Registry Matters Podcast
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00:00:14
Andy: Recording live from FYP Studios, East and West transmitting across the internet. This is episode, hold on for it, 274 of Registry Matters. Good evening fine, sir. How are you?

00:00:26
Larry: I'm doing awesome today, but I wasn't doing so well yesterday.

00:00:32
Andy: You shared that story with me. Tell me what happened.

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Larry: Well, the unthinkable happened, we lost electric power in my house for the first time in 40 years.

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Andy: That's amazing. And you toughed it out, you stayed at home and weathered it all.

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Larry: No, I spent the night at the office.

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Andy: And you spent it where exactly in the office?

00:00:52
Larry: On a sofa because I didn't bring everything I needed to set up my airbed.

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Andy: Was it any specific couch in the office?

00:01:03
Larry: It would be my boss' couch, yes.

00:01:06
Andy: Would it have been awkward if he would have walked in on you while you were snoozing away?

00:01:09
Larry: It would have been. But he was not going to because he was out of town and I knew that.

00:01:14
Andy: That would just be funny. You're sacked out in your skivvies and whatnot. And he shows up and he's like, “What the hell is going on here?”

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Larry: So, no, he was gone out of town.

00:01:24
Andy: I do want to make sure and mention Larry that we have been off for a while and people were looking for us, which was very warming of my little cold heart. I suppose that people were looking for us to see why you haven't been uploading episodes to YouTube or to Patreon or of us. So, thank you all that reached out and no, we didn't die.

We just kind of took a little hiatus because everything was chaos through the month of August. We just couldn't quite get together to make a recording. But, hey, we're back. It's the second of September and it's a holiday weekend. So, make sure that you press like and subscribe on YouTube and leave five-star reviews, all the drills out notification bells. And if you're new to the show, you can not only find us on YouTube, but you can download the show as a podcast and listen to your favorite podcast app. I use one I told you all about a few weeks ago. Which one? It's not Podcast Republic. It's podcast addict is what I use and you can find that there and you can download it and not use your data if you happen to be out in the wilderness camping and you can still listen to the show. One other thing before we go on Larry. I want you to tell me what we're doing is: we record at seven o'clock on Saturday nights. You have to be a patron to get in. And that's one of the perks of being a patron and everyone yells at me, “Why don't you tell people when you record?” That's when we record, seven o'clock Eastern Saturday nights. What are we doing in this episode?

00:02:50
Larry: Well, we have a case from the Montana Supreme Court to kick around and we have a special guest who is a practicing attorney that will be with us for the entire hour, and we have a few articles to discuss and one of them in particular has gotten you all worked up. Do you wanna go ahead and introduce the guest and provide a brief bio if you have one?

00:03:08
Andy: I don't have a bio. We have a guest. Can I say the full name? Is that ok? Yeah? You are Guy, the famous Guy Hamilton Smith.

00:03:21
Guy: I don't know about that, but I am Guy Hamilton Smith.

00:03:26
Andy: You are one of the few who have been a PFR and then also actually, is the right term, sat the bar. What's the right term to get your license?

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Guy: Yeah, you take the bar exam, you sit for the bar exam, and there are a handful of us that have gone through the legal system.

00:03:52
Andy: It's incredibly common though that our people get barred from all kinds of, I don't want to lump you into a trade, some kind of thing, nursing and other miscellaneous trades because of either a convicted felon or the whole PFR thing.

00:04:08
Guy: Right. Occupational licensing reform. I mean, it's been a big mission of mine. I've worked with a lot of different people on that. Not to get too far afield but, just basically, one of the goals of the criminal justice system is people, we want people to leave that system and do well, but if we don't give them opportunities to be able to do that, we're kind of shooting ourselves in the foot a little bit. I've worked for a long time in criminal defense, and I've worked with a lot of clients who, not necessarily with sex offenses, but really any kind of a felony conviction and it's very difficult to obtain housing, to obtain employment, and then of course, if you throw the registry on top of that as I'm sure a lot of the listeners know, it's extremely difficult to do.

00:05:06
Andy: Absolutely. And then we have something of a labor shortage in the United States and it seems that there would be a whole bunch of people that would potentially qualify for jobs if they weren't barred from those areas of the economy.

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Guy: You would think, but yeah, our response seems to be loosening child labor, relaxing child labor laws, to get more people in the workforce, which is ironic given our general stance towards child protection, but I think that you give people the opportunity to be a good worker and they will be. There's a lot of talent that we're missing out on by prohibiting people from whole occupations.

00:05:54
Andy: Without a doubt. All right. Well, I think you kind of meandered around a bio there, which is fantastic. So, are we ready to go then? We can dive right in?

00:06:04
Larry: Yes.

00:06:06
Andy: And Guy, if you have any comments along the way, just shoot yourself in there. Go ahead and object.

00:06:13
Guy: Yeah, I'll object. No, I don't think I'll have any objections but I'm looking forward to it.

00:06:19
Andy: Very good. Well, here in New York, this is a question from Mark. "Here in New York, people that the government wants to put on the sex offender registry are sent to court to determine the level and type of registration classification they will be subjected to. The court system uses a point system. There are automatic overrides that place a person at higher risk regardless of low points. What I would like to know is how accurate the guidelines are for the court to use to determine what level a person is assigned on the PFR registry. The premise seems to be that there is virtually always a high risk of offending sexually and yet there are studies and statistics that show that the recidivism rate is lower. Uh-oh, that's a trigger word for Larry. As compared to people with non-sexually related criminal convictions. Can people on the PFR registry do a class action? Another trigger for Larry. Can they do a class action challenge to the scientific validity and reliability of the guidelines and point systems the courts currently utilize?" Respectfully, Mark. All right, Larry, go ahead.

