MCFL

Massachusetts Citizens For Life, Inc.

Testimony in Support of H482-An Act relative to a woman's right to know/Laura's Law

Submitted to the Joint Committee on the Judiciary—June 9, 2011
By John F. Triolo, Assistant Legislative Director, Massachusetts Citizens for Life

I am writing, after waiting seven hours at yesterday's hearing without being heard, in support of H482-An Act relative to a woman's right to know.

This measure deserves support by people from all sides of the abortion issue because it is essentially about informed decision making. Women deserve to be provided with all the relevant facts before they make such a momentous decision as whether to procure an abortion. Obviously, we at MCFL believe that this legislation will reduce the number of abortions; however, if, as they claim, the facts actually support their "pro-choice" position, abortion advocates have nothing to worry about. I was surprised to find that the pro-abortion panel which spoke against this bill seemed to believe that giving women all the facts and time to consider them would represent an unreasonable restraint on the doctor-patient relationship—I know that I prefer my doctor to level with me and allow me to participate in medical decision making as an informed patient. Perhaps abortion advocates don't believe that the women they think need abortions can be trusted to make the "correct" decision.

I was also surprised by the objections raised to the bill by the physician testifying against it. Apparently she is concerned that the new information and consent forms that the bill calls for would be written by people with "little or no medical expertise." I must say I disagree. I have faith in our elected officials (that is to say, you) and the government of the Commonwealth, at least as regards their ability to find a doctor or even several doctors to design the materials.

The real reason that many advocates of "choice," so called, oppose this measure has nothing to do with concern about access to healthcare, or fear about causing patients distress and it certainly has nothing to do with women's ability to make informed choices. The real reason the opponents of this bill are so entirely against it is that this measure will hamper their ability to dictate the choices of their "patients" (perhaps I ought to write "victims") by controlling their access to information.

I urge the honorable members of this committee to consider the large amounts of evidence in favor of this bill, particularly the facts about frequency of complications after abortions (which we at MCFL have provided and can continue to provide upon request). Do not allow the fanatical devotion of some to ensuring the sheer volume of abortions performed to keep you from allowing women access to all of the facts about this dangerous procedure.

The Schrafft Center • 529 Main Street Boston, MA 02129-1100 • (617)242-4199 • Fax (617)242-4965

109 Center Street P.O. Box 96 Ludlow, MA 01056 • (413)583-5034 • Fax (413)547-6279

www.masscitizensforlife.org

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES
STATE HOUSE, BOSTON 02133-1054

REPRESENTATIVE
LIZ MALIA
11TH SUFFOLK DISTRICT

ROOM 33, STATE HOUSE
TEL: (617) 722-2060
FAX: (617) 722-2849
Liz.Malia@mahouse.gov

CHAIR
Committee on Mental Health & Substance Abuse

June 8, 2011

Joint Committee on the Judiciary
Room 136
State House
Boston, MA 02133

Dear Chairman O'Flaherty, Chairman Creem, and Honorable Members of the Committee:

Thank you for accepting this testimony in support of three of the bills before you today: House bill 492, An Act relative to the reform of archaic laws implicating certain private consensual intimate conduct between adults, House bill 1336, An Act to protect privacy and personal data, and House bill 2853, An Act to improve the collection and analysis of data relative to traffic stops.

As legislators, in addition to passing new laws, we also have a responsibility to remove bad, inappropriate, or outdated laws from the books. H492 addresses one such law that needs to be fixed, amending section 34 of chapter 272 of the General Laws and repealing section 35 of said chapter 272.

Clearly, one way that various branches and agencies of the government are seeking to prevent terrorism is through large amounts of data collection, on U.S. citizens as well as residents of other countries. In particular, the federal government has given funding to states for the development and operation of large, centralized data-collection outfits. Two of these "fusion centers," as they have been called, are running here in Massachusetts, in a daily process of collecting information on our Commonwealth's residents. "An Act to protect privacy and personal data" would establish some basic safeguards for what data is collected and how it is used.

"An Act to Improve the Collection and Analysis of Data Relative to Traffic Stops" addresses racial profiling in traffic stops. Basic data collection regarding traffic stops would serve as an ongoing reminder to avoid racial profiling in traffic stops, and a way to assess how we are doing in eliminating

such racial profiling. H2853 would codify in our General Laws the requirement that law enforcement shall collect such basic data shall be collected during traffic stops, and that this data shall periodically be compiled and reviewed by a Traffic Data Review Committee.

If you have any questions or would like any further information regarding these three pieces of legislation please do not hesitate to contact my office.

Sincerely,

Liz Malia

LIZ MALIA
11TH SUFFOLK DISTRICT

ACLU
AMERICAN CIVIL LIBERTIES UNION of MASSACHUSETTS

Gavi Wolfe, *Legislative Counsel*
ACLU of Massachusetts
211 Congress Street, Suite 301
Boston, MA 02110
617-482-3170 x340
gwolfe@aclum.org
www.aclum.org

Joint Committee on the Judiciary
June 8, 2011

Testimony in Support of H.2853
An Act to Improve the Collection and Analysis of Data Relative to Traffic Stops

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The American Civil Liberties Union of Massachusetts strongly supports House Bill 2853, because it offers a data-driven approach to improving the management and integrity of traffic enforcement in the Commonwealth. Chapter 228 of the Acts of 2000[1] – a special law that led to a two-year study of racial disparities in police stops of motorists – established the foundation for this legislation. A decade ago, there was a strong suspicion, supported by ample anecdotal evidence, that people of color in Massachusetts were being pulled over by police in numbers disproportionate to their representation in the general population. Since then, the phenomenon has been well, if not fully, documented.

Chapter 228 mandated the collection of data about the race and gender of all drivers given written citations. As a result, 366 law enforcement agencies, including state and municipal police departments as well as a number of special police units, collected this data for 1.6 million traffic citations, which was then rigorously analyzed by the Northeastern University Institute on Race and Justice. In 2004, the Institute published a report finding that the data collected by 249 of those 366 law enforcement agencies – a full 2/3 – demonstrated racial disparities by one or more measures.[2] Among departments showing a disparity was the Massachusetts State Police.

Subsequently, the Secretary of Public Safety directed the 249 communities with disparities to collect further data, on *all* traffic stops for a period of one year. The Secretary explained his decision by emphasizing that data collection is an industry standard practice for effective community policing: "Data collection ... supports strong management practice, good public policy, and is the right thing to do. The 6,000 police agencies across the country currently collecting data on traffic stops apparently agree .... Better information makes policing smarter and people safer."[3] Unfortunately, most police departments did not fully integrate this approach into their operational practice. According to a 2007 EOPS follow-up report, 10 communities failed to collect data that year, 38% did *no* analysis of the data they collected, 40% stopped collecting data after the year, and only 36% were conducting ongoing analysis.[4]

Despite the fact that data collection is an important component of effective, non-discriminatory, professional traffic enforcement administration recommended by numerous national professional police organizations, voluntary data collection and analysis by individual police departments is not consistently being conducted in Massachusetts. This bill aims to

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[1] Ch. 228 of the Acts of 2000, "An Act providing for the collection of data relative to traffic stops" (Aug. 10, 2000).
[2] Dr. Amy Farrell and Jack McDevitt, et al., *Massachusetts Racial and Gender Profiling Final Report*, Northeastern University Institute on Race and Justice, (May 4, 2004), *available at* http://www.racialprofilinganalysis.neu.edu/IRJsite_docs/finalreport.pdf.
[3] *MetroWest Daily News*, "Flynn: Racial Profiling Study Will Build Public Trust," May 26, 2004.
[4] Commonwealth of Massachusetts Executive Office of Public Safety, *Racial and Gender Profiling Data Collection Survey: An Analysis of Communities Required to Collect Traffic Stop Data* (August 2007).

address the problem comprehensively, making the collection of data regarding drivers' race and gender a routine practice for all traffic stops, and subjecting that data to thorough analysis so that state and local law enforcement offices can identify and take appropriate steps to correct any disparities. It is based on the principle that recent, demonstrated racial disparities in traffic enforcement demand better management and you can't manage what you don't measure.

The ACLU of Massachusetts is committed to ensuring equal treatment under the law – and by law enforcement – regardless of race or gender. On the roads and highways of the Commonwealth, officers continue to pull over thousands of drivers every day. Dangerous drivers should be stopped and ticketed, but a driver's race or gender should never be the reason for a police officer to order a car to pull over. That's discrimination, and we should end it in Massachusetts.

We urge the Committee to give this bill a favorable report. Thank you.

BRENNAN
CENTER
FOR JUSTICE

Brennan Center for Justice
at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, New York 10013
212.998.6730 Fax 212.995.4550
www.brennancenter.org

Testimony of Thomas Giovanni,
of the Brennan Center for Justice at NYU School of Law,[1]
Before the General Court of the Commonwealth of Massachusetts
Joint Committee on the Judiciary

June 8, 2011

Members of the Committee, thank you for allowing me to submit testimony for this hearing. I write on behalf of the Brennan Center for Justice at NYU School of Law in support of HB 2853, an Act to Improve the Collection and Analysis of Data Relative to Traffic Stops.

Introduction

The Brennan Center for Justice at New York University School of Law was founded in 1995 as a living tribute to the late Supreme Court Associate Justice, William J. Brennan, Jr. The Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Justice Project at the Brennan Center is dedicated to securing the nation's promise of equal justice, and focuses much of its work on ensuring fairness in the criminal justice system, including through addressing unwarranted racial and ethnic disparities in the criminal justice system. For nearly three years, the Brennan Center has collaborated with local partners to create and support this bill, previously designated as HB 3482. This testimony is submitted as part of the Center's continuing support of local efforts in Massachusetts to pass this important legislation.

The Brennan Center believes that a comprehensive approach to address and eliminate racial profiling must include: 1) a ban on the practice of racial profiling, 2) robust data collection, and 3) a mechanism for creating and implementing strategies to address racial profiling patterns that may be unearthed. If enacted, the bill would deliver on these three important objectives.

[1] Thomas Giovanni is counsel to the Justice Program of the Brennan Center for Justice at New York University School of law, and Director of the Center's Community-Oriented Defender Network.

Racial Profiling: A Persistent Problem

Racial profiling is the reliance by law enforcement agents or agencies on race, ethnicity, or national origin, without more particularized information, to select who to subject to investigatory or other law enforcement action. It is humiliating and degrading to the individuals who experience it, and it is a wasteful practice that squanders police resources.

A number of well-regarded studies have demonstrated that minorities targeted by law enforcement are no more—and in many instances, less—likely to be found with contraband than whites who are stopped.[2] Further, the Department of Justice has observed that "[r]acial profiling in law enforcement is not merely wrong, but also ineffective. Race-based assumptions in law enforcement perpetuate negative racial stereotypes that are harmful to our rich and diverse democracy, and materially impair our efforts to maintain a fair and just society."[3] Finally, in addition to being wrong and ineffective, racial profiling is also extremely unpopular with a majority of Americans.[4]

Yet, in spite of having no legitimate place in our society or law enforcement practices, racial profiling persists. Studies from around the country confirm that African Americans and Latinos continue to be stopped at rates disproportionate to their population.[5] The widespread

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[2] *See e.g.*, New York Attorney General, New York City Police *"Stop and Frisk" Practices: A Report to the People of New York From the Office of the Attorney General*, (1999); U.S. CUSTOMS SERVICE, PERSONAL SEARCHES OF AIR PASSENGERS RESULTS: POSITIVE AND NEGATIVE, (1998); U. OF ILL. AT CHI. CTR. FOR RES. IN LAW & JUST., ILLINOIS TRAFFIC STOPS STATISTICS STUDY, 2008 ANNUAL REPORT.

[3] U.S. DEPT. OF JUSTICE, CIVIL RIGHTS DIVISION., GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (JUNE 2003) *available at* http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf

[4] *See* Darren K. Carlson, *Racial Profiling Seen as Pervasive Unjust,* Gallop, Jul.20, 2004, *available at* http://www.gallup.com/poll/12406/Racial-Profiling-Seen-Pervasive-Unjust.aspx (reporting that 67% of Americans think it is never justified for police to use racial or ethnic profiling when stopping motorists on roads and highways).

[5] *See e.g.,* Ian Ayres, RACIAL PROFILING AND THE LAPD: A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT (2008); U. OF ILL. AT CHI. CTR. FOR RES. IN LAW & JUST., ILLINOIS TRAFFIC STOPS STATISTICS STUDY, 2008 ANNUAL REPORT; NORTHEASTERN U. INST. ON RACE AND JUSTICE, RHODE ISLAND TRAFFIC STOP STATISTICS DATA COLLECTION STUDY 2004-2005 (2006); INSTITUTE ON RACE AND POVERTY, MINNESOTA STATEWIDE RACIAL PROFILING REPORT: ALL PARTICIPATING JURISDICTIONS (2003); U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CONTACTS BETWEEN POLICE AND THE PUBLIC (2005); *see also* Deborah Ramirez, Jack McDevitt & Amy Farrel, U.S. DEPT. OF JUSTICE, A RESOURCE GUIDE ON RACIAL PROFILING DATA

perception, particularly among minority communities, that these disparities are the result of racial and ethnic bias undermines the legitimacy of our criminal justice system. Ironically, this barrier between law enforcement and minority communities hampers legitimate police efforts to work effectively in the very communities that are typically most harmed by crime, and which have the largest police presence.[6]

Without reliable information about what is happening on the ground, law enforcement will be unable to dispel the presumption that officers' actions are biased and unfair. Where unlawful practices persist, those problems will remain hidden, and unaddressed.

The Current Law

HB 2853 improves upon the earlier, "Act Providing for the Collection of Data Relative to Traffic Stops," special law, Chapter 228 of the Acts of 2000, passed eleven years ago. The original law required that all state and local police departments collect demographic data on drivers for traffic stops where a citation was issued. Police were also required to record whether a search was initiated as a result of the stop. The 2004 Northeastern University Institute for Race and Justice analyzed 27 months of data, and found that over 80% of law enforcement agencies had stopped a disproportionately high number of minorities, as compared to their representation in the population. While Chapter 228 required a second phase of data collection for those agencies for all traffic stops, there was no requirement that agencies analyze the data they collected, or take any remedial measures to address stop patterns indicative of racial profiling, if found to exist. The result, by all accounts, has been inconsistent compliance with the data collection requirements and the complete absence of meaningful analysis of data that is being collected.[7]

COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED 6-8, (2000) (describing studies finding racial and ethnic disparities in law enforcement stop and search patterns in Maryland, New Jersey and New York).

[6] *See* Jack Ludwig, *Americans See Racial Profiling as Widespread*, Gallop, May 13, 2003, *available at* http://www.gallup.com/poll/8389/americans-see-racial-profiling-widespread.aspx (finding that a majority of Americans considered racial profiling to be widespread (59%), although the percentage of blacks who felt that way was substantially greater than the percent of whites, 85% and 54% respectively).

[7] See Michael Levenson, *Study of Traffic Stops is Derailed: Police Lagging on Racial Data Collection*, BOSTON GLOBE, Sept. 9, 2007.

The new bill, HB 2853, fixes these deficiencies by requiring that law enforcement agencies collect data on all stops, not only those that result in citation, and that the data is published and analyzed on an annual basis. The act establishes a ban on racial profiling, and creates an advisory board structure to create a mechanism for stakeholder input on law enforcement policies that can help eliminate unwarranted disparities.

The National Momentum is in The Direction of the Proposed HB 2853

Passage of the HB 2853 would bring Massachusetts in line with the growing number of states around the country who have taken bold and necessary steps to address the persistent problem of racial and ethnic profiling.

At least half of the 50 states have some form of racial profiling-related legislation.[8] As of 2009, 13 states required or have required some form of mandatory data collection of demographic data of motorists for traffic stops.[9] Twelve states have written express prohibitions of racial profiling into their state codes,[10] and seven have established oversight or advisory boards to help devise solutions to recurring problems.[11] Missouri and Illinois are two states that have enacted legislation that serves as a model of the type of comprehensive efforts needed to effectively assess and address racial profiling.

In 2000, in response to citizen concerns, the Missouri legislature passed a bill that requires the 715 law enforcement agencies[12] across the state to collect motorist demographic data

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[8] *See* ACLU AND RIGHTS WORKING GROUP, THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES 40 (2009).

[9] *See* THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING, *supra*, (listing California, Connecticut, Florida, Illinois, Louisiana, Maryland, Missouri, Rhode Island, Tennessee, Texas, Utah and Washington).

[10] *See* THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING, *supra*, (listing Arkansas, California, Connecticut, Kansas, Kentucky, Nebraska, Nevada, New Mexico, Oklahoma, Rhode Island, Texas, and West Virginia).

[11] *See* THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING, *supra*, (listing Illinois, Kansas, Minnesota, Missouri, Nebraska, New Mexico, and Rhode Island).

[12] Based on 2008 data.

for all automobile stops. The Attorney General performs an annual analysis of the data and this report is submitted to the governor, general assembly and every law enforcement agency.[13]

The Missouri legislation goes further than HB 2853 in that it contains an enforcement mechanism to punish agencies that do not comply with the data requirements. It also requires law enforcement agencies to adopt procedures for determining whether any officers have a pattern of disproportionately stopping people of color, and to provide counseling and training to any such officers.

In 2002, then Missouri Attorney General Jeremiah Nixon, who was tasked with implementing Missouri's racial profiling law, convened an advisory group consisting of law enforcement representatives, community leaders and activists. Attorney General Nixon remarked,

> Needless to say, this was a group that did not always see eye-to-eye on issues. Racial profiling is not a visible problem to most whites; thus, there has been a tendency for many to dismiss or belittle such claims. Police have defended their practices as practical, calculated crime-stopping techniques. Through the year, however, we found that people of good will--despite differing affiliations and views on an issue--can find common ground and learn from one another.[14]

The dialogue occasioned by Missouri's efforts to squarely assess traffic stop patterns of law enforcement agencies has led to meaningful reform. The legislature has passed subsequent laws to require additional law enforcement training on the prohibition of racial profiling, respect for racial and cultural differences, and the use of effective, non-combative methods for carrying out law enforcement duties in a racially diverse environment.

Illinois has similarly enacted comprehensive racial profiling legislation. In 2003, the state passed the Illinois Traffic Stops Statistic Act, sponsored by then state senator Barack Obama. It required every state and local law officer to collect data on the race of drivers for citations and

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[13] Missouri Revised Statutes § 590.650 (2000).

[14] Jeremiah W. ("Jay") Nixon, *Remarks On Racial Profiling In Missouri*, 22 ST. LOUIS U. PUB. L. REV. 53, 54 (2003).

stops, and annually analyze the data for a three year period.[15] Subsequent legislation has extended the data collection period, increased the frequency of data compilation from once to twice a year, and expanded the scope of data to be collected to include information on consent searches, and whether contraband was discovered in the searched vehicle.

In both Illinois and Missouri, the state's ability to confront disparities in the number and types of police stops has laid the groundwork for a fairer system of justice and is helping to restore public confidence in the law enforcement community. The proposed HB 2853 would allow Massachusetts to join those states, and others, in pursuit of a fairer system.

Conclusion

Without reliable standards in place, the current events (and underlying practices) that can periodically inflame conversation over racial profiling become far more difficult to resolve than would otherwise be the case.[16] Massachusetts is, in fact, unable to participate in dialogue on the issue alongside other states because the data most relevant to illuminating bias in law enforcement practices in Massachusetts is haphazardly tracked, or not tracked at all. HB 2853 is an important next step for the Commonwealth toward identifying and addressing unwarranted racial and ethnic disparities in our criminal justice system.

We urge you to pass HB 2853.

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Thank you for your consideration of this important bill. Please feel free to contact me at 646.292.8355, or thomas.giovanni@nyu.edu if you have any questions.

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[15] Illinois Public Act 93-0209, 93rd General Assembly (2003).

[16] *See* Carol Rose, *Racial Profiling is Alive and Well*, BOSTON GLOBE, Jul. 22, 2009 (discussing the arrest of Professor Henry Louis Gates in his Cambridge home).

M•A•C•D•L, Massachusetts Association of Criminal Defense Lawyers
Profiling Data Collection: Will Rubber Rhetoric Meet Reality Road?
House 2853 (Rushing) & Senate 677 (Chang-Diaz)
Judiciary Committee (Wed., June 8, 2011)

MACDL has strongly supported the thrust of these bills from their inception, indeed beginning in the 1990's, and offered testimony – including a historical perspective back to the 1980's – when predecessor bills were heard by the Joint Judiciary Committee, then submitting also the **(attached)** *Mass. Lawyers Weekly editorial* from 2008, "*Lora*': a profile in rhetoric?" We are unable to attend today's hearing, due to relatively short notice, but we look forward to providing further input if the Committee sees fit. As for the foregoing *MLW* editorial, as Yogi Berra said, it's "déjà vu all over again"; but now with glimmers of hope – and action. There has been more and more mainstream support for not only minimizing racial profiling, but for this specific tool, the most obvious and systematic one – keeping electronic data about the race of drivers in all car stops. An Aug. 2008 American Bar Association resolution urged all levels of "governments to enact effective legislation ... and procedures to ban "racial and ethnic profiling," including "Data collection, on all police stops and searches ... ; and Funding for police agencies to be made contingent on compliance with these requirements." Even Attorney General Ashcroft in 2002 said:

> This administration ... has been opposed to racial profiling and has done more to indicate its opposition than ever in history. The President said it's wrong and we'll end it in America ... Using race ... as a proxy for potential criminal behavior is unconstitutional, and undermines law enforcement by undermining the confidence that people can have in law enforcement.

About 50 communities,[1] including large ones like Boston and Brookline (the first in 1997), keep this e-data, apparently without either fiscal or administrative roofs collapsing. Nor would motions to suppress become commonplace, since the necessary comparison data for "driving population" (Mr. Lora's fatally lacking evidence) is a Herculean challenge to gather in any case.

It's time to get real – statewide – and pass this, probably the most important civil rights legislation in decades. The data is necessary for simple transparency and accountability, to stop the ubiquitous bickering about the facts,[2] and to make meaningful the SJC's constitutional mandate.

MACDL [http://www.macdl.com/] **contacts**:

- Martin R. Rosenthal, Co-Chair (with Liza Lunt), Legislation Committee & Chair of Committee on Racial Profiling, 617-742-0606
- Liza Lunt, 617-742-6020
- John H. Cunha, President, 617-523-4300
- Jim DiNatale, Executive Director, 617-965-2215

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[1] 2009 testimony of Jack McDevitt, probably MA's leading expert, Director of N.U.'s Institute on Race & Justice, and Associate Dean, College of Criminal Justice .

[2] See e.g. "How to Correctly Collect and Analyze Racial Profiling Data," [DoJ, Office of Community Oriented Policing Services, "COPS," 2002]: *"More than 400 United States law enforcement agencies have instituted traffic-stop data-collection measures...* . Polls indicate that a majority of citizens believe that police departments engage in racial profiling, while most police chiefs do not believe their officers engage in racial profiling. This difference of perception, at times, is a reflection of a fractured relationship between the police and the community."

MASSACHUSETTS LAWYERS WEEKLY
www.masslawyersweekly.com

Editorial: ***'Lora': a profile in rhetoric?***
Published: May 29, 2008 (Print ed. Mon. June 2) [¶ breaks reduced by MRR]

Commonwealth v. Lora was closely watched by civil-rights lawyers. The case before the Supreme Judicial Court was to provide the answer to a critical question: Could statistics be used to suppress evidence against a motorist who was pulled over because of his race? The SJC answered the question in the affirmative, opening a sorely needed crack in the door long closed by cases refusing to examine officers' "pretexts" for traffic stops. But civil-rights attorneys feel the victory is a hollow one. Yes, the court found that statistical evidence of racial profiling can be used to rebut the presumption that an officer making a traffic stop has acted with nondiscriminatory motives; and the court did permit challenges to stops under the 14th, and not just the Fourth, Amendment.

But the court has apparently provided a right without a remedy. For all but the affluent, it will be difficult if not impossible to get by discovery the data needed to show the discrimination or to complete the meticulous study the court mandates. The defense bar's fear is that the court has gone down another ill-advised path, where an important right to exculpatory evidence was recognized (like the SJC's standard set in *Bishop-Fuller*), but initially with an impossible Catch-22 burden for the defense to show that treatment records were exculpatory - without being able to see them. As for collecting data the way the SJC seems to require, it will easily cost $10,000 or more. Given all the SJC's procedural and threshold barriers, will judges grant indigent court costs for such challenges? The court speaks of a 1996 New Jersey decision in *State v. Soto*, which it seems to hold out as the gold standard in racial-profiling cases. But *Soto* was the result of a Herculean effort and doesn't hold much promise for the victims of racial profiling in Massachusetts.

Justice Roderick L. Ireland's concurring opinion in *Lora* captures this dilemma nicely, concluding: "Because the ability of defendants to establish a prima facie case is fraught with such great difficulty, my concern is the degree to which the right to challenge seized evidence could seemingly be elusive in practice." In Soto, wrote the judge, a database of all stops and arrests by State Police patrolling a certain area of the New Jersey Turnpike between April 1988 and May 1991 was compiled. "This involved ... the attorney from the public defender's office actually traveling the portion of the highway at issue, 'observing and recording the number of vehicles that passed him [he was traveling at sixty miles an hour], the number of vehicles he passed and how many had a black occupant,'" wrote Ireland. However, said the judge, "[h]ere in the Commonwealth, even if a defendant could conduct such a survey, it is not clear whether the kind of database of stops and arrests the defendants were able to obtain in New Jersey is available yet."

Pursuant to a law enacted by the Legislature, an analysis of 27 months of collected data was performed by experts at Northeastern University and a report was issued in May 2004. The report found that of the 366 Massachusetts law enforcement agencies reporting data for analysis, 249 had substantial disparities in at least one of four measurements used. The statute, G.L.c. 228, §10, states that agencies appearing to have engaged in racial or gender profiling must collect in-

formation on all traffic stops for one year. "However," wrote Ireland, "it appears as though the statute does not provide expressly for the reporting or analysis of the additional data. Moreover, nearly one-half of the targeted police departments did not follow recommended guidelines and the State did not receive or review any data." Further, the statute, in deference to police officials, forbids data collection on individual officers. Will the courts sanction that exclusion?

Finally, some observers of *Lora* also find the court's deference to the executive branch curious and, especially in light of the state's now obviously flawed data collection effort, annoyingly ironic. The court writes: "Of necessity the important responsibility of eliminating racial considerations in the day-to-day enforcement of our laws lies principally with the executive branch of government, and no evidence was presented in this case to suggest that that this is a responsibility that is being ignored." Those who hoped the court would breathe life into this important issue feel let down by that remark. The effectiveness of the actions of the executive branch was not an issue in the case.

Lora still provides glimmers of hope for some. It is possible that the case will eventually lead to more practical avenues of establishing racial profiling in the future. Massachusetts does, after all, join New Jersey as the only two states to acknowledge that such data can be used at all in court. Unfortunately, *Lora* leaves civil-rights lawyers waiting for some (perhaps non-profit) organization - or, even better, the state - to step forward and collect the necessary data, e.g. "Driving Population Estimates" for every community. (Sadly, the Northeastern University project's data collection effort is now gathering dust; and its current parameters are hopelessly restrictive and non-binding.) *Lora* was a victory for civil-right lawyers, but ultimately contained more rhetoric than guideposts of progress.

MASSACHUSETTS CATHOLIC CONFERENCE
WEST END PLACE

150 Staniford Street, Suite 5, Boston, MA 02114-2511
Phone (617) 367-6060
FAX (617) 367-2767
http://www.macathconf.org
staff@macathconf.org

LEGISLATIVE TESTIMONY

To: Joint Committee on the Judiciary
From: James F. Driscoll, Esq., Executive Director
Re: Senate 764/House 502, "An Act Relative to Transgender Equal Rights"
Date: June 8, 2011

The Massachusetts Catholic Conference ("Conference") respectfully submits this testimony in opposition to Senate 764/House 502, "An Act Relative to Transgender Equal Rights."

Summary of the Bill

Sections 1-5	Add "transgender youth" to the title and scope of the Massachusetts Commission on Gay, and Lesbian, and Bisexual Youth (amending M.G.L. c. 3, § 67).
Section 6	Expands the membership of the advisory board of the Massachusetts Commission Against Discrimination by requiring the inclusion of "people of diverse gender identities or expressions" (amending M.G.L. c. 6, § 56).
Section 7	Amends the state "hate crimes" reporting statute (M.G.L. c. 22C, § 32). The bill authorizes law enforcement agencies participating in a voluntary statewide project that compiles data on crime incidents to include in their incident reports "hate crimes" motivated by prejudice against the victim's "gender identity or expression." The reporting statute defines "hate crime" as "any criminal act coupled with overt actions motivated by bigotry and bias," and currently includes "racial, religious, ethnic, handicap, gender, and sexual orientation prejudice."
Secs 8-10	Amend various state statutes governing public schools and charter schools (M.G.L. c. 71, §§ 89(f) & (l); M.G.L. c. 76, §§ 5 & 12B(j)) by adding "gender identity or expression" as a protected status to non-discrimination requirements related to school admission and activities.
Secs 11-14	Amend the state statute (M.G.L. c. 151B) prohibiting discrimination in employment, housing, insurance, credit, and real estate transactions. The bill adds "gender identity or expression" as a protected status to numerous non-discrimination provisions in Chapter 151B, which currently prohibits discrimination based on race, color, religious creed, national origin, sex, sexual orientation, age, ancestry and handicap. Section 7 of the bill defines "gender identity or expression" as "a gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual's assigned sex at birth."
Secs 15-16	Amend the state "hate crimes" criminal statute penalizing personal or property assaults intended to intimidate the victim because of the victim's race, color, religion, national origin, sexual orientation, or disability (M.G.L. c. 265, § 39), by adding "gender identity or expression." The bill thus adds a category of assaults based on the victim's gender identity or expression to a statutory scheme that, when involving status-based

intimidation, increases the maximum fine from $1,000 to $5,000 for assaults that do not cause bodily injury, and from $5,000 to $10,000 for assaults resulting in bodily injury, and allows for triple damages in assault cases causing property damage.

