

## Court Rulings Support Rights of People with Mental Illness

The ACLU-WA is involved in two high-profile lawsuits seeking to reform our state's broken mental health system. In one, a federal court in December found that persistent delays in providing competency evaluation and restoration services to pre-trial detainees in jail violates due process rights. The ruling came in a lawsuit (*A.B. v. DSHS*) filed in U.S. district court on behalf of individuals who have experienced lengthy delays in receiving these court-ordered services in state criminal cases. A trial to determine a remedy is set to begin on March 16.

"This ruling confirms that the Constitution protects everyone, including people with mental illness. The state may deprive individuals with mental illness of their liberty before a criminal trial only if it provides the care and treatment needed to evaluate and restore those individuals to mental competence," said Sarah Dunne, ACLU-WA legal director.

Under state law, whenever there is reason to doubt that an individual with mental disabilities is competent to stand trial, the trial court is to order an evaluation to determine his

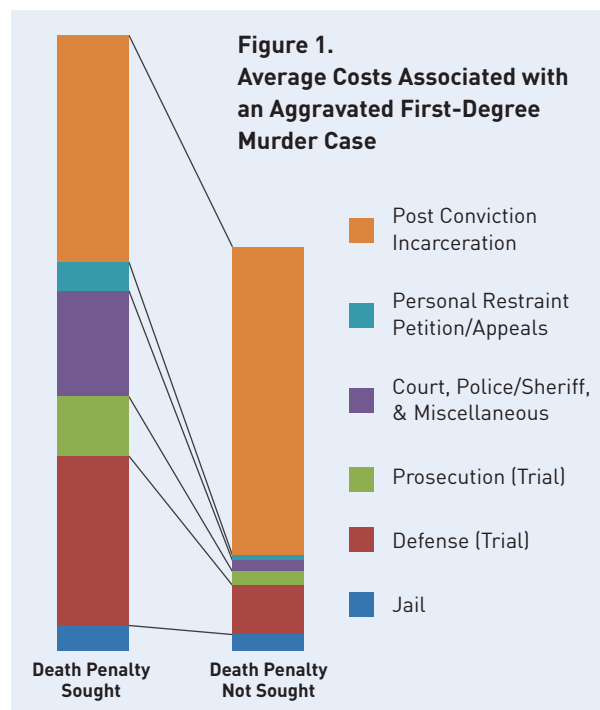
or her competency. The law charges Eastern State Hospital (ESH) and Western State Hospital (WSH) with evaluating and treating these individuals. If their competency is restored, their criminal cases may proceed; if it is not restored, the criminal charges are dismissed. During the evaluation and restoration periods, speedy trial rights are automatically waived, and the criminal proceedings are stayed.

Unfortunately, the state has failed to perform these services on a timely basis. Stays of criminal proceedings pending evaluation and restoration of competency often last for months. As a result, individuals with mental health disabilities have languished in city and county jails without appropriate mental health treatment while awaiting transport to ESH or WSH.

Warehousing these vulnerable people in jail is harmful. The delays cause individuals to experience needless deterioration in their mental health as they sit in jails – frequently in solitary confinement for 22 to 23 hours a day – for weeks and months on end. Jail disciplinary systems

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## Study: Death Penalty Cases Cost Much More Than When Death Not Sought



A just-released study by Seattle University professors has found the average cost of a death penalty case in Washington is over \$1 million more than for a similar case in which the death penalty is not sought. The researchers found that death penalty cases cost \$3.07 million, compared to \$2.01 million (in 2010 dollars) for non-death penalty cases.

That means that costs related to pursuing the death penalty are about 1.4 to 1.5 times more than when a prosecutor does not seek death. The study also noted that pursuit of the death penalty has become more costly in recent years.

The study, "An Analysis of the Economic Costs of Seeking the Death Penalty in Washington State," is the first comprehensive examination of the spectrum of costs from the beginning of trial proceedings through incarceration and execution. It looked at 147 aggravated first-degree murder cases in Washington. The report documents costs in different parts of the criminal justice system and explains the complexity of capital cases that leads to increased costs. Among its findings:

## SUPPORT CIVIL LIBERTIES IN THE 2015 LEGISLATURE

### DEBTORS' PRISONS

Reform the system of court-imposed debts, known as Legal Financial Obligations, so that people aren't punished for being poor.

### HEALTH CARE ACCESS

Ensure that religious doctrine doesn't interfere with the health care decisions of patients and their providers.

### GOVERNMENT DRONES

Adopt reasonable regulations to ensure that privacy and accountability are protected when government uses drones in Washington.

### DEATH PENALTY

Replace the death penalty with life in prison without the possibility of parole

### VOTING RIGHTS

Provide a statewide framework to change unfair voting systems and ensure all communities have a meaningful voice in local elections.

*See pages 4-5 for the ACLU-WA's agenda in Olympia this session.*

- The average trial-level defense costs related to pursuit of the death penalty are 2.8 to 3.5 times more expensive than cases not seeking the death penalty.
- Average prosecution costs in death penalty cases are 2.3 to 4.2 times more expensive.
- Court, police/sheriff, and miscellaneous costs related to pursuit of the death penalty are 3.9 to 8.1 times as much.
- Assuming a life sentence for all offenders, post-conviction lifetime incarceration costs are .7 to .8 times that of a non-death penalty case.
- Average jail costs related to pursuit of the death penalty are 1.4 to 1.6 times more than for non-death penalty cases.

The report noted that the Washington Supreme Court has emphasized the need for defense counsel to be specially trained and certified, to be "learned in the law of capital

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# Civil Rights: The Legacy and the Work to Be Done

Enacted 50 years ago, the Civil Rights Act was a key part of a series of laws that made the 1960s a watershed for equality in this country. No one can deny the impact it has had on a host of rights that are easily taken for granted today: sitting at a lunch counter, going to school, voting or getting a job.

And no one can deny the great distance between the promise of the Civil Rights Act and the reality. Yes, everyone has the right to sit at the lunch counter, but can you afford to sit at the lunch counter? The public schools are open to all, but why are African American boys disciplined more harshly than others for the exact same conduct?



Our civil rights laws do not stop the policies and practices that result in arrest and imprisonment of black and brown Americans far beyond their rates of crime. With 5% of the globe’s population, the “Land of the Free” holds 25% of the world’s prisoners.

Race discrimination, especially against African Americans and Latinos, is as institutionalized now, but in different ways, as it was before the civil rights laws of the 1960s.

I agree with Paul Butler, who wrote in his book *Let’s Get Free, A Hip-Hop Theory of Justice* that this country’s mass incarceration “represents the most urgent challenge to democratic values since the civil rights era.” He added that “If we fail to respond, our country will become a police state. If we act thoughtfully, however, the US can not only be saved but improved, just as the civil rights movement did for us.”

We need to dramatically transform the criminal justice system. Here are key areas where we must work to reclaim justice. The ACLU-WA is deeply committed to the long-term work that is required.

**Too many crimes.** We must reduce the number of laws that lead to incarceration. The 40-year War on Drugs is a root cause of the over-incarceration crisis. In less than three decades, the U.S. prison population exploded from 300,000 to more than two

million, with the majority of the increase for drug violations. This has been especially devastating to communities already marginalized by race and poverty.

