody, conditions of confinement, which were deplorable and the arrest of material witnesses without probable cause. So, if you wanted to find someone who is suspected of a crime, they would arrest his girlfriend or his wife and lock her up until she talked and told them where he was all in violation of the constitution.

But over the years with a monitor, a professional police monitor who came in and helped them develop new policies, new training, new management systems, implement dashboard, cameras and other kinds of tools, they were able to improve substantially. Now it's not a perfect department today, but it does engage in constitutional policing. And so that's the idea, to be able to work with departments to help bring them up to a level of constitutional policing, the least that we can expect.

Joyce Vance:

Consent decrees are really important, because ultimately, if the department gets cold feet down the road or just doesn't fulfill its obligations, a court can actually intervene and make sure that they do. So what's the capacity of DOJ to do this kind of work with departments nationwide, Barb?

Barb McQuade:

Well, what I've seen is they tend to focus on larger departments. They did do one in Ferguson, Missouri after the shooting of Michael Brown. And I think it was because the situation there was so dire and they did make findings that the municipal court system was being used as a revenue generating system that caused great distrust in the community. But they can't do every department. As I said, they tend to focus on bigger cities because they want to have the maximum impact.

And so one of the things we saw in the last administration that was being implemented through the COPS Office when Ron Davis, a former police chief was running that office, was to do these smaller scale, self-report police departments who could ask for help on their own in the same way we have corporate compliance programs, police compliance programs, where people say we've had an issue and we'd like help. The Dearborn, Michigan, Police Department raised it's hand for one of these after two police shootings of citizens. And the Justice Department came in and helped them modify some of their training and some of their policies regarding use of force and also the way they were dealing with people with mental illnesses. And so there are a lot of ways that the Justice Department can use this statute to try to improve policing across the country.

Joyce Vance:

Even during the Obama administration, when consent decrees were being used pretty aggressively, the capacity, the resources, the number of people trained to do them at DOJ meant that it was tough to do more than three or four in any given year because consent decrees don't happen and then end, they continue over a long period of time. So I think your point is a good one, Barb, that there has to be more than just the consent decree process. Jill, can you talk about what some of the other options are?

Jill Wine-Banks:

Yes, but I want to just follow up a little on what you and Barb were talking about in terms of the consent decrees, because Chicago had a consent decree and then a new attorney general in the Trump administration said, we're not going to bother with that. And for political reasons, our mayor said, "Oh, whoa, that's good." And so it never really got enforced. And there's some effort being made now to do it, but there are other options which are essential. And you've mentioned one which has been successful, which is the national initiative that is a very different kind of program and that can be very helpful in terms of getting police trained and getting some equipment for them, as well as getting them trained. So this is a national initiative and building community trust.

During the Obama administration, there was a use of best practices developed and there was a report called 21st Century Policing. And there's also, of course, the growth of using body cams and of the federal government in some way, helping to pay for the body cams as well as other equipment that can be helpful in community policing. So I think those things help a lot as well as the consent decrees, but there's also, of course, the George Floyd Policing Act that would have significant advantages if that were to become law.

And I just want to point out, I mean, we can all talk about some of the many things that are in it, but one is to create a national registry of police misconduct. And the reason that's important goes back to the consent decrees, which are pattern or practice episodes. You can't develop a pattern or practice if

you don't have the data underlying it. In Chicago, our police contract with the city said that after five years, every record of police misconduct would be wiped out. Well, how do you develop a pattern or practices if it's constantly being eliminated from the database?

And I belong to, I'm on the board of an organization called the BGA, Better Government Association, and we sued and won. And the courts have now said, you cannot, that contract clause is not enforceable. And so they have to now keep the records. And that would be required under the George Floyd Act. And I think that's really important, as is the change in criminal intent standard. It goes from willful to just reckless. And that will make it a lot easier to hold accountable police officers than the higher intent standard of willful. So those are some of the things that I think are really good.

Joyce Vance:

Jill, something else that happens in the George Floyd Act is it changes one of the elements, federal prosecutors have to prove in civil rights cases against police officers who use excessive force. And of course, federal prosecutors can sue in essence, can prosecute state and local police officers for the use of excessive force if you don't have a state prosecution, like what we had in Minnesota. Can you talk a little bit about how that standard of proof changes and how that impact this area?

