

ACLU-WV Civil Fights

5. Kim Davis Protection Act? (WV Legislative Session Preview)

One Nation Under Pod

[Intro Music]

JAMIE: Hello, this is Jamie Lynn Crofts and welcome back to Civil Fights. In the new year, we're going to try to be a little more regular with our episodes, so please keep an eye out.

Today I am here with the ACLU of West Virginia's Policy Director, Eli Baumwell. He's going to give us a little preview of some of the things we're going to see in West Virginia's Legislative Session this year...which is something I'm always terrified for [laughing]

ELI: And I'm always a mix of terrified and excited. It's a fun time.

JAMIE: So, Eli, what do we have to look forward to in the next couple of months?

ELI: Well, the next few months is going to be pretty busy for the ACLU of West Virginia, I expect. We are introducing a number of pieces of legislation ourselves, and we're also anticipating some major fights on a number of key issues that we keep close track of.

JAMIE: So, what are some of the broad topics we're going to see before we get into the nitty gritty?

ELI: Well, we're going to see a lot done on criminal justice reform. In West Virginia, we've been dealing with a crisis in correctional officers; we don't have enough. We have too high of a prison population, they're leaving, they're inexperienced, and it's causing problems. So, there's already a lot of efforts underway to reform criminal justice. We're going to be trying to spearhead some of those ourselves. We're probably going to see a tax on both LGBT issues as well as a tax on reproductive rights and reproductive justice, so we can expect some big fights there.

JAMIE: Those are always great!

ELI: It seems like we see more and more of those every year, unfortunately. We'll probably also see things attacking public benefits, particularly digging into due process issues and privacy issues; we're going to look at that.

JAMIE: Are they going to try to drug test more people again?

ELI: It's a possibility, it's something we've been hearing about.

JAMIE: Oh, goodie.

ELI: Yep, it'll be interesting.

JAMIE: So, let's dig in a little bit deeper. You mentioned LGBT rights and I know in the last couple of years, we've seen RFRA (Religious Freedom Restoration Act) introduced and debated on, but we've also seen non-discrimination protections be introduced by a bipartisan group of people. What do you think is coming for us in 2018 as far as LGBT rights?

ELI: The rumor circulating the capital hallways have brought up four potential pieces of legislation that we might see. One thing we're looking at is what's called a Pastor Protection Act. This can be something that's very simple; just a symbolic bill for people who want to say that they're interested in religious freedom, and it can really just say that pastors don't have to – aren't forced to marry people that they don't agree with, which is already the law.

JAMIE: Right, I was going to say, Eli, isn't that what the First Amendment dictates already?

ELI: Absolutely, and in fact, if we ever had a situation where a pastor was being forced to marry someone that they didn't want to, we would probably be the first ones defending them. Unfortunately, we have seen that in other states, sometimes these get amended later on in the legislative process and expanded to include people like state employees, so it would be essentially what happened with Kim Davis...they'd be exempted...

JAMIE: The Kim Davis Protection Act?

ELI: Exactly.

JAMIE: Ugh.

ELI: So, we've got to keep a close eye on something that like that if it gets introduced.

JAMIE: Definitely!

ELI: Another thing that we could be looking at is what we call an Abolishing Local liberties Act. That's a sneaky way to undermine these non-discrimination ordinances that we've seen passing throughout the state by essentially saying that municipalities can't pass these ordinances, and any of the ordinances that have been passed are void.

JAMIE: That sounds strikingly similar to a United States Supreme Court case from the 1990's out of Colorado.

ELI: Well, you're our legal director. Maybe you could tell us about it.

JAMIE: [laughing] So, in the 90's, Colorado passed a law that banned cities from being able to enact their own non-discrimination ordinances. This went up to the Supreme Court. This was well before DOMA or bans on same sex marriage were held unconstitutional. The court in the 90's actually held that Colorado's law was unconstitutional, so I would just like to remind anyone listening that that exists [laughing].

ELI: And hopefully the legislature will take that under advisement. It would certainly make my job a little bit easier. We also may be looking at another RFRA.

JAMIE: Oh...

ELI: Yep. Now, personally, and based on what I've been hearing, I think that's a little less likely only because that was such a fight before and it wasn't able to pass before, but we are gearing up to prepare to fight that battle again if we have to.

JAMIE: Great, that was really fun and not at all terrible the last time around...

ELI: Well gear up, because the one we're probably going to see is going to be just as bad. The one we're probably anticipating seeing is the Bathroom Predator Myth Bill, sometimes calls the Transgender Bathroom Bill.

