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The States & Antiterrorism

Dialogue & Resistance

In the early days after September 11, a number of states moved quickly to enact various forms of strengthened antiterrorism legislation—some expanding the definition of terrorism in state law and strengthening punishments, others adopting new measures on emergencies and public health, and some engaging in vigorous debate about providing law enforcement with new wiretapping and surveillance tools. These moves did not occur in an empty playing field, for a number of states had already begun addressing terrorism-related issues in the 1990s. In Illinois, for example, where several heavily scrutinized Muslim American charitable organizations were based, the legislature had passed a law in 1996 that criminalized solicitation of or providing support for "international terrorism." California had adopted legislation against manufacturing, possessing, using, or threatening to use "weapons of mass destruction" in 1999, as well as against possession of some biological agents.[1]

But the world was different in the early days after the brutal September 11 attacks, and the states rushed toward legislation in response. Some of that legislation was symbolic: a few state legislatures, for example, considered or enacted legislation

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mandating or strongly encouraging recitation of the Pledge of Allegiance. And some of the legislative initiatives had perhaps less serious civil liberties or political implications than others—such as moves to upgrade some public health, emergency management, state building security, and other areas. And in virtually all states, the desire to join in the struggle against terrorism had to be balanced by the realities of fiscal life.[2]

In these early days, as this chapter shows, civil liberties activists sought to build coalitions with libertarian conservatives and others to delay and, where possible, ameliorate the most draconian aspects of the rush toward new state antiterrorism law. In a number of states this alliance was somewhat successful; in others the early antiterrorist legislative packages passed relatively quickly and easily. In early 2002 the American Civil Liberties Union (ACLU) wrote of "state and local insatiable appetites" for new powers, including expanded wiretap authority and increased surveillance.[3]

But by mid-2002, the haste to enact immediate antiterrorist legislation at the state level began to abate, though in a number of states these battles now turned to crucial issues such as the expansion of state wiretapping authority and conservative forces kept state legislation high on the agenda. The results of this second stage of jockeying over state antiterrorism legislation in 2002 and 2003 were mixed, but in a number of states the coalition of civil liberties, libertarian, and other constituencies held the line against a further resurgence in executive authority—ironically aided by the adoption of national laws that undercut the rationale for an expansion of some state authority.

A number of state legislatures—California, Michigan, and Wisconsin among them—declined to give law enforcement and other state authorities strengthened authority to wiretap akin to that adopted in the federal Patriot Act. The Florida legislature passed an initial wave of antiterrorism legislation but

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then refused to pass a law that would have forced colleges and universities to report data on adult foreign students to a state police database. Even some provisions requested by Governor George Pataki in New York, home of the World Trade Center, were denied by the New York legislature.[4]

By late 2003 and early 2004, the battles had begun to shift once again. Though conservative forces continued to introduce expanded wiretapping and other legislation, little was emerging in adopted form, partly due to the vigilance of the civil liberties, libertarian, and pro-privacy communities. But state battles now began to focus on the role of state authorities—state police, homeland security bureaus, governors, attorneys general—in implementing federal data mining and surveillance measures that had encountered political roadblocks at the national level because of their threats to privacy and civil liberties. Conservative attempts to further extend the antiterrorism legislative and enforcement agenda have clearly increased and in some cases migrated to the states. These include the Matrix project discussed in chapter 2, a corporate-state partnership data mining program that, in certain ways, succeeded John Poindexter's discredited Total Information Awareness (TIA) initiative, as well as some aspects of the Operation TIPS (Terrorist Information and Prevention System) proposals.

Because of the nationwide focus on the Patriot Act and other federal measures, the intensive efforts around the country to enact and to resist state-based legislation in the wake of September 11 have often escaped notice. State legislative efforts receive little attention in the national press and even from the key civil liberties organizations that are hard pressed even to defend against the expansion of federal law and policy. And so the strategies and efforts to block, water down, or ameliorate some of the more intrusive state proposals fall to local

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coalitions of civil liberties organizations, interested legislators of various views, committed citizens, and local newspapers. Sometimes those coalitions are strong, and sometimes they are weak.

This chapter discusses these important developments in state-based antiterrorism policy by looking carefully at the experiences of three politically important, highly populated and diverse states in which these battles have been waged—California, Michigan, and New York. It then draws some initial conclusions about the scope and progress of state-based antiterrorism law and policy and the coalitions that have banded together to slow or stop their advance.

