MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Third Session
May 9, 2005

The Committee on Judiciary was called to order at 8:21 a.m., on Monday, May 9, 2005. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada, and, via simultaneous videoconference, in Room 4401 of the Grant Sawyer State Office Building, Las Vegas, Nevada. Exhibit A is the Agenda. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Mr. William Horne, Vice Chairman
Ms. Francis Allen
Mrs. Sharron Angle
Ms. Barbara Buckley
Mr. John C. Carpenter
Mr. Marcus Conklin
Ms. Susan Gerhardt
Mr. Brooks Holcomb
Mr. Garn Mabey
Mr. Mark Manendo
Mr. Harry Mortenson
Mr. John Oceguera

COMMITTEE MEMBERS ABSENT:

Ms. Genie Ohrenschall (excused)

GUEST LEGISLATORS PRESENT:

Senator Terry Care, Clark County Senatorial District No. 7

STAFF MEMBERS PRESENT:

Risa Lang, Committee Counsel
Allison Combs, Committee Policy Analyst

Jane Oliver, Committee Attaché

OTHERS PRESENT:

Sergeant Bob Roshak, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department, Las Vegas, Nevada
Sergeant Michelle Youngs, Public Information Officer, Washoe County Sheriffs' Office, Washoe County, Nevada; and Legislative Advocate, representing Nevada Sheriffs' and Chiefs' Association
Ben Graham, Chief Deputy District Attorney, Clark County District Attorney's Office; and Legislative Advocate, representing the Nevada District Attorneys Association
Kristin Erickson, Legislative Advocate, representing the Nevada District Attorneys Association
Norma Alaimo, Private Citizen, Las Vegas, Nevada
Allen Lichtenstein, General Counsel, American Civil Liberties Union of Nevada, Las Vegas, Nevada
Linda Bowmer, Unit Manager, Youth Parole Bureau, and Deputy Compact Administrator, Interstate Compact for Juveniles, Division of Child and Family Services, Nevada Department of Human Resources
Robert McLellan, Deputy Administrator, Juvenile Services, Division of Child and Family Services, Nevada Department of Human Resources
Major Bob Wideman, Manager, Central Repository for Nevada Records of Criminal History, Nevada Department of Public Safety
Ron Titus, Director, Administrative Office of the Courts, Supreme Court of Nevada
David Kallas, Executive Director, Las Vegas Police Protective Association, Metro, Inc., Las Vegas, Nevada; and Legislative Advocate, representing Las Vegas Police Managers and Supervisors Association, Las Vegas Police Protective Association Civilian Police, North Las Vegas Police Officers Association, and Nevada Conference of Police and Sheriffs
Ron Dreher, Legislative Advocate, representing Peace Officers Research Association of Nevada
Gary Peck, Executive Director, American Civil Liberties Union of Nevada, Las Vegas, Nevada

Vice Chairman Horne:
[Called the meeting to order and roll called.]

Senate Bill 28 (1st Reprint): Prohibits person from knowingly and intentionally capturing image of private area of another person under certain circumstances and prohibits person from knowingly distributing, disclosing, displaying, transmitting or publishing image captured under such circumstances. (BDR 15-8)

Senator Terry Care, Clark County Senatorial District No. 7:
I am not the sponsor of S.B. 28. It bears no resemblance to the bill that was introduced. It was modified by the Committee, and we ended up with what you have before you.

The time has come to create a crime for video voyeurism. This bill refers to the guy with the camera in his shoe walking through the shopping mall, and people with cell phones. After they take a picture of somebody in a compromising position, they are able to post it on the Internet. This person's image is in places they never imagined, without their consent.

It's usually in a situation where a person would have expected some sort of privacy. There's no expectation of right to privacy when cameras go through shopping malls during the Christmas holiday shopping season.

When you are in a bedroom or a locker room—although the bill doesn't name specific locations—that's where you have a reasonable expectation of privacy, depending on the circumstances. This can also happen in a public place, because technology can now penetrate clothes, go around clothes, or go up under clothes.

Section 1, subsection 1 is the prohibited act: "You shall not knowingly and intentionally capture an image." It doesn't specify a camera or video camera, as was stated in the original bill. The language says, "Capture an image." This bill is modeled after language contained in a federal bill that prohibits the same conduct in federal buildings and at federal locations. There's no national law against this; it's only confined to federal locations.

It says, "Shall not knowingly and intentionally capture an image of the private area of another person." If you look on page 3, subsection 8, there's a definition of "private area." That's modeled after the federal legislation.

This happens without consent of the other person, under circumstances in which the other person has a reasonable expectation of privacy. It's impossible to define in law what that means; it's going to depend on the circumstances.

There's a body of case law, along with the tort of invasion of privacy, that would give you some idea of the circumstances we're talking about.

[Senator Care, continued.] Subsection 2 contains a second crime for distribution of an image. This happens when you know it was made without the person's consent, and under circumstances in which the person had a reasonable expectation of privacy. There is the capturing of the image, and then there is the distributing and transmitting of the image. Both of these could be done by the same person, or it could be different people. The penalty in subsection 3 is a Category E felony, which is 1 to 4 years and mandatory probation.

Subsection 4 is similar to Speaker Perkins' bill that dealt with a person who's hiding himself in somebody's backyard. An exception would be a law enforcement officer who's conducting an investigation.

The language in subsection 5 is not contained in the federal legislation. It recognizes the sensitivity of the person whose image has been captured. We're saying that the image itself would be confidential. If there were a trial, the public could sit in on the testimony, but the public would not view the image itself as it would be confidential court records, the Criminal Repository, and the like. Subsection 6 provides exceptions to that for an investigation, prosecution, and in preparing a defense for the person who's going on trial for this sort of conduct.