JAMIE: [sighing]

ELI: Yep, so it's as bad as that. And for people who aren't familiar, this essentially says that people have to use the bathrooms that align with their given sex at birth.

JAMIE: So, like, do I have to start carrying my birth certificate around with me, or what's the deal?

ELI: Well we're not entirely sure how something like this would actually be enforced.

JAMIE: This sounds familiar. Didn't we see something similar come out of North Carolina recently?

ELI: We did! And it caused them a whole world of headache and trouble and economic loss; things that we are hoping that our West Virginia legislators are keeping in mind as they even potentially consider something like this.

JAMIE: Good.

ELI: Yeah

JAMIE: Not good [laughing]

ELI: Not good, and it unfortunately gets even worse from there, at least in our defensive work.

JAMIE: Oh, what else is on the plate?

ELI: Well, like I said, we'll be looking potentially at some reproductive rights issues. Notably we're looking at Medicaid funding for abortion. West Virginia is one of the few states that still allows Medicaid funding for abortion.

JAMIE: Why is West Virginia one of those states? I wouldn't think that would be the truth.

ELI: Well, West Virginia had a supreme court case that examined this issue, this exact issue, and the court said that the equal protections in the West Virginia constitution are greater than the equal protections in the U.S. constitution, and that if Medicaid can cover things like birth, then it has to cover, essentially the opposite end of that spectrum, which is abortion.

JAMIE: That makes logical sense.

ELI: Makes logical sense and makes legal sense.

JAMIE: Yep. And to our listeners, I was just kidding. I obviously knew that case. It is *Panepinto v. Women's Health Center of West Virginia* [laughing].

ELI: Absolutely. It's a good case. It's good case law, and unfortunately what we're seeing is because this is under the West Virginia constitution, one of the things that's really been brought up is a constitutional amendment.

JAMIE: A constitutional amendment. So, they want to write discrimination against poor women into West Virginia's state constitution, is that what you're telling me?

ELI: That's exactly what I'm telling you.

JAMIE: Well, you know, it's almost as much fun for me when the WV legislature talks about reproductive rights as it is when they talk about LGBT rights, and I'm wondering if my body will compared to any kitchen appliances this year.

ELI: It's been known to happen in the past.

JAMIE: [laughing]

ELI: No, this would be a really bad fight, and unfortunately, this is really being driven very cynically, too. This isn't even about abortion. Certainly it doesn't do anything to change abortion, other than make it harder for poor women to get that. To pass a constitutional amendment in the state of West Virginia, for those who aren't familiar, you need two-thirds majority in both chambers - so two-thirds majority in both the senate and the house - and then it has to pass in a popular referendum, which means that it would wind up as a ballot initiative. And the most likely time that would be would be the November midterm elections. Now, a lot of Republicans are afraid that they're going to see some big hits this November based on some of the previous elections we've seen throughout the country, and they see this primarily as a way to drive up turnout for their base.

JAMIE: Alright, I'm going to get up on my soap box for a minute here because generally, abortion restrictions do affect poor women and working class women more than rich women, because if a woman who is well off needs or wants to have an abortion, she can probably afford to travel for it

whether that be out of state or out of the country. And so these restrictions we see at the state levels already overwhelmingly impact poor and working class families. But in this situation, they're actually specifically targeting poor women, and this would literally write discrimination against poor women into the West Virginia constitution, which is just unconscionable. And, I would also like to remind everyone that before Roe v. Wade, women died because they tried to have abortions. Women died because abortion was illegal. Making abortion illegal or harder to access does not reduce the demand for abortion, it just makes it unsafe and results in women dying. So, not only does this bill specifically target poor women, it would likely result in deaths in the state of West Virginia.

ELI: Interesting fact...do you know what the highest trending google search in Texas was after the law was passed that, um, that was overturned by Whole Women's Health?

JAMIE: No

ELI: It was how to perform at-home abortions.

JAMIE: Oh...

ELI: It was the biggest increase in searches in Texas after that...

JAMIE: Wow

ELI: ...the highest trending. And so, again, this is something we're looking at. Now, while we are watching the partisan politics behind this, I'd like to take a moment to remind people that we are a nonpartisan organization, however, we find it particularly offensive when people go after core constitutional rights purely for political gain.

JAMIE: Word.

ELI: So those are some of the bad things that we're looking at. There are a number of other things we may see coming down the pike as far as bad bills go. We may be looking at drug testing for benefits that include either SNAP and/or Medicaid

JAMIE: What's SNAP for our listeners?

