



RM245: Idaho Crimes Against Nature Statute is Unconstitutional. State Settles *Doe v. Wasden*—Recorded 11-12-22

Announcer 00:00

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Andy 00:09

Recording live from FYP studios, east and west, transmitted across the internet. This is episode 245 of Registry Matters. How are you people this evening?

Larry 00:20

Doing awesome, except for I'm running late thanks to tech issues.

Andy 00:25

You have some. They started Thursday night when we did our little chatting with Larry session. People were like, hey, Larry, what do you think about this, and all we heard is crickets and Larry? Larry? And your computer crashed?

Larry 00:39

It did. And then we got the modem reset yesterday. And then, lo and behold, the same thing happened today. I do not understand. Can you explain this? This all-in-one HP is only 15 years old. Why am I having trouble with it?

Andy 00:55

Because no one has ever done any hard drive maintenance on it. There's probably about a whole family of dust bunnies in there. Also, that might mean the airflow is not very efficient in there. Maybe those would be two guesses.

Larry 01:10

So it needs to be vacuumed.

Andy 01:13

I don't know that I would go that route. There are these little canisters of compressed air. You may need to run that through there. Get the dust bunnies out.

Larry 01:22

We do live in a dusty climate; I will have to concede.

Andy 01:26

I believe that. Also you're like 100,000 years old, and there's probably some skin, which gets really gross.

Larry 01:35

I don't think so.

Andy 01:37

So, before we get going, make sure that you press like and subscribe and leave five-star reviews everywhere and share this with people. Because we would really like to grow some numbers. And we think that this is very valuable information for you people. Now there's that. Now tell us what we're going to cover tonight.

Larry 01:57

We've got some good articles. We're going to go into a little bit of detail on two or three articles. And then we have a case that was settled. And the case originates from Idaho, but it was settled as a result of an appeal to the ninth circuit. And it has to do with people forced to register for what would be acceptable behavior today. But it wasn't acceptable at the time they did it. So it has to do with—I don't even know what the right term is. We'll have to wait and figure out what to say when we get there. But it's a detailed analysis of a case. Hopefully, it will inspire folks to know that we can win these cases, especially when you get to the final paragraph where you find out what the attorneys' fee award is going to be in the case. It's amazing.

Andy 02:50

All right. Well, then we will dive right in with an article from Equal Justice Initiative, or EJI. So Equal Justice Initiative says, "Alabama prison crisis continues with homicide at Elmore." It's just a couple days ago that another person was killed in an Alabama prison. This was an individual who "was 17 when he was arrested and charged with burglary and theft of property. He had served nearly 13 years of a 20-year sentence at the time of his death." And why did you want to bring this in here?

Larry 03:31

Well, primarily because we've harped about Alabama prison conditions particular. But we've harped about conditions in the south and that whole swath of the country—Florida, Alabama, Mississippi, Louisiana, probably Georgia as well. They're notoriously lack funding for managing their prisons. And this is just a tragedy that people are sentenced to the loss of their freedom, not the loss of their lives. So I just wanted to mention that Alabama has been put on notice for over four years that the dangerous conditions within its prisons are unconstitutional. "In April 2019, the Department of Justice notified the state and the Alabama Department of Corrections that Alabama's failure to protect incarcerated people from high levels of violence—described as 'too common, cruel, of an unusual nature, and pervasive'—violated the Eighth Amendment's prohibition on cruel and unusual punishment." Despite this, very little has been done to reduce the unprecedented level of violence in Alabama's prisons. At least 52 homicides have been recorded in the state's prisons since the publication of the Justice Department's report." And I was wondering if you'd be so kind as to read the names of the recently deceased. There's a handful here I know I can't pronounce. Hopefully, you'll do better.

Andy 04:53

Looking at their name. Okay, so there's Harold Wallace, who was 24 and was killed at Felton (I guess it would be Felton State Prison.) And on January 11, Barry Gardiner, 33, was killed at Donaldson on February 22. Nyheim Toney, 29, was killed in Bibb on June 27. Roman Salinas, 31, was killed at Ventress on September 22. And please forgive me his family, and I'm so sorry, but Denariya Smith, 30, was killed at Donaldson on October 1. Joseph Agee, 29, was killed at Donaldson on October 3, and Kenyon Arrington, 35, was killed at Limestone on October 15.

Larry 05:37

Truly, our hearts go out to those families.

Andy 05:41

Here's my question to you on this type of thing. It feels like if there's a constitutional violation, somebody should go in there and rectify it. Like, you don't have 10 years to fix these problems. You have 10 days or a year or something like that. But we've been talking about this almost the entirety of this podcast, and I'm sure it goes on way before that. Why doesn't this being a constitutional violation make the Feds, or somebody go in there and take over the problem?

