



## Registry Matters Podcast

Episode 213

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Andy 00:17

Recording live from FYP Studios, east and west. Transmitting across the internet. This is episode 213 of Registry Matters. Larry, how's the training on your heater going out there? Is it still cold?

Larry 00:30

It's warming up. It hit a balmy 40 today, I think.

Andy 00:34

Okay. And you haven't frozen to death yet?

Larry 00:38

No, it's only been dropping to like, somewhere between eight and 10 at night for the last three nights (Andy: Good grief. That's pretty cold.) And I'm doing just fine without the heater. So it hasn't taught me anything either.

Andy 00:53

Well, very good. How are you on this fine Saturday?

Larry 00:57

Awesome. I'm ready for a lively program.

Andy 01:00

Excellent. Excellent. Excellent. All right. Well, can you give us a rundown on what's going to happen this evening?

Larry 01:04

Oh, we've got some questions from listeners. And we've got a case to talk about to unpack from the Fourth Circuit Court of Appeals.

Andy 01:12

Is it another stellar victory?

Larry 01:16

I don't know if I could go that far. It's not going to be very encouraging for people.

Andy 01:23

All right, then, let's dive in. I found this over on the NARSOL social media site. And it's no question or anything here. But this is obviously from like a parent says, My son has been incarcerated for four years now with two or more years to serve his whole sentence. Since the COVID, There's been no doctor visits, no therapist visits, no psychiatrist visits. Now when he gets out, how is he supposed to be rehabilitated?

Larry 01:50

Well, there's a question there. And the answer is- I don't know what state that comes from. But I'm not sure that rehabilitation is the driving force and most of our correctional systems in this country. That is a secondary thing that if it happens, it's great. But I'm not aware of any state where it says that is the primary purpose for the Department of Corrections.

Andy 02:15

I think people do think that that is the point of you going behind bars. There's an interest in public safety, and then isn't there some sort of intent that by the time you get out that you should be in a position that you don't do the same thing anymore?

Larry 02:32

Well, ideally, that would be desirable. Yes. But I think I've used the example before of the state of Georgia, which most of us are familiar with. They used to have the Georgia Department of Offender Rehabilitation. And if you look up that, that department doesn't exist anymore. What is it called now?

Andy 02:51

No. It has now been merged with parole and probation. It's now the department of community supervision.

Larry 02:58

But the department where you serve your time is referred to as corrections. (Andy: Right.) So it used to be the department of offender rehabilitation a long time ago, back in the liberal pointy headed days of Governor Jimmy Carter. But so rehabilitation is not something that's highly prioritized, particularly in adult corrections. You've got a few states- used to be Minnesota was one of those where they stressed rehabilitation. I'm not even sure they do any longer. But punishment and deterrence takes the front and center of when we send people to prison. Rehabilitation is an afterthought. If it happens, that's great, but they just don't put the emphasis and the money into providing the programming. Merely putting someone out of circulation for a period of time does not rehabilitate them. I mean, that's nonsensical thinking. If you take a drug addict, and you drive them out for whatever period of time... if you can keep them sober, and keep them off drugs in prison, that did not cure the problem, as far as I've been told. And the same thing with people who have other dysfunctions that causes them to be predisposed to commit crime. Merely taking them out of circulation, it does provide some protection for the community. And it does deter them for at least for the time that they're incarcerated. But I'm not sure that it rehabilitates in any meaningful way. Unless you just age out a crime because you get too tired and too old to do it.

Andy 04:32

There is that for sure. But why do they have any programs to help rehabilitate you if the intent is to not rehabilitate you? Whether that's some sort of drug or alcohol, some kind of educational curriculum so that you have opportunities when you get out?

Larry 04:48

I don't think it's that they don't want to rehabilitate you. I just don't think it's the highest of priorities. When you look at programming in prison, it's very hit and miss. They have usually some basic GED program and maybe some online correspondence courses, but you don't really have, at least states I'm more familiar with, which tends to be the state I live in and the southern region of the United States, they just don't seem to put a lot of emphasis on rehabilitation. I mean, they manufacture some license plates, and they put people to work in Mississippi in the fields, raising

crops and stuff, but I'm not sure that that translates to the modern economy that we're living in. I'm not sure that other prison jobs really translate and would transfer out once your leave. You'd learn to be to be at work on time, and you'd learn how to be a subordinate and take orders and direction but I'm not sure that you would learn all those necessary skills for a modern economy.

Andy 05:45

Definitely not. Okay, well, alright, well, I guess we can leave that one alone. This one came in as a comment to our previous information where we were talking about Butts County, and this is from Will. Do you want me to read the whole thing do you think?

Larry 06:02

if you have the energy because I want to make sure that we give it its due consideration? So if you don't mind?

Andy 06:08

All right. No, I don't mind reading it at all. If you want me to stop at a particular point, so we can talk about that then I'll continue later. So alright, a situation with the same dynamic that was in play in Butts County, Georgia is now playing out in the state of Tennessee. Recently, the state of Tennessee updated and improved their registry website, which is administered by the Tennessee Bureau of Investigation. The state contracted with steeple technologies to update and revamp the Tennessee registry website. A supposed coding error has resulted in information regarding criminal charges that were reduced by way of plea bargaining being displayed for all the public to see. There's no statutory authority for this information to have been released to the public. For some PFRs, this can be especially dangerous when dealing with offenses involving a minor. One of the features of the registry for some time now has been to put a bright notice above those PFRs who were actually convicted of or pled guilty to offenses involving children that says offender against children. There are PFRs in the state of Tennessee who have charges involving a child, but due to a plea bargain were never charged with a violation of a statute that authorizes that bright conspicuous notice to be placed above their names, which means they were spared from having that designation printed in large, bright letters above their registry photograph. But now, thanks to that coding error, that no one has any idea regarding the timeline for the issue to be fixed, the original charges are now being displayed under the PFRs criminal history segment. How is posting information not authorized by statute on the Public Registry website any different from a sheriff going door to door putting signs up in PFRs front yards warning trick or treaters away due to the resident being a PFR? NARSOL has put out notice whenever a state or local government acts against PFR is outside of statutory authority, they'll be there to put a stop to it. With that in mind, what will NARSOL do for PFRs in Tennessee? And I will read part two, if you wish me to now.