Washington state’s new approach to marijuana, I-502, was the culmination of 10 years of work by the ACLU-WA. Already it is keeping 10,000 people a year from being charged with crimes. Now we must consider options other than the criminal justice system for other drugs.

There are several hundred laws in WA that can make you a felon. We have launched a massive data collection project to gain a better picture of the nature and scope of criminalization in Washington. We are analyzing 20 years of arrest and prosecution data to help determine where and how we can best shrink the criminal justice pipeline. We must limit the use of incarceration to those occasions when it is the only method to protect public safety and must find alternate, effective sanctions for other crimes.

**End the school-to-prison pipeline.** Kicking kids out of school and leaving them on their own is not going to improve their education or their attitudes. Today, conduct that once would have been handled by the principal now can land a child in juvie detention. We are working to replace harsh, biased, and ineffective discipline practices with restorative discipline practices based on fairness, community, and education. Speaking of kids, we must prohibit any juvenile from being tried in the adult court system and eliminate long sentences for young adults, whose brains are not fully formed until around age 26.

**Stop biased and violent policing.** African Americans now constitute nearly 1 million of the total 2.3 million incarcerated population, and they are incarcerated at nearly 6 times the rate of whites. The path to incarceration begins with an arrest. Police departments need to undergo a major overhaul – one that moves them away from a warrior mentality and toward a guardian perspective, accountable to our communities. In 2011, the ACLU along with 34 community groups called upon the Dept. of Justice to investigate excessive use of force and racial bias by the Seattle Police Department. The SPD remains under a consent decree, with reformers working to rewrite use of force policies and to push for training to implement new bias-free policing.

## EVENTS CALENDAR

- FEBRUARY 17:** *Drone Lobby Day* in Olympia.
- FEBRUARY 22:** *ACLU-WA at Urban Poverty Forum* in Seattle.
- MARCH 7:** *ACLU-WA Annual Meeting*, 10:00 am at 901 5th Ave, Seattle - 5th Floor Conference Room, followed by *ACLU-WA Board Meeting*.
- MARCH 25-27:** *ACLU-WA at Emerald City Comic-Con*.
- MARCH 27:** *ACLU-WA Student Conference on Civil Liberties* in Seattle – for high school students.
- APRIL 25:** *ACLU-WA Board Meeting* in Seattle.

For more information about these and other ACLU events, visit [aclu-wa.org](http://aclu-wa.org) or call the ACLU office at 206.624.2184

**CIVIL LIBERTIES** is the newspaper of the American Civil Liberties Union of Washington, published by its Communications Department. It is sent to the members of the ACLU of Washington and is not a subscription publication.

The **ACLU-WA** comprises two separate corporate entities, the American Civil Liberties Union and the ACLU Foundation. Although both the American Civil Liberties Union and the ACLU Foundation are part of the same overall organization, it is necessary that the ACLU have two separate organizations in order for the ACLU to do a broad range of work in protecting civil liberties. This newsletter collectively refers to two organizations under the name “ACLU.”

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Civil Liberties is published three times a year — Fall, Winter and Summer.

**Ensure adequate public defense for the crimes that remain.** In 2013 the ACLU-WA won a legal challenge to the shockingly deficient misdemeanor public defense systems in Mount Vernon and Burlington. Two part-time attorneys handled over 2000 misdemeanor cases. They spent little time on the cases, didn’t investigate the facts, and rarely, if ever, conferred privately with their clients. We intend to build on that win to make significant changes statewide.

**Reduce barriers to re-entry.** Our country must undo the creation of a perpetual underclass caused by barring people with criminal histories from meaningful opportunities to re-enter society, get a job and get a home. Yet studies have shown that people with criminal records older than seven years are no more likely to

commit a crime than those without a record; and that having stable housing and employment decreases a person’s chances of committing a new crime.

Through a class action lawsuit, we stopped a major tenant screening agency from unlawfully providing information that had prevented hundreds of prospective tenants from getting housing. And with the assistance of volunteer attorneys, we have helped over 500 individuals traverse barriers based on old criminal records. Now we are looking for even bigger solutions.

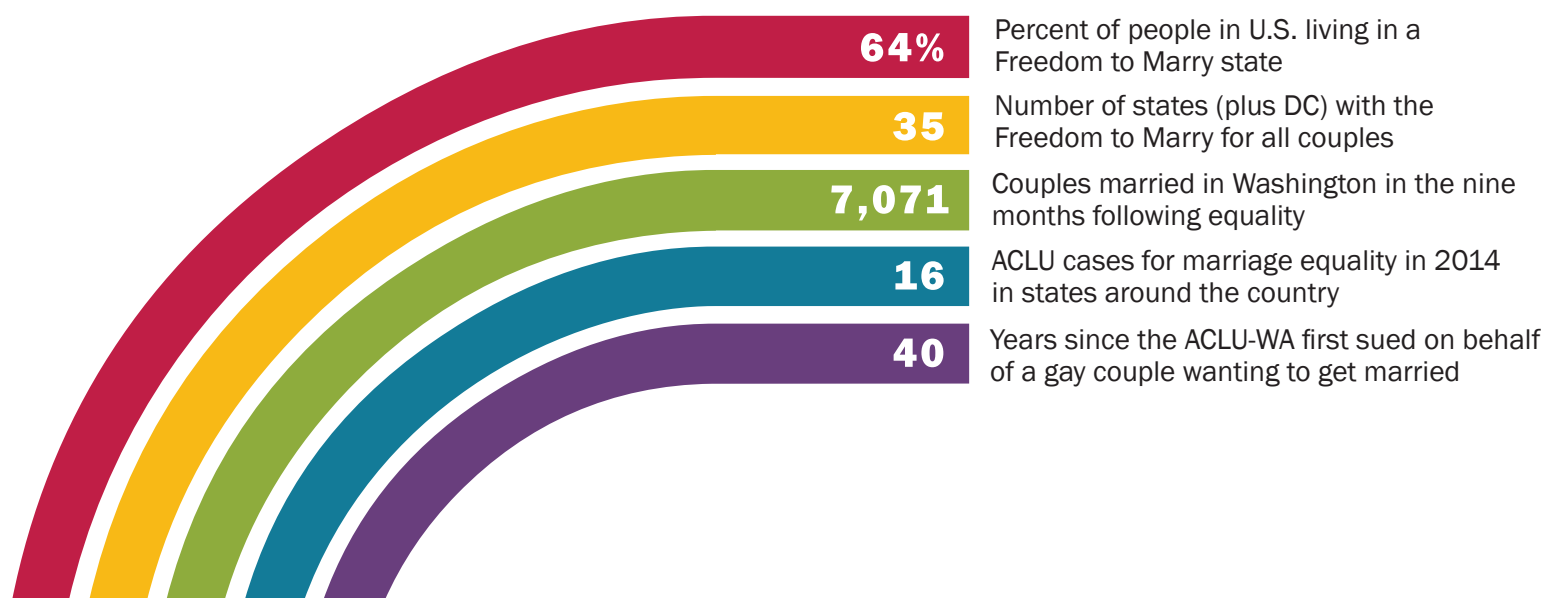
All of this is to say that 50 years after the ground-breaking Civil Rights Act, we still have a lot of ground to break. Thank you for being part of the movement for civil rights and, as Paul Butler describes it, “the beautiful struggle for justice.” ■

# Civil Liberties by the Numbers: Together We Win

From spreading the freedom to marry to over half the country to reversing the course of the war on drugs, ACLU supporters have helped defend and extend our civil liberties in many important ways. Here are a few highlights from the ACLU-WA annual report for 2014, which presents statistics and dramatic graphics that illustrate our successes for civil liberties. Want to see more? The full report is available online at [www.aclu-wa.org](http://www.aclu-wa.org).