Defining a Field of Battle The Scope of State-Based Antiterrorism Law & Policy

If federal antiterrorism law and policy are broad, complex, and difficult to categorize, state efforts are, if anything, even more unwieldy to discuss. The National Conference of State Legislatures provides one quite useful framework that classifies state antiterrorism laws and proposals into several important arenas, adapted for discussion here.[5]

the expansion of provisions for crimes involving terrorism in state criminal laws, including definitions of broad new crimes involving terrorism and the provision of substantial penalties, including the death penalty in some cases;

efforts to improve environment, energy, and transportation security, including legislation designed to address potential threats to nuclear power plants and water, gas, oil, and power facilities; drivers' licenses and identity concerns; and terrorism in the agricultural sector;

legislation in the economic and commercial arena, including work to improve airports and other transportation facilities;

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statutes and policies to strengthen emergency management and the administration and operations of government, including the security of state capitol buildings and other key state institutions; compensation for police and for military reservists; and, certainly most important, the formation or rapid expansion of state offices of homeland security in each of the fifty states;

protection of health, including measures to defend public health institutions and other facilities; efforts to avert bioterrorism; and a series of "emergency health powers acts" that cover disease surveillance, reporting requirements, isolation and quarantine, examination and treatment of certain persons, compulsory vaccination in some cases, public health emergencies, and other issues;

protection against cyberterrorism and defense of information technology and Internet resources, including laws to punish terrorist use of the Internet;

loosening of restrictions on wiretapping and eavesdropping in defense against terrorism; and

legislation intended to strengthen the expression of patriotism, including mandatory expression, which was introduced in a number of states after September 11.

Not all of these areas are equally controversial, and space does not permit discussing them all. Two of the more important areas, each discussed subsequently in state examples focusing on California, Michigan, and New York, are omnibus antiterrorism laws and the proposed relaxations of state wiretapping and eavesdropping laws.

Many of these new or enhanced laws and policies are largely unobjectionable and even necessary under the circumstances as American states adapt to an environment of heightened concern about terrorism. And so, in principle, few would object to regulations or policies that strengthen the security of state capitols and other key government buildings, or that make it less likely that terrorists can obtain drivers' licenses and other

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useful documents, or that enable states to deal with terrorist-related public health emergencies.

But even the less objectionable elements of the state-based antiterrorist agenda may harbor significant issues. When does the need to strengthen security at key government buildings interfere with the exercise of democratic rights? Already there have been charges that the rationale of protection against terrorism is being used to keep protestors away from federal and state officials, including requirements that wide distances be maintained between nonviolent protestors and the president. When does public health emergency legislation carry with it the danger of political overreaching and overuse of powers? As even the National Conference of State Legislatures—which helped to draft the Model State Emergency Health Powers Act discussed later in the chapter—commented: "[S]ome critics claim the . . . emergency powers go too far and that the act's language is too vague."[6] When do enhancements in tracking identity documents translate into tracking individuals and their activities? When do broad definitions of terrorism in laws designed to prevent "cyberterrorism" come to be used to punish persons exercising free speech rights? In the midst of other, often more pressing, issues, some of the disadvantages and misuses of otherwise unobjectionable state laws and policies are not being fully addressed.

Michigan

Shortly after the September 11 attacks and during the wave of anthrax letters, when the atmosphere was at its most charged, the Michigan legislature passed a statute strengthening penalties for manufacturing, possessing, transporting, or releasing chemical or biological weapons. The attorney general of Michigan, soon to become governor, called implied and false

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terrorist threats "equivalent to domestic treason" and called for stiff penalties for such activities. Even more important were calls for new laws to allow state enforcement authorities to engage in wiretapping at the state level to investigate suspected terrorism and to obtain evidence about a wide range of other crimes as well.[7] And it was to these proposals that Michigan's civil libertarians, as well as privacy-oriented conservative legislators and activists, quickly turned their attention. "On September 12 of 2001 I would not have taken bets on our being able to stop wiretapping," notes William Flory, who spearheaded the ACLU of Michigan efforts to soften and delay severe new legislation after the terror attacks. "We looked upon every day without a vote as a minor victory. The further out a vote, the more we had the sense we would prevail."[8]

In Michigan and in other states, the early environment for opponents of such wide-ranging proposals was bleak. Five days after the September 11 attacks, the *Detroit News* had blared the headline "America Approves Limits to Liberties."[9] Faced with a "mob mentality . . . taking hold to support something that until now was deemed not necessary in Michigan,"[10] Michigan's civil libertarians and others pleaded for patience and played for time, reaching out to traditional constituencies and the press as well as to others concerned with the freedom implications of potentially draconian state legislation.[11] Republicans were quoted freely—Senator Chuck Hagel of Nebraska, for example, who said that "if we abandon the liberties we cherish, the terrorists will have won."