Larry 08:17

No, let's go ahead and deal with what he's got in here. NARSOL has put out notice and I can speak for an NARSOL that people are being watched. But everything that you would like us to challenge doesn't mean that it's a viable challenge. But we are watching and we're aware of what's happening in Tennessee that Will and others have told us about what's happening in Tennessee with this coding error. But what's the difference? There's a significant

difference. And I'm not saying- so don't jump to conclusions, folks- I'm not saying that this is a good thing. It's absolutely not a good thing. But the question is he asked what's the difference? There's a significant difference. The platform that's being used here to disseminate this information is operated by the Tennessee Bureau of Investigation. The platform being used in the case of Butts County was the person's front yard private property. So we have two different platforms for dissemination of information. And the compelled speech analysis is going to be analyzed differently. The courts going to look at this is not compelled speech because the PFR is not being required to speak here. This is the state speaking. So the question in this case is is the state speaking accurately? Well, according to Will, the state is not speaking accurately. He's saying that that the speech that the state is doing, which is government speech, is not accurate. So when there's not accurate information being spoken about someone, the question becomes what is the remedy for that inaccurate information? So I'm taking it at face value that the information about him in particular is not accurate. So we look at what is the remedy for that? Because he's not being forced to speak. The state is doing the speech. And the information is not accurate so he says, and we take that at face value. So when someone says something untrue, generally in a civil proceeding, the question is, again, like I brought up last week, what are his damages? Well, what are his damages? Tennessee, in all likelihood doesn't have any presumptive damages. And then you have this terrible thing that, it's called qualified immunity.

Andy 10:46

Okay, you're gonna go there? Bring out the big guns why don't you?

Larry 10:49

Well, it's same thing. We've gotten comments on the NARSOL case saying, Well, why don't all these PFR's in Butts County get damages? Well, because the court found that Sheriff Long had qualified immunity. Qualified immunity as an invented doctrine that the liberal do gooders are trying to get rid of. But there's a lot of conservative pushback on that. Now, I'm not naming parties. So you don't need to get all upset about that. It's the conservative side, whether they be whatever party persuasion they be that say we need to protect the honest cops from these vicious and outrageous lawsuits. Therefore, they're in favor of qualified immunity. And it's the progressives that want to want to abolish or weaken qualified immunity. But the court ruled that since there was no standing precedent until ours, that Sheriff Long has qualified immunity. But even he if he didn't have qualified immunity in Butts County, if there was no such a doctrine, the question would be, again, damages. So in terms of this thing in Tennessee, with the signs- not the sign- with the notation of offense against a minor, those bright, conspicuous letters, that is probably something that can be dealt with. But how, and who would make the challenge? You're always looking for a plaintiff that is going to have the greatest amount of sympathy. You can hear Paul Dubin say that if you play his speeches. You're always looking for a sympathetic plaintiff. And if it required litigation, that would become more of a factor. If we could just simply write a letter to the Tennessee Bureau of Investigation saying you need to turn this thing off, if you can't fix it and that would end it. That would be ideal. But in terms of what NARSOL is going to do, we don't know yet because we haven't been aware of this for very long. We haven't had enough time to internally analyze it in terms

of all the competing things for our limited resources. So we don't know that we'll do anything but what I would suggest to people in Tennessee, why don't you go out and see if you can find an attorney that knows Tennessee law better than we do. And see if you can find someone who would be interested in partnering with us to see if there's anything that we can do to help you. That would be my recommendation. I mean, rather than pointing the finger at us, point the finger at yourself and see what you can do to help us just as we did in Georgia, remember. We went looking for an attorney in Georgia. We didn't have the connections when we started the battle in Butts and Spalding County. We didn't have any resources in Georgia. We had a little bit of help. And we went and found went found an attorney.

Andy 13:46

I guess also, I don't think that the... I guess in certain cases, the court can move quickly. But he would have to develop something to present to them to create, the right word is injunction here, for them to stop it?

Larry 14:00

Correct. And I'm not sure, again, since I'm not licensed practice law, but I know how deferential courts are to what states are doing. The registry is going to be very difficult to get an order just to turn the thing off because you've got a coding error. I think that's gonna be an extreme long shot to get that done.

Andy 14:22

I think so. I think when we cover this case, I think there are a few points there that will come up along those lines too. Shall we move to part two of this?

Larry 14:31

So I don't know if I was even gonna do part two, but you can read it if you'd like.

Andy 14:37

Okay, um, Continuation of Problem in Tennessee. Something being done outside statutory authority is something being done outside statutory authority. That's the bottom line here, whether by a mistake or on purpose, the end result is the exact same. I prayed there is something NARSOL can and will do to address this even if it's sending letters to the Special Agent in Charge of the SOR urging them to make it in fixing this coding error a top priority and placing a notice on the website warning the public of this error that is resulting in unauthorized and inaccurate information being displayed. As I understand it, original charges don't mean squat once they're reduced to plea bargain. Is that true?

Larry 15:16

In some instances, that's true as we've learned in the case out of Connecticut that you actually can classify a person as a sexual offender, even though they've pled down if you provide them due process. And our state takes the position that they can supervise you as a sexual offender even if you're not convicted of a sexual offense. They can't require you to register. But they can supervise you with conditions consistent of those that are placed on people who have been convicted of sexual offenses. So they look at the original charges. But in this case, I think the law is on Will's side. I did read the Tennessee section of law that I think governs this which is Tennessee code annotated 40-39-206, looks like it was

last amended in 2014. It looks like they can only display the conviction information. So regardless of what it was pled down from, it doesn't appear that they have any authority to display anything other than that. But then it gets a little more nuanced than that. He wasn't- he, or whoever- if they weren't convicted of an offense against a child, is there any wiggle room for them since they were originally charged? That's an unanswered question. This is one of those things where it might be a matter of first impression. There's probably not any case law in Tennessee on point on this. Without any case law, this could be a protracted battle if they don't agree to modify this of their own volition without litigation. And in all likelihood, they would probably say it's out of our control. I mean, everybody wants to point the finger. So they'd say, Look, we don't run the website.

Andy 16:51

I'm wondering if this isn't similar to an organization that I follow, the Freedom From Religion Foundation, that if a school starts doing something that is very pro religion, that they will have their staff attorneys, which I know that's one key difference, write a letter saying, Hey, you can't do this. Here's the case law, yada, yada, yada. And shots fired across the bow, but it's just a formal letter written with someone with Esquire at the end of their name to try and get them to backtrack.