00:07:23
Larry: Well, I'm going to focus on the political aspect and I'll let Guy respond to it. I'm going to zero in on the political ramifications. First of all, there's no requirement for New York to do what it does other than the statute and statutes are not carved in stone, they can be amended, or they can be repealed. So, therefore, you have a privilege in New York that many states do not have in terms of having a risk-based model. Rather than a categorical approach, you're having an individualized approach. Is it perfect? Probably not. States that have that system, people that come out with a higher risk rating are not pleased. So, the question is, "What type of due process is afforded you if you disagree?" Is it a robust review? Is it an administrative review? Is it a judicial review? Those sorts of questions. And I didn't get into all the nuances of the New York process, but I can tell you one thing, plenty of people come out at tier one level. People who are level one only have to report in every three years and they're not visible on the internet. So, a lot of people in New York are not automatically defaulted to the higher risk. That is just a flat-out misunderstanding by the writer in terms of political ramifications. You go ahead and keep fussing about this and saying how horrible it is and if

I'm the New York legislature, I'm gonna say, "Well, what is this thing costing us? Oh, well, we have a bureaucracy that consists of 65 people that do all these assessments and all this. It's very distracting for us. Let's just go to the categorical approach." So, what you need to really focus on would be to try to improve the system if you feel like the appellate review is not adequate and to try to do a reform in that regard. But you have got to be careful because they're not required to hold on to the system. And, in fact, many states have abandoned the systems where they do individual risk. I could make a list of them that come to mind. Wyoming used to do risk. They don't anymore. There are a number of states that have totally abandoned it and take the categorical approach. So politically, you're in dangerous territory if you complain too much. What does Mr. Hamilton Smith say?

00:09:31
Guy: I agree with that. And with New York specifically, I had occasion to work on a project in New York. And at least as of few years ago, my understanding was that New York's risk assessment system is just sort of home brewed by the State Department of Corrections. It's never been empirically validated. But to get to the heart of what the questioner is asking, to my understanding, generally speaking, there's not gonna be a requirement for that type of categorization process, that there be a scientifically empirically validated risk assessment tool. I mean, the Supreme Court itself has stated that when it comes to putting someone on the registry, whether or not someone is a danger, in this context, what their level of risk is, is not relevant to the statutory scheme. So like Larry was saying, it really comes down to what the statutory scheme is now. Occasionally, statutes can create due process rights. And I am certainly not an expert in the New York statutory scheme. But just generally speaking, it seems like it would be a tough road to hoe to establish a due process right to any kind of an accurate, meaningful tier scheme based on risk because the Supreme court case, Connecticut Department of Public Safety vs. Doe kind of foreclosed a lot of that at least on procedural due process grounds. I mean, what would it be, in terms of being in favor of, would it be good for public policy? If we did something like that, I don't know, maybe, but also like Larry mentioned, piggy backing off that many states just employs an approach that's categorical, like federal law, the Adam Walsh Act just employs a categorical approach for putting people into tiers. Basically, if you were convicted of this crime, then you were put in this tier, which of course, doesn't correspond to actual risk. What the research that's been done has shown is that somewhat paradoxically, people who are in lower tiers under the Adam Walsh Act reoffend at higher rates than people in, higher tiers. So, it's kind of backwards in terms of risk. As far as bringing in class action, I would defer to a New York attorney, but I think it would be a difficult road to hoe to do that. And you just kind of have to, like Larry was saying, work on the legislative angle. A lot of times, legislatures are responsive to cost.

They do want to save money, but it is difficult for, as I'm sure everyone knows, any sort of legislative work here. Legislators will agree with you in private that these laws don't make a lot of sense, and that they don't do the things that they're supposed to do, but as far as doing anything publicly, and everyone's looking at re-election and no one wants to be the person who's making this any easier on 'sex offenders.' So, anyway, that's my two cents worth.

00:13:01
Andy: Cents from the federal side. What are they suggesting that the states do at a minimum in this regard?

00:13:11
Larry: The federal guidelines take a categorical approach. They don't even recommend risk assessments and that's why many states have abandoned them because the Adam Walsh Act is based on a static look at the offense and the seriousness of the offense in terms of it. If it's carries less than 12 months, 12 months or less, it can be a tier one unless it's a target offense against a minor. And then if it carries more than 12 months, it's a maximum penalty, not what was imposed on you, but what the maximum penalty is. If it carries a penalty of more than a year, then it's gonna be at least a tier two under the categorical approach. And then if it's an offense against someone under 13, then you're gonna be in tier three. And if you have a second subsequent sex offense, you're gonna rise a tier, but it's a categorical approach. And when the states got the picture of the Adam Walsh Act, they said, "Why are we spending all this money? Because this is not what the government wants us to do to get our Byrne grants is to just put them in categories and that's what they've done."

But unfortunately, rather than categorizing them correctly and tiering them correctly, a lot of offenses have gotten put into tier three. They really don't need to be like Maryland. About two thirds of everybody on the registry needs to be in tier three. And that's just not necessary under the recommendation from the feds, it's just not needed. It's a much narrow universe of people that need to be in tier three than what actually end up being there.

00:14:42
Andy: We shall move along, I believe. So, this next article, I guess the first article is coming from the Ninth Circuit panel shakeup leads to reversal in the Los Angeles Police Department officer immunity bid. This is a story Larry that I wanted to ask you about. You go ballistic every time that I mention who appointed a particular judge. And here's an example of why I feel it's worthwhile to mention who

appointed them. This is from a courthouse news service. The first paragraph reads, “Swapping out a Barack Obama-appointed judge for a George W Bush appointee, a panel on the Ninth Circuit Court of Appeals on Wednesday reversed its December opinion that a Los Angeles police officer wasn't entitled to so-called qualified immunity at a deadly shooting at a Hollywood gym.” Will you please actually admit that the person that appoints the judge actually has something to do with how they rule in their decisions. Can you admit that?