The major push was to allow state-based wiretaps of telephones and surveillance of online activity, long desired by Michigan prosecutors and police and long denied by the Michigan legislature. The wiretap and surveillance proposals would have directly allowed the state police to tap the telephones of suspected criminals and given the state attorney gen-

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eral authority to allow local prosecutors to wiretap suspects with court approval. Opponents charged that the motivation for the bill was not terrorism. "You have been trying to get this legislation through since 1973," a criminal defense attorney told Michigan's Senate Judiciary Committee. "We're not talking about going after terrorists here. We're talking about going after drug traffickers."[12] After active debate about the wiretap provisions,[13] they died on the floor of the Michigan House at the end of the 2002 legislative session.

The alliances built between civil liberties organizations and conservative privacy activists, many from a libertarian bent, were crucial to this victory. As William Flory explains: "[T]here were contacts with some Republicans before September 11, more with libertarians than with the social conservatives. . . . They were concerned about the impact of greatly expanded police powers. They recognized that the ACLU would be a valuable ally. . . . There was a different set of allies against the wiretapping provision than against the terrorism bill—a broader coalition, including some more directly concerned with the privacy issues in the wiretapping bill. One key argument was that there was already a federal wiretapping statute, and a feeling that was enough and a state effort wasn't needed. . . . [And] people pointed to the Patriot Act and said that had taken care of a lot of the problems."[14]

A wide range of other proposals was put forward by state officials. The proposed legislation was designed to narrow public disclosure laws to keep more government documents confidential, particularly documents related to search warrants and the affidavits necessary for them. The materials in question were not limited to terrorism-related activities but included warrants for drug and other offenses. The proposals would have allowed seizure of the assets of convicted terrorists, man-

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dated background checks on criminal records for students in flight schools, provided the state Secretary of State with the power to deny driver's licenses to undocumented or illegal aliens, and established or expanded penalties for supporting or hindering the prosecution of terrorism.[15]

The press emerged as an important brake on the march of antiterrorism legislation in Michigan, especially the expanded wiretapping provisions. State newspapers editorialized that the federal government should be left to handle antiterrorism issues and expressed anxiety about the wiretapping bill. "It would have been considerably more difficult to pull a coalition together without the media," notes Flory. "Most media took the position that there was no rush to pass legislation, there should be careful consideration before enactment. . . . And in the aftermath of the Patriot Act . . . there was a concern about the impact on investigative journalism that caught their attention."[16]

The civil liberties community, conservatives, and the press also criticized a proposal in the Michigan Anti-Terrorism Act, tabled in 2002, that would have broadly defined a new crime of terrorism so that even "a public protestor in a demonstration that goes awry could be charged as a terrorist." Civil libertarians warned that existing crime statutes would easily cover terrorist actions and that "the threat of life imprisonment is an unlikely deterrent for people who are willing to engage in suicide attacks."[17] That the proposed bill's definition of terrorism allowed the punishment of activity intended to "influence or affect the conduct of government or unit of government" particularly worried civil libertarians, gay and lesbian groups, and others. The ACLU of Michigan called the definition of terrorism in the proposed Michigan Anti-Terrorism Act "even worse than [in] the new federal law," the Patriot Act. Similar objections based on vagueness and severity were raised to the new

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crimes of furnishing criminal assistance or material support to terrorists and of making a terrorist threat.[18]

The Michigan situation was complicated by the presence of a large Arab and Muslim community in Detroit, Dearborn, and other communities and by protests against discrimination toward that community. Michigan became the site for the first judicial challenge in the country to the closing of immigration hearings for noncitizens swept up in the post–September 11 crackdown when the ACLU challenged the closing of immigration hearings for Rabih Haddad, a leader in the Ann Arbor Muslim community and the Global Relief Foundation.[19] For the civil liberties community and its allies, the presence of that large population was an advantage. "We were able to point to a specific group that might be harmed by draconian measures," says Flory. "And such a large group gave a degree of leverage. . . . It was hard to ignore the impact on that large a community. It was helpful to have people to speak who were directly impacted."[20]

The final antiterrorism bill stripped out the wiretap and electronic surveillance provisions, a significant victory for the coalition of civil liberties organizations, defense attorneys, and others. There were other victories as well. The provision to prohibit illegal aliens from receiving driver's licenses was dropped from the Anti-Terrorism Act.[21] As mentioned previously, the proposed measure to expand state wiretapping was also dropped from the act. It also retained provisions to maintain secrecy on some government documents that would normally be open under Michigan's open records law—primarily relating to search warrants, including search warrants issued in situations entirely unrelated to terrorism. State authorities put that provision to use almost immediately. In late May, a county drug task force executed a search warrant in a drug case in Howell, Michigan, where only a seventeen-year-old

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boy was at home at the time. County officials then refused to provide the single mother who lived at the home with the affidavits underlying the search warrant, directly citing the secrecy provisions of the new Anti-Terrorism Act and sparking protests from the city where the raid took place and civil liberties activists. Partly in response to that raid, legislators pushed through a bill in the summer of 2002 making search warrant affidavits available to those searched fifty-six days after they were issued.[22]