Larry 17:20

Well, I think we could consider doing something like that. That's not particularly labor intensive. But I don't know what case law... At first glance, I didn't find anything directly on point other than the statute which appears to support what he says, that the website shall display the conviction information. That doesn't say they can't display anything else, but it says what they shall display, but I don't see any prohibition. All this stuff is got to be really, really nuanced in terms of what the state's going to argue in response. If they fix it from a letter, that'd be great. But what if they say we can do whatever the heck we want to do? Then what?

Andy 17:58

Yeah, sure, then then I guess they've called your bluff, I guess is the way to word that.

Larry 18:03

So well, that's kind of what the sheriff's, one of the sheriff's- actually both of them initially- but isn't that what the sheriff's in Georgia did?

Andy 18:10

I believe so. Especially one of them saying that they wanted to go all the way to the Supreme Court.

Larry 18:13

Yeah. They said, if you have something to file, file it, and we did. And years later, we got a favorable decision that we still don't know if it's going to be challenged. Based on what Sheriff Long put on his Facebook page, it appears as though he's not planning on going any further. But that zone has not closed, that opportunity is not beyond him. He could. But I don't know what to tell this person in Tennessee, but go help us find an attorney. And that'd be the first step.

Andy 18:43

Okay. All right. Well, let's move over to a letter from Cody. Dear NARSOL, thank you for taking the time to read my letter regarding my wrongful classification within the Connecticut Department of Correction. Within the Connecticut prison system, there is a substantial amount of inmates that have been burdened by the DOC's unconstitutional procedures and policies. And as far as my situation, having a jury trial and being found not guilty of any sexual misconduct and still being classified as if I were found guilty is something I could not of thought in my wildest dreams. I do look forward to reading the transcripts of the podcast episode. And if you would like any further information, don't hesitate to ask. Can you expand on this one a little bit?

Larry 19:31

Well, first, my apologies. We were going to talk about this on 209. But I think we had too much on 209 on that episode. So here we are 213, a month later getting to it. But there's no prohibition. That decision that we talked about cannot be read to say that you cannot classify a person as a PFR who has not been convicted of a sex offense. That is not what the court said. The court said that you can't do it without due process. And they said that the process provided to that offender was basically a dog and pony show. That's what they said. So if you were afforded no due process, I think you could use that decision as a means to challenge your classification, which would enhance your privileges. If you're a PFR, the way we understood it was that diminished your opportunities within the correctional system there in Connecticut. So that would benefit you. But if they provided you anything that resembled due process after your court decision, then you may have a whole different situation. You're gonna need a Connecticut attorney. And then he sent a follow up letter asking, it was in this one, saying do we have any attorneys to recommend him to? Unfortunately, finding attorneys that'll take cases... and I'm making this assumption that he's wanting it pro bono. And I got yelled at one time for making that assumption. But I'm assuming that most prisoners have income streams that are very limited. And we just don't have a list of pro bono attorneys that we can refer you to in the state of Connecticut. I wish we did.

Andy 21:08

Okay. Then, are we ready to move on?

Larry 21:13

I think so. Unless you have anything else on that one. But I don't.

Andy 21:18

I do not.

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Andy 22:06

All right. Well, you people put this case in for tonight that was just decided by the United States Court of Appeals for the Fourth Circuit. It has generated quite a bit of chatter. So I wanted to do a deep dive. Are you people up for that?

Larry 22:23

I'll do my best. I don't know how deep you're gonna get.

Andy 22:27

Well, it's gonna be really deep. The name is *John Doe v. Colonel Gary Settle* (No. 20-1951) Is the person there, is he a retired colonel? Is it that his position has the title of Colonel?

Larry 22:39

Apparently that's his rank within the Virginia Department of State Police apparently.

Andy 22:47

That's silly sounding to me. Anyway. Okay. So this is Colonel Gary Settle in official capacity as superintendent of the Virginia Department of State Police number No. 20-1951. So have we discussed this before Larry?

Larry 23:05

Well, I found some evidence in our archives that we had the original decision. Unfortunately, I couldn't find anything that reflects our discussion. So I don't know that we ever did. Maybe I intended to, but we got pushed on time. But this this case was decided at the District Court level in I think September 21, August 21, sometime in late 2021. Matter of fact, I got the decision here, but it was decided not that long ago at the district court level.

Andy 23:33

Okay. Um, and I know that you often talk about how much you hate summary judgment. And was this decided by summary judgment?

Larry 23:41

Well, I do hate summary judgment. But unfortunately, it didn't even make it that far. It was dismissed by the trial court for failure to state a claim upon which relief can be granted.

Andy 23:54

Going back to we played a clip where the person was saying, "what are we even arguing here with the female attorney?" Like, is that the same? Like what are we arguing here, without the failure to state a claim?

Larry 24:09

No, no, that's not the same. That case actually made it to the Court of Appeals with something underneath it, stipulated facts. This case got dismissed at the complaint. When you file the complaint, and then you file your answer, then the party that the lawsuit is filed against, they typically file a motion to dismiss because they claim that, assuming everything's true, which is the standard, that even if everything you said was true, that no relief could be granted by the court. So when you get dismissed on failure to state a claim which relief can be granted, you didn't even make a decent showing out the gate. So this case didn't even get out of the gate.

Andy 24:46

Alright, so he didn't even get out of the gate. All right. All right. Well, let me set up a couple basic facts as it is written in the court of appeals. Two months after he turned 18- Boy, there's a whole big mess here, Larry with this part- two months after he turned 18, John Doe was caught having sex with his 14 year old girlfriend. I'm going to assume from that, Larry that they were still in high school together.

Larry 25:08

It certainly looks that way.

Andy 25:10

Everyone's in proximity together. I think then we need to have schools like segregated almost like a handful of years apart so we cannot have this situation arise, where you have adults in school with minors. I know we've done it this way for forever. But now we have laws that criminalize people when they go to, like, high school prom together. Nevermind, I'll continue. Given the facts of his arrest, Doe may well, I have been charged with "carnal knowledge of a child," a class four felony that prohibits sex with 13 and 14 year old children. But instead, he was charged with and pled to a lower-class felony, taking indecent liberties with children, which only prohibits behavior like propositioning a child for sex. Does' plea may have gotten him a shorter prison sentence, but due to a quirk in Virginia law, it also led to a worst treatment by Virginia's PFR registry. I know I've heard you people pontificate that sometimes the punishment is harsher for noncontact offenses, and particularly registration in states that do risk assessments.

