2011 OREGON LEGISLATIVE SESSION – CIVIL LIBERTIES UNSCATHED

Despite numerous proposals to undermine civil liberties during the 2011 Oregon legislative session we had a **very successful session**. While we had a few losses along the way, we stopped the most egregious attempts to undermine civil liberties. We are happy to report our proposal to require the government to properly preserve evidence that can be used to exonerate a person years after conviction passed unanimously in both the Senate and the House.

This was one of the shortest sessions in Oregon history. However that did not reduce the numbers of bills introduced or considered. This report covers the highlights, and in a few cases, the lowlights, of the 2011 session. With another legislative session beginning in February 2012, we expect many of the proposals that we successfully stopped will be renewed during in the short one-month session. In the past two previous "short" sessions in 2008 and 2010, important policy issues were advanced with very little debate or opportunity for us to provide meaningful input.

In the 2011 session, we tracked hundreds of legislative proposals that in most cases would have diminished civil liberties and civil rights. These proposals covered the whole gamut of our work area including free speech, search and seizure, privacy, criminal justice, reproductive rights, equal protection, public records, religious freedom, the death penalty, prisoner rights and drug reform. This report begins with a summary of the ACLU sponsored proposals and then covers the work we did by issue area.

ACLU SPONSORED LEGISLATION

This session, the ACLU of Oregon proposed two bills. The first, SB 731 requires long-term preservation by the government of any biological evidence collected during a criminal investigation. The second, SB 266 would have provided consumer privacy protections if Oregon implemented roadway toll collections. In addition, as discussed under the free speech section, we drafted legislation to repeal the unconstitutional portions of two 2007 laws restricting access by minors to sexually explicit material. While we were unsuccessful in 2007 in persuading the legislature not to pass the laws, we succeeded before the 9th Circuit Court of Appeals and much of the law was held unconstitutional.

Criminal Justice: DNA Retention Law (SB 731)

This session, because of the evenly divided House, it was easier to stop than to pass a bill. The ACLU nevertheless spearheaded the passage of **SB 731**, culminating a ten-year

effort to bring added protection to the criminal justice system regarding the preservation and use of evidence containing biological material (DNA) to prove innocence.

In light of the increasing use of DNA technology for purposes of criminal investigation, prosecution and exoneration, SB 731 is an important step to provide necessary safeguards in the criminal justice system. It builds on the 2001 Oregon Post-Conviction Motion for DNA Testing Law, Oregon's DNA Innocence law. That law allows a defendant to request testing of biological evidence from the original criminal investigation even years after conviction.

While the original 2001 DNA Innocence law expired after a few years, in subsequent legislative sessions the ACLU successfully worked to expand its scope and make it permanent in Oregon statutes. At the same time, we began asking what the policies and practices were around the state to retain this evidence over the years, especially after a defendant has exhausted post-conviction relief. Without proper retention of biological evidence, a defendant can never use the Oregon Innocence law.

Although we asked various stakeholders over the years how evidence was retained after a conviction, we were never able to get a clear answer. As a result, at the ACLU of Oregon's behest, in 2009 legislation was introduced to set forth a process for retaining biological evidence. While we were only successful in passing a temporary fix in 2009, Sen. Floyd Prozanski (D-Eugene) agreed to convene a workgroup of all the stakeholders during the interim to return with a new bill in the 2011 session. The result of that work was the introduction of SB 731 this session.

SB 731 establishes uniform procedures for the retention of biological evidence for the most serious crimes (murders and rapes) for a specific amount of time, in most cases 60 years. The Oregon Attorney General, in consultation with the Department of State Police and property clerk custodians, must adopt rules governing the proper collection, retention, preservation and cataloging of biological evidence. By leaving those details to rulemaking it allows for the necessary flexibility to take into account the changes in retention practices, many of which are making it easier and less costly to preserve this evidence for decades.

SB 731, consistent with other laws across the country, does not require the custodian to preserve evidence that by its physical nature makes retention impractical. In those cases, the custodian must remove and preserve sufficient quantities to permit future DNA testing. Similar to other states, the Oregon law allows for the property custodian to request early destruction. SB 731 establishes important safeguards before this can happen. It requires the custodian to obtain permission from the local district attorney. The district attorney may deny the request in which case the evidence must be retained. If the district attorney wants to proceed with early destruction, notice must be given to the defendant, who then may object and seek judicial review.

As the lead proponent, the ACLU moved the bill forward through the legislative process. SB 731 was heard first in the Senate Judiciary Committee and then the House Judiciary Committee. In addition to our testimony, the Oregon Association Chiefs of Police and the Oregon State Sheriffs' Association also testified in support and signed our floor statement, which was given to every member prior to the vote. SB 731 passed both the Senate and House without any opposition. After ten years, we are pleased to have made these important changes to Oregon's criminal justice system. The Governor signed SB 731 into law on June 7 and it became effective immediately.

WIN: PASSED INTO LAW
Senate: 29-0
House: 60-0
Scorecard Vote: Senate & House

Privacy: Toll way Consumer Protections (SB 266)
The ACLU proposed **SB 266**, which would have provided consumer privacy protections if Oregon implements toll collection for roadways. We believe it is important that prior to use of toll collection in Oregon sufficient privacy protections for consumers be put in place. These protections include allowing a person to travel on a toll road anonymously (allowing for some means of cash payment), restricting the use of any personal information collected for any other purpose other than toll collection and requiring the government to provide sufficient information to consumers about their privacy protection options and rights.

Before session, we worked extensively with the Oregon Department of Transportation (ODOT) to address its concerns about this bill and we had amendments drafted after SB 266 was introduced. However, we ran into the controversial issues surrounding the Columbia River Crossing (CRC). Because SB 266 had the possibility of being used as a vehicle to add language related to the CRC, but unrelated to our tolling issue, the Senate Business, Transportation & Economic Development Committee decided not to hear SB 266. However, members of that Committee expressed support for our concept and we believe if Oregon were to ever move forward with the use of toll collections, language from SB 266 (including the agreed upon amendments with ODOT) would be part of any legislative proposal.