The final package of legislation, generally referred to as the Michigan Anti-Terrorism Act, certainly contained largely unobjectionable elements—such as revisions to the state's Emergency Management Act that help communities work together in emergency situations and protection for "vulnerable targets" such as power plants and other infrastructure. While it criminalized "act[s] of terrorism" against the objections of civil libertarians and others, the definition of "terrorism" was reined in, and the law specifically guaranteed that prosecutions would not be permitted against actions protected by the First Amendment. Crimes of aiding terrorists, hindering terrorist prosecution, and making real or hoax terrorist threats were added. Search warrants and their underlying affidavits were made nonpublic information, against the arguments of government openness advocates. The statute of limitations for terrorism-related offenses was eliminated.[23]

In the end, then, the results were mixed, but the strategy of alliance building, full discussion, and delay proved as successful as any approach could have been. As the ACLU of Michigan put it: "[T]he coalition of groups put together by the ACLU . . . significantly helped to slow the process." And the desire for a broad, bipartisan antiterrorism package gave opponents some leverage. Again, as the ACLU noted: "[T]he discussion[s] between the parties gave us the time and opportunity to point

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out flaws that sent the bills back to the drawing board more than once. The more time that passed between September 11th and the vote . . . the more willing legislators were to question the language and even the necessity of the bills. As a result . . . the language in the new Michigan Anti-Terrorism Act . . . is a far cry from the very frightening original version we saw last fall."[24] In the end, the expanded wiretap authority failed because of a liberal-conservative alliance that included Republican and libertarian lawmakers, the lack of remedies for citizens wrongly wiretapped or put under electronic surveillance to sue the state, and repeated attempts to narrow the wiretap authority by limiting it to specific terrorist threats.[25]

Civil libertarians summarized this struggle in uncharacteristically positive terms. "After September 11, 2001, there were very few people who believed that we would be able to stop anything that was labeled 'anti-terrorist.' They were wrong. Given the sorts of so-called anti-terrorist measures that have been adopted at the national level, we did quite well. The legislation to block illegal immigrants from obtaining drivers' licenses was defeated in the Senate because members were convinced that its impact would reach beyond illegal immigrants. The wiretapping proposal was defeated as an unnecessary and costly idea that would not help to catch terrorists. Even the Michigan Anti-Terrorism Act is a far cry from the USA-PATRIOT Act and is far less threatening that the original version."[26] Different and overlapping coalitions and alliances to oppose diverse elements of the state's agenda were the clear strategy in the Michigan battle and one that seems to have worked as well as could be expected under the circumstances.

The struggle in Michigan against unreasonable antiterrorist measures quieted after the adoption of the Michigan Anti-Terrorism Act, but it did not end. In late 2003, word leaked out that Michigan, Connecticut, New York, Ohio, and Pennsylvania were participating or seriously considering participation in

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the Matrix data mining and surveillance program discussed previously—the successor to Total Information Awareness in which data mining is devolved to the states through the work of a private corporation. The ACLU immediately filed freedom of information act requests in those states, as well as in Florida and Utah, where the Matrix program is already operating with state support, seeking information on the sorts of data state officials are allowing Matrix to utilize and on how the resulting Matrix files are being used by the states.

In December 2003, the Michigan State Police replied to the ACLU, providing some documents and stating that "the MSP currently is not a user of Matrix."[27] But the company operating Matrix has noted in its promotional materials that Michigan has "signed a memorandum of understanding to participate in Matrix"; Michigan officials attended a Matrix briefing on May 8, 2003; and minutes of a Matrix meeting in November 2003 show that, while Michigan may not be a "user" of Matrix, it certainly has contributed data to the effort. At a Matrix Board of Directors meeting in November, Inspector Karen Halliday of the Michigan State Police said that "Michigan has provided sex offender registry data and Department of Corrections data. The state is still working on providing driver's license data."[28] By early 2004, civil liberties groups were pressing for more information from Michigan, state newspapers were inquiring about Michigan's participation in Matrix, and state officials began questioning the program.[29] In early 2005, after a Michigan judge refused to throw out a suit by the Michigan Civil Liberties Union against the state's participation in Matrix, Michigan withdrew from the program.[30]

New York

Nearly three thousand people lost their lives in New York State in the horrific September 11 attacks, and so the state's