Secs 17-19 Amend the state statute prohibiting discrimination in places of public accommodation (M.G.L. c. 272, §§ 92A & 98) by adding "gender identity or expression" to the protected status list, which currently includes race, color, religious creed, national origin, sex, sexual orientation, deafness, blindness or any physical or mental disability, and ancestry. Thus the bill would guarantee "the full enjoyment of accommodations consistent with an individual's gender identity or expression" in such places as public schools, rest rooms, swimming pools, bathhouses, and with limited exceptions, exercise facilities (see Section 18 of the bill). Under the current statute (M.G.L. c. 272, § 98), protection against status-based discrimination in public accommodations "is recognized and declared to be a civil right."

Section 20 Provides that if any provision of the bill is struck down by the courts, the other provisions shall remain in effect.

Preliminary Considerations

Every individual human being possesses an inherent personal dignity that includes the right not to be subjected to violence or unjust discrimination. All violence against persons is reprehensible and deserves condemnation regardless of the motivation.[1] Differential treatment in the provision of services, accommodation or access, however, is not always objectionable. Rather, it is only arbitrary discrimination, based on prejudice that lacks any connection to principles of justice or the common good, which must be opposed.

As observed in a 1984 statement by the Roman Catholic Bishops in the Commonwealth against a bill to add sexual preference as a protected classification,

> It must be remembered always that there is a necessary distinction, very often ignored, between unjust discrimination (the arbitrary limitation of human rights) and the necessary limitation placed on the exercise of human rights whenever such actions would interfere with the just rights of others and harm society. All people of good will must oppose unjust discrimination. However, there are times in our lives when each of us experiences the pain, discomfort and challenges of necessary limitations on our rights whenever there is a prudent judgment that the common good is at stake.[2]

Senate 764/House 502 seeks to prohibit discrimination against persons on the basis of their "gender identity" or "gender expression." These terms are broadly defined in the bill to include all forms of "gender-related identity, appearance, expression, or behavior," and are to be protected even when one's asserted identity, appearance, expression or behavior is determined not to correspond to one's biological sex.

The bill raises a critical policy question. Is it unjust or otherwise in conflict with the common good to bar individuals from qualifying for sex-specific services, accommodations or access due to their own biological sex and despite their claimed identification with the opposite biological sex?

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[1] See New York State Catholic Conference, Statement on Hate Crimes Legislation (Nov. 16, 1999), http://www.nyscatholicconference.org/pages/news/show_newsDetails.asp?id=89.

[2] Massachusetts Catholic Conference, Statement of the Bishops (May 31, 1984), available online at http://www.macathconf.org/Archives1984BishopsStatementSexOrientationMay31.pdf.

The Conference submits that, based on policy-related concerns to be discussed in the next section, differential treatment that limits eligibility according to one's biological identity as male or female, and not according to one's self-identification, comports with justice and the common good. If enacted, the bill instead would violate established principles of justice contrary to the common good.[3]

Practical Policy Concerns

The bill would require places of public accommodation and public schools in Massachusetts to grant to a broad category of individuals access to sex-specific programs, services or places solely on the basis of one's self-assertion that he or she identifies with the qualifying sex designation. Three immediate policy concerns arise.

Destabilizing Legal Impact

First, as approvingly acknowledged by a supporter of "a right to gender self-determination," "[c]laiming that all people have a right to determine their genders destabilizes the male/female binary upon which numerous social spaces and legal rights, entitlements and documents

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[3] The policy issues to be addressed below are distinct from the philosophical issues also raised by the bill. The Roman Catholic Church agrees with the metaphysical proposition, informed by biblical theology, that the body and soul of the human being are united, such that one's sexual identity is rooted in one's biological identity as male or female. See Catechism of the Catholic Church, nos. 364, 365, 2332, 2333, 2393. Thus in Catholic teaching, sexual difference is considered "a reality deeply inscribed in man and woman." Congregation for the Doctrine of the Faith, Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World, no. 8 (2004). The Church regards this view of reality as normative, obliging men and women to accept their biological identity as their sexual identity. See Catechism at no. 2393 ("By creating the human being man and woman, God gives personal dignity equally to the one and the other. Each of them, man and woman, should acknowledge and accept his [and her] sexual identity."). "If the Church speaks of the nature of the human being as man and woman, and demands that this order of creation be respected, this is not some antiquated metaphysics. What is involved here is faith in the Creator and a readiness to listen to the 'language' of creation. To disregard this would be the self-destruction of man himself, and hence the destruction of God's own work. What is often expressed and understood by the term 'gender' ultimately ends up being man's attempt at self-emancipation from creation and the Creator." Pope Benedict XVI, Address To The Members Of The Roman Curia For The Traditional Exchange Of Christmas Greetings (Dec. 22, 2008). The filing of this bill in Massachusetts is part of a movement to persuade the courts and legislatures to establish what one Massachusetts author refers to as "a right to gender self-determination" that "transcends the binary" and overrides "a legal regime which vigilantly polices the brutal boundaries of male and female," and thus the legislation raises provocative philosophical questions. See Laura K. Langley, Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities, 12 Tex. J. on Civil Liberties & Civil Rights 101, 101, 103 (2006-07) (the author is identified as a Northeastern University School of Law student and graduate of Boston University). Recently the Holy See objected to a proposal at the United Nations to establish gender identity as a protected classification in international law partly on the grounds that "it takes up controversial concepts [that] imply that sexual identity is defined solely by culture and is thus susceptible to be transformed at will, according to individual desire or historical and social influences." Statement of the Holy See on the Declaration on human rights, sexual orientation and gender identity (Dec. 18, 2008). The bill before this Committee would similarly involve the General Court in the endorsement of a controversial philosophical view, as evidenced by the language in the bill referring to an "individual's assigned sex at birth," as if one's status as male or female comes into being not as the result of one's own pre-natal make-up of DNA but because of some post-natal human assignment. The Conference respectfully suggests that taking sides in this sort of philosophical debate lies beyond the legislature's competence. Policy considerations aside, the Conference opposes the bill in its entirety since all of its provisions rely on an understanding of "gender identity" that conflicts with Church and natural law teaching.

depend."[4] The state would have to legally accommodate the decisions of individuals to "identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities" regardless of the legal consequences.[5]

Given the destabilizing objective of the campaign for "gender self-determination," it is not surprising that the bill now before this Committee was intentionally drafted broadly so as to permit any person for any reason to demand under state law to be identified with the particular sexual designation he or she chooses at any moment.[6]

The bill's passage would launch the Commonwealth into a chaotically shifting legal milieu by forbidding the state from requiring an individual's self-identification for legal purposes to comply with any time limitation, documentation, or other commitment that formalizes and stabilizes one's individual sex designation. An individual would be legally empowered to pose as both a man and a woman at different times or at the same time, and for any length of time, however short in duration.

Violation of the Right of Privacy

Second, there remains the biological fact of opposite sex differences of a physiological nature which underpin important legal and social policies; these policies would be undercut or negated by the bill. The bill's broad scope implicates a host of potential conflicts in a variety of areas.

For example, many sex-specific services, accommodations or places exist as a means of protecting the privacy interests of those who use them. Specifically, all individuals have the constitutionally protected right of privacy in shielding one's body from exposure to persons of the opposite biological sex in situations involving partial or full disrobing in close quarters.[7]

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[4] Langley, Self-Determination in a Gender Fundamentalist State, supra note 2, at 102.

[5] Id. at 104. A publication by a national transgender rights organization distributed to homeless shelters, although it recommends that males who identify themselves as female should have access to women's shelters, acknowledges that biological females residing in homeless shelters for women may be confused and upset by biological males seeking access to the same shelter "who identify as both genders or alternate genders," and who seek to "pass" as "a woman at night but dress[ ] as a male during the day." National Gay and Lesbian Task Force Policy Institute & National Coalition for the Homeless, Transitioning Our Shelters: A Guide to Making Homeless Shelters Safe for Transgender People 38 (2003), http://www.thetaskforce.org/downloads/reports/reports/TransitioningOurShelters.pdf.

[6] Ethan Jacobs, "Advocates, Opponents of Trans Rights Bill to Have Their Say on Beacon Hill," BayWindows.com, Feb. 28, 2008, at http://www.baywindows.com/index.php?ch=news&sc=glbt&sc2=news&sc3=&id=7O9O4 (see comments of Laura Langley and Jennifer Levi about drafting the bill with the intent of protecting the right of even "non-transgendered-identified" persons to access single-sex settings despite being of the opposite biological sex).

[7] See Safford Unified School District #1 v. Redding, 557 U.S. ___, slip op. at 8 (June 25, 2009) (Docket no. 08-479) (affirming the "reasonable societal expectations of personal privacy" where exposure of the human body is concerned and emphasizing the embarrassment and intrusiveness to children of involuntary exposure); see also York v. Story, 324 F. 2d 450, 455 (9th Cir. 1963), cert den. 376 U.S. 939 (1964) ("We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."); Fort v. Ward, 621 F. 2d 1210, 1717 (2d Cir. 1980) (recognizing that the "interest entitled to protection concerns the involuntary viewing of private parts of the body by members of the opposite sex"); Fisher v. Washington Metropolitan Area Transit Authority, 690 F.2d 1133, 1142 (4th Cir. 1982) (recognizing a "general right, constitutionally protected, not to be subjected by state action to involuntary exposure in a state of nakedness to members of the opposite sex"); Cumby v. Meachum, 684 F. 2d 712, 714 (10th Cir. 1982) (finding that the constitutional right of privacy is violated by state policies that result in involuntary exposure to the view of persons of the opposite sex of such personal activities "as undressing, using toilet facilities, or showering"); Everson v.

The bill interferes with this fundamental right by expressly granting access to all individuals of one biological sex (regardless of whether they have undergone sex reassignment surgery, or are otherwise diagnosed as gender-dysphoric)[8] into settings designated for exclusive use by members of the other biological sex, including in rest rooms, bathhouses, exercise facilities, shelters and public school locker rooms. See Section 18 of the bill.

Single-sex services, programs and facilities take into account the sensitive nature of having to partially or fully disrobe in front of others, an experience of invaded privacy that, when occurring in the presence of members of the opposite biological sex, increases diametrically the sense of one's personal vulnerability. Single-sex policies are designed to shield persons from having to disrobe in the presence of, or from witnessing bodily exposures by, members of the opposite biological sex. The right to privacy applies independently from the issue of security, for even the most secure areas that nonetheless allow access to persons of the opposite sex, thereby increasing the risk of unavoidable opposite-sex bodily exposure, violate the right.

In effect, the bill would require the state to elevate the interests of those, who, for whatever reason, wish to enter rest rooms and like facilities designated for persons of the opposite biological sex and where bodily exposure regularly occurs, over the fundamental, constitutionally protected privacy interests of those who desire to prevent such exposure by avoiding opposite-sex settings. Changing the law in a way that disassociates "gender identity" from biological references cannot change the reality of physiological sexual difference which forms the very basis of the privacy right at issue.[9]

The bill would require Massachusetts law to prefer the desires and interests of the person who asserts that he or she identifies with the opposite biological sex, thus taking precedence over other important interests rooted in biological facts as if those facts can be ignored or wished away.

Overbroad Remedy

As already noted, the bill seeks to vindicate the interests of a class of persons that is broadly defined. As a result, the protected class would include those individuals who already have access to services, accommodations, facilities or programs designed for use by members of their own biological sex, and yet who need not show under the bill that taking advantage of the presently

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Michigan Dep't of Corrections, 391 F.3d 737, 757 (6th Cir. 2004) ("Most people 'have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.'"); Brannum v. Overton County School Bd, 516 F. 3d 489, 495 (6th Cir. 2008) ("Perhaps it is merely an abundance of common experience that leads inexorably to the conclusion that there must be a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex when not reasonably necessary for some legitimate, overriding reason, for the obverse would be repugnant to notions of human dignity and personal integrity.").

[8] Gender dysphoria involves "persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender-role of that sex" that causes "clinically significant distress or impairment in social, occupational, or other important areas of functioning". American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders § 302.9 (4th ed., text-revised 2000).

[9] In addition, to take another example of potential conflict, insurance policies are designed to accommodate the statistical differences in life expectancy and other actuarial factors related to each of the biological sexes. The scope of the bill raises the question of whether insurers would be forbidden to arrange insurance plans according to the insured's biological sex if the insured self-identifies with the opposite sex. Again, changing the law in a way that gives individuals the right to identify with one or the other biological sex regardless of biological realities cannot make those realities disappear.

allowed access will pose any hardship to them. The bill would grant them the right of entry to services, accommodations or programs designed for use by members of the opposite biological sex solely on the basis of their self-assertion that they happen to identify with that biological sex at the time of entry.[10]

The United States Supreme Court has adopted a narrower legal definition of "transsexual" persons based on medical authorities. According to the Court, a person who is to be considered transsexual is "one who has '[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,' and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change."[11] As one of the bill's drafters explains, however, under the bill "[a] transgender person who identifies as a particular gender would be entitled to use bathroom, locker room and other single-sex facilities for that gender, regardless of whether or not they have had surgery or are taking hormones."[12]

The bill therefore seeks to impose a far-reaching and unfairly skewed remedy that bears no reasonable relation to the true dimensions of any problem that might actually be at issue. If there are individuals who for medical reasons experience "clinically significant" discomfort[13] in certain settings, the solution is not to override the privacy interests of other persons. It is a contradiction to argue that the discomfort of one group requires the granting of access to other settings that then causes the discomfort of another group, as if the discomfort of those others who rely on the privacy of single-sex settings does not count.[14] The legislature is equipped to investigate the actual dimensions of the problem and to explore ways of addressing the issue of discomfort in certain places caused by medical conditions and finding solutions that respect the privacy and comfort of everyone.[15] The bill fails to provide an even-handed remedy.

Interference with Conscience

A fourth category of concerns arises from the fact that the bill will create issues of conscience. For example, advocates for the bill admit that the non-discrimination mandate contained therein will interfere with and override the religious interests of faith-based providers of services and programs offered to the general public.[16] A flyer produced in April 2009 and posted online by the

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[10] Supporters of the bill claim that under the bill entry into sex-specific avenues such as women's gyms would be allowed only for "those transgender women who can certify their gender via established Massachusetts medical protocol." The Truth About H.1728/S.1687, http://www.masstpc.org/publications/legis/debunking-apr09.pdf (noting that the document was "compiled by GLAD, MPTC and the Transgender Civil Rights Coalition") (see response to "Myth 3"). The bill does not refer to any medical protocol or protocol requirement (nor do supporters identify the whereabouts of such a requirement) and the Conference is unaware of any state-mandated protocol existing under other state laws.

[11] Farmer v. Brennan, 511 U.S. 825, 829 (1994) (quoting American Medical Association, Encyclopedia of Medicine 1006 (1989)).

[12] Laura Langley, Mass. Transgender Political Coalition, as quoted in Jacobs, supra note 6.

[13] See supra note 8.

[14] See comments of Jennifer Levi as reported in Jacobs, supra note 6 ("discomfort should not be at the heart of the refusal to adopt non-discrimination laws").

[15] For example, the state could mandate the creation of sex-neutral accommodations identified for use by persons uncomfortable in settings with other individuals of their same biological sex.

[16] One of the key statutes that the bill would amend makes no distinction between secular and religious establishments. The public accommodations law, M.G.L. c. 278, §§ 92A & 98, subjects all places of public accommodation to a non-discrimination mandate. "Public accommodation" is defined broadly to include any place "which is open to and accepts or solicits the patronage of the general public" without any further qualification that would exclude religious entities from its scope. M.G.L. c. 278, § 92A. Those churches and schools that do not limit access to their worship services or educational programs to their own adherents would have to abide by the "gender

Gays & Lesbians Advocates & Defenders, the Massachusetts Transgender Political Coalition, and the Transgender Civil Rights Coalition explains that current religious exemptions in the law are limited and thus "people of faith running commercial enterprises (like hospitals) cannot pick and choose among customers."[17] This raises the prospect that religious institutions will be forced under the bill to violate their religious principles in circumstances involving "gender identity" discrimination claims.[18]

Considering the impact of the bill in the medical setting is instructive. Current protocols require sensitivity to the dynamics of patient examinations in situations where the medical provider and the patient are of different biological sexes. The bill would complicate these situations by granting individuals who identify with the opposite biological sex the civil right to override those protocols, thereby posing conflicts for the exercise of individual and institutional conscience heretofore protected by the protocols.

Conclusion

Creating a new "right to gender self-determination," as this bill would accomplish as a matter of practice, would destabilize the law, override privacy, and conflict with conscience. As a result, the bill would interfere with core interests, policies and protections that flow from considerations of justice and the common good.

Position of the Conference

On the basis of the foregoing, the Conference urges the Committee to give an unfavorable report recommending that Senate 764/House 502 ought not pass.

The Massachusetts Catholic Conference is the public policy office of the Roman Catholic Bishops in the Commonwealth, representing the Archdiocese of Boston and the Dioceses of Fall River, Springfield, and Worcester.

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identity" non-discrimination mandate as described herein, such as by opening sex-specific restrooms on church or private school premises to individuals of the opposite sex who identify with the other sex, even when it conflicts with religious doctrine.

[17] The Truth About H.1728/S.1687, supra note 10 (see response to "Myth 6").

[18] See, e.g., Catholic News Agency, "Catholic Hospital to Allow Transgender Surgery After Being Sued," Mar. 3, 2008, http://www.catholicnewsagency.com/new.php?n=11967, detailing case of Seton Medical Center in Daly City, California where a lawsuit was filed against the Catholic hospital alleging discrimination based on the hospital's religious-based initial refusal to allow a sex change operation to be performed in its institution.

MASSACHUSETTS CATHOLIC CONFERENCE
WEST END PLACE

150 Staniford Street, Boston, MA 02114-2511
Phone (617) 367-6060
FAX (617) 367-2767

LEGISLATIVE TESTIMONY

To: Members of the Joint Committee on the Judiciary
From: James F. Driscoll Esq., Executive Director
Re: Support of House 482, "An Act Relative to a Woman's Right to Know" and House 484, "An Act Relative to Sex Selection in Pregnancy"
Date: June 8, 2011

The Massachusetts Catholic Conference ("Conference") respectfully submits this testimony in support of House 482, "An Act Relative to a Woman's Right to Know" and House 484, "An Act Relative to Sex Selection in Pregnancy."

Strengthening State Law by Protecting A Woman's Right to Know

House 482 requires the Department of Public Health (DPH) to make available a pamphlet, web page and telephone message describing a woman's rights under the Massachusetts Patients Rights Act, detailing the risks of abortion, listing agencies providing abortion alternatives and prenatal care, and supplying scientifically accurate descriptions of fetal development. Abortion providers would be required to inform women and young girls before the procedure that such materials are available and give the materials to those who request them. Abortion facilities would be required to provide women and young girls 24 hours to reflect before going through with the abortion. These requirements would not apply in medical emergencies.

A provision contained in section 2 of House 482, the "Woman's Right to Know" bill, would further require that access to ultrasound imaging of the unborn child and electronic audio recording of the unborn child's heartbeat be offered to the pregnant woman. As of the end of 2010, informed consent laws similar to House 482 have been put into effect in thirty-one (31) states.[1] Laws in effect in twenty (20) states specifically require information about the availability of ultrasound imaging or require the performance of an ultrasound before an abortion.[2] House 482 provides the Commonwealth an opportunity to join other states in the country in this effort to support the inherent dignity of all women and young girls.

The U.S. Supreme Court has legalized abortion for any reason and at any stage of pregnancy.[3] Moreover, an agency that seeks to profit from a decision to abort is not required in Massachusetts to disclose all of the known side effects a woman may encounter during or after her operation.[4] Prior to the abortion, the Commonwealth of Massachusetts simply obliges the providing facility to inform the woman that during an abortion "the contents of the womb (uterus) are removed." See the attached form created by the Massachusetts Department of Public Health (for third trimester abortions, identical in relevant respects to forms created for first and second trimester abortions). Today, the abortion industry does not have to share with a pregnant woman contact information for agencies prepared to provide her with alternative choices and assistance.[5]

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[1] Americans United for Life, Women's Right to Know Act: Model Legislation & Policy Guide for the 2011 Legislative Year 19 (2011), available at http://www.aul.org/wp-content/uploads/2010/12/WRTK-Informed-Consent-2011-LG.pdf.
[2] Americans United for Life, Women's Ultrasound Right to Know Act: Model Legislation & Policy Guide for the 2011 Legislative Year 11 (2011), available at http://www.aul.org/wp-content/uploads/2010/12/Ultrasound-Requirement-2011-LG-_2_.pdf.
[3] As a result of the Court's 1973 decisions in Roe v. Wade and Doe v. Bolton, "no significant legal barriers of any kind whatsoever exist today in the United States for a woman to obtain an abortion for any reason during any stage of her pregnancy." Report of the United States Senate Judiciary Committee on S.J. Res. 3, at 6, (1983) (Sen. Rep. No. 98-149).
[4] For background, see Daniel Avila, Briefing Paper: Abortion Consent in Massachusetts—Women Are Being Denied the Right to Know (2001), available at http://www.macathconf.org/abortion_consent_in_massachusett.htm.
[5] Id.

House 482 would improve current policy regarding informed consent, and move our laws closer to providing equal protection for all women and their children. It would reinforce every woman's right to know the complete facts about an invasive medical procedure prior to its execution on her body. Additionally, the bill would ensure that all clients have access to professionals that can offer a second or third opinion, prior to their surgery. The bill simply requires industries that profit from abortion to first offer their patients information about the all the known consequences and side effects that may occur during or after an abortion.

Opponents claim that this bill unfairly tilts the consent process against abortion, yet they fail to acknowledge that current industry practices are slanted towards abortion. Due to economic and ideological pressures, women are subjected to a counseling approach that emphasizes the virtues, so to speak, of the industry-preferred choice.[6] Those offering abortions in Massachusetts believe that they are providing a benefit. However, abortion providers retain a vested interest in one outcome, abortion, and have every motivation to offer to potential consumers only such information that favors that outcome.

House 482 attempts to ensure a level field for women and young girls by requiring information that an abortion provider otherwise has little incentive to provide. Imparting more balance to the consent process satisfies state constitutional requirements of neutrality. See, Avila, supra at 548-56.

The Roman Catholic Church joins other secular and religious organizations in affirming the dignity of all human life at every stage of existence from conception until natural death. The Conference, the public policy office of the Roman Catholic Bishops, supports the passage of House 482.

An Act to Prevent Gender Selection

The Conference also supports the passage of House 484, "An Act Relative to Sex Selection in Pregnancy" which seeks to prohibit a physician from providing an abortion to a woman that is dissatisfied with the gender of the infant in her womb. Support for this legislation is consistent with the firm support that the Roman Catholic Church has for the right to life of every person.

> "The first right of the human person is his life. He has other goods and some are more precious, but this one is fundamental--the condition of all the others. Hence, it must be protected above all others. It does not belong to society, nor does it belong to public authority in any form to recognize this right for some and not for others: all discrimination is evil, whether it be founded on race, sex, color or religion."[7]

Requested Committee Action

For the foregoing reasons, the Conference urges the Committee to give House 482 and House 484 a favorable report recommending their passage.

The Massachusetts Catholic Conference is the public policy office of the Roman Catholic Bishops in the Commonwealth, representing the Archdiocese of Boston and the Dioceses of Fall River, Springfield, and Worcester.

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[6] See Daniel Avila, "The Right to Choose, Neutrality, and Abortion Consent in Massachusetts," 38 Suffolk U. L. Rev. 511, 530-47 (2005), available online at http://www.law.suffolk.edu/highlights/stuorgs/lawreview/documents/AvilaFinal_000.pdf.

[7] Congregation for the Doctrine of the Faith, *Declaration on Abortion* no. 11 (1975), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abortion_en.html.

Massachusetts Department of Public Health
Last Trimester Pregnancy Termination Consent Form

Facility Name: _____

Patient Name: _____

Patient I.D. Number: _____

By state law, before a doctor may do an abortion, the doctor must get your written informed consent on a form prepared by the Massachusetts Department of Public Health (MDPH). This form contains information about:

- pregnancy termination procedures
- the possible medical problems
- the choices you have other than termination

When a pregnancy is ended in the last trimester, state law (G.L. c.112 §12P) requires that the doctor must take all reasonable steps within good medical practice, consistent with the procedure being used, to preserve the life and the health of the fetus.

Under Massachusetts law (G.L. c.112 §12M), pregnancy termination in the last trimester is allowed only when medically necessary to save your life or if continuing the pregnancy will cause a substantial risk of harm to your physical or mental health.

Last Trimester Pregnancy Termination

In a pregnancy termination, the contents of the womb (uterus) are removed or pushed out by the body, leaving the uterus to return to its non-pregnant state.

The following kinds of procedures are used to end a pregnancy of 24 weeks or more and are done in a hospital.

Dilation and Induction

Induction procedures cause contractions in the uterus. Contractions dilate the opening of the uterus (cervix) and help to push out the contents of the uterus. Contractions can be started by the use of medicines that are given through the vagina or through a vein. These procedures can take a few hours from the beginning to the end. Sometimes suction and/or other instruments are used to finish the procedure. Pain medicine usually is given to make you more comfortable.

Sometimes, to help in this procedure, different kinds of dilators are put into the cervix, where they stay for a few hours or up to a day before the procedure. This helps stretch the cervical canal. You may have cramps during or after the dilators are put in.

Cesarean Section (C-Section)

A C-Section is a type of surgery in which a cut is made through the belly and into the uterus. The contents of the uterus are removed through this opening. The opening is then stitched up.

General, spinal or epidural anesthesia is used for C-Sections. For spinal or epidural anesthesia, the medicine is injected in or near the spine. This causes numbness and stops pain. For general anesthesia, medicines usually are given through a vein in the arm (with an IV) and a gas is breathed through a mask. The gas stops the pain and makes you unconscious for a short time. *Your doctor should talk with you about your choices of pain medicine.*

Possible Medical Problems

As with any medical procedure, problems may happen. Problems with pregnancy terminations are rare but may include: infection, heavy bleeding (hemorrhage), retained tissue, continued pregnancy, reactions to the medicines, blood clotting problems, tear in the cervix or uterus, or injury to nearby organs.

In very rare situations, a termination may effect your ability to have children or may lead to major surgery, including hysterectomy, and colostomy (if your bowel is injured), or death.

Make sure your health care provider answers your questions about these risks.

Follow-up Care

It is important to return to the hospital or your health care provider 3 - 4 weeks after the termination procedure. At this time, your health care provider will make sure there are no signs of infection or other problems and will discuss any health care concerns you may have. If you don't have a doctor, ask a provider at the hospital to help you find one.

Choices You Have Other Than Pregnancy Termination

Pregnancy termination in the last trimester is allowed only when medically necessary to save your life or if continuing the pregnancy will cause a substantial risk of harm to your physical or mental health. If you decide to continue the pregnancy, you are advised to discuss the risks and options with your doctor.

Public Assistance

If you decide not to have an abortion, the state cannot deny you public assistance for this reason. For information on eligibility and benefits, contact the Massachusetts Department of Transitional Assistance (welfare).

I, _____,

Name of Patient

have received the information prepared by the Massachusetts Department of Public Health that describes pregnancy termination procedures, the possible medical problems associated with these procedures and my pregnancy options. I have read and I understand the information provided. I have had the chance to ask questions and discuss my concerns.

I hereby authorize my doctor to perform a pregnancy termination by the following procedure:

_____

_____ _____

Signature of Patient Date

_____ _____

Signature of Witness Date

This form shall be maintained solely by the facility as part of your confidential medical record and must be destroyed seven years after the procedure.

Bruce Caley
42 Fengmere Ave.
Quincy, MA 02169
617-347-8055

Transgender bill H.502, S.764
Mass. State House Joint Judiciary Hearing

Dear Chairman Creem and Chairman O'Flaherty,
Transgenderism causes one to discriminate on the basis of gender. I don't think these bills are the right way to protect transgender people. Transgenderism is a condition where gender discrimination is at its core. The transgender person is conflicted between their perception of their internal/external genders. They are motivated to discriminate against one gender (their physical sex). Transgenderism is also a psychological disorder. I certainly would not want to see any transgender person made fun of or hurt in any way. However, when it comes to law and the constitution, I think there is a line where equality shouldn't be used as a defense to normalize discriminatory gender identities such as transgenderism. This would institute an oxymoron which could open the door to racial or other discrimination being legalized or normalized. How can we teach diversity to our children if transgenderism is anti-diversity? We do need more compassion for transgender folks, but how far should we go?