PARTIAL WIN: CONENSUS AMENDMENTS BUT DIED IN COMMITTEE

FREE SPEECH

This session a number of serious free speech restrictions were proposed. A statutory restriction regarding protests at funerals, not surprisingly, raised significant emotional responses. Others were constitutional referrals to weaken our free speech provision. Fortunately, despite the strong advocacy by sponsoring legislators to pass these bills, the session concluded without the passage of any of these proposals that would have weakened the free expression provision of the Oregon Bill of Rights.

Funeral Protest Restrictions (HB 3241)

In response to the nationwide publicity surrounding the Phelps family that operates the Westboro Baptist Church and their controversial demonstrations outside the funerals of fallen service members, **HB 3241** was introduced. In its original form, HB 3241 would have prohibited "picketing" and "disruptive activities" within 300 feet of the property line of a location hosting a funeral service. This effectively prohibited protected activity on public property. The ACLU testified that HB 3241 was unconstitutional under the Free Expression provision of the Oregon Constitution (Article I, section 8) and the First Amendment of the United States Constitution. Along with our written testimony, we submitted a legal memorandum prepared by the ACLU's cooperating attorneys Greg Chaimov and Alan Galloway (of Davis Wright Tremaine), explaining the constitutional flaws in detail. No one else testified against HB 3241.

It should be noted that we do not frequently testify that a legislative proposal is, on its face, unconstitutional. More often than not, we oppose legislation because of the policy at issue or some constitutional concerns. Ultimately the courts decide the constitutionality of any law. Over the years there have been a few circumstances where we believe that the case law is so clear that the proposal would not survive a challenge. HB 3241 was a case where the proposal was so clearly unconstitutional under both the Oregon Free Expression and the federal First Amendment that we had no difficulty stating so in our testimony.

As a result of our testimony and legal opinion, the House General Government and Consumer Protection Committee amended HB 3241 to make it a crime to "disturb" a funeral service. It also provided that funeral directors could obtain a permit to bar persons from being present on public sidewalks and parks within 1,000 feet of a funeral service. We testified against this version, HB 3241 A-Eng., urging the Committee not to pass it because it still suffered from constitutional problems. We provided the Committee with a second legal analysis from our cooperating attorneys.

Not only did we oppose HB 3241 on constitutional grounds, we also opposed it because it fed into the twisted agenda of the Phelps family. Throughout this country, state and local jurisdictions have enacted laws aimed at restricting the Phelps family from demonstrating at funerals. When these types of laws are passed, the Phelps family comes to the jurisdiction that enacted the law to engage in the activity that these laws attempt to prohibit. More often than not, they successfully challenge these laws as unconstitutional. As result, the Phelps' often recover attorney fees that they then use to support their activities.

It has been more than five years since the Phelps family made an appearance at a funeral in Oregon and while we opposed HB 3241, we shared the proponents' desire that the Phelps do not come to Oregon. We believed that passage of HB 3241 would not only bring the Phelps to Oregon but would also result in a successful challenge by them

of the law, costing the state and its residents not only the pain of having them present but financially through costly litigation.

HB 3241 A-Eng. passed the Oregon House by a vote of 57-3, despite our urging a "No" vote. The three "No" votes were Representatives Mary Nolan (D-Portland), Tina Kotek (D-Portland) (who submitted our floor statement in opposition), and Jules Bailey (D-Portland). We are most appreciative of their willingness to stand up and say no despite the pressure to do otherwise.

HB 3241 A-Eng. moved to the Senate and was assigned to the Senate Judiciary Committee. We believe that if HB 3241 had been assigned to the House Judiciary, it would not have necessarily come to the House floor. Unfortunately, we will never know. Despite significant pressure on the Senate Judiciary Committee, behind the scenes both Republicans and Democrats from both judiciary committees urged the Senate Judiciary not to hear HB 3241 A-Eng. for the very same reasons expressed by the ACLU. Fortunately, HB 3241 A-Eng. was not heard and died in the Senate Judiciary Committee. There is continued interest by some legislators to renew this legislation and we expect a Joint Judiciary Committee hearing on this issue during the interim.

WIN: PASSED HOUSE BUT DIED IN SENATE COMMITTEE
House Vote: 55-3
Scorecard Vote: House

Constitutional Amendments (SJR 28, HJR 35 and HJR 34)
Three constitutional referrals were submitted to weaken the free expression provision of the Oregon Constitution (Article I, section 8). Two of the referrals were heard (SJR 28 and HJR 34), one of those had a public hearing in *two* house committees and the ACLU testified against both.

SJR 28: Introduced by Rep. Tobias Read (D-Beaverton) and Sen. Mark Hass (D-Beaverton) and heard in the Senate Judiciary Committee, SJR 28 would have, yet again, added an exception to Article I, section 8 to allow local jurisdictions to regulate the location of businesses and organizations that offer live entertainment or other services by nude persons. We write "yet again" because voters have rejected an almost identical provision in 2000 (Measure 87) as well as previous attempts in 1996 (Measure 31) and 1994 (Measure 19) to weaken our free expression provision related to sexual expression. Voters have made it clear that they do not want to weaken our Bill of Rights nor allow the government to decide what we can read, see and hear. Unfortunately, almost every legislative session, constitutional referrals of this nature are introduced by sympathetic legislators and too often are given serious consideration.

Joining the ACLU of Oregon in opposition to SJR 28 were recreation nudists, who would be affected if the amendment passed because they run organizations that includes individuals who work at their facilities in the nude. This is a reminder that while the focus of the proponents of SJR 28 may have been one thing (adult businesses), writing a

constitutional amendment that targets one type of speech is very difficult, if not impossible, to do. SJR 28 received a public hearing in the Senate Judiciary Committee and, fortunately, died in Committee.

WIN: DIED IN COMMITTEE

HJR 35 was a similar concept to SJR 28 and referred to the House Judiciary Committee. That Committee decided not to hear HJR 35 and it died in committee.

