

Ambitious ACLU Agenda Approved by 2009 Legislature

The Oregon Legislature approved all five of the ACLU's affirmative priorities this year, including SB 536 that prohibits Oregon from taking any further action to implement the federal Real ID Act. With passage of SB 536, Oregon became the 24th state to take action against Real ID.

In addition to our affirmative priorities, we had a very busy session tracking hundreds of other bills, most of which would have undermined civil liberties. We testified on more than 50 bills and worked closely on many others to address civil liberties concerns. Our biggest disappointment was the passage of SB 355 which will create a government monitored pharmacy database to track the millions of lawful prescriptions of controlled substances prescribed to Oregonians.

Among other issues we covered were: free speech, privacy, reproductive freedom, the death penalty, criminal justice, drug policy and election and initiative reform.

This report first covers our legislative priorities, including the five affirmative victories (SB 536, HB 2371, SB 310, SB 404, and SB 543) as well as one significant set-back (SB 355). It then covers the rest of the legislative work we did by issue areas: Free Speech, Reproductive Freedom, Death Penalty, Criminal Justice, Privacy, Drug Policy, and Election and Initiative Reform.

2009 PRIORITIES:

PRIVACY: Saying "NO" to Real ID (SB 536, SB 128)

ACLU arranged for the introduction of **SB 536**, with 27 bipartisan co-sponsors, including the chief sponsor, Senator Rick Metsger (D-Mt. Hood), Chair of the Senate Business and Transportation Committee. SB 536 prohibits Oregon from expending any additional funds to implement the federal Real ID Act until there are sufficient federal funds and adequate privacy protections. Congress passed Real ID in 2005 without any debate or discussion, attaching it to an emergency appropriations bill for Tsunami relief and Iraq war funding. Real ID would turn our driver licenses into national identification cards and require a nationwide shared DMV database. Across the country, ACLU has led the efforts to oppose Real ID because it raises significant privacy risks to all of us.

Originally, states had to fully implement the requirements of Real ID by May 2008. However, the Department of Homeland Security took years to issue draft regulations. When it did issue final regulations, the Department delayed final implementation of Real ID until 2017. Not only are the compliance requirements imposed on states onerous, there have been minimal federal funds available for states to implement those requirements and no guidance for how states could provide security for the nationwide database required by the Act.

In the 2007 session, ACLU introduced a bill identical to SB 536 as well as a resolution urging Congress to fix and fund Real ID. Caught up in the immigration controversy, our legislation ultimately failed to pass – even though there was broad bi-partisan support. In 2008 following an Executive Order by Governor Kulongoski, the Oregon legislature passed SB 1080 restricting access to Oregon driver licenses to persons who are U.S. citizens or can prove their lawful presence. ACLU opposed this effort because we believe that everyone on the road should be licensed and insured.

However, with the passage of SB 1080, the privacy issues related to Real ID were once again ripe for discussion. While we were working to introduce legislation to stop Real ID, the Governor and the Oregon Department of Transportation (ODOT) introduced **SB 128** which would have moved Oregon towards full implementation of Real ID. That bill would have allowed DMV to “scan and store” copies of all original identifying documents (birth certificate, Social Security card, U.S. Passport) and place that information in the proposed 50-state shared national database, effectively creating a “one-stop shop” for identity thieves seeking your personal identifying information.

As we noted above, SB 536 had 27 House and Senate Democratic and Republican co-sponsors. We would be remiss if we did not acknowledge the significant help we received not only from Sen. Metsger but also from Sen. Larry George (R-Sherwood) and Rep. Dennis Richardson (R-Central Point), who helped make this a truly bi-partisan effort.

At the same time SB 536 was moving forward, SB 128 in its original form was not. Under Sen. Metsger’s direction, the Senate Transportation Committee removed all language related to further implementation of Real ID. SB 128 ultimately went forward only to provide technical fixes required by previous legislation. ACLU took no position on SB 128 once it was amended.

SB 536 passed on the Senate floor by a vote of 30-0. With momentum behind it, SB 536 was heard in House Transportation Committee and moved out of that committee unanimously. It passed the House floor 39-6 and no one spoke against it. Unfortunately because SB 536 came to the floor near the end of session, 15 legislators, including a number of co-sponsors, were excused from the floor session for other legislative business. We know that if all 60 representatives had been present we likely would have had more than 50 “yes” votes. Governor Kulongoski refused to sign SB 536 into law, but allowed it to become law without his signature.