Larry 06:14

Great question. And it comes into the issue of funding because federal judges do have considerable power. Now they're not as activist today as they would have been in decades in the past in terms of using the power of their office to do things like forcing busing for racial balance of schools and desegregation--those cases that originated in the 60s and 70s. You heard about all that--well, maybe you didn't because of your age, but there was a lot of activism in the judiciary in those days to force political leaders to do things that they felt their constituents would not support. We're in the same situation with prisons. The average Alabama citizen has very little concern about these conditions, and they don't want more of their hard-earned tax dollars to be spent on prisons. Their attitude is you should have thought about this before you got there. So the question is--what does the federal judge do? Well, as we've learned in other states, like Texas and California, you can't really come in and raid the treasurer's office in the state and confiscate funds that have not been appropriated. So the options the court has are very limited. And what they may end up having to do is threatened contempt. And who do you hold in contempt? There has to be a direct order. And then another option might be to close down an unsafe institution, if an institution has a certain level of violence, and the state refuses to address it. The judge can say--I'll tell you one thing; I can't require you to build another prison. But what I can do is shut this one down. What you do with these people, that's not my problem. But you can't hold him in this unsafe institution any longer. If you can't make it safe, that I'm ordering it closed. That would be a dramatic draconian remedy. That would be unprecedented in modern times. But that is something it may come to because the elected leadership in Alabama is not going to do it. They've got a nutty governor. I hate to say this to you Alabama, but you just reelected a nut with Kay Ivey. You did. And she wasn't the only nut reelected. But that was really a disgrace for a governor. I mean, she really isn't very smart. And she's not going to risk any political capital to try to persuade the legislature of Alabama to do anything about prisons. It's not her problem, as far as she sees it. Now it is her problem because she put her hand on the Bible. And she's supposed to be responsible for the efficient governorship of the state. But I don't think it's going to be her priority to think about it.

Andy 08:56

When I first started my little journey, I was listening to the radio and heard about the overcrowding of the California prison. I think they were like 100% overcapacity. They were designed to hold 80,000 and they had like 150,000 people locked up, or something like that. The issue was they were housing people in the

gymnasiums. So now nobody gets any sort of indoor rec or anything like that. But the problem was everybody was stealing each other's socks, which then you've got really bad problems. If you are hand washing your socks, and you have to like, constantly keep them on your body. It's not like you're stealing somebody's electronics. It sucked, but they didn't have enough space, and I recall something along the lines that it's too overcrowded, unconstitutional, blah, blah, blah. I don't know that they ever fixed it. So this goes along with the same thing--shouldn't there be some way to remedy this and take over control or something like that? If it says it's unconstitutional, it sounds like it should cease to exist effectively immediately to some degree, like maybe not immediately, immediately, but tomorrow, next week, next month, something like that.

Larry 10:05

Well, there is a certain level of public support you need, even though the courts have broad power to do extraordinary things. When you start taking over the prisons, I mean, look what the consent decrees were the police departments voluntarily entered into consent decrees during the Obama administration, particularly in his second term. And then remember the President that succeeded him said that these consent decrees shouldn't exist, right? We ought to just let the police do their thing. There's not a lot of public support for these draconian measures. And we already have threats on lives of federal judges. In fact, one federal judge's family was shot not that long ago. Wasn't that up in Connecticut? Somewhere?

Andy 10:49

I think so.

Larry 10:51

So it's like these remedies are extraordinary. The elected officials should want to do the right thing. They should want to run constitutional prisons because they to put their hand on a Bible. Everybody who's serving in the legislature in Alabama put their hand on the Bible that they believe in the Constitution of the United States and the Constitution of Alabama.

Andy 11:14

All right let's move along to an article from ProPublica. And this one is "How Tennessee disenfranchised 21% of its Black citizens. While many states have made it easier for people convicted of felonies to vote, Tennessee has gone in the other direction." I don't love the stories, Larry, where we somehow don't make it easier to vote. But anyway, why don't you put this in here?

Larry 11:39

I wanted to try to shame the state of Tennessee. I know we have some listeners and some supporters there--in terms of how it treats those who have been convicted of felonies. "One in five Black Tennesseans are like Scott: barred from voting because of a prior felony conviction. Indeed, Tennessee appears to disenfranchise a far higher proportion of its Black residents — 21% — than any other state."

Andy 12:09

Republican Cameron Sexton speaker the Tennessee House of Representatives said people convicted of felony should have to pay court costs and child support before voting. "If someone's not

paying or behind on their child support payments, that's an issue," he told ProPublica. "That's an issue for that child. That's an issue for the family not having the things they agreed to in court to help them for that child." What's wrong with that?

Larry 12:35

Well, it sounds good. But when asked about Tennessee being the only state to require the child support payments be up to date before voting rights can be restored, Sexton said, "Maybe Tennessee is doing it correctly and the others are not." So basically, he's saying that the other 49 states are screwing up. There's a reason that 49 states are not including child support. Voting is a right, Mr. Sexton. It's a right.

Andy 13:08

It's an unenumerated right to vote. It shouldn't be whether you're good, bad, or indifferent to vote or not. That should just be a thing that you're allowed to vote, figure out some other punishment to take away from the person because they're behind on those payments. Don't take away the right to vote. That's ridiculous. That's an extreme overcompensation for someone's failure.

Larry 13:32

Yes, indeed.

Andy 13:33

All right. So is this an example of Team Red versus Team Blue? Do you think?

Larry 13:37

Oh, possibly, but maybe not. According to the article in 2019, "In 2019, two Republican lawmakers sponsored a bill that would have automatically restored voting rights to people upon completion of their sentence. It was supported by a bipartisan coalition of civil rights advocates, including the libertarian group Americans for Prosperity and the Tennessee American Civil Liberties Union. But it never gained traction among legislators. In 2021, two Democrats sponsored another bill that would have granted automatic vote restoration, but that bill also died. The sponsors said that the Republican supermajority in Tennessee's legislature simply doesn't have an appetite to take it on." Now, I've told you sometimes people sponsor stuff, knowing that it's not going to go anywhere because it satiates a request to sponsor. An average voter doesn't know that sponsor doesn't really mean much. It's more important to say what you've got passed through the process. But since they're talking to a very unsophisticated average voter, they put it on their literature, I sponsored this. So it could be that these two Republicans that sponsored this, they might have been in what we call swing districts, meaning that there were enough votes that it could swing the other way that it's not solidly Republican. And they may have wanted on their literature to say I sponsored this legislation knowing that it couldn't go anywhere and knowing that they weren't even going to try to work it through the system. They were just going to be able to say, look, I did my best. And don't blame me. So. So that could be. I don't know. But I put that out there as a possibility.