WIN: DIED IN COMMITTEE

HJR 34: Introduced by Rep. Andy Olson (R-Albany), HJR 34 was a constitutional amendment to add language to Article I, section 8, allowing the legislature to enact laws regulating the furnishing of sexually explicit material to minors "consistent with the U.S. Constitution." It was a direct response to our successful challenge to portions of legislation passed in 2007 that had the effect of putting booksellers, including Powell's Books, health organizations, including Cascade Aids Project and Planned Parenthood, family members, including grandparents, and many others at risk of being charged with a crime if they provided material to minors that contained "sexually explicit" content. In *Powell's Books v. Kroger,* the 9th Circuit Court of Appeals agreed with our position that the 2007 laws were overbroad and prohibited a significant amount of legal and age appropriate material, including the children's books *Mommy Laid an Egg* and *Where Do Babies Come From* by Babette Cole as well as pre-teen and teenage books, such as *Forever* by Judy Blume.

The 9th Circuit held that the 2007 Oregon laws were unconstitutional under the First Amendment, not Article I, section 8. Therefore, our constitution was not relevant to the constitutional flaws of the 2007 laws. Importantly, we did not challenge the portions of the 2007 laws that make it a crime for a predator to give sexually explicit material to a minor for the purpose of luring the minor to engage in sexual acts. In 2007 we agreed that there was a gap in the law and if a perpetrator is caught before committing sexual assault but was using sexually explicit material *intentionally* as a way of grooming the minor he or she should be charged with a felony. Because that gap was filled in 2007, we testified, among other things, that HJR 34 was not necessary. Indeed, when the chief sponsor of HJR 34, Rep. Andy Olson (who was also the co-author of the 2007 law along with now Secretary of State Kate Brown), testified, he was asked what kind of law he would propose if HJR 34 were passed by the voters. He was unable to identify any gap and could not provide any concept or actual proposal.

HJR 34 was first heard in the House Judiciary Committee. Joining us in testifying against was Candace Morgan, our grandmother plaintiff in *Powell's Books*, our cooperating attorney for that case, P.K. Runkles-Pearson (of Stoel Rives) and the Oregon Library Association. HJR 34 was moved out of the House Judiciary Committee to the House Rules Committee, where it was given another public hearing and we once again testified against it. Because the House Rules Committee (like its counterpart on the Senate side) remained open until the very end of session and was co-chaired by Rep. Olson, we

remained concerned that HJR 34 could have moved out of that committee at any time with merely an hour's notice. We worked hard to prevent that and were pleased when it died in that Committee upon *sine die*.

WIN: DIED IN COMMITTTEE

Repealing Unconstitutional Free Speech Laws (HB 3323)

As noted above the ACLU challenged portions of the 2007 laws that made it a crime to provide sexually explicit material to minors in *Powell's Books v. Kroger*. Because the 9th Circuit held one law unconstitutional and a portion of another law unconstitutional, we looked for an opportunity to repeal those unconstitutional provisions. We believe it is important to remove unconstitutional laws from the Oregon Revised Statutes. Not doing so creates the risk that law enforcement may charge someone with an invalid law or, in the alternative, mistakenly believe that all the 2007 laws are unconstitutional and not use even the constitutional portions.

Since we did this late in the session, we found a bill that, in its original form, had already passed the House but was not necessary because there was a duplicate version already moving forward. We did what is called a "gut and stuff" and removed the original contents of HB 3323 and added new language that repealed the unconstitutional 2007 laws. The bill was heard in the Senate Judiciary, which adopted our amendments and passed **HB 3323 A-Eng**. to the Senate floor. It passed the Senate 28-2. It moved back to the House and with a motion for concurrence by the Co-Chair of the House Judiciary (where HB 3323 was heard in its original form), HB 3323 was re-passed in its amended form by the House by a vote of 57-3.

WIN: PASSED INTO LAW

SEARCH & SEIZURE

Police Roadblocks (HJR 25 & HB 3133)

A constitutional amendment to weaken our search and seizure provision (Article I, section 9) of the Oregon Constitution was introduced for the third session in a row. **HJR 25** would have amended the constitution to authorize law enforcement to use roadblocks to stop and question individuals to detect drunk drivers without any individualized suspicion of wrongdoing. Along with HJR 25, the constitutional referral, HB 3133 was introduced for the purported purpose of putting into Oregon law specific criteria that a law enforcement agency would be required to follow if it employed roadblocks. Rep. Andy Olson (R-Albany) was the chief sponsor of both.

This issue is important to the ACLU because it was our legal challenge back in 1987 in *Nelson v. Lane County* that stopped the use of roadblocks in Oregon. The Oregon Supreme Court held that police roadblocks constituted a search and seizure without a suspicion of wrongdoing or a warrant. It concluded that these practices violated Article I, section 9.

Our case also illustrated why the use of roadblocks diverts limited law enforcement resources from stopping people who are actually suspected of driving while under the influence. Before Ms. Nelson encountered the roadblock, she and her friend were on the highway and noticed a driver who appeared to be driving in a manner that suggested he was under the influence. Indeed they were relieved when they pulled off the highway. But moments later, Ms. Nelson and her friend were stopped at a police roadblock and questioned by a trooper about when she had her last drink. She explained she had consumed one glass of wine at a reception, hours ago and prior to a full dinner with dessert. Ms. Nelson's friend leaned over to tell the trooper that Ms. Nelson was not the one drinking but rather there was a dangerous driver still on the highway. The trooper became upset and required Ms. Nelson to perform a series of field sobriety tests. He continually questioned her about when she had consumed her last drink. Of course Ms. Nelson passed all the tests because she was sober. The next day she called the ACLU and we took her case all the way to the Oregon Supreme Court.