In subsection 7, there are additional exceptions. That's where the court finds "good cause," whatever that might be. We can't be specific, but if the court is going to consider good cause, there has to be a notice given to the person whose image was captured. The rest of S.B. 28, subsection 8, has the definitions, which are modeled under federal law.

There was testimony from prosecutors and law enforcement. This bill is not what we started with, but I've explained how we got here. We looked at a number of things, simply criminalizing the tort of invasion of privacy. Under Nevada law, we looked at a number of possibilities, but the Committee thought this was the best way to go.

Vice Chairman Horne:
Were there any discussions about the Category E felony, as opposed to a gross misdemeanor? How did you arrive at a Category E felony?

Senator Care:
It is fluid with the sponsor of the bill. The first offense was a misdemeanor, and the second offense was a Category E felony for capturing and a Category D

felony for distributing. It's not our intent to nail down this Committee. The Committee may have a mind of its own about penalties.

Sergeant Bob Roshak, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department, Las Vegas, Nevada:
I would like to testify in support of this legislation. Currently, the Youth and Family Bureau receives complaints of this nature, and they have difficulty finding the appropriate statute to submit the case under. This addition to *Nevada Revised Statutes* (NRS) will provide appropriate relief to victims.

Sergeant Michelle Youngs, Public Information Officer, Washoe County Sheriffs' Office, Washoe County, Nevada; and Legislative Advocate, representing Nevada Sheriffs' and Chiefs' Association:
We are in support of this legislation. Our Detective Division receives these types of reports. The additional charge will allow us to do something appropriate to help these victims. We are pleased to see that it encompasses the different technology that we're seeing now, including camera phones and digital recording devices. It's getting out of hand.

Chairman Anderson:
Would there be a problem with making this a gross misdemeanor for the first offense, and then tracking it so that any subsequent offense would be a felony?

Bob Roshak:
We wouldn't have an issue with that.

Chairman Anderson:
There might be a problem with raising it too quickly to a Category E felony. It's not an act we want to condone. If we make the first offense a gross misdemeanor and the second offense a Category E felony, I think it might have a better chance. Will there be a problem with enforceability?

Bob Roshak:
No.

Assemblywoman Gerhardt:
Could we find out what penalties we used for the video voyeurism, since that seems to be similar? For the sake of consistency, we might want to keep them the same.

Ben Graham, Chief Deputy District Attorney, Clark County District Attorney's Office; and Legislative Advocate, representing the Nevada District Attorneys Association:
We echo the sentiment of Senator Care in his explanation of the bill. The first thing we think of regarding a reasonable expectation of privacy is constitutionally protected areas, which has a whole different meaning than what we're talking about here. You would expect that certain parts of your body or clothing would not be photographed. It's not just a constitutionally protected area.

I would like to remind the Committee that Category E felonies are mandatory probation. None of these people would be going to prison for a first offense. Over 98 percent of cases are plea bargained. If you started with a Category E felony—which would be mandatory probation—if it were reduced down to a gross misdemeanor, there is the likelihood that the people would get probation. If it started out as a gross misdemeanor, it's possible that it would be reduced to a misdemeanor, and then there would be no probation. These are some things to think about when you consider altering the penalty scheme. As Senator Care and others have said, this is an issue that is ripe for legislation.

Vice Chairman Horne:
If we started with a gross misdemeanor, wouldn't you still be able to track it? For example, if someone is charged with a gross misdemeanor and you plead it down to a misdemeanor, and a year later they are caught doing the same act, could you then charge them with a Category E felony?

Ben Graham:
I'm not sure what misdemeanor someone would plead down to, maybe to a disorderly conduct. You're talking about people who are running around taking pictures of little girls' underpants in the mall. I'm not sure why they need to be treated as a gross misdemeanor, and then reduced down to a misdemeanor, but that's a policy decision for this Committee. I don't see any harm in leaving it as a Category E felony, because somebody who does it for a lark might say it isn't worth it. For predators, maybe it should be higher.

Vice Chairman Horne:
Isn't there a distinction between photos taken of minor children as opposed to adults?

Ben Graham:
In the testimony that we've had over the years, I have not come up with a distinction between young people and adults. There may be, but I'd have to check into it.

Assemblyman Carpenter:
What other crime could be raised to a higher level other than Category E felony?

Ben Graham:
I don't know of anything like this, because technology has brought us into an area that we didn't have before. In the old days, people trespassed and took pictures through windows, and we talked about that during other testimony. This is specifically aimed at this type of conduct. I don't know of anything else where it could be raised to a higher level. That's why Senator Cegavske and the Committee introduced the bill. Senator Care singlehandedly reworked it.

Assemblyman Carpenter:
In Section 4, it says that law enforcement can distribute, disclose, display, and publish it. Under what circumstances would they distribute or publish it for an investigation?

Ben Graham:
Publishing doesn't necessarily mean putting it in the newspaper. Publishing just means distributing—to be able to show it to people, to determine who the victims are, and who the perpetrator is.

Bob Roshak:
Ben Graham is correct. Also, we might film something for a prostitution investigation that could fall into this category.

Assemblyman Carpenter:
Why would you want to distribute, disclose, and display it? Would it be amongst yourselves, or are you going to let the public see it?

Bob Roshak:
It would strictly be in-house for investigative purposes. It wouldn't be anything we would put out for anyone's enjoyment.

Assemblyman Carpenter:
I don't see the need for that.

Vice Chairman Horne:
At the end of subsection 4, it states, "For the purpose of investigating or prosecuting a violation of this section." You're wondering if there's any way that it could go outside that scope.