Andy 15:18

I think it's kind of obvious. But I just have to ask the question. What do you think needs to happen for these kinds of things to get fixed in the future?

Larry 15:27

Well, I used to say something about the federal Civil Rights Voting Rights Act and civil rights. But you know, all that's also been gutted and weakened in recent years by our US Supreme Court. So in terms of this, it's going to have to be a groundswell of support from the people in Tennessee. They're going to have to convey to their super red legislature that this just doesn't represent their values. That's what you're going to have to do down in Tennessee. They're going to start hearing from that you believe that people who have paid their debt to society should be able to vote again. And that it's unconscionable to have 21% of the black population disenfranchised?

Andy 16:13

Can we just stick here for just a minute? Stefan in chat asked a question. He says, "What about those without a felony? Do they have to be up to date on child support payments?" To clarify, I think what he's asking for, forget the part about convicted felon, if it's just an individual that's behind on their child support payments, is that the only difference that makes it so that you're ineligible to vote in this particular case?

Larry 16:42

I'm not sure that if being behind on your child support, I've never heard of that being the case. But Tennessee does some weird stuff. It could be that if you're not up to date on your child support, you don't get to vote. But it seems like this is specifically regarded to trying to be disenfranchised after a felony conviction. So that's the way I took the article.

Andy 17:00

Yeah. And so I just think it'd be interesting. If everyone that would make it something that the guests, they would pass more constitutional muster. If you are, if everyone is behind, then nobody gets to vote. But if it's only the ones that have a conviction of a felony, then those are the only ones that aren't allowed to vote.

Larry 17:20

Yeah, I'm not sure how to answer that.

Andy 17:22

I was just wondering if you had experience like nationwide or if you've heard in other places, forget Tennessee is the specific example here. All right. Well, then we'll move over to an NBC News article, "Supreme Court refuses to consider requiring 12-person juries." And I thought everything was a 12-person jury, Larry. And I'm just weirded out by this, because I remember we covered that. I think there were two states and then there was one and maybe now there are none that you didn't have to be convicted by the unanimous jury. So it could be less than the 12 to convict you. And maybe that was just capital kind of crimes. But so this is talking about only like six and eight person juries.

Larry 18:03

Yes. Two different issues. You're talking about non-unanimous jury verdicts, and we're talking about the size of the jury itself? Apparently, there's been some sixth- and eighth-person jury has been allowed. And I'm going to give a shout out because people say Larry never does shout outs. I'm going to shout out to two

conservative justices, Neil Gorsuch and Brett Kavanaugh, who apparently were willing to grant this case a writ of certiorari, meaning the Supreme Court will review it. But it takes four votes to say we're going to review this, and they didn't have them. So they're going to let the precedent stand from 1970 that says a jury could be as small as six people. Now, it's interesting that we say that precedent should be respected. Well, maybe this is a precedent that should possibly be revisited. That's why I try not to take these rigid positions one way or the other that precedent is always good for eternity. I wasn't really following the courts much in 1970. And I'm not familiar with the decision. But I would say that it would be worthwhile to revisit that 1970 decision because I much prefer as a practitioner if I'm trying to get one holdout. I'd rather be fishing from one holdout out of 12 than one holdout of six.

Andy 19:36

Sure, sure. Sure. Yeah, yeah, I got you. One out of 12 is a much easier proportion to find than one out of six.

Larry 19:44

I'm not a mathematical genius, but I think I have better odds of coming up with a holdout if I've got to get a hung jury. Hung Jury doesn't get you an acquittal but if you hang a jury enough time, you'll eventually get a dismissal because you'll get prejudice attach at some point. I've seen case tried as many as three times, but at some point, if they can't reach a verdict, you're going to end up with a dismissal.

Andy 20:06

In the final paragraph though the lawyers argue "that the Constitution's Sixth Amendment guarantee to trial by jury, a bedrock legal principal, necessarily requires 12 people, a tradition that dates from medieval England. A 12-person jury is common in dramatic depictions of criminal trials, such as the classic 1957 film "12 Angry Men." I just thought everything was 12.

Larry 20:33

Well apparently, not.

Andy 20:36

I guess not. Shows you what I know. That's why you're here right? Alright, then from AP news, Kentucky Governor promotes Prison-to-Work program. And this is a state that's right next door to the other one where they don't want you to vote.

Larry 20:51

It is, yes.

Andy 20:54

And why did you put this here?

Larry 20:57

Well, I just thought that you could be so kind as to read the paragraph there about the nuances of this.