## PERSISTENT

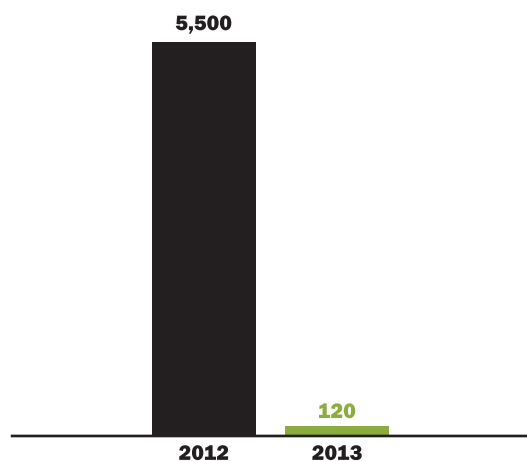
We are dedicated to **LGBT RIGHTS** and equality.



## INNOVATIVE

After years of legwork, we drafted the initiative that **ENDED SENSELESS MARIJUANA PROHIBITION.**

NUMBER OF MARIJUANA COURT FILINGS - AGE 21+

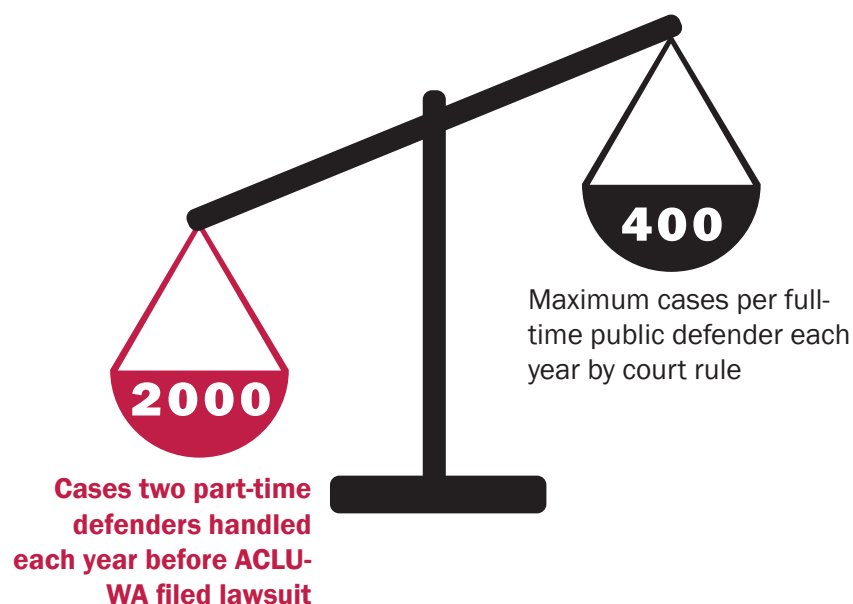


**\$20,000,000**

Amount Washington taxpayers spent each year on marijuana-related arrests and charges prior to legalization

## EFFECTIVE

This year we had a momentous victory for **THE RIGHT TO DEFENSE** in *Wilbur v. City of Mount Vernon*.





# OLYMPIA 2015

# Support Civil Liberties in the Legislature

**T**he 2015 Washington Legislature convened on January 12 for a 105-day session, the “long session” of our state’s two-year legislative cycle. Democrats now hold a slim majority in the House, while Republicans control the Senate by a narrow margin. So, gaining some bipartisan support will be essential to getting bills passed.

The ACLU is well-positioned to reach out to members of both parties, as we are strictly non-partisan and many of our issues have appeal that transcends partisan differences. Proposals to rein in government surveillance and other privacy protection measures, for example, have strong support within both parties. And criminal justice reform measures are gaining new traction as part of a shift from being “tough on crime” to being “smart on crime.” As seen in the state’s decision to legalize marijuana, this change is being spurred on by cost considerations in an era of tight government budgets.

Here are highlights of some key bills impacting civil liberties. Please check our website ([aclu-wa.org](http://aclu-wa.org)) for updates, as well as information on other issues on which the ACLU-WA is working in Olympia.



## REPLACING THE DEATH PENALTY

— SUPPORT —

Our criminal justice system should treat all people equally. Yet the death penalty is applied unevenly in our state, depending on a defendant’s race and the county in which the crime was committed. Further, scientific studies have shown that the capital punishment does not deter crime more than long sentences. And pursuing the death penalty has not proven to be effective: since its reinstatement in Washington in 1981, nearly 80 percent of death sentences have been overturned in cases that reached final disposition.

The risk of executing an innocent person means that the death penalty system must have safeguards, and these are costly. Capital cases require additional resources for investigation, case preparation, jury selection, trial, sentencing, and appellate review. A rigorous study by Seattle University criminologists recently found that the average total costs to the justice system related to pursuit of the death penalty were over \$1 million more per case than in similar non-death penalty cases.

The death penalty has failed Washington as a public policy. Instead of trying to fix an unfixable system, the legislature should replace it with a life sentence with no possibility of parole. The sentence should include a work requirement so restitution can go to victims’ families. Added to the ACLU-WA’s team working on the issue this session are John Engber, former state director for Sen. Patty Murray, and Carolyn Logue, a well-respected business lobbyist.

## ENDING DEBTORS’ PRISONS

— SUPPORT —

Many people convicted in Washington receive Legal Financial Obligations (LFOs) – fees, fines, costs, and restitution imposed by courts on top of criminal sentences. The current LFO system punishes poor people for their poverty. Without guidelines for determining what an individual can reasonably afford to pay, the system burdens the poor with uncollectable debt. Interest accrues on this debt at 12% a year, even while a person is incarcerated. As a result, people with limited finances remain tethered to the criminal justice system for years.

Individuals who have otherwise served their sentences can be arrested and jailed for non-payment of LFOs. While this sanction is supposed to be reserved for those who willfully refuse to pay, all too often courts lock up people who simply are unable to pay. Thus, the system creates modern-day debtors’ prisons (as shown in a report issued in 2014 by the ACLU-WA and Columbia Legal Services). Further, restitution to victims is not prioritized: Some courts take their share of LFO payments first, to fund their own collection systems, before any money is allotted to the restitution of victims of crime and their families.

The state’s current system for LFOs is unfair, burdensome, unproductive, and is in urgent need of reform. The ACLU-WA supports legislation to make the system fairer. It will promote public safety by assisting the successful re-entry of individuals and will prioritize restitution to crime victims and their families.

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## REGULATING GOVERNMENT DRONES

— SUPPORT —

Highly mobile unmanned aerial vehicles, drones can be useful to police in search-and-rescue operations and hostage situations. They also give government unprecedented capabilities to engage in extensive, relatively cheap surveillance. But Washington has no regulations on how the government may use drones and lacks protections for individual privacy. The legislature needs to adopt clear statewide regulations so that the state can have the benefits of this new technology without drones being used for law enforcement fishing expeditions without suspicion of wrongdoing.