Ben Graham:
This has been carefully crafted so that the defendants will be able to see what they're charged with under certain circumstances, but the images would not be massively distributed. Part of the concern was that if it should go to trial, we should try to narrow it down to a limited number of people, so that it wouldn't be on the World Wide Web. They emphasize that the police could utilize it in their investigation and for internal purposes.

When we get a child pornography case in our office, which we get from time to time, the ability to see and utilize those files is narrowly defined. The immediate people charged with the prosecution, including the police, are the only ones that are privy to those files.

Vice Chairman Horne:
To answer Ms. Gerhardt's question, the earlier voyeurism bill, A.B. 190, stated that if there was a deadly weapon, it was a felony, and if there was no deadly weapon while on the premises of taking such photos, it was a gross misdemeanor. If there was no deadly weapon and no camera, it was a simple misdemeanor.

Assemblyman Manendo:
I can understand capturing or distributing an image in an investigation, or disclosing it at a trial and displaying it on a bulletin board. Would "transmit" mean emailing each other the pictures? I'm trying to understand what happens in a case like that. The part that bothers me is, I don't know what happens in the investigation for a trial where you would publish a picture.

Ben Graham:
If I were to repeat slander about someone to Ms. Kristin Erickson, that is publishing if I tell it to her. That's another term for publishing. It doesn't mean putting it in *People* magazine.

Assemblyman Manendo:
But, it could.

Vice Chairman Horne:
I can't imagine law enforcement publishing these types of photos, because these would be photos of victims. I can't see the purpose of placing them for public viewing in a magazine or on the Web, because it doesn't serve an investigatory purpose. It's different with a perpetrator's photo. When I read this, I was thinking of it in relation to other law enforcement agencies or district attorneys, et cetera.

Kristin Erickson, Legislative Advocate, representing the Nevada District Attorneys Association:
There is one additional definition of "publishing." Publishing is a legal term used when an attorney shows a photograph to the jury. That could also be defined as publishing in subsection 4 of S.B. 28.

Norma Alaimo, Private Citizen, Las Vegas, Nevada:
I'm here on behalf of Senator Barbara Cegavske, to help put our bill into law. It is making video voyeurism a felony, punishable by 20 years in prison.

Video voyeurism is stalking. A person is being watched in their own home 24 hours a day, seven days a week. There isn't any privacy at all, and you live a completely different life than before your house was bugged. One way to know if your house is bugged is that you're in the bathtub and you see lights coming through the overflow while trying to bathe. Bugs can be put anywhere in the house: smoke alarms, clocks, radios, vents, lamps, et cetera. You live in a glass bowl.

The world is watching you take a shower, go to the bathroom, and sleep. We must make this a felony punishable by 20 years in prison. A person's life is completely ruined if this bill is not passed.

Vice Chairman Horne:
Are you aware that S.B. 28 calls for a Category E felony, which is mandatory probation?

Norma Alaimo:
Yes, I heard that, and it isn't enough. These people continuously do this, and probation would not be enough for them because they would go right back and do the same thing again.

Vice Chairman Horne:
Are you proposing an amendment to this bill to call for a stiffer penalty?

Norma Alaimo:
Absolutely. I think it should be 20 years in prison. New York has that penalty, and I think it's been law for the past 10 years.

Allen Lichtenstein, General Counsel, American Civil Liberties Union of Nevada (ACLU), Las Vegas, Nevada:
We're not in opposition to this bill. We testified when it was in the Senate, and the changes that were made by Senator Care went a long way to addressing some of the concerns we had. There are a few matters that need more work.

[Allen Lichtenstein, continued.] In subsection 6, paragraph (b) on page 3, line 3, "As necessary for the purpose of allowing a person charged with a violation of this section and his attorney to prepare a defense ..." It's important to remember that the same behavior is also subject to a civil suit, a tort. As it is written here, a person or an attorney defending that civil suit would not be able to use this particular information in a defense, which I think is an oversight. Also, it's possible that some of these images may be involved in other criminal cases, so I think that section needs to be rewritten to encompass all of the circumstances in which a defense would depend on the use of this material.

In Section 8, paragraph (c), since it's not used elsewhere in the bill, the definition of a "female breast" is not really germane anymore.

Our main concern is to ensure that in criminal or civil cases, these images are available for a defense and should be authorized by this bill.

Vice Chairman Horne:
In subsection 6, paragraph (b), I don't know if I was following you.

Allen Lichtenstein:
It's necessary for the purpose of allowing a person charged with a violation of this section. There may be other circumstances where someone is involved in a civil suit for invasion of privacy for taking these pictures. In that circumstance, the attorney would not be allowed to utilize that picture, because it's only authorized for a defense of this particular section.

Vice Chairman Horne:
I understand now. I see that it says you are neutral on S.B. 28.

Allen Lichtenstein:
We do not oppose this bill with some corrections, so there won't be unintended consequences.

Vice Chairman Horne:
He makes a good point in subsection 6, paragraph (b), and we should consider an amendment to include a civil suit. [Closed the hearing on S.B. 28.]

Senate Bill 43: Adopts revised Interstate Compact for Juveniles. (BDR 5-81)

Linda Bowmer, Unit Manager, Youth Parole Bureau, and Deputy Compact Administrator, Interstate Compact for Juveniles, Division of Child and Family Services, Nevada Department of Human Resources:
[Ms. Bowmer read from prepared testimony, Exhibit B, which is incorporated herein.]

Vice Chairman Horne:
Were you planning to walk us through the bill? This is replacing the previous compact.

Linda Bowmer:
Right. The Interstate Compact that we currently have was developed in 1955. Society problems, the problems of families and youth, and technology and transportation issues have changed drastically since then. The compact that was developed in 1955 no longer functions well today, so there is a new compact on the table that will provide better enforcement between states. It will clean up a lot of the issues that we're facing today with the current compact.