We are expected to get over our discomfort to enable transgender comfort
The basis of transgenderism is internal/external gender prejudice
The basis of transgenderism is gender stereotyping:
The person's body does not fit their internal stereotype (or vice-versa)
One of the most helpful things a transgender person can do is accept their internal/external gender diversity and celebrate diversity.
How is fairness and equality promoted by a personal motivation to exclude a gender or sex like transgenderism does. Does every group need to have anti-discrimination legislation?
We are crossing a line when we protect every equality of a group, with legislation, that is fundamentally anti-equality. We do need to protect transgender people from bullying, etc. We need laws that focus on bullying, etc, not on bathrooms.
This transgender bill seems to be equating gender with gender identity, which includes more than one gender, and discrimination of transgenderism internally against one of those genders, usually the physical gender assigned at birth. This is a huge leap from single to complex.

Please do not support these bills (H.502, S.764).
Transgenderism is based on gender stereotyping.
We do not need to be encouraging people to cut their bodies and take drugs the rest of their lives so that they can eliminate their internal/external perception of gender diversity.
In addition, companies, etc, can make decisions based on how a person dresses or presents themselves this is not considered "discrimination"

Testimony of Kara Suffredini, Esq., Executive Director of MassEqualtiy
Joint Committee on the Judiciary
Wednesday, June 8, 2011

Chairwoman Creem, Chairman O'Flaherty, and members of the committee,

Thank you for allowing me the opportunity to testify today. My name is Kara Suffredini, and I am the Executive Director of MassEquality, the statewide, grassroots organization working to ensure that every lesbian, gay, bisexual and transgender person in Massachusetts is protected from cradle to grave – with equal rights and opportunities in school, in marriage and family life, at work and in retirement.

On behalf of our membership, the lesbian, gay, bisexual and transgender community in the Commonwealth, and all of those who believe in justice and equality for all, I'm testifying here today in support of House Bill 502/Senate Bill 764, "An Act Relative to Transgender Equal Rights." This legislation would ensure the most basic rights for transgender people in Massachusetts: the right to work and take care of their families; the right to be safe in school; the right to rent an apartment – all without fear of discrimination or harm. This is a basic matter of fairness and equality.

These are values upon which the Commonwealth was built. And yet, despite our reputation as a national leader on civil rights, we are lagging behind fifteen other states and the District of Columbia, 136 cities and counties, nearly 100 businesses in Massachusetts as well as the federal government on issues of basic equality for our transgender residents. That lag has disastrous effects on our state's transgender community. Earlier this year, a transgender woman was viciously beaten in Chelsea. Her assailant punched and kicked her in his car, then got out of the car, opened the trunk, retrieved a chain, and continued to beat her with the chain. Unfortunately, this is not an isolated incident.

At issue with this bill is whether we are we willing to allow a small, vulnerable group of our co-workers and neighbors to suffer severe discrimination, harassment and violence simply because of who they are. We all have a gender identity – our internal sense of whether we're male or female. For each of us, it is core to who we are, an indivisible part of our humanity, central to our sense of self and how we engage with the world. Transgender people are no different. They just happen to be born with a body that does not match their gender identity. Yet they face grave violence and discrimination throughout our Commonwealth because of it. Denying them the basic ability to feel safe in their communities, to earn a living and support their families, or to rent an apartment because of something so innate is the lowest form of discrimination. It harkens back to some of the darkest days in our country's history and our state's history. It is not who we are as a Commonwealth.

More than one-third of our country's population is protected by a law just like the one pending before this committee. That includes fifteen states and the District of Columbia, including states like Colorado, Iowa and Nevada, as well as our neighboring New England states: Rhode Island, Maine, Vermont and, just last week, Connecticut. It also includes 136 cities, including four right here in our Commonwealth – Boston, Cambridge, Amherst and Northampton.

Nearly 100 companies in Massachusetts – including large employers such as Raytheon, Bank of America, John Hancock, and Prudential Financial – have adopted equal opportunity policies prohibiting discrimination against transgender employees. In 2009, the U.S. President issued an Executive Order prohibiting discrimination against transgender federal employees, and just recently the federal Office of Personnel Management issued guidance to assist federal agencies with compliance. And, in February of

this year, Governor Patrick signed an Executive Order protecting transgender state employees from discrimination here in the Commonwealth.

According to a recent survey by the Center for American Progress, seventy-three percent of those surveyed support protecting gay and transgender people from workplace discrimination. This support cuts across party lines, religion, and age. It includes 74% of Catholics surveyed and 61% of senior citizens. In Massachusetts alone, we know that constituents have placed over 1200 calls and signed over 2600 postcards to legislators calling urgently for passage of this bill.

I urge this committee and the legislature to join the chorus of states, cities, businesses, religious institutions, and civic leaders calling for basic fairness and equality. Make protections for our transgender residents uniform throughout the Commonwealth by passing the Transgender Equal Rights Bill.

Thank you for your time.

Senator Cynthia Stone Creem
Joint Committee on the Judiciary
State House Room 405
Boston, MA 02133

Representative Eugene L. O'Flaherty
Joint Committee on the Judiciary
State House Room 136
Boston, MA 02133

Re: An Act Relative to Transgender Equal Rights

Dear Senator Creem, Representative O'Flaherty, and Members of the Committee:

We are writing to ask you to support the passage of "An Act Relative to Transgender Equal Rights" (H.502/S.764).

The Young Democrats of Massachusetts supported this bill last year, and we have renewed our commitment to see its passage this year. Our three thousand members state-wide believe that all people deserve equality under the law, regardless of their gender identity. As the current and future leaders of Massachusetts, we see this proposed law as a bold assertion that the legislature and citizens in our state believe in the first article of the Constituent of the Commonwealth, that "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."

This proposed law would prohibit discrimination in employment, housing, education, credit lending, and public accommodations on the basis of a person's gender identity or expression. It adds 'gender identity or expression' to existing hate crimes statutes, which reflects the heightened level of violence experienced by transgender people.

Transgender people throughout the Commonwealth are often harmed by harassment, discrimination, and violence. For example, Bay State employers have fired transgender people either before or after transitioning their gender, while many other transgender people in the state remain unemployed or underemployed as a result of discrimination, hostility, and misunderstanding about who they are.

This legislation is absolutely vital to our community. In countless dehumanizing ways, transgender people are denied opportunities and services for their basic needs, as well as the ability to be productive members of society. The Massachusetts Legislature has a chance this year to send a very different message by passing "An Act Relative to Transgender Equal Rights" Bill. This bill makes it clear that we value our transgender residents and will protect them against discrimination and violence.

We urge you to support this legislation, which represents an important step towards equality for all residents of the Commonwealth. It is time for the Commonwealth of Massachusetts to join 13 other jurisdictions, including Washington D.C., and the hundreds of municipalities, including Boston, Cambridge, Northampton, and Amherst, that already protect their transgender residents in this country, and once again take its rightful place as a beacon of liberty, justice and equality for all people.

Signed,

The Young Democrats of Massachusetts
77 Summer St., 10th Floor
Boston, MA 02111

Elaine Almquist, Chair

Ashley Coulombe, Vice Chair of Administration and Finance

John Kleschinsky, Vice Chair of Programming and Policy

James Ryan, Public Policy Director

And the further undersigned members of the Board of Directors:

Jonathan Sclarsic

Senator Cynthia Stone Creem
Joint Committee on the Judiciary
State House Room 405
Boston, MA 02133

Counsel

Representative Eugene L. O'Flaherty
Joint Committee on the Judiciary
State House Room 136
Boston, MA 02133

Re: An Act Relative to Transgender Equal Rights

Dear Senator Creem, Representative O'Flaherty, and Members of the Committee:

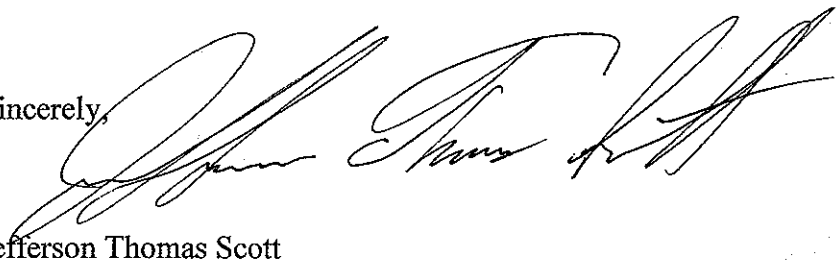
I am writing as owner of Firebreathers Fitness LLC and its business operations in the Commonwealth (CrossFit Fenway and CrossFit Somerville) in support of "An Act Relative to Transgender Equal Rights," (H.502/S.764) which has been introduced by Representatives Carl Sciortino and Byron Rushing and Senators Ben Downing and Sonia Chang-Diaz. I believe that this legislation is aligned with our purpose as an organization and is consistent with good business practice in regard to the treatment of employees, clients, stakeholders, and the general public.

Firebreathers Fitness LLC already has established policies protecting transgender employees and clients against discrimination. As a small business employing 8 residents of the Commonwealth and growing rapidly, it is a cornerstone of our organization's principles to demonstrate leadership in the community and in our industry by insisting upon nondiscriminatory policies in our employment and client services.

This legislation would also help establish equity in our industry and society by making clear what our rights and responsibilities are as employers. The Massachusetts Commission Against Discrimination (MCAD) has already interpreted state law to protect all people, including transgender persons, from discrimination based on gender identity or expression. Making this protection explicit, uniform and clearly visible will make it easier for my industry as a whole to design policies that follow the law.

As a business that is owned and operated in Massachusetts that is directly committed to the heatlth, wellness, fitness, and general well-being of the residents of our state, CrossFit Fenway, CrossFit Somerville, and Firebreathers Fitness LLC urge you to support this legislation. It is time for the Commonwealth of Massachusetts to join 13 other jurisdictions, including Washington D.C., and hundreds of municipalities that already protect their transgender residents in this country.

Sincerely,



Jefferson Thomas Scott

Owner, Firebreathers Fitness LLC

http://www.crossfitfenway.com/

counsel

Street Address
85 River Street, Suite 3A
Waltham, MA 02453-8349

Mailing Address
PO Box 541619
Waltham, MA 02454-1619

Toll-free Information Line
866-GBPFLAG (427-3524)

Office
PHONE 781-891-5966
FAX 781-891-7444
EMAIL info@gbpflag.org
WEBSITE www.gbpflag.org

Senator Cynthia Stone Creem
Joint Committee on the Judiciary
State House Room 405
Boston, MA 02133

Representative Eugene L. O'Flaherty
Joint Committee on the Judiciary
State House Room 136
Boston, MA 02133

Re: An Act Relative to Transgender Equal Rights

Dear Senator Creem, Representative O'Flaherty, and Members of the Committee:

I am writing to ask you to support the passage of "An Act Relative to Transgender Equal Rights" (H.502/S.764).

This proposed law would prohibit discrimination in employment, housing, education, credit lending, and public accommodations on the basis of a person's gender identity or expression. It adds 'gender identity or expression' to existing hate crimes statutes, which reflects the heightened level of violence experienced by transgender people.

This bill is important to Greater Boston PFLAG because we have transgender family members and friends. And, we believe that all people should have equal opportunities and protections in employment, housing, education, credit lending, and public accommodations.

Greater Boston PFLAG offers a support group for parents who have a transgender child. Our parents greatest concern is for the safety of their child and that they will not be discriminated against in their lives. They want what every parent wants for their children – for them to be able to live their lives without fear and without discrimination. They want their children to be happy. Our parents want their transgender children to be protected in the same way all children are protected.

We think that it is reprehensible that transgender people throughout the Commonwealth are often harmed by harassment, discrimination, and violence. For example, Bay State employers have fired transgender people either before or after transitioning their gender, while many other transgender people in the state remain unemployed or underemployed as a result of discrimination, hostility, and misunderstanding about who they are.

This legislation, therefore, is vital to our community. In countless dehumanizing ways, transgender people are denied opportunities and services for their basic needs, as well as the ability to be productive members of society. The Massachusetts Legislature has a chance this year to send a very different

message by passing "An Act Relative to Transgender Equal Rights" Bill. This bill makes it clear that we value our transgender residents and will protect them against discrimination and violence.

On behalf of Greater Boston PFLAG, I urge you to support this legislation, which represents an important step towards equality for all citizens of the Commonwealth. It is time for the Commonwealth of Massachusetts to join 13 other jurisdictions, including Washington D.C., and the hundreds of municipalities, including Boston, Cambridge, Northampton, and Amherst, that already protect their transgender residents in this country, and once again take its rightful place as a beacon of liberty, justice and equality for all people.

Sincerely,

Pam Garramone, Executive Director

Greater Boston PFLAG

85 River Street Suite 3A

Waltham, MA 02453

(781) 891-5966

PERKINS
SCHOOL FOR THE BLIND

175 North Beacon Street
Watertown, MA 02472
www.Perkins.org

Steven.Rothstein@Perkins.org
617-972-7315 fax
617-972-7200 phone

Steven M. Rothstein
President

Testimony of Steven Rothstein, President, Perkins School for the Blind

House Bill 462

An Act relative to CORI information for Chapter 766 approved private schools

June 8, 2011

It is a pleasure to submit this written testimony in support of House bill 462, An Act relative to CORI information for Chapter 766 approved private schools sponsored by Representative David Linsky.

This legislation is critical to ensure the safety of some of the most disabled students across the Commonwealth.

Right now at Perkins School for the Blind and other special education schools across the state we submit every name for possible employees and volunteers through the CORI system. We are vigilant to ensure this paperwork is completed and the responses are returned. At Perkins we have a current construction project and we even require the construction company to have every individual who works on our campus to have a clear CORI.

Unfortunately right now these completed CORI reports only provides history of illegal activity in the State of Massachusetts. If a potential employee, volunteer or contractor had been convicted in another state of a horrible act we would not know under current Massachusetts statute. Based on how often people move, this means we may not be truly ensuring the safety and security of our students.

Some of the students at Perkins and other special education schools cannot speak for themselves. Some have challenges in their physical, developmental or

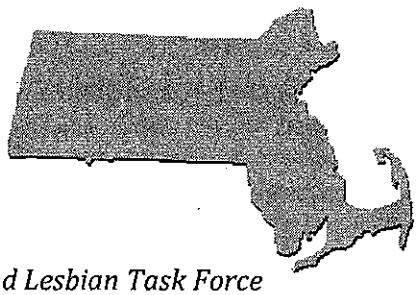
cognitive abilities that would prevent them from protecting themselves or even reliably reporting an awful incident.

Because we do not have access to the national databases that this legislation would allow, Perkins School for the Blind currently pays an extra fee to obtain additional national information. . So we are spending extra and still not providing the safety our students deserve. There are close to 6,000 students at special education schools in the state. The 200 students at Perkins often are more complicated and have more challenges in addition to their visual impairment. We work hard to provide them with the educational, vocational, social skills they need to be ready for society. In addition to the range of physical education offerings, we even offer a self-defense class for our students. Without the ability to obtain this national information we cannot keep them as protected as possible.

On behalf of our students and their families, please support House Bill 462, An Act relative to CORI information for Chapter 766 approved private schools. This will allow us to sleep, knowing our students are safe.

Findings of the

NATIONAL TRANSGENDER DISCRIMINATION SURVEY



by the National Center for Transgender Equality and the National Gay and Lesbian Task Force

Massachusetts Results

There were 283 respondents from Massachusetts.

Workplace Discrimination

Rates of discrimination were alarming in Massachusetts, indicating widespread discrimination based on gender identity/expression:

- 76% reported experiencing harassment or mistreatment on the job
- 20% lost a job
- 17% were denied a promotion
- 39% were not hired

Harassment and Discrimination at School

- Those who expressed a transgender identity or gender non-conformity while in K-12 settings reported alarming rates of harassment (79%), physical assault (31%) and sexual assault (11%)
- Harassment was so severe that it led 11% to leave a school in K-12 settings or leave higher education

Economic Insecurity

Likely due to employment discrimination and discrimination in school, survey respondents experienced poverty at over three times the rate of the general population:

- 15% of respondents had a household income of $10,000 or less, compared to 4% of the general population[1]

Housing Discrimination and Instability

Survey respondents experienced blatant housing discrimination, as well as housing instability, much of which appears to stem from the challenges they face in employment.

- 6% were evicted
- 17% were denied a home/apartment
- 10% had become homeless because of their gender identity/expression
- 22% had to find temporary space to stay/sleep
- 18% had to move back in with family or friends
- 25% reported owning their home compared to 67% of the general population[2]

Harassment and Discrimination in Accommodations and Services

Survey respondents experienced discrimination in public accommodations and services, including from government agencies and police, because of their gender identity/expression.

- 58% were verbally harassed or disrespected in a place of public accommodation or service, including hotels, restaurants, buses, airports and government agencies
- 22% were denied equal treatment by a government agency or official
- 9% were denied equal treatment or harassed by judges or court officials
- 24% of those who have interacted with police reported harassment by officers
- 50% reported being uncomfortable seeking police assistance when needed

Health Care Discrimination and Health Outcomes

- 14% were refused medical care due to their gender identity/expression
- 1.42% were HIV positive, compared to the general population rate of 0.6%[3]
- 25% postponed needed medical care, when they were sick or injured, due to discrimination
- 35% reported attempting suicide at some point in their life, 22 times the rate of the general population of 1.6%[4]

Bias-Motivated Violence

In questions related to experiences in educational settings, at work, in interactions with police and with family members, at homeless shelters, accessing public accommodations, and in jails and prisons, respondents were asked about physical violence and sexual violence committed against them because of their gender identity/expression. There was no general question asked about whether respondents had ever experienced any bias-motivated violence in other areas of life, such as while walking down the street.

- 18% had been physically assaulted in one of these contexts because of their gender identity or expression
- 7% were sexually assaulted in one of these contexts because of their gender identity or expression

Note: In the full report of the National Transgender Discrimination Survey, we found that discrimination was pervasive throughout the entire sample, yet the combination of anti-transgender bias and persistent, structural racism was especially devastating. One of our most important findings was that people of color in general fared worse than white participants across the board, with African American transgender respondents faring far worse than all others in nearly every area examined. Due to the sample size of respondents from this state, we were unable to break these state results down by race/ethnicity without creating small sample size problems. However, we expect that people of color in Massachusetts would exhibit the same national pattern.

"Injustice at Every Turn: A Report of the National Transgender Discrimination Survey," which provides the national results, is in press and will be available in February 2011 online at www.thetaskforce.org and www.transequality.org.

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[1] U.S. Census Bureau, "Current Population Survey," Annual Social and Economic Supplement (Washington, DC: GPO, 2008).
[2] U.S. Department of Housing and Urban Development, "U.S. Housing Market Conditions, 2nd Quarter, 2009" (Washington, DC: GPO, 2009): http://www.huduser.org/portal/periodicals/ushmc/summer09/nat_data.pdf.
[3] United Nations Programme on HIV/AIDS (UNAIDS) and World Health Organization (WHO), "2007 AIDS Epidemic Update" (2007): http://data.unaids.org/pub/EPISlides/2007/2007_epiupdate_en.pdf.
[4] "U.S.A. Suicide: 2002 Official Final Data," prepared for the American Association of Suicidology by John L. McIntosh, Ph.D. Official data source: Kochanek, K.D., Murphy, S.L., Anderson, R.N., & Scott, C. (2004). Deaths: Final data for 2002. National Vital Statistics Reports, 53 (5). Hyattsville, MD: National Center for Health Statistics DHHS Publication No. (PHS) 2005-1120. Population figures source: table I, p.108. of the National Center for Health Statistics (Kochanek et al., 2004), see http://www.sprc.org/library/event_kit/2002datapgv1.pdf

AMERICAN CIVIL LIBERTIES UNION of MASSACHUSETTS

Carol Rose, *Executive Director*
ACLU of Massachusetts
211 Congress Street, Suite 301
Boston, MA 02110
617-482-3170
crose@aclum.org
www.aclum.org

Joint Committee on the Judiciary
June 8, 2011

Testimony of Carol Rose, Executive Director, ACLU of Massachusetts
In Support of HB 1336 -- An Act to Protect Privacy and Personal Data

---

The American Civil Liberties Union of Massachusetts, a nonprofit civil rights and civil liberties organization with more than 22,000 members and supporters in Massachusetts, strongly supports House Bill 1336, *An Act to Protect Privacy and Personal Data*. This legislation is vital to the protection of Massachusetts residents' freedom to assemble, to worship, and to dissent without fear of government surveillance and reprisals. The legislation is also an important step toward protecting ordinary people's personal lives and data from government monitoring.

House Bill 1336 provides the critical oversight necessary for government data collection and surveillance operations in Massachusetts. It sends a clear message that the laws of the Commonwealth prohibit domestic surveillance of non-violent political activity, religious expression, and other everyday activities, absent a reasonable suspicion of criminal conduct.

It is difficult to imagine that we need to worry about domestic political monitoring or improper data collection in Massachusetts. We are in the cradle of liberty, after all. Our Commonwealth has a long history of respect for civil rights and constitutional liberties, beginning with those who devised our constitutional system providing that each of us may live free from unreasonable searches and constant surveillance by government spies.[i] They bequeathed to us a system of legal protections designed to protect our right to worship freely, to assemble, and to engage in political speech and dissent without fear of government surveillance and retaliation.[ii]

These cornerstones of our democracy and liberty are now under assault by a wave of new surveillance technologies that have dramatically expanded the ability of the government to secretly monitor, collect, and rummage through data on virtually every aspect of our daily lives. At the same time, the federal government has embarked on a project to erect a complex and costly national intelligence infrastructure, aggressively expanding into the states by deploying state and local law enforcement officers as surrogates for federal surveillance efforts. In Massachusetts, state, municipal, and even university police have been deputized to pursue these new national intelligence objectives -- a mission that is, by definition, far broader and more amorphous than their traditional roles, and far more prone to abuse.

Former Massachusetts Governor Mitt Romney endorsed efforts to create this national domestic surveillance system and in 2004 established the Commonwealth Fusion Center, a multi-agency data-collection hub under the auspices of the Massachusetts State Police.[iii] In 2005, the Boston Police Department created its own center for coordinated monitoring of domestic activity, known as the Boston Regional Intelligence Center (BRIC).

Opened without public debate or state legislative action, these fusion centers operate with virtually no independent oversight, with overlapping lines of authority between federal and state agencies, and without adequate privacy protections at either the federal or state level. Most people in the Commonwealth don't even know they exist. These operations stand in stark contrast to other Massachusetts law enforcement institutions, such as the State Police or the Department of Criminal Justice Information Services, which were established by statute and therefore subject to a public process involving hearings, some measure of analysis, opportunities for modification, and legislative and executive approval.

In a democracy, any new endeavor of this magnitude warrants at least some public process. Yet, this hearing represents the first opportunity for the Judiciary Committee to consider and deliberate about the existence of the Commonwealth Fusion Center and BRIC, to give thought to appropriate mechanisms for accountability, and to consider how to safeguard Massachusetts residents' constitutional and privacy rights. Thank you for shedding legislative sunlight on this critically important issue!

Make no mistake: there is nothing inherently wrong with law enforcement agencies seeking to improve methods for sharing legitimately-acquired, reliable information about criminal activity. In a democracy, however, tracking and sharing information about residents should never be conducted on an industrial scale without thorough public deliberation, without meaningful limitations, or without careful consideration of the implications for personal privacy. Most important, such powerful institutions must be subject to careful checks and balances to guard against misuse of power as well as critical security measures to protect against data breaches of all kinds. Absent this crucial legislation, that oversight doesn't exist.

The news media give us near-daily reminders of the dangers of huge databases that lack adequate security and oversight. Just this Monday, the Boston Globe reported that hackers successfully gained unauthorized access to the extensive records of an organization that partners with the FBI to share information about threats to US critical infrastructure.[iv] By itself, this is an enormous public safety problem. But when databases collect all manner of personal information about people throughout the Commonwealth in addition to reliable intelligence about criminal activity, as fusion centers are currently able to do absent limiting legislation, data breaches threaten personal privacy as well. Gathering and sharing information without limitation is playing with fire.

Fusion centers, combined with the FBI's Joint Terrorism Task Forces, represent a significant departure from traditional law enforcement objectives and methods. They allow for the collection, tracking, and sharing of information about people who are not suspected of having engaged in crime. They empower local and state officials, including undercover operatives, to engage in domestic data collection and monitoring of everyday behavior. They encourage state and local police to collect and report on non-criminal "suspicious" behavior, including protected First Amendment activity such as taking photographs, using binoculars, writing notes and "espousing "extremist views."[v] Finally, they invite non-law enforcement participants, including private sector companies and the U.S. military, into local and state police operations, radically expanding government sharing of information about ordinary Massachusetts residents. The dramatic expansion of unfettered government collection of personal data and possible tracking of political activity at the local and state level raises profound privacy and civil liberties concerns,

notably in the realms of individual privacy and freedom of speech and association. Indeed, the federal Department of Homeland Security's Privacy Office, itself, has "identified a number of risks to privacy presented by the fusion center program," including: (1) Ambiguous Lines of Authority, Rules, and Oversight; (2) Participation of the Military and the Private Sector; (3) Data Mining; (4) Excessive Secrecy; (5) Inaccurate or Incomplete Information; and (6) Mission Creep.[vi]

The DHS Privacy Office, however, offers little assistance to states in addressing these concerns and instead "presumes that the States are interested in preserving and competent to protect the rights of their own citizens, and offers no opinion as to their methods."[vii]

Simply put, it's up to you – the members of the Great and General Court – to provide the oversight necessary to protect the freedoms established by the founders of our Commonwealth.

This bill, *An Act to Protect Privacy and Personal Data*, is a critical step toward providing such protection. It gives the legislature a monitoring role and establishes commonsense standards regarding data collection, use, and accuracy. Finally, it ensures that intelligence data centers operate in keeping with established principles regarding individual rights under Massachusetts law.

The ACLU of Massachusetts – along with its 22,000 members and supporters – urges the committee to safeguard the rights of the Commonwealth's residents to engage in lawful political and religious activity without being targeted for secret surveillance, and to protect residents' privacy by protecting their personal data from indiscriminate government monitoring. House Bill 1336 will uphold the basic principle that Massachusetts residents should not be targeted for domestic tracking or data collection without reasonable suspicion of criminal activity, and will create a much-needed oversight mechanism for fusion centers in the state, ensuring both transparency and accountability. We urge you to give this legislation a prompt and favorable report.

ATTACHMENTS:

- MICHAEL GERMAN AND JAY STANLEY, WHAT'S WRONG WITH FUSION CENTERS? AMERICAN CIVIL LIBERTIES UNION (Dec. 2007), http://www.aclu.org/pdfs/privacy/fusioncenter_20071212.pdf.

- MIKE GERMAN AND JAY STANLEY, AMERICAN CIVIL LIBERTIES UNION, FUSION CENTER REPORT UPDATE (July 2008), http://www.aclu.org/pdfs/privacy/fusion_update_20080729.pdf.

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[i] Massachusetts Constitution's Declaration of Rights, art. XIV (adopted in 1780). (freedom from unreasonable searches).

[ii] *Id.*, arts. II, XIX, XVI. (freedom to worship, freedom to assemble and petition, freedom of press/speech).

[iii] Stephanie Ebbert, *Fusion Center takes aim at terror, but secrecy alarms civil libertarians*, THE BOSTON GLOBE, September 26, 2005. http://www.boston.com/news/local/massachusetts/articles/2005/09/26/fusion_center_takes_aim_at_terror/. See also,

Executive Order No. 476, "Designating the Commonwealth Fusion Center as the Commonwealth's Principal Center for Information Collection and Dissemination," January 3, 2007.

[iv] *Hackers breach FBI partner's site*, THE BOSTON GLOBE, June 6, 2011.

