

Barb McQuade:

Welcome back to #SistersInLaw with Jill Wine-Banks, Joyce Vance, Kimberly Atkins Stohr and me, Barb McQuade. Since the holiday season is approaching, it's time to order your #SistersInLaw merch. You can go to politico.com/merch where you can get #SistersInLaw T-shirts, tote bags, water bottles, and much more. And so, on with the show, today we will be discussing the trials of Kyle Rittenhouse, the Charlottesville rioters, and the killers of Ahmaud Arbery. Then, we'll look at how parental rights clash with COVID vaccines for children, and the importance of diversity in legal education. And as always, we look forward to answering your questions at the end of the show. But it's Halloween weekend. And so, sisters, I want to ask I'm a little worried we've all been Nooming to the best of our abilities. I'm a little worried about my abilities to withstand eating all the Halloween candy before I pass it out to the kids. I've avoided buying it. I'm not buying it until Halloween the day. And then I'm hoping to avoid some of my favorite candies. What are some of your favorites? Who's got a favorite candy?

Joyce Vance:

Well, the worst thing that I have going this year is that I feel so bad for the neighborhood kids who didn't get to trick or treat last year that I've gone out to a local artisanal chocolate maker Chocolata and have put together some little special stuff for the kids that we know that are on our street. We're a very large trick or treating street. People usually just drop their kids off and we have hoards for two or three hours. But I'm looking at those special chocolates and it's a good thing I only got just the right amount.

Barb McQuade:

I'm coming trick or treating on your street.

Joyce Vance:

It's a good one.

Barb McQuade:

What about you, Kim or Jill? What's your favorite candy? What's your candy vice?

Jill Wine-Banks:

I love all of the candies. I mean, there's almost none that I don't like. I tried... When I went to the store, I thought, "I'm not going to buy the ones that are my favorites. I'll buy my husband's favorites." But I broke down in the store. But I really feel like Noom has kept me straight, and I would rather have a grape than eat the little candies. And I did buy the teeny ones so that if I do cheat it's only one-

Barb McQuade:

Yeah, great that helps. [crosstalk 00:02:34].

Jill Wine-Banks:

Yeah, I think that helps. And I particularly love Almond Joy, and Butterfinger, and Charleston Chew if anybody remembers those? Actually, there's none that I don't love. Kim, what about you?

Kimberly Atkins Stohr:

Listen, I love grapes. As I've said, I have a newfound appreciation for grapes, but if you put a Reese's Peanut Butter Cup in front of me that's going to beat the grape every time. I'm going to be absolutely honest. For Halloween, it's just once a year, just once a year. But one thing I love is I love giving out candy. That's one of my favorite things to do. And this year is a little bittersweet because for the last 10 or more years, I've always done costumes with my late dog Boogie who passed away in June. I would be Princess Leia and he would be Chewbacca. He was a great Chewbacca, or-

Barb McQuade:

We're going to need pictures, honey.

Kimberly Atkins Stohr:

I just post... I tweeted some a couple days ago. RIP [Uhura 00:03:29], and he was a triple. And so, I have to figure out what costume I'm going to wear to give out candy. I guess I'm going to have to enlist my husband to be my partner. So, anybody with ideas of what we should be?

Barb McQuade:

Oh, there's so many-

Kimberly Atkins Stohr:

Pass them along.

Jill Wine-Banks:

I wear a Dalmatian mask and just stand next to my dog. [crosstalk 00:03:49]. I got Dalmatian pajamas, onesies. [crosstalk 00:03:55].

Kimberly Atkins Stohr:

That would be a good one, too.

Jill Wine-Banks:

A friend of mine gave me a fake Dalmatian coat one year lined with 101 Dalmatians. And I used to wear it to the office at Motorola where there was a child care center in the building I worked in and the kids would all go berserk when I would walk in wearing it. So yes, maybe Corella next year.

Barb McQuade:

What about going is Kirsten Cinema in the denim vest, too scary?

Jill Wine-Banks:

Too scary.

Joyce Vance:

Very scary.

Jill Wine-Banks:

No.

Barb McQuade:

Joyce, I figure you're Squid Game fan. I figured you'd be getting one of those green track suits [crosstalk 00:04:33].

Joyce Vance:

By the time I tried to get them they were all sold out, and my husband was really disappointed. But the costume that I'm proudest of this year is our oldest kid. He's a young lawyer and he's not of the costume variety. And so, our Alabama listeners will know that my husband actually ran for Chief Justice of the Alabama Supreme Court against the unlamented Roy Moore who people may remember from the Doug Jones Senate race. This is before Roy Moore's predilection for younger girls came out. But anyhow, what I told my oldest kid to do was to wear a campaign shirt from my husband Bob Vance for Supreme Court T-shirt, and to go as a failed judicial campaign. So, that's his costume.

Barb McQuade:

Too soon, so mean.

Kimberly Atkins Stohr:

So proud about one [crosstalk 00:05:20].

Barb McQuade:

Oh, that's so mean.

Joyce Vance:

I know, but he lost Roy Moore. I mean, it never get some old burning him for that.

Barb McQuade:

Well, Kim, you'll have to let us know what you ended up with, with your costume. But we should move on. We've got some important things to talk about in the news. And I think Kim, you're going to lead us through our first topic.

Kimberly Atkins Stohr:

Yes, so let's talk about three high profile trials underway that share some troubling commonalities when it comes to race and violence. Joyce, let's start with the criminal trial of the three men charged with killing Ahmaud Arbery. How does a repealed Civil War era law factor into this case?