Jill Wine-Banks:

Yes, it makes it a lot easier to get a conviction. The standard that's in existence right now is one that requires that you be willful in your intent. And under the George Floyd Act, it would be knowing or reckless. And that would allow convicting law enforcement officers for misconduct in federal cases where it's necessary to bring the federal case. And we saw intent as an element in the Chauvin case. And so I think our audience is probably now familiar with the different levels of what is required for the intent. And this is one of the advantages of this particular act. Another, of course, is getting rid of the qualified immunity that police officers now have against civil suits from private citizens for their misconduct. And that has been a cause of enormous outcry from the public is that police can do this and they don't have to pay any of the fines. Cities, well, we saw the City of Minneapolis having to pay \$27 million in penalties for what happened. And none of that comes out of Derek Chauvin's pocket. So that would change under this as well.

Barb McQuade:

And can I interject about some of those things that you talked about, Jill? I think that this is one of those areas where we have to work really hard to get the balance right. One of the things the law does is try to draw a line between competing values. So on the one hand, we want to have effective policing and we want to encourage good people to be police officers and we don't want them to be arrested and charged with a crime every time they make a mistake. On the other hand, it seems that we have gone way too far in that direction because we are having all of these completely unacceptable situations with police officers who are killing people.

And so the standard that you talked about of moving willfulness to knowing or reckless doesn't mean we completely take away that standard of proof or that proof of intent. It's just that willfulness has been in practice almost impossible to achieve, because it really requires a deliberate abuse of someone's constitutional rights, which is rarely the case in these situations. And so instead requiring that they knowingly or recklessly abuse someone's constitutional rights, I think will make those cases more fair because it will draw the line in a better place.

And then with regard to qualified immunity, I don't know that I go so far as to agree, and some of you probably disagree with me, that it should be completely abolished. I think qualified immunity serves a purpose. The problem I've seen with qualified immunity is it says you can't sue a police officer unless he has violated a clearly established right.

But the way that part has been interpreted, the clearly established right, has meant, unless he's done something exactly like something that has already been found to be a violation, we're going to say it's not a clearly established right, how would he have known? And therefore, he is entitled to qualified immunity. And the interpretation has been down to the point of, unless he's left-handed and it happens on a Tuesday and he has blue eyes, unless it happens exactly the way it happened last time, that's not a clearly established right. And so I think some legislation to state what is and isn't a clearly established right or to give some guidance there so that we still have qualified immunity for somebody who acts in good faith, but is not such a complete bar to filing a civil lawsuit.

Joyce Vance:

So I think this is such an important point, because when January 6th happens, we want the police to protect, in that case, the Congress. When there's a mass shooting, we want to be able to call the police. And yet, we know that there are a lot of problems that are going on in this area where we see the need for police reform. And it seems like it's very easy to just pick a side and go that direction. And this is a much more nuanced problem in many ways, but it's a very real problem. And Kim, you wrote what I thought was the most important piece that I read this week about policing in America and helping white people understand the way the issue looks to people of color. So can you talk with us a little bit about this very provocative piece that you wrote?

Kimberly Atkins:

Yeah. I mean, it plays right in to what we were just talking about right now. I mean, the reason that we want reforms to qualified immunity laws, the reason that changing the standard for proving these cases, the reason that's important isn't just to make it easier to convict a police officer. Ultimately, it is to prevent these things from happening if police departments, if policing systems change in order to reduce to train their police officers, to put in the culture that you are not automatically going to be protected no matter what you do so long as that uniform is on. That is how you bring change. And some of the levers of that is changing what the consequences might be for engaging in these actions.

And the reason that we have to look at it in a whole systemic way is the same reason why most black folks, myself included, after the Chauvin verdict, even if we were relieved at the result of that verdict, we did not feel any safer in America with police being as they are, with the state of policing being as it is. And you're right, it's not a binary choice being for police or being for Black Lives Matter. That's a political ploy that folks were made to believe in the past several years. That is not the truth.

What black and brown folks want to be, like all Americans, is they want to be protected, they want to feel safe, they don't want to feel, like me when I was walking my dog last year in the middle of the pandemic, my elderly dog, who has arthritis, who has all kinds of illnesses, and so we take a little shortcut in front of our home after our night walk and I was approached by a police officer. And all I could think about was the fact that he had a gun on his hip. I was holding something in my hand and I didn't know how that was going to end up. I didn't know that he would see that what I was holding was a retractable dog leash with my dog that looks like bungee on the end of it. I didn't know if he was mistaken me for somebody else who he might've been in pursuit of. I didn't know. And the reason that he came up to me is because he admonished me for jaywalking.