00:15:41
Larry: I've always, on some level, admitted that judicial departments matter, but I try not to make it a team red versus team blue analysis. All federal judges take the same oath to the constitution of the United States. They are American judges, they're not Trump judges or Biden judges. And I believe that to classify them according to a political party only serves to diminish the faith in our judicial system. When you get assigned to a judge, I don't think the first thing you should ask yourself is, “Is this a Biden judge or a Trump judge?” But yes, it does matter who appoints the judges because the process funnels through the senators, the senior senator from the state. And when you have a process like that, well, a lot of states are under die-hard conservative senators. So, it's hard to imagine that an Alabama Senator is going to recommend to either President Biden or President Trump, a liberal lefty judge. But, a senator from Alabama might cause this to happen by the process. Like when you make the recommendation. If the president doesn't like the recommendation, the president doesn't have to appoint a soul. And you could have a situation of what happened in the Carter administration. And I believe it was for one of the Virginias. I don't know if it was West Virginia or Virginia, but we had a democratic president named Jimmy Carter. Have you heard of him?

00:17:08
Andy: I believe so. He might be something of a peanut person.

00:17:11
Larry: He was looking to get some more progressive federal judges and whichever one of the Byrds it was, it was Harry Bird or Robert Byrd was not gonna make a recommendation for a black judicial nominee. And Carter says, “Well, you can do what you want, but I'm not going to appoint anybody from the list. You'll just have vacancies in your federal judicial district until you decide to give me a list that I'm happy with. That's really all the president can do. But if the president were to nominate someone that had not gone through that process, the senator gives them a pink slip or a blue slip or some slip and all the senator has to do is say, “I don't want that judge,” and they are not going to be confirmed by the United States Senate. They're just not, that's one of the courtesies that has not died. And you're just not gonna get a federal judge appointed and approved to serve in a district in a state that hasn't gotten the blessing of that senator. This is really important when you elect people, not just to the presidency but to the United States Senate. You need to take into account that they have a heavy hand in who the judges are and yes, it does matter who the federal judges are, but I just don't want to call them team red and team blue.

00:18:24
Andy: Do you have any comments to add to that Guy?

00:18:27
Guy: I thought about maybe pleading the fifth here. I think that law has always been political and in recent years it's become much more political on a surface level. I mean, federal judicial appointments matter. That's why, for example, right now we're in the conservative swing on the Supreme Court. So I'll just pick on them. Federalist Society, that's why you have organizations, like that to sort of stack the federal judiciary with people that they like, with people that they, will sort of, they think are gonna rule along their lines and, I think they often do, but that doesn't mean that you're always gonna have a breakdown in terms of people on the left are always gonna go this way and people on the right are always gonna go this way. I think that's also especially apparent in cases having anything to do with the registry in particular, it creates strange alliances, so to speak. I do think it's important to consider the political nature of judicial appointments and, the law generally is becoming much more, I don't know what right word is, highlighted? I think that public confidence in the Supreme Court, for example, is at an all-time low. I don't think that's exactly an accident. I think that's a result of a lot of political machinations that have sort of been bubbling up. I tend to think it has more of an influence, but also it doesn't necessarily mean that judges are mindless drones either. I haven't seen this opinion before sitting down to record this podcast, about this ninth circuit and I’ll just say that qualified immunity is a terrible doctrine and should be completely abolished. But I don't want to get too far afield.

00:20:51
Andy: A little bit more of the story. Go ahead, Larry.

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Larry: I was gonna say that you're starting to sound like a liberal lefty getting rid of qualified immunity. You're gonna put our officers in continuous danger and society is going to unravel. But go ahead Andy.

00:21:06
Andy: A bit more from the story in an unusual twist. Circuit Judge Consuelo Callaghan was drawn to replace US District

Judge Gary Feinerman on the three-judge panel after the Obama appointee at the federal court in Chicago, who had served on the panel by designation, resigned from the bench late last year. In May, Callaghan voted sua sponte. I have no idea what that word means. Please someone explain.

00:21:33
Guy: That's of the court's own initiative you said it exactly the way I would. I don't know if you mispronounced it, but I say it the same way.

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Andy: Yeah, but you're the one that got schooled on this stuff. So, I will take it that I'm right.

00:21:48
Larry: You are correct and he explained it exactly as I would have. It's when normally a party is gonna make a motion but the court, on its own motion, which is the legal term that you would see, that when the court does something without a motion from the party, it's referred to as sua sponte.

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Andy: In May, Callaghan voted sua sponte with Circuit Judge Daniel Bress, a Donald Trump appointee who had dissented from the majority's opinion against the LAPD officer to withdraw the December decision and to reconsider the appeal of Officer Edward Agdeppa, A-G-D-E-P-P-A. That is a lot of consonants all squished in there, Officer Edward Agdeppa. Circuit Judge Morgan Christian, an Obama appointee who had written in the previous ruling, had voted against reconsidering and dissenting in the new 2 to 1 opinion. So, what does this ultimately mean? It's kind worded weird to me, Larry, that it says who got replaced by whom? And now what. I no longer understand who's at risk. Is the officer now at risk?

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Larry: No, the officer just got protected. The district judge and the three-judge panel had said you're not entitled to qualified immunity. And so now, with the replacement of the so-called Bush judge, the new panel comprised of a different judge rather than having 2 to 1, you have a different 2 to 1 outcome and they did it to a sua sponte, meaning that apparently nobody asked them for that reconsideration. But the judge on the losing side must have had angst about it and decided, "I'm going to go back and revisit this now that we have a different judge on the circuit." And so now the officer has gotten away with whatever the underlying claims were because he's immune. He has been granted qualified immunity.

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Andy: Very well. Anything before we move out of here Guy that you'd like to comment on?

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Guy: Not to jump on qualified immunity too much, but for a basic primer, it's just a court-made doctrine that for anyone interested in learning more about qualified immunity and reasons why it should be abolished, I know Cato Institute has a lot of good resources, and I think Institute for Justice as well. They have a lot of good resources directed at qualified immunity. Essentially what it does is a lot of lifting to protect cops and other government agents who violate people's constitutional rights. Such that if the right has not been clearly established prior to the lawsuit, then they, essentially, "get away with it." And that's not even, of course, getting into the weeds of [section] 1983 cases against police officers and, even police officers who are held accountable, those ultimately who don't get qualified immunity. The reasons for all the various problems and incentives that go with, for example, the damages to plaintiffs being paid out of taxpayers, insurance pools, as opposed to coming out of the officer's pocket, but I don't want to get too far afield. I'll just suggest anyone who wants to learn more about qualified immunity can check out those organizations. And I think it's bad. That's my opinion.