Joyce Vance:

This is such a troubling case down in Savannah, Georgia, really Brunswick, Georgia on the coast in southern Georgia, and Arbery was executed by a father and a son the McMichaels while he was out jogging. Their excuse was they thought that he might have been involved in some previous burglaries in their neighborhood. And of course, I think people are familiar with the dynamic here. The victim is black. The two men who executed him as well as a third who filmed the murder and has been charged with felony murder are white, and the elder of the two men involved in the shooting, Mr. McMichael is ex-law enforcement. And that led to what many people have perceived as special treatment for these

defendants. So much so that the former prosecutor in the case has actually been indicted for violating her oath of office.

Kim, the law that you're talking about, the law that's sort of the predication for this whole fact pattern is a citizen's arrest provision that dates back to slavery. And that permits citizens to arrest someone if they have reasonable and probable grounds of suspicion that they've committed a felony. And so, that's the hook that the McMichaels hang their hat on. But something that I think we should just point out, and this case is still in jury selection. We'll have a lot to talk about in the next few weeks. The trial is expected to run for a couple of weeks after they finish getting a jury, which may well be another full week. But there's no reason to believe that these defendants can prove that they had a reasonable suspicion. I mean, they may have had suspicions, but whether they're reasonable is an entirely different question. And even if they do, the law authorized them to arrest and not to execute. So this case, I think, is one that's going to be very troubling when we hear all of the facts.

Kimberly Atkins Stohr:

And Jill, let's talk about another criminal trial out of Wisconsin, and that one is one of Kyle Rittenhouse. We've heard a lot in the past few days or so of questions about the use of the word victim in terms of describing the people that Kyle Rittenhouse shot and killed and explain what a judge is doing in that case. I think it's caught a lot of people's attention.

Jill Wine-Banks:

And just to remind people, this is a case where a teenager from Illinois drove into Wisconsin carrying an automatic weapon and shot and killed two people and injured many others, and is now being tried. And the judge has ruled in what I would have to say in my opinion is an unfair standard and a very disparate decision where he is allowing the defense to call the people he killed an injured rioters, looters, arsonists, but is not permitting the prosecution to call his dead people, the people he killed as being victims. The judge says, "Victims is a loaded word." Of course, the prosecution is saying nothing is more loaded than calling the dead people, rioters and arsonists. And yet I have to say that according to local lawyers, this particular judge has this rule about not allowing victims to be called victims. So, it's not special for this case, even though it looks like it is a prejudicial decision hurting the prosecution and helping the defense.

He believes that until someone is proved to be the killer, especially in a case where self-defense is the defense and that is Kyle Rittenhouse's defenses is that he killed them because he was is afraid. And he's going to have to prove, though, that they were doing anything that was criminal rioting, arson. But so far, there is no evidence that he saw any of that. Even if he could prove that they did it, it wasn't in his vision. So, I don't see how he gets away with a self-defense, and I don't see how they can't call them victims. On the other hand, I think there are a lot of substitute words that may be more persuasive to a jury, and that the jury could even be outraged by the defense calling the victims, I'll call them that, by calling them arsonists, and rioters, and looters, that that could offend the jury. So, we'll have to wait and see how this plays out.

Barb McQuade:

I know there's a lot of outrage about this. I saw a lot of people saying, "What? That's ridiculous. This is a double standard. Clearly, the deck is stack." Neither of those rulings actually surprises me. And maybe it's just the culture of the district where I practice. But the idea that a judge says you can't call people victims during the trial is not unusual for me. I mean, I think the point is the defendant is presumed innocent. And to call someone a victim before the jury has made a decision suggests that the judge and

everybody in the courtroom thinks that the person is guilty. So, I've encountered that many times before. So, that one doesn't surprise me.

And then the idea that well, if the prosecution can't call the decedent victims, then the defendant shouldn't be allowed to call the people he killed rioters, or looters, or whatever. But I think that it's a different standard because it's a different question. The government doesn't get this presumption of innocence. These are victims, they're not on trial. What matters is Kyle Rittenhouse's mindset, his mens rea when he felt the need to commit an act in self-defense. And so what the judge said is, the lawyer may use it in closing argument, if the proofs have come in during the trial to support it. And what he said as you just mentioned jail, you use it at your peril. Because if you don't have, even if you do prove that that's what they were, there is a very high risk that you offend the jury, that somehow he believed he was entitled to kill them because they were looters, and rioters. And so, if I were the prosecution in this case, I would call them simply by their names. That is the respect to which they are entitled.

Joyce Vance:

Barb, I agree with that. [crosstalk 00:12:28]. I understand why it hasn't been a popular view publicly. But in addition to all of the good points that you and Jill have made, on appeal, this is just a little bit of extra security, if there's a conviction, right? If there was this use of the term victim throughout the trial, that would just give the defendant an additional argument on appeal following a conviction. I think that whether we like this ruling or not, ultimately, it's a smart and a good ruling.

Barb McQuade:

Joyce, you raise a really important point, which I also remember saying, sometimes the judge would rule against you and say, "Believe me, you'll thank me on appeal." And I'd say, "Stop doing me favors. You're not helping me." Because remember, only the defendant can appeal if there is a conviction. If there's an acquittal, then the government gets no appeal. And so, sometimes judges do go out of their way in my experience as a prosecutor to favor the defense because it makes the judges rulings a little more appeal proof.

Joyce Vance:

Yeah, I mean, I think [crosstalk 00:13:28]-

Kimberly Atkins Stohr:

I want to ask questions more generally about all these cases in terms of how to defend them. But first, let's just get the third one on the table, Barb. There's a civil case against the organizers of the Charlottesville rally. So, talk about the claims that are being brought in that case and what penalty the defendants could face if they're found liable.

Barb McQuade:

Yes, this is a civil suit, a lawsuit brought against the organizers of that 2017 Unite the Right protest. This is the one that Donald Trump described as very fine people on both sides. There's a protest there. A rally protesting taking down the statue of Robert E. Lee. It attracted counter protesters, and the lawsuit is brought by some of the people who were injured in that protest and rioting. It's under a statute sometimes referred to as the Ku Klux Klan Act 42 USC Section 1985. This was a statute passed right after

the Civil War to put some teeth into the 14th amendment to protect freed slaves from attacks by the KKK or other private actors.