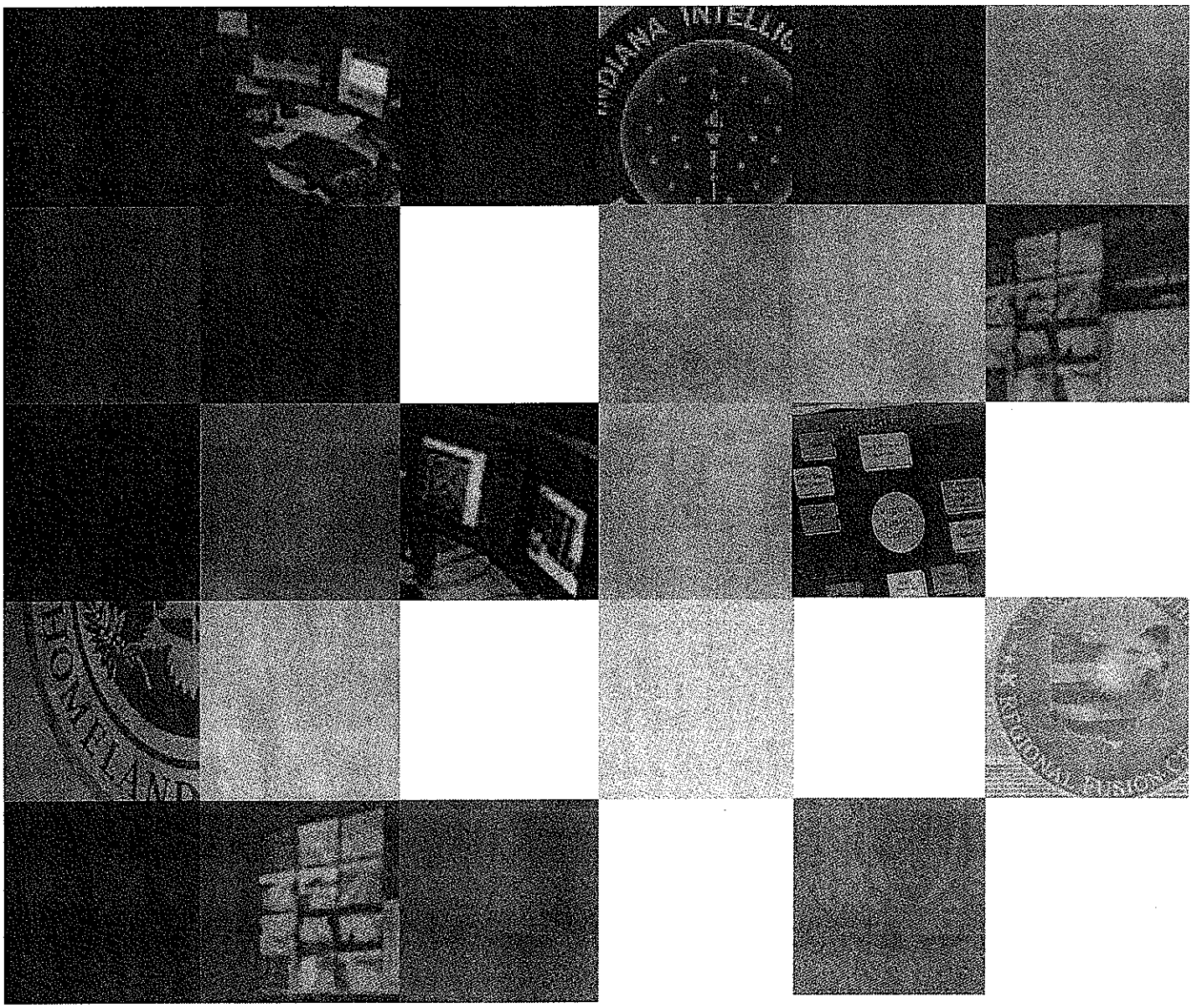
[v] See, MIKE GERMAN AND JAY STANLEY, Fusion center update, July 2008, available at http://www.aclu.org/pdfs/privacy/fusion_update_20080729.pdf. This report cites LAPD Special Order #11, dated March 5, 2008, which states that it is the policy of the LAPD to "gather, record, and analyze information of a criminal or *non-criminal nature*, that could indicate activity or intentions related to either foreign or domestic terrorism," and includes a list of 65 behaviors LAPD officers "shall" report. The list includes such innocuous, clearly subjective, and First Amendment protected activities as:

- taking measurements
- using binoculars
- taking pictures or video footage "with no apparent esthetic value"
- abandoning vehicle
- drawing diagrams
- taking notes
- espousing extremist views

[vi] Privacy Impact Assessment for the Department of Homeland Security State, Local, and Regional Fusion Center Initiative December 11, 2008, available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ia_slrfci.pdf.

[vii] *Id.*

WHAT'S WRONG WITH FUSION CENTERS?



ACLU
AMERICAN CIVIL LIBERTIES UNION

WHAT'S WRONG WITH FUSION CENTERS?

Published December 2007

Michael German
Policy Counsel for National Security, ACLU Washington Legislative Office

Jay Stanley
Public Education Director, ACLU Technology and Liberty Program

Acknowledgements:

The authors would like to thank legal intern Anh-Thu Nguyen, of the University of Texas School of Law, for her invaluable assistance on this project. Her research and analysis contributed greatly to the content of this report.

ACLU NATIONAL OFFICE
125 Broad Street, 18th Fl.
New York, NY 10004-2400
(212) 549-2500
www.aclu.org

ACLU WASHINGTON LEGISLATIVE OFFICE
915 15th Street, NW
Washington, DC 20005
(202) 675-2325

Executive Summary

A new institution is emerging in American life: Fusion Centers. These state, local and regional institutions were originally created to improve the sharing of anti-terrorism intelligence among different state, local and federal law enforcement agencies. Though they developed independently and remain quite different from one another, for many the scope of their mission has quickly expanded—with the support and encouragement of the federal government—to cover "all crimes and all hazards." The types of information they seek for analysis has also broadened over time to include not just criminal intelligence, but public and private sector data, and participation in these centers has grown to include not just law enforcement, but other government entities, the military and even select members of the private sector.

These new fusion centers, over 40 of which have been established around the country, raise very serious privacy issues at a time when new technology, government powers and zeal in the "war on terrorism" are combining to threaten Americans' privacy at an unprecedented level.

Moreover, there are serious questions about whether data fusion is an effective means of preventing terrorism in the first place, and whether funding the development of these centers is a wise investment of finite public safety resources. Yet federal, state and local governments are increasing their investment in fusion centers without properly assessing whether they serve a necessary purpose.

There's nothing wrong with the government seeking to do a better job of properly sharing legitimately acquired information about law enforcement investigations—indeed, that is one of the things that 9/11 tragically showed is very much needed.

But in a democracy, the collection and sharing of intelligence information—especially information about American citizens and other residents—need to be carried out with the utmost care. That is because more and more, the amount of information available on each one of us is enough to assemble a very detailed portrait of our lives. And because security agencies are moving toward using such portraits to profile how "suspicious" we look.[1]

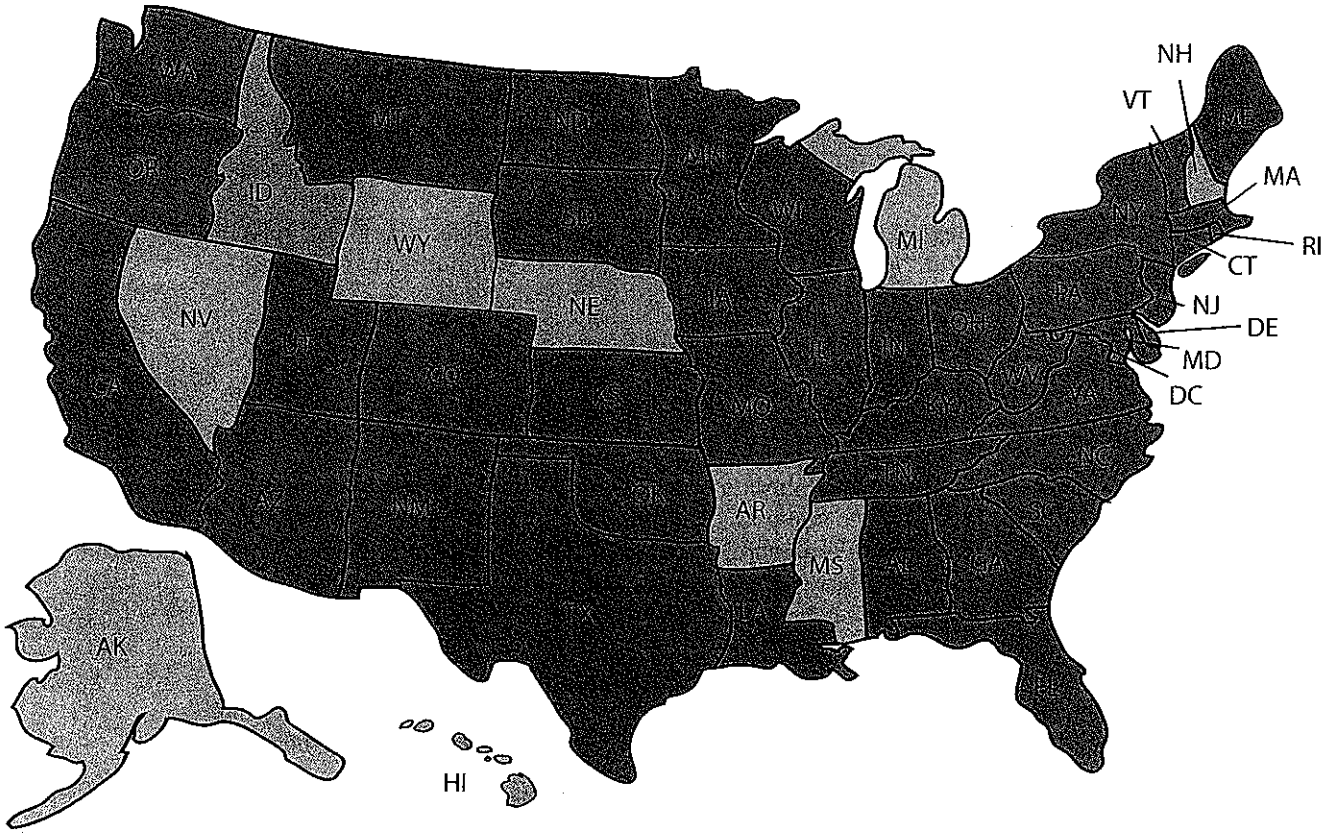
New institutions like fusion centers must be planned in a public, open manner, and their implications for privacy and other key values carefully thought out and debated. And like any powerful institution in a democracy, they must be constructed in a carefully bounded and limited manner with sufficient checks and balances to prevent abuse.

Unfortunately, the new fusion centers have not conformed to these vital requirements.

Since no two fusion centers are alike, it is difficult to make generalized statements about them. Clearly not all fusion centers are engaging in improper intelligence activities and not all fusion center operations raise civil liberties or privacy concerns. But some do, and the lack of a proper legal framework to regulate their activities is troublesome. This report is intended to serve as a primer that explains what fusion centers are, and how and why they were created. It details potential problems fusion centers present to the privacy and civil liberties of ordinary Americans, including:

- **Ambiguous Lines of Authority.** The participation of agencies from multiple jurisdictions in fusion centers allows the authorities to manipulate differences in federal, state and local laws to maximize information collection while evading accountability and oversight through the practice of "policy shopping."

FUSION CENTERS BY STATE



STATES WITH A FUSION CENTER

STATES WITH A FUSION CENTER UNDER DEVELOPMENT

STATES WITHOUT A FUSION CENTER

- **Private Sector Participation.** Fusion centers are incorporating private-sector corporations into the intelligence process, breaking down the arm's length relationship that protects the privacy of innocent Americans who are employees or customers of these companies, and increasing the risk of a data breach.

- **Military Participation.** Fusion centers are involving military personnel in law enforcement activities in troubling ways.

- **Data Fusion = Data Mining.** Federal fusion center guidelines encourage whole sale data collection and manipulation processes that threaten privacy.

- **Excessive Secrecy.** Fusion centers are hobbled by excessive secrecy, which limits public oversight, impairs their ability to acquire essential information and impedes their ability to fulfill their stated mission, bringing their ultimate value into doubt.

The lack of proper legal limits on the new fusion centers not only threatens to undermine fundamental American values, but also threatens to turn them into wasteful and misdirected bureaucracies that, like our federal security agencies before 9/11, won't succeed in their ultimate mission of stopping terrorism and other crime.

The information in this report provides a starting point from which individuals can begin to ask informed questions about the nature and scope of intelligence programs being conducted in their communities. The report concludes with a list of recommendations for Congress and state legislatures.

The American Civil Liberties Union has prepared this report based upon publicly available materials including congressional testimony, government reports, news articles and independent research. The ACLU attempted to contact every fusion center around the country in an informal survey regarding the level of private sector participation in the centers. Responses were as varied as the fusion centers themselves. Many either did not return calls or refused to provide information. Some were commendably open, willing to discuss their work and the legal authorities that govern their operations. We have also drawn on a report by the Congressional Research Service, which was able to interview a much larger number of fusion center personnel.[2]

INTRODUCTION

The origins of fusion centers... Federal government encouragement of fusion centers... A dark history of abuse of secret intelligence activities... Fusion centers today...

The origins of fusion centers

After 9/11, pressure grew for a larger state role in counterterrorism. At first, the FBI attempted to increase intelligence sharing with state and local law enforcement by expanding their Joint Terrorism Task Forces (JTTFs). But state and local officials continued to feel that the federal government was not sharing enough information to allow them to prevent terrorist attacks.[3]

This frustration with the JTTF system developed because while state and local law enforcement officers participating in JTTFs were given security clearances, secrecy rules prevented these officers from sharing any intelligence they acquired with other state and local colleagues who did not have such clearances. From a police department's point of view, it did them little good to send personnel into a task force only to have them cut off from and, for all practical purposes, no longer working for their departments. At least one city, Portland, Oregon, actually withdrew its officers from the Portland JTTF because of this problem.[4]

Another factor fueling the emergence of fusion centers was a trend within policing of moving away from traditional law enforcement methods toward what was dubbed "intelligence-led policing," or ILP. ILP focuses on the gathering and analysis of "intelligence" in the pursuit of proactive strategies "geared toward crime control and quality of life issues."[5] One law enforcement official described ILP as policing that is "robust enough" to resist "terrorism as well as crime and disorder."[6]

Intelligence fusion centers grew in popularity among state and local law enforcement officers as they sought to establish a role in defending homeland security by developing their own intelligence capabilities. These centers evolved largely independently of one another, beginning in about 2003, and were individually tailored to meet local and regional needs.

This growth took place in the absence of any legal framework for regulating fusion centers' activities. This lack of regulation quickly led to "mission creep," in which fusion centers originally justified as anti-terrorism initiatives rapidly drifted toward an "all-crimes, all-hazards" policy "flexible enough for use in all emergencies."[7] The leadership at some fusion centers has admitted that they switched to an "all-hazards" approach so they could apply for a broader range of grants, and because

> it was impossible to create 'buy in' amongst local law enforcement agencies and other public sectors if a fusion center was solely focused on counterterrorism, as the center's partners often didn't feel threatened by terrorism, nor did they think that their community would produce would-be terrorists.[8]

This expansion of the articulated mission of fusion centers reflects an evolving search for purpose, bounded on one side by the need not to duplicate the mission of existing insti-

tutions such as federal agencies and state Emergency Operations Centers, and on the other by the desire to do something that is actually useful.

Federal encouragement of the growth of fusion centers

As fusion centers proliferated, national efforts at bolstering, defining and standardizing these institutions on the part of governors and the federal government began to intensify.[9] The federal government began providing facilities, manpower and financial resources to fuel the growth of these state and local intelligence centers. In 2006, the departments of Justice and Homeland Security produced a report, "Fusion Center Guidelines: Developing and Sharing Information and Intelligence in a New Era," which outlined the federal government's vision for the centers, and sought to encourage and systematize their growth. "Intelligence sharing among states and jurisdictions will become seamless and efficient when each fusion center uses a common set of guidelines," the agencies proclaimed.[10]

The Guidelines defined a fusion center as a "collaborative effort of two or more agencies that provide resources, expertise, and information to the center with the goal of maximizing their ability to detect, prevent, investigate, and respond to criminal and terrorist activity."[11] These goals are laudable and appropriate for any law enforcement intelligence operation, as we all want the police to be able to effectively protect us from criminals and terrorists. But the federal government intends for fusion centers to broaden their sources of data "beyond criminal intelligence, to include federal intelligence as well as public and private sector data."[12]

A dark history of abuse of secret intelligence powers

Expanding the scope of an intelligence agency's mission in that way, particularly when done in secret, is an invitation to abuse. And there is a long, nasty history of abuse surrounding vaguely defined, pro-active "intelligence" as carried out by domestic law enforcement agencies at the local, state and federal level. Law enforcement personnel and agencies have actively joined with corporations to track, surveil and harass the labor, anti-war, civil rights and other movements pushing for social and political change.

Urban police forces long maintained political intelligence units (also known as Anti-Subversive Squads, or Red Squads), which spied upon and sabotaged numerous peaceful groups—often in utterly illegal ways—throughout the twentieth century. For its part, the FBI ran a domestic intelligence/counterintelligence program called COINTELPRO that quickly grew from a legitimate effort to protect national security into an effort to suppress political dissent through illegal activities. Frequent targets were groups that criticized the FBI itself. The Senate panel that investigated COINTELPRO (the "Church Committee") in the 1970s found that a combination of factors led law enforcers to become law breakers. But the crucial factor was their easy access to damaging personal information as a result of the unrestrained collection of domestic intelligence.[13]

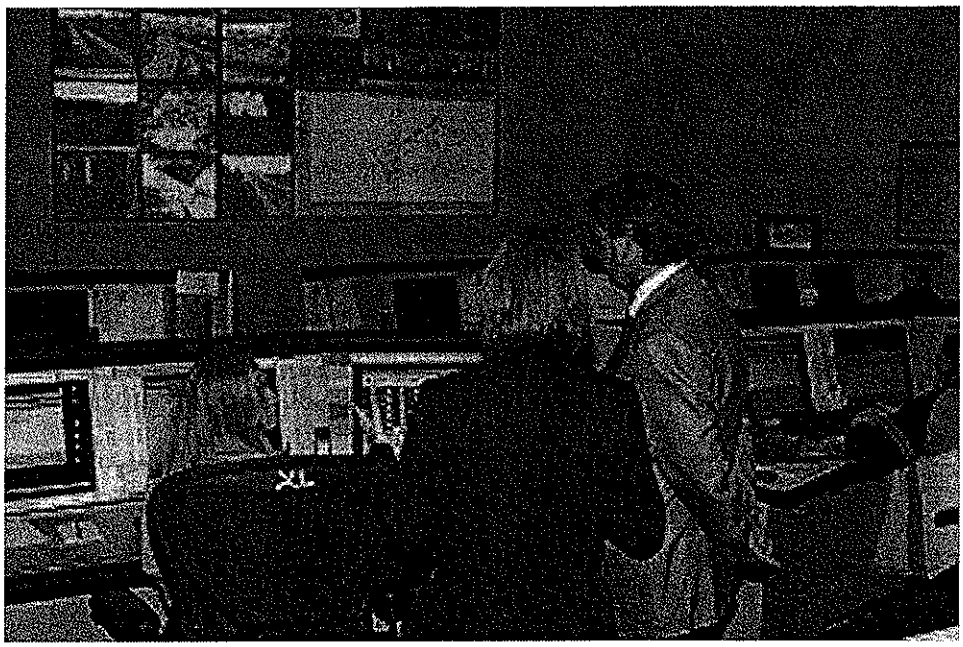
The Church Committee found that part of the problem with COINTELPRO was that no one outside the FBI was ever supposed to know it existed.[14] No one could object to activities they weren't aware of and, as investigators found, "the absence of disapproval" was "interpreted by the Bureau as sufficient authorization to continue an activity."[15] Secrecy created a haven from the public eye where abuse could flourish.

Fusion centers today

Nevertheless, efforts to build fusion centers have continued, often in seeming ignorance or disregard of this dark history. Today there are 43 state, local and regional fusion centers in operation around the United States, with at least 15 more in development. No two fusion centers seem to be exactly alike, either in form or function, so it is difficult to con-

duct a generalized assessment of their value as compared to the potential risks they pose. In addition, they operate in considerable secrecy, so it is difficult for the public to evaluate what any particular fusion center does, much less what the network of fusion centers across the country is doing.

It is clear that not all fusion centers are engaging in improper or worrisome activities, and not all fusion center functions raise civil liberties or privacy concerns. But the statements and activities of some, combined with the push to standardize and weave together these state institutions, do raise questions about the overall direction in which they are headed. In particular, the federal government's vision as outlined in its Guidelines raises many concerns, as does the continuing lack of a legal framework to regulate the centers' activities.



Kentucky Governor Ernie Fletcher tours Kentucky's fusion center.

THE PROBLEMS WITH FUSION CENTERS

I. Ambiguous lines of authority allow for "policy shopping."

II. Private sector participation in fusion centers risks privacy and security.

III. Military participation in fusion centers violates fundamental tenets of liberty.

IV. Data fusion = Data mining, which is bad for privacy and bad for security.

V. Excessive secrecy undermines the mission of fusion centers.

I. AMBIGUOUS LINES OF AUTHORITY

One problem with fusion centers is that they exist in a no-man's land between the federal government and the states, where policy and oversight is often uncertain and open to manipulation. There appears to be at least some conscious effort to circumvent public oversight by obscuring who is really in charge of these fusion centers and what laws apply to them. In struggling to answer the seemingly simple question of who is in charge of fusion centers at a recent congressional hearing, a Department of Homeland Security official could only offer that "fusion centers are in charge of fusion centers."[16] One analyst reportedly described his fusion center as the "wild west," where officials were free to "use a variety of technologies before 'politics' catches up and limits options."[17]

Federal involvement in the centers continues to grow. Most fusion centers developed as an extension of existing law enforcement intelligence units and as a result they have sometimes been described as "state police intelligence units on steroids."[18] But exactly who is providing those steroids is key to determining who will control them in the future. Fusion centers are still primarily staffed and funded by state authorities, but:

- The federal government is playing an essential role in the development and networking of fusion centers by providing financial assistance, sponsoring security clearances, and providing personnel, guidance and training.[19]
- The FBI has over 200 agents and analysts assigned to 36 fusion centers and plans to increase this commitment in the future.[20]
- As of December 2006, the DHS alone has provided over $380 million in federal funds to support fusion centers.[21]
- At least one fusion center, the Maryland Coordination and Analysis Center (MCAC), was initiated and led by federal authorities and was only recently turned over to the control of state officials.
- Thirty percent of ostensibly state-controlled fusion centers are physically located within federal agency workspace.[22]

Federal authorities are happy to reap the benefits of working with the fusion centers without officially taking ownership. Fusion center supporters argue that the federal government can use the "800,000 plus law enforcement officers across the country" to

"function as the 'eyes and ears' of an extended national security community."[23] Homeland Security Director Michael Chertoff, while denying that the federal government had any intention of controlling fusion centers, declared that "what we want to do is not create a single [fusion center], but a network of [centers] all across the country."[24]

Policy shopping

The presence of representatives from federal, state and local agencies at fusion centers and the ambiguity over who controls them can lead to a practice of "policy shopping," in which officials pick and choose from overlapping sets of laws so they can collect and use personal information as freely as possible, while avoiding privacy laws, open-records acts, and civil liability.

Some states, for example, have much stronger privacy or open-records laws than the federal government,[25] while in other states they are weaker. Fusion centers can manipulate who "owns" the records, or where they are "held" to thwart public oversight. If a particular state or locality has unusually broad privacy protection laws, the cooperating authorities can simply arrange for fusion center participants from that jurisdiction to have access to the data without actually "hosting" it. A Texas fusion center analyst's description of this scheme was described by a reporter:

> Of particular interest to many at the meeting was the way the Center accesses and uses data from local agencies; it does not host the data, but rather refreshes them regularly. That means analysts are not subject to the Freedom of Information Act (FOIA) or being dragged into court.[26]

Shielding fusion centers from public scrutiny may seem convenient from a pinched, bureaucratic perspective, but it is potentially disastrous for private citizens trying to pin down responsibility for mistaken information that is turning their lives upside down. Professionalism in law enforcement means not viewing privacy and FOIA laws as mere obstacles to be defeated, or "politics," but recognizing them as crucial checks and balances that must be respected to ensure accountability.

In addition to rules and jurisdictions, technology can also be manipulated to make more information accessible to the fusion centers, while limiting what information is retained for public accountability. The Maryland fusion center doesn't host any of its own data but rather uses a tool called the Digital Information Gateway (DIG), which allows MCAC to "connect with individual law enforcement, public health, public safety, and related databases throughout the Mid-Atlantic region."[27] MCAC representatives told the ACLU they only use DIG to connect to other law enforcement databases at this time. But that kind of data-mining tool could easily allow a fusion center to engage in widespread data retrieval and analysis across jurisdictions without producing any retained documentation or data that could be subject to freedom of information laws or oversight investigations.

From a privacy point of view, it does not matter where data is "hosted" or "stored" or "owned." All that matters is who has access to it. (See section on data mining, below.)

The networked fusion center approach promises the Department of Homeland Security all the benefits of a nationwide intelligence collection and analysis capability with none of the headaches that come from privacy laws, open-records statutes and other necessary elements of a democratic government.

Federal law

Title 28 of the Code of Federal Regulations, Part 23, governs what information can be put in a law enforcement database and how it can be used. The regulation states that all

criminal intelligence systems "shall collect information concerning an individual only if there is reasonable suspicion that the individual is involved in criminal conduct or activity and the information is relevant to that criminal conduct or activity."[28] And the law limits the dissemination of law enforcement intelligence to situations in which "there is a need to know and a right to know the information in the performance of a law enforcement activity."[29]

This provision should limit what types of information fusion centers could exchange with non-law enforcement fusion center participants, and with each other. Indeed, many fusion center personnel contacted by the ACLU stated emphatically that they complied with this law, and that they planned to remain compliant by not incorporating private sector personnel within their fusion centers. CRS even reported that some fusion center personnel were concerned that sharing law enforcement information with DHS, which often employs non-law enforcement contractors, might violate the statute.[30] These law enforcement officers should be commended for their professionalism.

However, it is worrying that the federal Guidelines report does not account for this law when it advocates for the expanded scope of data to be collected at fusion centers. And indeed as fusion centers start sharing databases they appear to be looking for ways to circumvent these regulations. A California fusion center representative complained that compliance tasks required to manage law enforcement data sharing regulations "require an enormous amount of work," then suggested that by establishing "memorandums of understanding with data sharing in mind, they can move data from one database to another without worrying about someone else's data warehouse policies."[31]

II. PRIVATE SECTOR PARTICIPATION

Fusion centers are poised to become part of a wide-ranging trend of recent years in the United States: the creation of a "Surveillance-Industrial Complex" in which security agencies and the corporate sector join together in a frenzy of mass information gathering, tracking and routine surveillance.[32]

One of the goals of fusion centers is to protect the nation's "critical infrastructure"—85% of which is owned by private interests.[33] And one of the "value propositions" justifying federal support for fusion centers is increased government access to "non-traditional information sources."[34] The Guidelines emphatically encourage fusion centers to invite a wide range of public safety, public works, social services and private sector entities to participate in the fusion process (see box).

A Wide Range of Information

The DOJ Fusion Center Guidelines include a 6-page list—which it says is "not comprehensive"—of potential types of information fusion centers could incorporate. Some of the sources included on the list were:

- Private sector entities such as food/water production facilities, grocery stores and supermarkets, and restaurants.
- Banks, investment firms, credit companies and government-related financial departments.
- Preschools, day care centers, universities, primary & secondary schools and other educational entities providing information on suspicious activity.
- Fire and emergency medical services in both the public and private sector such as hospitals and private EMS services.
- Utilities, electricity, and oil companies, Department of Energy.
- Private physicians, pharmaceutical companies, veterinarians.
- The gaming industry, sports authority, sporting facilities, amusement parks, cruise lines, hotels, motels, resorts and convention centers.
- Internet service and e-mail providers, the FCC, telecom companies, computer and software companies, and related government agencies.
- Defense contractors and military entities.
- The U.S. Postal service and private shipping companies.
- Apartment facilities, facility management companies, housing authorities.
- Malls, retail stores and shopping centers.
- State and child welfare entities.
- Governmental, public, and private transport entities such as airlines and shipping companies.

While it is entirely appropriate for law enforcement to confer with private entities for specific, well-defined purposes, breaking down the arms-length relationship between government and the private sector by incorporating private entities into fusion centers is a bad idea. Several features of public-private fusion centers raise red flags:

- **"Critical infrastructure" is not defined in the DOJ Guidelines.** Rather, it is left to the discretion of state and local officials to determine who would be invited to participate in fusion center activities. That opens the possibility that political considerations could determine who gains access to fusion center information.

- **Some private entities foresee an active role in all aspects of the intelligence process**—and they want access to classified materials. An executive with Boeing (which has an analyst assigned to the Seattle fusion center) testified that the private sector "has the ability to effectively acquire, interpret, analyze and disseminate intelligence information—which may originate in the private sector."[35] He argued that giving private sector participants like Boeing "access to all information both classified and unclassified, which potentially or actually threatens them, is vital."[36]

- **Some fusion centers hire private companies to store and analyze the data they collect.** For example, in the wake of the influx of evacuees after Hurricane Katrina, the Texas Department of Homeland Security contracted with Northrop Grumman Corporation for a $1.4 million database project that would bring together a wide variety of law enforcement and government data, as well as consumer dossiers gathered by the private data company ChoicePoint.[37] The project was intended to create a "global search capability" over all this unstructured data, which would then be made available to the Texas Fusion Center. According

to the Texas Observer the project failed due to concerns over the security of the data: "it was not clear who at Northrop had access to the data, or what had become of it."[38]

Private-sector involvement is a bad idea

It is a bad idea to give private companies access to classified materials and other sensitive law enforcement information. While law enforcement officers undergo rigorous training, are sworn to serve their communities, and are paid public salaries; private companies and their employees are motivated to maximize profits. Potential risks include:

1. **A private company could use classified information to gain an unfair business advantage against its competitors.** Participation in fusion centers might give Boeing access to the trade secrets or security vulnerabilities of competing companies, or might give it an advantage in competing for government contracts. Expecting a Boeing analyst to distinguish between information that represents a security risk to Boeing and information that represents a business risk may be too much to ask.