The ACLU testified against HJR 25 when it was heard in the House Rules Committee. Because that Committee remained open until the very end of session, HJR 25 remained in play all session long. Despite there being no fiscal cost related, HJR 25 had an "interesting" second referral to the Joints Ways & Means Committee. We eventually learned through testimony that this referral had been intentional by the proponents. In recent sessions this constitutional amendment had been introduced on the Senate side, where, after being heard, it died in the Senate Judiciary Committee. By placing a Ways & Means referral on HJR 25, if it passed out of that both the House Rules and the Joints Ways & Means Committees, it would go to the House floor for a vote and then directly to the Senate floor for a vote, avoiding a Senate policy committee, such as the Senate Judiciary Committee. We worked hard to prevent HJR 25 from leaving the House Rules Committee and we were pleased that it did not move forward.

WIN: DIED IN COMMITTEE

HB 3133, the statutory companion to HJR 25 was intended to place uniform statutory requirements if law enforcement were to use roadblocks (assuming HJR 25 passed). Yet, as we testified, HB 3133 did not put any specific requirements into state law to curtail the scope and use of roadblocks. Instead, it simply authorized the use of roadblocks if law enforcement followed *guidelines* published by the National Highway Traffic Safety Administration. However, the guidelines only identified issues for law enforcement to consider when implementing roadblocks but did not impose specific requirements or limitations. HB 3133 was assigned to the House Judiciary Committee and we testified against it during the public hearing. Fortunately, HB 3133 did not move further.

WIN: DIED IN COMMITTEE

PRIVACY

Prescription Database Monitoring Program (proposed amendment)

At the end of session we revisited the Prescription Database Monitoring Program (PDMP) law, which was passed over our strong objections in 2009 (SB 355). We have been monitoring the implementation of this law by the Oregon Health Authority (OHA) over the past year. This law authorizes the government to create a database of those prescribed controlled substances, Schedules II, III & IV (most pain medications as well as sleep aids and Ritalin). Oregon estimates it will database 5 million prescriptions per year and the information collected will be made available on an electronic database to doctors and pharmacists. Although purported to deal with drug seekers (but more recently touted as an aid to assist providers with medication assistance), the PDMP puts hundreds of thousands of Oregonians' medical information at risk. The risks include misuse by those authorized to use the system (a doctor or pharmacist who wants to check on the prescription information of someone who is not a patient), theft by someone hacking into the system (which happened in Virginia), and misidentification because of common names and dates of birth. We wrote extensively about our objections in our 2009 legislative report.

This spring we filed comments on the draft rules implementing the PDMP and we specifically called into question the portion providing patient notification about the PDMP. The draft rules provided that patient notification was sufficient if pharmacies posted a sign about the PDMP. We knew that this did not comply with the law because it was our amendment to the 2009 law that specifically required individualized patient notification. Generic posters would not be sufficient to notify patients because very few people pay any attention to the various signs at a pharmacy and, more importantly, patients would not be provided with contact information if they had any questions or notification that under the law they have certain rights. Because of our instance about the patient notification requirement, the OHA obtained an Oregon Attorney General opinion that concurred with our opinion (and the law), and the final rules were changed to require individual patient notification.

As a result, near the end of session, the various lobbyists representing the Oregon State Pharmacy Association, the Oregon Community Pharmacy Council and various chain pharmacies attempted to modify the law requiring individual notification by either placing the duty exclusively on doctors (which would be far less successful to implement than through pharmacies and was, not surprisingly, opposed by the Oregon Medical Association once they heard about it) or requiring a poster sign at either pharmacies or doctors' offices. We strongly opposed these proposals. There were quite a few bills still moving through the legislative process that would have been vehicles to add this change to the PDMP law. We worked to stop all of these attempts, first in the Senate Judiciary Committee and then in the House and Senate Rules Committees.

Pharmacies have been collecting prescription data since June 1, 2011 and, at the same time, providing individual notice to patients (the database will be operational later this year). Despite their concerns it appears that individualized notice can be achieved and we hope they will not

return in February 2012 to amend the law. But if they do, we will oppose any effort to weaken patient protections.

WIN: Amendments Died in Committees

Driver License Data Harvesting (HB 2615)

In 2009, the ACLU successfully sponsored legislation (HB 2371) that restricts the swiping of the barcode on Oregon Driver Licenses (ODL) through an electronic reader. The barcodes contain significant personal information, including name, date of birth (DOB), address, height, weight, gender, driver license number, driving restrictions and donor status.

As more personal information is amassed in databases, the likelihood increases that the information will be misused or stolen, leading to increased risks of identity theft. While it appears there is limited use of this technology in Oregon, we advocated for laws that limit its use by providing protections *before* swiping becomes the latest trend.

After our proposal was introduced in the 2009 session, the ACLU negotiated changes to HB 2371 with what we thought were all of the stakeholders: Associated Oregon Industries, the Oregon Mortgage Lenders Association, a member of TechAmerica and the wireless telecom providers. The result was a compromise that allowed the swiping of an ODL for very limited purposes (for fraud, age verification, check services, and, optional for the consumer, to open a wireless account) and only by certain types of businesses. It also prohibited any use of the data for any other purpose (including marketing) and limited the information that can be collected to four datasets (name, address, DOB and ODL number only); however, it allowed businesses to permanently retain those four datasets.

This session **HB 2615**, introduced by the Oregon Bankers Association (OBA) and sponsored by Rep. Mike Schaufler (D-Happy Valley), would have expanded both the scope of use and the datasets that can be retained under this law in a manner inconsistent with the 2009 law. OBA believed the 2009 law did not allow them to swipe an ODL. They wanted all financial institutions, which under Oregon law includes extra national institutions, to have the authority to swipe an ODL for any purpose. That grant of authority was far too broad and inconsistent with the uses allowed by all other entities covered under the current law. We were willing to discuss a more narrow approach for specific types of uses consistent with the current law.

At the same time, AT&T, one of the wireless providers we negotiated with in 2009, wanted to amend the law to allow wireless providers to collect an additional dataset, the ODL expiration date. Despite extensive negotiations in 2009, AT&T and other wireless providers now claimed that their systems required five datasets to operate. In our informal survey in the Portland area, we found no wireless provider that actually swipes a person's driver license to open an account. ODL expiration has no relevance to opening or maintaining a wireless account. As such, we opposed this proposal as well.