And I thought there is no reason why we should have a policing system where a pedestrian infraction that's probably punishable by a \$10 fine should be handled by somebody with a gun. It's the reason why, so I told you all a story that last, in the middle of the pandemic, in the middle of everything that was going on, it was a high stress time, it was worsened by the fact that I have insomnia, so I don't fall asleep easily, but my neighbor had this hot rod car that he would rev up during his morning commute, which happened to be at 5:00 AM. And it happened every day and it drove me crazy.

So I went to the website of the town that I lived in to find out how do I, I looked up to make sure that it is a civil infraction to do that, find out how to file just a civil complaint or something, get them to stop, make someone with authorities send them a letter to make them stop. And the answer was the agency that handles that is the police. Now I had seen this person driving. I knew he was a man of color. There is no way I was going to call the police to instigate what could be a stop that could end up the way the stop of Daunte Wright turned out. There's no way.

Again, there's no reason for these civil infractions that police are doing too much, they're too many places, they're in schools. They're just in too many non-violent situations where they don't have to be. In the town where I lived in, if someone called an ambulance, a police car comes. If someone reports a fire in their oven, a police car comes. I think we need to reform the system that different agencies, our taxpayer dollars are still demanding that we get the services that we want, but that is not done by cops, because statistics show that black folks are 20% more likely in a pullover, to be pulled over than white folks. Statistics show that deadly force is four to six times more likely to be used against black and brown folks than white folks. It's the system that begets the George Floyd's of the world, the Daunte Wright's of the world, the Philando Castile's of the world. And by pulling policing out of places that it doesn't need to be, I think, is a crucial element of that.

Joyce Vance:

This is such an important conversation. And I know it's one that we'll continue to have over the next month. This conversation about, can we have mental health workers or people that are addiction specialists supplementing police, or even in place of police, in some areas, it's tough to calibrate a system that keeps everyone including the first responders safe while ameliorating some of the racial injustice that just seems to pervade the system when you look at the statistics. So we look forward to your continued writing, Kim. And I think that you made a point that's important. This isn't a matter of being pro-police or anti-police. This is a matter of being pro-community and figuring out what we can do to keep communities safe.

Jill Wine-Banks:

So, Barb, have you been using HelloFresh?

Barb McQuade:

I have, Jill. I historically have not been much of a cook. It's a bit of a joke in my household as a matter of fact, but HelloFresh really makes it very easy to make these healthy and really delicious meals. So I've been really getting into it. We have had fish and we've had chicken and we've had lean cuts of beef and my whole family really likes it. We're eating our vegetables and we're really enjoying it. How about you?

Jill Wine-Banks:

I love it. I cannot believe that I am putting on a restaurant-ready meal on a plate every time I use it, it looks professional. I feel so creative. I feel like I've really done something. And I'm learning some cooking

things that I can use when I'm not having the meal, like how to roast vegetables that come out fabulously. So it's really wonderful. And this week, I got two of the same things so that I could actually have company and serve a meal that I knew would be delicious. And I'm doing that tonight after we're done recording.

Joyce Vance:

Very nice.

Jill Wine-Banks:

I love it. I think everyone should have the experience and go to hellofresh.com/sisters12, and use code Sisters12 for 12 free meals, including free shipping.

Barb McQuade:

That's 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.

Kimberly Atkins:

And for our next segment, we want to talk about something a little more personal. It was spurred by a question that we got a couple of weeks ago from @Cape doghouse. It says, dear sisters, you all have multiple jobs and teaching posts, and at least three of you are on MSNBC constantly. How do you juggle these various positions? And do you sleep? I will start in talking about how we juggle a busy life. I think for me, it is a matter that I learned over time that I'm wired that way. My brain works best when it's like a browser with about 14 tabs open. It's just my natural spot when I have a bunch of different projects happening at once is when I'm at my best.

