

Q&A: **Bridget McCormack** on the Law's New Era

By Caleb O. Brown

In a candid discussion, the former Michigan Supreme Court chief justice addresses the systemic challenges in civil adjudication and the dynamic potential of AI-driven legal aid.

Bridget M. McCormack, president and CEO of the American Arbitration Association and former chief justice of the Michigan Supreme Court, delivered the Annual B. Kenneth Simon Lecture at the Cato Institute's 22nd annual Constitution Day symposium on September 18, 2023. Caleb O. Brown, host of the *Cato Daily Podcast*, sat down with McCormack for a conversation about the state of America's adjudication system, reforms that could aid those who cannot afford legal help, and how generative artificial intelligence (AI) might be a game-changer.

CALEB O. BROWN: At Cato's Constitution Day, part of the challenges you laid out is people not being able to navigate the system without highly qualified assistance. Hasn't that always been the case?

BRIDGET M. MCCORMACK: The legal system has always been complicated, and I think that's a feature, not a bug. But the problem we face right now is the sheer number of people who have to navigate their civil justice problems without the help of lawyers. When the legal system was built, it was built by lawyers for lawyers, and everybody who encountered it had a lawyer. Now most people are left trying to navigate it on their own or—in many cases—just give up.

The number of people now navigating civil dockets without lawyers is so staggering that I wish I could have every brand-new law student stop in at an eviction docket and a debt collection docket and a family law docket before they start law school.

The vision of our justice system that we teach in law schools (and see in the movies) where each side is represented by a lawyer and the best argument wins is a fiction in most of our civil justice dockets.

BROWN: You suggest big changes that might repair the civil justice system. Are there specific reforms that you think would deliver a disproportionate punch?

MCCORMACK: In a few states, we've seen regulatory reform where the state supreme courts have set up systems where people other than lawyers can provide legal help to people who cannot afford lawyers. Arizona and Utah were first, but recently Alaska and Oregon have done similar things.

There has also been some important litigation in a couple of states that has potentially opened a new avenue for people other than lawyers to help people with civil justice problems. The Upsolve litigation in New York state, which I know Cato has been active in, has so far been successful



PHOTOGRAPHY BY EMMA BURCUSEL

“If you are somebody who’s been served with an eviction notice or a debt collection notice and you can barely even understand the notice, you’re very likely to not even figure out how to defend it.”

in litigating the problem of people who are not lawyers being able to help people with civil justice problems under the First Amendment’s protections.

BROWN: What do you see as the potential role of AI in the legal profession going forward?

MCCORMACK: I believe that this new technology is a good fit for the legal profession for lots of reasons. I talked a lot about the unlicensed practice of law statutes. If an individual who is served with an eviction figures out how to use one of these large language models effectively to respond to an eviction notice and then describes that for others, is that the unlicensed practice of law? It’s going to be awfully hard for states to shut down that kind of information sharing among people who might now have the tools

to figure out what the law provides for them and expects of them—information that we all should know.

BROWN: I appreciate that a lot of your examples are issues related to debt and eviction because, almost by definition, those are the people who can least afford counsel.

MCCORMACK: Exactly. We see extremely high levels of default on those dockets, and you can imagine why. If you are somebody who’s been served with an eviction notice or a debt collection notice and you can barely even understand the notice, you’re very likely to not even figure out how to defend it. You just move out of your apartment, or you don’t show up on the date the court says you’re supposed to because you don’t think there’s much you can do about it.

Imagine if other government services



McCormack delivers the Annual B. Kenneth Simon Lecture at Cato's 22nd Constitution Day in September 2023.

required a translator to be able to use them—if to enroll your kids in public school, you had to hire a public school specialist, who is the only one allowed to help you enroll your kid. Or if you, to use the highway, had to hire a highway driving specialist. We would overthrow the people in charge.

BROWN: How have lawyers responded?

MCCORMACK: This is actually one of the most disappointing parts of this problem—and I get it. Lawyers usually borrow a lot of money to become educated; in fact, a not insignificant number of lawyers are underemployed. We're graduating people from law schools who are not able to pay their debts back. So maybe it's not surprising that there has been significant lawyer resistance to allowing people who are not lawyers to represent people with civil justice

problems. It's silly because the folks with debt collections and eviction problems are not going to make up the difference between the lawyers who are fully employed and those who are not. But we have seen significant lawyer resistance. This happened in California most recently—the lawyers were opposed to some of the reforms that might have tracked with Arizona's and Utah's. And they were successful.