2. **Private information in the hands of companies could be funneled to the government** without proper legal process. The types of information that could be provided to law enforcement from private entities that own or control "critical infrastructure" could endanger the privacy of ordinary Americans who work for or do business with these companies. Boeing, for example, is the fourth largest employer in Washington State.[39] For law enforcement to gain access to the breadth of information that a large employer like Boeing could make available would violate the principle that law enforcement only gather information on us when it has a reasonable suspicion of wrongdoing and proper legal process.

3. **Companies become an extension of the surveillance state.** Telecommunications companies contracted with the NSA to assist with its warrantless intelligence collection efforts,[40] and they contracted with the FBI to circumvent the Electronic Communications Privacy Act by using "exigent letters."[41] The cozy working relationships that developed between law enforcement agents and their "partners" in the private sector facilitated this blatantly illegal conduct, according to a report from the Inspector General of the Justice Department.[42] Rather than being chastened by the scandal resulting from that audit, the FBI requested another $5 million in their 2008 budget to pay the telecoms to warehouse data they would not otherwise keep, just in case the FBI might have a reason to request it later.[43]

4. **Private partnerships provide opportunities for the government to mask illicit activities.** Private companies could be used to as proxies to conduct activities that the government would otherwise be prohibited from engaging in. For example, the ACLU is currently suing a Boeing subsidiary, Jeppesen Dataplan, for, among other services, falsifying flight plans to disguise CIA "extraordinary rendition" torture flights.[44]

5. **Companies can glean personal information from security requests.** Just as internet service providers retain records of their customers' web searches for business intelligence purposes,[45] the private companies participating in fusion centers could mine the records of incoming government requests to create new prediction tools to identify other individuals who might be of interest to investigators. These new tools could then be marketed to other fusion centers,

or worse, to other clients, including private individuals, other commercial interests, and even foreign governments.

6. **Government information could be abused by companies.** From a security standpoint, the more people who have access to sensitive information, the more chances there are of a security breach—particularly where employees' loyalties lie with a private company rather than the community. Companies participating in fusion centers could be tempted to use their access to sensitive information to retaliate against company critics, competitors or troublesome employees, or to gain an advantage in difficult labor battles.

7. **Private participation could lead to private retaliation.** Private-sector access to inside information from fusion centers could lead to people unfairly being fired from a job, evicted from an apartment or denied a loan. What protections could be built to prevent this from happening? The Church Committee report on the FBI's COINTELPRO program is full of stories in which private sector actors cooperated with the FBI in firing, expelling or harassing Americans who were merely advocating for social change.[46]

8. **Employees of companies assigned to fusion centers could be asked to spy on their neighbors, clients, co-workers or employees.** Such concerns are not misplaced. The Bush Administration proposed nationalizing this very concept in 2002 through its "TIPS" program; Congress blocked it due to public outcry but it has resurfaced around the country in various guises.[47] One Kansas police department, for example, already trains maintenance and rental staffs of apartment complexes, motels and storage facilities to look for things like "printed terrorist materials and propaganda."[48] And a recent *Washington Post* article quoted a federal official staffing a fusion center as saying, "You need to educate cops, firefighters, health officials, transportation officials, sanitation workers, to understand the nature of the threat." While the official said these individuals were trained not to be "super-spies," he followed with a caveat: "constitutionally, they see something, they can report it."[49]

III. MILITARY PARTICIPATION

One of the more disturbing developments with fusion centers is the participation of active-duty military personnel. Longstanding American tradition, as enshrined in an 1878 law known as the Posse Comitatus Act, prohibits the U.S. military from acting in a law enforcement capacity on U.S. soil, except under express authority of Congress.[50] Yet military personnel are participating in many of these fusion centers with little debate about the legality of this activity or the potential effects this may have on our society.

The Maryland Coordination and Analysis Center (MCAC), for example, includes an active-duty U.S. Army soldier, whose mission is limited to military force protection, according to MCAC personnel. But it was not clear from the interview with the MCAC representatives what laws authorize Army participation in fusion centers, even at this limited level, or what oversight mechanisms exist to ensure that the military personnel assigned to the fusion center do not become involved in other intelligence or law enforcement activities. After all, the stated purpose of fusion centers is to share intelligence and increase coordination among participants.

Many fusion centers also incorporate National Guard troops, and at least one fusion center (in North Dakota) is located within National Guard facilities.[51] Other fusion centers

use the Law Enforcement Information Exchange (LInX), a law enforcement intelligence sharing system developed by the Department of the Navy for use in areas of strategic importance to the Navy.[52]

The involvement of military personnel is especially dangerous at a time when government officials are using hyperbolic rhetoric about the threat of terrorism to scare Americans into abandoning their civil liberties. For example, Major General Timothy J. Lowenberg, the Adjutant General of Washington State's National Guard, which participates in the Washington Joint Analytical Center, told Congress:

> We are a nation at war! That is the "ground truth" that must drive all of our data collection, information sharing and intelligence fusion and risk assessment actions... Today, all American communities, large and small, are part of a new and frighteningly lethal 21st Century global battle space.[53]

Officials who regard American communities as battlegrounds in a "war" can be tempted to dispense with "inconvenient" checks and balances. Americans have long been suspicious, for very good reasons, of the idea of deploying military assets on U.S. soil, and have long considered the Posse Comitatus Act to be one of the touchstones of American liberty. Allowing that bedrock principle to erode would be a radical step in the wrong direction.

IV. DATA FUSION = DATA MINING

The Justice Department's 2006 Guidelines envision fusion centers doing more than simply sharing legitimately acquired law enforcement information across different branches of our burgeoning security establishment. The Guidelines encourage compiling data "from nontraditional sources, such as public safety entities and private sector organizations" and fusing it with federal intelligence "to anticipate, identify, prevent, and/or monitor criminal and terrorist activity."[54] This strongly implies the use of statistical dragnets that have come to be called data mining.

The inevitable result of a data-mining approach to fusion centers will be:

- Many innocent individuals will be flagged, scrutinized, investigated, placed on watch lists, interrogated or arrested, and possibly suffer irreparable harm to their reputation, all because of a hidden machinery of data brokers, information aggregators and computer algorithms.[55]

- Law enforcement agencies will waste time and resources investing in high-tech computer boondoggles that leave them chasing false leads—while real threats go unaddressed and limited resources are sucked away from the basic, old-fashioned legwork that is the only way genuine terror plots have ever been foiled.

The Guidelines set forth a comprehensive vision for how these new institutions should operate:

> Data fusion involves the exchange of information from different sources, including law enforcement, public safety, and the private sector. When combined with appropriate analysis, it can result in meaningful and actionable intelligence and information.[56]

At a fusion center, the report says, threat assessments and information related to public safety, law enforcement, public health, social services and public works could be 'fused'

with federal data containing personally identifiable information whenever a "threat, criminal predicate, or public safety need is identified."[57] Subsequent analysis and dissemination of criminal/terrorist information, intelligence and other information would "ideally support efforts to anticipate, identify, prevent, and/or monitor criminal and terrorist activity."[58]

The head of the Delaware Information Analysis Center (DIAC): Delaware State Police Captain Bill Harris, explained that

> The fusion process is to take law enforcement information and other information—it could be from the Department of Agriculture, the Department of Transportation, the private sector—and fuse it together to look for anomalies and push information out to our stakeholders in Delaware who have both a right and a need to know.[59]

Rather than being constrained by the law regarding what they can collect, Capt. Harris appeared to feel constrained only by resources: "I don't want to say it's unlimited, but the ceiling is very high... When we have the money, we'll start going to those other agencies and say, 'Are you willing to share that database and what would it cost.'"[60]

The broad language used to describe fusion is eerily reminiscent of the Total Information Awareness program, a controversial Pentagon data-mining program that Congress shut down in 2003 because of its implications for the privacy of innocent Americans. These programs envision:

A) Compiling information from as broad a variety of sources as possible;

B) Proactively identifying unknown risks from among the population at large by sifting through that data; and

C) Looking for patterns "that can be used to predict and prevent future criminal activity."[61]

Data mining is not good for security

Perhaps the most fundamental problem with data mining is that, as many experts have pointed out, it won't work, and investing in data-mining technologies will drain finite homeland security resources, which makes it bad for security.

- Soon after 9/11 Gilman Louie, the head of the CIA's venture capital arm In-Q-Tel, warned against a "data-mining or profiling" approach to counterterrorism, which he described as "too blunt an instrument" to be a primary tool of surveillance. "I think it's very dangerous to give the government total access," he said.[62]

- The Association for Computing Machinery has said that data-mining approaches "suffer from fundamental flaws that are based in exceedingly complex and intractable issues of human nature, economics and law. . . As computer scientists and engineers we have significant doubts that the computer-based" approach will be effective.[63]

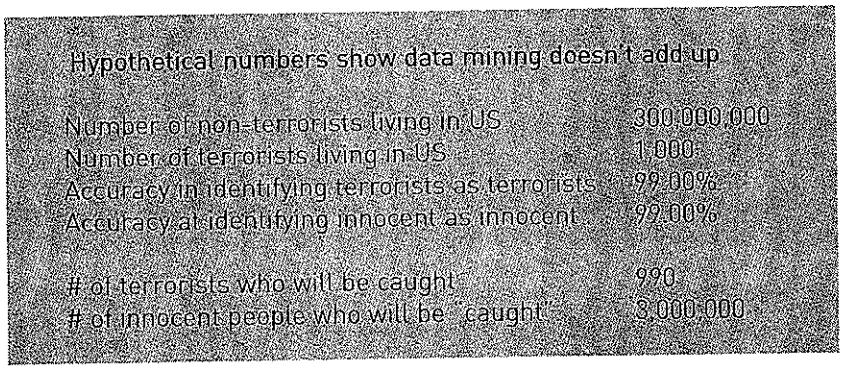
- In a recently published analysis, data mining pioneer Jeff Jonas and Jim Harper of the CATO Institute explained that while data mining has many useful purposes in other applications, it is poorly suited for predicting or preventing acts of terrorism:

> It would be unfortunate if data mining for terrorism discovery had currency within national security, law enforcement, and technology circles because pursuing this use of data mining would waste taxpayer dollars, needlessly infringe on privacy and civil liberties, and misdirect the valuable time and energy of the men and women in the national security community.[64]

Experts say that data mining can be effective where there is substantial amount of relevant data, a manageable universe of false negatives and a negligible cost to false positives. Direct mailers use data mining frequently to target advertising, and financial institutions often use data mining to screen for fraud. But these techniques rely on an analysis of thousands, if not millions of relevant transactions every day, and as Jonas and Harper point out, "terrorism does not occur with enough frequency to enable the creation of valid predictive models."[65] Moreover, as we have seen, what little data does exist, such as that making up the terrorist watchlists, is incomplete and riddled with errors.[66]

A drain on investigative resources

As a little simple math shows, even a hypothetical data-mining system that is 99% accurate—impossibly high by anyone's standards—will generate disabling numbers of false positives trying to identify a hypothetical terrorist population of 1,000 individuals (see box).[67]



Hypothetical numbers show data mining doesn't add up

Number of non-terrorists living in US	300,000,000
Number of terrorists living in US	1,000
Accuracy in identifying terrorists as terrorists	99.00%
Accuracy at identifying innocent as innocent	99.00%
# of terrorists who will be caught	990
# of innocent people who will be "caught"	3,000,000

Even determining the relevance of data pertaining to terrorism cases can be little more than guesswork. James Pavitt, the former Deputy Director for Operations of the CIA, warned against expecting anything near precision from the intelligence community: "If we are right 40 to 50 percent of the time we're batting pretty well."[68] No data-mining project relying on incomplete, erroneous and irrelevant data could ever succeed.

Aggregating information is bad for security and bad for privacy

As we have seen (see text box page 14), the Guidelines envision fusion centers bringing together a vast array of information from diverse sources. That is what "fusion" means.

All this data has already become a problem for the fusion center analysts buried under reams of irrelevant information. Fusion center officials, according to CRS, "remarked that their staff could spend all day, every day reviewing all the information posted on [competing federal information sharing systems] and still not be confident they had seen all relevant and/or unique data."[69] Meanwhile, the important information can easily be missed.

Fusion is also invasive of privacy by its very nature. Americans routinely share their private information with different parties—stores, banks, doctors, friends, the government—but they don't expect the details they share with one party will become available to all the others. Compartmentalization is a vital part of privacy (indeed, it is the core difference between privacy and *secrecy*, which is what you have when *no one* knows your details).

That is one reason why the Privacy Act of 1974 imposed restrictions on the authority of the federal government (though not the states) to merge databases (unfortunately that act is now so riddled with exceptions that it offers citizens very little protection).[70]

Compartmentalization is all the more important today when our lives are more and more entangled with computers, the Internet, electronic gadgets, cameras and computer chips, which capture and store our every interaction with them. The result is that mountains of data about our daily lives is being recorded and stored on the servers of government agencies and multinational corporations.[71]

The Justice Department Guidelines do stipulate that because of privacy concerns, it is "not the intent of fusion centers" to combine personal information into "one system or warehouse." The data would be maintained separately by the individual fusion center participants, which will "allow information from all sources to be readily gathered, analyzed, and exchanged" whenever a "threat, criminal predicate, or public safety need is identified." And data would be maintained in accordance with privacy laws and policies.[72]

There are several problems with this policy, however:

- The fact that information is "held" separately by various fusion participants, rather than held in one warehouse, is a distinction without a difference. For the user, a distributed database is completely indistinguishable from a single centralized one. Millions of people experience that phenomenon every day when they use Internet search engines that seamlessly seek out information that is "held" on millions of separate computers. If a fusion center's operators have our records available to them, we don't care what the database architecture is.

- The fact that information would only be compiled when there is a "threat" or a "public safety need is identified" hardly represents much of a limit on the freedom of fusion center analysts to collect whatever they want, and is a significantly lower bar than what is required by federal law.[73]

- Nor does the fact that the centers would comply with privacy laws provide much comfort. As we have seen, U.S. law limits the sharing of criminal intelligence information—but the vision of the Guidelines does not seem to account for that fact. And more broadly, American privacy laws are highly inadequate when it comes to responding to today's technology, and many highly invasive information practices are simply not yet covered by any laws.[74]

- Talk of "risk-based, information-driven prevention" suggests the generation of "risk scores" on individuals based on mass computer crunching of information about individuals—a vision akin to what we have seen elsewhere in the security establishment in recent years.[75] It is a very dangerous idea for the government to begin ranking of its own citizens according to their supposed trustworthiness. It has also been repeatedly banned by Congress.[76]

- All these problems are compounded when the data is full of errors—or when the public is not permitted to know what data sources are being used, lacks any practical way of correcting that data and is unable to scrutinize the methods used to create the risk scores.

Reports of "suspicious activity"

It appears that most of what fusion centers currently do is "respond to incoming requests, suspicious activity reports and/or finished intelligence products."[77] In many cases fusion centers amount to little more than centralized call-in centers for the reporting of suspicious activity. This conclusion is consistent with the results of the ACLU's

survey and with media reports, where fusion center personnel report repeatedly answering calls about "people taking pictures" and "people behaving suspiciously."[78]

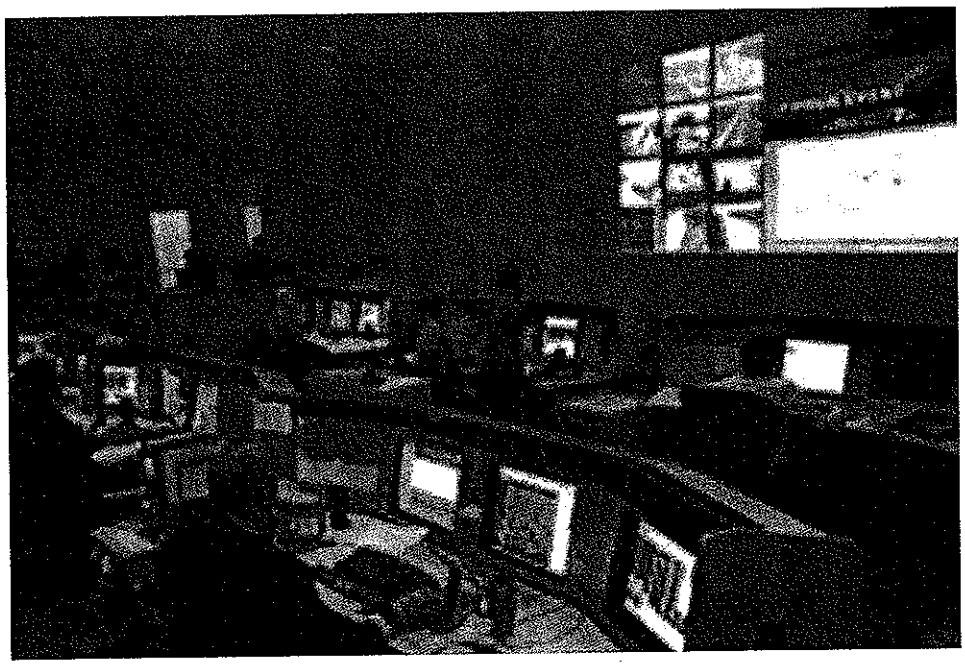
Centralized call-in centers for the reporting of threats to public safety would not pose significant threats to privacy and civil liberties, so long as information is only collected when there is a reasonable indication of criminality and no information is disseminated except where necessary to achieve a law enforcement purpose. However:

- Current policies require that all terrorist threat information be reported to the FBI Joint Terrorism Task Forces. Since the FBI maintains a "no terrorism lead goes unaddressed" policy, even threat information that a fusion center analyst finds bogus will result in some investigative activity, raising concern that spurious allegations will have real consequences for those falsely accused.[79]

- In too many cases the subjects of these reports are "Arabs" or "Middle Eastern men," which is often why their innocuous behavior is reported as suspicious in the first place. Few of the "literally thousands of such leads" documented around the country have amounted to anything.[80]

- Asked by the *Washington Post* for an example of a successful use of a fusion center, the best one official could apparently come up with was the arrest and detention of a Muslim man spotted videotaping the Chesapeake Bay Bridge. But the *Post* goes on to note that the person in question, a U.S. citizen, was quickly released and never charged with any crime.[81]

- While such calls are often not the fault of fusion centers, outreach and training initiatives that encourage people to "report all suspicious activity" may be creating a culture of fear that encourages such overzealous reporting.[82]



Kentucky's Fusion Center.

V. EXCESSIVE SECRECY

Excessive secrecy not only undercuts the very purpose of fusion centers—the sharing of information with those who need it—but, as always, increases the danger that incompetence and malfeasance will flourish. It also raises sharp questions about how individuals who find they have been hurt by a center's data fusion and "threat identification" practices can seek redress.

Excessive secrecy on the part of the federal government also appears to be thwarting the fundamental aim of fusion centers, which is the prevention of terrorism through the coordination of state, local and federal information.

Fusion centers were born out of state and local frustration with the federal government's failure to share information through the FBI's Joint Terrorism Task Forces and elsewhere. Yet they are once again confronting the failure of the federal government to properly declassify and share intelligence information with their state and local law enforcement partners. As the CRS reported, "Numerous fusion center officials claim that although their center receives a substantial amount of information from federal agencies, they never seem to get the 'right information' or receive it in an efficient manner."[83] These law enforcement officers complained of routinely having to request relevant threat information from the federal government—raising justifiable concerns about potential threats they don't know enough to ask about.

Seattle Police Chief R. Gil Kerlikowske, for example, told Congress that the "federally centered vision of intelligence management" was the primary impediment to integrated intelligence fusion.[84] Kerlikowske complained that security clearances were difficult for local law enforcement to get in a timely manner, and that even for those cleared, "the sharing of vast categories of information is prohibited unless brokered by the FBI."[85]

Overclassification of national security intelligence has been a problem for the intelligence community for as long as a classification system has existed:

- As early as 1956 a committee formed by the Department of Defense to study classification processes and procedures determined that "vague classification standards and the failure to punish overclassification had caused overclassification to reach 'serious proportions.'"[86]

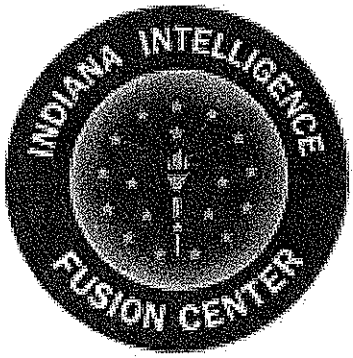
- In 1997 the Moynihan Commission found that the classification system "is too often used to deny the public an understanding of the policymaking process rather than for the necessary protection of intelligence activities," and recommended an overhaul of the classification system.

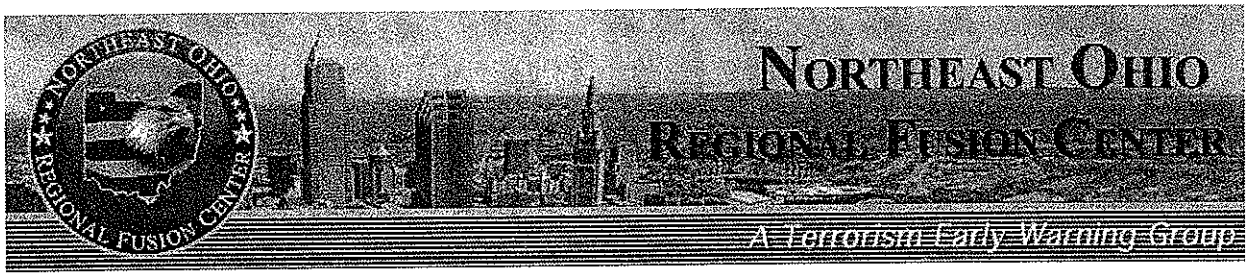
- Many experts have pointed to the counterproductive effects of overclassification. RAND terrorism expert Brian Jenkins, for example, argues that the classification system is a cold war legacy, and that the government should get away from the hub-and-spoke model of sending information to Washington to be stamped, and instead disseminate information widely.[87] It appears fusion center officials couldn't agree more.

- The 9/11 Commission found that classification issues were a factor in the failure to share intelligence that could have disrupted the terrorist attacks.[88] Of the ten missed "operational opportunities" to prevent the September 11th attacks identified by the Commission, not one involved a failure by a law enforcement officer or a weakness in a traditional law enforcement technique.[89] Instead, each missed opportunity was the result of a failure by intelligence officials to share critical information because of the confusing bureaucratic rules governing the dissemination of classified information.

Rather than overhaul their system for classifying national security secrets, the federal government has responded to the problem by increasing the number of security clearances it gives out. Yet this fails to confront the central problem. Fusion centers have an average of 14 staff members with "Secret" level security clearances, yet the problems with sharing classified information persist.[90] As Washington, DC police Chief Cathy Lanier put it, "it does a local police chief little good to receive information—including classified information—about a threat if she cannot use it to help prevent an attack."[91]

Most likely what is taking place is a power struggle in which federal agencies seek to turn fusion centers into "information farms"—feeding their own centralized programs with data from the states and localities, without providing much in return. The localities, meanwhile, want federal data that the agencies do not want to give up. For federal security agencies, information is often the key currency in turf wars and other bureaucratic battles, and from the days of J. Edgar Hoover they have long been loathe to share it freely.





RECOMMENDATIONS

Fusion centers are a diverse, amorphous and still-evolving new institution in American life. As presently constituted, many centers do not appear to raise any privacy or other issues. Others, however, appear to be taking active steps to dodge privacy rules, incorporating military and private-sector personnel, and flirting with a data-mining approach to their mission. And the federal government's vision for the centers, as well as natural tendencies toward "mission creep," suggest that they may evolve further in these unfortunate directions. Not only will this invade innocent Americans' privacy, but it will also hamper security by clogging the fusion centers with too much information and distracting our police forces from their public safety mission with false leads, fruitless fishing expeditions and bureaucratic turf wars.

The ACLU recommendations will help preserve our privacy, without endangering our security.

- Lift the cloak of secrecy surrounding the techniques that agencies at all levels of government are using to exploit information in the "War on Terror". Without any need to disclose particular investigative data, the public has a right to evaluate the techniques that may be applied to it.

- Urge reporters, legislators and citizens to learn more about fusion centers, and use state and local sunshine laws, as well as federal Freedom of Information Act requests, to do so. A list of questions that should be asked of the state and local fusion center representatives is available on the ACLU website at www.aclu.org/fusion.

- Subject fusion centers that involve the participation of federal agencies or receive federal funds to the federal Freedom of Information Act.

- Rather than use an outdated model of intelligence management that is ill-suited to modern threats to public safety, state and local authorities should return to traditional law enforcement techniques based upon reasonable suspicion that have kept America safe and free for over 230 years.

- Encourage Congress to focus more on the impact fusion centers may have on the privacy and civil liberties of ordinary Americans. The 109th Congress held more than five hearings regarding fusion centers and intelligence sharing, and the 110th held at least four more.[92] Witnesses included federal, state and local law enforcement agencies, and private sector fusion center participants—but no representatives from the privacy and civil liberties community.

- Encourage Congress to lead a pointed inquiry and debate over fusion centers before further resources are put into them. It must pursue the question of whether they represent a promising and effective approach to increasing security, whether they pose dangers to privacy and other civil liberties that outweigh any such promise, and what kind of federal regulatory action is warranted. Congress should explore how privacy protections can actually make these centers *more useful* as security tools.

- Congress should examine the use of military personnel in fusion centers and draw clear lines regarding how and when military personnel can engage in law enforcement intelligence collection and analysis.

- Demand that Congress take further steps to end the turn toward mass data surveillance as an acceptable law enforcement technique. It has already barred several questionable programs that move in this direction, but broader action may be required.

- Urge Congress to protect the privacy and civil rights of innocent Americans by requiring minimization procedures that prevent the intentional collection, retention and dissemination of private information when there is no reasonable indication of criminal activity. And Congress needs to build in protections to ensure that no American will be blacklisted without some form of due process.

- Stanch the free flow of data exchanged between the fusion centers and the private sector, through congressional action if necessary.

- The nation's security establishment must dispense with the myth that law enforcement is not an effective method for preventing terrorism.

Finally, state legislatures must act to create checks and balances on these institutions. Specifically,

- They should determine a proper mission for these entities and develop benchmarks for determining whether they are meeting their stated objectives.

- They should require regular reporting by the centers to determine what type of information they are collecting, how it is being used and with whom they are sharing it.

- They should regularly assess whether the fusion centers are acting in accordance with state law.

- If Congress will not act, state legislatures should bar fusion centers in their states from exchanging information with private-sector companies that are unaccountable to the public, or closely regulate such exchange.

End Notes

[1] Jay Stanley and Barry Steinhardt, Even Bigger, Even Weaker: The Emerging Surveillance Society: Where Are We Now? American Civil Liberties Union, (Sept. 2007), *available at* http://www.aclu.org/pdfs/privacy/bigger_weaker.pdf.

[2] Todd Masse, Siobhan O'Neil and John Rollins, Congressional Research Service, CRS Report for Congress: Fusion Centers: Issues and Options for Congress (July 6, 2007) [hereinafter CRS Fusion Center Report].

[3] CRS Fusion Center Report, *supra* note 2, at 18.

[4] *See generally, Mayor wants Portland out of anti-terrorism task force*, KGW.COM and Associated Press, April 22, 2005, http://www.kgw.com/news-local/stories/kgw_042205_news_joint_terrorism_task_force_.201f434fe.html.

[5] Democratic Staff of the H.R. Comm. on Homeland Security, 110th Cong., LEAP: A Law Enforcement Assistance and Partnership Strategy, prepared at the request of Congressman Bennie G. Thompson, Ranking Member 5 (2006), http://hsc-democrats.house.gov/SiteDocuments/20060927193035-23713.pdf [Hereinafter LEAP Report].

[6] *Id.* at 5 (quoting Michael Downing, Commander, Los Angeles Police Department Counterterrorism/Criminal Intelligence Bureau).

[7] CRS Fusion Center Report, *supra* note 2, at 22 n.60.

[8] CRS Fusion Center Report, *supra*, note 2, at 21.

[9] CRS Fusion Center Report, supra note 2, at 18-19.

[10] Bureau of Justice Assistance, Office of Justice Programs, U.S. Dep't. of Justice, Fusion Center Guidelines: Developing and Sharing Information and Intelligence in a New Era, at iii, (Aug. 2006) [hereinafter Guidelines].

[11] Guidelines, *supra* note 10, at 2.

[12] CRS Fusion Center Report, *supra* note 2, at 1.

[13] Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, U.S. Senate, 94th Cong., Final Report on Supplemental Detailed Staff Reports on Intelligence Activities and the Rights of Americans (Book III), S. Rep. No. 94-755, at 10 (1976).

[14] *Id.* at 11.

[15] *Id.* at 12.

[16] *The Way Forward with Fusion Centers: Challenges and Strategies for Change: Hearing Before the Subcomm. on Intelligence, Information Sharing and Terrorism Risk Assessment of the H. Comm. on Homeland Security*, 110th Cong. (Sept. 27, 2007) (quoting testimony of Jack Tomarchio, Principle Deputy Assistant Secretary for Intelligence and Analysis, Department of Homeland Security).

[17] Adena Schutzberg, *MetaCarta Users Tap Unstructured Data for New Geographic Uses*, Directions Magazine, May 30, 2007, http://www.directionsmag.com/article.php?article_id=2478&trv=1.

[18] CRS Fusion Center Report, *supra* note 2, at 1.

[19] CRS Fusion Center Report, *supra* note 2, at summary.

