AN ANALYSIS OF

GOVERNOR CARCIERI'S

"ACT RELATING TO

HOMELAND SECURITY"

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As part of his 2004 legislative agenda, Governor Donald Carcieri has proposed an "Act Relating to Homeland Security." In his February 12 news release announcing its submission, the Governor described the 18-page draft legislation as "designed to strengthen Rhode Island's homeland security by sanctioning the possession, manufacture, use or threatened use of chemical, biological, nuclear, or radiological weapons, as well as the intentional use or threatened use of industrial or commercial chemicals as weapons."

In fact, this extraordinarily dangerous bill does much, much more, and is alarming in its nature and scope. Far from being focused on so-called weapons of mass destruction, the legislation has enormous ramifications for political protest, freedom of association, academic freedom and the public's right to know.

The bill's definition of "terrorism" is so broad that virtually any political protest that "involves a violent act" – as well as protests that involve non-violent civil disobedience that might be "dangerous to human life" – could constitute an act of terrorism punishable by life imprisonment. In an even more astonishing attack on freedom of speech, the Governor's proposal, resurrecting two archaic and blatantly unconstitutional World War I-era laws barring teaching or advocacy of anarchy or revolution, seeks to subject people who *teach or advocate* "acts of terrorism" to ten years in prison.

Below in more detail is a brief summary of these and some of the other major provisions of the Governor's proposal.

1. SECTION 1. DEFINITION OF TERRORISM. Section 1, which might be considered the heart of the bill, defines "terrorism." According to the Governor's legislation, terrorism is activity that (1) is intended to "intimidate or coerce a civilian population" or "influence the policy of a unit of government by intimidation or coercion"[1] and (2) involves "a violent act" or "an act dangerous to human life" that violates the law. The penalty for any act meeting these criteria is a sentence of up to life imprisonment. The language is taken from the USA Patriot Act, a number of whose provisions, including this one, have been the subject of tremendous controversy.

Of course, political protest is, almost by definition, designed to "influence the policy of a unit of government," and effective protests will often have the goal of trying to "intimidate" or "coerce" change in governmental policies. Under this legislation, the commission of "a violent act" in the context of such a protest turns the activity into a capital crime. The legislation does not define what constitutes "a violent act," but we know from the rest of the proposed definition that it does not have to be an act "dangerous to human life." Thus, commission of what might qualify as a misdemeanor assault, or throwing a rock through a window, or possibly even spray-painting graffiti can turn a political protester into a criminal facing life imprisonment in light of the generally broad reach often given to the term "violence."[2]

The vagueness and breadth of the term "acts dangerous to human life" are just as disturbing. If protesters of America's involvement in Iraq were to engage in a peaceful sit-in at street intersections near a Halliburton facility, this act of civil disobedience might well warrant

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[1] The definition includes a third alternative more in keeping with most people's notion of terrorism: an act intended to "affect the conduct of a unit of government by murder, assassination, kidnapping or aircraft piracy."

[2] While defining violence as "unjust or unwarranted use of force," Black's Law Dictionary goes on to note that some courts "have held that violence in labor disputes is not limited to physical contact or injury, but may include picketing conducted with misleading signs, false statements, erroneous publicity, and veiled threats by words or acts." Black's Law Dictionary, 7th Edition, 1999, p. 1564.

arrests. However, by engaging in an activity which is arguably "dangerous to human life," and doing so in the context of a political protest, the demonstrators have potentially committed an act of terrorism under the Governor's bill.