The ACLU attempted to negotiate with the OBA to address our concerns. The OBA, despite testifying to the House Business & Labor Committee that it was eager to work with us, literally ignored our attempts to negotiate. As a result, we opposed HB 2615 when it came for a vote on the House floor. We did not anticipate stopping HB 2615 from passing in the House but we wanted to make sure there were enough "no" votes to assist us on the Senate side. We were more than pleased when HB 2615 passed by a narrow margin, 35-23. Our next step was to advocate for referral of HB 2615 to the appropriate Senate committee. At our urging, and over the objections of the proponents, HB 2615 was appropriately assigned to the Senate General Government, Consumer and Small Business Committee. We met with the Chair Sen. Chip Shields (D-Portland) and requested that HB 2615 not receive a hearing but instead die in the Committee. We are very pleased to report that this is exactly what happened.

WIN: PASSED IN HOUSE BUT DIED IN SENATE COMMITTTEE
House: 35-23
Scorecard Vote: House

CRIMINAL JUSTICE

Law Enforcement DNA collection of arrestees (SB 881)
This session, like last session, saw the introduction of a proposal to allow the collection of DNA from those arrested. **SB 881**, at the behest of Sen. Jackie Winters (R-Salem), would have required local law enforcement to collect a DNA sample of individuals arrested for any felony crimes committed against another person, all sex crimes and burglary in the first degree. SB 881 would have authorized the collection of biological evidence from individuals prior to any determination of guilt and without the requisite court order after a showing of probable cause.

One of the central tenets of our criminal justice system is the presumption of innocence. Taking DNA samples of people who are arrested but not convicted turns that concept on its head. Thousands of people are arrested or detained every year and are never charged with a crime. Allowing DNA samples from these persons to be uploaded to the state criminal DNA database fundamentally alters the meaning and purpose of the database from one of crime deterrence to population surveillance. It constitutes a search and seizure without a warrant or individualized suspicion of wrongdoing.

Certainly, if DNA evidence is available from the crime scene, the government can obtain the necessary court order to take a DNA sample from the arrestee. But SB 881 bypasses the judicial process and constitutional protections altogether.

Oregon law currently requires the collection of a DNA sample from a defendant upon conviction of a felony or certain misdemeanors. The Oregon Supreme Court upheld that law but made it clear that the decision was based on the fact that the collection occurred only after the person had been convicted. SB 881 requires blanket DNA

collection of individuals arrested but not convicted. In light of the Oregon Supreme Court's decision, we believe SB 881 raises significant constitutional questions under the Oregon search and seizure provision, Article I, section 9 and we so testified when SB 881 was heard in the Senate Judiciary Committee. Fortunately, the bill died in Committee.

WIN: DIED IN COMMITTEE

Removing the Statute of Limitations (HB 3057)

The ACLU opposed **HB 3057**, introduced by Representatives Dave Hunt (D-Gladstone), Margaret Doherty (D-Tigard) and Jeff Barker (D- Aloha), which would have removed any statute of limitations for sex-related crimes if the victim was under the age of 18 at the time of the alleged crime. Under this bill, a person could be charged with a crime decades after the alleged event. Current law provides expanded statutes of limitations for sex-related crimes, including prosecution up to 25 years after the crime. That expansion of the statute of limitations was adopted in 2007. Additionally, if there is DNA evidence there is no statute of limitations for crimes in the first degree.

In almost every session in recent years, the statute of limitations has been extended in various ways. In 2001, it was extended to 12 years if there was DNA evidence. In 2005, it was expanded to allow prosecution of a crime until the victim reaches 30 years of age if the victim was under the age of 18 at the time the crime was committed. As noted above, in 2007 it was expanded to allow for prosecution if there was DNA evidence 25 years after the commission of the crime for both first- and second-degree crimes. Most recently, in 2009, the legislature removed the statute of limitations entirely for first-degree sex-related crimes if there was DNA evidence.

In each of these instances, the arguments have been compelling. There are real victims who have suffered greatly. In the past, lost in the consideration of these proposals were the compelling reasons to have a statute of limitations, including protecting the falsely accused person who could be charged with one of these crimes.

The statute of limitations provides important safeguards designed to permit the prosecution and the defense to present a case before the evidence goes stale. Prosecution within a few years of the crime allows a defendant to confront the accuser, and allows the defendant to call witnesses and prepare a defense. As time elapses between the crime and the trial, it becomes increasingly difficult, if not impossible, for the defendant to prepare a meaningful defense – memories are lost, witnesses have died and exculpatory evidence is no longer available.

Criminal defendants are presumed innocent, and the prosecution must prove their guilt beyond a reasonable doubt. In highly emotional cases, however, juries usually presume that the defendant is guilty, otherwise he or she would not have been charged with a crime. This dynamic makes it exceedingly difficult for an innocent person to mount a defense decades after the crime occurred.

HB 3057 was vigorously debated in the House Judiciary Committee with the ACLU and the Oregon Criminal Defense Lawyers Association testifying in opposition. We were pleased that our concerns were heard and HB 3057 did not move forward to a work session and died in Committee.

WIN: DIED IN COMMITTEE

Health Care Notification to Law Enforcement (HB 3085)

Introduced by Rep. Barker (D-Aloha), **HB 3085** expands the requirement by health care providers to notify law enforcement of the results of a blood test performed in the course of treatment if the blood contains a controlled substance and the person is believed to have been the operator of a motor vehicle involved in an accident. Unfortunately, the medical community supported this proposal. The ACLU testified against HB 3085 because it not only requires health care providers to turn over medical information to law enforcement without a court order, it also requires disclosure even if the patient had consumed lawfully prescribed controlled substances, not illegal drugs. There is no evidence that the existence of a medication in a person's system means the medication either caused or contributed to an accident.