And so, it permits civil damages if the plaintiff can prove that two or more people conspire to deprive them of their rights to equal protection of the laws and caused injury or property damage. And so, these plaintiffs are seeking money damages for their physical injuries, for property damage, and emotional distress. There's a 111 page complaint, and we should put that in our show notes that details the planning of the events. The defense is, well, we planned this peaceful protest, and it got out of hand, and we couldn't help what happened where all these kinds of protesters and one thing led to another and violence broke out.

What they alleged in the complaint is that this was planned, that the violence was planned. And they include in that complaint some of the social media posts that are incredibly explosive photos of social media posts about doing violence to African Americans and Jewish people. This is this whole you will not replace us argument. And so, I think it's worthwhile for people to see what they're talking about here. This is not about stopping someone from holding a peaceful protest. This is about inciting violence against specific groups of people. So, the plaintiffs have to show by preponderance of the evidence that there was this agreement among the organizers to harm persons or property.

Kimberly Atkins Stohr:

So, I want to, as I said, talk about the defense in all of these cases. And since that's the last one, I want to start with that one. One thing that we are seeing according to news reports is, A, some of these defendants are having a really difficult time finding and keeping counsel to represent and defend them. And it's important to note that this is a civil case. This isn't a criminal case in which people are appointed counsel. So, if they don't have a lawyer, this could be trouble for their side. And also, I thought it was interesting that at least one defendant was preparing apparently by watching Tucker Carlson. So, what does this tell you, guys, about the defense in that Charlottesville case, anybody?

Jill Wine-Banks:

Well, it says more than just about the defense because it also is because it's a civil suit. They're hoping to recover some money damages. And the reason the lawyers are changing, apparently, is that the defendants can't afford to pay lawyers. So, how are they going to be able to afford to pay any damages? That doesn't make the case not worth pursuing because there is a point to be made, and to stop future organizations. And some of these organizations that are sued have gone out of business, but really, they haven't. They've just changed their name. And so, we want to make sure that... I think the plaintiffs want to make sure that they don't continue along this path. And I think that's an important part to keep in mind here.

Kimberly Atkins Stohr:

Yeah, some of the attorneys have dropped out because of, essentially, they did not... The clients were not paying attention to them and not following their direction as well in addition to not being able to pay them, but I'm sorry, Barb, go on.

Barb McQuade:

I was just going to say one of the challenges here also is about rights to free speech. It's a tricky case because there's not any government actor here who is chilling free speech. No one told them they couldn't have this protest, this peaceful protest. What is at issue here is whether there was a conspiracy

to physically harm people. And so, I think on social media and other places, the defense is spinning this as this is an effort to chill unpopular speech. But that's not going to be the case. In fact, the judge in this case denied a motion to dismiss on that basis because the issues are instead about whether there was an agreement to engage in violence to hurt people or property. And that's the issue that the jury will be focused on, and they'll be instructed on.

Joyce Vance:

This is a very experienced judge, too. This is not a judge who is going to be intimidated by this bevy of very aggressive plaintiffs, and their lawyers. In fact, he's been on the bench for so long that I actually took a trial procedure from him when I was in law school, he was a state court judge in the mid-1980s. He's now a federal judge. He's very straight up the middle and no nonsense. This is the Western District of Virginia in Charlottesville. And I think one of the most interesting things that I've heard about this case is that there is not community support for the plaintiffs.

In other words, all of the rallying that's going out in front of the courthouse and in Charlottesville. It's all very supportive of the plaintiffs and the defendants are not finding any approval in the community. And the allegations are really horrifying. They spit on a Christian priest while he was praying. They attacked a group of students who are around a monument that evening before the rally, and of course, the death of Heather Hire, and her friends who had accompanied her to the protest. So, I think that this also plays in to Jill's point. One of the things that the plaintiffs are trying to do here is to put these groups out of business. The Southern Poverty Law Center famously did that to the Ku Klux Klan in the '80s. This is that same strategy. Whether these defendants have money to pay in a judgment, whatever it is that they have, whether it's property, they're going to have to turn it over, and this will end them and their hate filled rhetoric, hopefully.

Jill Wine-Banks:

I want to make sure no one misunderstood me when I was talking. I fully embrace the First Amendment and their rights to protest and to say hideous things. I was on the board of the ACLU in Chicago, and this is the same board that helped the Nazis march in Skokie, a place with a very large Jewish population where it was quite a traumatic event. So I'm all in favor of that. Also, you asked about Tucker Carlson, which none of us has addressed. And I want to add to whatever your question was about him. I don't know if everybody has seen but he is now releasing a three-part documentary that is based on the trailer Replete With LIES, capital L-I-E-S, lies. And the First Amendment allows him to say these things and the Supreme Court doesn't allow prior restraint of broadcasting horrid things like that. But I'm betting that there's going to be some kind of lawsuit or something about Tuck Carlson doing this.

Kimberly Atkins Stohr:

I just want to get to before we run out of time on the really important issue of jury selection in all of these cases. I know in the Ahmaud Arbery case, especially, there's already been a very difficult time by both prosecutors and defense attorneys to find people who do not know, either the defendants or Ahmaud Arbery, in this case. From you all's experience as litigators, talk about that. Talk about jury selection process, and can in any of these cases given the attention they've gotten is a fair trial possible?

Jill Wine-Banks:

The test is not whether you know somebody, but whether you can set aside your preconceived notions. And that has been a problem in this jury selection, which has been going on for over two weeks now. And they're looking to get 65 jurors, I think, for the panel to select from, and they're only at 47. They've

summoned over 1,000, only half of those have actually even showed up. So, it's going to be troublesome because so many of them do have opinions that they say they cannot set aside. And some of those have been seated, despite the fact that they say they know these people.

