

Kris Turner:

Welcome back to Wisconsin Law in Action from the University of Wisconsin Law School. I'm your host, Kris Turner. Today, we're delighted to welcome a scholar whose work sits at the intersection of law, society, and democratic development across the globe. Kathie Hendley, director of the Lawyers and Democratic Decline Research Project, or LAD. Kathie is an internationally recognized expert on legal systems in authoritarian and post-authoritarian context, with decades of research on courts, judicial behavior, and the rule of law, particularly in Russia and Eastern Europe. As director of LAD, she also helps shape interdisciplinary research, teaching public engagement around some of the most pressing questions facing democracies today. Kathie, thanks so much for joining the podcast today.

Kathie Hendley:

Thanks for having me.

Kris Turner:

I'm excited to have this discussion. This is something I don't know a whole lot about so while I'll be learning here, I'll be eating popcorn and learning along with everybody else on the podcast. Let's just start with your own path. You've built a career studying courts, legal culture, and the rule of law, and in often challenging political context. What first drew you to this field? What questions have motivated you to keep your scholarship going over time?

Kathie Hendley:

Well, I wish I had a better answer for this because I often get asked, what is the motivation for studying Russia and studying Russia in such depth? And a lot of it was just that I was casting about for something that interested me. I was practicing law in a large law firm and was pretty miserable. And so, started thinking about what else could I be doing? I had the good fortune, I think, of having done a big backpacking across Europe, but starting in then the Soviet Union. And had an interesting experience there where I went to different cities with a relatively small tour group. I mean, tour groups was the only way to do it in that period. And in each city, we had a different person that was guiding us around. And so you didn't get this, the Communist Party is the secret to life answer to everything in every city.

We definitely got that in Moscow, but not in some of the smaller cities. So it got me intrigued with the question of what is the story of law in the Soviet Union? I started doing a lot of reading, literature, other things on my own, and then decided to leave the law firm and do an area studies master's and really wasn't sure that law was going to be part of my story anymore. I thought maybe I would just get a job doing policy work on Capitol Hill or something like that. But I had, again, the somewhat good fortune of starting this new path in 1985, which is when Gorbachev came to power. And all of a sudden under Gorbachev, law became more interesting.

And when I did the master's at Georgetown, which was a wonderful interdisciplinary program, because I had really no background at all. So I was learning the language, I was learning history, politics, economics, and so on. The more you learned about something, the more you realized there is to learn. And so then I decided to go on for a PhD. And so then that's how the story began. One of the things that struck me as I read the voluminous literature that there was on the Soviet legal system is how it was all about how the law was supposed to work, how the law was, I guess we would say here in Wisconsin, what the law was on the books. And even my very limited two weeks in the Soviet Union told me that that really wasn't what the story was. And so, I got very interested in this question of, well, what was really going on?

Berkeley, like Wisconsin, is one of the birthplaces of law and society. And I had people there that were very helpful in terms of explaining to me how to put this in a larger framework. And as I began to do my fieldwork in what was then the Soviet Union, I was determined to take this law and action approach. It wasn't easy because they were not interested in having me do a law and action approach. But in many ways, that's the story of my entire career is what don't we know? What blank spaces are there? And the sad thing about the Soviet to Russia story is, is that there are so many blank spaces that we will never fill in because we will never know how people really felt about the role of law in the '70s or the '60s because there was nobody that was allowed to do that kind of research.

And even now, most of the legal research in Russia by Russians is very doctrinal. So that's where I see my kind of value added is that I want to do there and I want to go there and I want to hang out in the courts. I want to go to workplaces. I want to talk to people, do focus groups, really listen to what's going on and try to figure out not so much what Putin is thinking about law and how law is working at that high level, but what is the ordinary story? What are people like us who are Russians thinking and doing about law?

Kris Turner:

That answer was worth the price of admission alone for this podcast. That was fascinating to hear all of that. And I'm so glad you were in a position to investigate this and provide that added context that I think is extremely important. In that answer, you had mentioned law and action. What we don't know about Russian law, what happened in the '60s and '70s and how you approach it, that comes to my next question. A central theme of your work examines how law actually functions in practice, not just in the books, particularly in hybrid regimes or authoritarian regimes. Why is it so important to look beyond those formal rules and understand how these legal systems really operate?