And I think in retrospect, when I look back at why I stopped practicing law, I think that was a big reason. When I was a lawyer, being a lawyer was my only job. I got up in the morning, I thought about that job. I did that job all day. Often the days were long. I went home. I thought about that job as I was eating my dinner. I went to bed and I woke up and I thought about it again. And after several years, I thought, oh my God, I don't think I could do this for the rest of my life. I was busy, I liked practicing law, I liked going to court, I got my own caseload right out of law school. I loved the people that I worked with, they're still very good of mine, but I just didn't feel fulfilled.

And it wasn't until I became a journalist, and I frankly, just wasn't making much money, so I had to do a lot of side gigs, that I realized, oh, well, this is fun. I like being able to do one job and then turn my mind to something else. And then I started designing clothes just for myself. And then that became a business. And I liked that. I liked having different things. So now, I currently have the ability to do my journalism in the paper in the Boston Globe, on TV, on MSNBC, which is different audience, different way to explain things and get to do this podcast with these brilliant women, where I learned a lot, as well as contribute to this conversation. I'm on radio, just for me, this isn't for everybody. This is how I do my best work. This is actually, it is less stressful to me to have different outlets than it was just to have one job. And as for sleep, I have insomnia. So I just make it work for me. I might as well.

Joyce Vance:

Barbara and I had US attorney colleague named Paul Fishman. Fish was the US Attorney in New Jersey. And one time when we were doing a lot of criminal justice reform work at a very fast pace and it was relatively intense and fish looked at me and he said, "Vance, we can sleep when it's over." I think I

sometimes live by those words. And I'll tell you all so you guys know I have four kids. This is the part where I'm going to have to say something nice about my husband. It pains me to say this, but Bob is really great. He actually has always been a full partner when we were little and we cloth diapered our kids, Bob would do the laundry. And Bob has always helped with cleaning up in the kitchen. He really didn't start cooking until HelloFresh came into our lives, but now he's a very accomplished cook and helps with that.

And so when our second child was born, I hit a point that was make or break for me. Our second kid was born with multiple heart defects and a complex immune system disability, and was in the hospital for a really long time. And I realized I could only do what I did because of support from the people around me. It was my husband, it was my mother-in-law, but it was also my colleagues.

I was in the hospital writing an appellate brief in an 11th Circuit case when my baby was having open heart surgery. And the guys in my office picked up a lot of my work. My then boss, a woman who was the US Attorney, Caryl Privett, cut a deal where I was able to take a lot of time off from work and then was able to work part-time from home. And the agents, the way that they filtered that notion that instead of being in the office, they would come to my house to get a search warrant, was they loved it because they could come over and have hot chocolate chip cookies and hold the baby while I was reading their search warrants and telling them that they needed to put a little bit more into it before I was willing to take it to a judge.

And I had the good fortune to evolve this support network that let me do what you talked about Kim, because like you, I think attention deficit disorder is a blessing, not a curse. I liked doing a lot of different things at one time. I knit while we podcast most of the time, I'm actually not doing it today. But in order to be able to juggle successfully and to work at a high level like we all do, you have to have an intentional network in your life of people that love you and see value in what you're doing and support you. And I think we're all entitled to actually ask for that from the people around us. That's something that we have to do. So I'll just leave it there. Barb, what about you?

Barb McQuade:

Well, like Joyce, I too have four children, which are the greatest part of my life and a husband who is a great partner. I often tell students that the most important decision you're going to make about your career is your choice for a partner. You may choose not to have a partner, but if you're going to choose a partner, you need somebody who is going to support you and what you want to do. And I do have been blessed with a husband. My husband, Dan, does far more work around the house than I do. Don't tell him, hope he doesn't listen.

Joyce Vance:

That's the problem. If they hear us saying nice stuff, it's all over.

Barb McQuade:

He had a boss, his first job out of law school was to clerk for a judge named Cornelia Kennedy on the Sixth Circuit Court of Appeals. And the advice she gave him upon getting married was that you both have to feel like you're contributing 75% to the marriage, right? You're probably only doing 50%, but if you each feel like you're doing 75% and that's your goal, then you'll probably be able to pull it off.

But I have found that I need good partners at home and at work to make it all go. And you can't be afraid to ask for help when you need it. I think that's one of the things that so many women are afraid to do is to ask for help. And to also try not to beat yourself up too much whenever you inevitably

fail to do one or the other job not as well as you might have. If all I had to do was work on my job, I could be a superstar. If all I had to do is be a mom and a wife, I could be a superstar maybe. But because you're doing all these things, you tend to get spread thin and sometimes you aren't able to be at everything you want to be at or do things as much as you would, but we are such so often our own worst enemy.