To give a real-life example from Rhode Island, five anti-nuclear protesters, known as the Trident II Plowshares, entered Electric Boat at Quonset Point in 1984 and damaged several empty missile tubes by banging them with hammers. They were charged with misdemeanors at the time, but if the actions were attempted again and this bill were law, the protesters could face life in prison for engaging in terrorism.[3] Indeed, if this same act of civil disobedience were done today, the Trident II Plowshares protesters could face life sentences under *no less than three* separate provisions of the proposed "Homeland Security Act."[4]

Not only does the bill's definition of terrorism go far beyond any reasonable or common sense meaning of the term, its consequences are alarming. The far-reaching ramifications of this definition beyond those already noted are readily apparent. Picket lines in labor disputes are at least in part designed to "intimidate" or "coerce." If a striking worker shoves a person trying to cross a picket line, or lets air out of a car's tire (an "act dangerous to human life"), he or she has potentially committed an act of terrorism under this bill. Many people believe that "pro-life" protests that take place in front of abortion clinics are intended to "intimidate" a civilian population. If a demonstrator allegedly shoves a clinic escort or blocks a path in an intimidating manner, has he or she engaged in terrorism? The examples go on and on.[5]

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[3] In fact, the trial judge in the case, John Bourcier, likened the protesters to terrorists, calling the defendants "the first cousin to bomb-throwers, grenade-throwers and airplane hijackers." *Providence Journal*, October 19, 1985.

[4] Those provisions are Section 1 (engaging in an act of terrorism); Section 13 (injuring public property in the furtherance of terrorism); and Section 14 (accessing a computer in the furtherance of terrorism). Their public advocacy of their political views might also constitute felonies under Sections 2 and 4.

[5] One can only speculate as to how a law like this could have been misused in the 1960's at the height of political protests over the Vietnam War and racial segregation.

In short, under this bill, a person who commits what might otherwise be a misdemeanor offense – punishable by no more than a year in prison – suddenly becomes subject to life imprisonment merely because the offense occurred in the context of political protest.[6] It is an understatement to say that this definition of terrorism has the potential to significantly chill legitimate protest. Unfortunately, it is not the only provision in the bill to do that.

SECTION 2. ADVOCATING ANARCHY OR TERRORISM. Section 2 of the bill (along with Section 4, discussed below) is one of the most extreme attacks on freedom of speech that the ACLU has seen in recent history. The Governor's bill seeks to resurrect from dormancy two incredibly archaic World War-I era statutes whose blatant unconstitutionality has been apparent for decades. Section 2 seeks to expand R.I.G.L. §11-43-12, which currently makes it a felony, punishable by ten years in prison, to (among other things) "teach or advocate anarchy or the overthrow by force or violence of the government," or to be "affiliated with any organization teaching and advocating disbelief in or opposition to organized government." Rather than repealing this patently anachronistic law, the Governor instead proposes to *expand* it. His bill would amend this statute to make it a felony in Rhode Island to *teach or advocate* "acts of terrorism" as defined by Section 1. The college professor who enthusiastically assigns her students to read *The Autobiography of Emma Goldman* could face ten years in prison for that deed.

It is no exaggeration to call this provision a return to McCarthyism, when people had to be careful what they said or what organizations they belonged to. It is precisely laws like this that were used to stifle dissent in that shameful era of our country's history.

[6] This is not to suggest that the dangers inherent in this definition would be solved by, for example, limiting the "violent acts" to felonies. Virtually any incident of physical contact or broadly defined "violence" could be easily overcharged as a felony.

SECTION 3. WEAPONS OF MASS DESTRUCTION. This section appears to be the one referenced in the Governor's news release, as it establishes penalties for the possession or production of "weapons of mass destruction." Section 3 is generally unremarkable from a civil liberties standpoint,[7] but one must seriously question why Rhode Island – or any state – would try to criminalize the possession of nuclear devices or weapons of chemical warfare. Surely these are matters for the federal government to handle.

There is, however, one potentially troubling, though unintended, problem created by this section. Subsection 4 authorizes life imprisonment for anybody who "knowingly threatens to use a weapon of mass destruction." However, there need be no intent or ability to actually carry out the threat, so long as the threat is "unequivocal, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat," causing him or her "reasonably to be in sustained fear of his or her safety." This can be established by "evacuation of a building," including a school. In theory, this provision seems quite reasonable; certainly the government can punish a person who intentionally makes such a threat that is realistically perceived as one. In practice, however – particularly in the school setting – the ACLU fears that the theory may get lost in this post-Columbine age.