Kathie Hendley:

Well, I think that one of the myths that we have is that law works perfectly in this country and it doesn't work at all in authoritarian regimes. And the reality is that, as we well know, law is highly problematic in this country and is not always bad, is not always dysfunctional in other countries. And one of the dreams of literature that I found as a graduate student and that I've continued to try to play with is this idea of dualistic legal systems. This is something that a scholar of the Nazi period, Ernst Fraenkel, wrote a whole book about the dual state. He was arguing that even under the worst times of the Nazis, that there was a functional, getting the trains running on time, dealing with your neighbor, getting divorced, dealing with traffic tickets, all that kind of stuff was going on while you're having Nuremberg laws and all this really horrific stuff going on at the same time.

And that's a hard thing for us to hold in our mind. And we tend to focus on the horrible stuff, the Nuremberg laws and all of that kind of thing that really has no relationship to what we would think of as a moralistic role of law. There was a scholar who wrote a really wonderful essay taking this idea and applying it to the Stalinist period and arguing that even while we're populating the Gulags and there's all of this kind of unpredictability, arbitrariness, at the same time, a lot of people are living normal lives and they're using the law in a mundane way to deal with their interests. And that's the thread that I've been pulling on and I think is a very important one. It's been very difficult to get policymakers to recognize that.

It's so easy to say, "Oh, well, let's talk about what happened to Navalny or let's talk about what happened to Pussy Riot and let's look at those trials." Which obviously have been predetermined. And I don't think anybody doubts that, but in the book that I did called *Everyday Law in Russia*, rather than focusing on that, I focused on, well, what's going on in the justice of the peace courts? How are these

people dealing with their problems? Because one of the things that I think would surprise people is that the use of courts in the post-Soviet period has gone up, up, up, up, up. Now, it's always hard to say, well, what does that mean? Because the reality is that all we can see is what I think of as the tip of the iceberg.

We can see who's gone to court. We can't see how many problems there were that could have gone to court. And so it's hard to make sense of that. One of the ways that I've tried to do that is through focus group discussions where you go in and you pull together a group of people who've had a common experience. Some of the things I looked at were home repairs or automobile accidents or a cell phone that didn't work. All things where there is a legal avenue for that, but there's also a lot of ways that you can solve that problem without going to court.

And how did people think about that? And how was... Because I think the common wisdom is that when you don't go to court in Russia, it's because you're afraid. You think that the case is going to be politicized and I almost never heard that. I almost never heard that people said, "Oh, I'm not going to go to court." Again, in a mundane case, "Because I think that the courts don't like people like me." Now, if I asked them what would you do if you got in a dispute with some governmental official? Totally different story. Sometimes when you think about the dual legal system, you think, okay, well, there are two buckets that you're going to... It's either politicized or it's mundane. And the reality is it's really a spectrum.

There's a lot of things in between, but that's my hobbyhorse, I guess you could say, in terms of what bugs me about the way that people think about authoritarian legal systems. Because the reality is that if you had a legal system that was just repressive all the time, you almost couldn't function because you would have to have such a large army really of people watching people. And so, instead you need to have law having some kind of legitimacy, even if in certain pockets of life, it's problematic. Another long answer to a short question.

Kris Turner:

I savored every word of that answer because it's something that makes it a lot more relatable. I think that I totally agree with you just from my own limited perspective. If you look at a different country, one that is operating under a different government and think that is the wrong way of doing it or that is something that happens to other people that could be better, but there is a much more relatable way of looking at a car accident. You want to go somewhere to settle a car accident, and that's probably the judicial system still, or in some sense, and you would do the same thing here. You probably have looked into this about how if you asked a group of Americans, if they have a problem with a governmental entity, it's a different reaction versus if you have a car accident where it's between two citizens. And that might be something that, again, draws strong parallels between Russia and the US judicial systems.