The ACLU-WA supports legislation that would require local or state government approval before an agency acquires drones. Law enforcement would be able to use drones during emergencies, for routine regulatory enforcement, and for missions that don't involve collecting personal information, but otherwise would need a warrant. Agencies would have to report how and for what purposes they are using drones.

The 2014 legislature passed – with strong bipartisan support – a bill to regulate government drones, only to have Gov. Inslee veto it. While doing so, he stated a commitment to protect citizen privacy in the future. Lawmakers should again adopt legislation to provide bright lines for drone use, rather than leaving drones to proliferate unregulated.

## LOBBY FOR LIMITS ON DRONES

Join us in Olympia to urge the Legislature to set common-sense limits on government use of drones. ***Make your voice heard!***

**Tuesday, February 17th at 9:30 am**  
**Washington State Capitol**

John A. Cherberg Building, Conference Room ABC  
 304 15th Ave. SE, Olympia, WA 98501

If you're interested in participating in this event, please RSVP to [aclu-wa.org/events](http://aclu-wa.org/events). Questions? Call us at **206.624.2184**.

## STRENGTHENING VOTING RIGHTS

— *SUPPORT* —

In a healthy democracy, all voices need to be heard. But in some jurisdictions in Washington, outdated election systems prevent all communities from being represented in local government. Where bloc voting occurs, some communities do not get a fair chance at electing candidates of their choice. While the federal Voting Rights Act has been an important tool for defending voting rights, its focus is on litigation in federal court, which can be complex and very costly.

Washington needs its own, more flexible voting rights law. The Washington Voting Rights Act (WVRA) empowers local governments to take the lead in fixing election systems that exclude some communities from having a voice in local government. It provides a roadmap, data, and timetables for jurisdictions to avoid litigation, and provides a fair process for when litigation becomes necessary. It is modeled after a law that has worked to improve the fairness of local elections in California. Its adoption would strengthen local democracy and make governments more accountable.

Last session, the WVRA passed the House and came within a vote of passing from the Rules Committee to a vote by the full Senate. The ACLU-WA is working with the Win/Win Network, One America, and other voting rights and civil rights allies to win passage of the bill.

## PROTECTING PATIENTS & PROVIDERS

— *SUPPORT* —

All patients deserve medically accurate and evidence-based health care. Yet a sharply increasing number of health systems in Washington are governed by religious doctrine that prohibits or limits the information, referrals, and services a health provider may provide to a patient. Such prohibitions hurt all patients, and they especially harm women, the LGBT community, and people who need end-of-life services.

The legislature should act to protect the patient-provider relationship, to ensure access to lawful, medically appropriate services. The ACLU-WA supports passage of a law that would ensure patients are able to make health care decisions with their provider free of religiously based restrictions.

## TAKING DNA UPON ARREST

— *OPPOSE* —

Proposed legislation would allow the collection of DNA samples from people arrested who have not yet been convicted of any crime. Doing so would be invasive and would constitute a search that violates the Washington Constitution, which has strong protections for personal privacy. DNA contains far more information than a fingerprint – it comprises an individual's entire genetic blueprint. More than 1,000 genetic conditions or traits can be read from our DNA, including susceptibility to many diseases, mental illness, and personality predispositions. Because DNA is inherited, information also can be inferred about family members.

Taking DNA samples from large numbers of people is not an effective approach. Many arrestees are never convicted of a crime – at least 40% in Washington state – and are not more likely than others to commit one. Collecting DNA on arrest has overloaded crime labs in other states, causing backlogs and delays to critical functions like testing rape kits. Minorities are more likely to be arrested, so it would worsen existing racial disparities in the criminal justice system. And taking DNA on arrest would cost millions of dollars – money better devoted to solving cold case, preserving DNA from crime scenes, and supporting victims of crime.

## OTHER BILLS

The ACLU-WA is working on numerous other measures this session, including:

- Seeking to fix the disconnect between I-502 and the state's medical marijuana law;
- Creating a statewide legal framework for police body cameras that focuses them on police accountability rather than general surveillance;
- Fending off efforts to carve out new exemptions to the Public Records Act;
- Preserving DNA to provide evidence in rape cases and other crimes;
- “Banning the box” – i.e., restricting unnecessary criminal history inquiries in the hiring process;
- Limiting the use of restraints and isolation on public school students;
- Supporting community-based prevention, intervention, and diversion approaches that provide solutions to the root causes of the state's mental health crisis, while opposing measures that loosen standards for depriving people of their liberty;
- Scrapping the state's Subversive Activities Act, a Cold War-era measure still on the books despite having been ruled unconstitutional. ■

## JOIN THE ACLU-WA E-MAIL ACTIVIST NETWORK

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**click on the “Take Action” button**



# Body Cameras: A Call for Careful Consideration

*By Kathleen Taylor, ACLU-WA Executive Director & Jared Friend, ACLU-WA Technology and Liberty Director*

Recent public outcry for police accountability and reform has been sparked by an epidemic of police violence targeted disproportionately at people of color. Advocacy groups, the public, and the president alike have touted body-worn cameras as a potential cure for police misconduct. If officers wear cameras, runs the thinking, we would have a clear visual record of what actually happened and who was at fault in disputed encounters with civilians.

But before we rush to embrace body cameras as an answer to police accountability concerns, let's carefully consider whether the value of body cams to the public is being oversold – and whether they bring a host of new problems that have no easy solutions.

Keep in mind that police body cams do not record officers – their lenses are focused on civilians. They are worn on the chest or stem of the officer's glasses and so the field of vision is limited. Amid the confusion of a fast-moving incident, they provide just a partial, potentially obstructed, and often unclear picture of what transpired.

And since one doesn't know when an encounter will turn problematic, the cameras must always be on. Otherwise we'll see repeats of Spokane's experience, when the first police shooting since the launch of its body cam program was not recorded because the officer's camera was off. If cameras are to be effective for accountability, officers cannot have the discretion to turn cameras on and off as they choose. And the department must spell out sanctions for officers who fail to follow the always-on policy.

Law enforcement officials don't want to limit the use of camera footage to police oversight uses. But without this restriction, police will become roving tools of mass surveillance. Cameras will document the activities of not only suspects, but also countless victims, witnesses, bystanders, and people simply out in public. Mission creep will be a near-certainty, leading to dragnet surveillance of protesters and fishing expeditions through images of people not suspected of wrongdoing.

Body cameras also create other risks to privacy. Because government transparency is a crucial principle of democracy, journalists and the general public have the right to access government records. So, video captured by these cameras will be accessible to anyone and everyone through public record requests. Sensitive footage of people in emotional crisis, domestic violence victims, and other people in vulnerable circumstances will become publicly available. And it is easy to imagine some people creating "best of drunk and disorderly conduct" YouTube channels for commercial gain or harassment purposes.

Crafting ways to protect individual privacy while still preserving the public's access to government records is a very complicated proposition. Technologically limiting access and use, for both the government and the public alike, of all body camera video unless it is the subject of a police misconduct complaint may be the only reasonable way to address this.

Even when an officer-involved death has been recorded, the video evidence does not necessarily ensure accountability. The officers who choked Eric Garner to death in New York are still on the job despite a clear video of the killing and violation of NYPD policy. Body cams are not a quick solution to police misconduct against communities of color.