I remember having an epiphany once when I was going to pick up my kids from daycare and I saw this other mom sprinting from the car in the rain to try to get in before they closed their doors at seven o'clock or whatever it was to avoid a fine. And she was just so upset with herself for running late. I remember saying to her, it's okay, you're doing an awful lot. And we gave her like a real pep talk. And then I thought to myself, I should give myself the same pep talk. We should not be so hard on ourselves. So I think that sometimes we're our own worst enemy on those things. But we have to be willing to say no and control our own agenda and our own calendar.

And I also have learned not to let the urgent overshadow the important. Sometimes things that happen and somebody wants it right away, it gives this false sense of importance, when in fact, even though it's maybe urgent, it's not as important as some other things and so maybe you can't get to that. Email is a great example. It's popping up, it's popping up. I learned from a female head of the Bureau of Alcohol, Tobacco and Firearms, she only checked her email in the morning, at noon and in the evening because she didn't want the constant interruption of her flow of thought. She had to work on things that required her concentration. So that idea of not allowing the urgent to overshadow the important has also been a good lesson I've learned from others. How about you, Jill? You must've developed some good lessons along the way.

Jill Wine-Banks:

Yes. And I love everything that everyone has said and agree with everything that has been said. I would say a couple of other things I've learned is to compartmentalize, which is when I'm working on something, I focus on that thing and I don't get distracted, but I am like Kim and I love having a 100 tabs opened at once. I like to multitask. I am much better that way. I also have a body clock that says that midnight is when I should be really wide awake and working. And so I can keep going till very late. I need very little sleep. My doctor says that's medically incorrect, but I wake up and I feel refreshed and fine after a few hours sleep. I'm trying to do better on the sleep side. But I think having a lighted pen next to my bed helps because I get great ideas as I'm falling asleep. And if I turn on the light, it wakes me completely up, but if I take my lighted pen out, I can write it down and remember it in the morning without waking myself up.

So I think the only difference I would have is when I was in private practice, I never woke up thinking about my job and went to bed thinking about my job. When I've been in government, I have always done that. That's always been wonderful for me. And having a portfolio now where I'm busy doing speaking and writing and television and the podcast, that makes me really happy because I go from one great thing to another and I so enjoy it.

The other thing that I will say is, I missed the gene for being a housekeeper and that's something I have delegated. I hire someone to help me with that because it's just one of the things I do not choose to spend my time on. I love cooking, and like Joyce, or like Joyce's husband, it's made easier by HelloFresh, but I've always liked that. I love making soups, which you can then have for days because you can make enough of it. And I feel creative doing that. It's a very creative outlook. So I try to keep something creative as well as just professional in my life. And having the support of knowing you can come home and complain and have a sympathetic ear does help. So thank you, Michael.

Joyce Vance:

Jill, my mother-in-law who was a wonderful, wonderful person, she died several years ago and I still miss her a lot, but she used to tell me all these great things like honey, when you turn 60, you can quit caring what people think and smoke cigars in public and drink scotch, stuff that I'll never do. But she also told me when my kids were little and I was obsessed because my house wasn't as clean as it should be, she said, "Your kids are never going to remember that there were dust bunnies in the corner, but they are going to remember if you had time to sit down on the floor and play with them at night." And I have probably taken that to an extreme. And unlike you, Jill, I delegate the cleaning functions in my life, but I think that that's actually really good advice, you can't do everything. I don't care how many people tell you that you can, you have to figure out what you're good at and what you enjoy, and what it makes sense to delegate, then delegate it and let it go.

Jill Wine-Banks:

Yeah. And I'll tell you something else your mother-in-law didn't tell you, when you turn 70, you can start talking to strangers in elevators. It's amazing, but I will say [crosstalk 00:52:06] you're wearing, I love that color on you. And people love hearing that. I would have never ever done that before. I would've just thought that. So I don't know, I just couldn't have done it. So there's a lot of things that aging is really nice for.

Barb McQuade:

Don't sit next to Jill on the airplane. That's my takeaway.