Kathie Hendley:

Well, one of the things I've always thought about the United States is that when we think about duality in the United States, the issue is not so much politics, it's money. And at least until relatively recently, money has not been a driver of the outcomes. And by money, I'm thinking of, can you afford to hire a decent lawyer, not do you pay a bribe? And we have this incredibly adversarial system where the skill of your lawyer is essential, whereas Russia comes from a civil law heritage where it's not adversarial. And so the skill of your lawyer, is that relevant? That's a project that I'm trying to unpack a little bit now, but when I was watching in court, I was notably unimpressed with the value added of lawyers.

Kris Turner:

Yeah, that's very fascinating. It's something that lawyers anywhere might be disconcerted to hear like, oh, the lawyer did not have a value add in this sense, but this is something that as you unpack, you might discover the nuance and context of what role the lawyers play.

Kathie Hendley:

That's right.

Kris Turner:

As your research has evolved in recent years, especially given the dramatic political shifts we've seen globally, are there new questions you find yourself asking that you weren't asking earlier in your career?

Kathie Hendley:

Absolutely. And the sad thing for me, although it's much, much more tragic for the people who live in the region, is that my whole way of doing research is not possible anymore. That I spent most of my career in summers in Russia, sitting in courts or hanging out with lawyers or doing what we would think of as fieldwork. I don't think that's safe anymore. There are a few people who continue to go, but it's not advised and we've seen these horrible incidents where someone gets picked up for really just to be a pawn. So this has forced me into trying new things.

One of the things that didn't exist until relatively recently were Lexis or Westlaw-like databases of court opinions. Now, one thing you could say is, well, why would you be interested in court opinions if there isn't a robust system of precedent? You can be interested in court opinions, not so much because you're tracking the evolution of a legal principle, but just to see what kinds of arguments are being listened to by the courts, what they're paying attention to, do you have witnesses in the case, all that kind of stuff.

And so, I started subscribing to these databases and working with them to figure out what we can learn from the data that they provide for us. And so, there are two different databases, one, which is almost all basic information about cases, a more statistical type of approach. And then the other one has full text opinions. You would think they would just combine the two, but they don't. For the one that was statistical, I did analysis looking at cases that I thought might be affected by the pandemic and trying to figure out if there was a difference in the way that the tools that the parties were using, the way that the court was resolving these cases. So I looked at cases that involved nonpayment of commercial rent, right? Because we know that in Russia, especially in big cities, just like here, people weren't going to shop and so there was a difference.

And what I found is that we did have an influx of new, especially small actors bringing these cases and that they did not know how to use the tools that might have been able to make the process a little bit easier for them. There's what I would think of as a quasi-summary judgment procedure buried within the procedural code that the ordinary person would not know, but someone who was a repeat player who had done this many times would know. And so I saw that those kind... And so that was the sort of thing that I was able to pull out. I have to say that this sort of research does not really race my motor. It seemed a little bit tedious, although we were finding things of interest. More recently, I've been looking at the full text opinions and with your help, I've been experimenting with using AI to pull out some of the information.

One of the things that we're trying to figure out is, does it matter whether or not you had a lawyer? And to do that, I've isolated a cause of action that I think you would probably need a lawyer. And this is a post-Soviet cause of action for damage to your business reputation. So it's a tort, right? And of course, torts, we didn't really deal with torts in the Soviet period. And the thing that's really cool about it is that it exists as a cause of action in two different types of courts. So it exists in the economic courts where

it's businesses, and it exists in the courts of general jurisdiction where ordinary people are angry about things that are said about them mostly online. So that's interesting too, that they're mad about that. I've been working on trying to pull out the information in these large numbers of cases with the help of AI tools. And that's something new that I've been working on.

Kris Turner:

I've enjoyed being a fly on the wall just to see bits and pieces of what AI has been able to do. And generally, it's been encouraging from what I can tell that it's making things move in the right direction at least. Would that be true?

Kathie Hendley:

Yeah. It's been very helpful in terms of being able to code large numbers of cases. Because I have written articles before there were these databases where I would just download maybe a 100 or 200 cases and I would hire somebody to help me code them. But once you get up into more than 500 cases and sometimes more than 5,000 cases in a year, then you'd have to create a sub-sample from your sample. And so, this is a way of getting at information that we've never even thought about studying. These are questions that are old hat in the US, but completely unexplored. And this goes back to my desire to always be trying to figure out where are the blank spots and how can I help fill those in?