Currently, the law authorizes health care providers to notify law enforcement if the person's blood alcohol level meets or exceeds the legal limit under Oregon law. While we believe that law enforcement should be required to obtain a court order for this information (which we believe is easy to obtain), the existence of a blood alcohol level outside the authorized amount is illegal. The same, however, cannot be said for the existence of a lawfully prescribed controlled substance in a person's system. The Senate Judiciary Committee removed language that required the release of not only a blood test but also urine and other diagnostic testing. While this was an improvement, if they decided to move forward with HB 3085, we urged the legislature to limit it to illegal drugs, not lawfully prescribed medication. Unfortunately, we were unsuccessful in our efforts and HB 3085 B-Eng., became part of the final package of bills that moved out of both judiciary committees and we were not able to stop it.

LOSS: PASSED INTO LAW

<u>REPRODUCTIVE FREEDOM</u>

20-week abortion ban (HB 3512)

HB 3512, sponsored by almost all of the House Republicans, would have prohibited a woman from obtaining an abortion after 20 weeks except in limited circumstances. Banning abortions starting at 20 weeks – which is a pre-viability stage of pregnancy – directly contradicts longstanding U.S. Supreme Court precedent. In the context of viability, the U.S. Supreme Court has declared that state legislatures cannot declare a single factor (such as weeks of gestation or fetal weight) as the sole determinant of when the state acquires a compelling interest in the life or health of a fetus.

HB 3512 is part of a nationwide effort by the anti-abortion movement. Unfortunately, with a 30-30 House, HB 3512 received a hearing in the House Judiciary, but it was only an "informational" hearing with invited testimony from proponents and opponents. The ACLU submitted written testimony raising the constitutional flaws with HB 3512. The bill died in Committee.

WIN: DIED IN COMMITTTEE

EQUAL PROTECTION

Although there were many anti-immigration proposals this session, we were thankful that there was little interest in debating or moving forward with what is a contentious and divisive debate across the country.

Private Prisons (HB 3682)

Near the end of the session, **HB 3682** was introduced (on behalf of the Judiciary Committee so we do not know who proposed it). It would have authorized the Oregon Department of Corrections (DOC) to send inmates to out-of-state *private* prisons. We heard that HB 3682 was not drafted as the sponsors intended because it was intended only to apply to inmates whose immigration status is in question. The ACLU strongly opposes the use of private prisons as does the Oregon DOC. HB 3682 was assigned to the House Rules Committee and we were prepared for yet another "courtesy" hearing even if there was no intention to move the bill out of the Committee. Fortunately, because we were so near the end of session, HB 3682 was never scheduled for a hearing. We have no doubt that the proponents will raise this proposal again, aimed specifically at the immigrant community.

WIN: DIED IN COMMITTEE

Expanding Access to Driver Licenses (SB 845)

In 2008, the Oregon legislature limited access to driver licenses to only individuals who can prove their lawful presence in this country. The ACLU opposed that law along with the preceding Executive Order issued by then-Governor Ted Kulongoski because the purpose of driver licenses is to ensure that only qualified drivers get behind the wheel.

Applicants trying to obtain a driver license in Oregon must take a written test on traffic laws and practical test on the basic operation of a motor vehicle. That ensures that those behind the wheel understand the rules of the road. Vehicle owners are also required to obtain liability insurance. Already Oregonians face rising costs to their automobile insurance because of uninsured drivers. Individuals who do not have a driver's license cannot obtain automobile insurance thereby expanding the pool of uninsured drivers. We believe that the complicated issues surrounding immigration need to be addressed at a federal level and not through restricting access to driver licenses. Our concerns were shared by retired Hillsboro Chief of Police Ron Louie who testified in 2008 that restricting access to driver licenses makes all of us less safe on the roads.

This session, those joining us in opposing the 2008 law introduced **SB 845**, which would have authorized individuals to obtain a license for the limited purpose of providing identification related to driving and not for any other use. SB 845 was assigned to the Senate Business, Transportation & Economic Development Committee, which despite the Democratic majority in the Senate was evenly divided. SB 845 received a "courtesy" hearing and there was never any intention of moving the bill forward for a vote. The ACLU submitted written testimony in support of SB 845 and Ron Louie also testified in support. We were not surprised but we were disappointed that there was no meaningful interest in the House or Senate to make this change in the law. SB 845 died in Committee.

LOSS: DIED IN COMMITTEE

PUBLIC RECORDS

Restricting Access (SB 392)

The ACLU opposed **SB 392**, which extends a special exemption to the public records law for the Oregon Health & Science University (OHSU). This law allows OHSU to redact the names and home addresses of those involved in animal research.

The ACLU does not oppose redacting the home addresses of employees; Oregon law already allows for that. SB 392 goes further and allows exclusion of the identity of researchers and the companies that provide research animals to OHSU. We testified against SB 392 because we believe that access to public records should be preserved so that the media and public interest groups can sufficiently investigate and report on issues affecting the public. This is particularly important because public watchdog groups are adept at exposing abuses by public agencies. In some instances, watchdog groups provide the only protection against these abuses. The public has a right to know whether research that is done with taxpayer funds by OHSU is in compliance with federal standards aimed at avoiding animal abuse. In the past, public records have proved invaluable in exposing serious animal care issues at OHSU. This resulted in needed reforms at OHSU.

Despite concerns about the safety of OHSU researchers as the reason for the law, OHSU not only posts the names of many researchers on its website, but also their photographs. OHSU continues to contradict its public safety argument by posting this information online. Since the law was originally passed a number of years ago, OHSU has kept a log of how it handles public records requests. The log has shown that OHSU has abused the law and has instituted a policy that treats animal watchdog groups differently than the media, by restricting access by the former but allowing full access by the latter. Not surprisingly, despite media objections to other legislative efforts limiting public records disclosures, no media organizations testified in opposition to this law.

This year OHSU did not provide an updated log. Given its past practices, it is not unreasonable to believe that OHSU may be acting inconsistently with the Oregon public

records law. When SB 392 was heard in the House, members of the General Government and Consumer Protection Committee requested that OHSU continue to keep a log of requests and present it to the legislature when the law comes up for renewal in four years.