WIN: PASSED INTO LAW

Passed Senate: 30-0

Passed House: 39-6

****Scorecard Vote – Senate & House**

PRIVACY: Driver License Data Harvesting (HB 2371)

ACLU arranged for the introduction of **HB 2371** which restricts businesses and government from swiping the barcode on the back of our Oregon driver licenses and state-issued identification cards. Electronic swiping of the barcode reveals almost all of the personal information contained on your license or ID card, including your name, address, date of birth, height, weight, gender, eye color, lens restrictions, donor status and license or ID card number.

Businesses in Oregon and across the country have been acquiring the technology that allows them to swipe this data. HB 2371 establishes important safeguards. While the new law will allow swiping for fraud prevention and in some other cases with permission, it prohibits the collection or retention of anything beyond your name, address, date of birth and card number. Even in cases where swiping is authorized, businesses are prohibited from using the data for marketing purposes.

Currently, some bars and taverns have acquired hand-held machines to confirm a person's age by swiping the driver license or identification card. Under HB 2371, bars and taverns would still be allowed to do this but would be prohibited from retaining *any* information. They can use it only to authenticate age, but not to collect or sell information for marketing purposes.

Wireless telecom providers were successful in lobbying for a special provision allowing them to swipe licenses when an individual opens an account for wireless service. While HB 2371 allows for cellular providers to swipe a license to obtain the name, address, date of birth and license or ID card number, it also requires the merchant to seek the customer's permission before doing so. In addition, if the customer refuses to allow the business to swipe the license, the business cannot deny the customer any goods or services (but instead may collect this information manually).

As an enforcement mechanism, HB 2371 allows for a private right of action, including recovery of attorney fees, if the terms of the law are violated by any business. We included this provision so that there would be teeth to these restrictions. The new law will go into effect January 1, 2010. Watch our web site in coming months for a fact sheet explaining your rights under HB 2371. We will want to hear about situations involving any business that is not complying with the law.

WIN: PASSED INTO LAW

Passed House: 59-0

Passed Senate: 20-0

DNA & CRIMINAL JUSTICE: DNA Retention Policy (SB 310)

SB 310 builds on Oregon's DNA innocence law passed a few years ago allowing a person convicted of murder, a "person" felony or certain sex crimes to request testing of evidence for DNA that was obtained in the original criminal investigation. ACLU worked to pass what was a temporary law when it was first introduced in 2001 and led the effort in 2007 to make it a permanent part of Oregon law. That law establishes a procedure to request testing but does not address the question of retaining evidence so that it can be tested years later.

Currently, local law enforcement agencies across the state retain evidence during the pendency of the trial and appeal process, which can take a number of years. However, there is no uniform policy or practice regarding the retention of evidence that contains biological material after that time. SB 310 sets that effort in motion.

We know from across the country that DNA has not only been used to convict the guilty, but also to exonerate the innocent, sometimes decades after conviction and many years of incarceration. Establishing innocence years after conviction requires preservation of the evidence containing biological material. The technology and science around DNA continues to advance and evidence that contains DNA but cannot be tested today using current technologies, may very well provide reliable results years from now. Most jurisdictions are already preserving evidence that might be used to solve both cold cases, but we want to be sure they also retain evidence that may prove a convicted person's innocence.

SB 310, in its original form, would have enacted a statewide retention requirement with specific limitations and a process for eventual destruction. However, behind the scenes law enforcement representatives began to work in opposition, despite never testifying on the bill when it had a public hearing. Facing the possibility that the legislation would not pass because of this opposition, we agreed to amend the bill. SB 310 now creates a moratorium on destruction of any biological evidence in murder and sex crime cases until January 2012. In the interim, a work group will be formed to prepare legislation to establish uniform retention policies and practices statewide.

The new law starts the process of modernizing biological evidence preservation practices in order to ensure that powerful DNA evidence will be available to exonerate innocent people as well as to convict the guilty.

WIN: PASSED INTO LAW

Senate: 30-0

House: 57-0

CIVIL JUSTICE: Repeal Constitutionally Questionable 1862 Laws (SB 404)

Prior to the legislative session, ACLU agreed to represent an attorney who was threatened with being held in contempt of court under two laws first approved in 1862. ORS 20.160 and 20.170 provided that a plaintiff's attorney can be held personally liable for a cost bill awarded against the attorney's client *if* the client is an out-of-state resident. Normally, if an attorney represents an Oregon plaintiff and loses, the defendant can recover costs (such as filing fees, transcript and copying charges) against the plaintiff. If the plaintiff fails to pay, the defendant can pursue that claim only against the plaintiff. However, if an attorney represents an out-of-state plaintiff who fails to pay the cost bill, instead of pursuing the plaintiff, the defendant can pursue the plaintiff's attorney personally. We believed this law was unconstitutional and we challenged it on behalf of an attorney whose client failed to pay an \$800 cost bill awarded to TriMet. Instead of pursuing the plaintiff, TriMet pursued the plaintiff's attorney.