Andy 21:04

Alright. "Gov. Andy Beshear on Monday promoted a "prison-to-work" initiative aimed at offering second chances for Kentucky's inmates by having jobs lined up for them before they leave custody. The goal is to match inmates with Kentucky businesses in

need of workers by allowing employers to virtually interview prisoners, the governor said at a news conference. Inmates also will receive help in writing resumes and preparing for interviews with prospective employers. 'The goal is for reentering inmates to have a job offer and ready to start to work the day they walk out of the gate,' said Kentucky Justice and Public Safety Secretary Kerry Harvey. Beshear's administration is teaming with the Kentucky Chamber of Commerce to promote the initiative. It will be offered at all 13 state prisons and 19 local jails that house state inmates." So I just have a little story to tell you. I was listening to a podcast today. And if I don't have the number right, I was not fully listening. There are 1.9 jobs for every person looking for a job right now. Does that sound right to you?

Larry 22:06

That sounds about right. There's about just shy of 11 million known vacancies. And there's about half that number of people in the workforce so-called looking for work.

Andy 22:18

So 6 million-ish looking. And there are 11 million jobs to fill. And I just got to think that there's a lot of human capital of former people visiting the big house that would like to have jobs that could get them, but they have other roadblocks and stumbling blocks that keep them from going and getting jobs. So kudos here.

Larry 22:38

Kudos here. Absolutely. This is not the cure all, be all. I mean, it's a step. But after the resumes and all the virtual interviews have been done, there are going to be some employers who are going to be hesitant to hire these people. That's because their bean counters on the insurance liability side are going to tell them, depending on the type of offense, this is risky. And I bet you can guess what type of offenses are going to be deemed risky.

Andy 23:08

I bet you the PFR type ones are going to be ones where they don't qualify for these programs.

Larry 23:13

If they do qualify for the interviews, I'm doubting that a lot of them are going to be hired because of perceived risk. So folks, we've got to do a step further. We've got to start talking about maybe some tort reform, where there's a statute of limitations on negligent hiring, that at some point, America has to join the world as it's evolving in terms of letting people put their past behind them. Because anybody can commit an offense. But you have you have human resource people who are scared to death because the insurance, their insurance carriers and their risk management people have told them if you hire these people, and they screw up, we're toast.

Andy 23:57

All right, we'll see how Kentucky handles this going forward.

Announcer 24:03

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Andy 24:51

You ready for the main event there, sir?

Larry 24:53

What are we doing on the main event? What kind of stuff did you dredge up?

Andy 24:57

I found something in Idaho. I always get Iowa and Idaho mixed up. To me, they're like the same place. I know they're not, but I always get it screwed up. So shall we go there? I have a video to play for you.

Larry 25:10

Well, let's do it. I think this is going to be a good case to talk about.

Andy 25:15

This just slightly less than two minutes.

News Anchor 25:20

A new settlement will protect people who consensually engage in common sexual acts from being added to Idaho's sex offender registry and advocates are calling it a major win for the LGBTQ plus community. Our anchor Roland Barris explains.

Roland Barris 25:48

Today is certainly a big day for three men placed on the sex offender registry in Idaho for consensual sex. The ACLU says in accordance with the settlement, the state will remove all three from the Idaho sex offender registry and create a policy for removing other individuals with similar claims. The case focuses on Idaho's quote infamous crime against nature law, which makes it technically illegal for anyone to have oral or anal sex. And last year, a federal judge ruled that the law was unconstitutional based on a 2003 Supreme Court ruling in a case out of Texas, that anti-sodomy laws violate the 14th Amendment. But in Idaho, while the change could expunge a conviction, you could still be placed on the sex offender registry.

Unknown Speaker 26:25

What the Ninth Circuit said in an oral argument earlier this year was you all should really settle this case. We know the underlying statute can't be enforced today. So why are you requiring these people to register a sex offender? Settle this case? You know, why are you wasting taxpayer dollars defending this unconstitutional statutory regime?

Roland Barris 26:43

So the state finally gave in and started negotiating a settlement this past summer, although she says they did so reluctantly. The ACLU says they should be assigned to the state that those who identify as LGBTQ plus have the same human rights under the law as anyone else. A state law though still does not protect that group from being fired from their job or evicted from their homes

just because of who they are. We reached out to the Attorney General's Office on the settlement, and they declined to comment.

Andy 27:16

All right, so you people put this in here. And I'm sure you have some reason why you wanted to talk about this case. So my understanding is that Idaho settled.

Larry 27:26

That is what was reported in the news. And I did some research as quickly as I could and correct--they did after receiving a stern warning from the Ninth Circuit that the case was not going to end well for them.

Andy 27:39

Can you stick there for just a second, the Ninth Circuit? Is that common for one of those appeals courts to telegraph back to them don't go down this path?

Larry 27:51

I've never seen it before. I've seen it at trial level. But I have never seen something at an appellate court say you really need to settle this because you're not going to like what we do. I have not seen that before. Interesting.

Andy 28:05

I'm trying to see the magnitude the logic, like all that goes behind them doing that. And then obviously, Idaho pulling back on it.

Larry 28:18

So what you need to do is think about the case we did out of Kansas with the Supreme Court. When the Justice said it's one thing to have a difference of opinion about the facts. It's another thing when we don't know what we're litigating. What I think these three judges on the panel did is they looked at each other and they said, well, the trial judge has put it all here. There's nothing here to litigate. Why are we here litigating because this case cannot be won. So your next question would be, why did the Attorney General of Idaho appeal the trial judge? And the answer is because he could. He could because he has the resources, because the public is always too willing to give the resources, whatever law enforcement and the people who defend law enforcement say they need. Voters are more than willing to give them those resources. And if you ever mentioned reducing those resources, you're accused of defunding the police and turning loose a tidal wave of crime. But they did it because they could, and they did it because they felt they were representing the views of the people who elected him. That's why they did the appeal.