Barb McQuade:

Yeah, in a big city like where I practice, you could almost always find jurors who didn't know the parties, and even if it was a high profile case, and they may have read something about it. As Jill said the question is, can you set anything you already know, any preconceived notions aside, and decide the case based on what you hear here in court? And the answer is, yes. In a small town, like the one where they're trying the Arbery case, what they're finding is everybody who comes in says, "Well, my dad works with his brother," something like that. It's a small town. And so, if they simply cannot sit a jury, then the solution is a change of venue. You would move the trial to some other community. That has its pros and cons because there are community standards that are part of a jury's verdict. The judgment of the community is an important part of it. But that's the solution if you simply can't find an impartial jury.

Joyce Vance:

This is not the first high profile trial that they've had in this district. They've had in the past, not the recent past. But even when the area was a little bit smaller, a very notorious murder for hire case. Ultimately, you do get a clean jury in this situation. That's why it's so important to be meticulous and voir dire, and make sure you find out the details and learn where there are potential jurors who could down the roads. I guess this is my day to play appellate lawyer. But the problem if you get a juror who can't set aside their biases are who they know then you're setting up an issue on appeal if there's a conviction. So, it's great that the judge is doing this very carefully, and the lawyers are engaged. They'll ultimately get a jury that'll be just fine.

Kimberly Atkins Stohr:

Now, we talked about that a little bit in the Tsarnaev case, with the Boston Marathon bomber case, and that's, it's before the US Supreme Court for that very reason. Well, we'll be keeping a close eye on all these cases as they move ahead.

Barb McQuade:

Hey, Kim, I know a good night's sleep matters a lot to you. How's ChiliSleep™ working for you?

Kimberly Atkins Stohr:

It's working great. I've talked about my insomnia. And one of the worst things is waking up because you're uncomfortable. And I've been using the OOLER® mattress topper and it keeps you cool. It stays on my side of the bed, doesn't bother my husband who doesn't have the same issues, and it's working out great. What about you, Joyce? Have you tried, ChiliSleep™?

Joyce Vance:

I really like anything that keeps me cool when I'm sitting sleeping. I'm a little bit idiosyncratic, there's a huge surprise. I have a down comforter that I brought home from college in Germany a really long time ago. And I love sleeping under it. To me, it just says, time to go to sleep as soon as I put it on, but it's warm. I mean, I live in Alabama. And so, having something that cools off the bed is a really big deal and improves sleep for me. Jill, how about you?

Jill Wine-Banks:

Well, I have the opposite problem of Kim, which is my husband is the one who is always really warm. And so, we're using it on his half of the bed, and so that I can stay at my comfortable temperature and he gets cooled down. And it lets him sleep all night without interruption, which otherwise would happen. And so, that's a really good thing. So opposite of Kim. But Kim, what do you think?

Kimberly Atkins Stohr:

Yeah, that's really great. It's something for everyone. And with cell phones and 24/7 work, your body needs a trigger to let it know it's finally bedtime. So, if you hate tossing and turning in sweaty sheets, ChiliSleep™ is here for you. ChiliSleep™ makes customizable climate controlled sleep solutions that help you improve your entire wellbeing like the OOLER like I have and the Cube Sleep System. They're hydro powered temperature controlled mattress toppers that fit over your existing mattress to provide you a perfect sleep temperature.

Jill Wine-Banks:

Whether you sleep hot or cold, these luxury mattress pads keep your bed at the perfect temperature for deep sleep. And their sleep systems are designed to help you fall asleep, stay asleep, and give you the confidence and energy to power through your day. And for an extra layer of comfort they also make the chiliBLANKET™, the only weighted blanket that can also be paired with a control unit for the ultimate sweat-free sleep. Can you imagine waking up and not feeling tired? ChiliSleep™ can help make that happen.

Kimberly Atkins Stohr:

Head over to chilisleep.com/sisters to learn more and save 20% off the purchase of any new sleep system. This offer is available exclusively for SistersInLaw listeners, and only for a limited time. That's chili, C-H-I-L-I sleep.com/sisters to take advantage of our exclusive discount and wake up refreshed everyday.

Joyce Vance:

So, as we were getting ready to tape the podcast I got one of those little news alert notices on my phone, and it said that the FDA had authorized the Pfizer vaccine for kids who were five to 11 years old. Those shots are expected to be available as soon as next week, and previously COVID-19 vaccines had been approved for kids who were 12 years old and up. So, that's all good news, right? I mean, it's fantastic news. Unless you're divorced or you share custody of a child and there's a dispute over whether or not the child should be vaccinated. Then those questions have some interesting legal dimensions. And they involve what happens when divorced parents or other partners with a custody agreement disagree about getting the COVID vaccination for their kids. So Kim, I think this is a fascinating issue the more that I look at it. You were the first one that flagged it for us to think about. Why don't you go ahead and tee it up and talk about the dynamics and the issue?

Kimberly Atkins Stohr:

Yeah, so this is very interesting. I did a very little bit of family law practice when I was a civil litigator. But I've been seeing stories about parents not agreeing on whether to have their children vaccinated. And also, I've been hearing anecdotally, from people that I know that are in this situation, either divorced

parents or divorcing parents who have different ideas about what to do with their kids. And it's presenting legal issues that more attorneys are reporting hearing from their clients about this.

So, generally speaking, from my experience handling things like divorces I learned that in that case family law is about 1% black letter law and 99% emotion, right? It's a very charged thing. It's very different than the other kind of topics that we really examine where we look at a statute and we break out down all of the elements. It's really not like that. I happen to be, to have been talking to a lot of judges over the past couple of days. And this was a topic of conversation among them, too. And one thing one judge said to me was the message to any parent in a dispute like this is, "Look, you don't want me deciding this for you what will happen to your child. I don't want to decide this for you about what happens for your child. I want you all to figure this out, and you decide for you." And that's essentially what governs.