ELI: SNAP Is the Supplemental Nutrition Assistance Program, also known as food stamps.

JAMIE: Ah

ELI: Yep, so this would essentially say that people would have to take a drug test for SNAP. Now, as we brought up when we fought the drug testing for welfare, which is actually the TANF program, Temporary Assistance for Needy Families program, the incidents of drug use that they find when they do this sort of testing is miniscule, and pretty much every state that's ever tried this has spent more money drug testing people than they have not paying benefits to any individual. And I'd also remind people that the

underlying assumption here is that we've deemed certain behaviors to be so bad that we don't want people to eat.

JAMIE: Yeah.

ELI: Seems particularly cruel to me.

JAMIE: And also, just kind of not forward thinking, um, particularly when you consider the fact that you know on the state level, we still criminalize marijuana where other states are legalizing it and legalization gets, you know, polls huge both in West Virginia and nationwide.

ELI: Oh, absolutely and of course we could get into other issues like the lack of treatment in West Virginia. So, we have a number of people who are simply on waiting lists trying to get into treatment centers. We have people who may recreationally use drugs, but hold down full time jobs and be working professionals, but these may also be jobs that just don't pay a whole lot. And, the idea that we would cut that off for a behavior that, that is part of their own choice, is part of their own bodily autonomy shows a complete lack of compassion, a complete lack of understanding into the factors that underlie drug abuse disorders.

JAMIE: Is there anything else we're looking at from the defensive here?

ELI: Well, how deep do you want to go?

JAMIE: [laughing] Oh, no.

ELI: There are a number of things that we'll be keeping an eye on that we may see coming down the road. We're continuing to watch privatization of education, that's something we were watching very closely last year. We know that that's a priority for this particular legislature.

JAMIE: So, like, school vouchers?

ELI: School vouchers, charter schools, could be education tax credits. They don't seem to be set on any particular model, but all of them bring up constitutional concerns for a number of reasons.

JAMIE: Right, aren't a lot of private and charter schools allowed to discriminate against, for example, LGBT students or students with disabilities?

ELI: They're allowed to discriminate, they also - these programs tend to heavily favor parochial schools, which winds up being the government then funding religious education.

JAMIE: Right, and I seem to recall our dear Secretary of Education advocating for schools to be able to discriminate against students with LGBT parents for religious reasons.

ELI: A whole host of forms of discrimination that could come up, particularly when you have these essentially private schools that are then getting state money and are not subject to all the protections that public schools are.

JAMIE: Alright, what else we got?

ELI: Well, we keep hearing rumors that we might see a Running Over Protestors Bill, hopefully something that wouldn't move, but gosh, I hope no one is foolish enough to put something like that into the hopper.

JAMIE: (sigh) Are we going to see a bible as the state book again? (laughs)

ELI: We might see bible as the state book again. Always fun. We might see a Blue Lives Matter, too, we're watching that.

JAMIE: Um, what's Blue Lives Matter for our listeners who don't know?

ELI: Blue lives matter is essentially making it a hate crime to kill or in a lot of cases assault a police officer, and usually these laws are defined so broadly that assault can include things like resisting arrest, which, for those of us who are, who follow civil liberties know that virtually any situation in which there is anything even remotely resembling a struggle, including someone who's in pain and just writhing, can be construed as assaulting an officer at this point.

JAMIE: Right, I mean, I feel like I've seen that a lot, and it often goes along with other vague things like obstruction of justice or you know things like that.

ELI: Interfering with government processes

JAMIE: [laughing] Shout out to Dan Heyman

ELI: There we go. Um, yeah, so we may see a number of things like that, um we'll also probably be watching more criminalization of drug activity, even as we recognize this correctional officer crisis, there are still people who think we need to find more criminal penalties for drug users.

JAMIE: Alright, well, that was depressing, but is there anything good that we can look forward to?

ELI: There is. There's a lot of good that we can look forward to. So I'll talk a little bit about our proactive agenda. We've got a very aggressive proactive agenda this session. The biggest thing, the one that we're most excited about is bail reform.

JAMIE: Yes!

ELI: So, we're looking at borrowing a model from New Jersey – shout out to the Garden State.

JAMIE: Woo hoo! Hi Joanna!

ELI: So New Jersey has a bail model that requires magistrates to essentially use a rubric, a risk assessment rubric - it's evidence-based - to determine whether or not someone has a risk of either fleeing, not showing up to court, or re-offending while they're out awaiting trial. And people who are low and even low-moderate risk of this are released on their own recognizance; that means no cash bail.