[20] *The Way Forward with Fusion Centers: Challenges and Strategies for Change: Hearing Before the Subcomm. on Intelligence, Information Sharing and Terrorism Risk Assessment of the H. Comm. on Homeland Security*, 110th Cong. (Sept. 27, 2007) (quoting testimony of Michael Mines, Deputy Assistant Director, Directorate of Intelligence, Federal Bureau of Investigation).

[21] CRS Fusion Center Report, *supra* note 2, at 41.

[22] CRS Fusion Center Report, *supra* note 2, at 36.

[23] CRS Fusion Center Report, *supra* note 2, at 7.

[24] CRS Fusion Center Report, *supra* note 2, at 9.

[25] *See* National Conference of State Legislatures, http://www.ncsl.org/programs/pubs/privacy-overview.htm (last visited Oct. 16, 2007).

[26] Schutzberg, *supra* note 17.

[27] *Visual Analytics to Support Information Sharing for the Maryland Coordination and Analytical Center (MCAC)*, PRNewswire, Nov. 14, 2003, http://sev.prnewswire.com/computer-electronics/20051114/DCM06114112005-1.html; *See also* Visual Analytics Technical Information, http://www.visualanalytics.com/products/dig/details/index.cfm (last visited Oct. 16, 2007).

[28] 28 C.F.R., §23.20(a) (2006).

[29] 28 C.F.R., §23.20(e) (2006).

[30] CRS Fusion Center Report, *supra* note 2, at 49.

[31] John Moore, *Policing Terror*, Federal Computer Week, Nov. 13, 2006, http://www.fcw.com/print/12_41/news/96760-1.html.

[32] Jay Stanley, The Surveillance-Industrial Complex, American Civil Liberties Union, (Aug. 2004), *available at* http://www.aclu.org/FilesPDFs/surveillance_report.pdf.

[33] Guidelines, *supra* note 10, at 17.

[34] CRS Fusion Center Report, *supra* note 2, at 4.

[35] *Building a Partnership Strategy: Improving Information Sharing with State & Local Law Enforcement and the Private Sector: Hearing Before the Subcomm. on Intelligence, Information Sharing and Terrorism Risk Assessment of the H. Comm. on Homeland Security*, 110th Cong. (May 25, 2007) (statement of Richard E. Hovel, Aviation Security Advisor, The Boeing Company), *available at* http://homeland.house.gov/SiteDocuments/20070525162

154-66669.pdf.

36 *Private Sector Information Sharing: What Is It, Who Does It, and What's Working at DHS?: Hearing Before the Subcomm. on Intelligence, Information Sharing and Terrorism Risk Assessment of the H. Comm. on Homeland Security*, 110th Cong. (July 26, 2007) (statement of Richard E. Hovel, Senior Aviation & Homeland Security Advisor, The Boeing Company), *available a t* http://hsc.house.gov/SiteDocuments/20070726123058-82504.pdf.

37 Jake Bernstein, *The Governor's Database*, THE TEXAS OBSERVER, April 20, 2007, http://www.texasobserver.org/article.php?aid=2472.

38 *Id.*

39 America's Career Info CareerOneStop, Washington State Profile: Largest Employers, http://www.acinet.org/acinet/oview6.asp?soccode=&stfips=53&from=State&id=&nodeid=12 (last visited Oct. 16, 2007).

40 Leslie Cauley, *NSA has massive database of Americans' calls*, USA TODAY, May 11, 2006, at A1, *available at* http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm.

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42 *Id.*

43 Posting of Justin Rood to ABC News Blotter, http://blogs.abcnews.com/theblotter/2007/07/fbi-would-skirt.html (July 10, 2007 1:12 PM) (Post is titled: FBI Would Skirt Law with Proposed Phone Records Program).

44 First Amended Complaint, *Binyam Mohamed et al., v. Jeppesen Dataplan, Inc.*, Civil Action No. 5:07-cv-02798(JW), filed Aug. 1, 2007, http://www.aclu.org/pdfs/safefree/mohamed_v_jeppesen_1stamendedcomplaint.pdf.

45 *See*, Michael Barbaro and Tom Zeller, Jr., *A Face is Exposed for AOL Searcher No. 4417749*, N.Y. TIMES, Aug. 9, 2006, *available at* http://www.nytimes.com/2006/08/09/technology/09aol.html?ex=1312776000&en=996f61c946da4d34&ei=5088&partner=rssnyt&emc=.

46 SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, U.S. SENATE, 94th CONG., FINAL REPORT ON SUPPLEMENTAL DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS (BOOK III), S. Rep. No. 94-755, (1976).

47 *See* Stanley, *supra* note 32.

48 LEAP Report, *supra* note 5, at 6 (quoting Chief Ellen Hanson of the City of Lexana, Kansas Police Department).

49 Mary Beth Sheridan and Spencer S. Hsu, *Localities Operate Intelligence Centers To Pool Terror Data*, WASH. POST, Dec. 31, 2006, at A03, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/12/30/AR2006123000238.html.

50 18 U.S.C.A. §1385 (West 2005).

51 National Guardsmen are not governed by the Posse Comitatus Act when they are not called to federal service and therefore remain employees of the state. Still, the level of their participation in law enforcement activities is limited by law. In discussing the limits on National Guard participation in fusion centers, Major Robert Pankiw, coordinator of the Delaware National Guard program, reportedly explained that "the practice does not violate the federal Posse Comitatus Act because the Guard analysts have no arrest powers, focus only on drug crime and are under state, not federal, control." *See*, Mike Chalmers and Lee Williams, *Intelligence Facility Casts a Wide Net*, THE NEWS JOURNAL, May 7, 2007, http://www.delawareonline.com/apps/pbcs.dll/article?AID=/20070507/NEWS/705070333. MCAC officials, however, stated that their National Guard participants were not totally restricted to drug intelligence analysis, although that was their primary focus.

52 Law Enforcement Information Exchange, http://www.ncis.navy.mil/linx/index.html (last visited Oct. 16, 2007).

53 *Building a Partnership Strategy: Improving Information Sharing with State & Local Law Enforcement and the Private Sector: Hearing Before the Subcomm. on Intelligence, Information Sharing and Terrorism Risk Assessment of the H. Comm. on Homeland Security*, 110th Cong. (May 25, 2007) (statement of Major General Timothy Lowenberg, the Adjutant General –Washington National Guard and Director, Washington Military Department), *available at*, http://homeland.house.gov/SiteDocuments/20070525162917-27103.pdf.

54 Guidelines, *supra* note 10, at 13.

55 For example, the FBI's Terrorist Screening Center's (TSC) watchlist contains over 700,000 records and increases by an average of 20,000 records per month. A recent Department of Justice Inspector General audit determined that 38 percent of the TSC records tested "continued to contain errors or inconsistencies that were not identified through the TSC's quality assurance efforts," thereby increasing "the chances of innocent persons being stopped or detained during an encounter because of being misidentified as a watchlist identity." Moreover, the list was also incomplete, as the IG determined that several known or suspected terrorists were not watchlisted appropriately. *See*, DEP'T. OF JUSTICE, OFFICE OF INSPECTOR GENERAL, AUDIT DIVISION, FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER, (Sept. 2007), at iii, http://www.usdoj.gov/oig/reports/FBI/a0741/final.pdf. Highlighting the fact that such bloated watchlists do nothing to improve security, even this inappropriately long list has apparently produced few arrests. *See*, Ellen Nakashima, *Terror Watchlist Yields few Arrests*, WASH. POST, Aug. 25, 2007, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/08/24/AR2007082402256.html?nav=rss_.

56 Guidelines, *supra* note 10, at 2.

[57] Guidelines, *supra* note 10, at 13.

[58] Guidelines, *supra* note 10, at 13.

[59] Mike Chalmers and Lee Williams, *Intelligence Facility Casts a Wide Net*, THE NEWS JOURNAL, May 7, 2007, http://www.delawareonline.com/apps/pbcs.dll/article?AID=/20070507/NEWS/705070333.

[60] *Id.*

[61] Guidelines, *supra* note 10, at F2 (definition of Crime-Pattern Analysis).

[62] Steve Lohr, *Data Expert is Cautious About Misuse of Information*, N.Y. TIMES, Mar. 25, 2003, at C6, *available at* http://query.nytimes.com/gst/fullpage.html?sec=technology&res=9E07E6D71530F936A15750C0A9659C8B63.

[63] Letter from Association for Computing Machinery Public Policy Committee to Sens. John Warner and Carl Levin (January 23, 2003) (on file with author), *available at* http://www.acm.org/usacm/Letters/tia_final.html.

[64] Jeff Jonas and Jim Harper, *Effective Counterterrorism and the Limited Role of Predictive Data Mining*, CATO INSTITUTE POLICY ANALYSIS, Dec. 11, 2006, at 1, http://www.cato.org/pubs/pas/pa584.pdf.

[65] *Id.* at 8.

[66] *See*, DEP'T. OF JUSTICE, OFFICE OF INSPECTOR GENERAL, AUDIT DIVISION, FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER, (Sept. 2007), at iii, http://www.usdoj.gov/oig/reports/FBI/a0741/final.pdf.

[67] This problem has been pointed out by several experts, including computer scientist Benjamin Kuipers of the University of Texas at Austinand Bruce Schneier. *See* E-mail from Benjamin Kuipers, Professor, Computer Sciences Department, University of Texas at Austin (Dec. 14, 2002), http://osdir.com/ml/culture.people.interesting-people/2002-12/msg00061.html; Bruce Schneier *National Crime Information Center (NCIC) Database Accuracy* CRYPTO-GRAM NEWSLETTER, http://www.counterpane.com/crypto-gram-0304.html.

[68] Dana Priest, *Retired Official Defends the CIA's Performance*, WASH. POST, Nov. 5, 2004, at A23, *available at* http://www.washingtonpost.com/wp-dyn/articles/A26485-2004Nov4.html.

[69] CRS Fusion Center Report, *supra* note 2, at 30.

[70] 5 U.S.C.A. §552a (West 2005).

[71] Jay Stanley and Barry Steinhardt, BIGGER MONSTER, WEAKER CHAINS: THE GROWTH OF AN AMERICAN SURVEILLANCE SOCIETY, AMERICAN CIVIL LIBERTIES UNION (Dec. 2002).

[72] Guidelines, *supra*, note 10, at 2.

[73] 28 C.F.R. Part 23.

[74] Jim Dempsey and Lara Flint provide a useful overview. *See* Jim Dempsey and Lara Flint, PRIVACY'S GAP: THE LARGELY NON-EXISTENT LEGAL FRAMEWORK FOR GOVERNMENT MINING OF COMMERCIAL DATA, CENTER FOR DEMOCRACY AND TECHNOLOGY, (May 28, 2003), http://www.cdt.org/security/usapatriot/030528cdt.pdf.

[75] Guidelines, *supra* note 10, at D2. Other examples include the CAPPS II and Automated Targeting System airline passenger profiling programs. *See* American Civil Liberties Union, Feature on CAPPS II, www.aclu.org/capps (last visited Oct. 16, 2007); American Civil Liberties Union, Automated Targeting System, www.aclu.org/ats (last visited Oct. 16, 2007).

[76] Section 514(e) of the Department of Homeland Security 2007 Appropriations Act states,"[n]one of the funds provided in this or previous appropriations Acts may be utilized to develop or test algorithms assigning risk to passengers whose names are not on Government watchlists." Department of Homeland Security 2007 Appropriations Act, H.R. 5441, 110th Cong., §514(e) (2007).

[77] CRS Fusion Center Report, *supra* note 2, at 25.

[78] Shane Harris, *Shadow Hunters*, NAT'L J., April 27, 2007, *available at* http://nationaljournal.com/about/njweekly/stories/2007/0427nj1.htm.

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FUSION CENTER UPDATE

JULY 2008 By Mike German and Jay Stanley

If the federal government announced it was creating a new domestic intelligence agency made up of over 800,000 operatives dispersed throughout every American city and town, filing reports on even the most common everyday behaviors, Americans would revolt. Yet this is exactly what the Bush administration is trying to do with its little-noticed National Strategy for Information Sharing, which establishes state, local and regional "fusion centers" as a primary mechanism for the collection and dissemination of domestic intelligence.[1]

In November 2007, the American Civil Liberties Union issued a report entitled "What's Wrong with Fusion Centers."[2] Extrapolating from a few troublesome incidents and comments made by state and federal officials, and mindful of the nation's long history of abuse with regard to domestic "intelligence" gathering at all levels of government, we warned about the potential dangers of these rising new institutions. We pointed out that, while diverse and often still in the early stages of formation, they often seem to be characterized by ambiguous lines of authority, excessive secrecy, troubling private-sector and military participation, and an apparent bent toward suspicionless information collection and data mining. We urged policymakers to examine this incipient network of institutions closely and, at a minimum, to put rigorous safeguards in place to ensure that fusion centers would not become the means for another wave of such abuses.

In the six months since our report, new press accounts have borne out many of our warnings. In just that short time, news accounts have reported overzealous intelligence gathering, the expansion of uncontrolled access to data on innocent people, hostility to open government laws, abusive entanglements between security agencies and the private sector, and lax protections for personally identifiable information.

Overall, it is becoming increasingly clear that fusion centers are part of a new domestic intelligence apparatus. The elements of this nascent domestic surveillance system include:

- Watching and recording the everyday activities of an ever-growing list of individuals
- Channeling the flow of the resulting reports into a centralized security agency
- Sifting through ("data mining") these reports and databases with computers to identify individuals for closer scrutiny

Such a system, if allowed to permeate our society, would be nothing less than the creation of a total surveillance society.

Recent reports have confirmed each of these elements.

MONITORING EVERYDAY BEHAVIOR

In April 2008, the *Wall Street Journal* and the *Los Angeles Times* both reported on a new Los Angeles Police Department order that compels LAPD officers to begin reporting "suspicious behaviors" in addition to their other duties—creating a stream of "intelligence" about a host of everyday activities that, according to documents, will be fed to the local fusion center.[3]

LAPD Special Order #11, dated March 5, 2008, states that it is the policy of the LAPD to "gather, record, and analyze information of a criminal or *non-criminal nature*, that could indicate activity or intentions related to either foreign or domestic terrorism," and includes a list of 65 behaviors LAPD officers "shall" report.[4] The list includes such innocuous, clearly subjective, and First Amendment protected activities as:

- taking measurements
- using binoculars
- taking pictures or video footage "with no apparent esthetic value"
- abandoning vehicle
- drawing diagrams
- taking notes
- espousing extremist views

Most people engage in one or more of these activities on a routine, if not daily, basis. Terrorists eat, but it would be absurd to investigate everyone who eats. The behaviors identified by the LAPD are so commonplace and ordinary that the monitoring or reporting of them is scarcely any less absurd. This overbroad reporting authority gives law enforcement officers justification to harass practically anyone they choose, to collect personal information, and to pass such information along to the intelligence community.

Suspicious activity report (SAR) policing opens the door to racial profiling and other improper police behavior, and exposes law-abiding people to government prying into their private affairs without just cause. This concern is not just hypothetical; the Associated Press has reported that new, forthcoming Attorney General Guidelines for the FBI will authorize opening investigations without evidence of wrongdoing, based solely on terrorist profiles that use race and ethnicity as risk factors.[5] No less an authority than former Attorney General John Ashcroft has called racial profiling "an unconstitutional deprivation of equal protection."[6]

Moreover, the LAPD's collection of "non-criminal" information runs afoul of Title 28, Part 23 of the Code of Federal Regulations, which states that law enforcement agencies:

> shall collect and maintain criminal intelligence information concerning an individual *only if there is reasonable suspicion that the individual is involved in criminal conduct or activity* and the information is relevant to that criminal conduct or activity.[7]

And it isn't just that SAR policing is illegal, it's also ineffective and counterproductive. These orders, if taken seriously by LAPD officers on the beat, can yield only one outcome: an ocean of data about innocent individuals that will dominate the investigative resources of the authorities. The police should instead focus their efforts and resources where there is a reasonable indication of misconduct. The LAPD cannot maintain the support of the community it serves if the department is viewed as a collection of spies instead of peace officers.

TURNING LOCAL POLICE OFFICERS INTO NATIONAL DOMESTIC INTELLIGENCE AGENTS

Rather than criticize the LAPD efforts, the Office of the Director of National Intelligence said the LAPD program "should be a national model."[8] Not surprisingly, in June 2008 the Departments of Justice and Homeland Security teamed with the Major City Chiefs Association to issue a report recommending expanding the LAPD SAR program to other U.S. cities.[9]

In fact, just a few weeks before the LAPD order was issued, the Director of National Intelligence published new "functional standards" for suspicious activity reports that a program like the LAPD's would generate.[10] The sequential timing of the DNI's functional standards, the LAPD SAR order and the Major City Chiefs' recommendations creates more than a little suspicion that these efforts are closely coordinated.

The DNI standards actually encourage state and local law enforcement to report non-criminal suspicious activities to the intelligence community by defining the scope of suspicious activity as "observed behavior that may be indicative of intelligence gathering or pre-operational planning related to terrorism, criminal, or other illicit intention."[11] What might constitute "other illicit intention" is not defined in the document but it is clearly something other than "criminal." The Major City Chiefs' report contains a diagram that illustrates the organizational processing of a SAR, which shows that information deemed "terrorist related" would be forwarded to fusion centers *before* "reasonable suspicion" is established.[12] This process clearly reflects the intent to retain information where no reasonable suspicion of criminal activity exists.

Defenders of these suspicious activity reports (SARs) claim they aren't a privacy concern because they would not include "personally identifiable information." But the DNI standards also re-work the term "personally identifiable information" to allow the collection and retention of specific data that could be used to distinguish or trace an individual's identity.[13] For instance, imagine a police officer stopping you for taking pictures and asking for identification to compile an SAR [see box]. Under the DNI functional standards your name and driver's license number would be removed from the SAR before it was distributed—but your date of birth, height, weight, race, hair and eye color, driver's license state, date of issue and date of expiration would all be reported. It is logical to conclude that this detailed information could be traced back to a particular individual. How this information could later be used, analyzed and mined by the intelligence community or private sector entities participating in fusion centers is completely unknown.

THE INCREASING COLLECTION OF DATA FOR DOMESTIC INTELLIGENCE

Rather than recognizing the dangers of fusion centers and taking measures to rein in domestic intelligence activities, fusion center proponents in federal, state and local government have expanded the nature and scope of information they collect.

The *Washington Post* reported in April of 2008 that fusion centers have increasing access to Americans' private information through an array of databases.[14] In addition to access to FBI and even CIA records, fusion centers often have subscriptions with private data brokers such as Accurint, ChoicePoint, LexisNexus, and LocatePlus, a database containing cellphone numbers and unpublished telephone records. According to the article, fusion centers have access to millions of "suspicious activity reports" sent to the Treasury Department's Financial Crimes Enforcement Network, as well as hundreds of thousands of identity theft reports kept by the Federal Trade Commission.

Some fusion centers appear to have unique access to particular databases or particular types of information, based perhaps on each individual state's laws or guidelines:

> Pennsylvania buys credit reports and uses face-recognition software to examine driver's license photos, while analysts in Rhode Island have access to car-rental databases. In Maryland, authorities rely on a little-known data broker called Entersect, which claims it maintains 12 billion records about 98 percent of Americans... Massachusetts... taps a private system called ClaimSearch that includes a "nationwide database that provides information on insurance claims, including vehicles, casualty claims and property claims."[15]

The fusion centers' access to these kinds of databases raises urgent questions about the lack of controls over law enforcement's use of large pools of data on innocent Americans. Because of the unfortunate history of abuse in which law enforcement and national security agencies kept files on the political activities of innocent Americans, the federal government adopted Title 28, Part 23 of the Code of Federal Regulations which bars those agencies from compiling dossiers on people not involved in wrongdoing. But commercial databases such as these, which collect as much information about as many Americans as they can, offer law enforcement an end-run around laws designed to protect privacy. The police don't "maintain" such dossiers anymore, but if they are just a few keystrokes away, the effect is the same—especially when all that innocent information is combined with Suspicious Activity Reports and other data that only government can access.

Even more troubling is the fact that these centers are networked together and seamlessly exchange information with the intelligence community through the Director of National Intelligence's Information Sharing Environment (ISE). The *Washington Post* report was based on a document produced from a survey of fusion centers, which shows their intent to maximize the access each of the fusion centers has to the various databases. This would allow a state fusion center that under state law or local policy is prohibited from buying credit reports, as an example, to circumvent its own restrictions by simply calling a fusion center in Pennsylvania to and asking Pennsylvania authorities to access the records it wants to analyze. This "policy shopping" process guts state and local privacy protections and gives the participating agencies, including the federal intelligence community, access to information they may not legally have on their own.

This outcome is not an accident, but rather the intended result of a national strategy. Fusion center proponents consciously regard the "800,000 plus law enforcement officers across the country... as "the 'eyes and ears' of an extended national security community,"[16] and the Office of the Director of National Intelligence encourages the intelligence community to consider all state and local government officials as "the first line of defense in a very deep line of information assets."[17]

The federal government's increasing efforts to formalize, standardize, and network these state, local, and regional intelligence centers—and plug them directly into the intelligence community's Information Sharing Environment—are the functional equivalent of creating a new national domestic intelligence agency that deputizes a broad range of personnel from all levels of government, the private sector, and the military to spy on their fellow Americans.

THE PERFECT STORM: THE LOS ANGELES COUNTY TERRORISM EARLY WARNING CENTER

The *San Diego Union-Tribune* recently exposed a scandal linking a police task force called the Los Angeles County Terrorism Early Warning Center (LACTEW) to an intelligence fiasco that can only be described as a "perfect storm" of the problems identified in the ACLU's November 2007 fusion center report.[18] This one has it all:

- Spying on religious groups in violation of the First Amendment
- Military involvement in domestic spying in violation of the Posse Comitatus Act
- Police officers and military personnel engaged in illegal activity to further their perceived intelligence mission
- A lack of security over classified material and a lack of oversight over the activities of "trusted" insiders
- The reported involvement of private defense contractors
- Excessive secrecy that shields all the other problems from public view

LACTEW, established in 1996, has often been described as the first fusion center. It has also been recommended as a model for others to emulate.[19] FBI Supervisory Special Agent William A. Forsyth described the methods employed by the LACTEW in a Naval Postgraduate School thesis published before the scandal came to light: "[t]he TEW utilizes data-mining tools, as well as standardized "Intelligence Preparation for Operations (IPO)" products to build all-source situational awareness and a common operating picture for the interagency response community."[20] According to 2006 congressional testimony, the LACTEW has now "evolved" into the Joint Regional Intelligence Center (JRIC) in Los Angeles.[21]

According to the *Union-Tribune* reports, a group of military reservists and law enforcement officers led by the co-founder of the LACTEW engaged in a years-long conspiracy to steal highly classified intelligence files from the Strategic Technical Operations Center (STOC) located at the U.S. Marine Corps Base at Camp Pendleton, California and secret surveillance reports from the U.S. Northern Command headquarters in Colorado Springs, Colorado. Some of the stolen files reportedly "pertained to surveillance of Muslim communities in Southern California," including mosques in L.A. and San Diego, and revealed "a federal surveillance program targeting Muslim groups" in the United States. The scheme apparently began in 2001 when the LACTEW co-founder called a civilian analyst at U.S. Northern Command to ask that she surreptitiously supply the LACTEW with military surveillance reports. The National Security Agency's involvement in the investigation hints that these records may relate to warrantless domestic surveillance operations conducted by the military.

Though some involved in the theft ring have claimed "patriotic" motives—the desire to share secret military intelligence with local law enforcement—the *Union-Tribune* reports indicate the possibility of financial motives for the crimes. Investigators are looking into allegations that the records were passed to defense contractors "in exchange for future employment" opportunities. Employees of one of the companies mentioned in the article, Kroll and Associates, a "risk assessment" firm, reportedly had ties to the LACTEW.[22]

The thefts of intelligence files were not uncovered through internal oversight mechanisms at the LACTEW, the STOC or the JRIC, but rather by accident, through a military investigation into stolen Iraq war trophies. Search warrants executed at a Carlsbad, California apartment and storage lockers in Carlsbad and Manassas, Virginia located the war booty, along with boxes of highly classified FBI and Department of Defense intelligence files.

The easy circumvention of the security of these centers by corrupt insiders reveals what little protections are given to the data government is collecting about Americans. We may never know the nature of the surveillance these authorities conducted, with whom they shared the resulting information, or the risks associated with its unauthorized disclosure because the "[l]egal proceedings in the case will probably be conducted in private."[23] LACTEW is a prime example of the combination of overzealous intelligence collection and inadequate oversight leading to "an intelligence nightmare."[24] As we warned in our report, giving profit-driven entities access to valuable intelligence information poses a grave risk to security and to the privacy rights of those caught in the web of surveillance.

If LACTEW is to be a "model" for anything, it should be seen as a shining example of the need for policy makers to construct mechanisms for tight oversight over fusion centers, lest they continue to become centers for out-of-control public-private surveillance and data-collection abuses.

The threat that suspicious activity reporting poses to law-abiding people is not hypothetical. There have been numerous reports of police stopping, questioning, even arresting individuals based on nothing more than certain perfectly lawful activities listed in the LAPD order. Whether these specific reports have actually been shared with fusion centers or not, they are exactly the kind of "intelligence" that the centers are ostensibly being created to collect. These reports include:

Taking video footage

- Sheriff's deputies in Texas stopped an Al-Jazeera television crew that was filming on a public road more than a mile away from a nuclear power plant and conducted "extensive background checks" on them. The police said they "found no criminal history or other problems."[26]

Taking pictures

- Mariam Jukaku, a 24-year old Muslim-American journalism student at Syracuse University, was stopped by Veterans Affairs police in New York for taking photographs of flags in front of a VA building as part of a class assignment. After taking her into an office for interrogation and taking her driver's license the police deleted the photographs from her digital camera before releasing her.[26]

- Shirley Scheier, a 54-year-old artist and Associate Professor of Fine Art at the University of Washington was stopped by police in Washington State for taking pictures of power lines as part of an art project. Police frisked and handcuffed Scheier, and placed her in the back of a police car for almost half an hour. She was eventually released, after officers photographed maps that Scheier used to find the power station. The officers also told her she would be contacted by the FBI about the incident.[27]

- Neftaly Cruz, a 21-year-old senior at Penn State, was arrested in his own backyard in Philadelphia for snapping a picture of police activity in his neighborhood with a cell phone camera. He was taken down to the police station where police threatened to charge him with conspiracy, impeding police, and obstruction of justice, but he was later released without charge.[28]

Expressing political and religious beliefs

- After making public comments criticizing the FBI's treatment of Muslims in Pittsburgh, Dr. Moniem El-Ganayni, a nuclear physicist and naturalized American citizen had his security clearance improperly revoked by the U.S. Department of Energy (DOE) despite 18 years of dedicated service. Though they never told him the reason his clearance was revoked, during seven hours of interviews, representatives from the DOE and the FBI never alleged a breach of security but instead questioned El-Ganayni about his religious beliefs, his work as an imam in the Pennsylvania prison system, his political views about the U.S. war in Iraq, and the speeches he'd made in local mosques criticizing the FBI.[29]

Taking measurements

A Middle Eastern man in traditional clothing sparked a three-day police manhunt in Chicago when a passenger on the bus he was riding notified the police that he was clicking a hand counter during the trip. A Joint Terrorism Task Force investigation into the episode revealed he was using the counter to keep track of his daily prayers, a common Muslim practice.[30]

A ONE-WAY MIRROR?

Even as fusion centers are positioned to learn more and more about the American public, authorities are moving to ensure that the public knows less and less about fusion centers. In particular, there appears to be an effort by the federal government to coerce states into exempting their fusion centers from state open government laws.[31] For those living in Virginia, it's already too late; the Virginia General Assembly passed a law in April 2008 exempting the state's fusion center from the Freedom of Information Act.[32] According to comments by the commander of the Virginia State Police Criminal Intelligence Division and the administrative head of the center, the federal government pressured Virginia into passing the law, with the threat of withholding classified information if it didn't.[33] Such efforts suggest there is a real danger fusion centers will become a "one-way mirror" in which citizens are subject to ever-greater scrutiny by the authorities, even while the authorities are increasingly protected from scrutiny by the public.

Another example of the "one way mirror" emerged recently in Massachusetts, where the ACLU of Massachusetts recently obtained a copy of the Commonwealth Fusion Center's (CFC's) "Standard Operating Procedures."[34] The procedures allow undercover police officers to attend public meetings to gather intelligence even when there is no reasonable suspicion of illegal activity. These guidelines also authorize "inquiries and investigations" when "oral or written statements advocate unlawful or violent activity, to determine whether there exists a real threat," which is clearly First Amendment-protected activity. The hazards of such a policy were revealed in a recent incident at Harvard University, where a plain-clothes Harvard University detective was caught photographing people at a peaceful protest for "intelligence gathering" purposes.[35] HUPD officers are sworn special State Police officers with deputy sheriff powers, and they often work "in conjunction with other agencies, including the Massachusetts State Police, Boston Police, Cambridge Police, Somerville Police, and many federal agencies."[36] A university spokesman refused to say what the HUPD does with the photographs it takes for "intelligence gathering" purposes, so it is unknown whether this information was shared with the CFC. What is clear is that this type of unwarranted police surveillance of First Amendment-protected activity is exactly what the CFC Standard Operating Procedures explicitly authorize.