We need real accountability and enforcement programs that target and punish misconduct combined with the long, hard work of changing police culture by training officers in de-escalation tactics, holding supervisors responsible for officers' misconduct, and teaching everyone in law enforcement to recognize and remedy their own biases. At very best, body cameras can only be one component of a much larger, comprehensive plan to address the problems entrenched in our police departments. At worst, they are a technological snake oil -- a proposed cure-all that fails to address the underlying problems of police misconduct and bias and instead brings us one step closer to a repressive surveillance society.

To date, no police department in this state has proposed policies or guidelines that adequately address the many concerns raised by body cams. Before adopting body cams as a "fix" for police misconduct, let's consider very carefully what the devices are going to do for us, and to us. ■

# Jared Friend, Marlena Torres Join ACLU-WA Staff



Jared Friend

**Jared Friend** has joined the ACLU-WA staff as Technology and Liberty Director. Jared most recently worked as an attorney in the Seattle office of Cooley LLP, specializing in technology transactions, privacy, and data protection. He grew up in the Seattle area and Indonesia and earned a Bachelor in Fine Arts degree in digital arts and experimental media from the University of Washington. He attended law school at the University of California, Berkeley in its Law and Technology program. While there he spent a good deal of time working for the Samuelson Law, Technology, and Public Policy Clinic; his clients included the Electronic Frontier Foundation, and he worked on projects ranging

from biometric privacy issues to copyright reform.

"I am thrilled to be joining the ACLU of Washington and am excited to be focusing full-time on issues I care so deeply about," Friend said. Among his top interests are music and movies, computer security research, and board and video games.

**Marlena Torres** is the ACLU-WA's new Director of Finance and Administration. Marlena is a CPA and worked for nine years at the accounting firm Moss Adams, primarily serving non-profit organizations and institutions of higher education. For the past three years, she worked at the Berklee College of Music in Boston, most recently as Senior Director for Budget and Financial Planning. She grew up in New Mexico and received Bachelor's and Master's degrees in Business Administration from the University of New Mexico.

"I have always wanted the opportunity to work for an organization that makes a difference for others and helps make our country a better place. I feel honored to join the ACLU of Washington team," said Torres. She is an avid football fan and likes to cross-stitch, hike, bike, read, and cook.

Torres is succeeding **April Williamson**, who is retiring after 23 years with the ACLU-WA. April's organizational skills were vital as the ACLU-WA expanded to a staff of more than 30. She developed reporting systems and maintained our records in ways that enable us to understand all our financial actions.



April Williamson

"April has been a huge part of our successes over the past two decades. She kept us on the straight and narrow path of financial accountability and clarity, which is crucial for an organization like ours," said executive director Kathleen Taylor. "And she's been a wonderful source of reading lists, cat jokes, and dry humor." ■



Marlena Torres

# ACLU Challenges NSA Surveillance

The Ninth Circuit Court of Appeals in December heard oral argument in Seattle in an ACLU case challenging the NSA's phone records surveillance program.

Anna Smith, a nurse in Coeur d'Alene, filed her lawsuit (*Smith v. Obama*) in 2013, shortly after the government confirmed that the NSA was collecting telephone records on a massive scale under Section 215 of the Patriot Act. A Verizon customer, Smith argues the program violated her Fourth Amendment rights by amassing a wealth of detail about her familial, political, professional, religious, and intimate associations.

After the district court in Idaho ruled against Smith in June 2014, the ACLU and the Electronic Frontier Foundation (EFF) joined the case as co-counsel to assist in the appeal.

Two similar ACLU cases have been argued before appeals courts and are awaiting rulings: In November, the ACLU and EFF presented oral argument in the appeal of *Klayman v. Obama*, in which a district court in Washington, DC had found the NSA program to be likely unconstitutional. In contrast, a New York district court in *ACLU v. Clapper* sided with the government. ■

# It's Time for a Single Marijuana Law in Washington

By Alison Holcomb, Director, ACLU Campaign to End Mass Incarceration

Lawmakers face many competing priorities, but it's important they clean up Washington's medical-marijuana mess. Before licensed marijuana retail stores began opening last summer, legitimate reasons existed to tolerate some of the commercial activity that's been squeezing itself into gaps in the medical-marijuana law. Now, however, it's time to stop winking and nodding. Everyone who wants to make money selling marijuana ought to play by the same rules, and we finally have a set of rules under Initiative 502.

I-502 did not legalize "recreational" marijuana. I-502 created a system for regulating commercial marijuana activity, regardless of the intended use of the product. Products for patients with terminal and debilitating medical conditions arguably should be held to higher standards, which could be added to I-502's baseline. But it's time for businesses not willing to comply with at least the same requirements as I-502 producers and retailers to close up shop, and the Legislature needs to make that explicit under the medical-marijuana law.

To be fair, the current medical-marijuana mess grew out of real and desperate necessity. Before drafting Initiative 502 and working with legislators on multiple medical marijuana, decriminalization and legalization bills, I represented medical-marijuana patients, providers, casual users, growers and international smugglers in city, state and federal courts across Washington for more than a decade.

In 1996, I defended a man tried in King County Superior Court on felony charges for growing marijuana in his home for his own personal use. He had been involved in a near-fatal motorcycle accident 10 years earlier that had permanently damaged his skeleton, larynx, and optic nerve. Marijuana alleviated his debilitating pain and spasms, and made it easier for him to swallow, speak and work as a carpenter. But because growing marijuana was a felony under Washington state law, his home was raided, and he was tried. The jury ultimately deadlocked. Two years later, Washington citizens passed Initiative 692, our state's medical-marijuana law.

The problem with I-692 was that it didn't provide either legal or practical access to marijuana. Technically, the initiative gave patients nothing more than a codified version of the medical necessity defense my client had raised. Despite legislative amendments in 2007, 2010 and 2011, today's Medical Use of Cannabis Act still only provides an affirmative defense patients can raise at trial — after search, seizure, arrest and prosecution. However, the practical impact of I-692's passage was much greater. Most sheriffs, police chiefs and prosecutors don't want to waste time bringing cases a jury is likely to throw out, and I-692's 59 percent majority vote sent a strong message that voters don't want sick and dying people treated like criminals over marijuana.

The trick has been sorting out who is truly sick and dying, and that challenge has spawned a vibrant "gray market" medical marijuana industry. According to RAND researchers, approximately 750,000 Washington residents — 1 out of every 9 men, women and children — likely have used marijuana in the past month.



Alison Holcomb

*“The point of passing I-502 was to replace prohibitionist policies and practices with an aboveboard regulatory approach — and that approach is broad and flexible enough to encompass all businesses.”*

Before I-502's passage, all of them were considered criminals under the law. However, medical-marijuana authorizations, like prescriptions for “medicinal whiskey” during Prohibition, offered marijuana users a new legal defense. Moreover, authorizations allow people to grow as many as 15 marijuana plants and possess much more than I-502's limit of a single ounce — up to 24 ounces, or 1.5 pounds. It's easy to see the financial opportunities for doctors with loose authorization practices, and questionable “patients” willing to sell their surplus to unregulated dispensaries holding themselves out as “collective gardens.”