JAMIE: That sounds awesome.

ELI: Absolutely. It's awesome, it's more fair, it's what bail is essentially set to do is to keep -make sure people show up to court, and if they're already going to do it, why should they have to pay money.

JAMIE: Right, because isn't that a basic tenant of our entire criminal justice system that in the United States, you're innocent until proven guilty?

ELI: That's what they keep saying.

JAMIE: That's what I thought.

ELI: Yeah. So this is what we're borrowing, this is what we're looking at doing; something very similar to that. Now it will still allow magistrates some flexibility. They could set bail where there's more risk of either re-offense or not showing up, but the law's going to make it very clear that they have to set the minimum amount necessary to ensure appearance. That means that someone who steals \$50 of food should not be given a \$20,000 cash bail.

JAMIE: Which recently happened in Huntington.

ELI: Yes, it did. And it does allow magistrates – even if they go through the rubric to rule against it, but then they're going to have to provide written findings of fact and law that can be appealed so that we've got a full due process system to protect people.

JAMIE: That sounds great. Do you think it has any chance of moving?

ELI: I do, actually. I know that there's some leadership in the House who've expressed some interest in this. I know this is an issue that some other members, particularly in the House, have been looking at. So, I think the momentum's there for that and I think there are a lot of people who recognize that one of the huge ways that we can help with this correctional officer crisis is to not hold people in jail who haven't even been convicted of a crime, who are just waiting for their trial.

JAMIE: Yup

ELI: Absolutely. So this is going to hopefully help, and again, I think that we'll see some movement there. Another big thing we're looking forward to is going after the civil asset forfeiture process

JAMIE: Can you explain civil asset forfeiture and what that means?

ELI: Long story short, civil asset forfeiture is legal theft by police.

JAMIE: Oh. That's wonderful.

ELI: Absolutely. A little bit more detail – what it means is that if you are stopped by police and they suspect you of a crime, they can seize any property that they think is related to the crime. Now, that can be cash that you have on your body. It could be cash that someone else in a vehicle has on their person. It could be backpacks, it could be a vehicle. So, it can be a whole wide array of property that the police can then seize and hold onto while this process is going. Now, the really interesting thing about this is they don't ever have to even charge you with a crime. You don't have to be convicted.

JAMIE: What?!

ELI: Yep. They can take it because they suspect it as being related to a crime and then not charge you with a crime.

JAMIE: How is that allowed?

ELI: Well, Jamie, you can probably give more to criminal procedure in terms of how you go from an initial arrest down to an indictment. But because police are the ones on the front lines, the ones doing this, they can seize that property and then down the line it can be determined that there's no reason to press charges.

JAMIE: Well, that's just nuts, um, but what are we looking at to try to reform that?

ELI: So, what we're looking at is actually working with Americans for Prosperity, and for anyone who doesn't know Americans for Prosperity is an outgrowth of the Koch brother network, but they're also very big advocates for reforming the civil asset forfeiture process. And what we're proposing is legislation that would require a conviction before property could be forfeited, and that's the other part of the civil asset forfeiture process is that once police take it, they can then file a motion in court to keep your property and under current law what happens is that you then have to respond, you have get a lawyer and respond in court, to try to go back and prove that you can get your property back. Understandably for a lot of people, the property that was taken isn't worth the cost of the lawyer, they're afraid to go into court, so police wind up keeping that property and then they get to keep a portion of the proceeds, so under the law that we're proposing what would happen is you would have to have a conviction. If there isn't a conviction, then the property automatically goes back to the property owner, and if there's a conviction, as part of that process, after a person's been convicted, they will make a finding as to whether or not any seized property can be forfeited.

JAMIE: It's sounds to me like the current system almost encourages corruption.

ELI: Absolutely. It creates a perverse incentive for police to go out looking for people that they can take cash from.

JAMIE: Yeah.

ELI: Which we've heard about happening. So that's something that we're really excited about, and again, we think that we've got some possibility to move it there. I know it's something that a number of legislators have been looking at in years past.

JAMIE: Well, I'm excited to hear that we're at least looking at trying to change that.

ELI: Absolutely. Another big thing that we're looking at is taking a step to address the Drug House Ordinances or as I'm calling them, Mandatory Eviction Ordinances.