As the vote below indicates, SB 392 passed the Senate and the House with only one "no" vote. After obtaining a two-year extension in 2009 (rather than the requested four-year extension) with instruction by legislators that OHSU convene discussions and explore modifications to address the concerns expressed by the ACLU, OHSU instead spent the last two years bringing legislators to its facility to introduce them to the primate center researchers. This appears to have been quite effective because there have been a number of legislators in the past that consistently voted against this law and yet this session voted in support. Only Rep. Mary Nolan (D-Portland) stood by the ACLU on this issue and voted "no."

LOSS: PASSED INTO LAW
Senate: 29-0
House: 57-1
Scorecard Vote: Senate & House

RELIGIOUS FREEDOM

Pledge of Allegiance in Schools (HB 3604)
Currently, school districts are required to provide their students with the opportunity to recite the Pledge of Allegiance once a week. **HB 3604** was introduced to expand the current requirement by allowing for daily recitations of the Pledge of Allegiance. The ACLU opposed HB 3604. We think the fatal flaw with the current law, ORS 339.875, is that it sets forth not only the requirement that public schools provide students with the opportunity to recite the Pledge of Allegiance on a weekly basis, but that it requires the "One Nation under God" version in the state law.

It was only in 1954, in the midst of the McCarthy era "Red Scare" that Congress added "Under God." The hallmark of the McCarthy era was that it pressured people to conform in politics, religion, speech and belief. The prevailing assumption was that all good (non-communist) Americans believed in a monotheistic God. This assumption was as untrue in the 1950s as it is today.

If the goal of this law is to promote patriotism, then we should choose a non-religious expression of patriotism, such as the pre-1954 pledge. Choosing to include the words "under God" indicates that the real purpose of this law is religious, not patriotic. While the current law allows a child who does not want to recite the Pledge to not participate and "maintain a respectful silence during the salute," we remain concerned about the application of this law in schoolrooms. Too often, children who do not want to participate feel pressure to conform. Some schools have confused the "respectful silence" requirement with a requirement that non-participating students must stand,

which is a means of participation not required under Oregon law. The ACLU testified against HB 3604 when it was heard in the House Rules Committee. It had only one hearing and died in Committee.

WIN: DIED IN COMMITTTEE

Civil Rights Protections and Religious Exercise (HB 3609)

Introduced near the end of session, **HB 3609**, sponsored by Rep. Shawn Lindsay (R-Hillsboro) would have put a person's free exercise of religion above any neutral state or local laws, including civil rights laws, if the person asserted that the law infringed on his or her religious beliefs. This proposal has been introduced in past sessions and we have testified against these proposals because they put important civil rights protections at risk.

HB 3609 requires that when a person claims a public body is burdening a person's exercise of religion, the public body has the burden of establishing a *compelling* government interest and that the law is the least restrictive means available to achieve that interest. This strict standard is the most stringent level of scrutiny and is very difficult, if not impossible, for the government to satisfy.

In reality, these proposals are often used to discriminate against gay, lesbian, bisexual and transgender individuals. For example, if state law prohibits an apartment owner from discriminating against someone who is gay, the owner could refuse to rent to that individual by asserting that renting to that applicant violates his or her religious beliefs. Although we believe that courts should find civil rights laws compelling and enforce them in the least restrictive means possible, we know that several courts, including our own 9th Circuit Court of Appeals, have come to the opposite conclusion.

The ACLU was one of the founding members of the coalition that supported federal legislation around religious liberty and, along with a very broad based coalition of religious and civil rights groups, we supported the 2000 federal law, known as the Religious Land Use and Institutionalized Persons Act (RLUIPA).

This law covers two significant areas that have comprised the majority of litigation across the country. To name only a few, RLUIPA addressed problems with prohibitions on home worship meetings and bible studies, church soup kitchens and homeless shelters, remodeling or expanding worship space and the ability of religious assemblies to build in a locality together.

We testified in opposition to HB 3609 because we believe that state proposals such as HB 3609 are unnecessary and dangerous when it comes to ensuring meaningful civil rights protections. Because HB 3609 was introduced late, it was assigned to the House Rules Committee and was given a hearing. The ACLU testified against HB 3609 and the bill did not advance out of the Committee.

WIN: DIED IN COMMITTTEE

DEATH PENALTY

Expanding Death Penalty (HB 3211)

Under Oregon law only those convicted of aggravated murder are eligible for the death penalty. **HB 3211** would have expanded the scope of the aggravated murder law to include the murder of a reserve officer. We believe the death penalty is inconsistent with the underlying values of our democratic system; therefore, the ACLU opposed this proposed expansion to our death penalty law. Since 1973, over 139 people have been exonerated and released from death row in 26 states. The majority of these exonerations occurred in the past ten years.

As we testified before the House Judiciary Committee when HB 3211 was heard, it is the wrong time for Oregon to consider a bill expanding the death penalty, when across the country the momentum is building to eliminate the death penalty. HB 3211 did not move forward and died in Committee.

WIN: DIED IN COMMITTTEE

PRISONER RIGHTS

Limiting Access to Courts (SB 77)

SB 77 was introduced on behalf of the Oregon Department of Corrections (DOC). In its original form, SB 77 replicated the exhaustion requirements in the federal Prison Litigation Reform Act (PLRA). Under these requirements an inmate can only bring a claim for mistreatment within a facility after he or she has exhausted the administrative grievance process. A failure to use this system in a timely manner will result in a case being thrown out before a judgment on the merits. The ACLU opposes the PLRA and the results across the country have been devastating on incarcerated individuals.

SB 77 was heard in the Senate Judiciary Committee on the first day of session. The DOC testified that SB 77 was intended to address the increased harassment of inmates filing small claims actions against other inmates. The majority of SB 77 had nothing to do with this issue, and instead, was a wholesale restriction on inmate access to the judicial system. It prohibited an inmate from bringing *any* action against a public body unless the inmate had exhausted *all* administrative remedies. This would have constituted a fundamental policy change, completely independent of the purported inmate-to-inmate small claim issue.

In a January 2008 letter to Congress, the Chair of the National Prison Rape Elimination Commission (created by Congress) wrote that the effect of the same type of exhaustion requirement in the federal PLRA on eliminating sexual abuse in U.S. prisons and jails has undermined the ability of sexual assault victims to gain access to crucial judicial oversight and to obtain necessary relief.