Larry 26:12

Well, that doesn't completely apply here because Virginia actually has a categorical approach to its system. And both crimes generally put the person on the highest tier, which is registration for life. But there's a narrow exception to that rule. When an offender is less than five years older, he or she may be removed from the registry in some amount of time. I'm not clear on that. But that mitigating exception only applies to carnal knowledge, not the crime with a higher sentencing range and not to indecent liberties. So while Doe may have felt lucky to be charged with indecent liberties given the potential for a lower prison sentence, the plea ended up condemning him to worse treatment on the registry. And the court noted, quote, because of that oddity, Doe will spend the rest of his life on Virginia's PFR registry with no hope for relief.

Andy 27:07

Now, Larry, when I was reading through this, I found that it said that the actual act because of that five year window, that would have put him at the lower tier. But because he sent a text message to the girl a day or two later saying, Hey, can we do that again? That's what got him jammed up, just that text message.

Larry 27:27

I didn't catch that part in there. So you did a better job.

Andy 27:30

Oh, my God, that's just horrid that you can be like, Hey, baby, that was great. Let's do that again. And so what was once legal, now

because they communicated it over the text messaging things... Oh, my God. All right. So this case was initially filed in August 17 of 2020. Doe, now in his 30s, sued Colonel Gary T Settle, the superintendent of the Virginia Department of State Police, hoping to persuade a court to remove him from that registry and its burdens. Doe argued that the registry and the five-year gap provision violate multiple constitutional principles. In his 14th amendment equal protection claim, Doe asked the court to consider why an offender convicted of having sex with a child, as doe might have been, should be treated better than an offender convicted only of propositioning a child for sex. And number two, in his eighth amendment claim, Doe asked the court whether a lifelong registration requirement is an appropriate sanction for a single nonviolent crime committed by a high school student. This seems to be a policy issue. Do courts generally assume the role of deciding appropriate penalties for criminal behavior?

Larry 28:39

Very interesting question indeed. They do not generally decide penalties for criminal behavior. They simply impose those penalties that have been prescribed by the people through their elected representatives. In fact, the court stated both appeals present significant issues of fairness. But at the bottom, they ask us to question the wisdom of the Virginia Legislature and its PFR registry. This is not our place. When the Constitution is invoked, our place is to determine whether state laws comply with the specific dictates of that document, and Virginia's PFR registry complies with the eighth and 14th amendments. That's directly from the decision.

Andy 29:29

You people have stated repeatedly that states' imposition of disabilities and restraints is the winning hand. That does not appear to have worked in this case. The court noted beyond simply providing information, other consequences flow from an offender's status on the registry. Tier three offenders cannot enter a school during school hours without court ordered permission. Offenders on the registry offenders on the registry are not eligible for certain commercial driver's licenses, cannot drive a tow truck, and cannot work as rideshare drivers for companies like Uber or Lyft. Are these not disabilities or restraints?

Larry 30:01

Well, they are. Unfortunately, the court did not have any testimony in terms of how debilitating these restrictions are on the registry. Because remember, it was dismissed for failure state a claim. And most of them appear to apply only to tier three PFRs. And the court also noted that tier one and tier two offenders can petition for removal. So it's not a lifetime imposition on the tier ones and tier twos. So yes, this did not appear to carry the day with this particular court.

Andy 30:31

And it sounds to me like doe was asking the court to legislate from the bench. He obviously disapproves of the difference in treatment of the two similar crimes. He's not asking the court to substitute its judgment for the legislature of Virginia?

Larry 30:44

He is actually asking that. As the Court noted, while crimes certainly proscribe different acts, that is only true to an extent.

Carnal knowledge is precise. It covers only the act of sex with a child without force, and sometimes without consent. Indecent liberties is broader. It covers any of the following: exposing one's genitals to a child or asking the child to expose himself, proposing that a child feel or fondle himself or others, proposing sex, and I'm not going to say all those things, those sexual acts, because I know how those prisons get all upset, or enticing or inviting a child into someone's place to do anything else on the list. It is the prerogative to consider the broader list of conduct when deciding who may be exempted from registration. That is just flat out there prerogative in Virginia. Elections have consequences. And when you vote for people, when they tell you how they stand, and they tell you that they're a law and order candidate, they're probably not going to be too interested in hearing about any of our arguments about PFRs. But that is their prerogative to make the registry. They can make the list how they see fit.

Andy 32:05

Then the court noted that the crimes involve different age requirements for both defendants and victims. Indecent liberties can only be committed by adults. Carnal knowledge has no age limit, so will include some child offenders. Carnal knowledge can only be committed against 13 or 14 year olds, indecent liberties can be committed against any child under the age of 15 years. Virginia argued that these differences alone make the crimes dissimilar enough to avoid any scrutiny under the equal protection clause. What level of scrutiny did the Court of Appeals apply, and I'm guessing it was rational basis since there were not First Amendment issues at play?

Larry 32:41

You're correct. And under the standard of rational basis, the court noted, "we are tasked with imagining any conceivable justification for this classification, and there is at least one that will do and that is ensuring that children do not become tier three PFRs. Above we mentioned how Carnal Knowledge can involve 15, 16 and 17 year old offenders and how indecent liberties only ever involves offenders over 18. While that minor distinction might not definitively separate the two crimes, in our similarities situated analysis, it is decisive here." And I'm reading from the court, "we do not doubt that the government has a legitimate interest in not imposing its harshest collateral consequences on children, even children who commit serious felonies. And this five-year gap provision is at least rationally related to that purpose of protecting children from being lifetime PFRs. It ensures that even though children can be charged and convicted of carnal knowledge, they cannot become tier three offenders on the PFR registry." That's enough to uphold the distinction. And that's on the opinion on page 21. And ends on page 22.

Andy 33:52

Are you familiar with the term a Venn diagram?

Larry 33:54

Of what?

Andy 33:57

I figured you were gonna go there. When you see a picture that has circles that overlap and where they overlap is a place where things apply together, in multiple places? I think there's three things that we're working with here. And there are certain gaps

and certain thing places where things overlap. Like this dude was over 18, therefore these things apply. But they're still in this situation together where they're less than five years and I was like, I need to make a matrix of this to find out where he actually fit between the lines and where he fell outside of the lines. Because, again, they're in school together. They see each other every day. And it's bothersome to me that we have that kind of clause in there that just because he's over 18, poof.