Kris Turner:

What a wonderful blank spot that you are filling in and putting your distinct signature on there with a little bit of AI help writing a little on the side there, that's really great. So AI is a new development. One thing that's also kind of a new development is your new current role here at UW Law, the Director of Lawyers and Democratic Decline at LAD. For listeners who may not be familiar with it, can you give us a big picture overview of LAD and its core mission and maybe some of its priorities if you have time.

Kathie Hendley:

Sure. It's a project that came out of another project that was looking at backsliding democracies. And one of the realities of the literature on backsliding democracies, which is huge and is largely dominated by not lawyers, not legal scholars, but by political scientists or sociologists, is that they really don't pay very much attention to us, to the legal... What we would think of as the large group of legal professionals. Judges, courts, lawyers, legal academics, prosecutors, and so on. And one of the things that was very clear to those of us who were on the edges of this, who were thinking about this, is that lawyers and judges are under a huge amount of pressure in systems that are already authoritarian. And then we know from just watching, reading the headlines in our own papers that they're under tremendous pressure in countries that have long been thought of as stable democracies like the United States.

And so, the idea was to bring together scholars that are working on these sorts of issues and be able to compare what we're learning. What are the factors that affect the ability of lawyers to make a difference? One of the things that's been striking to me is that we often assume in the United States or the UK or many European countries that lawyers matter, that lawyers are political animals and that judges are policymakers. Well, if you asked a Russian if they thought of a judge as a policymaker, they would laugh at you. And if they thought that lawyers had a political role to play, again, laughter. Because this just is not how they're socialized, this is not the method, it's a bad verb, but sort of how we groom people in law school to think about themselves.

I think that we're always trying to push this idea in American law schools about not so much what is the law. That's the starting point, but is it the right law? Why did it turn out that way? This critical thinking, this willingness to say, okay, we're reading this judicial opinion, but what are the flaws in it? And so, I think that is something that maybe could be a real contribution out of this project is that we have a more holistic, a more realistic view of the patterns of how lawyers comport themselves in different countries.

Kris Turner:

The idea of lawyers in America where they're taught to question what they are seeing is something that is we treasure, but also when you're in a classroom with lawyers and law students like, "Okay, I'm going to get questions and you better be ready to have a discussion there." It can be challenging in a good way, and I think that you make a very good point that this is not something that can be taken as written in Russia or elsewhere in the world, not something I had considered before. And that can make it hard to see eye to eye for how these nations develop in democracy backslides or moves forward.

Kathie Hendley:

Yeah, yeah. I mean, just the very idea of how do you teach law? And a lot of European countries, this is of course changing and lots of different examples, but a lot of that is done by almost rote learning of the basic codes. And so the question is not so much, is the lawyer going to be able to be an advisor to you or are they just going to answer the question from their client, is this legal? Is it a good idea and is it legal are two very different kinds of questions and you really need different kinds of training for that.

Kris Turner:

I'm trying to decide if it would be worse to be in law school where you're in the Socratic method all the time or if you're just by rote memorizing statutes, and I think I'd rather be in the Socratic method. I just don't want to sit down and memorize statutes.

Kathie Hendley:

Well, it's interesting because when you read the, what did I do last summer articles by American law professors who go, and it's not just Russia, it's lots of other countries. They are very critical of the tedium of the way that law is taught. Students tell them that they don't even bother to prepare for class because they just sit there. It comes at them rather than them being part of the learning process. I think some of our students might say, "Oh, wouldn't that be great if they just told us what all the answers were?" But you realize that the whole learning process is figuring out as a group what the right approach is, and that's not present in all countries.

And the other thing that I think is helpful about our project is to, almost back to the dualism thing, that is it necessarily repression that is the guiding principle of countries on a more authoritarian or a backsliding kind of road that when we think about our own country and the push a year ago when they were going after big law firms and taking away their security clearance, I mean, a lot of that was materialist, not thinking that you're going to end up in jail, but just that you're not going to make as much money or you're going to lose clients.