As of May 4, 2005, 24 states have enacted the new compact into law (Exhibit C). When 35 states adopt and ratify the new Interstate Compact, it will become law. We're hopeful that Nevada will be on board with this, especially in terms of establishing a state commission and being part of the national commission to promulgate new rules and regulations with the new Compact.

Robert McLellan, Deputy Administrator, Juvenile Services, Division of Child and Family Services, Nevada Department of Human Resources:
[Mr. McLellan read from prepared testimony, Exhibit D, which is incorporated herein.]

Vice Chairman Horne:
In Article 1, it establishes what the compact is going to be responsible for—particularly, "Ensuring immediate notice to jurisdictions, establishing procedures to resolve pending charges, and establishing a system for uniform data collection." Will we be reinventing the wheel in some cases?

Robert McLellan:
Much of this is already in place in the existing compact. The major departure, in terms of the new Interstate Compact, is to allow for better enforcement and to be able to enter into dispute resolution with other states when the other states don't follow the existing rules. That's the stark difference between the present compact and the proposed new compact.

Vice Chairman Horne:
Ms. Bowmer, did you state the number of jurisdictions that already adopted this compact?

Linda Bowmer:
Yes, I did. As of May 4, 2005, 24 states have adopted the new compact. There are 3 states where it has passed one chamber, and the new compact is under consideration in 11 other states.

Vice Chairman Horne:
[Closed the hearing on S.B. 43.]

Senate Bill 452 (1st Reprint): Revises provisions pertaining to Central Repository for Nevada Records of Criminal History. (BDR 14-612)

Major Bob Wideman, Manager, Central Repository for Nevada Records of Criminal History, Nevada Department of Public Safety:
The premise of S.B. 452 is to keep up with some changes, in housekeeping terms, in the collection of criminal justice information and publishing of crime statistics.

We want to eliminate the existing Committee for Uniform Crime Reporting and recreate a committee that would advise on issues related to the Nevada Criminal Justice Information System. The uniform crime reporting process was initiated at the federal level in the late 1940s. Things have changed since then in terms of the availability and timeliness of data collection, data availability, and data analysis.

As a result, the federal system is making some changes in their process of collecting and analyzing information. The preferred concept is to use data mining from existing law enforcement technologies to acquire information at the federal level, without accumulating a variety of State reports.

We want to adjust our state process to be more in line with the coming federal process. In this state, the Nevada Criminal Justice Information System is the automated system by which law enforcement agencies and other criminal justice components share information across the boundaries of the state of Nevada.

[Bob Wideman, continued.] The Department believes we would be better served by having a shared governance committee related to our own Criminal Justice Information System then having it narrowly defined to uniform crime reporting.

Section 1 of S.B. 452 creates the Nevada Criminal Justice Information System and sets the membership of the advisory committee and the process by which the terms would be set and filled. Section 3 of the bill eliminates the now-defunct Uniform Crime Reporting Committee.

Section 2 of the bill makes a housekeeping change regarding the placement of the Criminal History Repository within the Nevada Highway Patrol. When the Repository was created 20 years ago, the Nevada Highway Patrol was the only law enforcement agency within the Department of Motor Vehicles structure, and that has changed.

It is necessary in the completion of duties that the Repository is within a law enforcement agency. However, at this point, the Department of Public Safety has taken over that umbrella. We think it would be more efficient for the administration and management of the Department and the Repository to leave it as an organization within the Department of Public Safety, rather than specifically related to a traffic enforcement agency.

Assemblyman Carpenter:
In the bill, it says that all of these people except for two are appointed by the Director of the Department. If he wanted to, he could load it up with his buddies.

Bob Wideman:
The interest of the Director would be well served to staff the committee with persons of appropriate knowledge and circumstance. At the same time, the Department's desire is to create a circumstance of shared governance with this system, and we are amenable to any particular makeup that might be preferred by another group.

Vice Chairman Horne:
Couldn't that same thing be accomplished if we varied this membership? You have the Director of the Department of Public Safety and the legislative members, but what about the Attorney General, Director of the Department of Corrections, and the AOC [Administrative Office of the Courts]? Could we mix this committee up a little bit?

Bob Wideman:
We could mix it up in any way the Committee felt comfortable with. Our premise is shared governance, and we chose to submit the bill in a simple way to get it done, but we're amenable to any level of inclusion in that bill.

Vice Chairman Horne:
How would these changes help or hinder the current speed on background checks?

Bob Wideman:
These changes don't impact that issue.

Ron Titus, Director, Administrative Office of the Courts, Supreme Court of Nevada:
We are in support of S.B. 452, but we have an amendment (Exhibit E), which I have talked with Major Wideman about. He is in agreement with it.

In Section 1, subsection 2, paragraph (e), we suggest there be one member who is a representative of the Judicial Branch, who would be appointed by the Chief Justice. That allows the individual who is appointed by the Chief Justice to truly represent the Judicial Branch and commit the Judiciary to any decisions that may be made by this body.

Vice Chairman Horne:
The only change you have is in Section 1, subsection 2, paragraph (e)?

Ron Titus:
That's correct.

Vice Chairman Horne:
Would the AOC be opposed to adding the Attorney General?

Ron Titus:
If you want to get things done, you want to keep the committee small. A representative of the Judicial Branch, which could be a member of the AOC, is at the Chief's discretion. We want somebody who can represent the Judicial Branch and commit justice courts, municipal courts, and the AOC to this process.

Subsection 2 talks about what the advisory committee shall do: "Recommend policies, advise technical support, and advise on integrated information sharing." The third one is more applicable to us. I would prefer that the internal operations

of the Criminal History Repository be the responsibility of the Department of Public Safety, but it does cross over into the Judicial Branch and other areas.