Andy 29:36

Alright. So this case is Doe versus Wasden was brought back in September of 2020. On behalf of an Idaho resident known as John Doe, surprising, and Idaho State Police forced Doe to register because of an out-of-state conviction more than 20 years ago for having oral sex. "Since then, in 2003, the U.S. Supreme Court's landmark decision in Lawrence v. Texas held that anti-sodomy laws, including Idaho's Crime Against Nature statute, violate constitutional protections under the Fourteenth Amendment. Yet Idaho is one of four states that continues to enforce its Crime Against Nature law by requiring people with convictions to

register." Is there a connection to some sinister reason the states require registration for this type of conviction?

Larry 30:20

Oh, yes. According to the ACLU's Press Release, "In Idaho and other states around the country, anti-sodomy laws have historically been used to criminalize sexual acts traditionally associated with homosexuality."

Folks, that's them saying that, but I tend to think take their summer validity to that.

Andy 30:40

I see that. "They said from 1955 to 1957 Idaho's crime against nature,"--that sounds like something using farm animals,--" statute was the primary legal tool for the "The Boys of Boise" affair—one of the most virulent anti-gay witch hunts in American history. Idaho's Crimes Against Nature Statute remains virtually unchanged since its inception in Idaho's territorial days." I don't understand this at all. If the Supreme Court held that the right to engage in certain intimate activities with a consenting person historically known as sodomy is constitutionally protected, why is this just an issue now? 20 years later?

Larry 31:24

You're correct. They did hold that in *Lawrence v. Texas*, 539 U.S. 558 (2003). Just because the Supreme Court held that, the attitudes of people of Idaho did not instantly change. In fact, I would say that a significant number of Idahoans still oppose same sex activities and marriage. Does the name Larry Craig ring a bell to you?

Andy 31:51

Not at all. I mean, we talked about that preshow, but I've never heard of the person beforehand. Who's Larry Craig?

Larry 32:00

Craig was a United States Senator from Idaho who got arrested while in office in a sodomy attempt in the Minneapolis St. Paul airport. After a week filled with scandalous headlines and ribald late-night TV humor at the expense of one of their own, Republican leaders got what they wanted Saturday: the resignation of Idaho Sen. Larry Craig. The news from back in 2007 was as follows. "Senator Craig made the right decision for himself, for his family, his constituents and the United States Senate," said White House spokesman Scott Stanzel. One of Craig's harshest critics, Senate Minority Leader Mitch McConnell, R-KY said Craig "made a difficult decision, but the right one." It sure sounds to me like being perceived as gay is not good in Idaho.

Andy 32:55

Let's move on with the case. Idaho Code § 18-6605 requires people convicted of Crime Against Nature to register. As everyone knows, registrants suffer restrictions on their everyday life pursuant to being on the PFR list. No, Larry, it's just a website, just a website.

Larry 33:18

No, being required to register is not the same as just a website. So it's two different things. Being required to register usually carries a lot of direct implications of what you must do and what you may not do. Being on a website after you're no longer required to

register does not have any prohibitions on what you can do, and it doesn't place any restrictions on what you're required or what you must do. But anyway, Idaho requires people convicted of violating sodomy convictions in other jurisdictions to register as well-- whether or not those prohibitions are registerable in their original state, the original jurisdiction. Now, that's funny.

Andy 33:58

As I was reading the complaint, I noticed that in 1913, somewhere around like your childhood days, Larry, the Idaho Supreme Court found that the punishment for having oral or anal sex could not include execution but could include life imprisonment. Now according to Larry, that would be funny.

Larry 34:18

Well, you're correct. That is really funny to think that in 1913, just a century ago, that you could be receive a life sentence for having consensual sex, that is funny.

Andy 34:32

I would like to cover the scope of what is required by Idaho's PFR statute. The information that PFRs must disclose includes: current and former names, including nicknames, pseudonyms, and ethnic or tribal names; email addresses, "instant messaging" address, and any other every online identity or screen name used for electronic communications; complete physical description including scars and tattoos; date of birth; social security number; residential address and a physical description of the residence; name and address of any school the registrant attends; description and license plate number of any vehicle used for personal or employment use; telephone number; addresses of employment and volunteer positions; information related to any professional licenses; passport information; a photocopy of any driver's license or identification card; fingerprints; and a photograph. This sure doesn't just sound like information that would already be in the public domain as a result of the conviction. Would it Larry?

Larry 35:34

Oh, you're correct. It has information that would have no relation to the underlying conviction, which is one of my big beefs. I tell lawmakers, you could actually have a constitutional registry if you would just assimilate what happened at the conviction and let it drop at that point. But all this stuff has nothing to do with a conviction. Most of the stuff on the list has absolutely nothing to do with a conviction.

Andy 35:57

Other than to I mean, the complete physical description. So yes, I got a new tattoo on my left forearm, like you would have to divulge that information.

Larry 36:07

And most of the time, my experience from talking to people is that they want to photograph that, not that I have had any personal experience. But that's what I hear. I've been told that there are jurisdictions in the registration process that require the registrants to strip, and I said that would be a cold day in hell before I would do that. But I have been told that in fact, I think that the two counties in Georgia, I was told that Cobb and Newton required that.

Andy 36:33

No kidding. Um, and we'll just continue it doesn't stop there. There. Larry, Shall I continue?

Larry 36:41

Well, of course.