Since litigation can take years and success is never guaranteed, we also decided to ask the Legislature to repeal these laws. Although there was no legislative history left from the 1860s, it is reasonable to speculate that the reason for the law almost 150 years ago was the difficulty a defendant had in pursuing an out-of-state plaintiff. With a modern court system and the ease of following a plaintiff across state lines, the justification for the law no longer exists. ACLU introduced **SB 404**, which repealed these two laws and allowed us to dismiss our current case once the bill became law. SB 404 passed and the court has since dismissed TriMet's attempt to recover costs from the attorney.

WIN: PASSED INTO LAW

Passed Senate: 24-3

Passed House: 38-6

****Scorecard Vote – Senate & House**

FREE SPEECH: Update Free Speech Protections (SB 543)

At the request of ACLU cooperating attorney Charles Hinkle, we helped shepherd through a bill updating Oregon's SLAPP law (Strategic Lawsuits Against Public Participation). The legislature first adopted the SLAPP statute in 2001. It is intended to provide for dismissal of lawsuits that are intended to chill public participation. These lawsuits target individuals who speak at public hearings before government bodies, write letters to the editor on public issues or express opinions on radio talk shows and Internet websites. The law allows the defendant (the public participant) to move to dismiss the lawsuit upon a showing that it is intended to chill speech before he or she is subject to substantial expenses. The law has worked well; it has resulted in lower litigation costs and fewer lawsuits against defendants who speak out on issues of public interest.

SB 543 updates the law in two ways. First, it allows for a defendant whose motion to dismiss is denied to directly appeal that decision. Second, it clarifies that the protections for free speech in the original statute are to be liberally construed, which is consistent with a California law, which was the model for Oregon's law, and (more importantly) with

the Oregon Constitution, which protects speech and expressions of opinion “on any subject whatever.”

WIN: PASSED INTO LAW

Senate: 29-0

House: 45-0

PRIVACY: Government Monitored Pharmacy Database (SB 355)

For the third time in as many sessions, the Board of Pharmacy introduced legislation, **SB 355**, to allow the state to create a statewide database to monitor the lawful prescriptions of controlled substance schedules II, III or IV prescribed to patients in Oregon. The database would cover all codeine-based products, most prescription pain medications, and other prescription drugs such as Ambien, Ritalin and Xanax, prescribed to thousands of Oregonians, including children. Proponents expect the database will track more than five million Oregon prescriptions annually.

In addition to the Oregon Board of Pharmacy, the effort to pass SB 355 was led by the Oregon Department of Human Services, Sen. Alan Bates (D-Ashland), Sen. Bill Morrisette (D-Springfield), Sen. Jeff Kruse (R-Roseburg), Rep. Chip Shields (D-Portland), Rep. Jim Thompson (R-Dallas) and Rep. Ron Maurer (R-Grants Pass). They maintain that the database is necessary to deter drug seekers and drug abusers. We believe that the database will violate the medical privacy of hundreds of thousands of Oregonians and the risks outweigh any possible benefits.

The ACLU of Oregon led the effort to oppose this law. We argued that our private and personal medical information should not be the subject of surveillance by the state government and accessed by thousands of pharmacists and health care providers across the state. This law treats all Oregonians as potential drug abusers, in an attempt to ferret out a small percent of those who are inappropriately seeking drugs.

While a number of other states have similar databases, most have been funded by grants from the federal Department of Justice, which includes the Drug Enforcement Agency, the federal government’s law enforcement arm. To date there has been no evidence-based evaluation that these databases successfully solve the problem as proponents claim.

Despite the six-year effort to pass this legislation, BOP’s failure to do the necessary foundational work was identified in May by a Legislative Fiscal Office analysis of SB 355, exposing the significant weaknesses of this program and the lack of a realistic budget, work plan, and security safeguards, to name just a few.

For several years, we had been highlighting the potential security risks of pharmacy databases. In April, the Virginia prescription database was breached, exposing over 8 million Virginians to medical identity theft. Even after this incident, proponents continued to assert the breach was only alleged. However, Virginia sent out notices to over half a million Virginians alerting them to the data theft and as of this writing the database is still

off line, four months later. (As we've argued, these databases are particularly attractive for criminals because they put in one place sensitive and valuable information about millions of individuals.)