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Larry: Let me add just one more quick point. If you truly, as an audience listener, believe that qualified immunity is bad, then you're gonna need to kind of convince your conservatives that they would like to see it altered because the biggest pushback we get as liberal lefties trying to diminish and abolish qualified immunity is from the right. So, if you believe that officers should be held accountable, then you need to help us convince the conservatives that that's where this issue is resolved best. This is an invented doctrine, and conservatives claim that they don't like for courts to legislate from the bench. And Guy is correct. That's exactly how this came about. It was an invention that came in the civil rights era when there were so many abuses by the police. And the court said, "If they meant well and there was nothing that they broke, it was clearly established." I mean, we can't hold officers responsible so let's help move conservatives towards this viewpoint that we'd like to see this amended or abolished.

00:26:37
Andy: Next on the docket is an article that came from NACDL, which is the National Association for Criminal Defense Lawyers, applauds US Sentencing Commission a vote on retroactive reduction for many incarcerated individuals. There was a press release from NACDL which came out a few days ago. It states the nation's criminal defense bar applauds the US sentencing commission's

August 24th vote to make retroactive the recent amendments to sentencing guidelines that permit targeted evidence-based sentence reductions. As a result, beginning on February 1st of 2024 courts can begin resentencing certain currently incarcerated individuals who could be eligible for reduced sentences. Guy, would you be so kind to tell me what this means?

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Guy: I haven't done a deep dive into these specific amendments, and maybe Larry can chime in , but what I can say, generally is that at the federal level, sentencing is kind of done by way of sentencing guidelines. There is a whole big thick book (United States Sentencing Guidelines manual) that is put out by the United States Sentencing Commission, which is a creature created by Congress of sentencing guidelines for the entire country. The goal of the federal system is to sort of promote sentencing uniformity throughout the country. So instead, if two people are convicted of the same crime in different parts of the country and get different judges, the sentencing guidelines, which are not mandatory on federal judges, they're advisory, but ideally, they're gonna get roughly the same sentence is kind of the idea.

And the sentencing guidelines themselves, when you go through them and when you apply them to a case, for example, for a defense attorney, preparing for sentencing, it's a lot like doing your taxes. Except instead of figuring out how much money you have to pay the IRS to avoid having the sentencing guidelines applied to yourself, the output is a term of months. And you can kind of think of a big chart. On one axis of the chart is a person's criminal history, and they assign points based on criminal history. And then on the other axis of the chart is a number of months. It's based on sort of the offense level that is assigned by the United States Sentencing Commission and they make amendments to these guidelines all the time.

Sometimes these amendments are retroactive, meaning that they apply to cases that were final before the amendments were passed and sometimes they don't apply to them retroactively. So, what I know about these amendments in particular is that they do provide a little bit of room, that they basically show a little bit of leniency. And they're running them retroactive such that people can go back to court and say, “Hey, I was sentenced under this particular guideline that has since been made more lenient and the Sentencing Commission is saying that it runs retroactively. So, judge, I would like you to sort of give me some of the benefits of this amendment.” But like I said, I have not done a deep dive into the actual text of the amendment, so I don't know if Larry has or can speak more intelligently to what those amendments are exactly.

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Larry: I have not either. I would just go by the article that the commission estimated that 11,000, roughly 11,500 incarcerated individuals will be eligible for a retroactive sentence reduction under the status of the amendments. And that's a good thing. I always hate when they have to go back to court because of trying to find the resources and trying to get attention to your case. But at least if this is an accurate assessment, there will be thousands of people who could see a release much sooner.

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Andy: I recall something similar during the Obama administration where there was a big disparity between crack and powder cocaine.

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Guy: I believe it used to be 100 to 1.

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Andy: OK. Yeah, it wasn't like you get five or three years. It was 100 years and that the route to relief was through presidential action. Is that gonna be the case here too?

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Larry: It looks like the action is gonna go through the federal judge that sentenced them the way I'm reading this article, but I haven't done a deep dive either.

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Guy: Yeah. And I just clicked on the link in the article to actually see the text of the amendments. And of course, it's giving me the entire 100-page, sort of track changes, document with the amendments. So, I'm not sure we're not gonna try to figure it out.

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Larry: We're gonna try to get into it.

00:31:46
Andy: You should be done with it by the time I finish reading this next little segment [Guy: Maybe].

00:31:50
Larry: The point of this was to try to show people that are in prison that there is hope for positive reform and that there are things moving in the right direction.

00:32:01
Guy: Absolutely. I mean, I do think it's sort of cooled off a little bit, but I think the general trend is still towards, in recognition that we live in a country that is afflicted by mass incarceration. And I think there is still a lot of appetite for reform, at the federal level, at state levels. I think even conservatives are getting on board, like Larry had

mentioned earlier. One thing that conservatives often care a lot about is how much things cost We're spending a lot of money on keeping people in prison; especially people who are aging. And, of course, I'm sort of a liberal lefty. So, what speaks to me is, not keeping old people who have health issues in prison. But, as Larry said, that doesn't really work on conservatives and the money angle does. So, yeah, I think that there's definitely still an appetite for criminal justice reform and, we just got to keep that ball moving forward.

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Larry: Well, Guy, now when I say that, that is actually not what I believe because it's rhetoric from the conservatives. They really don't care about the money when it comes to things that they prioritize like mass incarceration and police resources and prosecutorial resources. But I try to hold them intellectually honest when I'm negotiating with a conservative. I remind them of what they state publicly in their campaign. And I tell them, "What I have admired about you through the years is that you have always been a fiscal responsible lawmaker. Now, let's do a little bit of that here." We have the highest rate of incarceration and I go around right down the list, and I say, "If conservatism really means anything with intellectual honesty, you would be in favor of looking at these costs as well." But they really don't mean what they say.