I mean, family law varies state to state. But generally speaking, our judges look to what is... The general standard is what is in the best interest for the child? And when you look at that on balance, what judges and attorneys tell me is that more likely than not, if this goes to a judge. If you have two parents who disagree on what to do with their children, if it goes to a judge, the judge is more likely than not to rule in favor of the person who wants the vaccination. Now, that depends on a lot. It depends on if they're married parents with co-equal control, and say over what their kids have. But if it's any other situation, it's probably contractual. They're probably either governed by a decree. A divorce and custody decree that has been issued by a court, which basically lays out everything including medical care.

Sometimes those decrees have provisions such as in the case of a medical determination, it's up to what the pediatrician says. Or it will give judges some leeway. But if, for example, whether or not to vaccinate a child makes a difference, as to whether that child can go to school, can participate in the activities that they normally do, can really keep their lives in the standard that they're used to. Again, that's probably gone away in favor of vaccination acts in a really good either religious or medical reason to not have the vaccine, it's going to be a real difficult road to hoe.

So, generally speaking, my advice always in family law, is to try to work it out, try to see if you can come together and figure it out. You can't always. One thing that an attorney said to me, a family law attorney said to me is, "Look, you can either save your money to put your kid through school, or you can give me your money so that I can put my kid through school." Those are basically your choices in this case. But the fact that it's coming up now, it's a novel new area. So, obviously, we don't know. Maybe judges, certainly judges in more conservative areas may make rulings otherwise, but it's going to be interesting to see all this play out.

Joyce Vance:

I guess COVID is not the first time this has come up, right? There's always been an anti-vax movement in this country. This issue can even come up around circumcision and other medical decisions. But Barb, Kim makes the point that most of this is emotion, very little of it is law. Can you talk a little bit about the best interests of the child standard and how that gets worked out between parents?

Barb McQuade:

Yeah, so again, as Kim mentioned, this is going to vary state by state. But typically, that's going to be the goal in any sort of custody arrangement, or any sort of dispute about it. What is in the best interest of the child? But when you prepare these documents in advance, you don't always anticipate every single issue that's going to come up. In fact, there are probably plenty of these agreements that are on the

books where COVID wasn't a thing, and people weren't even anticipating it, and have now developed strong feelings about whether there should be or shouldn't be a decision. And so, if the parents can't agree on how this should be done perhaps one parent gets to make these decisions, then it goes before a judge to make a decision as to what is in the best interest of the child. I think objectively looking at it, as you say, unless there is some family based religious exemption, it seems that most objective finders effect like a judge would find that a vaccination is in the best interest of the children.

One thing that is useful in all civil disputes, but especially in the family court arena is mediation. There are trained mediators who will work with the parties to try to get them to agree on certain kinds of things. And so, mediators may be helpful in getting parents to reach some sort of agreement. But I'll tell you, based on all the things we've seen at school board meetings, and hospital boards, and health officials, people have really strong feelings about vaccinations and even masks when it comes to COVID. And I could see people really going to war over this issue.

Joyce Vance:

I think you're absolutely right, and this is going to maybe be the next edge issue where we see a lot of, if not violence, a lot of trauma, a lot of argument, a lot of stress getting into the mix. And I spoke with a friend who practices family law, and she made the point that so much of this is specific on what's in the consent decree, or the agreement that people enter into when they separate or divorce. Sometimes they'll give one of the parents the ability to make decisions about certain types of medical decisions, the other parent will control in others. Sometimes a pediatrician is even offered up as the tiebreaker. Can you imagine being the pediatrician who agreed to do that six years ago, and suddenly, you like these school board members have to get in the middle of these highly emotional decisions? So, I guess if nothing else, it points to the importance of having a really, really good lawyer negotiating these sorts of deals for you. But Jill, beyond these very practical sort of assessments, there are also constitutional dimensions to this issue, aren't there?

Jill Wine-Banks:

There are. Before I answer that, though, I do want to point out that I also spoke to a family law judge and a terrific family law lawyer. And these are real issues happening right now. My friend Gloria Block said that in her office she now has several of these cases. And as speaking for myself, as someone who's been through a divorce, I can only imagine that if you have children and are divorced, you couldn't talk to each other while you were married. So, it's going to be really ugly and Gloria said that this just shows how charged this issue is. But getting to your point about constitutional, the constitutional issue comes up in terms of religious exemptions, to vaccine mandates and to vaccine decisions. And this is a very complex issue because federal law is predominant over state law. So, although there may be state laws that differ, ultimately the federal law will prevail.

The first question is, is the claim of a religious exemption legitimate? Is there a real religious reason for saying you can't get a vaccine. And in my research, no major religion has objected to the vaccine. And in fact, the Catholic Church has encouraged people to get the vaccine. And courts have ruled except in Barb's home, Western Michigan, in connection with some athletes have ruled for vaccination. But in this one case in Western Michigan, they have said that athletes who claim religious exemption don't have to get the vaccine. And states, and institutions, employers are very reluctant to look at the legitimacy of the claim of religious exemption. So, it's going to take a while to find out what will actually happen in terms of states and the religious freedom exemption. Let's just say that it has to be something that ultimately will be determined in the best interests of the child, and whether the vaccine will end up being upheld.

I know we're all doing a lot of online shopping these days because of COVID. And one thing that will help you save money whenever you're shopping online is Honey. Have you tried it, Kim?

Kimberly Atkins Stohr:

I have. I have done a great deal of online shopping in the pandemic, maybe a little too much.

Joyce Vance:

Say it's not so.