[Ron Titus, continued.] In the interest of keeping the committee at a reasonable size, one member would be sufficient for the Judicial Branch.

Vice Chairman Horne:
I was thinking along the lines of adding a representative of the Nevada Sheriffs' and Chiefs' Association and the district attorney's office, in addition to the AOC and DPS [Nevada Department of Public Safety].

Mr. Carpenter, would it work for you if we add the Attorney General, the Director of the Department of Corrections, AOC, Nevada Sheriffs' and Chiefs' Association, and the district attorney's office?

Assemblyman Carpenter:
I guess we'd have to see how much of a direct involvement they have.

Vice Chairman Horne:
I'm talking about them sitting on the advisory committee and your other concern.

Assemblyman Carpenter:
What concerns me is that they're appointed by the Director of the Department. Your idea is good too, because they need to have involvement with the agency. I think we can work it out.

Vice Chairman Horne:
[Closed the hearing on S.B. 452.]

Senate Bill 150 (1st Reprint): Prohibits false or fraudulent complaint against public employee. (BDR 23-1168)

David Kallas, Executive Director, Las Vegas Police Protective Association, Metro, Inc., Las Vegas, Nevada; and Legislative Advocate, representing Las Vegas Police Managers and Supervisors Association, Las Vegas Police Protective Association Civilian Police, North Las Vegas Police Officers Association, and Nevada Conference of Police and Sheriffs:
Last Thursday, I dropped off an issue paper along with some supporting exhibits to all the Committee Members' offices.

[Mr. Kallas read from prepared testimony, Exhibit F, which is incorporated herein.]

Vice Chairman Horne:
In your testimony you said that false statements are not protected speech, but if I'm remembering correctly, in one of the cases that the Supreme Court of Nevada relied on, it was the U.S. Supreme Court that stated the protections provided are not for the individual, but for the public at large, in determining whether or not a First Amendment issue is present.

In your argument, you say that the California Supreme Court said that protection is not provided for someone who lies, but hasn't it already been stated that's not the protection we're looking at? It's not the person who lied, but the group in general. That's why they believe it chills free speech.

David Kallas:
In *People v. Stanistreet* [29 Cal. 4th 497, 58 P.3d 465 (2002)], the California Supreme Court decision you're talking about, they refer to *Garrison v. Louisiana* [379 U.S. 64 (1964)]. That's a standard they used that said there is no First Amendment protection for somebody who has a reckless disregard for the truth or knowingly files a false complaint. In the case that you're talking about, *R.A.V. v. City of St. Paul, Minnesota* [505 U.S. 377 (1992)], they talk about the "chilling effect," but the California Supreme Court also addresses the "chilling effect" issue in that decision. You can find that on page 12 of Exhibit 2 (page 25 of Exhibit F).

Vice Chairman Horne:
It seems like it's a departure from the U.S. Supreme Court case, but I won't belabor that point.

I'm curious about the high percentage of unfounded allegations. If you follow the logic of your testimony, I can easily infer that because we have such a large number of unfounded complaints, a large number of those unfounded complaints may find themselves facing a charge of filing a false complaint. Are we going to see a large number of charges for filing a false complaint for unfounded charges? Unfounded doesn't mean it didn't happen.

David Kallas:
I agree with you. That is not the intent of S.B. 150. I can only speak from a law enforcement perspective. In law enforcement, when an investigation is opened, there can be five conclusions. You can have a complaint that's sustained, which means the action occurred and violated policies and procedures or state or county law. It could be unfounded, which means there is no validity to the

complaint. It could be not sustained, which means it could not be proved or disproved. It could be exonerated, which means the actions did occur but they were lawful, or there could be misconduct not based on the original complaint.

Vice Chairman Horne:
You said "unfounded" means that the incident didn't occur?

David Kallas:
Didn't occur, correct.

Vice Chairman Horne:
I define "unfounded" as that we don't have enough evidence to say that the incident occurred or didn't occur.

David Kallas:
I may be confusing "not sustained" and "unfounded." The premise is that we're only looking at the ones in which there is absolutely no evidence that it occurred—not that you couldn't prove or disprove it, but that it actually never occurred. The complaint itself was filed falsely, and the person knew that the allegations were a lie. This is similar to what the *California Penal Code* 148.6 currently states and what the supporting language in the decision that we have cited also supports. That's the only circumstance.

Assemblywoman Buckley:
In reading the federal court case, I worry about what a court will do with this ultimately. Even though we have that issue in the California Supreme Court case, the way they focus in on criminalizing defamation misses the intent of what you're trying to do.

Maybe we should tighten it up some more. The "knowingly filed," that's a strong burden right there. Instead of an allegation of misconduct, it could be limited to crimes. The biggest area of concern is when an officer is falsely accused of theft or battery, and it didn't happen. You could list out some of the allegations made that are not true, and that way, we won't get into misconduct.

What if someone is alleged to be very rude? Let's say it's somebody at the planning and building department, and they say, "I'm not handling your complaint today; come back tomorrow." That's rudeness, but should that be criminal? Misconduct, because there's no definition, might run into some constitutional concerns. In my legal opinion, I think we would be better off tightening this to be a little more specific, so that it can't be alleged that you're just trying to criminalize defamation. I'd like your thoughts on that.

David Kallas:
Based on some information I'd received and conversations I'd had, I decided to try to define what an allegation of misconduct is.

Before you is an amendment (Exhibit G) that would try to define it. At this point, I'd be willing to work with anybody who wanted to narrowly define it, because it is not our intention to prosecute people because they have a difference of opinion. I can tell you as I sit here today, the Eakins arrest was a travesty. That individual never should have been arrested. It was a misapplication of the intention of that law, and had that not happened, we probably wouldn't be sitting here today. Since it did, we're trying to rectify the situation. We're willing to rectify it in whatever venue necessary and in whatever language that will address the concerns of the Committee members and the general public, so they don't have to worry about criticizing a public employee and then finding themselves facing some sort of criminal charge.