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Guy: Well, yeah, that's certainly true. I mean, that was an issue that I've run into and working on civil commitment programs in states that have those. They are enormously expensive. And you know what the research has shown us so they don't really deliver any benefit in terms of public safety. But, when it comes to punishing people who have been convicted of sex offenses, I wonder, there's that saying, "There's no check we won't write. "

00:34:29
Larry: That is correct.

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Andy: To close things out, the US District Judge Carlton W. Reeves, who is the chair of the commission, said our decision today is one that brings hope to thousands of currently incarcerated people and their families. We listened to a full spectrum of views and considered the full costs associated with incarceration, balanced with the time needed to review petitions and prepare for a successful reentry. So very good. We have now made it to our main event which has been freaking fantastic. We have a time before a Guy has to step out. He said he has a hard break at eight o'clock.

00:35:05
Larry: Actually, we have this little Wisconsin GPS, and we can try to make it really fast. [Andy] I thought that this was it. No, the main event is the case from Montana.

00:35:15
Guy: Well, I can probably stay on for a little bit longer.

00:35:19
Larry: Let's try to do this quickly on the Wisconsin GPS.

00:35:26
Andy: Sorry, I jumped the gun. We have an article about GPS monitoring. It's related to our recent discussion about the Wisconsin Supreme Court's ruling in the Rector case and it says the State Department of Corrections has begun releasing certain PFRs from lifetime GPS tracking after the Wisconsin Supreme Court decision undermined the agency's justification for keeping people on electronic monitoring beyond their sentences. The department confirmed to the Cap Times that it was in the process of identifying everyone who was forced to wear the GPS device for the rest of their lives as a result of a now debunked interpretation of state statute by former Attorney General Brad Schimel. By the way, what did you think about Schimmel's argument and the AG offices under his leadership?

00:36:13
Reagan Soundtrack
Run by the strangest collection of misfits looney tunes since the advent of The Third Reich. [roaring applause]

00:36:22
Andy: Let me set it up a little bit for those who are not familiar. In May, the Wisconsin Supreme Court ruled in favor of a defendant named Corey T. Rector who was challenging an attempt by the Department of Corrections to have him register for life as a PFR. Rector was convicted in 2018 of five counts of CP. He was sentenced to eight years in prison and 10 years of extended supervision in Kenosha County.

00:36:50
Larry: I fell asleep here. The Supreme Court decision said, "The plain and unambiguous meaning of the phrase, separate occasions means that convictions occurring during the same hearing do not constitute convictions on separate occasions."

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Andy: The article states as of Tuesday, it remained unknown precisely how many offenders would get relief from wearing the GPS monitoring. But the Cap Times previously reported that over 180 people received a notice from the

department in 2018 saying that they had to wear the tracking bracelets for as long as they lived. The state has continued the practice in the five years since that report. So, what's happening now?

00:37:31
Larry: Well on Tuesday, the Department of Corrections began sending technicians out to remove the GPS devices from the offenders that were ordered to wear them. And the article stated that the newspaper found that 624 people were wearing lifetime GPS bracelets in the spring of 2022. They were no longer under any of the Department of Corrections Supervision. It's a significant number, somewhere in the 600 to maybe 800 people were being forced to have these devices attached to them and they were off all supervision, and they only had one case with multiple accounts. Remember this is from a government under Scott Walker that claims that they are for fiscal responsibility and keeping the cost of government down. But I mean, that helps make the point that I was making earlier.

00:38:21
Andy: Just details, Larry, just details. And just to refresh people's memory in September of 2017, former AG Schimmel issued a formal opinion saying that people who are convicted of multiple counts of PFR type offenses were essentially, repeat offenders and therefore subject to Wisconsin's special bulletin notification statute which required people who had a PFR offense conviction on two or more separate occasions to register for the entirety of their being on the planet. Schimmel said that the offenders convicted of multiple accounts of a PFR type offense needed to wear the lifetime GPS bracelets as part of their PFR registration. Schimmel interpretation was that multiple counts of a sex offense was equal to repeating the offense.

00:39:07
Larry: And as the article explains, nearly every conviction of a PFR crime involves multiple counts, particularly child pornography cases where each image can be considered an additional count. Generally speaking, a person convicted of all the counts that they were charged with is not considered a repeat offender if the convictions occur on the same day in the same hearing for the same offense. Nevertheless, the Department of Corrections acting on Schimmel's opinion sent letters to hundreds of former offenders, many of whom had already completed their prison parole sentences and they were no longer under supervision. The letter said they had five days to put on the GPS monitor bracelets and wear them continuously. And like I said earlier, keep in mind that this was the conservative fiscal responsibility rhetoric of the government of Scott Walker and Attorney General Shimel. And since we're kind of pressed for time, let's just go ahead and move to the main event. But that's good news for people of Wisconsin. So now we're out to Montana.

00:40:51
Andy: All right. Very good. Sorry for jumping the gun there. Didn't mean to. You put this case in here tonight. It's named Montana versus Richard Hinman. It was decided by the Montana Supreme Court back in June. So just like a couple months ago in your analysis, you referred to it as a fantastic win. Why are we just now discussing a fantastic win almost three months later?

00:41:14
Larry: Because we just learned about it,

00:41:16
Andy: I always ask you this, but how is it that people make it all the way through the entire legal process and never reach out; do a Google search to see anybody that handles advocates? Anything of that sort? How is it that they stay without ending up in contact with our people?

00:41:33
Larry: I don't know, but [Andy: I don't understand that] I can tell you one thing when you get into this, you'll see that they're listening to our podcast as we go through this. But go ahead.

00:41:41
Andy: All right. Well, the question and issue before the court was, “Did the retroactive application of the Sexual or Violent Offender Registration Act violate the prohibition against ex post facto punishment in Article Two Section 31 of the Montana Constitution?” Since you were excited. I'm assuming the outcome was good.

00:42:03
Larry: I am excited, and all of our supporters should be excited as well.