Kimberly Atkins Stohr:

And I love a deal. And Honey is just so easy to use. And make sure even when you're not even thinking about it, you look up and poof, there's 20% off or whatever coupon code is available. It's really great. What about you, Barb?

Barb McQuade:

I first learned about Honey from all of you, sisters. I didn't know much about it before, but it's a proper tradition in my family. My mother is a great coupon cutter from way back, child of the Great Depression, and I'm happy to save money wherever I can. So, Honey is great because it just automatically populates and finds them for you. You don't have to go looking, so I found it to be very useful. How about you, Joyce?

Joyce Vance:

I'm in the thick of Christmas and Hanukkah shopping already. I'm worried about supply chain issues. And I love having honey just pops up. It used to be that I would be checking out and that promo code box I wouldn't have a code to put in it and I would feel terrible. With Honey that's taken care of for you, and you don't have to manually search for coupon codes. That's just a thing of the past. Honey is the free browser extension that scours the internet for promo codes and applies the best one it finds to your cart. It's like getting the perfect deal every time. They support over 30,000 stores online with everything from tech to popular fashion brands, and even food delivery. And so far Honey has found its over 17 million members, over \$2 billion in savings. How does it work, Kim?

Kimberly Atkins Stohr:

So imagine you're shopping on one of your favorite sites. And when you get to checkout, the Honey button drops down, and all you have to do is click apply coupons. And then you wait a few seconds is Honey searches for coupons it can find for you on the site. And if Honey finds a working one, you'll watch the prices drop. It's really that easy.

Joyce Vance:

And it really is fun, isn't it? I love it when that happens. If you don't already have Honey, you can be straight up missing out on free savings. It's literally free and installs in a few seconds. And by getting it you'll be doing yourself a solid and supporting this podcast, not coincidentally. Get honey for free at joinhoney.com/sisters. That's joinhoney.com/sisters or look for the link in our show notes.

Jill Wine-Banks:

Let's move to talking about diversity in legal education. When I graduated, my law school had zero women faculty members, and likely no other law school had any either. But by September 2021, 42% of law professors were women. Kim, since you work in Boston or for the Boston Globe, not in Boston, you're in Washington. You should know that the UMass law school is better than average, women make up 54% of tenured faculty there. And overall 55% of UMass law students are female, including 59% in this year's class.

Kimberly Atkins Stohr:

Wow.

Jill Wine-Banks:

Nationally, they are one of only 22 ABA accredited law schools with a majority female tenured faculty. But it's not just the faculty, the same paucity of women also exists among the student body and the law profession. When I was at Columbia, my class had 5% females, and only 4% of all practicing lawyers were women at that time. Now, of course, classes are at least 50% female. And last year, more than 50 years after I graduated, the percentage of lawyers in the US who are women was still only 37%. So, obviously, it's going to take us a long time to get to parity. But I want to start, Barb and Joyce with you as law professors, and talk about the lack of gender diversity in law faculties. And tell me aside from the general equity issue, and giving students a role model, does the percentage of women on the faculty matter in terms of how things are taught or what is taught in the classroom? Barb, do you want to start?

Barb McQuade:

Yeah, and I think the answer is resoundingly yes. First, I want to say thanks to Bernetta Hayes at the Council on Legal Education Opportunity. It's a nonprofit that works to expand opportunities for minority and low income students to attend law school. She suggested this topic, and I think it's phenomenal. And I think we need to think about diversity as to all underrepresented groups. Because we can all learn so much by having those different perspectives surrounding us, and that's especially true at law school. So women, minorities, LGBT, all manner of diversity.

In fact, the University of Michigan Law School was part of a big affirmative action case, Gruder versus Ballinger, where the Supreme Court held that diversity is a compelling governmental interest because it enhances the learning opportunities for all students. And to your particular question, Jill, that is a topic that Joyce and I were talking about is in my criminal law class, we just finished talking about sexual assault. I was trying to think about the way it was taught when I was in law school. And the reason I don't know is because it wasn't. When I was in law school in 19... I had a male law professor who was fantastic. He was a giant in the field. But we didn't discuss sexual assault, and I think it probably just wasn't to him a big deal or an important case, and you look at the evolution of sexual assault of the crime, and in the early days of sexual assault it was rape or nothing.

It was only of female victims, or survivors, the term we use now. It was only by physical force. And in fact, it required physical force, bruises, and torn clothing. There was a case we just read recently that said something to the effect of it is the moral duty of every woman to fight to the utmost to defend her honor. Even if by today's standards, I think we would recognize, even if that means fighting back might get you killed. I think we recognize that sometimes it's not in the best interest to physically fight back. But that was the view in these early cases. And it seems to me that much of the law was written by older white men of wealth and privilege who saw the world in this way. And they saw the world of sexual assault as they needed to protect men against false accusations of rape. And so, if you required

the woman to be beaten and with torn clothing, then that would make sure that, yes, I guess we can believe her when she says that she was the victim of some sort of sexual assault.

Jill Wine-Banks:

Well, whatever the law was when you were in law school, when I was there, a woman un-corroborated could not be believed. You required corroboration for the crime of rape, unlike any other crime. So, Joyce, what would you like to add to that about how things are affected in the classroom?

Joyce Vance:

First off, I agree with everything that Barb says and her assessment of what the law and what law school used to look like in this area. Because rape is a state crime, we don't have just one rape law across the country. We've got different rape laws in every state. And in some states, the law has evolved more than in other states. But in many ways, this is a success story in the law. This is a little bit of a story about what happens when you have more women in legislatures. And when the law evolves beyond these unbelievable requirements that women fight back, and that they can't be believed. And those laws are really grounded in treating women as chattel, as property, and trying to protect the property, whether it's of the father or of the husband more than it's interested in the woman and what she's been through.