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executive and legislative responses were, justifiably and understandably, rapid and severe. Within a week of the attacks, New York governor George Pataki had convened a special session of the legislature, and within days the legislature passed two significant antiterrorist measures without hearings, amendments, or significant debate.[31] As a result, New York has one of the toughest state-based antiterrorist legislative frameworks in the country. And New York's governor and many state legislators have sought to further strengthen antiterrorist laws since the passage of that act. That process has been encouraged by continuing antiterror investigations both in New York City and around the state, including the well-known case of the "Lackawanna Six," Yemeni Americans from a community near Buffalo who traveled to Afghanistan; trained with Al Qaeda; and were charged with assisting a terrorist organization, pleading guilty in 2003.[32]

But even in New York, so badly hit by terrorism on September 11, cooler heads and democratic debate have largely prevailed after the initial, severe legislative response to the destruction of the World Trade Center—in significant measure because of the alliances built by civil libertarians and others who have been able to ameliorate the most severe of legislation to emerge after the first rush to punish in the fall of 2001.

The New York antiterrorist act adopted shortly after September 11 defined and provided severe penalties for terrorist crimes. Terrorist crimes were defined as the commission of almost any sort of felony in order to "intimidate or coerce a civilian population, influence the policy of a unit of government, or affect the conduct of a unit of government."[33] And they criminalized a range of terrorist-related threats or support activities, including hindering of prosecution, and expanded the list of executable terrorist crimes in New York.[34]

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The governor also sought expanded wiretap authority similar to that proposed by (and granted to) the attorney general in the days after the attacks. The New York State Senate agreed to provide that authority, but the assembly did not act. The governor also sought authority for state officials to initiate "roving wiretaps" and to "eliminat[e] the statute of limitations for terrorist offenses."[35] But, once again, this authority was not granted by the legislature in the difficult fall of 2001. Yet these victories were also tempered by problems, including a weakening in the restrictions placed on the New York City police in investigating groups and individuals that engage in political activity. The loosening of this "Handschu settlement" and a wider role for police investigators interested in advocacy groups and individuals caused substantial concern in 2002 and 2003.[36]

When the Model State Emergency Health Powers Act (drafted for the U.S. government's Centers for Disease Control by the Center for Law and the Public's Health at Johns Hopkins and Georgetown Universities in collaboration with several other organizations) came up for consideration in the New York legislature in the spring of 2002, civil libertarians were ready with a sophisticated response: "Government surely has a great responsibility to prevent and respond to . . . bioterrorism" but sought to soften aspects of the bill in order to avoid "using state police powers in a discriminatory manner to suspend freedoms based upon race or national origin." They sought a narrowing of the act's very broad definition of "public health emergency," which as written might be used not only against bioterrorism but also to isolate or quarantine HIV and AIDS patients, "to coerce and punish the most vulnerable among us." They also sought a tightening of the governor's expansive powers to declare such an emergency and to act during it.

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Of particular concern was the power to be granted to the governor to override almost any "regulatory statute" during a public health emergency and to suspend state business processes. The New York Civil Liberties Union graphically pointed out the ramifications: "Under this grant of authority the governor could summarily override any rule or regulation—privacy protections, the Freedom of Information Law, arrest procedures, incarceration standards. Perhaps, most notably, the provision that permits the government to suspend procedures for conducting state business may well include suspension of the judiciary and the state legislature."[37] Other key problems were the powers granted to the governor during such a public health emergency to undertake medical testing of patients that seemed to be, at least formally, voluntary in nature. But the governor would also be empowered to isolate or quarantine those who refused mandatory testing. Because the act also would allow the governor to suspend state business, including the work of the courts, and even to name "emergency judges," there might well be substantial difficulties in asserting individual rights under this legal framework.

The act also would require health care providers and laboratories to report bioterrorism cases to state health institutions, but this is not actually limited to bioterrorism—under the model act, state public health institutions may require the reporting of "any health condition," as well as personal information, data on pharmacy visits, and prescription information. Civil libertarians opposed this provision, arguing that it "can and should be designed to capture information without personal identifiers, absent a showing the state has an overriding interest in breaching the privacy interest a person would otherwise expect."[38]

In New York, as in many other states around the country, the Model Emergency Health Powers Act ran into a buzz saw

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of opposition from civil libertarians and conservative and libertarian privacy, legislative, and other groups, even from prominent right-wing libertarian magazines. Even survivalists joined in to oppose legislation drafted by eminent specialists in law and public health. But in the end the implications of the act for privacy, for executive power, for governmental access to personal information, and even for forced isolation and quarantine have spelled delays or amendment for the act in a number of states, including New York. Since 2001 the Model State Emergency Health Powers Act has been introduced, in whole or in part, in most of the states. In a number of those, liberal and conservative forces have pressured state legislatures to weaken quarantine and other elements of the model statute.[39]