Andy 36:42

Okay. • Registrants are prohibited from applying or obtaining employment at a day care center, group day care facility, or family day care home. In fact, registrants are prohibited from being on premises of a day care center, group day care facility, or family day care home while children are present, other than to drop off or pick up their own child or children. Absent certain limited exceptions, registrants are prohibited from living within five hundred of a school used by children. Registrants are prohibited from picking up or dropping off their own children at school absent prior notification and annual written approval of the school. The law mandates that every registrant register for their entire lifetime, including people who registered for a conviction of Crime Against Nature.

Larry 37:48

Yes, it's quite a list of disabilities and restraints, for sure. Unfortunately, the challenge was not on the registry itself. Rather, it was a targeted challenge on the underlying convictions that were rendered null and void by the United States Supreme Court ruling and Lawrence vs. Texas.

Andy 38:08

I've heard you people pontificate about subject matter jurisdiction in the past. Is this an example of the state of Idaho lacking subject matter jurisdiction for the original criminal conviction?

Larry 38:20

Yeah, you're absolutely correct. Now, why do you even bother inviting me in here?

Andy 38:24

Because I need someone else to edify me and make it sound like I'm smart.

Larry 38:29

So, yes, I've maintained and to the consternation of some attorneys that if a statute is unconstitutional, you can challenge it at any time, even though you may have pled to it. Because if the statute is unconstitutional, then the consequences of their conviction is null and void because the court never had subject matter jurisdiction to begin with. So if it's facially unconstitutional, which this is based on US Supreme Court's holding in 2003. You cannot prohibit consensual sex between men who are of age who consent to that activity. So therefore, every conviction that occurred is lacking subject matters jurisdiction. Now, they had the subject matters jurisdiction at the time, but they lost it when the statute was declared unconstitutional. So therefore, any collateral consequence that flows from this conviction has to be removed because the conviction is null and void on its face. That's one of the reasons why I wanted to put this in here. Because people they heard of that list of disabilities or restraints, and they said, my goodness, the Idaho registry is coming down. Now, the Idaho registry is going to be alive and well because that wasn't what was

being litigated here. What was being litigated here was whether or not Idaho could compel people that were registered for this particular offense to be subjected to all these conditions. Now they put that in the complaint to illustrate the severity of the disability, as you're saying, because otherwise, the judges might think it was just a list that people had to sign up for. The lack of subject matter jurisdiction with a statute was declared unconstitutional. Look at the people that that were locked up in World War Two, when they were removed from their homes, and they were put in the encampments--

Andy 40:37

The internment camp we did with the Japanese.

Larry 40:41

Yes. Some of those people posthumously had their records expunged, because some didn't care much to have been taken away from their families and their businesses. So they rebuilt, and they had convictions. But that should have never happened. So the fact that they may have done something while they're in custody they shouldn't have ever been in custody to begin with. These people should never have been on the registry, and certainly, in the last 20 years since the Supreme Court spoke, but again, who's going to take the lead on that? Who's going to take the lead on that? Tell me who in the law enforcement apparatus when somebody goes in and says, well, you know what, I think I got a conviction here on this crime against nature. And I think that the Supreme Court said, this is unconstitutional. I shouldn't have to register, though deputy might say, well, sounds pretty good to me, but ain't nothing I can do. And can you think of it going up the food chain. Who would want to take the leadership on trying to get these people off the registry?

Andy 41:46

Nobody would want to take that lead, other than a civil rights organization. Correct. The news is that the state of Idaho chose to settle. Can you talk about the Settlement Agreement?

Larry 42:06

Yes, it's very comprehensive. I think we should just post the stipulation in the show notes because it's five pages. But the key point, I think, are the attorneys' fees. And can you at least read that section? related to what what's going to come their way?

Andy 42:25

All right. Paragraph 10 states, "the Idaho State Police shall remit to plaintiffs \$275,000 in attorneys' fees. Defendants will submit the request for payment to the Idaho Board of Examiners no later than December 31, 2022. If not approved by the Idaho Board of Examiners for payment from the Constitutional Defense Fund, then Idaho State Police shall pay plaintiffs' counsel \$25,000 on July 1, 2023, and submit the remaining \$250,000, plus interest, as part of the Fiscal Year 2025 budget request to the Legislature. Those monies, if appropriated, will be payable on July 31, 2024. Interest shall begin accruing July 1, 2023, at the rate of 4.4%, in the spirit of 28 U.S.C. § 1961. Failure to appropriate state funds shall not relieve Defendants' obligation to remit to plaintiffs \$275,000 plus interest."

Larry 43:36

Now, you have to admit that's funny.

Andy 43:39

Okay, I'll go with that one's actually funny. That's complicated, though. So they're required to pay 275,000 bucks, but if they don't, they only owe \$25. But then they owe it as part of the budget the next year, and then they don't have to pay it until the next year. And then interest starts accruing at 4.4%.

Larry 43:57

It was the court trying to be sympathetic to the large amount of the award and the budgetary process. The State Police said we don't have that laid out in our budget to pay a quarter million dollars in attorneys' fees.

Andy 44:11

Then they should have thought about it. Okay, so let's play the other side. They should have thought about that before they had these people in the registry for 20 years.

Larry 44:18

But you got to understand that you do not get to make that argument back to them?

Andy 44:23

Oh, I'm sorry, I forgot we call this "the hypocrisy show."