One option some legislators have considered for discouraging fraud and enhancing enforcement is the creation of a state registry of qualifying patients and their authorizing physicians — a system similar to the prescription monitoring program administered by our state Department of Health. Washington remains the only medical-marijuana state that does not have some form of government registry of patients.

Setting aside the questions of cost and actual enforcement efficacy, many Washington patients understandably object to the idea of a registry. In addition to piercing physician-patient confidentiality and compromising medical privacy, most registries create lists of individuals engaged in federal crimes, easily obtainable via subpoena. In Michigan, a judge ordered the state to turn over registry records in a federal criminal investigation. In Hawaii, a reporter obtained registry information just by asking for it.

The simpler path forward is to eliminate differences between I-502 and the medical-marijuana law that undermine the former and incentivize abuses of the latter. Allow all adults to grow and possess the same small amounts of marijuana, regardless of whether they use it for medical purposes or pleasure. Colorado, Oregon, Alaska and Washington, D.C., all now allow adults to grow their own marijuana. Amend the 1,000-foot location restrictions for licensed stores, or license home delivery for everyone. Collapse the three-tier tax structure into one tax that would be levied at the point of sale, and keep licensing producers and retailers to increase supply and drive down prices.

Once these changes are made, all adults would have the same option to grow their own marijuana or purchase it from a store, and they won't need a medical authorization for either. Then, the medical-marijuana law could be retooled for patients not accommodated by I-502 — those under the age of 21. A stronger argument can be made for state agency oversight of the medical use of marijuana by young adults, teens, and children.

Providing patients access to quality marijuana products and advice does not require, and should not be used to justify, rewarding gray market entrepreneurs with unfair competitive advantages over peers who are complying with state licensing and regulatory requirements. The point of passing I-502 was to replace prohibitionist policies and practices with an aboveboard regulatory approach — and that approach is broad and flexible enough to encompass all businesses. ■

## Holcomb Heads National ACLU Effort to End Mass Incarceration

ACLU-WA criminal justice director Alison Holcomb has been selected as the national director of the ACLU Campaign to End Mass Incarceration. The campaign seeks to reform criminal justice policies that have increased incarceration rates dramatically during a period of declining crime — and exacerbated racial disparities.

"We've had 40 years of widening the criminal justice net too far and have relied too heavily on punishment to address social and health problems," Holcomb said. "We've drained coffers and cut people off from jobs, housing, and family stability — the very things they need to succeed in society."

The nation's adult jail and prison population numbers over 2.2 million with one in 100 adults behind bars, the highest incarceration rate in the world. The ACLU will work to cut that number in half by 2020. Bolstering the effort is a recent grant of \$50

million to the ACLU from The Open Society Foundations.

"Elected officials on both sides of the aisle now see clearly the disastrous results of the 'tough on crime' politics of the '80s and '90s. The ACLU is partnering with allies across the entire political spectrum to take a new approach and get the work done," said national ACLU executive director Anthony Romero.

Author of I-502, Holcomb managed the 2012 campaign that gained statewide approval for the measure legalizing marijuana possession for adults in Washington. Before joining the ACLU-WA staff in 2006 to work on marijuana policy reform, Holcomb had her own law practice focused on criminal defense litigation, civil rights, and civil asset forfeiture cases. She will continue to live in Seattle and will help the ACLU-WA in lobbying on medical marijuana issues in the state legislature. ■



# Fixing the Mental Health Crisis

By Mark Cooke, ACLU-WA Criminal Justice Policy Counsel



Mark Cooke

Washington state's mental health systems are in crisis. Individuals are not receiving adequate mental health care in the community, in large part due to chronic underfunding of public services. People struggle with inadequate care until they suffer a crisis and end up cycling through emergency rooms and jails, often being isolated and detained for unlawful periods of time.

Mental health experts agree that jail cells and chaotic emergency rooms are not therapeutic environments. These options should only be used as a last resort. The long-term solution is to invest in community-based prevention, intervention, and recovery services.

Nevertheless, our state has come to rely on the criminal justice system and hospital emergency rooms to cope with what is fundamentally a public health issue. That reliance has landed our state in court.

Two high-profile lawsuits in which the ACLU-WA has been involved (see page 1) address some of the most pressing problems with our mental health system. In December, a federal court found that persistent delays in providing competency evaluation and restoration services to pre-trial detainees in jail violates due process rights. And last August, the State Supreme Court unanimously invalidated a practice known as "psychiatric boarding" – using civil commitment laws to hold patients in hospital emergency rooms with no access to appropriate mental health treatment.

In short, the courts found that psychiatric boarding and long-term stays in jail are unlawful, clinically harmful, and increasingly expensive. It is important that the state move quickly to put an end to their use.

Police, prosecutors, and the courts also have an important role to play in reforming Washington's mental health system. With proper training, law enforcement can de-escalate many incidents, preventing an arrest, trip to jail, and potential involvement with state mental health systems. All law enforcement officers should be required to receive crisis intervention training on how to deal with individuals struggling with mental illness. Prosecutors should also use their broad discretion to divert individuals into community-based treatment programs. Courts should emphasize that treatment in the community is preferable to incarceration.

The state should also fund crisis diversion centers, facilities where law enforcement can take someone in mental health crisis, instead of jail or the emergency room. These facilities are more therapeutic and cost-effective. Yakima, Pierce, and King counties have crisis diversion centers, but they are limited in scale and don't serve the entire state. Washington should encourage law enforcement to work with service providers and provide funding streams to create more diversion centers.

Further, the state implementation of the Affordable Care Act provides an opportunity to increase resources for community-based solutions. Newly available mental health, chemical dependency, and medical services should be coordinated to meet the needs of individuals struggling with mental illness. Also, the state should seek to have Medicaid cover additional services such as supportive housing and employment support – crucial for persistently mentally ill individuals.

The long-term answer to reforming the state's mental health systems is not the band-aid approach of funding more beds for people in crisis. Instead, the state must take a comprehensive approach which involves helping people, whenever possible, before they are in crisis. ■

## Death Penalty Study

*Continued from page 1*

punishment." The court requires that when the death penalty is possible, "At least two lawyers shall be appointed for the trial and also for the direct appeal." Developments in case law have led to additional time and resources being required for capital cases.

The study was funded by a grant from the ACLU-WA and was developed to provide accurate estimates to inform debate and decision-making by policy-makers and the public. The ACLU had no role in conducting the research and did not influence the analysis and formulation of conclusions. ■

## SHORT & SWEET

### Bias-Free Policing

Seattle's Community Police Commission (CPC) has worked with the Seattle Police Department to implement its curriculum based on the SPD's new Bias-Free Policing policy. The curriculum was designed to help officers understand how implicit bias affects their decision-making and serves to widen the rift between the police and the community. ACLU-WA deputy director Jennifer Shaw, a member of the Commission, participated in eight trainings, giving a short description of the CPC and the ACLU's interest in police reform.

### Harassment in Schools

To reduce school-based peer harassment, the ACLU supports a legal standard that would hold schools accountable for discriminatory harassment if the school or an administrator "knew or should have known" about the conduct. In a case (*B. W. v Mercer Island*) involving a student being harassed by other students, we have filed an amicus brief urging the application of that standard to evaluate school liability in harassment cases. The lower court ruling used the higher standard of "deliberate indifference," which makes proving a school's responsibility for harassment extraordinarily difficult.