Governor Pataki's antiterrorism bill passed one chamber of the New York state legislature in 2002 but failed in the other under concerted opposition from civil libertarians, moderates who believed that expanded federal legislation covered most of what was needed, and conservatives concerned with privacy. In early 2003, Governor Pataki once again moved forward, "ramm[ing] anti-terrorism legislation through the Republican-controlled [State] Senate . . . without a public hearing or even the normal three-day waiting period," according to the *New York Times.* Like the 2002 bill, the 2003 action would have expanded roving wiretap authority to all crimes, established new terrorist-related crimes, and weakened double jeopardy protections and protection against searches without warrants.[40]

But like earlier New York attempts to pass sweeping antiterrorism legislation, the 2003 bill was sharply opposed by a growing coalition of civil liberties groups, moderates, libertarians, trial lawyers, public defenders, and others.[41] They were even joined by the New York State Bar Association, which

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attacked the proposed bill as "not only an attack on terrorism, but an assault on the criminal justice system."[42] In the end, much of the legislative package failed again, the victim of the opposition coalition, intense political conflict between the governor and senior state legislators, and a Democrat-controlled state assembly.[43] The calls for stronger antiterror legislation were renewed in early 2004, though by March 2004 the road to passage looked no easier than in 2002 and 2003.[44]

President Bush sought to bolster New York's antiterror proposals through an April 2004 visit to Lackawanna, where the Yemeni men had been prosecuted for terror involvement. Yet even in the wake of that visit, the New York governor's proposals for reducing the threshold for convictions by allowing accomplice testimony alone for conviction, a weakening of prohibitions against "double jeopardy," and roving wiretaps remained bottled up in the state legislature—the victim of intense Democratic and civil libertarian opposition and rivalry between the governor and the speaker of the New York assembly. New York's civil libertarians even went on the offensive, calling for New York City officials to begin active oversight of the impact of antiterror measures on the Muslim, Arab, and South Asian populations of New York and detailing numerous instances of detentions and ethnic and religious profiling.[45]

California

As mentioned previously, California had adopted legislation against the manufacture, possession, use of, or threat to use "weapons of mass destruction" in 1999, as well as prohibiting possession of some biological agents. It did not immediately pass a state antiterrorism bill after September 11.[46] California did adopt measures to strengthen the definition of a weapon of mass destruction by including means of transport (such as

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hijacked aircraft) as a weapon. The state also expanded the range of biological agents considered weapons of mass destruction, made provisions for safeguarding the state capitol, and provided support for New York and California victims of the September 11 tragedies.[47] Most of these initial moves went largely unopposed, although California civil libertarians noted that the "new definition of . . . viruses and microorganisms" was "vague and ambiguous" and punished simple possession.[48]

The real battles came in 2002. In late 2001, California governor Gray Davis proposed expanding the powers of California law enforcement officials to employ so-called roving wiretaps against a broad array of suspected terrorists and also suggested weaker requirements for obtaining regular wiretaps and expanded provisions for surveillance of e-mail. California's civil libertarians lobbied against such provisions, seeking to broaden opposition to the measures. The ACLU of Northern California expressed concern that "the Governor's proposals will weaken judicial supervision of telephone and internet surveillance by law enforcement and . . . lead to the surveillance of many innocent Californians." Even the budget crisis and fears of bioterrorism and duplicative big government found their way into the ACLU's approaches: "California is currently facing a major budget deficit and we would be better served if the governor allocated state funds to help fight bio-terrorism instead of duplicating the federal government's efforts." And the legislation's "marginal" impact on terrorism, but substantial impact on privacy, came under criticism as well.[49]

California's civil libertarians and others opposed to the governor's legislative proposals were assisted by an official opinion issued by California's Office of Legislative Counsel that said that roving wiretaps were "beyond the limited wiretapping authority provided to the states by the federal government."[50] The revised version of the bill eliminated provisions for roving

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wiretaps and for expanded electronic surveillance. And it added a section requiring prosecutors to notify defendants who were identified through wiretapping before trial or a plea bargain.[51]

Another ten terrorism-related bills were also introduced in the California legislature that year. One would have added terrorism to the "special circumstances" for which a convicted prisoner could be executed. That bill, like most of the others, died in the legislature, the victim of civil liberties organizations, groups opposed to the death penalty, and other adversaries. Civil liberties, public health, and other forces succeeded in defeating bioterrorism legislation, modeled after the Emergency Health Powers Act, that would have allowed for quarantining and other harsh measures.[52]

California's civil libertarians and their allies also played a significant role in national issues arising out of the September 11 attacks and government responses to them. As the federal government and airlines began the alleged profiling of airline passengers, removing some passengers from aircraft and refusing others permission to board, the ACLU of Northern California sued in San Francisco to prevent profiling of passengers of Asian or Middle Eastern appearance. And when Attorney General Ashcroft weakened the guidelines on FBI surveillance of political and advocacy groups, civil libertarians demanded that the state attorney general decline to follow suit at the state level and instead maintain limits on federal, state, and local law enforcement investigations under California's state constitutional right to privacy.[53]

In 2003, as most of the harsher antiterrorism measures failed in the California legislature under pressure from civil liberties organizations and other forces, attention turned to nonlegislative means used by California authorities to track dissidents and antiwar activists. Two such means were of major concern: the bulletins issued by CATIC (the California Anti-

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Terrorism Information Center) and the CAL/GANG database maintained by the state.