00:42:08
Andy: Let's get this set up for our people. The case arose from an appeal filed by Richard Hinman. Hinman appealed an order entered in a trial court in 2019. The district court denied his motion to dismiss the charge of failure to register. Hinman was convicted of an offense in 1994 and discharged his sentence at the time. Montana's PFR Registration Act is known as the Sexual or Violent Offender Registration Act. S V O R A (SVORA) required him to maintain registration for 10 years and only to submit to an annual verification through the mail. Did I get that basically right?

00:42:46
Larry: You did.

00:42:49
Andy: Very well. But as is so common in most states, the Montana legislature amended the SVORA requirements to include more onerous steps and applied them retroactively because it's a civil regulatory scheme and it's not punishment. They applied them retroactively to previously convicted registrants. When Hinman was charged with failure to register in 2019, he argued that the charges should be dismissed because the amended SVORA requirements had evolved and now rendered the statute and an unconstitutional expo factor punishment. What did the district court do with the motion?

00:43:25
Larry: Oh, well, the district court denied his motion so he chose to plead guilty to the charge while reserving his right to appeal. And I'd like for Guy to briefly explain the machinations of pleading guilty while preserving the right to appeal. I understand it. It does not occur routinely, but it can happen. Have you had the experience in your practice to plead someone and then reserve the right to make a constitutional challenge later?

00:43:49
Guy: The procedures differ state by state. But the basic idea for listeners is this: when you plead guilty, you generally give up, essentially all or most of your appellate rights. But there are certain circumstances when it makes sense to you have an argument that you want to preserve, that you want to argue before the court of appeals. But at the same time, if you go through a trial, it's just gonna be a big old waste of everyone's time. This often comes up like in the criminal defense context, in the case of a motion to suppress, for example, if all the evidence gets tossed out, then there's gonna be no real point of having a trial or if the evidence comes in, there's also no point in having a trial because there's really no other defense. So, if someone loses a motion to suppress, in some places they call it conditional guilty plea where person will plead guilty. But say I want to reserve my right to appeal the denial of motion to suppress or in this case, it was a motion to dismiss. And I want to take that upstairs to the appellate court and if the appellate court reverses, then I want to be able to vacate my guilty plea and we'll be back to square one. So that's it in a nutshell, how that procedurally works.

00:45:11
Larry: See, that was a good concise answer. Thank you,

00:45:15
Andy: Larry. You've maintained that the states cannot help themselves, they just can't "hep" themselves and they keep increasing the obligations of registration.

00:45:24
Larry: You're correct. States appear totally unable to help themselves and they continue piling on more and more requirements that transform what was often originally a relatively benign regulatory requirement into something that's clearly similar to probation in some cases, even worse than probation, but they just can't help themselves.

00:45:44
Andy: Nearly all Supreme Courts have ruled on registration since Smith versus Doe. What had the Montana Supreme Court decided?

00:45:53
Larry: Well, you're correct. I think every state I've researched has. Their courts have interpreted that registration is civil and regulatory. But in 2003, the Montana Supreme Court issued a decision in a case called *State vs. Mount*. And they found that the intent and the effect SVORA was not to punish people convicted of sexual offenses. Rather the act served as a regulatory scheme collecting and disseminating information meant to reduce recidivism and help the public mitigate potential harms. But that was then and now we move forward to 20 years later.

00:46:29
Andy: Yeah, I noticed that. Back in 2003, the court gave a passing nod to the inclusion of reducing recidivism as part of the purpose of SVORA. Now they have modified their view. In this case, they stated a growing body of research into effectiveness of PFR registries has cast significant doubt on their capacity to prevent recidivism and citing a 2013 study. What else has changed since they issued their decision in Mount back in 2003?

00:47:02
Larry: Well, before we get to that, I'll mention that this is not his first registry violation. He had pled guilty earlier to a failure to register and that time he paid a fine because it was not viewed nearly as serious as it is now. But by the time we get to where we are now, there had been amendments in 2007, 2013, 2015, and 2017. These amendments included many new obligations for level two PFR such as Hinman. And this is a far different registry than what was originally acted back in 1994 and was ruled on in the Mount case. And just to highlight some of the stuff, originally, the person was automatically removed after 10 years, no petition. Now, 25 years must pass without re-offense or any failure to register and now they can petition to be removed and level three offenders are not able to be removed at all. Residents must now supply law enforcement with DNA samples, email addresses, social media names, vehicle descriptions, license plate numbers, social security numbers and workplace and school addresses. That wasn't required back then. Law

enforcement is empowered to supply most of the information to the public. And that was not a part of your conviction. Registrants must now update their addresses, work, and school information within three days of a change. They weren't required to do it back then. All updates as well as periodic verification and photographs must be conducted in person. Back then it wasn't. Transients are required to check in with law enforcement monthly and any time registrants leave the county of residence for more than 10 days, they must re-register in whatever county they travel to and re-register upon returning home. Those are major, major changes and that is what makes this case so different than the Mount case.

00:48:51
Andy: And this is what you mean when you say not to focus so much energy on *Smith v Doe*. You say focus squarely on the Kennedy Mendoza stuff with disabilities and restraints.

00:49:03
Larry: Correct. I say that because that is the winning recipe. Hinman, he didn't focus and get all obsessed over 2003 and Smith v Doe, and all that stuff. He went for the GUSTO. He said, maybe it was constitutional then, maybe it was. But I'm telling you now that this is a whole different version and I'm distinguishing what we're facing now, and the court noted that Hinman cited a growing body of case law in other jurisdictions regarding the constitutionality of applying several laws to Montana's retroactively. And he pointed to the breath of collateral consequences of SVORA that are apparent today but did not exist or they were not well understood in 1994 or 2003.