Despite all of this, led by the efforts of Sen. Bates and Rep. Tina Kotek (D-Portland), SB 355 moved forward and was amended in the Ways & Means Subcommittee on Human Services, turning the program over to the Department of Human Services (instead of the Board of Pharmacy), providing them up to \$250,000 to do the foundational work over the next 6 months, authorizing the collection of a \$25 pharmacist and provider license fee *and most importantly, implementing the law*. Since the foundational work has yet to be done, we continue to question why the Legislature would enact the policy, leaving only final fiscal sign-off in February after DHS (a strong proponent of this legislation) puts together a work plan.

While some basic consumer protections were put in place after ACLU identified these obvious vulnerabilities, the final bill authorizes the government to collect our Schedule II, III and IV prescription information, place it in a government run database and allow pharmacists and providers to run a report on *every single patient or customer*. This overreaching authority allows a pharmacist to access this report even if he or she is selling you eye drops, birth control, or any other medication and *not* a Schedule II, III or IV controlled substance. ACLU pointed this out but that concern was ignored.

SB 355 also allows DHS to decide when to allow this Oregon database to be accessed by other states with similar databases. Just like the proposed nationwide Real ID driver license database, the prescription database could become accessible to thousands of users across the country, none of them accountable to Oregonians. As the Legislative Fiscal Office stated in its analysis, 60-80% of database breaches are internal. With thousands of pharmacists and providers (in Oregon alone) legally authorized to access your reports (without any notification to the patient), this law will send out an invitation for inappropriate snooping and possible legal misuse. Medical identity theft is widespread and it only takes a few bad apples for significant damage to be done.

The outcry over SB 355 from our members and activists was unprecedented. We heard from various legislators that they had heard from constituents opposing SB 355. Despite this effort, SB 355 passed at the very end of session.

There were a number of legislators who worked hard to stop SB 355. (See our Scorecard.) We thank them all for their ongoing support to stop SB 355.

ACLU will continue to monitor the planning and implementation by DHS and will raise our concerns again when DHS provides a status report and seeks final authorization from the Legislature in February 2010.

LOSS: PASSED INTO LAW

SENATE: 20-10

HOUSE: 42-17

****Scorecard Vote – Senate & House**

ACLU 2009 LEGISLATION BY ISSUE

We also worked on the following legislation, which we have organized by issue areas. As in every session, we dealt with a wide-range of topics.

FREE SPEECH

Amending Oregon Constitution Article I, section 8 (HJR 42)

The perennial attempt to amend the Oregon Constitution's free expression provision (Article I, section 8) to allow local governments to restrict nude dancing once again was introduced this session. **HJR 42**, sponsored by Rep. Scott Bruun (R-West Linn) and Sen. Richard Devlin (D-Tualatin), was given a hearing in the House Judiciary Committee. ACLU testified in opposition, objecting to any attempt to weaken the Oregon Constitution and limit Oregonians' free speech rights. We reminded the committee that Oregonians have rejected similar ballot measures *three times in the last 15 years* at the ballot box. The last time was a legislative referral rejected by voters in 2000 (Measure 87). After a public hearing (and much media coverage), HJR 42 saw no further action in committee. However, on June 4 the House considered a motion to withdraw the bill from committee for an immediate vote on its merits. That vote failed on a vote of 29-27.

WIN: FAILED ON HOUSE FLOOR

House: 29-27

****Scorecard Vote - House**

Public Records: Restricting Access (HB 3094)

The ACLU opposed **HB 3094**, which extends a special exemption to the public records law for Oregon Health & Science University. That law allows OHSU to redact the name and home address of anyone conducting animal research.

ACLU does not oppose removing the home address of employees. Oregon law already allows public employees in sensitive positions to remove references to their home addresses and phone numbers from public records. However, HB 3094 allows exclusion of even the identity of researchers or the companies that provide research animals to OHSU. This law, up for renewal, is part of an ongoing trend to carve out innumerable special interest exceptions to Oregon's public records law — in this case for animal research activities.

ACLU testified against HB 3094 because it is important for the news media and public interest groups to be able to inquire about these issues and examine public records. In many cases, this type of watchdog activity is the only way to expose abuses by public agencies. The public has a right to know whether the research being done with taxpayer funds by OHSU—a public institution—is in compliance with federal standards aimed at avoiding animal abuse in research experiments. In the past, it has only been through public record requests that animal care issues have been brought to light, which resulted in needed reforms at OHSU.