CATIC bulletins to local, state, and national law enforcement and civil affairs bodies were supposed to focus on direct antiterrorism threats. But according to documents obtained by the Associated Press: "[A] large part of what this agency is doing has focused on protest groups rather than terrorists. . . . [One] advisory, issued last December and labeled 'For Law Enforcement Use Only,' analyzed anti-war protests 'in an effort to help law enforcement better understand a new movement that appears to be sweeping the United States and the rest of the world.'"[54]

According to the *Oakland Tribune*, CATIC issued a bulletin to local law enforcement authorities before an April 2003 antiwar protest in Oakland detailing the activities of the organizers, Direct Action to Stop the War. At the demonstration, Oakland police used tear gas and rubber bullets against five hundred antiwar marchers, with about twenty injuries resulting.[55] CATIC apologized for issuing the bulletin, noting that "while the Oakland advisory was sent out under CATIC letterhead, it had nothing to do with terrorism. The way in which the language was used and the way in which the advisory was distributed for the Oakland event was not wise and it's not something we intend to repeat. CATIC does not retain any information about any group or any individual that does not have a bona fide connection to violent activity."[56] This certainly did not allay concerns about the use of CATIC, particularly because the standards seemed merely to be set and enforced within the center rather than supervised from outside.[57]

The CAL/GANG database, established as a way to track gang activity, has long been suspected by civil liberties and other groups as having additional, more political, uses for the

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state. CAL/GANG authorities have refused to provide any significant information about its scope or use, other than the worrisome indication that ill-defined "affiliates" of gang members, who need not be gang members themselves, are included in the system.[58]

The use of these systems to track and report on dissident and antiwar activity may well have violated both the privacy clause of California's constitution and federal law. In response to a rising level of queries and criticism of state-based surveillance, California's attorney general issued new guidelines in the fall of 2003 that limited surveillance by California law enforcement authorities, including police and other officials working on joint task forces in California with the federal government. Under the guidelines, California police and other authorities may not attend or report on political, educational, religious, or social events without "reasonable suspicion of the existence of a criminal predicate." Gathering information in violation of this standard is, the guidelines state, "a mistake of constitutional dimension."

The new guidelines were generally praised by the ACLU and other groups, but some concern was expressed that police officers might not understand or implement the rules with assistance (or enforcement) from above and that local police, which had local guidelines on surveillance of protest and other groups, would need to revise their guidelines to comply with the new state policy.[59]

Space does not permit a fifty-state survey of post–September 11 antiterrorism law and policy. But there are indications that the stages of antiterrorism policy development, and the role of alliances and coalitions in slowing the adoption of new laws and policies, have applicability well beyond those three important states. For example, in Iowa, a substantially rural state that

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was considerably further from the attacks than New York and somewhat isolated from the ongoing fear of terrorism in California, even fewer antiterrorism measures were adopted as the same alliance-building strategies were used. After spirited debate in the fall of 2001 over proposals modeled after the strengthened New York measures, the Iowa legislature declined to institute the death penalty for terrorism-related murder—opting for life in prison instead—and, according to the Iowa Civil Liberties Union, "amended . . . legislation at least three more times to address the objections of civil liberties advocates." The Iowa legislature even enacted a provision emphasizing that "picketing, public demonstrations and similar forms of expressing ideas or views" would not be prosecutable under a terrorism label.[60]

The alliances noted in Michigan and other states played a substantial role in slowing and ameliorating the more far-reaching proposals in Iowa as well. "The passage of time has also permitted opposition groups to form coalitions with greater clout," noted Ben Stone, the executive director of the Iowa Civil Liberties Union. "The ICLU formed an unlikely alliance of organized labor, the gun lobby and antiabortion activists to seek additional protections. The result: a narrower [anti-terrorism] law that specifically protects political activities."[61] Stone put the matter even more plainly to the *Des Moines Register*: "We'll sleep with anybody to get a bill passed or stopped," he said. "The most important thing is to preserve civil liberties."[62]

Certainly worries remained. Iowa's civil libertarians were concerned that the definition of terrorism "remains broad enough that [even] a group of teenagers throwing rocks at the school principal's home could be charged with terrorism and face penalties of as long as 50 years."[63] The "unusual alliance" blunting the most severe of the state antiterrorism provisions requires constant guarding—and was considerably less power-

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ful on measures not related to privacy. On the eve of the second Iraq war in early 2003, for example, a proposal to require daily recitation of the Pledge of Allegiance made its way back to the Iowa legislature; although it was not adopted, civil libertarians could not rely on the pro-privacy alliance to block it.