And I think what we found is that regardless of what path you took, some firms lost clients because some clients were not comfortable with kowtowing to the regime. And then of course you're going to lose clients if you have a big government practice and you lose your security clearance, and that's just the US case. There can be many other things that go on in other countries that act to discourage lawyers from zealous representation.

Kris Turner:

Your last few remarks really dovetail nicely with my next question. It's about how LADS work works on a global perspective. So we get all these international comparative insights like we were just talking about with law school and with just different regimes, how they deal with lawyers. How do they help us better understand democracy and legal institutions here in the US?

Kathie Hendley:

Well, I think that when we started the project, we did not really think that the US was going to be a compelling case. And over the last couple years, it has become a compelling case. And so, some of the people that write about this process talk about the toolkit of autocrats. One of the beauties of comparative work is you can say, okay, Poland went down this road and came back. Hungary is still going down this road. And here we're thinking about the phenomenon of people who are popularly elected and then pull the ladder up after them and don't hollow out the Democratic institutions. And one of the things I think is helpful from comparative work is that we can have a list of things that other autocrats, other wannabe autocrats have used, and are we beginning to see those?

I think the most common tools are trying to pack courts or unpack courts, trying to... And oftentimes they don't do it in the way like, "Oh, we're just going to get rid of everybody we don't like." They just say, "Okay, now nobody over a certain age." Or "Nobody with a certain kind of seemingly neutral characteristic." But when you look at it, you realize, oh, I see what they're doing here. They're getting rid of this, this, and this person that they don't really like. And then of course, the way in which in many of these countries, they have been able to change the Constitution to lessen the meaning of the rights that were in the more democratically inclined constitutions. Now, the beauty of the American Constitution is it is almost impossible to amend. Now, this method that we have where you have to have the super majority in the national legislature, and then you have to get it approved by so many states, Russia picked up exactly that system in their constitution.

And one of the things we've seen is that when someone like Putin came to power, he was able to capture not only the national legislature, but a lot of regional legislatures so that he has been able to change the Constitution. I guess we watch that, but I think that for us, the amendment process is considered to be so wrenching and so almost an impossible hill to climb that that doesn't seem to be somewhere where we're going. But we can see that other countries thought they had created insurmountable obstacles to random amendments and those have fallen by the wayside. Because, of course the cautionary case here is always the Weimar Constitution that was such a good-looking constitution, and then they just came in and they picked it apart. And some of the mechanisms that countries have adopted to try to make sure that doesn't happen to them haven't always worked.

But in one of the points that is made by this growing group of people that are studying lawyers and judges and what we think of broadly as legal professionals, because that's another thing is that you have to figure out, well, what are the groups that are active and willing to work together? In lot of countries, judges and lawyers come together to achieve or to fight illiberalism, to fight against certain things. The people who are writing about this idea of the toolkit and how our popularly elected leaders turning into populist autocrats, they often say, well, they don't come to power with tanks, they come to power with lawyers because it's the lawyers who understand how to make all these things happen. And I think that's an interesting question.

Who are the lawyers that are on their team? What is their ideology, if any? Because I think that's one of the things that has also come to light is that in many of these countries, Russia, Hungary, there's not really a unifying ideology anymore. The ideology is staying in power, whereas we think of liberal

democracy as having being such a powerful set of ideas, and the same is not always true as you're undoing it.

Kris Turner:

It reminds me of the old saying, "It's a democracy if you can keep it." I'm probably mangling the phrase a little bit there, but about how there's some things that we feel like we're well established and they are always going to be constantly challenged in different ways and you can sometimes see that by doing this interdisciplinary research and working outside of the boundaries of the United States.

Kathie Hendley:

Yeah, exactly.

Kris Turner:

So LAD supports a wide range of projects. You've touched on some of these here and there, faculty, research, workshops, student engagement, public facing conversations. Are there any recent or upcoming initiatives that you're really especially proud of or would like to discuss here?