Larry 44:27

Yes, you do. Do you do not get to tell them that they should have thought about something? Because the State Police their defense would be? Well, we looked at the statute book and the list has that on there. So we had to register them so it ain't our fault. Our budget shouldn't have to take a hit. The attorney general would say "Well, I'm just the Enforcer I'm sworn to uphold the defend the laws in the state. And the legislature made the laws and I'm obligated to defend them so therefore, it shouldn't come out of my budget." And then it would have kicked all the way around the legislature. They would say, "Well, I'm an individual legislator. I voted because that's what the leadership was telling us that this was a must-do." Most of these people are not in office anymore that put this on the list. I mean, they've all retired or died. So you had the circular firing squad of nobody was responsible for this. And I'm sorry, but that's the way the game works. So this was the court trying to be sympathetic, to give them time to come up with the money. They're not going to want to pay it.

Andy 45:29

Was this three people though? I think in the news article that we played they said three people, so that's 275 per person. So three quarters of a million dollars?

Larry 45:39

Well, I don't think this is going to the people. This is going for the for the belabored, long, multi-year fight for the legal fees.

Andy 45:48

So \$275,000 for the attorneys that fought for the three people.

Larry 45:54

Correct. That's where this money's going. The stipulation does provide that they're going to put a process in place to review everyone who has this conviction, and only this conviction, and they're supposed to proactively remove them. Unlike other states,

where they've told the person they have to file something, apparently the stipulation requires them to do that. I didn't get enough time to go through all the documents carefully enough. I hope they preserved the Settlement Agreement enforcement within the jurisdiction of the court, because you have another game played when enforcement of the settlement agreement is not specifically preserved, and a case is dismissed. Then when you try to get your money that they'll say, "Well, you can't enforce this as a settlement agreement?" Well, I think we had Ms. Bellucci from California explain that on one of her settlements, she did not reserve enforcement power to the trial court with a dismissal order. And I'm hoping that they were wise to that, and they preserved their enforcement.

Andy 46:59

Do they have any sort of wiggle room to not pay it for some reason? And like, what's the recourse for them not paying? Do you then tell the federal government they're not paying their debt?

Larry 47:10

You would move the court to hold someone in contempt. But normally, these federal judges are very sophisticated. And they all will only enter to a settlement agreement if someone who's authorized to represent the state and make a commitment to have the state show up because they've learned from the school of hard knocks that the state will say, "Well, they didn't have the authority to do that." So the federal judge won't want to facilitate settlement negotiations if an authorized party doesn't show up. I have a feeling that this money will get paid. But it may take they may drag it out for a very long time. If you if you take a look at the in addition to the show notes, if you look at the docket sheet, this case was filed September 23, 2020. Here we are two years later. And this is a relatively fast case. Because if the Ninth Circuit had not realized that this was a waste of everybody's time, it would have had to have been fully argued fully briefed, then they would have had to have decided it, published an opinion, and this would have taken another many months or maybe another year, before we'd gotten a Ninth Circuit decision. And then we would have the risk that they would file a cert petition with the US Supreme Court. So this could go on and on and on. But this is a two-year-old case. And that was 128 entries in the docket. If you'd look there, 128 entries, that's a lot of stuff and it took a lot of time. Some of this stuff requires a lot of work to respond to the various motions that they filed.

Andy 48:44

Okay. Um, and I would like to talk a minute about these people were fighting something as a constitutional issue. They weren't fighting the registry. They use it as almost as a supporting thin, like, these are the issues that come along with this unconstitutional situation that we're in. Most of the people that we end up talking to our bitching about the registry. It's a justified bitch, but that's what they want to get rid of-- is the registry. These people were fighting, specifically something that was labeled as unconstitutional, unrelated to the registry. They then had the registry tacked on to them after all that are in and on top of all of that.

Larry 49:34

You're just meandering. I'm not sure I got the full gist of what you're saying.

Andy 49:41

They're attacking something underneath the registry itself, not the registry.

Larry 49:46

Well, they're attacking having to be on the registry.

Andy 49:49

Of course. and probably like, being convicted of something that you are born to be into is one thing. Having the registry on top of it makes it difficult to live, obviously. But their underlying complaint was the unconstitutional piece of it. And then they use this to say life is hard. Because of all these extra things. All I'm getting at is that they were challenging the part that got them on the registry, not that they were on the register. Is that right? Or no?

Larry 50:23

Well, I mean, they were challenging that they were on the registry. But they were using a 20-year-old Supreme Court decision to say that this is ludicrous. We shouldn't even be on the registry because our conduct is constitutional. Therefore, you cannot force us to register for constitutional conduct.

Andy 50:39

That's much more simply than I said it.

Larry 50:42

But they use the draconian nature of the registry to get the court's attention, because I don't think very many people understand all that stuff you read off there. You could spend all day tomorrow, go into the most populated place and whatever city that you choose, and you couldn't find anybody who knows all that stuff, unless they have a family member on the registry. So therefore, they used the registry, to show how bad the registry was. So they went into the details of the registry, but they didn't really need that, in my opinion. It was a safety measure, to make sure they left no stone unturned. But I think that they could have won this without going into all that detail. But you have to give them kudos. They say the ACLU never does anything, supposedly. But they were in a very conservative state and did something for PFRs. They won. They got a settlement, which is a win. And they're going to get paid at some point for their work. And it is beginning of possibly other challenges. What we just discussed--I didn't know about the Idaho registry. I always pick on the southern states. This sounds almost as bad as the southern states, really, doesn't it?