Despite citing concerns about the safety of its researchers as the reason for this law, OHSU continues to post not only the names of many researchers on its website, but also their photographs. Posting photographs and the names of individuals who may be targeted seems contradictory to the argument that having names provided on public records creates a public safety risk.

As part of its testimony this year, OHSU submitted its log of public records requests since the law was passed. The log shows that every request by groups associated with animal rights activities was significantly delayed and the records were redacted. But that same log shows that there was no such delay or redaction when OHSU responded to requests from media outlets. Oregon's public records law does not distinguish between media and non-media requests. OHSU appears to be choosing to use its special exemption in the public records law to withhold information from its critics.

Because there was significant objection to HB 3094 in the Senate, a compromise version of the bill was passed, extending the law for only two more years, during which time a workgroup will be convened to address the inconsistent application of this law.

LOSS: PASSED INTO LAW

House: 53-6

Senate: 23-6

****Scorecard Vote – Senate & House**

REPRODUCTIVE FREEDOM & DEATH PENALTY

“Death” of Fetus and Pregnant Woman (SB 982, SB 984, HB 3505)

Normally, reproductive rights and death penalty issues do not intersect, but *at the very end of session*, they did. SB 982, SB 984 and HB 3505 were all introduced in response to the horrendous crime that occurred in Beaverton resulting in the death of a pregnant woman and the stillbirth of her infant. As explained below, ACLU opposed all three proposals.

SB 982 redefined “human being” in Oregon law to include an “unborn child” at any stage of fetal development and expanded the aggravated murder statute to cover the new definition of “human being.” Article I, section 40 of the Oregon Constitution authorizes the death penalty in aggravated murder convictions. ACLU opposed both aspects of this proposal. Defining “human being” to include a fetus at any stage of development would grant the fetus constitutional rights equal to the pregnant woman. We also oppose the death penalty and any efforts to expand it in Oregon. Led by Sen. Bruce Starr (R-Hillsboro), the chief sponsor, there was a motion on the Senate floor to withdraw the bill from committee, which would have required a vote on the merits of SB 982 by the Senate. The motion to withdraw was defeated, and the bill died in committee.

WIN: FAILED ON SENATE FLOOR

Senate: 10-19

****Scorecard Vote - Senate**

In response to SB 982, **SB 984** was introduced by Sen. Peter Courtney (D-Salem). It expanded the aggravated murder statute, which authorizes the use of the death penalty, to include the murder of a pregnant woman if the defendant “knew or reasonably should have known” that the victim was pregnant, but did not redefine the definition of “human being.” ACLU opposed SB 984 because it expanded the death penalty (and we were particularly alarmed because it would have allowed a death sentence if the defendant should have “reasonably known” the victim was pregnant, which is a very low threshold). SB 984 was amended in the Rules Committee to remove the “reasonably known” standard, but we continued to oppose it because of the death penalty expansion. SB 984 never came to a floor for a vote because HB 3505 (see below) moved forward instead.

HB 3505 was introduced by a bipartisan group of legislators. HB 3505, like its counterpart on the Senate side, SB 984, expanded the death penalty for killing a pregnant woman. It required that the defendant knew the woman was pregnant, similar to the amended version of SB 984. HB 3505 was heard in the House Rules Committee, where it was amended to remove the death penalty provision. Instead, the final version of HB 3505 elevates the penalty for the crime of killing a pregnant woman to life in prison without the possibility of parole, unless the jury finds by a vote of 10-2 there is mitigating evidence that justifies a lesser sentence of 30 years, after which the defendant would be eligible to seek release.

ACLU was the lone opposition to the final version of HB 3505 (our pro-choice coalition partners supported it) because it enhances the sentence of killing a pregnant woman, alone, without any additional result, such as a stillbirth or miscarriage. Murdering anyone is a heinous crime, but we believe that the severity of punishment should not be based solely on the fact that the victim was pregnant. The proponents talked about the vulnerability of a pregnant woman. Under that analysis, many others in our society would also be considered vulnerable victims, but a person who killed them would not be eligible on that basis to receive an enhanced sentence. Because the consideration of HB 3505 occurred so late and so quickly, we were unable to adequately raise our objections to legislators, and we believe most legislators were not aware of our opposition. HB 3505 passed the Senate unanimously and the House 59-1. Rep. Mitch Greenlick (D-Portland), was the lone “no” vote and spoke in opposition.

PARTIAL LOSS/PARTIAL WIN (NO DEATH PENALTY EXPANSION)

House: 59-1

Senate: 30-0

DEATH PENALTY

Individuals with Mental Retardation (HB 2668, HB 2669, HB 2670).