JAMIE: Mhmm

ELI: To give everyone a quick rundown of that, these are ordinances that municipalities have been passing that essentially say that if police get called to the same property, usually the triggering number of times is twice in a one year period, even, again, if there's never an arrest, if there's never any conviction or finding that even there was criminal activity, as long as there is suspicion of criminal activity based on these calls, they can then force landlords to evict the tenants, to potentially screen future tenants and refuse to rent to certain tenants with certain criminal backgrounds even if they've already served their sentences...as well as a number of other things against the tenant and the landlords.

JAMIE: Wow! Yeah, and I know that we've seen those popping up all around the state like as far away as the Eastern Panhandle and as close to us here in Charleston as South Charleston.

ELI: Absolutely, so they've been cropping up all over the place, and what we're looking at is a state law that says municipalities cannot pass ordinances that are going to punish people for a genuine call for emergency services.

JAMIE: Right, it seems to me that we should never really be discouraging people from calling 911 in an emergency

ELI: Absolutely. And we also don't want survivors of domestic abuse to feel like they can't call police to get involved when they are in an abuse situation because they're afraid of losing their home.

JAMIE: Right.

ELI: So that's something that we're also looking at doing; making some progress there. Another thing that we're looking at doing is a privacy bill and this follows after our legislative success in 2016 on the Take Control initiative which is really about electronic privacy. So, the bill we passed in 2016 prohibits employers from firing or punishing employees who don't turn over passwords to personal electronic

devices - that is owned by the employee not owned by the company – or to personal social media accounts. What we want to do this year is expand that to students and make sure that students in schools can't be punished, expelled, or anything else for not turning over passwords for, again, their own cell phones, their own tablets, their own electronic devices, or their own social media accounts. Because we're talking about the school situation, there are some exceptions when schools are investigating a specific incident and they feel like they need access to some of that information to investigate a serious incident, but again, those are very narrowly drawn, and go through a number of process protections for the students.

JAMIE: Right, because public school students are protected by the fourth amendment, which prohibits unreasonable search and seizure. But because of the unique situation, particularly that primary and elementary school provide, that line of case law is very different than just general 4th amendment search and seizure case law

ELI: Exactly. And then there are some things we're going to be looking at supporting that aren't going to be introduced by us, so I'll just briefly run down that list.

JAMIE: Sounds good

ELI: We're probably going to see a bill called Death with Dignity, which is going to be about assisted suicide, allowing people at the end of life to make the determination of what's best for them.

JAMIE: Mhmm

ELI: And conversely, but using the same logic, we might see a bill that is going to close some loopholes that doctors can currently use to contradict end-of-life orders for people who want to be kept alive, even with extreme measures.

JAMIE: Oh, that's kinda cool...bodily autonomy, whether you want to be kept alive or not.

ELI: Exactly. So, we're going to be really on both ends of that spectrum dealing with end-of-life bills this session. We're also likely to see a conversion therapy ban that we think may pass this year.

JAMIE: Wow! That would be pretty cool.

ELI: That would be very cool! And we'll also be looking at an Equal Pay Act; we'll have to see what happens there, but this would be something to make sure that employers can't pay men and women doing the same job, or essentially the same jobs, differently.

JAMIE: That sounds like a great idea [laughing].

ELI: Absolutely, very good one! Now that's just a small sampling of the probably 500 or more bills that we'll be following this session, but those are some of the biggest things on our agenda as we head into it.

JAMIE: Awesome, well thanks for sitting down and talking to me about this today. Will you be doing video updates like you gave us last year?

ELI: There will be video updates. We're going to aim to have them out weekly, probably Wednesday afternoons. For those who follow WV legislative session before you know things can get a little bit hairy, especially toward the end, so we'll see how regular that schedule keeps as things progress.

JAMIE: And how long is West Virginia's legislative session?

ELI: We have a 60 day session, which is a short period of time to cram a lot in.

JAMIE: Yeah, that's a long sprint [laughing].

ELI: [laughing] It is. That's a good way to put it.

JAMIE: And Eli also has a twitter that he uses to keep people updated about our issues. What's your twitter handle?

ELI: @eliacuwv

JAMIE: Alright, well thanks for tuning in, and I will try to get back to you with regular updates on session, but also just keep an eye out for Eli's videos, because he knows a lot more about what's going on behind the scenes than I do.

ELI: Sometimes...

JAMIE: [laughing]

[Outro Music]

JAMIE: So, thank you to Brian Deziel and Pat Gilroy for their audio editing and mastering. The original music is by Titans of Punk, a music production company by Pat Gilroy and Jeremy Galanes. Please check out our past episodes and rate us on Itunes if you haven't yet, and we'll talk to you soon."