So, I credit a lot of the way I teach this to my law school professor John Calvin Jeffrey's Jr. at the University of Virginia. Like Barb, I went to law school a really long time ago. But John was real enlightened about this, and he did teach it is something that had begun to evolve, and needed to continue to evolve. So, for instance, rape shield laws, you now can't inquire in most places into a woman sexual history, and make the implication that she slept around, so she couldn't have been raped, which was all too common in rape sorts of cases.

I also teach federal law when I teach criminal law, which means I spend a lot of time talking about assault, and how instances that didn't used to be dealt with as sex crimes, as sex assaults can now be explicitly dealt with in areas where there's federal jurisdiction. It's not just this notion of violent rape, you can also have coercion. There are special laws that make it easier to prosecute cases involving children, specific laws for sex trafficking. So, although rape is it's still under-reported, it's still under prosecuted, and there's a lot that we can do better. I think that this is in some ways a success story of the law evolving and being better now than it was when we were all in law school.

Barb McQuade:

And don't you think, Jill, I'll ask you this. Don't you think that is a result of the fact that there are more women in legal scholarship at Michigan Law School, we now have not only our general law review, we have journals on gender in the law, and race in the law. And there are scholars because we have more academics who are working in this space who are people of color or who are women. And I think they just voice many of these different worldviews than what we were hearing a generation ago.

Joyce Vance:

And it's also important that we're educating our women students and sending them to legislatures and putting them on the bench. All of those dynamics are responsible for progress.

Jill Wine-Banks:

Exactly. I mean, when you listen to decisions of the Supreme Court where they understand what it means to have a girl have to be stripped searched, and the male on the bench do not see that. And that laws now are being made by women, as well as by men it makes a big difference. But another difference that I want to turn to Kim on this is about law school deans, and whether having more females and more people of color as deans is making a difference in terms of how legal education works, how the law profession works. Could you talk about that, Kim?

Kimberly Atkins Stohr:

Absolutely. And it absolutely makes a big difference. So let's face it, we all went to law school a long time ago. Why don't we just let you know? We'll just put that on the table, we'll stipulate. But when I was in law school, there were, yeah, it was more than 50% of my law school class was women. And there were a lot of women professors at the school, but there are only a handful, two, that I can think of off the top of my head of women of color, professors at the school at the time, and that has changed a lot. And I remember reading just a few years ago, it wasn't that long ago, when I think there were four women of color in the top 50 law schools in the deans position in the top 50 law schools in America and I was just gobsmacked at that.

Well now, an ABA study shows that 14% of ABA accredited law schools have black women at the helm. One of them is my alma mater. I'm very proud to say, Dean Angela Onwuachi-Willig who I know, and I'm very glad that she is the dean of Boston University School of Law. When I was in school there, it was Ron Cass who was definitely not a black woman. But so there's been a lot of change. I mean, when I went to school, I came to Boston and go to school from Detroit, and there was a class of 400 students. And you could fit all of the black students in my living room. You could almost fit them on my couch, there was seven of us. And that's in part because of the faculty. The students go where they feel comfortable, and that's an important thing.

And as Barb was saying, at a time where really critical things are being discussed, as Jill was saying, it's not just about women's issues, and understanding how the law impacts that. It's race and other things. So, here it is, you guys, critical race theory, law school, that's where it's happening. That's where it actually is happening. That's where it's supposed to be, and when you have leadership.

Jill Wine-Banks:

But Kim, I thought they were teaching our [crosstalk 00:51:07]-

Kimberly Atkins Stohr:

No, it's not in the second grade. It is not in the second grade, it is in law school. And when you have diversity from the top all the way down, it makes such an important difference with the curriculum, with the comfort of the students, with the understanding of what the issues of law you're discussing has, the impact it has in the world. So, it's really important, and I'm glad that at least in this area, we're moving in the right direction.

Jill Wine-Banks:

I've been using Noom now for several months, and it is been really wonderful. But I've had a little breakdown recently, and I'm getting SOS messages from Noom. Has anybody else gotten those? Kim, what about you?

Kimberly Atkins Stohr:

I will not neither confirm nor deny the SOS messages. But I will say, look, the one thing that I really like about Noom is that it makes you realize that you can think and behave differently with your food. So, for example, one thing that I do lately that I realized that I like is instead of reaching for a cookie or some other sugary dessert, I reach for grapes, which actually after a meal is really refreshing and light and sweet. And it's really delightful. And I wouldn't have done that if I weren't on Noon. What about you, Barb?

Barb McQuade:

Noom has really been life changing for me, I've lost 40 pounds. And in fact, I'm just done. I'm now working on maintaining. I'm a little worried about Halloween weekend. But somehow it just clicks for me. A big part of it is just here's the formula, it's math. Calories in, calories out, exercise earns you more. And it's been really easy for me. And I know, weight maintenance and weight loss is really challenging for a lot of people. It has been for me, and I always just thought I've reached middle age. And yes, I do expect to live to be 112 years old. Thank you very much. And so, this was just a new normal for me. And it just works for me, it clicks for me. Joyce, I think it's worked well for you too, hasn't it?

Joyce Vance:

It has. It's worked really well. And you know what I worry about because I think about how sometimes when you go off the wagon a little bit and you're eating a little bit too much Halloween candy, that might be me this week. You get depressed and you just want to walk away. And so, to Jill's point, having those SOS messages where they reach out when you walk away from the app, but you don't feel like a bad person, right? The message is ultimately, hey, you can do this, and we're here to help. And I know it sounds a little bit, I mean, maybe it's a little bit silly, but it's not. It really, really works for me. And I'm the person I resent being told what to do. But the Noom app is so easy to use, and it's such a powerful tool that it has really showed me how to understand my cravings for the big bag of Tootsie Rolls sitting upstairs right now. And it's helping me build new habits to reach my goals. I appreciate that I was ultimately able to put the Halloween candy down and walk away. Something I've never been able to do before Noom.