Other than the Reproductive Freedom bills above, no other death penalty legislation was heard this session. Three bills were introduced, **HB 2668**, **HB 2669** and **HB 2670**, all of which would have created a procedure for considering the issue of whether a defendant who is charged with aggravated murder (eligible for death sentence) is a person with mental retardation. This has been a contentious issue for years, even before the U.S. Supreme Court ruled that persons with mental retardation cannot be executed. The issue

has resisted attempts at resolution because there have been consistent disagreements between the Oregon District Attorneys Association on one side, and ACLU, the criminal defense bar and those advocating for persons with disabilities on the other. District attorneys want the mental retardation determination made by the jury after the defendant has gone through a trial and been convicted of aggravated murder. The other groups, including ACLU, believe the determination should be made by a judge *prior* to the trial.

Evidence of mental retardation is based on years of documentation, often going back to the person's childhood. As such, we believe this evidence is best heard by a judge, independent of the evidence of the underlying crime and prior to the trial. If the defendant is found to be a person with mental retardation, the defendant would still be tried for the crime but would not be subject to the much more complex trial involving the possibility of a death sentence. Since the rules for death penalty juries eliminate any person from the panel who opposes the death penalty, a "death qualified" jury may be quite different in composition from a non-death penalty jury.

Prior to session, under the auspices of then-Attorney General Hardy Myers and Rep. Sara Gelser (D-Corvallis), all the stakeholders met numerous times to see if we could agree on these issues. We could not, and the result was the introduction of three bills, attempting to reflect the various positions. Because of the difficult nature of the issues and lack of agreement, the bills were not heard and died in committee.

PARTIAL WIN/PARTIAL LOSS: DIED IN COMMITTEE

CRIMINAL JUSTICE

Every session there is a wide range of criminal justice legislation, most often creating new crimes or expanding existing crimes. ACLU works closely with the Oregon Criminal Defense Lawyers Association on these issues. Because there are so many other civil liberties proposals throughout session (including many where ACLU is alone in raising concerns) we are never able to get involved in every criminal justice bill.

Collecting DNA from Felony Arrestees (HB 2103)

Introduced by former Rep. Donna Nelson (R-McMinnville), **HB 2103** would have required law enforcement to collect a DNA sample from every person arrested for a felony. When the House Judiciary Committee held a public hearing we provided the only testimony, and we testified in opposition. Collecting someone's DNA is a search, and as such it should require a court order with the required showing of probable cause. DNA, unlike fingerprints, not only reveals information about the individual, but can also provide genetic information, including medical conditions, of that person's family members. We oppose the government collecting DNA of innocent people not yet found guilty of any felony. Oregon law currently allows for post-conviction collection.

WIN: DIED IN COMMITTEE

Defense Counsel Access to Evidence (HB 2344)

One very contentious proposal this session was **HB 2344**, which ACLU opposed. Introduced by Rep. Sara Gelser (D-Corvallis) on behalf of former Attorney General Hardy Myers and the Attorney General's Sexual Assault Task Force, it would have significantly restricted criminal defense counsel access to evidence used by the prosecutor in the criminal proceeding if that evidence depicts the victim in any state of nudity or engaged in sexual activity. Currently, prosecutors and defense counsel have access to copies of all discovery material that can include this type of evidence.

ACLU agrees with the proponents that this evidence is extremely sensitive and must be handled carefully by everyone involved (law enforcement, prosecutor, defense counsel and the courts). We expect everyone in the criminal justice system not only to comply with the law but to act professionally. Oregon law already allows the prosecutor to seek a protective order when providing copies to defense counsel restricting any further copying or dissemination.

HB 2344 would have, in most cases, prohibited defense counsel and defense experts from obtaining a copy of this type of evidence. Instead, it would have limited access to this evidence for review only at a government facility. Such a law would greatly restrict the ability of both defense counsel and defense experts to review evidence and prepare the client's defense independent of the prosecution.

An informal survey by the defense bar showed that while some prosecutors seek protective orders, many others do not. Because there was no indication that any of the protective orders had been violated, ACLU supported an amendment that would have made such orders mandatory in all cases involving this type of evidence. Unfortunately, the proponents did not support that approach. HB 2344 passed the House 52-5. While many more representatives expressed concern with the bill, most of them voted for it on the understanding that it would be amended when it got to the Senate. Unfortunately, the parties still could not agree, and the bill died in committee.