Larry 34:51

I thought they were more than five years. Or there is less than five years difference between them?

Andy 34:57

She was 14. She was 90 days away from being 15. And he is two months past 18. So all of 14, 15, 16, 17 and then two months into 18. That's not more than five

Larry 35:09

All right.

Andy 35:12

He's still in the Romeo and Juliet range, but then just because he's over 18, everything goes to poop. recalled Doe asserted an Eighth Amendment cruel and unusual punishment claim. What did the court do with that claim?

Larry 35:29

Well, not very much other than putting them in the trash can. The court stated because the Constitution only regulates punishments, we must begin our analysis by determining whether Virginia's PFR registry is punishment before moving on to consider whether it's cruel and unusual. And I say this and some people roll their eyes. You cannot get to the part two about cruel and unusual, you can only examine that clause in the context of something having been determined to be punishment. When we put you in the electric chair, we agree, everyone, there's no contesting that that is punishment. It doesn't feel particularly good. And it's usually final. I mean, unless there was a malfunction in the electric chair. But on the PFR registry, there's not a decision yet in Virginia that says it's punishment. So therefore, you can't get to that point. So it was not a wise argument to make. A cruel unusual regulation may violate other constitutional protections. But unless it is punishment, the Eighth Amendment does not apply. And this is from a court. "Doe had the same problem that existed in Colorado when Judge Richard Matsch declared the Colorado's registry was cruel and unusual punishment. He failed to recognize there was no case law in Colorado that had previously held the registry to be punitive." And that's just a minor inconvenience. You can't get to the cruel and unusual until you prove punishment. And you can't prove punishment without having a trial. You can't prove punishment in summary judgment. And of course, they didn't even get to the summary judgment because they failed to state a claim. They got a little bit too cute. They were going to show us that they were brilliant. And they were going to argue about what the legislature should have done and what better public policy would be. But those are not constitutional claims, what the legislature ought to have done and what a better public policy would be. That's not something for courts.

Andy 37:09

You people are too much, Larry. The court stated that Virginia scheme includes some restrictions and impositions, but they do not approach the level of restraint imposed by a prison sentence. To start offenders cannot hold certain jobs. But Job restrictions cannot alone make a punishment. They stated, tier three offenders must also ask permission to enter school during school hours even to visit their own child. And offenders are required to register and re register in person. Why can't you admit that the court ignored the disabilities imposed by registration?

Larry 37:40

Oh, I can admit that. They did. But unfortunately, we're stuck with their finding. And that's that the Virginia PFR registry imposes some disabilities and restraints on people like Doe, but at worst, they're minor and indirect. That's their finding. But yes, I can admit that those disabilities are there. They didn't have the opportunity because of the way the case was brought, the nature of the complaint, the way it was drafted. They didn't have the opportunity to put forth a lot of proof. So we're stuck with this for now.

Andy 38:12

All right, well, then what happens next? Does this go to the Supreme Court of the United States?

Larry 38:16

It could if Mr. Doe has the financial resources to continue the fight. That's an expensive thing. If he wants to go to Supreme Court, he's going to have to pony up. I doubt... I don't know who represented this far. I didn't get that deep into the case. But the cost of drafting a new set of briefing, the cost for printing briefing. I think they're back on having to print the documents, they suspended that during the pandemic, but I think you're having to do the paid- to have the booklets printed again, that's an expensive thing to do. And if he's on private funding, he may not have the money. And he would have some hesitation from organizations wanting to jump on with that. I just don't think this case has developed well enough that you want the Supreme Court to take a look at it.

Andy 39:04

And so you don't think that he has a reasonable chance?

Larry 39:06

I don't think so. I think the United States Supreme Court, it's not going to choose to legislate from the bench, especially in view of what the Fourth Circuit stated. And the Fourth Circuit stated in the end, our Constitution, quote, presumes that even improvident decisions will eventually be rectified by the democratic process. The judiciary is not meant to revise laws because they are clumsy, unwise, or even in some cosmetic sense, unfair. In cases like this, courts are asked to make judgments about what is inside and what is outside the precise lines drawn by the Constitution. And whatever else there they may be, Virginia's PFR registry, and its narrow Romeo and Juliet provision are constitutional. That's what they say. And I would be very surprised if the Supreme Court saw it any differently.

Andy 39:59

I have some additional questions if you are so inclined.

Larry 40:02

Let's go for it.

Andy 40:04

Alright, was anyone in our sphere of influence aware of this case to advise counsel and strategy? Were you or was anybody or was any of the other organizations involved in this?

Larry 40:15

The only time it came on my radar was when the decision came out, the district court decision, which was issued on August 17, of 2020. And it appears as though we may or may not have talked about it, but I was not aware of anything pertaining to this case.

Andy 40:33

What I was thinking of is like, I don't know, six months ago or something, there was the case that came out of South Carolina that went all the way to the Supreme Court and was like, Hey, this is the first time we've heard of it. This, like, I don't understand how these things make it this far into the process, and no one goes, advocate for PFRs. I don't know how somebody doesn't do a Google search and whomever shows up, whether that's the South Carolina group, or NARSOL, I don't understand how that equation never clicks for someone to go look for help.

Larry 41:05

I don't know either.

Andy 41:08

Um, alright, so to compare the current exposure that the registry website presents to... this is something that they talked about in the in the briefing there, that they were comparing the current state of affairs for 2020 and '21 to the state of affairs in the Smith v Doe in 2003. Like, to me, Larry, that's comparing the Wright Brothers to a Concord.

Larry 41:33

Sure. A lot has changed since 2003. But again, you have to develop that from the case as it's brought up on appeal. The appeals courts are merely reviewing what was done below. They're not taking testimony and developing an evidentiary record. And you remember the Kansas case when the Justice asked the question, why should we send this back for you to do what you should have done?

Andy 41:59

Yeah, I do remember that. Yes. All right. So the lower court from where this was, this was the Fourth Circuit. So the group that represents four or five states near Virginia?

Larry 42:11

Sure. And I think they're based in Richmond. But this was a case out of out of the Eastern District. The United States District Court for the Eastern District of Virginia, the Norfolk division.