Barb McQuade:

Noom shows you how to pursue the goals you set for yourself and make sure you reach them focusing on motivation and improvement, not diet teas and airbrushed expectations. No food is off limits. It's about finding your balance.

Joyce Vance:

And if you're like us, you're busy. So, I love that Noom only asks for 10 minutes a day. Most days I get it done in about five. Over 80% of Noomers end up finishing the program and more than 60% of users lose 5% or more of body weight and 60% keep the weight off for a year or more.

Barb McQuade:

Start building better habits for healthier long term results. Sign up for your trial at noon.com/sistersinlaw. That's N-O-O-M.com/sistersinlaw to sign up for your Noom trial. Look for the link in our show notes.

So, our favorite part of the show is when we get questions from our listeners. If you have a question for us, please email us at sistersinlaw@politicon.com or tweet using #SistersInLaw. If we don't

get to your question during the show, please keep an eye out on our Twitter feeds throughout the week where we'll answer as many of your questions as we can. So, our first question comes from Shelley. And Shelley asks, is there a way President Biden could add to the number of federal judges? There seem to be full dockets and backlogs of cases. Couldn't that be a rationale for adding an increased number of judges? Kim, you want to take a stab at one?

Kimberly Atkins Stohr:

Yeah, so you're absolutely right about the backlogs. What the difference is, it is not within the power of a president to expand the number of judges on courts. And we're talking about not the Supreme Court, we're talking about the other federal courts that the idea about expanding the Supreme Court is already being reviewed by a commission, but Congress can. Congress can act to expand the number of lower trial level, and I should say I was taught by lawyers not to call trial level judges lower courts, so I'm not going to, I'm sorry. For trial level courts and federal appellate level courts, they can add more judges to those posts. And it's something that actually has bipartisan support.

Republicans and Democrats actually want to do this. The problem happens when Democrats are in control Republicans don't want to do it, and vice versa. But you can pass a law that spreads it out over time, that adds a certain number of judges every year so that a number of administrations have the ability to name these judges. It's something that should be happening in Congress. It's one of many things that should be happening in Congress. So, hopefully, that will happen soon to eliminate that backlog. And it's just in the interest of judges, and as I said, a lot of people support it.

Barb McQuade:

All right, our next question comes from Linda and Linda asks, "Barb, who are you cheering for? Michigan or Michigan State?" Have you not been listening to every episode of this podcast? I attended the University of Michigan for undergraduate and law school. My husband went to Michigan, two of my children have gone to Michigan. I am true blue. I've been wearing maize and blue all week. And it's actually a pretty exciting... So, the answer is Michigan. It's been a pretty exciting week because for the first time since 1964 both teams are undefeated. And so, you will not hear me trash talking because I am a little afraid. I have seen Michigan lose games in every creative way possible. But I've also seen Michigan win games that are absolutely thrilling. So we're hoping for a good one tomorrow. A lot of interstate rivalry. A lot of families divided. We will be flying our maize and blue flag tomorrow and cheering go blue.

Our final question comes from [[@didgeet2 00:58:04](#)]. Who can forget [[@didgeet1 00:58:06](#)]?. But [@didgeet2](#) asks can Roger Stone's pardon from Donald Trump prevent him from getting a subpoena from Congress for involvement in the January 6th insurrection? What do you think, Jill?

Jill Wine-Banks:

I can answer that simply, no. First of all, the pardon has nothing to do with January 6th, or with testifying. And furthermore, it actually means he has no self-incrimination left on anything he was pardoned for. So, that makes it even harder for him to resist responding to Congress, should they subpoena him? Because if he were not pardoned, he might still have a fifth amendment privilege, but having been pardoned, he can't be prosecuted. So, the answer is no.

Barb McQuade:

Joyce, you want to chime in on that one?

Joyce Vance:

No, I think Jill covered that perfectly. I mean Roger Stone, not only can be subpoenaed, he should be subpoenaed. And my guess is that the only reason he wasn't in that first group to get a subpoena is that the investigators, the congressional investigators want to learn a little bit more so that when they sit down with the notorious, I don't want to say liar, but I'm searching for another word that would work. I'll just settle on the notorious liar, Roger Stone, who actually brags about his inability to stick to the truth that they are loaded for bear like good investigators are in that sort of a situation.

Jill Wine-Banks:

I hate to go back to Watergate but I would have to call him the notorious dirty trickster.

Joyce Vance:

I think that's really right.

Kimberly Atkins Stohr:

Jill, you love to go back to Watergate.

Jill Wine-Banks:

I do.

Joyce Vance:

And we like it when you do. We learned so much when you do.

Jill Wine-Banks:

And remember [crosstalk 00:59:53].

Barb McQuade:

Many women to go to law school because of her Watergate [crosstalk 00:59:56]-

Joyce Vance:

Jill inspires me to stay on Noom because I want to be able to wear a miniskirt at some point in my life.

Jill Wine-Banks:

And Barbara inspires me so that my doctor will tell me stop losing weight.

Joyce Vance:

We've come full circle you guys, it's a Friday.

Barb McQuade:

Thanks for listening to #SistersInLaw with Jill Wine-Banks, Joyce Vance, Kimberly Atkins Stohr and me, Barb McQuade. Don't forget to send in your questions by email to sistersinlaw@politican.com. Or tweet them for next week's show using #SistersInLaw. Don't forget to go to politican.com/merch for all of our new amazing T-shirts, hoodies, bags, buttons, water bottles and more. This week's sponsors are

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Kimberly Atkins Stohr:

Every time we say Honey that Mariah Carey song pops into my head.

Jill Wine-Banks:

Are you going to sing it for us?

Kimberly Atkins Stohr:

No.

(singing)

You remember that one, it's a good one.

Joyce Vance:

I could listen to you sing all day.

Kimberly Atkins Stohr:

All right, let's do this.