Joyce Vance:

Well, I think this is really interesting. It's a really important problem that a lot of people struggle with. We all have these multiple hats we have to wear. So I hope some of our tips are helpful for folks. So Kim, I've actually got two ThirdLove bras now, one is the traditional underwear style and the other is one that you pull over your head. It's a little bit more sporty. And I really loved them, they're both comfortable. And that matters to me a whole lot after this COVID year, I'm really not willing to wear a bra that's not comfortable anymore. ThirdLove is great. What about you?

Kimberly Atkins:

Yeah. I agree. Being uncomfortable, even though it has been this pandemic and we've been at home, we have so much to do. And the last thing you want to do is be uncomfortable. And I took the ThirdLove quiz to find my size. And I found out I was wearing the wrong bra size probably for years. And they even have half cups. That's how close they get to it. So I've been wearing the Pima Cotton set, which is so comfortable I forget that it's on. And the last thing you want to be thinking about is your underwear, right? So it's great.

Joyce Vance:

Isn't that the truth? So all of our listeners can now take the fun and easy fitting room quiz. And then ThirdLove takes care of the rest. They focus on your fit, on your size, your shape, current issues, and your personal style to deliver bras and underwear that are perfect for you.

Kimberly Atkins:

And with their custom-designed bras with half cup going from AA to I, amazing lounge wear and wireless styles, the number one rated 24/7 t-shirt bra, that's one of my favorites, and more, ThirdLove gives you the ultimate underwear shopping experience.

Joyce Vance:

They even give their gently used returned bras to women in need, donating over \$40 million in bras so far.

Kimberly Atkins:

ThirdLove knows your one true fit is out there. So right now, they're offering listeners 20% off your first order. Go to thirdlove.com/sistersinlaw now to find your perfect fitting bra and get 20% off your first purchase.

Joyce Vance:

That's thirdlove.com/sistersinlaw for 20% off today, or look for the link in our show notes.

Barb McQuade:

Let's go to some listener questions. If you have a question for us, please email us at sistersinlaw@politicon.com or tweet us using #sistersinlaw. If we don't get to your question during the show, keep an eye on our Twitter feeds throughout the week, and we'll answer as many questions as we can there. Our first question comes to us from @DanBrooklyn, who asks, why do citizens face consequences for lying to Congress yet they can lie to the American people without consequence? Who wants to take that one?

Jill Wine-Banks:

Well, let me start. First of all, the simple answer is that there are laws that say that if you lie to Congress, you will be convicted of perjury. And those are part of our criminal code, Section 1621 and 1001, Title 18. And so that's the easy answer, but it's interesting because during Watergate, we considered it to be at least an impeachable offense for the president to lie to the public. And in the roadmap that the Watergate prosecutor gave to the House Judiciary Committee, looking at impeachment, we laid out a number of things that were provable lies that the president had said to the public. And so I think there is at least that way of holding elected officials to be honest with the people they represent.

Kimberly Atkins:

And of course-

Barb McQuade:

Go ahead, Kim.

Kimberly Atkins:

I was going to say, and of course, the ultimate accountability comes at the ballot box, right? If you have somebody who you can't trust, you can not vote for them and they can lose that position. It doesn't always happen that way, but that's the way the system was set up.

Joyce Vance:

I think the only reason it's even a live question is because there was so much toleration of Trump's lies to the public over the last four years. And that was unprecedented. In normal America, people vote the bums out when that happens.

Barb McQuade:

Our next question comes from Rohanna and @snowbird0007. Do you know how a defendant like Derek Chauvin his defense?

Kimberly Atkins:

So that's an interesting question. I've actually gotten that question, heard that question a lot. And it was actually, I think at one point during trial, it was mentioned that the police union was paying for Derek Chauvin's defense in this case. That's actually not true. It's actually an organization called the Minnesota Police Association. And what usually happens with many police departments is that the police union itself doesn't fund a legal defenses, but they pay into a fund that a lot of police unions join in in order to pay for the legal expenses of a police officer who finds himself in court, either civilly or criminally based on actions in the line of duty. And so in this case, it was no different that association hired a law firm, which provides his defense and it's something that we frequently see. And that is what happened in this case.

Barb McQuade:

All right. Very good. And our last question comes from @jazzdax, who says, how does the Supreme Court decide which cases of the thousands it receives make the cut for review?

Kimberly Atkins:

Yeah, I'll start. I mean, so we talked a little before about the process, either a case makes its way through federal court or state court and an appellant files what is called a writ of certiorari asking the Supreme Court to take up a case and the Supreme Court takes up only a tiny fraction of the cases before it. So there are a lot of factors. It's purely discretionary. The Supreme Court can choose to take a case or not take up a case with the exception of lawsuits between states, which is something separate, we don't have to talk about here.