Andy 42:23

Okay, and what would have been the lower court that they were presenting this in? What I'm asking, ultimately, that's where they would have had to present all of the evidence that then got filtered up to the next level of the chain?

Larry 42:35

Correct. It would have been in the district court in Virginia in the Norfolk division. But they didn't get that far, because the claim as it was presented, did not survive motion to dismiss. So there was no evidence presented. There was a brief. When you look at the district court decision, it was document 18. So when you get kicked out of court on document 18, that means not a whole lot of activity happened, because the first thing you file after briefing is complete... when you file the complaint and the response, then the party that opened the case gets the file a reply in support. And then the next thing that's generally filed is a motion to dismiss. You say, hey, you know, assuming everything's true, you can't grant and relief, and that's what the state of Virginia did. They said, assuming everything's true, there's nothing here. And the district judge agreed and the court of appeals agreed there was nothing there. So there was no development. Had he made different claims to begin with... Had he not attacked the legislature's choice to make the levels of punishment the way they did, and the registration obligations the way they did, if he had actually attacked and said it's punitive, here's why... I'm ready to put on evidence. I've got 342 witnesses I'd like to call. He didn't do that in the complaint.

Andy 44:03

Then moving along. I wrote on page 28, it says that in *Under Seal*, which I don't quite understand. What is that? Was Seal the name of the case?

Larry 44:10

That was that was the name of the case. It was *Under Seal*. I don't have that case to read. So yes.

Andy 44:15

Okay. The Federal Registry- this is the thing that I want you to key in on- included a statement of purpose, much like the one in Virginia's registry and most of the same requirements: registration, regular in person verification, and the provision and publication of personal information. Is this hinting at a Federal duty to register Larry?

Larry 44:34

It was hinting at that. I think there'd be a lot of courts that would say that there's a Federal duty to register, particularly in view of the Willman case out of the Sixth Circuit. And in particular, in view of the fact that most judges don't understand the nuances. That's why we had to spend so much time in Maryland trying to convince the Maryland Court of Appeals, which is their highest court, that there's not really a federal registry.

Andy 44:58

But if we keep getting these things that say that, it doesn't make it true. But eventually people say that it is true.

Larry 45:07

Well, if the courts hold it's true, it's true. If the US Supreme Court were to agree with the Willman court if there was a federal registry, if they were hold the same thing, then there's a federal registry regardless of what I say. And then you have to have the state fight the federal government saying you can't do this to us. And I don't I don't imagine any state attorney general- because

that's general who defends the state- can you picture a State Attorney General saying, I'll tell you one thing, if I get reelected Attorney General, I'm going go head to head with the Department of Justice and I'm gonna get those big bureaucrats in DC off my state on terms of my PFRs. We just ain't gonna take that kind of stuff down here. We are not going to tolerate that. Can you picture that happening?

Andy 45:52

On the one hand, there are states that whatever the federal government tells them to do, they will not do it. And then other ones would be first in line to go do whatever they're told to do. I can see in some places.

Larry 46:05

I can't see a single state saying that I'm gonna protect the PFRs from the big, bad federal government. I can't see a single state doing that. I think that's a lot of wishful thinking.

Andy 46:16

All right, well, maybe that is on me. Um, Virginia uses a categorical approach to classification. Can you please explain the difference between categorical and risk-based briefly, please?

Larry 46:26

Categorical means you take all the list of things that will get you on a registry, and you decide as a category, these seven offenses are tier one, these 11 offenses are tier two. And these 17 offenses are tier three. And there's no analysis of the individual. They don't get to come in and be interviewed, they don't get to be tested. You don't look at any factors related to the offender. You're looking at what their conviction is. A risk based system is where you look at the individual with some degree of personalized attention. You may use various instrumentation in terms of the static99, a battery of different tests they have, I forget all the names of them. But that would be where you would come up with a risk level. And that can be changed from time to time. Your categorical approach doesn't change unless they change the statute. If the statute were to say, gee, we looked at this, and we've realized we've got four of our offences of the 17 in tier three that don't belong there, and we're going to move them down, then categorically you would become a tier two or tier one. But in a risk based system, it's based on you. In a categorical approach, it's based on where you fall in the list that has been decided and placed in the statute.

Andy 47:41

And even if someone is your age, you know, and 100 or 150 years ago, they got this conviction, he'll still be a tier three because this crime is categorical and not risk based?

Larry 47:52

That is correct. And in fact, I found it interesting that the Secretary to Mexico Department of Corrections- He's no longer in the state, I don't think- but some 10 years ago, I was sitting and chatting with him. And we were talking about the PFR registry. And he was shocked to learn that you can ever step down over time because he had enough knowledge of how the threat level diminishes with age. And he says, Well, it seems like to me that that this tier thing ought to be where people can step down and step off. And I said, Well, sir, it doesn't work that way. In a categorical approach, if you're a tier three, you're always a tier three.

Andy 48:31

Hmm, alright. And finally, it says also on page 28 and into 29, they said, Doe is not subjected to anything like prison. That is why Smith and Under Seal found this factor to cut against a finding of punitive effect because neither registry imposed anything like prison and neither sought to restrain activities PFRs may pursue or require them to seek permission before acting. Does that mean the only standard of disabilities and restraints is that compared to prison?

Larry 49:00

I don't think that most courts have taken that narrow of a view of disabilities and restraints. But again, this case didn't have any evidence from below developed. But if you take the literal... it's kind of like the banishment argument. People say, Well, Larry, you don't understand. I am banished. And I say, Well, are you? Tell me a town that you're not allowed to enter. Well, Larry, you don't understand. I can go to town, but I can't live there. I said, Well, you know, if you look at the historical definition of banishment, which is what a very original textualist would look at, because remember, we're supposed to interpret words and they're meaning at the time they were written. We accept that. That's what Justice Scalia said, right? That's what textualists do. You look at the time it was written and what those words would have meant. So punishment in colonial times, we didn't have probation. We didn't have sexual offense registries. We didn't have all these things. Punishment was thought of as being in prison. So therefore, if you took the original view and you didn't do all that evolving, nonsensical standards of decency garbola that the Liberals espouse and talk about, then that would be a way you would interpret this as a very, very narrow interpretation. Hopefully, not too many courts would agree with them because we've won a lot of cases without having to be in prison. But the PFR registry in some states, there are no disabilities. You can do anything that anybody else can do. My state's one of them. There's not anything that a PFR can't do here. The company may not hire you, but the PFR registry doesn't prevent you from doing a single thing. You can be anywhere at any time, and you can hold a job, and you can live anywhere anybody wants to live.