In Oregon, like elsewhere, grievance procedures and requirements are set forth by administrative rules. In short, these provisions establish limited timelines and procedural barriers with which inmates must comply in pursuing a grievance. In Oregon, an inmate must grieve an issue within 30 days of the event and may only raise one event per complaint. Not all inmates can or will be able to comply for many reasons, including: mental capabilities, fear of retaliation, emotional trauma, disabilities, medical crises, language skills, limited access and comprehension of the process. It does not extend deadlines or give any other meaningful resources to inmates. If an inmate does not use the right form, then the grievance will be rejected. If an inmate is unable to file a grievance properly or in a timely manner, the inmate will be barred from pursuing further action within the grievance process. Having failed to pursue all administrative remedies, the inmate would be barred from pursuing a judicial remedy.

The structure of the exhaustion requirement allows inmates' access to the courts to be controlled by the people that the inmate is trying to sue. For example, a prison or jail can institute as many steps in its grievance procedure as it desires. It can also make the filing deadlines as short as it wants. In one ACLU prison project case in another state, after the inmate successfully went through the three-stage grievance process, the prison simply changed it to a seven step process in order to limit the inmate's access to a remedy.

The ACLU was the only organization to testify against SB 77. With the help of the ACLU Prison Project, we submitted written testimony from Jeanne Woodford (the former warden of San Quentin State Prison and former director of the California Department of Corrections) and Chase Riveland (the former Secretary of the Washington State Department of Corrections and the former Executive Director of the Colorado Department of Corrections). They urged the Committee not to enact a law that requires prisoners to exhaust all administrative remedies prior to filing suit against a public body in court.

While we would have preferred SB 77 to die in the Senate Judiciary Committee, it was clear that Committee was interested in moving some version of the bill forward. The Senate Judiciary Committee requested that the DOC and the ACLU meet to discuss the ACLU's concerns. Following this meeting, the DOC agreed to remove the exhaustion requirement entirely, modify other provisions of the law so that it ultimately set some additional requirements related to inmate small claims actions against the government and barred inmate to inmate small claim actions. Access to circuit courts for any kind of action remained untouched. With the most egregious portions removed, the ACLU was neutral and SB 77 A-Eng. passed both chambers.

WIN: ACLU AMENDMENTS ADOPTED

DRUG REFORM

Medical Marijuana (SB 777 & HB 3664)

The ACLU submitted written testimony in opposition to **SB 777**, which would have significantly weakened the Oregon Medical Marijuana Act (OMMA). Passed by voters in 1998, the OMMA permits Oregonians suffering from debilitating medical conditions to use marijuana to relieve their symptoms without being in violation of Oregon criminal law.

There are many OMMA patients whose symptoms can be adequately relieved by occasional use of marijuana. Unfortunately, because federal authorities continue to insist on treating marijuana as a Schedule I controlled substance, Oregon law does not permit physicians to write prescriptions for the medical use of marijuana as they do for medications containing codeine, amphetamines, or morphine. Instead, the attending physician is authorized to issue a statement, signed and dated, to a patient diagnosed with a debilitating medical condition.

SB 777 would have removed the provision in the Oregon law that authorizes the Oregon Health Authority (OHA) to expand the list of medical conditions approved under the OMMA for medical marijuana. Since 1998, OHA has only expanded the law for one additional use despite receiving fourteen requests. OHA appears to be acting in a restrictive manner when it comes to any expansion of this law. The one expansion it allowed was the inclusion of "agitation due to Alzheimer's disease."

In addition to removing the authority of OHA to expand the list, SB 777 rewrote the list of debilitating conditions, and dramatically limited the current scope of appropriate use. It removed Alzheimer's disease and restricted the use of medical marijuana for those with acquired immune deficiency syndrome to treat only lack of appetite and no other symptoms. SB 777 greatly restricted use by cancer patients and allowed only use for appetite loss or nausea as a result of chemotherapy, but not for nausea as a result of any other cancer treatment or any other symptom.

SB 777 would have interfered with the doctor/patient relationship by dramatically limiting the ability of the medical profession to authorize the use of medical marijuana and, thus, make appropriate medical decisions for patients.

Finally, SB 777 would have added another burden to patients, physicians and the OHA, which would have likely passed the financial burdens on to patients, by changing the requirement to seek reauthorization for use from every 12 months to every 6 months. This provision would have required the patient to request that the physician prepare, and the OHA receive documentation, from the attending physician regarding the person's condition and need for the medical use of marijuana. All of this was intended to eliminate the OMMA. The ACLU submitted written testimony when the Senate Health

Care, Human Services and Rural Health Policy held a public hearing. Fortunately, SB 777 died in Committee.

WIN: DIED IN COMMITTTEE

The ACLU testified against **HB 3664**, which would have significantly rewritten and weakened the Oregon Medical Marijuana Act (OMMA). We joined other advocates before the House Rules Committee as part of a panel providing invited testimony. Because of the limited time allotted for the hearing, the hearing closed before dozens of others, who had signed up to testify against HB 3664, could testify.

We focused our comments on a few aspects of the proposed law, including one change that would have made it impossible for anyone to use the program. Under HB 3664, a physician would be required to state in his or her recommendation for medical marijuana that its use *will* mitigate a patient's symptoms or the effects of the patient's debilitating medical condition. The current law requires only that a doctor state it *may* mitigate symptoms or effect condition.

When a physician prescribes any kind of medication to a patient, the physician hopes that it will help the patient's medical condition. But a physician is not in a position to state that any medication *will* help. A change from "may" to "will" would have effectively ended the OMMA program because no physician would have recommended the use of medical marijuana if the law required stating unequivocally that use would mitigate symptoms or affect the debilitating condition.

While we know law enforcement continues to look for any opportunity to weaken and undermine the OMMA, there was enough opposition to HB 3664 that the bill died in Committee.

WIN: DIED IN COMMITTTEE