### Government Use of Private Information

Jared Friend, ACLU-WA technology and liberty director, has been appointed to a City of Seattle privacy advisory board. The body is to advise the city as it creates privacy guidelines for the collection, use, and disclosure of personal information of its residents. This program is the first of its kind in the U.S., following similar successful initiatives in the EU and Canada. Other members are prominent local industry representatives, activists, academics, and attorneys. The group is expected to continue its work through 2015.



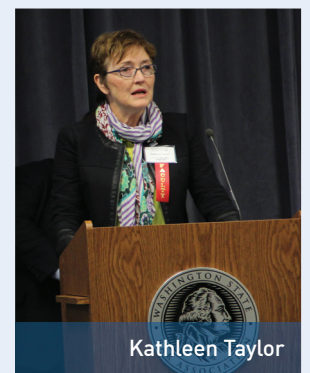
Vanessa Hernandez

### Modern Scarlet Letters

We continue to represent and advise approximately 200 individuals a year on vacating and sealing records, as well as representing individuals unfairly denied housing and employment on account of criminal history. Our efforts in individual assistance and community education were recognized by the Community Partners for Transition Services, which awarded staff attorney Vanessa Hernandez and our Second Chances Project its 2014 Outstanding Service Award.

### Civic Leader Award to Kathleen Taylor

Kathleen Taylor has received the Civic Leader Award from the Washington State Bar Association Civil Rights Law Section. The award recognized her service in the cause of civil rights and freedom and justice for all as executive director of the ACLU-WA since 1980 and as director of the Coalition on Government Spying before then. The award was presented in November at a CLE marking the 50th anniversary of the passage of the landmark federal Civil Rights Act of 1964. ACLU-WA staff attorney La Rond Baker co-chaired the event and moderated a panel on civil rights protections.



Kathleen Taylor



## Rights for People with Mental Illness

*Continued from page 1*

can further exacerbate mental health conditions. People often end up spending more time waiting in jail than they would if they had pleaded guilty. Some lose their homes, their belongings, or their eligibility for community-based services.

ACLU-WA staff attorneys Sarah Dunne, La Rond Baker, and Margaret Chen are handling the case, along with attorneys for Disability Rights Washington, the Public Defender Association, and Carney Gillespie Isitt PLLP.

### Psychiatric Boarding

The Washington Supreme Court in August unanimously invalidated a practice known as “psychiatric boarding” – holding civil commitment patients in hospital emergency rooms unable to provide adequate treatment.

In a case arising out of Pierce County, the state and county had argued the practice was occurring because of the lack of available certified psychiatric treatment beds. Following reasoning similar to an amicus brief by the ACLU-WA, Disability Rights Washington, and the National Alliance on Mental Illness Washington (NAMI), the court rejected that justification. It found that the government’s authority to use civil commitment carries with it the obligation to meet patients’ constitutional rights to receive individualized treatment.

The patients in this case (*In re Detention of DW et al.*) were involuntarily detained in emergency rooms for days, often with little or no psychiatric care. In 2013, a Pierce County Superior Court judge ruled this practice is illegal since the law requires that the patients be held in certified evaluation and treatment facilities which are capable of providing the treatment that they need.

“*My son has been warehoused in jail for nearly six months, of which nearly two months he's been awaiting transfer to Western State for stabilization and treatment. His condition has just gotten worse and worse. He has really been suffering and can't get the treatment he needs while in jail.*”

*-Kathryn McCormick,  
mother of plaintiff in A.B. vs DSHS*

According to a report by the Washington State Institute for Public Policy, 20 percent of patients committed under the state’s Involuntary Treatment Act were being boarded. The report found that the problem of psychiatric boarding in emergency rooms had swelled to nearly 200 per month in 2010.

The court’s ban on boarding took effect in late December. In the wake of the ruling, Gov. Inslee authorized \$30 million to help the state stop the practice, and the state added more than 150 psychiatric treatment beds. The legislature will consider proposals for additional funding for such beds. While this is a welcome development, the ACLU-WA is advocating for greatly increased community-based intervention and treatment programs as a long-run solution.

“This ruling addresses a problem coming from a broken mental health system. Washington needs to focus on helping individuals when mental health problems first arise, not just when they have a crisis and go to the emergency room,” said ACLU-WA deputy director Jennifer Shaw. ■

## Protecting Health Care Access

Religious and secular health systems are affiliating at an unprecedented pace in Washington state, and many of these affiliations have resulted in the reduction or elimination of important medical services. Addressing this issue, the ACLU-WA in November convened a gathering of health care experts to discuss concerns about religiously based restrictions of care. Participants came from all over the country, including Washington, New York, California, Texas, Alaska and Portland.

The ACLU’s Provider Consultation served as a forum for important conversations on the future of reproductive, end-of-life, and LGBT health care. Topics included empirical research on religiously based refusals of care; conflicts between medical ethics and the restrictive Ethical and Religious Directives of the U.S. Conference of Catholic Bishops; the importance of protecting the patient-provider relationship; and steps forward to protect best-care medical services. ■

## ACLU to Burien: Repeal Unconstitutional Trespass Law

The ACLU-WA is urging the city of Burien to repeal a trespassing ordinance that is unconstitutional and unnecessary. Intended to address problematic behavior in public places, the vaguely worded law gives public employees too much discretion to determine which conduct is prohibited. It likely will be enforced disproportionately to target the homeless, groups of young people, or others deemed “disruptive” in public spaces.

“The ability to speak, associate, and travel freely are liberty interests protected by the Constitution and enjoy special protection in ‘traditional public forums’ like public parks and sidewalks. Courts in our state have repeatedly struck down laws that do not provide reasonable notice of what conduct is prohibited or that prescribe such nebulous standards as to invite arbitrary or discriminatory enforcement,” said ACLU-WA deputy director Jennifer Shaw.

The Burien ordinance repeatedly uses but does not define the term “unreasonably” when describing prohibited behaviors: “unreasonably hostile or aggressive language or gestures”; “unreasonably loud vocal expression”; “unreasonably boisterous physical behavior”; “unreasonably disruptive to others.” This lack of clear definition leaves people to guess at how and when the examples of prohibited behavior will be applied.

Further, the measure is not needed because there are already a variety of both laws and rules of conduct on the books applicable to public places in Burien. These provide adequate tools for responding to problematic disruptive behavior.

“Current assault, harassment and disorderly conduct laws already empower police officers to cite or arrest those whose conduct poses a genuine risk of harm to others,” said the ACLU-WA’s Jennifer Shaw. “And they give people fair and appropriate notice about what constitutes unsafe or unreasonably disruptive conduct.”

Banishment laws rarely solve the problem – instead, they move it elsewhere and fail to address the underlying issues of poverty, homelessness, and mental illness. Homeless individuals who are slapped with criminal penalties under this ordinance will face additional barriers to finding employment and housing, the costs of their arrest, prosecution, incarceration, and public defense.

Instead of this heavy-handed and ineffective approach to the problem, the ACLU-WA is urging the council to take steps to connect people with urgently needed services such as shelter, temporary housing, counseling for substance abuse and mental illness, and access to facilities for basic hygiene.