These days, a youngster who, in a creative writing assignment, threatens to "blow up the school" faces not only suspension but a visit from police. Less innocently, access to the Internet makes it easy for an impulsive, immature youngster to make an impulsive, immature – and totally fanciful – threat. In either of these cases, with passage of this provision, the ACLU believes it is only a matter of time before we see a middle school student being dragged out of

[7] Chemical companies with bad safety and environmental records might want to take note of it, though. The deliberate dumping of toxic wastes could constitute an act of terrorism under 2(b) of this section.

school in handcuffs, charged with threatening to use a weapon of mass destruction – a crime carrying potential life imprisonment.

SECTION 4. ADVOCATING OVERTHROW OF THE GOVERNMENT. Section 4 is a companion to Section 2 of the bill, and is another chilling throwback to the McCarthy era. This section resuscitates an antiquated and long-unenforced World War I statute that makes it a felony to "willfully speak, utter, print or write or publish any language" intended to "incite, provoke or encourage" a "defiance or disregard of the constitution or laws of Rhode Island or of the United States." (The statute also makes it a felony to "publicly display any flag or emblem" of a form of government that is "proposed by its adherents or supporters as superior or preferable to the form of government of the United States.") Under the Governor's proposal, this section, like Section 2, would be expanded to make the mere advocacy of terrorism a felony as well.

Recognizing the vital importance of free speech in a democratic society, the U.S. Supreme Court has held for decades that mere advocacy – even advocacy of violence – is entitled to the protection of the First Amendment. In the Court's words, "the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent lawless action and is likely to incite or produce such action*."[8] The Governor's bill ignores this fundamental principle, and in doing so, severely undercuts freedom of speech in the name of fighting terrorism.

SECTION 5. DISORDERLY CONDUCT IN AIRPORTS. Section 5 expands the current crime of disorderly conduct. Disorderly conduct – which includes such vague and open-ended offenses

[8] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)(emphasis added)

as making "a loud or unreasonable noise" – is one of the most common misdemeanor charges used by police when there are no more specific offenses with which to charge somebody they wish to arrest. However, any activity now deemed to be disorderly conduct will, under Section 5, become a felony if it occurs at an airport and "adversely affects airport security." Of course, in this age of heightened safety concerns, virtually *any* disturbance at an airport will be deemed to "adversely affect" airport security, whether it's a loud argument with a ticket agent, a dispute with a security officer about perceived racial profiling in being subjected to a search, or any other similar incident. It is inevitable that if this provision is enacted, dozens of people will face terrorism-related felony penalties for behavior that has nothing to do with terrorism and that in any other context would be considered, at best, minor criminal conduct.[9]

SECTION 6. WEAPONS. This section adds a definition of "weapons of mass destruction" to the definitional section of the state statute governing weapons. Unfortunately, the term is so broadly defined that virtually any weapon whatsoever could be considered one of "mass destruction." That is because a "weapon of mass destruction" is defined as an "instrument, device or substance designed to cause death or serious injury to a person." Obviously, any firearm or other typical weapon is encompassed by this definition. [10]

SECTION 7. INJURY TO PUBLIC TRANSPORTATION. Like many of the bill's other provisions, this one is especially problematic in light of the incredibly broad definition of terrorism. Under this section, a person will now face possible life imprisonment for "willfully

[9] One need only recall the highly-publicized shoving incident in 2000 between Rep. Patrick Kennedy and an airport security guard to recognize the potentially far-reaching consequences of this provision.

[10] Since the bill does not amend any other part of the weapons statute, it is unclear what purpose is served by adding this definition in the first place.

injuring any instrumentality of public transportation … in the furtherance of terrorism." A student who takes a pocket knife and etches on the inside of a bus the slogan of a political protest group may violate this provision. As with Section 13, discussed immediately below, it is important to note the incredible disparity in punishment the bill creates, depending on the intent of the perpetrator. Willfully injuring bus property presently carries with it a fine of up to $500 and 30 days in jail. However, engaging in the identical conduct "in the furtherance of terrorism," as so broadly defined by the bill, leads to potential life imprisonment.