Our idea is not to put people in jail. First of all, nobody's going to go to jail for a second or third offense of this. It's a misdemeanor, and they may potentially receive a fine. Even then, it's not our intent to prosecute people because of differences of opinion, whether somebody was or wasn't rude, or whether somebody was or wasn't discourteous. These are perceptual issues. We're talking about conduct that could be considered a crime had it occurred in the scope and course of an individual's employment.

Assemblyman Carpenter:
I agree with Ms. Buckley that in this conduct, there's a lot of singe. I don't know whether it should rise to a misdemeanor or not. Where you're trying to describe allegation and misconduct, and you say, "any act or omission," does that throw it into the same realm?

David Kallas:
No. The intent isn't about perceptual issues. There needs to be a process put in place because there are concerns about the police going out and prosecuting the people they believe have filed a false complaint against an individual. Our thoughts are that you need to create separation as to who files a complaint. There have to be standards that are met. That could be done at the city attorney's office, depending on the jurisdiction, or the district attorney's office. It would be proper to have a third party look at it to see if there's enough probable cause to file a charge against an individual for violation of this statute.

Ron Dreher, Legislative Advocate, representing Peace Officers Research Association of Nevada:
I want to echo what Dave Kallas said. I've been representing law enforcement officers in my capacity as a law enforcement officer representative, and now as a representative—post-retirement—of law enforcement.

Many complaints come in for rudeness, like Assemblywoman Buckley described. That's not the intent of this legislation. Senate Bill 150 is for those who purposely take out an officer with reckless disregard. For example, someone files a complaint about stolen money, and the reason they did it was because they wanted Mr. Kallas' job.

Recently, I had a case where a repeat offender purposely alleged that one of the officers in our state had stolen money and done other things. It appears that the reason they are doing this is an attempt to impeach the credibility of the officer. That's what this bill is about.

I want to clarify something that Vice Chairman Horne said regarding the five findings that can be reached in a case. In law enforcement terms, and in internal affairs procedure, "unfounded" means that it did not happen. The finding of "not sustained" means you can't prove or disprove it. Your definition of "unfounded" was the same as our definition of "not sustained." If you get an unfounded conclusion, it did not happen and the results of the investigation are done. "Exonerated" means that no administrative violation occurred. That's how that's usually applied in our world.

In the *R.A.V.* decision—which California upheld—in law enforcement and internal affairs settings, we have to keep those records for a number of years. They don't go away. That's another reason the California Supreme Court went on point to say you need this for the reckless regard. It's not to stop the person that gets a traffic ticket and says that the officer was rude. It goes on point with the amendment that Dave Kallas handed out to you (Exhibit G), which attempts to define when it is a criminal allegation like that.

Allen Lichtenstein, General Counsel, American Civil Liberties Union of Nevada, Las Vegas, Nevada:
Eakins v. Nevada [219 F. Supp. 2d. 1113 (Nev. 2003)] is a federal case and was not dependent on what California did. California decisions are not binding on the federal courts. The federal court agreed with the logic there, along with logic and precedent from other cases.

One of the cases was *R.A.V.*, a fourteen-year-old case. One of the things that was said by the United States Supreme Court in *R.A.V.* was that the

government has the right to prescribe libel, but it can't just prescribe libel against government officials. Well, that's what's being done here.

[Allen Lichtenstein, continued.] It's true that there is no First Amendment protection for libelous or other defamatory statements. One of the questions is equal protection. You have a special law that protects government people, but it does not apply to the rest of the citizens, which is an equal protection problem. That was one of the problems the court found in *Eakins*. Expanding it to include some other government employees doesn't really solve the problem.

The way this is written, there are several problems. One of them is filing a written complaint without defining that. So, any complaint or allegation of misconduct that may be in writing would then be presumably covered by this. That covers newspapers. So, if in a *Reno Gazette-Journal* editorial there is an allegation of misconduct—let's take it out of the police realm—against the school or water district, or the recorder's office, presumably that can be covered here. Is it unlikely? I don't think so.

We just finished a case dealing with the Ethics Commission, where everyone said this "Truth Squad" law would never cover newspapers, until it did. The plain language of this covers newspapers and any other kind of complaint about government, government employees, and police, et cetera, that is written down.

If you read the first statement, "A person who knowingly files..." Grammatically, the word "knowingly" modifies the word "files." So, all the "knowledge" had to be is knowing that you're filing it, whatever that means. There is nothing in here, as it is written, that requires knowledge of falsity.

In *Eakins*, the ACLU intervened, representing a bunch of people. One of them is a former colleague of yours, former Assemblywoman Kathy Von Tobel. In her affidavit she clearly states that she witnessed police misconduct. She went to the police department and was threatened with prosecution under the previous version of this if she continued. This is from a state legislator and a well-respected person. Imagine someone who is not in that particular situation.

If this bill is passed, it will be challenged, and just like the *Eakins* case, it will be declared unconstitutional under *R.A.V.*, as well as a number of other grounds. There are remedies for a public employee—and for private persons, for that matter—who feel that he or she has been libeled. Defamation laws exist here to go into court and redeem your reputation, if that is what you feel is appropriate.

To carve out a special category of crime that applies only to defamation of people in government is against the explicit language of the U.S. Supreme Court

in *R.A.V.*, and nothing has changed that, regardless of what any state court chooses to do. The federal courts will come to the exact same conclusion with this version of the law that they came to with the last one.