Andy 50:48

And my final, final, final question is, do you think that I interpreted reading what they were saying there... that they were the standard of disabilities and restraints, like if we're going to compare everything to prison? Well, then sure, nobody's in prison if they're not in prison.

Larry 51:05

Well, I agree. I've read that part and I was hesitant to put it in there, but this is a very narrow interpretation of disabilities and restraints.

Andy 51:17

Okay. Okay. So that, okay, that's a more clear way to word it. That, to me, that's what they were like, "Okay, so if we're not in prison, we're not in prison, therefore, nothing of that Kennedy Mendoza Martinez thing applies with the disabilities and restraints."

Larry 51:30

So Well, I think that- I would like to hope anyway- that had there been an evidentiary record from below, where there had been evidence in terms of the disability and restraint, maybe this would have been different, but again, maybe it wouldn't have been. This Fourth Circuit is not known for its progressive thinking.

Andy 51:48

I can imagine not. What states? Obviously Virginia. Who else? North Carolina, South Carolina, something like that?

Larry 51:56

I know North Carolina. I'm not sure about South Carolina. We'll have to look that up. Can one of our PFR researchers that's online right now look up that for us real quick?

Andy 52:06

No doubt. Someone should be able to Google that.

Larry 52:08

We've got 297 people in chat right now.

Andy 52:12

Give or take, yes. Alright. Then the only other thing really that I think we're gonna have time for Mr. Larry is the Vox article about the Supreme Court's new a death penalty order should make your skin crawl. I didn't have a chance to read it while getting prepared and reading the decision, but I'm pretty sure that you will have something you want to say about it.

Larry 52:32

Okay. The Fourth Circuit is Maryland, North Carolina, South Carolina, Virginia and West Virginia.

Andy 52:42

Okay, I didn't think that Maryland would be in there. But okay, cool. All right. So that is the Fourth Circuit.

Larry 52:47

So all right, this Supreme Court was recently... it ties into the cruel and unusual punishment. And I don't want to go provoke any firestorm of controversy here. But the death penalty is mostly final. I think we could all agree on that, right? When you're put to death, that's the end of the line.

Andy 53:14

Generally speaking, well, depending on your religious persuasion, it could be one step before the next step. But yeah, it's pretty final for this one.

Larry 53:20

Yes, in generalities. But this was a decision where the state of Alabama, as many states that still do the death penalty are having trouble getting the three drug potion. And I'm not medically trained to tell you that one of them does one thing and then the other drug does the next thing and the other does the next thing. And they can't get those concoctions because the drug company are not providing them. So Alabama has allowed a person to choose their method of execution. And if you don't choose, they have another potion of drugs that they use that apparently is very painful. And so this person that was executed named Reeves has

an IQ that placed him as intellectually disabled. And the Supreme Court said, well, even though he got the most painful method of execution because he wasn't capable of making a choice, that's all okay. I mean, his sentence was death, and he chose that way to go and so that's all "well and good." So it it's a long article, I just summarized it, putting my own spin onto it. But if being put into a torturous situation where all the evidence shows that there's immense amount of pain being associated with the execution, if that's not cruel or unusual... the lethal injection using the new potion that they have is by all accounts very cruel and very unusual. But the majority on Supreme Court says no problem with it.

Andy 55:03

My understanding which only comes from like a movie called law abiding citizen is that the three drugs, one of them essentially like just puts you to sleep. Like night-night, and then another one renders you neurologically not moving. And then the third one shuts down your heart. I could be wrong, but that's what I think it is. And there's something in here, a paragraph, and I'm not going to try and pronounce it. Its sodium thiopental, like I'm not going to pronounce it right. But Sonia Sotomayor said, in the opinion, these unreliable execution drugs leave death row inmates exposed to what may well be the chemical equivalent of being burned at the stake. That sounds lovely, Larry,

Larry 55:44

It does sound horrible, but the only reason I put it in was to make sure people understand it's a very high standard we're trying to get to to show something is cruel and unusual. If being burned at the stake is not cruel and unusual, I'm not thinking that being listed on a PFR registry is going to reach that level.

Andy 56:04

I can certainly find a clip, it would take me a minute, but I could find a clip where if we wanted to make execution something that we don't do in the United States, we have the power to do it at the state level. And we would certainly have the way to do it as an amendment. But we have chosen to not do this. So this is what our people want in this country. Go us. I'm happy to be here.

Larry 56:26

That's what Justice Scalia said. That there's absolutely nothing unconstitutional by executing people. You can't be deprived of life or liberty or property without due process, which when you flip that over and analyze it, you *can* be deprived of life, and liberty and property with due process of law.

Andy 56:46

And then there's another one here later that this kind of intrigues me. It says many experts believe that nitrogen hypoxia, so that would be putting you in a chamber and then they slowly remove the oxygen out so that there's just nitrogen. You're still breathing, but you'll eventually not have any oxygen to function. It says it's much less painful than lethal injection, especially if the state does not have access to reliable anesthetics. Although, for obvious reasons, it's impossible to conduct an ethical experiment.

Larry 57:14

Well, that was an option he could have chosen but with his intellectual challenge, he was not able to make the choice. And so it defaulted to the injection, is the way I understood it.

Andy 57:27

It said he needed at least an 11th grade level to understand it, and his reading comprehension was at the first grade. So we're still killing people that have that low of IQs. \*SARCASTICALLY\* - Perfect. Fantastic. Love it. Alright. Any other articles? We got a couple minutes. Is there anything else you wanted to cover before we go to Who's that Speaker?

Larry 57:47

Well, we did have a submission about me.

Andy 57:53

Yeah, yeah. Well, I was gonna put that after Who's that Speaker? Okay, well, we'll do that now. So we received an email from someone that had recently- What's the word? What's the word?- They desisted? It's not the right word. They cancelled their subscription to be a patron. And, and it said, it was directed at you of course. It says, I've been listening to Registry Matters for some time now, and it seems you are getting more cynical, and even sometimes negative. Considering your ripe old age, Larry, my question is,

Unknown Speaker (Audio Clip)

How much longer are you planning to stay?