It is ironic that even as police increasingly challenge the right of regular citizens to take photographs in public places [see box], police themselves are busy photographing citizens peacefully exercising their First Amendment rights.

MISSION CREEP: MOVING FROM TERRORISTS TO PEACE ACTIVISTS

Police in Maryland appear to have followed practices similar to those authorized in the Massachusetts standard operating procedures. According to documents released in response to an ACLU lawsuit, the Maryland State Police (MSP) used undercover officers to spy on non-violent peace activists and anti-

death penalty groups. The undercover agents consistently reported that the activists acted legally at all times, yet the investigations continued for over 14 months. Information about the groups' political activities gathered during the investigations "was shared with seven different agencies, including the National Security Agency and an un-named military intelligence official."[37] A longtime peace activist who was an apparent target of the surveillance, Max Obuszewski, had his identifying information entered into a federal database under the "primary crime" heading of "Terrorism—anti-government," even though absolutely no violent activity was even alleged in the reports.[38] The information was uploaded into a federal drug task force database that is accessible by the Maryland fusion center, the Maryland Coordination and Analysis Center (MCAC).[39]

We do not know whether the MCAC was aware of these MSP investigations or whether the "intelligence" the MSP gathered was shared through the fusion process, but fusion centers are clearly *intended* to be the central focal point for sharing terrorism-related information. If the MCAC was not aware of the information the state police collected over the 14 months of this supposed terrorism investigation, this fact would call into question whether the MCAC is accomplishing its mission. If the MCAC takes in information from its participating members, however, the fusion center itself should be responsible for determining whether the "intelligence" it receives is being appropriately collected. It can do that by, for example, enforcing strict guidelines and conditions of participation on its sources and participants.

For Mr. Obuszewski, in any case, the impact of being listed as a terrorist in a federal database is simply unknowable in the current climate of secrecy surrounding these intelligence programs.

Mr. Obuszewski's experience is all too typical of what we have seen in the United States for many decades—new police and surveillance powers, granted to the authorities out of fear of terrorism, end up being deployed against peace activists and other political dissenters. It has happened before—police departments employed "red squads" and the FBI ran a dirty-tricks program called COINTELPRO—and now it is happening yet again. It is a disturbing sign that our policy makers have not learned from that long history.

We can't afford to be in the dark about fusion centers. And just because the government isn't announcing this domestic surveillance program in grand style the way it has with other surveillance programs, doesn't mean we can ignore it. Given the broad scope of information fusion centers collect, process and disseminate, it would be irresponsible not to enforce vigorous public oversight. We have to make sure our Congress and our state legislatures know it's up to them to guard our privacy and to impose appropriate oversight controls and accountability standards on these out-of-control data-gathering monsters.

NOTES

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[11] INFORMATION SHARING ENVIRONMENT (ISE) FUNCTIONAL STANDARD (FS) SUSPICIOUS ACTIVITY REPORTING (SAR) Version 1.0, ISE-FS-200, (Jan. 25, 2008) (on file with authors).

[12] Major City Chiefs' report, *supra* note 9, at 31.

[13] The Government Accountability Office has previously defined the term "personally identifiable information" as "any information about an individual maintained by an agency, including any information that can be used to distinguish or trace an individual's identity, such as name, Social Security number, date and place of birth, mother's maiden name, biometric records, and any other personal information that is linked or linkable to an individual." *See* GOVERNMENT ACCOUNTABILITY OFFICE, GAO 08-343, REPORT TO CONGRESSIONAL REQUESTERS: INFORMATION SECURITY: PROTECTING PERSONALLY IDENTIFIABLE INFORMATION 5 (Jan. 2008), *available at* http://www.gao.gov/new.items/d08343.pdf.

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[21] *How Does Illegal Immigration Impact American Taxpayers and Will the Reid-Kennedy Amnesty Worsen the Blow?: Oversight Hearing Before the H. Comm. on the Judiciary*, 109th Cong. (Aug. 2, 2006) (statement of Leroy D. Baca, Sheriff, Los Angeles County), available at http://judiciary.house.gov/OversightTestimony.aspx?ID=674.

[22] Rogers, *Records Detail Security Failure in Base File Theft, supra* note 18.

[23] *Id.*

[24] Rogers, *Marine Took Files as Part of Spy Ring, supra* note 18. The LACTEW evokes uncomfortable memories of a long line of similar California-based quasi-vigilante groups that involved the exchange of information about "subversives" between military and police agencies and private activists, including the "Western Goals Foundation" and the "San Diego Research Library." *See* JAY STANLEY, THE SURVEILLANCE INDUSTRIAL COMPLEX, AMERICAN CIVIL LIBERTIES UNION 9 (2004), available at http://www.aclu.org/FilesPDFs/surveillance_report.pdf.

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AMERICAN CIVIL LIBERTIES UNION

WASHINGTON LEGISLATIVE OFFICE
915 15th Street, NW Washington, D.C. 20005
(202) 544-1681 Fax (202) 546-0738
Laura W. Murphy
Director

Senator Cynthia Stone Creem
State House
Room 405
Boston, MA 02133

Representative Eugene L. O'Flaherty
State House
Room 136
Boston, MA 02133

RE: TESTIMONY IN SUPPORT OF HOUSE BILL 1336 BEFORE THE JOINT COMMITTEE ON THE JUDICIARY

Dear Chairwoman Creem, Chairman O'Flaherty, and members of the Committee,

My name is Michael German, and I am policy counsel at the American Civil Liberties Union's Washington Legislative Office, where I focus on national security and open government issues. Thank you for the opportunity to submit testimony as you consider legislation to regulate intelligence fusion centers. Too often since the terrorist attacks of September 11th, 2001 we have been told that we need balance our liberty interests against our security interests, but my experience during a 16 year career in federal law enforcement taught me this is a false construction. In fact, what I learned by infiltrating domestic terrorist groups as an FBI undercover agent is that the opposite is true: by failing to protect the liberty interests of innocent people we actually harm our security, and by failing to properly regulate and oversee the activities of law enforcement and intelligence agencies we allow them to become less competent and less effective.

I found that the legal standard I operated under as an FBI agent before 9/11, which required reasonable suspicion that someone was engaging in or planning to engage in illegal activity before investigating that person did more than just protect the innocent from unnecessary scrutiny; it made me a more effective law enforcement officer. In short, the reasonable suspicion standard helped me to focus my attention on real threats to the community rather than on people who simply said or did things I didn't like. Investigating people who aren't breaking the law is a waste of law enforcement time and finite security resources, as well as an unnecessary violation of privacy.

Unfortunately, after 9/11 law enforcement agencies at the federal, state and local levels moved away from the time-tested reasonable suspicion standard toward a new model known as "intelligence led policing," or ILP. This new theory of criminal intelligence argues that collecting even outwardly innocuous behaviors will somehow enhance security. In 2006, former DHS Secretary Michael Chertoff said,

> Intelligence is about thousands and thousands of routine, everyday observations and activities. Surveillance, interactions – each of which may be taken in isolation as not a particularly meaningful piece of information, but when fused together, give us a sense of the patterns and flow that really is at the core of what intelligence is all about.[i]

Fusion centers are a direct institutional outgrowth of ILP, which promotes information collection and sharing as a strategy for preventative law enforcement, emphasizing the use of data mining technology in order to find patterns of potential criminal or terrorist behavior in a community. Despite a federal regulation that requires reasonable suspicion of criminality before personally-identifiable information can be collected in a shared criminal intelligence system, Fusion Center Guidelines published by DHS and the Department of Justice encourage fusion centers to broaden their sources of data "beyond criminal intelligence, to include federal intelligence as well as public and private sector data."[ii] Rather than being constrained by the law regarding what they can collect, Delaware State Police Captain Bill Harris, head of the Delaware Information Analysis Center (DIAC), appeared to feel constrained only by resources: "I don't want to say it's unlimited, but the ceiling is very high... When we have the money, we'll start going to those other agencies and say, 'Are you willing to share that database and what would it cost.'"[iii]

This erosion of reasonable limits on police power to collect our private information has set the stage for a return of the abusive practices of the past. In recent years the ACLU has uncovered substantial evidence that domestic intelligence powers are being misused at all levels of government to target non-violent political activists. In Maryland a State Police spying operation targeted at least 23 non-violent political advocacy organizations based solely on the exercise of their members' First Amendment rights lasted more than 14 months.[iv] None of the reports from these operations suggested any factual basis to suspect these groups posed any threat to security and, not surprisingly, no criminal activity was discovered during these investigations. Despite this lack of evidence, the MSP labeled many of these activists "terrorists," distributed information gathered in their investigations widely among other law enforcement and intelligence agencies – including a local police representative of the FBI's Joint Terrorism Task Force (JTTF), a National Security Agency security official, and an unnamed military intelligence officer –and uploaded the activists' personal information into a federal drug enforcement and terrorism database.[v] The Department of Homeland Security (DHS) was also involved, collecting and disseminating e-mails from of one of the peace groups to assist the MSP spying operations.[vi] From a pure information sharing perspective, this case worked well. But the sharing of such misleading, erroneous and irrelevant information provided no security benefit to the people of Maryland, and only undermined the credibility of state and federal intelligence systems.

In addition to the abusive Maryland investigations, the ACLU of Colorado uncovered illegal surveillance of peaceful protestors and environmental activists by the Denver Police and the FBI,[vii] and the ACLU of Northern California produced a report of widespread illegal spying activities by federal, state and local officials.[viii] ACLU Freedom of Information Act litigation revealed FBI JTTF investigations targeting peace activists in Pennsylvania and Georgia, and Department of Defense intelligence operations targeting anti-military protestors from around the country.[ix] This is not an isolated problem: since 9/11 the ACLU has documented improper spying on or obstruction of First Amendment protected activity in 31 states and the District of Columbia. And the security of the information collected for law enforcement databases is also in doubt, and not just because private companies often house or have access to the information. Here in Massachusetts a 2009 audit revealed police from across the state abused the criminal records system to search for data on local

celebrities.[x] It is unclear how many private citizens might have also had their privacy violated with these improper searches.

The ACLU has also produced two reports detailing problems at intelligence fusion centers.[xi] Since these reports were published a Texas fusion center released an intelligence bulletin that described a purported conspiracy between Muslim civil rights organizations, lobbying groups, the anti-war movement, a former U.S. Congresswoman, the U.S. Treasury Department and hip hop bands to spread Sharia law in the U.S.[xii] The same month, but on the other side of the political spectrum, a Missouri Fusion Center released a report on "the modern militia movement" that claimed militia members are "usually supporters" of presidential candidates Ron Paul and Bob Barr.[xiii] In March 2008 the Virginia Fusion Center issued a terrorism threat assessment that described the state's universities and colleges as "nodes for radicalization" and characterized the "diversity" surrounding a Virginia military base and the state's "historically black" colleges as possible threats.

The Department of Homeland Security has also trained its attention on activities here in Massachusetts. A 2006 "preventive intelligence" bulletin included on a list of "activities of various civil activists and extremist groups" a March 18 event in Boston on the eminently peaceful subject "stop the violence, stop the war at home and abroad."[xiv] These bulletins, which are widely distributed, would be laughable except that they come with the imprimatur of a federally-backed intelligence operation, and they encourage law enforcement officers to monitor the activities of political activists and racial and religious minorities.

A September 2010 report by the Justice Department's Inspector General concluded that the FBI had "little or no basis" for investigating many advocacy groups and had lied to cover up this fact.[xv] FBI head Robert Mueller was given "mistaken and misleading" information which he conveyed to the Senate Judiciary Committee. Thousands of documents obtained through FOIA lawsuits reveal the extent of the FBI's abuse of its authority. In the words of former FBI agent Coleen Rowley, "a secretive, unaccountable, post 9/11 homeland security apparatus has increasingly turned inward on American citizens."[xvi]

It should be clear enough that these abusive intelligence reports and unnecessary investigations of peaceful activists do nothing to improve security. Sharing misleading information about the ideologies and activities of non-violent groups only wastes security resources and the exposure of this misconduct undermines public support for law enforcement. But a 2007 National Academy of Sciences National Research Council study funded by DHS raises even more fundamental questions about whether data mining technology behind the fusion center concept is a scientifically viable methodology, which may explain why these programs have not yet produced demonstrable accomplishments. The study concluded:

> Automated identification of terrorists through data mining (or any other known methodology) is neither feasible as an objective nor desirable as a goal of technology development efforts. One reason is that collecting and examining information to inhibit terrorists inevitably conflicts with efforts to protect individual privacy. And when privacy is breached, the damage is real. The degree to which privacy is compromised is fundamentally related to the sciences of database technology and statistics as well as to policy and process.[xvii]

Expending resources on scientifically unsound technology is not a wise use of our security dollars, particularly when the rights of ordinary Massachusetts residents are unnecessarily being put at risk.

All law enforcement agencies feel the same pressure as a result of their responsibility for providing security to the communities they serve, so it is not surprising that they sometimes step over the line, even with the best intentions. But it is their obligation to protect our rights as well as our security. Providing our law enforcement officers with uniform, clear standards that protect the rights of all Massachusetts residents will only make these public servants more efficient and more effective at protecting their communities from real threats to public safety. Providing strong oversight will ensure that abuses are caught and corrected before they undermine public confidence. House Bill 1336 provides reasonable checks that will make Massachusetts fusion centers more effective at protecting our rights as well as our security.

Thank you,

Michael German
Policy Counsel

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Fusion Center, *See* U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, DHS'S ROLE IN STATE AND LOCAL FUSION CENTERS IS EVOLVING (Dec. 2008), *available at* http://www.fas.org/irp/agency/dhs/ig-fusion.pdf ; GENERAL ACCOUNTABILITY OFFICE, HOMELAND SECURITY: FEDERAL EFFORTS ARE HELPING TO ALLEVIATE SOME CHALLENGES ENCOUNTERED BY STATE AND LOCAL INFORMATION FUSION CENTERS (Oct. 2007), *available at* http://www.gao.gov/new.items/d0835.pdf.

[xiii] T.J. Greaney, *'Fusion Center' Data Draws Fire over Assertions*, COLOMBIA DAILY TRIBUNE (March 14, 2009), *available at* http://www.columbiatribune.com/news/2009/mar/14/fusion-center-data-draws-fire-over-assertions/.

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[xv] U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FBI'S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS (Sept. 2010), *available at* http://www.justice.gov/oig/special/s1009r.pdf.

[xvi] Coleen Rowley, *We're Conflating Proper Dissent and Terrorism*, MINNEAPOLIS STAR TRIBUNE (Jan. 14, 2011).

[xvii] NATIONAL RESEARCH COUNCIL, PROTECTING INDIVIDUAL PRIVACY IN THE STRUGGLE AGAINST TERRORISTS: A FRAMEWORK FOR PROGRAM ASSESSMENTS, COMMITTEE ON TECHNICAL AND PRIVACY DIMENSIONS OF INFORMATION FOR TERRORISM PREVENTION AND OTHER NATIONAL GOALS (Oct. 2007), *available at* http://www.nap.edu/catalog.php?record_id=12452.

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Providence RI 02908

Statement by Robert Ellis Smith, Publisher, Privacy Journal, in support of House Bill 1336

Joint Committee on the Judiciary, Commonwealth of Massachusetts

June 8, 2011

For many decades, Massachusetts has had one of the strongest records among the states in protecting personal privacy. The Commonwealth is the site of what many believe is the creation of the right to privacy in the private sector, the notable article in the ***Harvard Law Review*** in 1890 by two prominent citizens of Boston, Louis Brandeis and Samuel Warren.

A public servant from Massachusetts, Elliot Richardson, provided the impetus for reform in response to the threat posed by computerized personal information when as Secretary of Health, Education and Welfare in Washington he created a committee to develop findings and recommendations. The Committee's 1973 report on ***Records Computers and the Rights of Citizens*** and the Code of Fair Information Practice that it contained remain today as the basic reference point for protecting privacy in large databases.

Also, in 1973, Massachusetts Gov. Francis Sargent took decisive action, declining to provide the state's criminal records to the FBI because the federal system was "poorly secured and loosely controlled." Sargent prevailed, and in the process he discovered "a strong untapped constituency for protecting privacy, even in criminal records." After that, a federal court in the District of Columbia told the FBI three times that it had an affirmative obligation to keep an accurate database, not merely a neutral, passive repository of arrest information.

This was at the same time that the Commonwealth enacted the Criminal Offender Record Information law, in an era when control over the accuracy and completeness of criminal records was virtually nonexistent. And just last session, the legislature passed legislation to update and strengthen that law.

In 1976, Massachusetts became the fourth state to enact a fair information practices law, which incorporated the HEW principles, virtually intact.

When it first ranked the 50 states in protection of privacy in 1999, ***Privacy Journal*** found that Massachusetts ranked in the top ten, very close to California and Minnesota, which were rated the best. In 2004, when ***Privacy Journal*** ranked the states again, Massachusetts had maintained its position in the top ten.

In addition to the durable Fair Information Practices Act, Massachusetts has credible laws (1) regulating consumer credit reports, (2) requiring employers to provide employees copies of their personnel records (only 17 states do so), and (3) creating a Patient's Bill of Rights. It also prohibits the secret interception or recording by a private party of others' conversations.

Nearly all states punish identity theft as a crime; Massachusetts was one of the pioneers. More than 40 states – and some federal regulations – require an entity to notify individuals when their personal data has been disclosed through a breach of security; Massachusetts has one of the most developed schemes as well as implementing regulations under the law.

In view of this pioneering record in protecting personal privacy – including protecting rights of those who find themselves in criminal-records systems – it is an anomaly and a danger that the legislature has allowed the creation of fusion centers without any such safeguards. These cooperative law enforcement efforts are designed to collect all sorts of information, all of it sensitive, much of it secret, much of it about individuals, and much of it unevaluated and unverified. This is the same situation that faced citizens of the commonwealth in the 1970s with regard to newly emerging automated criminal-records systems.

H. 1336 provides the necessary oversight of information gathering by these fusion centers. In the legislation, I would strengthen the responsibilities of the Inspector General in two ways: (1) He or she should be able to provide ***directly*** to citizens the right to review, correct or amend, or in some cases expunge, personal information pertaining to them. And (2) he or she should have enhanced responsibility to assure the accuracy of all information in the centers. In protecting privacy interests of citizens, the Inspector General may often be in conflict with colleagues in the fusion centers. In assuring accuracy of the data, by contrast, the interests of the IG and the management of the centers should coincide, which will aid the IG in his or her responsibilities. Assuring accuracy meets the interests of ***both*** citizens who become the subjects of data files ***and*** law-enforcement personnel seeking to discover and deter threats of terrorism.

Robert Ellis Smith, a lawyer and journalist based in Providence, has published ***Privacy Journal*** monthly newsletter since 1974. As a journalist, he covered the major developments in reforming criminal-records systems and in 2004 authored a book on privacy in U.S. history called ***Ben Franklin's Web Site***.

Gavi Wolfe, *Legislative Counsel*
ACLU of Massachusetts
211 Congress Street, Suite 301
Boston, MA 02110
617-482-3170 x340
Fax 617-451-0009
gwolfe@aclum.org
www.aclum.org

Joint Committee on the Judiciary
June 8, 2011

Testimony in Support of Transgender Equal Rights – H.502/S.764

The ACLU of Massachusetts strongly supports the Transgender Equal Rights bill (H.502/S.764), legislation that is sorely needed to update and clarify Massachusetts civil rights law by adding protections based on gender identity and expression. 15 other states have led the way; Massachusetts should continue the national trend toward fairness.

No one believes that it is right or just for individuals to be fired from a job, denied a place to live, or refused service at a restaurant solely because of their gender identity, but Massachusetts law does not provide explicit protection against such bald discrimination. No one believes that it is acceptable for people to be attacked and assaulted on account of their gender identity, yet when it happens – and it happens all too frequently – the stiff penalties that an assailant would face for committing similar violent acts motivated by racial, religious, or anti-gay bias do not apply. It is time to fix these inequities by putting basic civil rights protections in place.

Today, Massachusetts anti-discrimination law in this area is inconsistent and unsettled. Without express statutory prohibitions against discrimination based on gender identity and expression, transgender individuals cannot count on equal treatment under the law. The MCAD and some trial courts have found existing non-discrimination laws adequate to protect certain plaintiffs in individual cases, but this is a far cry from clear, across-the-board statutory protection. A handful of cities and towns have passed ordinances prohibiting discrimination based on gender identity and expression on the municipal level, but these are few and far between, and they lack meaningful enforcement mechanisms.

These gaps in our laws leave individuals vulnerable. Without explicit legal protections, well-qualified workers may be refused employment, eligible tenants may be denied housing, and patrons of businesses across the Commonwealth may be told to go elsewhere, simply because their gender identity does not conform to the expectations of an individual employer, landlord, or business owner. This kind of discrimination happens routinely. Furthermore, when transgender individuals experience discrimination, they face a compound problem. Because the law is ill-defined and inconsistent, they have a harder time finding lawyers to take their cases, and often cannot pursue their claims at all.

This legislation provides clarity and protection for employees and employers alike. For employees, it has the power to confer a heretofore unknown measure of dignity, equality of opportunity, and access to justice. For employers, who are vulnerable to dangerous missteps in the current spotty legal landscape, a clear state law will provide refreshing clarity and invaluable guidance.

Massachusetts has historically been a leader on civil rights issues, and a champion of basic fairness and equal protection of the laws. We should continue that leadership. Opponents of advances in civil rights have historically played on fear instead of reason, a pattern that repeats itself here. The primary objection to this legislation alleges that it will provide cover for men to invade private spaces reserved for women, such as restrooms and locker rooms. This is fundamentally and demonstrably false. Under this bill, sex-segregated spaces will remain sex-segregated, and people will access them the same way they do today – using the facility that is consistent with their gender identity. Only, they will do so without the very real fear of being harassed or discriminated against because of anti-transgender prejudice.

It is useful to remember that 15 other states and more than 125 municipalities across the country – including Boston, Cambridge, Northampton, and Amherst – have passed similar measures, and in those jurisdictions the bogeymen never materialized. May our great tradition of extending civil rights to vulnerable populations continue, and not succumb to a baseless scare tactic. Equal protection is too vital a principle to be sacrificed so cheaply.

For all of the foregoing reasons, the ACLU of Massachusetts urges the Committee to give a favorable report to this vital legislation. Thank you.

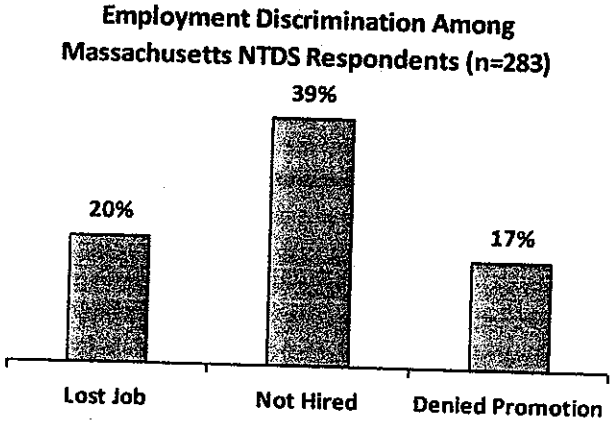
The Cost of Employment Discrimination against Transgender Residents of Massachusetts

Jody L. Herman
Peter J. Cooper Public Policy Fellow

April 2011

Introduction

Transgender residents of Massachusetts have reported experiencing discrimination in employment. The *National Transgender Discrimination Survey* (NTDS) found that 76 percent of respondents from Massachusetts experienced harassment, mistreatment, or discrimination in employment.[1] NTDS respondents reported that due to anti-transgender bias, 20 percent had lost a job, 39 percent were not hired for positions they applied for, and 17 percent were denied promotions.[2]



Loss of employment due to anti-transgender bias often means lost wages, lost health insurance coverage, and housing instability. Therefore, employment discrimination might affect the budget of the Commonwealth of Massachusetts in several ways: reduced income tax revenues, higher public assistance expenditures, and other costs. For instance, if a worker is fired for being transgender and loses wages as a result, the Commonwealth loses the income tax revenue it would have gained from those lost wages. Furthermore, that worker may need to participate in a public health insurance program to replace lost employer-provided coverage. Those health insurance costs are then transferred from that worker's former employer to the Commonwealth. This study estimates that the impact of discrimination is likely to cost the Commonwealth millions of dollars each year. The added cost to the Commonwealth for public health insurance coverage alone is $3 million annually due to employment discrimination.

Estimating the Transgender Population of Massachusetts

According to the U.S. Census Bureau's 2009 American Community Survey, the population of Massachusetts is 6.6 million.[3] A recent Massachusetts population-based survey suggests that 0.5 percent of the population of Massachusetts considers themselves to be transgender.[4] Therefore, about 33,000 Massachusetts residents are estimated to identify as transgender.[5] If rates of employment discrimination found in the Massachusetts sample of the NTDS hold true for the transgender population of Massachusetts as a whole, then: 6,600 have lost a job, 12,900 were not hired for a job, and 5,600 were denied a promotion due to anti-transgender bias.

Estimating the Cost of Employment Discrimination

Employment discrimination might negatively affect the Commonwealth's budget for several reasons. This section describes costs in terms of lower income tax revenues, higher public assistance expenditures, and other costs of unemployment and underemployment.

Reduced Income Tax Revenues

When workers are fired for being transgender or are unable to get jobs due to discrimination, their wages are likely to fall, leading to lower income tax revenue for the Commonwealth. According to the NTDS, 15 percent of surveyed transgender Massachusetts residents made $10,000 or less in annual household income, while only 3 percent of the Massachusetts general population made this amount.[6] Yet, the educational attainment of transgender NTDS participants is high, with respondents reporting much higher rates of attaining college degrees and graduate degrees than the U.S. general population.[7] Therefore, it is likely that this income disparity is due, at least in part, to employment discrimination. If transgender residents of Massachusetts had incomes similar to the general population, the Commonwealth would garner millions of dollars in additional income tax revenues.

A simple example reveals the potential for added state revenue. If 15 percent of all transgender people in Massachusetts make under $10,000, then nearly 5,000 residents are making this amount annually. If transgender residents were making this amount at the same rate as the Massachusetts general population (3%), about 4,000 additional people would be making more than $10,000 every year. The difference in income tax revenue for a person making $10,000 annually versus $20,000 annually would be $627.[8] If all 4,000 people shifted from $10,000 to just $20,000 in annual income, the Commonwealth would garner over $2 million in additional income tax revenue per year.

Public Assistance Expenditures

When workers lose jobs, they are likely to lose income and health insurance coverage for themselves and their families. These workers and their families may need to utilize public assistance programs to replace lost income and insurance coverage. Major programs for cash assistance and medical coverage include MassHealth (Medicaid), Commonwealth Care, Transitional Aid to Families with Dependent Children (TAFDC), Supplemental Security Income (SSI), and the Children's Medical Security Plan (CMSP). To the extent that workers who have lost jobs due to discrimination and their families participate in these programs, costs accrue to the Commonwealth.

While it is difficult to estimate the impact on expenditures for all cash and health assistance programs, available data make an estimate possible for Medicaid, known as MassHealth in Massachusetts, and Commonwealth Care, a state-funded program that provides subsidized premiums for low-income Massachusetts residents to purchase private health insurance coverage.[9] These two programs provide health insurance coverage for over 1.5 million Massachusetts residents, transgender and non-transgender alike, each year.[10] This study estimates that the cost to the Commonwealth for both programs is nearly $3 million annually for transgender workers who have lost jobs due to bias.

According to the NTDS, over 4 percent of transgender residents of Massachusetts who have lost a job due to bias receive their health insurance coverage through MassHealth (Medicaid).[11] Of those respondents in Massachusetts who have *not* lost a job due to bias, *none* receive their health insurance coverage through MassHealth.[12] Applying those rates of MassHealth coverage to the Massachusetts transgender population as a whole, 293 transgender residents who have lost a job due to bias receive their health insurance coverage through MassHealth. The average annual Commonwealth expenditure for each adult enrollee in MassHealth is $1,841.[13] Thus 293 people getting MassHealth coverage as a

result of discrimination times $1,841 is nearly $539,000. In other words, if these 293 residents were to be covered by employer-provided insurance, the Commonwealth would save more than $500,000 annually in MassHealth expenditures.

Also according to the NTDS, some transgender residents of Massachusetts receive their health insurance coverage through public insurance programs *other* than MassHealth, such as state-funded or locally-funded programs.[14] These respondents could be participating in one of two public health insurance programs in Massachusetts: the Medical Security Program (MSP) or Commonwealth Care.[15] The MSP is an employer-funded health insurance program for those who are receiving Unemployment Insurance benefits. In order to provide cost estimates only for likely Commonwealth Care participants, a state-funded program, those who reported receiving health coverage through other public insurance programs and are currently unemployed are assumed to be covered through the MSP. Those likely MSP participants have been removed from these calculations. The remainder, those who reported that they are receiving health coverage through other public insurance programs and are currently employed, are assumed to be covered through Commonwealth Care.