Assemblywoman Buckley:
If we were to change the language to make it clear that you're knowingly filing, or that the intent requirement follows the falsity and not the filing, and if it was expanded to include everyone and further changed to not be misconduct, but to actually be guilty of crimes—so that you allege that someone has stolen money, engaged in a battery, with more specificity—what would your opinion be on that?

Allen Lichtenstein:
You're getting into the realm of criminal libel laws, or libel and slander, if you expand it to beyond what is written. Those have never been particularly successful. I think the state still has criminal libel on the books, so I think this would be superfluous. It is not used, to the best of my knowledge, because it has a much higher standard of proof than civil libel cases. It appears, from experience here and elsewhere in the country, that the best way for an individual to clear his or her name is to directly sue. If truth is a complete defense, then the person can show truth.

If you're talking about just rewriting a criminal libel law, it would seem to be somewhat superfluous, and based on the experience of this state and other states where such things exist, probably not very well used.

Assemblywoman Buckley:
I see a difference between criminalizing libel and speech and the filing of a written complaint saying that someone stole money. The officer stopped me and took my $4,700. That's different, in my book, from saying, "I think they're all crooks." One is speech, an opinion, and the other is an allegation of a specific criminal act.

Allen Lichtenstein:
That's like saying that Gary Peck stole something from me. If you're going into the area where every time someone makes a criminal complaint they're going to be subject to criminal penalties, I think you will find a chilling effect, and it won't necessarily be the chilling effect in terms of complaints about police. You may have a chilling effect among people who are going to be reluctant to make criminal charges regardless. We need to be careful how we start expanding these things.

Assemblywoman Buckley:
Even if they knew it was false and you have a *mens rea*. Don't we have that for insurance fraud, where someone files a complaint knowing it's not true?

Allen Lichtenstein:
We have all sorts of fraud. Those things are already on the books. Adding another layer to that says anyone who is making a written criminal complaint. Take it out of the realm of police officers or public officials who are subject to these particular penalties, my guess would be that there are going to be a bunch of people who are not as trusting of government as some of us are, who are going to say, "I'm just going to let this one go, because I'm afraid of it coming back to me if I can't prove it." I don't want to discount this idea of the chilling effect.

When you say government can come back on you and slam you if you can't prove your complaint—particularly if it's against powerful people—I have no doubt that a significant number of people are going to say, "Wait a minute; I don't need this. This is more trouble than it's worth for me," and it takes one step in keeping the public away from the government—not just for complaints about government, but for complaints about each other or any other kind of criminal complaints. There are unintended consequences that may come into play here.

Assemblywoman Buckley:
The ACLU provided language and support for another bill that we passed, having to do with intimidation of public officers, that there is a "knowing" requirement. Could you contrast your support of that bill with the language that was utilized, with your lack of support for this bill?

Allen Lichtenstein:
We didn't really support that one; we felt that we could live with the language that was there. We still have some concerns, although we don't think that they had the constitutional infirmities that this one has. The distinction is we're talking about blackmail and extortion. We're talking about an absolute *quid pro quo* kind of thing, where I will threaten you or bribe you, or threaten to reveal private information, unless you do this or refrain from doing that. It's the classic extortion *quid pro quo* that has much less ambiguity than this, because it is trying to force a particular action.

Here, at least under the language that you're talking about, a complaint about a public employee or public official—or expanded to everybody—is not saying, "I won't make this complaint unless I get something." You're dealing with apples

and oranges. The other bill has some concerns, but this one clearly doesn't have that *quid pro quo* element to it, which makes it quite different.

Assemblywoman Gerhardt:
I would follow your logic, except that the only time someone is going to be charged with this crime is if it is found that there was absolutely no evidence that the event occurred. I don't follow the chilling effect logic, because not everyone who makes a complaint would be charged—only those people where it was proven they had knowingly accused someone falsely.

Allen Lichtenstein:
I can give you the numbers that the representative of the police department said. He gave numbers of 50 percent being unfounded or in that particular category, which to me is an astounding number, but that's what they're talking about.

If IAB [internal affairs bureau] finds it unfounded, that does not mean that it did not happen. It does not mean there's no evidence. Obviously, someone's complaint testimony is evidence. Whether that evidence is sufficient to go forward is a different question. We at the ACLU, as well as other people, have had cases where internal affairs has found something to be unfounded, and when the case has gone to the federal courts under a civil rights action, the result can be quite the opposite.

The idea that internal affairs finds something unfounded is not the same thing as an adjudication of that. It doesn't mean there is no evidence, because the complaint may have no corroborating evidence, and that may be a reason not to proceed, but unless one can find specific evidence to show that something did not happen and someone was lying—such as the case Mr. Kallas was referring to, which is pretty rare—you're left with a situation where there's a complaint that cannot be sustained, or maybe there's not enough information, and it doesn't go anywhere. It could be deemed by IAB as unfounded, but it doesn't mean that it proves that the person is lying.

Assemblywoman Gerhardt:
We need some clarification from Detective Kallas on the term "unfounded" and which kinds of cases would be charged under this bill. We have two definitions for "unfounded."

Chairman Anderson:
I don't want to restate for Mr. Lichtenstein, but it's not dissimilar in a criminal action where the police arrest somebody, but the district attorney decides there's not sufficient grounds to move forward. That doesn't mean the arrest

was improper; there just wasn't enough sustaining information. I would presume that if this language goes into effect, you're going to prove the "knowingly," so there is going to have to be a high level of conduct.

David Kallas:
There is confusion where you have a complaint filed with the district attorney, or somebody makes an arrest, and they look at it and say there was enough probable cause to make the arrest, but not enough to prosecute. In law enforcement terminology, that would be something that's "not sustained." You couldn't prove or disprove it. There's an allegation, but there's not enough evidence to move it forward and adjudicate it as sustained.