But generally speaking, the court will take up a case if one of several factors is in place. If there is something called a circuit split, which means the Circuit Courts of Appeals are coming to different conclusions on an issue of statutory interpretation or an issue of constitutional interpretation. And you can have different courts coming up with, you can't have different standards being set in different parts of the country in different courts. So the Supreme Court will come in and decide. If it is an issue that is very urgent, the Supreme Court will likely take it up. For example, Bush v. Gore was an election, was at stake. And so not only did they take that case up, they took the case up, they expedited the arguments so that they can issue a quick opinion. That is another case in which they take it up.

Or if there is something in a constitutional interpretation that even if there is not a circuit split, the Supreme Court seems very interested in taking that case up, particularly if they want to reverse an opinion that they think was decided wrongly in the past. That happens very rarely, but that would also be another factor that takes it up. But generally speaking, so long as four justices decide they want to take up a case, they can. And so a lot of one answer, one factor is we don't know. We don't always know the reason why the Supreme Court picks a certain case.

Joyce Vance:

One other reason they might take up a case is if it's what's called an issue of first impression. I mean, it's hard to believe that we're 200 plus years in and there are still legal issues that have never been decided. But if a case poses a question that's never been answered, then sometimes those cases also will get consideration. Kim, I think your answer is absolutely the right one, it's whatever intrigues enough justices on the court to get them to take the case.

Kimberly Atkins:

And that's sometimes the answer why they won't take up a case. I mean, very often when I covered the court for eight years and still write about it and you'll think, oh, they're totally, I thought last year they were totally going to take up a gun control case. And when we had all these cases that were primed and you had one of the justices even signaling in a different opinion that they're ready to take up a gun control case, and we're all ready to go, we thought it might be one for Massachusetts even, and nothing. Clients to take it up because they're just like, nope, we don't want to. So it goes both ways.

Joyce Vance:

They wait for the right case. There's this legal saying, good facts make good law. And so I think the court sometimes even when it really wants to address an issue, it waits for the right set of facts to come before it so that it can go the direction that it intends head.

Barb McQuade:

And that discretion I think is one of the hidden powers of the Supreme Court. If it doesn't want to take up an issue, it doesn't take it up. And so in many ways, that's what shapes the law going forward is the decisions that it makes. I had a law professor who once told me he had clerked for Sandra Day O'Connor. And during the time he was a law clerk, a case came along and they had voted it down for review. And there was something about it that caused him to go back and look at it a second time and ultimately recommended to his justice that they take it up and prevailed upon three others to do the same. And that case turned out to be *Batson v. Kentucky*, which is a really important case that has had a long progeny and stands for the proposition that you can't discriminate against jurors based on race. It's a violation of the rights of the defendant and the jury. So they control so much, they have so much power in just that decision of which cases they're going to take up.

Joyce Vance:

That's a really interesting insight, because we saw yesterday in *Jones*, the case about minors and criminal convictions. The new center of the court looks like Justice Kavanaugh. He's been in the majority on every opinion this term, and he's the new swing voters, no longer Justice Kennedy, who's retired. It's not Chief Justice Roberts, it's Justice Kavanaugh.

Kimberly Atkins:

I think we should review. We should revisit that topic in another podcast because I have some thoughts.

Joyce Vance:

That's a great one. We definitely need to take up this term in the Supreme Court.

Jill Wine-Banks:

I think life for a minor is a good idea. Is that the idea?

Joyce Vance:

I was involved in an amicus brief that opposed the way the Jones case came out. So it's possible that I have strong feelings, but really we should talk more about the Supreme Court. It's an endlessly fascinating topic.

Kimberly Atkins:

Agreed.

Barb McQuade:

I like beer too.

Joyce Vance:

All right.

Barb McQuade:

Thank you for listening to #SistersInLaw with Kimberly Atkins, Jill Wine-Banks, Joyce Vance, and me, Barb McQuade. Don't forget to send in your questions by email to sistersinlaw@politicon.com or tweet them for next week show using #sistersinlaw. And please support this week sponsors, HelloFresh and ThirdLove. You can find their 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 love to read your comments. See you next week with another episode #SistersInLaw.