Andy 51:55

It absolutely does. So then, with this, you just like hinted to it. Will this then open up challenges for people to actually go after the registry with the draconian nature of it. I guess we'll just talk about it being in Idaho of how bad it could be for people in that state, regardless of the type of conviction. This is a really shitty way to have to live.

Larry 52:17

I think it certainly does. It is the registry of Idaho. There was another part I didn't put it in there. But it's \$80 a year fee to be on the registry. As the complaint mentioned, it's \$80. It's not a

horrendous amount of money. But if you're working for something approximating minimum wage, \$80 is significant to some people.

Andy 52:37

I absolutely would. I'm looking up how many people are on the registry in Idaho, it's got to be like, 50. What do you think? How many people have 5000ish?

Larry 52:47

Well, it'll be it'll be 1000s. No state has just 50.

Andy 52:53

I'm just being silly. Can somebody find it in chat for me real quick? Because I can't do it.

Larry 53:03

You can go to you can go to Klass kids. And that's the one place where they generally have the totals every year.

Andy 53:09

And that's que la SS. Let's see if I can't find this. Oh, God, their website's down. They got a WordPress upgrade, and the websites down. I know that about this problem only too well, Oh, well. All right. So that's good news. Right? We'll call that good news.

Larry 53:30

That is really good news. This is spectacular news. I know it only affects a small number of people. But it instills confidence. The ACLU, once they get paid, they can afford to take some more risk now, because they're gonna have some good press that came out of this. And that gives you confidence that you can do this. And even if you don't come out as well as you did in this case.

Andy 53:54

What do you think about the political fallout, though? Because we talked about that, where why would they go to bat for people in this case and we don't necessarily support them. But this is not a popular issue for people.

Larry 54:07

You're correct. But it is fair to say the ACLU is hook line and sinker with LGBTQ+. That those are hand in hand, and that made it easy on this particular issue. But if the LGBTQ+ community can convince them that there are a lot of other people on the registry because of homophobic prosecutions and homophobic judges and stuff like that, you may be able to get them to go after the registry on a broader attack that what they did.

Andy 54:37

Gotcha. Interesting. And each ACLU, they're independent franchises, kind of like NARSOL affiliates. Is that fair to characterize them that way?

Larry 54:52

It is. It does have the umbrella. They can't stray outside and be in opposition to what the national does, but they do have a lot of autonomy when picking what they're going to prioritize because it is reflective of their members and their particular ACLU area. So the ACLU of Michigan may have different priorities than ACLU of Alabama or Florida. Is there even an ACLU in Alabama?

Andy 55:22

I don't even want to know. I mean, I do want to know, I don't even want to go there. Let's see. ACLU Alabama. The Alabama chapter is located somewhere, not here. There was an ACLU of Alabama, the uprising in response to George Floyd's murder in Minneapolis plays by blah, blah, anyway. Yes. ACLU of Alabama. They're in Selma, how about that?

Larry 55:40

I bet it's a very, very small one. Because the people who need these types of organizations the most are the ones who are least likely to use them. It's kind of like the people with labor unions-- I'm going off, and it's going to cause people consternation--but people who would benefit more from organization in the ranks of labor are very likely to be opposed to organization. I don't need no union; I can talk for myself. No, you really can't. Management doesn't pay you any attention.

Andy 56:14

Rocky, with very limited resources, found it for us. 5125 as of May 4, 2022, that's 5125 people on the registry in Idaho. And he has very limited resources and he pulled it off.

Larry 56:27

So well, I've got an extra computer so I can play with my computer.

Andy 56:31

I gotcha. I wouldn't expect you to do because you can't multitask. All right, I kind of want to do this other thing after the fact. And we're 55 minutes so we can close this segment down. And I'm going to plead with you to let me release a Patreon extra covering this other thing. Can I do that for you?

Larry 56:50

We did get a new subscriber, James. I'm not going to give last name since we never do. But we got James on board for print distribution. So thank you, James.

Andy 57:07

And along with that, we got a new patron named Jay with a generous monthly support amount. So thank you very much Jay, and then Al became an annual contributor. He wanted to speak to you, Larry, on the chatting with Larry episode. So thank you to you both. Remember, if you're a \$5 a month or more supporter, you get to participate in the monthly chatting with Larry session.

Larry 57:30

Yeah, but you forgot to mention after the other night he canceled right away because my computer died.

Andy 57:38

I haven't heard that yet. But all right. Find all the show notes over at registrymatters.com or FYPeducation.org. And you can find all the other links and everything that go along with that there. So yeah, just go there and everything will become apparent with links and stuff like that. So without anything else, any parting words, fine sir.

Larry 58:00

Now are we going to do our election round up?

Andy 58:04

Yeah, we will. That's going to be part of what this Patreon extra will be. It's an election round because I want to talk to you about some of your predictions. And then I wanted to talk to you about something that I saw a conversation going on NARSOL's Connections website, their social media site.

Larry 58:19

All right, so everybody better sign up if you want to hear all this gibberish we talk about.

Andy 58:25

Absolutely. Well, very good. Thank you, sir. And I hope you have a splendid weekend and all that, and I hope you have good weather. And oh, tell me about your furnace. Did you get it started again?

Larry 58:35

I did. It needed to be fixed. There was a part of the pilot assembly that had failed, and it was intermittent. So they fixed it, so now it should have continuous heat.

Andy 58:47

Okay, well, all right. I hope you stay warm. And have a great night and I'll talk to you soon. Good night.

Announcer 58:57

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