Lesson from State-Based Antiterrorism Initiatives & Thoughts about the Future

In some states, the rush toward fairly severe antiterrorism legislation was virtually unstoppable after September 11. Understandably, those states included New York. But state-based coalitions were surprisingly successful in halting or ameliorating a range of more intrusive responses in a number of other states. Those successes seemed to continue and expand in 2002 and 2003, as more time passed after the attacks and federal legislation came to cover the field. The executive director of the ACLU of Michigan put it well: "There has been a momentum to take away liberty. . . . But as more time passes, across the political spectrum, voices are saying, 'Whoa'."[64]

One clear lesson of antiterror law and policy at the state level is similar to the lesson from the situation at the federal level: the formation of broad coalitions and alliances, ranging from civil libertarians to conservative privacy and antigovernment activists, libertarians, gun owners, antiabortion activists, moderate legislators, and even the business community has been able to blunt some of the worst potential excesses of antiterrorism legislation.

In Michigan and other states, these broad coalitions have played a crucial role in blocking executive proposals for expansion of state wiretapping and surveillance authority. In most of the states such proposals have languished, or they have been

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pushed off the legislative agenda through the work of broad, sometimes disparate, coalitions.[65] In states where more severe antiterrorism legislation has been blocked or weakened, as in California, activist coalitions have now had to turn their attention to state action that does not require legislative approval. In California, where the California Anti-Terrorism Information Center and the CAL/GANG system were allegedly undertaking overly intrusive surveillance of political protestors well beyond any reasonable definition of "terrorists," the attorney general came under broad pressure to limit and regulate state surveillance—and he did. Those new California guidelines are not perfect, of course, and their implementation will be watched carefully by a range of groups in California, but they represent another partial success of broad-based citizens' coalitions in at least softening post–September 11 responses in state antiterrorism policy.

The New Devolution Controversial Federal Antiterrorism Policy Comes down to the States

Beginning in 2002 and accelerating in 2003, some troubled federal programs began to find their way to the states. The Matrix project partners states with a Florida-based data mining company to aggregate and provide access to an exceptionally wide array of data somewhat reminiscent of the Pentagon's Total Information Awareness program. It has involved as many as fourteen states, though now fewer because of public opposition, privacy concerns, and budgetary problems. Matrix has received some acknowledged federal funding, and as TIA recedes Matrix will bear watching as one of the largest and most active governmental efforts to gather and disseminate personal data to law enforcement for terrorism and criminal

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investigations. In a similar pattern, as the federal TIPS program disintegrated under criticism, state-based hotlines have expanded, industrial groups have come into the picture, and the military has rapidly expanded its Eagle Eyes informant program. All of these activities are discussed in more detail in chapter 2, but the key point here is that discredited and criticized federal efforts are, in most cases, not fading away. In many cases they have come to life again at the state level, scattered and often hidden until the press or civil liberties organizations have brought them to light, demanded information, and led coalitions of opposition at the state level.

The pace of state enactment of antiterrorist laws seems clearly to have slowed since 2003 and 2004, although renewed proposals continued to spur opposition in New York into 2004. And in some states such as California, concerted action by citizens and civil liberties groups has forced the state to temper the use of state antiterrorist laws and agencies against those exercising protected rights to speak and demonstrate. Yet concerns remained that state antiterrorism agencies were monitoring or infiltrating antiwar and other groups, perhaps now on behalf of federal agencies.[66]

Most of the laws and other provisions enacted quickly—often too quickly—in the early months and years after September 11 remain on the books, available for use. As critics warned at the time, there has not been much use to be made of those legal provisions against terrorists. But in a worrying new development, states have begun using the broad provisions of new antiterrorism laws against other defendants on the grounds that their allegedly criminal activities fit the new laws and constitute a form of terrorism against citizens.

In New York, a gang leader was charged under New York's antiterrorism statute after a ten-year-old girl was killed, allegedly by the gang, near a church in the Bronx.[67] In North

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Carolina, a prosecutor attempted to charge alleged methamphetamine producers under the state's antiterrorism law on the ground that meth constitutes a "chemical weapon" under the statute, though he was blocked by a state court.[68] And in Virginia, snipers John Allen Muhammad and Lee Boyd Malvo were prosecuted in part under the state's antiterrorism law, and Muhammad's death penalty sentence was also partly based on the state law.[69]

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