WIN: BILL DIED IN SENATE COMMITTEE

House Vote: 52-5

****Scorecard Vote**

Invasion of Personal Privacy (HB 2477)

HB 2477 was introduced by Rep. John Huffman (R-The Dalles) and would have amended current Oregon law that makes it a crime to photograph a person in a state of nudity without that person's consent. When the law was originally enacted in 1997, it was intended to address individuals who had set up cameras in tanning booths or bathrooms. Since then, with the widespread use of cell phones that can be used to take photographs, this law now covers many more situations.

ACLU opposed HB 2477 because it would have elevated the crime from a misdemeanor to a felony and subjected a convicted defendant to lifetime sex offender registration. We were concerned about the overbroad application of this law having such an enhanced penalty. It is not hard to imagine college students who share living space in dorms to

violate this law in spur-of-the-moment behavior. While it is already a crime subject to prosecution, making it a felony subject to lifetime sex offender registration is not appropriate in those circumstances.

HB 2477 passed out of the House Judiciary Committee and was sent to Ways & Means because of its potential fiscal impact. Eventually, the bill was amended in committee to remove the felony and sex offender registration provisions and passed both the House and Senate on the last day of session.

WIN: AMENDED TO ADDRESS ACLU OBJECTIONS

PRIVACY

Criminal History Background Checks for Employment & Licensing (HB 2187, HB 2217, HB 2224, HB 2442*, HB 2988*, HB 3427, SB 46, SB 66, SB 94, and SB 157)

Beginning in the 1990s, the Oregon legislature began authorizing FBI fingerprint criminal history checks for school teachers. Over the years, this authority has expanded greatly to include most state agencies that grant licenses or hire employees in “sensitive” positions. In 2005, ACLU worked on omnibus legislation in this area (HB 2157). We supported certain provisions of that proposal because it included new uniform safeguards and due process protections for all persons subject to FBI background checks and maintained the requirement that the fingerprints be destroyed after the background check.

One important safeguard is that state law generally prohibits a state agency from automatically denying employment or licensing merely because of a prior conviction of a crime. Instead, it requires an evaluation that considers the nexus between the particular crime and the type of employment or state license sought, as well as when the crime occurred and consideration of other mitigating evidence submitted by the applicant. As more and more agencies have been given the authority to conduct nationwide criminal background checks, this “nexus” evaluation has been left to each agency and licensing board to administer. That increases the risk that different standards will be applied by different agencies. Even so, we prefer the current process over expanding the list of crimes that automatically disqualify many more people from future employment or licensing.

Despite passage in 2005 of omnibus legislation that we thought would settle these issues, this session brought more than a dozen new “fingerprint” proposals. ACLU testified on most of these bills, raising concerns and successfully obtaining amendments to clarify or qualify the expanded authority being sought. Two proposals, HB 2442 and HB 2988, were of significant concern, and we spent significant time lobby these two bills.

Criminal History Background Checks – Fingerprint Retention (HB 2442). Sponsored by Rep. Sara Gelser (D-Corvallis), **HB 2442** establishes a quality care fund and deals with many issues related to the state’s role in caring for vulnerable Oregonians in nursing homes, foster care facilities and in-home health care. While most of HB 2442 did not raise civil liberties issues, two sections in the original version of the bill did. The first would have authorized the Department of Human Services (DHS), which oversees the FBI criminal

history checks on individuals who work in these facilities, to retain the actual fingerprint cards if the individual authorizes it.

This provision was intended to address a significant problem for this highly mobile workforce, since people may be subject to multiple FBI criminal history checks over the years when they change employers, costing money and possible delays in completing the background check. We strongly opposed this provision, as we have fought hard to ensure that the FBI and other government agencies not retain the fingerprints of individuals who have never committed a crime.

The other provision of HB 2442 that we opposed was the addition of more crimes that would automatically disqualify individuals from employment in nursing homes, foster care facilities and in-home health care. That would have prohibited any case-by-case evaluation of the person's criminal history and employment history, preventing those who have truly reformed from being considered. While ACLU agrees that most of the crimes listed in HB 2442 are those for which the person would likely never be eligible for employment, we have and will continue to oppose an approach that eliminates the possibility of exceptions being made for individuals who have fully reformed from their past behavior.

Concern for civil liberties often does not follow party lines. In this case, some of our staunchest supporters were Republican members of the House committee where the bill was being heard. We were ultimately able to reach a compromise with the chief sponsor, Rep. Gelser, and the bill was amended to remove the provision on fingerprint retention. The list of crimes barring employment, although more limited, was retained in the final bill. It then passed both the House and Senate.