We're talking about those situations where it is "unfounded." Somebody makes an allegation of an action by an officer or another public employee and there is absolutely no evidence that it occurred. That's the difference between unfounded and not sustained.

Assemblywoman Gerhardt:
There would have to be proof that it did not occur, not just that there was no evidence that it didn't occur, and I'll give you an example. I have some law enforcement experience myself.

I have seen situations where someone was arrested, in custody at the jail, and made an allegation that an officer had abused him. It turned out, during the course of the investigation, that there is video that the person in custody banged his head against the wall and caused the injury to himself. In those cases, there's proof that the event did not occur, which I think is what you're trying to capture. Is that correct?

David Kallas:
Absolutely, and I'm familiar with that case. That would be a case where it would be unfounded. There was no evidence whatsoever that it occurred and it was filed falsely. That person committed the action himself.

Gary Peck, Executive Director, American Civil Liberties Union of Nevada, Las Vegas, Nevada:
[Submitted Exhibit H.] It is important to understand the history here and some of the misdirection. I'm troubled because this seems to be a classic case of shooting a flea with cannon. What we have here is a police bill, and an effort—after we went through one legislative session and one round of lawsuits—to salvage an unsalvageable law. Now, we're talking about criminalizing it for the entire general public to get at the problem.

[Gary Peck, continued.] This isn't a money issue about wasted taxpayer dollars when IAB has to investigate unfounded complaints, and it isn't about what situations the charges against someone are ultimately going to be brought and upheld by a court. We are talking about the chilling effect that was evident in Kathy Von Tobel's case. A powerful State Assemblywoman, who had a long record of supporting law enforcement, who showed up to file a complaint about alleged criminal conduct by police officers, was told by people at IAB that if she filed a complaint, she was going to be prosecuted.

If the members of this Committee and the Legislature cannot understand why that would have a chilling effect on protected First Amendment speech, and why it is terrible public policy to pass a law that will make it difficult and require considerable courage on the part of a lot of people who are fearful of government to complain about what they believe is malfeasance or criminal conduct, then I would certainly be surprised.

That is what the court addressed. I assure you that as a legal matter, this law, no matter how you tinker with it, it is not going to withstand a constitutional challenge, and it is terrible public policy. The idea of trying to salvage it by expanding it to cover the entire general public is something that I can't even begin to get my head around.

Chairman Anderson:
It's a gross misdemeanor to knowingly misrepresent information in front of the Legislature. We make a very clear statement of policy at the beginning of most of our meetings, and it appears on the witness table here. I don't know whether it's on the witness table in Las Vegas. It's supposed to be, but I can't guarantee that it's there.

It doesn't seem to have a chilling effect upon people coming to the Legislature to represent facts in front of us. How does telling someone who's about to fill out a complaint form that they are expected to act in a truthful fashion have a chilling effect? There are those who wish to take advantage of the law enforcement officer, not because of who he is personally, but because of who he represents in society. They are representatives of the people, who are out there to enforce the laws that we've asked them to enforce.

Gary Peck:
It is precisely because police are who police are, and government officials are who government officials are, that they wield enormous power. Every month I deal with working people, poor people, and people of color who are intimidated when they have complaints that are sustained. They come to us and say, "I am scared to death to walk into a police department and file a complaint." When

those people walk into a police department and the first thing they hear—and I assure you we have had dozens of cases where this is true, and not just with former Assemblywoman Von Tobel, but with ordinary people—is that you better watch your Ps and Qs if you file a complaint that's false, because you're going to be prosecuted, I can assure you that those people turn around and leave the building.

Chairman Anderson:
That doesn't seem to happen here.

Gary Peck:
The people who appear before you are oftentimes people like me, and I'm certainly not easily intimidated. I understand what you're saying, but as a matter of law, this will not withstand a constitutional challenge. I hope we don't end up in court, because it would be a colossal waste of everyone's time and taxpayer dollars.

Chairman Anderson:
[Closed the hearing on S.B. 150 and adjourned the meeting at 10:12 a.m.]

RESPECTFULLY SUBMITTED:

_____
Jane Oliver
Committee Attaché

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: May 9, 2005 **Time of Meeting: 8:00 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Meeting Agenda
S.B. 43	B	Linda Bowmer, Unit Manager, Youth Parole Bureau, and Deputy Compact Administrator, Interstate Compact for Juveniles, Division of Child and Family Services, Nevada Department of Human Resources	Prepared testimony supporting S.B. 43
S.B. 43	C	Linda Bowmer, Unit Manager, Youth Parole Bureau, and Deputy Compact Administrator, Interstate Compact for Juveniles, Division of Child and Family Services, Nevada Department of Human Resources	Map of the United States presenting 2005 Legislative Activity on the adoption of the Interstate Compact for Juveniles
S.B. 43	D	Robert McLellan, Deputy Administrator, Juvenile Services, Division of Child and Family Services, Nevada Department of Human Resources	Prepared testimony presenting S.B. 43, including fiscal impact
S.B. 452	E	Ron Titus, Director, Administrative Office of the Courts, Supreme Court of Nevada	Amendment to S.B. 452, Section 1, subsection 2, paragraph (e)

S.B. 150	F	David Kallas, Executive Director, Las Vegas Police Protective Association, Metro, Inc., Las Vegas, Nevada	Prepared testimony in support of S.B. 150, including two exhibits describing court cases
S.B. 150	G	David Kallas, Executive Director, Las Vegas Police Protective Association, Metro, Inc., Las Vegas, Nevada	Amendment to S.B. 150
S.B. 150	H	Gary Peck, Executive Director, American Civil Liberties Union of Nevada (ACLU)	Email to Judiciary Committee members with an article from the *Las Vegas Review-Journal*