If the rate of likely Commonwealth Care participation found in the NTDS holds true for the Massachusetts transgender population as a whole, then just over 13% (879 people) of transgender residents who have lost a job due to bias likely receive their health insurance coverage through Commonwealth Care.[16] However, this study assumes that had this group of transgender residents not lost jobs due to bias, they would participate in Commonwealth Care at the same rate as those who reported they had not lost jobs due to bias (just over 5%, or 337 people).[17] In this case, discrimination may have led to a transgender respondent being employed by an employer that does not provide health insurance benefits. Thus, an estimated 542 transgender residents of Massachusetts likely participate in Commonwealth Care as a result of employment discrimination. The average annual Commonwealth expenditure for each member of Commonwealth Care is $4,474.[18] Thus 542 people getting Commonwealth Care coverage as a result of discrimination times $4,474 is over $2 million annually. In other words, if these 542 residents were in better jobs that included coverage by employer-provided insurance, the Commonwealth would save more than $2 million annually in Commonwealth Care expenditures.

Other Costs of Unemployment and Underemployment

Work-related programs: The Commonwealth of Massachusetts administers various employment programs using federal, state, and employer-contributed funds. In the event that transgender workers lose jobs due to bias, they may qualify for unemployment insurance payments and utilize programs that provide job placement and job training, increasing the costs of those programs. State-only funding supports several programs that unemployed workers could utilize, including programs for those workers who need to complete elementary and secondary education and workers with disabilities or who are blind.

The table below outlines the per-participant Commonwealth expenditures for selected workforce development and services programs for the 2010 fiscal year.[19] For each transgender worker who loses a job due to bias and participates in any one of the listed programs, the cost to the Commonwealth for that worker equals the Commonwealth per-participant expenditure listed for that program.

Housing programs: When a worker loses a job due to discrimination, housing instability may result.[20] In the NTDS study, 26 percent of Massachusetts residents who had lost a job due to bias had also been evicted from their homes compared to 5 percent of those who had *not* lost a job due to bias. Housing

and rental assistance programs in Massachusetts include Section 8 housing programs, rental assistance programs, homelessness prevention programs, and shelters. While these programs are funded in large part with federal funds, Commonwealth funds support many of these programs. The Commonwealth proposed spending $255 million for the 2010 fiscal year on housing and rental assistance programs administered through the Massachusetts Executive Office of Housing and Economic Development (EOHED).[21] Therefore, if transgender workers who have lost their jobs later access these programs for housing or rental assistance, costs accrue to the Commonwealth.

Conclusion

Any transgender person who loses a job due to discrimination in Massachusetts may experience reduced income, loss of health insurance, and housing instability. Not only does the Commonwealth suffer lost income tax revenue because of discrimination, but each transgender person who loses a job may become eligible for programs that will cost the state hundreds or thousands of dollars. This study estimates that the Commonwealth spends nearly $3 million annually in Medicaid and Commonwealth Care expenditures alone for workers who have lost a job due to anti-transgender bias. Employment discrimination against transgender residents likely costs the Commonwealth of Massachusetts millions of dollars annually in public assistance program expenditures, lost income tax revenues, and other costs.[22]

Commonwealth per-participant expenditures for selected programs for FY2010[23]

Office/Department	Program	Total Participants*	Common-Wealth funding	Commonwealth per-participant expenditure
Workforce Development, Division of Career Services	One-Stop Career Centers, Employment Services/Labor Exchange	211,761	$4,994,467	$24
Workforce Development, Division of Career Services	Workforce Training Fund Programs, General Program	5,031	$3,571,400	$710
Workforce Development, Division of Career Services	Workforce Training Fund Programs, Hiring Incentive Training Grant Program	58	$95,999	$1,655
Executive Office of Health and Human Services, Department of Transitional Assistance	Employment Services Program	80,220	$20,979,163	$262
Executive Office of Health and Human Services, Massachusetts Rehabilitation Commission	Vocational Rehabilitation Services	20,678	$10,207,592	$494
Executive Office of Health and Human Services, Massachusetts Commission for the Blind	Vocational Rehabilitation for the Blind	1,639	$3,044,221	$1,857
Elementary & Secondary Education, Adult & Community Learning Services	Adult Basic Education/ESOL	20,372	$23,710,206	$1,164

*Number served or number of employee participants.

[1] *Findings of the National Transgender Discrimination Survey by the National Center for Transgender Equality and the National Gay and Lesbian Task Force: Massachusetts Results*, Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, available at http://www.masstpc.org/publications/3party/MA-NTDS-final.pdf. The NTDS study was based on a national convenience sample of 6,456 transgender and gender non-conforming people. This sample provides the best available data on experiences of employment discrimination among transgender and gender non-conforming people in the U.S. The Massachusetts NTDS data set was used by permission of The National Gay and Lesbian Task Force. Additional calculations as needed for the Commonwealth of Massachusetts were completed by the author at The Williams Institute.

[2] *Id.*

[3] U.S. Census Bureau, American Community Survey, 1-year Public Use Microdata Sample (PUMS), 2009.

[4] Conron, K.J., Scott, G., Stowell, G.S., Landers, S., Transgender Health in Massachusetts: Results from a Household Probability Sample of Adults, *American Journal of Public Health*, forthcoming.

[5] This figure may not include all residents of the Commonwealth of Massachusetts whose gender identity or expression differs from conventional expectations of masculinity or femininity because individuals may not use the term "transgender" to identify themselves.

[6] *Findings of the National Transgender Discrimination Survey*, 2011, op.cit. Massachusetts general population figure from the U.S. Census Bureau, Current Population Survey, Annual Social & Economic Supplement, 2009.

[7] Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*. Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, available at http://www.thetaskforce.org/reports_and_research/ntds.

[8] A set of conservative assumptions underlie the calculations in this example. The income level of those making less than $10,000 annually is set at $10,000, which is the highest possible income in that income range. An income of $20,000 represents the highest possible income in the next income range ($10,000-$20,000). Transgender and gender non-conforming people are over-represented in the lower income categories (60% made $50,000 or less annually, NTDS sample) compared to the Massachusetts general population (32% made less than $50,000 annually, 2009 CPS Annual Social & Economic Supplement). This example provides a simulation based on a shift for only the lowest income category.

The 2010 Massachusetts tax forms, available at http://www.mass.gov, were utilized in calculating income taxes. In the case of an income of $10,000, tax owed was calculated for a person filing as single with the standard deduction and the limited income credit. Total tax owed for this person is $200. In the case of an income of $20,000, tax owed was calculated for a person filing as single with the standard deduction (not eligible for the limited income credit). Total tax owed for this person is $827.

[9] For more information on MassHealth, visit the official website of the Massachusetts Office of Health and Human Services at http://www.mass.gov/?pageID=eohhs2homepage&L=1&L0=Home&sid=Eeohhs2. For more information on Commonwealth Care, visit the Health Connector website at https://www.mahealthconnector.org/portal/site/connector/.

[10] Medicaid total enrollment for FY2007 in Massachusetts was 1,402,500. *See* The Henry J. Kaiser Family Foundation, Massachusetts: Total Medicaid Enrollment, FY2007, http://www.statehealthfacts.org/profileind.jsp?rgn=23&cat=4&ind=198. Commonwealth Care total year end membership for FY2008 was 175,617. *See* The Massachusetts Health Insurance Connector Authority, *Report to the Massachusetts Legislature Implementation of the Health Care Reform Law, Chapter 58, 2006-2008*, available at https://www.mahealthconnector.org. Expenditure estimates calculated in this report reflect health care insurance coverage that is available to all Massachusetts residents that meet the requirements for participation in these programs. All of the identified public health insurance expenditures exclude transition-related care.

[11] Grant, Jaime M., et al, 2011, op.cit. Additional calculations completed by the author at the Williams Institute.

[12] *Id.*

[13] Medicaid state-only expenditures were calculated by using the FY2007 average total per-adult-enrollee payment of $3,506. *See* The Henry J. Kaiser Family Foundation, Massachusetts: Medicaid Payments, http://www.statehealthfacts.org/profileind.jsp?rgn=23&cat=4&ind=183. The state share of the total per-adult-enrollee

payment for FY2007 was calculated by multiplying the payment of $3,506 by the overall percentage the Commonwealth contributed to the payment (50%), which yields a total per-participant state share of $1,753 (unadjusted). This per-adult-participant expenditure calculated for this report was adjusted to 2010 dollars to yield $1,841.

[14] Grant, Jaime M., et al, 2011, op.cit. Additional calculations completed by the author at the Williams Institute.

[15] For more information on the Massachusetts Medical Security Program, visit the official website of the Massachusetts Office of Labor and Workforce Development at http://www.mass.gov/?pageID=elwdhomepage&L=1&LO=Home&sid=Elwd.

[16] Grant, Jaime M., et al, 2011, op.cit. Additional calculations completed by the author at the Williams Institute. Those who reported they are currently unemployed are not included in the 13 percent figure reported here. Those who responded that they are covered by "other public insurance" and are currently unemployed are assumed to participate in the Massachusetts Medical Security Program (MSP).

[17] *Id.* Those who reported they are currently unemployed are not included in the 5 percent figure reported here. Those who responded that they are covered by "other public insurance" and are currently unemployed are assumed to participate in the Massachusetts Medical Security Program (MSP).

[18] Commonwealth Care per-member expenditures were calculated by dividing the FY2010 total spending including risk sharing ($717,245,870) by the FY2010 year end membership (160,318) to yield a per-member Commonwealth expenditure of $4,474. *See* Health Connector, *Report to the Massachusetts Legislature: Implementation of Health Care Reform, Fiscal Year 2010*, November 2010, available at https://www.mahealthconnector.org/portal/site/connector/menuitem.662b0c7793f3a4b2dbef6f47d7468a0c/?fiShown=default.

[19] Commonwealth Corporation, *Annual Performance Report of Massachusetts Workforce Development Services and Programs*, November 30, 2010, available at http://www.commcorp.org/resources/detail.cfm?ID=770.

[20] Not only is housing instability created by job loss, the NTDS found that due to anti-transgender bias, respondents from Massachusetts experienced eviction (6%), denial of a home or apartment (17%), and became homeless (10%). See *Findings of the National Transgender Discrimination Survey by the National Center for Transgender Equality and the National Gay and Lesbian Task Force: Massachusetts Results*, Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011.

[21] Massachusetts Department of Housing and Community Development, *2010-2014 Consolidated Plan for CDBG, HOME, HOPWA, and ESG*, May 2010, available at http://www.mass.gov.

[22] This finding is conservative in that it does not include estimates of the cost to the Commonwealth and to businesses in Massachusetts of curbed spending due to loss of income and other "downstream" impacts of employment discrimination.

[23] Commonwealth Corporation, op.cit.

About the Author

Jody L. Herman is the Peter J. Cooper Public Policy Fellow at the Williams Institute, UCLA School of Law. She holds a Ph.D. in Public Policy and Public Administration from The George Washington University.

Acknowledgements

The author thanks M.V. Lee Badgett and Brad Sears for their assistance and thoughtful reviews and the National Gay and Lesbian Task Force and National Center for Transgender Equality for the use of the NTDS data set.

For more information

The Williams Institute, UCLA School of Law
Box 951476
Los Angeles, CA 90095-1476
(310)267-4382
williamsinstitute@law.ucla.edu www.law.ucla.edu/williamsinstitute

To: Joint Committee on the Judiciary

From: Representative Denise Andrews, Second Franklin District

Subject: Personal Testimony In Support of Transgender Equal Rights Bill-

HB 502 and S764

Date: June 8, 2011

Thank you to the Chairs and to the Committee for your interest and work in advancing our Commonwealth and our state's historical role as a leader in civil rights and equality.

"A community is democratic only when the humblest and weakest person can enjoy the highest civil, economic, and social rights that the biggest and most powerful possess." This is a quote from A. Philip Randolph the founder of the March on Washington which advanced our country's civil rights.

Massachusetts citizens and their government are also known for and are called to be key leaders in advancing our society, a society that respects and is just to all. Once again, we have a chance to continue this calling and legacy.

I speak in strong support and as a co-sponsor of the Transgender Equal Rights Bill because it is just and is the right action to take to advance civil rights in our Commonwealth and world. This action will provide an additional policy to insure that all citizens are protected against discrimination.

For background:

I have worked with others for over 25 years in the private sector, to advance civil rights and diversity and inclusion. I've had the privilege to learn and teach diversity and inclusion to thousands of people, in over 23 counties, who desire to engage and to progress on these issues. What I've found to be a common experience across all countries is that on many diversity and civil rights issues, there are commonly held beliefs. There are, also, fundamental disagreements that will never be changed. However, even with these fundamental differences progress can occur. What I have learned, developed and taught leaders is that if we embrace the principle, "we do not need to agree but we must ensure respect, compassion and justice for all", we can progress. Leaders in international and local companies understand the importance of spearheading civil rights and diversity in order to both attract and retain top talent, as well as it is an essential way to create competitive advantages in the market place. Many leaders and companies have already enacted policies and benefits to insure that transgender individuals are given the same rights, protection, benefits and respect as their colleagues enjoy.

I, also, Chair Governor Patrick's Non Discrimination, Equal Opportunity and Diversity Advisory Council for our Commonwealth. Our charter is to move Massachusetts to be a global model and an exemplar state in diversity by 2020. In order to achieve this it will require Massachusetts to accelerate our progress and actions in civil rights and diversity and inclusion. Massachusetts leads in many areas but still has a long way to go in other areas, Transgender equality is one of those areas where we are lagging. In researching to prepare for this testimony, I found there are approximately 34 countries/territories that are actively making progress on transgender rights, protection and justice. South Africa lead progress in 2003 and several countries have since followed, including Bolivia, Pakistan, Croatia, Poland, Spain, Turkey, Israel, New Zealand and the Netherlands. In 2009, the United States, after a decade of struggle, passed and President Obama signed into law the Federal Hate Crime Law, an inclusive hate crimes bill that includes gender identity. Today, at the local level, approximately fifteen states plus Washington DC and 132 cities including Boston (2002), Cambridge (1997), Northampton (2005) and Amherst (2009) have enacted laws to include gender identity/expression to non-discrimination and hate crime laws. Our Governor, also, recently moved Massachusetts ahead by issuing an Executive Order protecting transgender state employees from discrimination. Now it is the General Courts time to act! The adoption of the Transgender Equal Rights bill is another critical step to have Massachusetts join the ranks of existing leaders for advancing civil rights and just societies.

After benchmarking with other public and private organizations that have advanced transgender rights and benefits, one should conclude that passing the Transgender Equality Bill is logical and straightforward.

However, there is also a moral and emotional analysis that we need to consider.

We must not be ignorant or emotionally disconnected from the reality that we in this commonwealth are not consistently treating people with respect, with compassion or justly. Discrimination, harassment, minimization and disparities are a reality for the vast majority of our transgender brothers and sisters in our Commonwealth.

I have attached two reports with compelling facts that begin to dimensionalize these disparities. (The National Transgender Discrimination Survey and the Williams Institute's Report on "The Cost of Employment Discrimination against Transgender Residents of Massachusetts").

We must ask ourselves as elected leaders, if we or members of our family faced these injustices would we tolerate it? I choose to believe our collective unanimous answer would be "no". The reality, however, is that members of our extended family are facing these injustices daily, and I respectfully implore you to care deeply and to act in order to end tolerance of these injustices and disrespect.

I respectfully request your committee to urgently move this bill out of committee with a favorable finding. Present the opportunity to the members of this 187th General Court of Massachusetts to act and advance the Transgender Equal Rights Bill, thus continuing the legacy of Massachusetts' civil rights leadership.

With God speed ,thank you.

Representative Denise Andrews

Additional quotes for reflection as one deliberates:

"All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate would be oppression."
Thomas Jefferson

"In giving rights to others which belong to them, we give rights to ourselves and to our country." John Fitzgerald Kennedy

"There is no place for violence or intolerance in this country, and it is urgent that we address these issues now. " Hillary Rodham Clinton

1.References:

http://en.wikipedia.org/wiki/LGBT_rights_by_country_or_territory

Commonwealth of Massachusetts
Massachusetts Developmental Disabilities Council

1150 Hancock Street, Third Floor Suite 300
Quincy, MA 02169-4340

DEVAL L. PATRICK
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Testimony of Lisa Ching
To the Joint Committee on the Judiciary
June 8, 2011
RE: HB523

Dear Chairpersons and Committee Members,

Thank you for giving me the opportunity to address you on House Bill 523: An Act to require national background checks. My name is Lisa Ching and I am a member of the Massachusetts Developmental Disabilities Council. The Council works to improve the system of supports for individuals with developmental disabilities and their families by bringing together lawmakers with advocates to make sure people with developmental disabilities are included in decisions about public policy. The Council works with legislators and policymakers to serve as an impartial educational resource to inform public policy at both state and federal levels to better meet the needs of individuals with developmental disabilities and their families. The Council reviewed hundreds of bills this session that positively impact the lives of people with Developmental Disabilities when developing our Legislative Priorities for the 2011/2012 Legislative Session. We voted on the National Background Check bill as our top priority.

On a personal note, my son has a lifelong developmental disability and it is extremely important to me and my family that whoever serves my child, as a respite worker, a caretaker, or a provider of service, be fully screened by having their background checked by a national registry database, so that if that person has committed a crime or a felony, my family would be made aware of that person's history. In some communities near Massachusetts' borders, it is common for human service providers to employ residents from adjacent states (i.e. R.I., NH, CT, N.Y.). The existing Criminal Offender Record Information (CORI) checks do not capture data for out-of-state residents who work in Massachusetts.

In order to have competent and trustworthy individuals working in the best interest of my son, I need to know that these potential workers have not committed crimes in the past, and will not have the opportunity to create crimes in the future, especially as it relates to my son. It is important to have this national background check bill passed for the mere fact that without it, people in the Commonwealth will not know if a potential worker/individual who has worked or lived out of state, has committed crimes. It should be something that all potential employees should disclose to employers, but the fact remains that this does not happen. People are able to move state to state and not have their past catch up to them until it is too late.

Massachusetts
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(617) 770-7676 (Voice)
(617) 770-9499 (TTY)
(617) 770-1987 (Facsimile)

Thus, to avoid repeat offenses or to have a safeguard in place, so that people with disabilities are secure and safe, it is of utmost importance that this national background check bill be passed. Please support and pass the national background check bill. Not only will it help to maintain the quality of life for people with disabilities, but it will also put families' and caregivers' minds at ease, knowing their loved one is not a vulnerable target of potential abuse by a past offender of the law.

In summary, the Massachusetts Developmental Disabilities Council supports House Bill 523 and I ask that you pass this bill as well. We applaud Representative Marty Walsh for introducing such an important piece of legislation, ensuring that vendor agencies have a means to access a person's comprehensive criminal history. This legislation will remedy the danger of not knowing an individual's past crimes and will benefit people with developmental disabilities to have a quality of life, free from potential abuse. Think of it this way, would you want your loved one, in the care of a person who committed crimes? The easy and most logical answer is: Of course not! Please pass House Bill 523.

Thank you for your time.

Spillane: Bathroom scares compete with transgender protections

June 05, 2011 12:00 AM

"The Bathroom Bill."

That's what some of the "Christian" people, whose lives seem to be all about defining for everybody else what is "normal," like to call it.

"The Bathroom Bill."

They've designed this catchy little phrase as if they were high school bullies with a whole lot of experience about how to reduce the "weird kids" to tears. They've designed it, in fact, so they can smear the lives of women and men whose lives are already more than hard enough as having no more value than a dirty little slur.

How very "Christian" of them.

The Massachusetts Family Institute (which has a mighty narrow definition of the word "family") is leading the charge.

You know these folks. They believe they hold the exclusive rights to what it means to be a "family" and sternly warn John and Mary Q. Average about how they will be in great danger if society ever decides to be humane to the "less than" people.

In this case, the "less than" people are transgender men and women.

So The Family Institute website very seriously warns that the "Bathroom Bill" will put women "at risk since access to sensitive areas such as single-sex bathrooms, locker rooms and ... women-only fitness facilities will be open to anyone."

Huh?

You mean transgender people don't already use the public bathroom or locker-room of their choice? I didn't know that.

You mean that right now a straight guy wanting to dress as a woman and enter a ladies room to leer at, or assault women and girls, can't already accomplish that?

I didn't know that.

You mean we're going to deny the estimated 33,000 transgender residents in Massachusetts their right not to be discriminated against in the workplace, housing and public accommodations so we can protect ourselves from bathroom threats that don't even actually exist?

Here's a bathroom threat that actually does exist.

A transgender person whose sex is hard to tell — or who has difficulty "passing" for the sex he or she

identifies with — is stared at or harassed when using a public restroom.

This Wednesday, June 8, the Legislature's Joint Committee on the Judiciary will hold a public hearing on H00502, the Transgender Equal Rights Bill. The proposed law would ban discrimination against transgender men and women, and Dartmouth's freshman state Rep. Chris Markey, the region's only member of the Judiciary Committee, will be a key vote.

For the past four years, the Judiciary Committee has refused to report the bill out to the full Legislature. So Massachusetts, supposedly a leader on social issues, doesn't have the transgender protections that 14 other states have already enacted.

Gov. Deval Patrick, by the way, signed an executive order in February giving state workers transgender protections and so far there have been no reports of Statehouse bathrooms being flooded by molesters in bad drag. Or even good drag.

Keep your fingers crossed.

The transgender bill seeks to protect "gender identity and expression," and Rep. Markey said he wonders if that would open the doors for other types of expressions to receive civil rights protection.

Fair enough.

But activists argue that "expression" needs protection because transgender people often convey their identity through things like clothing, makeup, behavior, speech patterns and mannerisms.

You might be surprised at who else is pushing the Dangerous Bathrooms view. In addition to the "Family" folks, there's Dartmouth's own best-known Republican activist, Brock Cordeiro.

Cordeiro, legislative aide to Sheriff Tom Hodgson and Southeastern Massachusetts regional chairman of the state Republican Party, in 2009 put up an alarmist online message under the byline, "BNCordeiro" on the right-wing web site "Red Mass Group."

Under the heading: "Keep Men Out of Women's Bathrooms," he wrote that if the transgender bill passes, "Any man could legally gain access to facilities normally reserved for women and girls simply by indicating, verbally or non-verbally, that he inwardly feels female at the moment."

Cordeiro is concerned that the bill's "vague" wording will lead to men harassing women in bathrooms.

Really?

If we do the humane thing for transgender people, men are going to try to get into women's rest rooms claiming they "inwardly feel female at the moment?"

Wow, I wouldn't have imagined that would be a big problem, given that we already have strong laws against voyeurism and sexual assault on the books.

Transgender is a term that applies to men and women whose gender identity doesn't match the sex to which they were born. The term includes both cross-dressers and people who have had sex-reassignment surgery. It's about people whose sense of sexual identity is different from the nature of their bodies.

From Chaz Bono to tennis player Renee Richards, there's been lots of stories over the years about transgender people as they've gained the courage to come out of the closet.

But there's still plenty of prejudice out there.

Cordeiro described people who have undergone reassignment surgery as "self-mutilated" and victims of "gender identity disorder."

That sounds like a pretty antiquated psychological diagnosis in this day and age.

On the one hand, Cordeiro says transgender people deserve "community compassion," but on the other hand, he said he "probably supports" making surgically-reassigned individuals use the bathroom of their birth sex and just deal with "the stares."

If only it were just the stares.

A survey by the National Center for Transgender Equality and National Gay and Lesbian Task Force found that 79 percent of transgender people have reported being harassed; 31 percent being physically assaulted and 11 percent being sexually assaulted.

Some Massachusetts Republicans, however, think they have a corker of an issue with this "Bathroom Bill."

After all, there's no shortage of sympathy for continuing to make transgender people little more than a joke. Raise the issue of a transgender man or woman in your office or at your Fourth of July picnic and wait for the snickers, the double entendres, the winking jokes. You won't wait long.

You would not take that attitude, however, if you realized more about the reality of life for the transgender men and women among us.

Joan Stratton, a 60-year-old transgender woman from Mattapoisett, said that's why she speaks out publicly about her own story.

The former manager of her family's boatyard business, Stratton, now a mental health counselor, has worked with transgender people suffering from emotional issues connected to societal rejection.

She herself had a tough time finding a job, she said, when she first received her degree. The required CORI (Criminal Record Offender Information) background check for social workers turned up a couple of traffic violations under her former male name, outing her.

She didn't get jobs she was well-qualified for, she said, and has always wondered why.

Stratton is living her life publicly in the hopes that as more people come to personally know a transgender individual, their prejudices will decline.

Most transgender people, Stratton said, go out of their way to keep a low profile because of the rejection they've lived. And in order for them to feel like it's OK for them to be who they are in any circumstances, they need the same civil rights protections as others.

"We just want to be treated the same as everybody else," Stratton said.

And that, not bathrooms, is what the transgender bill is really all about.

Contact Jack Spillane at jspillane@s-t.com.

News

Conn. Senate passes gender identity bill

Saturday, June 4, 2011

By The Associated Press

HARTFORD — Connecticut has moved closer to adding transgendered people to the list of classes of citizens protected from discrimination.

Early Saturday morning, the Senate passed a gender identity protection bill on a 20-16 vote. The bill has already passed the House of Representatives, and Democratic Gov. Dannel P. Malloy said he would sign it into law.

"This bill is another step forward in the fight for equal rights for all of Connecticut's citizens, and it's the right thing to do," he said in a written statement issued shortly after the vote was taken. "It's difficult enough for people who are grappling with the issue of their gender identity, and discrimination against them has no place in our society."

Sen. Beth Bye, D-West Hartford, said the bill codifies a ruling by the Connecticut Commission on Human Rights and Opportunities that made it illegal to discriminate against transgendered people. People with gender identity issues have repeatedly asked the General Assembly to include the protections in state law, saying they've experienced discrimination with employment, housing and other matters.

"These are things that get in the way of real people living their lives fully," said Bye, adding how 13 other states provide similar protections.

As was the case in last month's lengthy debate in the House of Representatives, some Republicans raised concerns about restroom usage, whether a man could misuse the transgender law to enter a women's restroom. The Family Institute, a conservative group that dubbed the legislation "the bathroom bill," has questioned whether sex offenders could misuse the law.

GOP efforts to amend the bill, such as exempting restrooms, locker rooms and boarding houses from the law, each failed.

Some Democrats said it was offensive to the people who've asked lawmakers for the legal protections to refer to the legislation as "the bathroom bill." Longtime Sen. Eric Coleman, D-Bloomfield, said he had never seen the degree of "mean-spiritedness" before that he has seen regarding this bill.

Sen. Len Suzio, R-Meriden, who supported the amendments, said it was unfair to suggest that people who question the transgender rights bill are bigots. He said they simply respect the customs and practices of the forefathers.

"We should not jettison them and throw them overboard," he said.

At times, senators brought up personal experiences to make their points during the late-night debate.

Sen. Edward Meyer, D-Guilford, told the story of his lifelong friend Richard Raskind, who later became Renee Richards, a

former professional tennis player who underwent sex reassignment surgery and made headlines for challenging the U.S. Tennis Association's decision not to allow her to enter the 1976 U.S. Open. The New York Supreme Court ruled in her favor.

"The change was really remarkable. It was totally genuine," said Meyer, adding how his friend not only physically became a woman but looks like a woman and thinks like a woman.

"To send Renee Richards into a men's bathroom, that would be very dangerous, very dangerous, because Renee is a woman," he said with a chuckle, adding how it would be "utter discrimination" to prevent her from using a women's restroom.

"I want you to think about Dick Raskind and Renee Richards and what it means to change your gender," Meyer said. "It's a real change. This is not someone who has put on women's clothes. This is a real change. We're talking about substance."

AP-WF-06-04-11 0131EST

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June 3, 2011

The Honorable Eugene L. O'Flaherty
Joint Committee on the Judiciary
State House Room 136
Boston, MA 02133

Dear Representative O'Flaherty,

As Vice President of the American College of Pediatricians, I urge the Judiciary Committee to reject House Bill 502 because it threatens the well-being of children.

Transgendered individuals suffer from Gender Identity Disorder (GID) as defined in the Diagnostic and Statistical Manual (DSM-IV-TR) of the American Psychiatric Association. GID is a psychosexual developmental disorder, not an innate and immutable trait. GID is not hardwired by DNA. GID in childhood causes significant distress, but if treated early, may be cured.

HB 502 promotes the dangerous myth that GID is equivalent to race: present at birth and unchangeable. The ramifications of this bill if passed will be far reaching. Rather than be referred for appropriate counseling as soon as possible, gender-confused children will have their psychosexual disorder reinforced, potentially to a point of irreversibility, and thereby experience life-long suffering that is entirely preventable.

Adults with intractable GID who pursue hormone therapy and sex-reassignment surgery deserve compassion and accommodations that do not violate the safety of the greater community. This is where HB 502 fails, and gravely so as explained below.

Approximately 0.5% of the adult population identifies as transgendered. House Bill 502 will allow the use of public restrooms, changing rooms, locker rooms and the like, based upon one's "gender identity or expression," which the bill defines as "a gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual's assigned sex at birth." Schools and

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their sports teams are not exempt. This means that any male could legally gain access to facilities reserved for girls or women by indicating that he "identifies" as a female at that moment. Consequently, passage of HB 502 will threaten the privacy rights of 99.5% of citizens in general, and the safety of women and children in particular.

Clearly, the language of HB 502 is dangerously vague and medically misleading. Its passage will have far reaching negative consequences. I again urge you – for the sake of our children – reject HB 502.

Sincerely,

Michelle A. Cretella, MD
Vice President
American College of Pediatricians

CC: Members of the Joint Judiciary Committee
Massachusetts Family Institute