PARTIAL WIN: RETENTION PROVISION REMOVED BUT MANDATORY CRIMES RETAINED

Right to Travel: Toll Bridges (HB 3409, SB 580)

While ACLU does not have a position on the use of tolls to pay for bridges and highways, we are concerned when toll collection systems are put in place that could be used for surveillance. Oregon and Washington are considering eliminating the option of paying for tolls in cash on the planned Interstate 5 bridge between Vancouver and Portland. They may require all travelers to pay with "smart cards" or other electronic devices for toll payments. While we did not take a position on either **HB 3409** or **SB 580**, we alerted legislators to our concerns. We are now working on this issue with the ACLU of Washington as plans for the new I-5 toll bridge move forward.

DRUG POLICY

Medical Marijuana Discrimination (HB 2497, HB 2503 and HB 2881)

As we anticipated, a number of bills were introduced to allow employers to terminate an employee who is a medical marijuana cardholder without any evidence of actual impairment on the job. The ACLU opposed **HB 2497**, **HB 2881** and **HB 3052** (and had concerns about **HB 2503**) because in one form or another the bills included this type of

power for employers. The Oregon Medical Marijuana Act permits use of marijuana to ease the symptoms of some debilitating medical conditions. Many patients who use marijuana to control their symptoms—such as muscle spasms by patients with multiple sclerosis—are able to get relief from their symptoms, and continue to work, without the harmful side effects of the available prescription medications.

A person who is actually impaired at work can already be sanctioned, no matter whether the impairment is caused by lawful or unlawful drugs, alcohol or many other reasons. Employers who have employees that operate high-risk equipment should use performance tests each day to determine if employees can operate machinery safely. But using urinalysis drug tests to detect the presence of drug residue does not determine if employees are impaired at the time of the test and also take days to get reliable results. In addition, the commonly used urine tests can detect residual metabolites of marijuana legally ingested more than 30 days earlier, which means most, if not all, medical marijuana patients would come up positive.

The House Business and Labor Committee held a public hearing on these proposals. While there were attempts to move some form of one of the bills forward, ultimately all the proposals died in committee until a motion was made on the House floor late in the session to withdraw HB 3052 from committee for immediate consideration. That motion failed on a 29-29 vote.

WIN: HB 3052 FAILED ON HOUSE FLOOR; OTHERS DIED IN COMMITTEE

House Vote: 29-29

****Scorecard Vote**

ELECTION & INITIATIVE REFORM

This session, ACLU testified in support of two initiative reform bills, both of which passed, and in opposition to a third bill that would have set a tight deadline for the Oregon Supreme Court to act on ballot title challenges.

Ballot Title Shopping (HB 2941)

HB 2941 directs the Attorney General to provide identical draft ballot titles for state initiatives if the Attorney General determines the proposals are substantially similar. ACLU actively monitors the initiative process, often commenting on proposed ballot titles, challenging the constitutionality of proposed initiatives when they are first filed, participating in ballot measure campaigns, and occasionally challenging the constitutionality of measures after they have been approved by voters.

For many years, proponents of initiatives have engaged in what is called “ballot title shopping.” Chief petitioners submit almost identical initiatives (often filing multiple versions on the very same day) and then only advance the initiative that they believe has the most favorable ballot title. Prior to HB 2941, state law required the Attorney General to issue unique ballot titles for each proposed initiative. We supported HB 2941 as an appropriate response to this type of activity. We successfully offered an amendment to

provide that the requirement of identical ballot titles would be limited to one two-year election cycle so the Attorney General's office could make an independent analysis in a future election cycle.

WIN: PASSED INTO LAW

Local Initiative Process (HB 3033)

In 2003, ACLU and our pro-choice coalition partners successfully defeated a Columbia County ordinance that would have required parental consent for any county public services to minors. We realized at that time that unlike state ballot measures, which allow for a two-year signature collection process, local initiatives often have no restrictions and sometimes can be circulated *for years* to collect signatures before being submitted to the voters. **HB 3033** brings local initiatives in line with the two-year limitation for circulation and signature collection of state initiatives, and we testified in support.

WIN: PASSED INTO LAW

Supreme Court Review of Ballot Titles (SB 337)

SB 337 would have directed the Oregon Supreme Court to rule on every ballot title challenge within 45 days of taking it under advisement. ACLU opposed SB 337. The Oregon Supreme Court (unlike the U.S. Supreme Court) has no timeline upon which it has to rule on any given case. Indeed, the Court often takes months, and in a few cases, years, to rule on cases. While we believe that the Court should rule on all cases in a timely manner, we do not believe ballot title cases should be given precedence over any other type of case before the Court. As a practical matter, the Court usually decides ballot title cases much more quickly than other cases before it.

WIN: DIED IN COMMITTEE