Kathie Hendley:

Yeah, we have a symposium that we're co-sponsoring with the Wisconsin International Law Journal on the 12th and 13th of February, which is open to the public. And so we're bringing together scholars who work on challenges facing both judges and lawyers. And we have a wide range of cases that are going to be discussed, including the United States, Brazil, China, Egypt, Ukraine, Russia. So it ought to be a very interesting couple days of discussions and the papers will then be published in the Wisconsin International Law Journal.

Kris Turner:

Given your expertise, what do you see as some of the biggest threats and perhaps some underappreciated sources of resilience for Democratic legal institutions today?

Kathie Hendley:

Well, I think that in the United States, I put a lot of faith in the lawyers, that I think that the work that we do at law schools creates people who are critical thinkers, who are willing to challenge. And I have hope that we're going to survive the current crises that we're in. As I look at other countries, I'm not quite sure where to look to for hope. The idea that one should push back against the state is not very well-developed in many other countries. And the ability of these populist autocrats to be able to shape the institutions, to serve their interests has almost been unrestrained, and that's sad. Another version of the quote that you had is "You get the democracy that you allow." And if people aren't willing to stand up for these institutions, then one might argue that they don't deserve them.

Kris Turner:

I think some of the phrases we've been talking about during this conversation and just doing your last answer, willing to challenge, pushback, stand up for, I think are all things that we see incorporated into not just the American mindset of lawyers, but also just in the law schools of the students we have been seeing. So you've just given me some unappreciated source of resilience there. When I'm talking to law students and I see all those characteristics and think, I'm glad you're pushing back. I wish it wasn't

against me, but I'm glad you're pushing back against that. It's a good crucible for doing these kind of things when you see something that you think is wrong that you can go back and stand up for that right that you're trying to fight for.

Kathie Hendley:

Exactly, exactly. But one of the things that we often don't pay enough attention to is the fact that we have Bar Associations that stand behind us and other kinds of, even informal norms that it just isn't acceptable to violate, say, lawyer-client privilege or other things like that. And again, not present everywhere.

Kris Turner:

Right. Yeah. The strong communities of the Bar Associations where you can go and discuss your issues and see if you are of a kind, other people are facing this or how to figure out and solve these problems is, again, something I think is easy to miss when you are just focused on a more national level.

Kathie Hendley:

Or take for granted.

Kris Turner:

Take for granted. I think is something that can be very dangerous and could be happening, and hopefully people are, again, pushing back against those assertions. And lastly, looking ahead, whether for your own scholarship or for LAD at the center, what questions, projects, directions feel most urgent or energizing to you right now?

Kathie Hendley:

Well, I think continuing with the questions that we're currently asking, one of the things we've done with LAD is to build a website, and I would encourage you to provide a link to that as well, where we keep track of news items that are relevant to this question. It's been a little bit of a challenge because so much of news now is behind paywalls. And so we've had to work at finding ways to make sure that the information is being conveyed without running afoul of copyright laws. But we've also tried to post amicus briefs and other kinds of things that are in the public domain and are being put out there by lawyers to push back again against...

A lot of this is US-based, but the newsfeed is not US-based. So we're trying to be very broad in terms of pulling together information of interest. And then we've also been developing a bibliography of work on lawyers and how they react to authoritarianism or to pushback from the regime and judges. And what we've done is not post the articles themselves, because again, copyright issues, but we've posted abstracts of those articles. And then it's a way for people who are interested in this question to begin to educate themselves about what people are writing and have been writing about this.

Kris Turner:

Professor Hendley, thank you so much for joining us today for sharing your insights, your knowledge with the podcast. It's been so wonderful discussing these very complicated but critical questions today. I hope you can come back and join us again sometime soon.

Kathie Hendley:

Oh, anytime. And thanks very much for your interest.

Kris Turner:

We will link out to Professor Hendley's prolific list of scholarship as well as the LAD website. And I think you'll find it all just as engaging and educational as I have. Thank you all for listening. This was Wisconsin Law in Action from the University of Wisconsin Law School. To hear more conversations with our faculty about their research and its real-world impact, visit wilwinaction.law.wisc.edu.

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