00:49:48
Andy: And as usual, the state argued that the court should hold fast to State versus Mount, maintaining its reasoning and outcome as applied to the present SVORA provisions in Hinman's case. The court was not amused. The court stated the basis for our analysis of whether the present SVORA is punitive does not arise in a vacuum but rather exists within a larger jurisprudential context. *Mount,* for example, found its footing in the US Supreme Court's reasoning about an Alaskan PFR registration law. That case is Smith versus Doe, which we all know in Smith, the US Supreme Court held that Alaska's law did not violate the expo factor clause in the Federal Constitution because it was not punitive. Were the state courts bound to walk in lockstep with Smith versus Doe?

00:50:35
Larry: Well, not in my opinion because I obsessed over page 100 of Smith versus Doe where it says we find this constitutional because it does not impose any disabilities on where a person can work. It does not impose any restraints on all these different things that it goes into. So, I reverse that and flip it over in my head. I say, “Well, if they say we're finding it constitutional because it doesn't do these things, then I say, hm, that means that they would have possibly found it unconstitutional if it did do those things.” So therefore, I focus on that fact beyond all else and everybody focuses on that recidivism, and they go crazy about it, but that wasn't why Smith versus Doe was decided the way it was. But the challenging party would have had to distinguish their case as he did significantly, and this was done very well in my opinion.

00:51:27
Andy: And as noted previously, that same year, Mount addressed Montana's SVORA, which was then relatively similar to the Alaskan law. In that decision, the Montana Supreme Court explicitly adopted the US Supreme Court's analytical framework and the intense effects test. Can one of you legal gurus, explain that test, please?

00:51:46
Larry: Well, I'm gonna do it and then let Guy expand on it. It's the 1963 case Kennedy versus Mendoza Martinez. They were determining if a regulatory scheme that had been labeled, ‘regulatory’ was, in fact, regulatory and they put forth 7 factors. They did not assign any particular weight to any of those seven factors to go through. And the one I obsessed over is the disabilities or restraints. I could not list them all off the top of my head, but they don't talk about recidivism and the Kennedy Mendoza intent effects test. And when I go through those seven, I focus on that one the most heavily. I'm going to always focus on the disabilities and restraints. But when you go through those seven factors, does it or has it been historically regarded as punishment? That's one of them. Does it impose a requirement of scienter that's another one and on and on and on. I can't name all seven and most of the people when they read that one about scienter, you have a major disagreement with the lawyers about what that means. And I believe that it means that in order to be subjected to the regulatory scheme, if it requires a finding of scienter then it's not a true regulatory scheme because in order to be convicted in most states, you have to know you have to register, you have to have knowledge. But the lawyers in some instances argued, “Does the original sex crime require a finding of scienter?” And I said, “No, that's not what it means, in my opinion.” But no one knows because the Supreme Court came up with those factors. No one knows for sure. But I don't argue it that way. I argued from a different point of view than most lawyers. But yes, there are seven factors and Guy, you can try to expand on the ones I missed if you like.

00:53:36
Guy: I guess I have a couple of things to add. I mean, one kind of interesting factor that Smith versus Doe in state

courts is that after Doe lost at the Supreme Court, then they went back to State Court and brought pretty much the same case under Alaskan state law under the state constitution. And they won on that case. The Alaska Supreme Court found that it did violate expo facto under the state constitution, even as the US Supreme Court said it didn't under the federal constitution. Um And as Larry pointed out in Smith vs. Doe, they borrowed this test from *Kennedy V Mendoza Martinez* and they laid out these seven guideposts for determining whether or not a statute that is ostensibly civil in nature is in fact punitive. Basically, if the legislature intends to pass a civil law, it will examine these factors, these guideposts which I believe they've said are not exhaustive. So there could be other analyses that are helpful for determining it. But there's several of these guideposts and I will push back a little bit on something that you said Larry. They don't expressly mention recidivism. But two of the factors are whether a law has a non-punitive purpose and the excessiveness of the law in relation to that purpose.

And the way I look at it is that recidivism is related to those points because Justice Kennedy, who wrote *Smith versus Doe,* of course as you mentioned, everyone focuses on the mistake that the Supreme Court made about recidivism rates. But it's relevant because if recidivism rates are, in fact, high, then, of course, there's less excessiveness in relation to a non-punitive purpose, right? But if recidivism rates are low, then I think the analysis, would trend in the other direction. And I'll also just say about the Mendoza Martinez test. I think it's come under increasing criticism. If you look Dimea, the Supreme Court case where Gorsuch offered a concurrence and he kind of cast a little bit of skepticism on this notion of a civil criminal divide, he highlighted that it's become increasingly artificial or academic, just this whole notion that like you can neatly put these laws into 1 category or another. And I guess we have, to a degree, and that's what the Mendez and Martinez test tries to do, is to figure out if this law is civil or criminal with the big question being whether or not, the law is actually punishment so as to trigger ex post facto prohibitions, but without delving too deep into the criticism of the Mendoza Martinez test. I'll guess I'll just leave it there.

00:56:49
Larry: Yeah, I appreciate that. In Mount, the Montana Supreme Court reasoned that a scheme which merely increases the accessibility of already-public criminal records information and requires those with such records to periodically mail in address verification is not as onerous as criminal punishment and can fall on the civil regulation side of the line. The court stated, "Our analysis in Mount of whether SVORA imposed an affirmative restraint or disability on registrants noted that verification by mail is a minor and indirect restraint and does not affect someone's physical movement." That was on page 9, so clearly, he did a great job of distinguishing the difference of how the registry existed.

00:57:33
Andy: And I know Larry that in this part, they actually copied it straight from the transcript of the RM podcast that we have here. You've pontificated for years that things have dramatically changed and the registry is far more than simply making public information about the prior conviction.

00:57:48
Larry: Well, I have indeed, and I love that they're listening to us because the court continued. But it is one thing to have your already public criminal information made accessible and periodically update your address with record keepers, which is what young men are forced to do that have to register for selective service. It's easy to extinguish that argument that the registry simply makes the history of the conviction public. What we're working with now has nothing to do with your conviction, who you're living with has nothing to do with the original conviction, your present occupation and your licenses that you may hold, have nothing to do with your original conviction, the vehicles you own and operate, have nothing to do with your original conviction and the registry if it only disseminated the conviction information and you were required to take no more action, I would say there would be a good chance it would be constitutional, but that's not the registry of today.