The city council adopted the ordinance last fall with a 6-1 vote. Under pressure from the ACLU-WA, it agreed to reconsider the measure. The city did make some revisions, including dropping a provision that targeted offensive body odor, which had been mocked in the media. Though the ACLU had made clear the ordinance was still unconstitutional, the council in early January approved the revised version – though this time by only a 4-3 margin. The ACLU-WA is exploring options for further action. ■

## The Right to Hold a Sign and Ask for Help

Across the country the ACLU-WA has been combatting local laws that target homeless people by violating free speech rights. A case in point: Several months ago, the city of Arlington passed an ordinance that made it a crime to ask for money or goods within 300 feet of all intersections, parks, transportation facilities, parking lots, and other locations. The measure had the effect of banning panhandling virtually everywhere in the city. In December the ACLU-WA sent a letter to the city council asking them to repeal this part of the ordinance.

“The Constitution protects a person who is standing on the sidewalk asking for money or holding a sign expressing a need for money, regardless of whether that person is a homeless veteran or a student soliciting contributions through a charity car wash or a person seeking donations for the victims of the Oso mudslide,” said ACLU-WA staff attorney Nancy Talner. “Governments cannot assume that such activity anywhere within 300 feet of an intersection necessarily interferes with pedestrian or vehicle traffic.”

We had an encouraging response from the city and are hopeful that some changes will be made in the law.

**BILL *of*  
RIGHTS  
DINNER**

More than 500 ACLU members and supporters came together on November 1st to celebrate civil liberties at the Sheraton Hotel in downtown Seattle. The William O. Douglas Award for a lifetime achievement was given to Floyd Jones and Alene Moris, and other awards were presented to two Perkins Coie legal teams, rapper Macklemore and student activist Sienna Colburn. Special kudos to emcee Jeff Robinson for an inspirational featured address.



Floyd Jones accepting the William O. Douglas Award



James Williams accepting the Civil Libertarian Award



Jeff Robinson



Kathleen Taylor



Sienna Colburn & Jean Robinson



Kevin Hamilton accepting the Civil Libertarian Award



Sal Mungia presenting the Civil Libertarian Award to Perkins Coie legal teams



# Balson, Shih Elected to Board

**Hank Balson** and **Dan Shih** have been elected to the ACLU-WA Board of Directors. Re-elected to the Board were **Rory Bowman**, **Emily Cooper**, **Peter Danelo**, **Pat Gallagher**, **Jean Robinson**, and **Jesse Wing**.



Hank Balson



Dan Shih

A former Legal Services attorney, Hank Balson now practices with the Public Interest Law Group, PLLC in Seattle. As an ACLU cooperating attorney, he has spoken about LGBT legal issues to community groups and worked on a suit about religious discrimination and First Amendment rights at Pierce County Jail. A partner at Susman Godfrey LLP, Dan Shih handles complex commercial litigation and has a substantial pro bono practice; he also serves on the boards of QLaw: the GLBT Bar Association of WA and API Chaya.

At its January meeting, the Board choose its officers for 2015: **Jean Robinson** is President, **David Whedbee** is First Vice-President, **Randy Gainer** is Secretary-Treasurer, **Peter Danelo** is representative to the national ACLU Board, and **Jamila Johnson** and **Binah Palmer** have joined the Executive Committee. ■

## STUDENT CLUBS IN ACTION

*The Seattle University School of Law ACLU-WA* student club sponsored a presentation on the *Hobby Lobby* decision featuring ACLU-WA policy counsel Leah Rutman.

*The University of Washington Law School* student club held a general membership meeting and began planning for events in the Winter term.

*The University of Washington* undergrad student club sponsors information tables on campus once a month and holds weekly meetings discussing civil liberties-related issues.

*The Garfield High School* student club sponsored an assembly on privacy and drones featuring ACLU-WA board member Pat Gallagher. They also sponsored a presentation on the death penalty by Caitlin Anderson of Safe & Just Alternatives.



UW Law School Club leaders David Hession, Jordan Taren, and Chad Law

## CIVIL LIBERTARIANS IN ACTION

Our thanks go to these speakers who helped do public education on civil liberties to school and community groups

**David Whedbee** spoke on rights with the police at the Chief Seattle Club in Seattle and on police brutality cases at a UW Law School student club event.

**Binah Palmer & Venkat Balasubramani** spoke on student rights with technology to four classes at Edmonds High School. Binah also spoke about current civil liberties issues and the Constitution to the senior class at the Center School in Seattle.

**Doug Klunder** spoke about technology rights at the Students for Liberty conference in Seattle.

**Pat Gallagher** spoke about privacy rights and drones at an assembly held at Garfield High School and discussed freedom of speech and protest to a class at the Art Institute of Seattle.

**Robert Flenbaugh** spoke about criminal justice and police brutality issues at a Seattle Academy of Arts and Sciences assembly.

And thanks to these **VOLUNTEERS** who have helped the ACLU-WA in the community and at our office:

Caitlin Anderson, Kelly Anderson, Venkat Balasubramani, Valarie Balch, Nacim Bouchtia, John Boze, Nick Crocker, Sally Mary De Leon, Michelle Dillion, Fabio Dworschak, Peter Feichtmeir, Jon Feinstein, Dorothy Finlay, Loretta Fisher, Jessica Fleming, Robert Flenbaugh, Don Franks, Pat Gallagher, Yoko Gardiner, Madison Grimsby, Patti Hackney, Alice Hsu, Jamila Johnson, David Keenan, Doug Klunder, Jessica Knowles, Angela Langer, Lawrence Lefsky, Julie Lehnis, Jennifer Lu, John Marlow, Diana McDougale, Claire McNamara, Kristie Miller, Kelly Morgan, Sal Mungia, Jennifer Nguyen, Binah Palmer, Clive Pontesson, Kaelen Quintero, Alan Rabinowitz, Andrea Rabinowitz, Jean Robinson, Jeff Robinson, Lauren Ross, Megan Rubio, Breanne Schuster, Mark Sheran, Mingmar Sherpa, Korica Simon, Monique Spivey, Leona Sponsler, Sally Suh, Tanya Suthern, Cameron Thorsteinson, Minda Thorward, Josh Treybig, Masami Villa, Taylor Wampler, David Whedbee, Miguel Willis, Bob Winsor

"Thanks again for a great experience this summer at the ACLU-WA. I've had six internships through college, and your policy advocacy position was by far my favorite – due to both the work and ACLU work environment."

– a 2014 intern

## Privacy of ACLU Membership List

The ACLU's membership list is confidential. The ACLU does not sell or give the names, membership status, or contact information of its members to other organizations or entities. In order to defray the cost of new member recruitment, our national ACLU rents or exchanges the list with other nonprofit organizations and publications, but never to political groups or groups whose programs are incompatible with ACLU policies. The ACLU follows strict privacy procedures recommended by the US Privacy Study Commission and never gives our list directly to another organization. Instead, the mailings are done by a professional mailing house and in a way that the other group does not possess your name or contact information unless you choose to reply to the mailing.

The ACLU always honors a member's request not to make his or her name available. Members who do not wish to receive mail from other organizations can write to the ACLU Membership Department, 125 Broad St., New York, NY 10004-2500 or email us at [membership@aclu-wa.org](mailto:membership@aclu-wa.org) and we will forward your request. Thank you for your understanding.



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# STUDENT CONFERENCE ON CIVIL LIBERTIES

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