SECTION 13. INJURY TO PUBLIC PROPERTY. This section raises concerns similar to, but even more troubling than, those expressed about Section 7. Section 13 amends a statute that prohibits "willfully injuring any public building or other property" – for example, spray-painting graffiti on a wall, breaking a window or engaging in similar mischievous behavior. This offense is presently a misdemeanor, with a maximum penalty of one year in prison. If the harm is minimal, the statute requires imposition of as little as a $100 fine. However, the Governor's legislation proposes that, if done in the "furtherance of terrorism," writing graffiti (like "injuring an instrumentality of public transportation") would carry the potential penalty of life imprisonment.

It is beyond belief that the penalty for *any* crime could vary from a $100 fine to life imprisonment, but that is what this bill authorizes. Two defendants who engaged in *identical* conduct could leave the courthouse paying a $100 fine or facing life in prison, the difference based solely on what their alleged motivation was in committing the offense. When one considers that the motivation turning the crime into a capital offense may be political in nature, this proposal goes even further beyond any bounds of rationality and propriety.

SECTIONS 14 & 15. COMPUTER CRIMES. These sections amend current statutes dealing with computer crimes. Once again, the penalties are increased enormously depending on whether the crime is committed in the "furtherance of terrorism." If so, the penalty increases from a maximum of five years in prison to possible life imprisonment. Indeed, as the bill is written, the mere accessing of one's *own* computer "in the furtherance of terrorism" would be a capital offense. Thus, the Plowshares II anti-nuclear demonstrators who in 1984 entered Electric Boat and used hammers to damage empty missile tubes would not even have to follow through on their planned civil disobedience to face life imprisonment. If they merely planned the action on a computer, they would have committed a capital offense under this bill.

SECTION 17. RACKETEERING ACTIVITY. This section amends the state's racketeering law (known as RICO) to include "terrorism" as a racketeering activity. By amending the racketeering statute to cover the bill's broad definition of terrorism, this section opens the door for RICO's draconian penalties to be applied to political groups. These penalties include not just lengthy criminal sentences and fines, but also forfeiture proceedings, civil suits and court orders requiring dissolution of the organization.

It took over ten years of litigation before the U.S. Supreme Court ruled that the *federal* RICO law could not be applied to an anti-abortion group which faced a civil suit for "extortion" for its activities in blocking access to abortion clinics. The state law, however, has never been interpreted as excluding politically-motivated activity from its reach, and attempts to clarify the law to that effect have thus far not succeeded. As a result, political organizations could face civil suits from private citizens seeking to put the organization out of business if they can allege harm from the group's "terrorist" activities.

SECTIONS 19, 20 & 21. CRIMINAL RECORD CHECKS. These sections would require criminal background checks for any people working in governmental facilities in "sensitive positions," as determined by the Department of Administration. In light of the broad definition of what constitutes a sensitive position – one "generally described as directly responsible for the health, safety and welfare of the general populace or protection of critical infrastructures," a large number of employees and job applicants will now have to undergo the humiliation and indignity of fingerprinting.

While these sections direct the DOA to designate the "sensitive" positions that will require fingerprinting and criminal checks, they do not provide the Department any guidance on the standards or procedures to be used. What is to be done with the criminal record information once a check is done? Will *any* criminal record disqualify a person for employment from any of these positions? Or will convictions only for certain offenses disqualify an applicant, and if so, what offenses? Will the applicant have the opportunity to contest the disqualification? In enacting other statutes requiring criminal record checks in employment, the General Assembly has been very careful to establish detailed criteria and procedural safeguards to protect the privacy and due process rights of job applicants. None of these safeguards is proposed in this bill.