00:58:37
Andy: What about if all of that information was then just left in the hands of law enforcement?

00:58:40
Larry: Oh, I think the biggest problem we can reach for is to have a declaration that shaming people and this opinion does relate and kind of touch on that, that this is nothing more than a shaming mechanism. But yes, I would love to see a law enforcement only registry if we're gonna have one at all.

00:58:58
Andy: The court went on to state. "It is another [legal analysis] to be placed under a probationary surveillance system in perpetuity which is designed to facilitate social ostracism. It defies common sense and sound judgment not to view the latter situation. The SVORA scheme since 2007 serves as punishment for a person's sexual crime. All the features of the act that supported our decision in Mount have changed dramatically since the law's amendments in 2007, 13, 15 and 17." And I'll let you read their closing.

00:59:31
Larry: Before I read their closing, I stumbled all over the thing about scienter, that legal term scienter, but we don't require a finding of scienter when you get a traffic ticket. We don't care if you knew what the speed limit was. There are no lifelong altering consequences coming from that finding that is truly a civil regulatory scheme, although you may go to criminal court. But for something where we don't care, there's no lifetime consequences, you don't need to have knowledge, but failing to comply with registration does require knowledge that you have a duty to comply. And that's one of the factors of the seven I think weighs in our favor. But the lawyers don't know how to articulate that, and they focus looking back in the mirror. They say, "Well, some crimes don't require a finding of scienter. Like, for example, if you look at statutory sex crimes, whereby merely they're criminal by age and there's no proof of knowledge of age." And I say, "Well, quit looking at that, look at the right way, the right way is to look at it the way I'm looking at it and I don't know a single state regulatory scheme where you're forced to register, it doesn't require that you have knowledge of that duty to register." So that's the point I was trying to make. But anyway, and concluding, the court said, "We conclude that the SVORA structure in place since 2007 is punitive and therefore cannot apply retroactively under the expo facto clause." Unlike the two pre-2007 SVORA, the law totally places onerous lifelong affirmative restraints on registrants that significantly hinder their liberty and deprive them of privacy. And thank you for listening to our podcast because this is what we have said for years.

01:01:13
Andy: Very good. Any closing comments before when we move on from this? Guy, are you still there?

01:01:27
Guy: I think it's a great decision because, overall, without getting into the weeds and the legality of it, it's just that it is one of the frustrating things about litigating in this area of the law, as I'm sure a lot of the listeners know. It feels a lot of the time like judicial gaslighting. Like the court, to borrow an expression from Judge Judy, the court's peeing on your leg and telling you it's raining, when they say no, this isn't punishment. And this court just calls a spade a spade and that's always really refreshing and I think that when it comes to this type of litigation, litigation about ex post facto, I think a lot of the litigation that's going on right now would probably dry up if courts would just be like, yeah, you know what it is, punishment and then we can go on and argue about other things. It's another decision that's going to be very helpful, I think, moving forward for another couple of cases I'm working on. I'm certainly glad to see it for that, but also just for the people of Montana and of course, Mr. Hinman himself.

01:02:50
Andy: For both of you, gentlemen, I have a question, and this is gonna nitpick about some words that we read along the way and it was back where we had an a in the brackets, "a growing body of research into the effectiveness of PFR registries has cast significant doubt on their capacity to prevent recidivism in citing a 2013 study." My question is, is this wordsmithing to the point that they're actually talking about misreporting of recidivism rates? So, the registry can't impact a misreported recidivism rate and just the way that they worded that seems like they're not actually casting doubt about the capacity of the registry to prevent recidivism, that the rate of recidivism is misreported.

01:03:39
Guy: I was just gonna say what they're saying there, that the "growing body of research" has sort of become a little bit of a mountain. There's an expert who does a lot of litigation in this area, Kelly Socia, and he's authored a number of important studies in this area. He has an analogy that I've stolen from him and I have used in various places. It's a good one, asking what kind of a registry is gonna be most effective at preventing sexual recidivism is a lot like asking the question what color should I paint my car so it can go faster? Can I give it a racing stripe? Will that make it go faster? And to me, when someone says the registry just doesn't have capacity, like that's not what it's meant to do. It just doesn't have that ability. And that is my understanding of the current state of the research done last year or a last couple of years. There's a big meta-analysis that was published on half a million individuals and found that, yeah, registries have absolutely no impact on the ability to prevent recidivism. So, I don't think they're doing any sneaky wordsmithing. The court is very much calling a spade, a spade. And I think they're doing the same thing with the research here.

01:05:13
Larry: I agree. I don't think that they're wordsmithing at all. I think they're casting doubt about the efficacy of the registry to reduce recidivism.

01:05:24
Andy: Well, very good. I'm gonna mute you for a moment Guy because you're echoing back. We are going to close things out. I want to say thank you. We had a whole bunch of people in the live stream tonight again. We record at seven o'clock on Saturday nights and, there's nothing else going on, Larry. Right. We're getting out of here.

01:05:43
Larry: We're getting out of here. We're late.

01:05:47
Andy: We are just a few minutes over. I want to thank you Larry for all that you do [Track from Movie MacArthur: I agree with you entirely, that is why I am here]. Anyway, you can find all the show notes over at registry matters dot co and the transcripts are at FYP education dot org. I definitely want to thank Guy Hamilton Smith for joining us as well and I think we're done. Anything else?

01:06:17
Guy: Thanks. Thanks for having me.

01:06:19
Andy: I appreciate you coming.

01:06:21
Guy: Sorry, I ran my mouth a little bit. That's what you get for having a lawyer on.

01:06:29
Andy: Thank you very much Guy for coming in and Larry as always, I appreciate all that you do and I couldn't do without you and I hope you have a great holiday weekend.

01:06:38
Larry: See you next week.

01:06:39
Guy: Bye. All right. See you all take care.

01:06:49
Announcer: You've been listening to FYP.

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