Louis DeJoy Postmaster General (Audio Clip)

A long time. Get used to me.

Andy 58:30

Oh, so we got to get used to you now?

Larry 58:34

Alrighty.

Andy 58:35

I do legit want to address some of those concerns about and I wrote back to the perso. We do try to add some level of comedy into the program because it is such a sh\*t show of the registry. Forgive me for saying sh\*t show if this, like, bans it from getting into prisons. Well, then I guess we'll cut that out. But the only way that I can think of to tolerate and deal with the sh\*t show that is the registry is to try and make fun of it and poke fun and have some humor and be snarky and sarcastic and stuff because otherwise, we'll all probably just run around and slit our wrists and cry. I don't see a whole lot of other options.

Larry 59:14

Does anybody have any idea who that was? It didn't sound like my voice did it?

Andy 59:22

Oh, no, that was definitely not you. if you think you know, that it'll be like a bonus Who's that Speaker? That wasn't Who's that Speaker, but that'll be the bonus one.

Larry 59:31

You should let them hear it one more time.

Andy 59:34

All right. I'll let him hear it one more time.

Unknown Speaker (Audio Clip)

How much longer are you planning to stay?

Louis DeJoy Postmaster General (Audio Clip)

A long time. Get used to me.

Andy 59:39

And not the person that asks the question, but the person who answers the question. I guess we will move over to Who's that Speaker if you don't have anything you want to say about that.

Larry 59:55

Awesome. Let's do it. Who is this week's speaker? I don't think I've heard it yet.

Andy 1:00:02

I'll play last week's first and we'll cover that real quick.

President Gerald R. Ford 1:00:05

There is a considerable anti-Washington feeling throughout the country. But I think the feeling is misplaced. In the last two years, we have restored integrity in the White House. And we've set high standards in the executive branch of the government.

Andy 1:00:21

So who is that Larry?

Larry 1:00:22

Oh, that would be former president, the late President Gerald R. Ford from the state of Michigan.

Andy 1:00:32

And the reason why I picked that one, I just happened to stumble on it. He said, we've restored integrity to the White House. I wanted to bring it up simply because people, they say things like, where's the integrity in the White House even, whatever, 25,30, 45 years later? And this was something that was said in the 1976 debate between him and Carter is where that one comes from.

Larry 1:00:58

Well, and that was a person, as far as I'm concerned, who had the utmost of integrity. So I believe in Mr. Ford.

Andy 1:01:09

Ford was there because of the step down of Nixon?

Larry 1:01:13

Yes. But how he got to the vice presidency, he wasn't elected to that either. There was a resignation of the vice president in October '73. So when Vice President Agnew pled Nolo to tax evasion, he stepped down because he could no longer serve as Vice President. And then the Democrat Party approved the nomination of President Nixon. It had to be approved by both houses, I think it was a supermajority. I don't remember the exact majority required, but he was overwhelmingly confirmed to be the

next vice president. So he was never elected to the presidency or to the vice presidency.

Andy 1:01:54

Alright, this one I found to be quite funny. I think very few people will know. Obviously, you knew Larry. So this one is for episode 213. So send me an email message at registrymatterscast@gmail.com and tell me who you think this is. This is funny, Larry.

Who's that Speaker?

What would you do if you were elected? About Aleppo? About Aleppo? And what is Aleppo? You're kidding. No. Aleppo was in Syria.

Andy 1:02:30

I love the way that the host of that show, immediately comes back goes Aleppo?

Larry 1:02:36

I remember that one when it occurred. I remember that.

Andy 1:02:41

Oh, do you really? Okay. Well, let me know who you think that is sending me an email message to registrymatterscast@gmail.com. All right. Somebody started posting something in chat, I thought it might be something important. I think that's about all we have time for this evening. Larry, is there anything else you want to say before we get out of here,

Larry 1:03:01

just a reminder, again, for some testimonials. We need them from all of our listeners. We'll pick the best ones, but how we've impacted your life. Hopefully, they're positive. But you certainly can say how... and the people who read our transcripts, hopefully, we have impacted you in a positive way. We're going to post those on our on our FYP website. And that's FYPeducation.org. And you can now download PDFs of all the transcripts going back to I think episode 137. So it's quite a number of them. And we're going to soon have hopefully the option for you to subscribe to the transcripts by filling out an old-fashioned form and mailing it to us here at our Global Operations Center. And we will put you on our subscription list and we may even offer the option of just picking a transcript if you need one from a previous episode that you're interested in. And of course that that creates a problem by how to figure out of all the list which ones you're interested in. But we're wanting to build the transcript subscriptions. So therefore, one way to do it is to make things free. That was the Microsoft model is to make everything free.

Andy 1:04:23

And you know, at the time that all that was free is even if you pirated it, and you got for one of the installs of Windows, Larry, you could just press 11111 and put in, I think it was eight or 11 ones, I forget which one it was. And it would work. Like that was the Registration Key.

Larry 1:04:40

Never did know that.

Andy 1:04:42

Yep, that was good stuff. All right. Well, as I said, email me over at registrymatterscast@gmail.com If you have any questions, phone number is 747-227-4477 and you can find all the show notes and everything like that over at FYPeducation.org. And of course, thank you to all the people in chat who are pretty much all patrons. Yeah, you're all our patrons. And I thank all of the patrons so very much and to become a patron, head over to patreon.com/registrymatters. I appreciate it everybody, and have a good night Larry and I will talk to you soon.

Larry 1:05:17

Good night.

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Glossary:

- PFR – Person Forced to Register
- NARSOL – Nasional Association for Rational Sexual Offense Laws
- AWA – Adam Walsh Act
- BCC – Bureau of Community Corrections
- CCC – Community Corrections Center
- CCF – Community Corrections Facility
- ICAOS - Interstate Compact for Adult Offender Supervision
- PC – Protective Custody
- PREA - Prison Rape Elimination Act
- DOC – Department of Corrections
- CSL - Community Supervision for Life
- DCS – Department of Community Supervision
- IML – International Megan’s Law
- SOMP – Sex Offender Management Program
- BOP – Bureau of Prisons
- CAGE – Citizens Against Government Entrapment
- PV – Parole / Probation Violation
- SMART Office - Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking
- MSR – Mandatory Supervised Release
- ICAC - Internet Crimes Against Children



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