SECTION 23. SCHOOL SAFETY AUDITS. This section requires that "school safety audits" be conducted for every public school. These audits will identify "protocols and strategies to address physical safety concerns." Unfortunately, the results of these audits can be withheld from the public for up to 90 days, and even then the school committee is given the additional authority to indefinitely withhold the release of any "specific risk and vulnerability assessment components"

if it decides that is appropriate. Thus, as school officials are charged with auditing the safety of schools, parents – in the name of security – are left to wonder and worry whether their schools have actually been found safe, and if not, whether anything is being done to address the problems.

SECTION 25. EXEMPTIONS TO OPEN RECORDS LAW. Section 25 proposes a major evisceration of the public's right to know. It creates exemptions in the open records law for a wide variety of "infrastructure" documents, including information routinely provided to building code inspectors. To give but one example of its breadth, if a business claims that it is necessary to "protect life or safety," the government would be required to keep information regarding the building's fire protection system confidential. Coming one year after the tragedy at The Station, it is extraordinarily ironic to see legislation proposed that could actually keep fire safety information hidden from the public.

This section also references Section 23 in authorizing the indefinite withholding of certain information gathered from "school safety audits." Ironically, the bill goes on to nonetheless allow release of that information under one circumstance – *after* any school building "has been subjected to fire, explosion, natural disaster or other catastrophic event"!

Of course, the proposed exemptions are framed in terms of being necessary to protect the public, and they rely on the stated concern that release of such information might jeopardize individuals' security. In narrowly-conceived circumstances, this makes sense. But as noted from the example above, the amount and types of information that could be withheld from public view are vast.

The problem is that by withholding so much information, the public is offered no opportunity to consider or offer input on the appropriateness or readiness of a particular building's security or safety, or to point out safety flaws that could be corrected. In other words, underlying the exemptions is the assumption that all of the withheld records and plans are as good and protective of the public as they could be, and that the public has nothing to offer in terms of recommending stronger safety ideas. One must wonder whether the proposed exemptions truly serve the purpose of protecting us, or instead merely keep us in the dark about how vulnerable we may be.

In sum, this provision could, in the name of "homeland security," keep fire safety information relating to a building like The Station nightclub secret. It could shield from public scrutiny other important records regarding workplace hazards or safety in schools. At bottom, it is a substantial undermining of the public's right to know.

Last year, in the closing days of the legislative session, the General Assembly passed, with little debate and no opportunity for floor amendments, a Department of Health-proposed "bioterrorism" bill. That law gave the Governor broad powers to declare a "state of emergency" and unilaterally suspend state laws and regulations. The law also gave the Health Department broad powers to obtain access to identifiable health care information; to coercively treat, examine and immunize people without consent; and to quarantine residents with virtually no procedural safeguards. If last year's law seriously damaged due process and privacy rights, this year's bill is a frontal assault on freedom of speech and the public's right to know. Regrettably, both of these bills show that, in the name of fighting a "war on terrorism," some people are all too willing to sacrifice the freedoms in the name of which we are fighting this war.

Lest anyone consider this critique of the legislation to be nothing more than a cry that "the sky is falling," one need only look to what happened earlier this month in Des Moines, Iowa. In but the latest example of government officials equating dissent with terrorism, federal prosecutors obtained a subpoena ordering Drake University to turn over a list of people involved in an antiwar forum on the campus, and issued other subpoenas ordering four peace activists to testify before a grand jury on their activities. Those served subpoenas included the leader of the Catholic Peace Ministry, the former coordinator of the Iowa Peace Network, a member of the Catholic Worker House, and an anti-war activist who visited Iraq in 2002. In the face of enormous protests, prosecutors ended up withdrawing the subpoenas, but the incident is a stark reminder that government attempts to chill political protest did not stop in the 1960's or 1970's, but are alive and well in today's "war on terrorism" environment. A bill like this can only encourage similar efforts to stifle debate and dissent.

We are hopeful that, by our pointing out the dangerous scope of this latest "anti-terrorism" bill, concerned residents will vigorously fight and help defeat this legislation and its assault on our civil liberties. Passage of this legislation would mark a big step backward in our state's commitment to liberty and freedom. The ACLU is hopeful that, upon consideration of all the consequences, the General Assembly will not allow this to pass.