Obviously, there have been some lawyers who have done a terrific job pushing some of these reforms, but not across the board.

BROWN: You founded the Michigan Innocence Clinic. It was called the first exclusively non-DNA innocence clinic in the country. First, explain what that means and what specific need it was created to meet.

MCCORMACK: At the time we founded

it, it was the only innocence project that focused only on cases where there was no DNA evidence to test. DNA exoneration has been a great boost to what we can learn about the mistakes made by humans in the criminal legal system. But what it taught us is the rate of wrongful conviction translates to cases where there is no biological evidence to test. So, if we know that the rate of wrongful conviction is somewhere between 3 percent and 5 percent—and that’s what the DNA cases have taught us—there’s no reason to believe that that rate is lower in cases where there is no biological evidence. So, we thought, let’s focus only on the cases where there is no silver bullet. Let’s put really smart University of Michigan law students on figuring out how to prove someone’s innocence—which is what you have to do once someone’s been convicted. It’s no longer beyond reasonable

doubt; you have to prove innocence. And the Michigan Innocence Clinic has been stunningly successful. I think they are up to 28 exonerations at this point since it was founded in 2008.

BROWN: What changes in a law student when they participate in this kind of project?

MCCORMACK: It’s a profession-shaping experience for every law student who gets to participate. Seeing the ways in which the justice system can go sideways allows a law student to have a perspective even if she never practices criminal law again, but that perspective—that skepticism—is important throughout your legal career.

BROWN: Something that our scholars will harp on is the fact that there are innocent people who plead guilty to crimes. For people who are not that familiar with the criminal justice system, why do you think that is?

MCCORMACK: It’s because the penalty for going to trial is so significant, and just because you’re innocent doesn’t mean you’re going to get acquitted. I started my career as a public defender in New York City in the early ’90s. The drug sentencing laws—the Rockefeller laws—were so severe that the penalty for possession was 25 to life for a first-time offender. I remember having one kid who had been arrested after taking a bus to New York with another kid who had been asked to carry a duffel bag, and the duffel bag turned out to have drugs in it. The plea offer was three years to life. That was the

“If Americans knew what was happening regularly, they would not be satisfied with the state of criminal adjudication.”

regular plea offer in these first-offense, first-degree possession cases. It was impossible for somebody not to take it.

He didn't know that the other kid had been asked to carry the duffel bag. But was the jury going to believe him when he said that? So, he took this plea. In the middle of the plea, the judge had to ask him to specify what was in the duffel bag. He turned to me and said, "I don't know what to say," because he didn't actually know what drugs were in the bag. It was a crushing moment. He was agreeing to go to prison for three years because, to him, it was rational because the chance of doing 25 years was significant. The DNA cases have taught us that a not insignificant number of people who are innocent plead guilty to avoid the trial penalty.

BROWN: How is justice served by a system in which people are strongly encouraged to plead guilty despite being innocent?

MCCORMACK: In my view, it's not served. This is one of those things that goes on inside courthouses that a lot of people go through life never understanding. If Americans knew what was happening regularly, they would not be satisfied with that state of criminal adjudication. But a lot of the regular players in the criminal adjudication system don't think there's any other way to manage it. The only way to manage it is with 96, 97, 98 percent of people pleading guilty.

BROWN: That's a pretty grim assessment.

MCCORMACK: It's grim.

BROWN: What informed your decision to go into a legal career?

MCCORMACK: My godmother didn't have kids of her own, so she was especially attentive to me as a kid. She was a legal aid lawyer in New York City when I was a kid, and I grew up in New Jersey. She had me come visit her, and I went to work with her. She was a real role model for me, and I saw the law as a way to help people. That's what attracted me to it.

BROWN: You became chief justice of the Michigan Supreme Court in 2019. You were not the first woman to hold that position, but it was the first time that the governor, attorney general, secretary of state, and chief justice seats were all held by women. You're notably a supporter and champion of other female justices. Did you have similar champions when you were younger?

MCCORMACK: I had excellent mentors throughout my career, and honestly, most of them were men. And I think men are well poised to support women and people of color taking on important leadership positions within the legal profession. That certainly happened for me, and I think without those mentors, I wouldn't have had the career I've had.

It's important to me to make way for a new generation. I think diversity on the bench, not just in terms of gender and racial diversity but practice-experience diversity, and of people who have represented individuals ascending to the bench will grow confidence in the justice system. ✦