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Transcriber's Office

Judiciary Committee
February 03, 2017

[LB84 LB202 CONFIRMATIONS]

The Committee on Judiciary met at 2:00 p.m. on Friday, February 3, 2017, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB84, LB202, and gubernatorial appointments. Senators present: Laura Ebke, Chairperson; Patty Pansing Brooks, Vice Chairperson; Roy Baker; Ernie Chambers; Steve Halloran; Matt Hansen; Bob Krist; and Adam Morfeld. Senators absent: None.

SENATOR EBKE: Good afternoon. Welcome to the Judiciary Committee. My name is Laura Ebke. I'm from Crete, representing Legislative District 32. I chair this committee. Like to start off by allowing my colleagues to introduce themselves. Let's start over on Senator Halloran's side first today.

SENATOR HALLORAN: Thank you, Chairperson. Steve Halloran, representing District 33, which is Adams County and southern and western Hall County.

SENATOR HANSEN: Matt Hansen, representing District 26 in northeast Lincoln.

SENATOR PANSING BROOKS: Patty Pansing Brooks, representing District 28 right here in the heart of the Lincoln.

SENATOR EBKE: Senator Baker.

SENATOR BAKER: Senator Roy Baker, District 30, Gage County, part of southern Lancaster County, and a little bit of the southern part of Lincoln.

SENATOR MORFELD: And Adam Morfeld, District 46, north northeast Lincoln.

SENATOR EBKE: And Senator Krist and Senator Chambers will probably be joining us here shortly. Assisting us today we have Laurie Vollertsen, who is our committee clerk. We have Tim Hruza, who is one of our two legal counsels. And our committee pages today are Kaylee and Toni. Is that right? Okay. On the table at the front over there you will find some yellow testifier sheets. If you are planning on testifying today, please fill one out and hand it to the page when you come up to testify. This helps us to keep an accurate record of the hearing. There's also a white sheet on the table if you don't wish to testify but would like to record your position on a bill. We will begin bill testimony with the introducer's opening statement. Following the opening, we will hear from proponents of the bill, then opponents, following by those speaking in a neutral capacity. We'll finish with a closing statement by the introducer if he or she wishes to

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give one. We ask that you begin your testimony, in all cases, by giving your first and last name and then spell them for the record. If you're going to testify, I ask that...on a bill, I ask that we keep the on-deck chair filled. That helps to move people in and out of the testifier's spot in a little more timely fashion. If you have any handouts, please bring up at least 12 copies and give them to the page. If you do not have enough copies, the page will help you make more. We'll be using the five-minute light system. When you begin your testimony, the light on the table will turn green. The yellow light is your one-minute warning. And when the red light comes on, we ask you to wrap up. As a matter of policy, I'd like to remind everyone that the use of cell phones and other electronic devices is not allowed during public hearings. However, senators may be using them to take notes or to stay in contact with staff. At this time, I would ask everybody to take a look at your cell phones and make sure that at the very least they are on silent or vibrate mode. Also, verbal outbursts, which I doubt we'll have today, but verbal outbursts or applause are not permitted in the hearing room and could be cause for you to be asked to leave. One last thing: You may notice committee members coming and going. That has nothing to do with the importance of the bill being heard and please don't take it personally if somebody gets up and leaves, but senators do have bills in other committees that they may be introducing or they may have other meetings. And so with that in mind, we're going to start today with a confirmation hearings on a couple of gubernatorial appointments for the Victim's Reparations Committee. First up, Joe Kelly. [CONFIRMATION]

JOE KELLY: Good afternoon. I am Joe Kelly, K-e-l-l-y, Lancaster County Attorney. My address is 575 South Tenth, Lincoln, Nebraska. I'm here today for the confirmation on the Crime Victim's Reparations Board (sic--Committee). I've now...I've been on the Crime Commission since 2011. I've been on the Crime Victim's Reparations board about half that time. We meet generally on the same day as the Crime Commission. We just meet at 1:00 and we consider, on an appellate level, decisions made by the Crime Commission staff about disbursing those fees to the claimants. They usually come in or at least come in on the phone. I enjoy it. I'm presently serving as the chair. I enjoy it because the staff does a great job at the Crime Commission of working through those claims to determine if someone is or isn't eligible for the full amount of \$25,000 in some cases. But sometimes as a group with the sheriff, who's with me today, and others, we're able to ask some questions, help the staff out, and just last couple weeks ago were able to help somebody out a little bit more by asking a few more questions on a claimant. We got some answers and were able to reconfigure the way that the money came to him. So it's an enjoyable process of diverting the money, some from you, some from the feds, and some from prison industries, Cornhusker Industries. [CONFIRMATION]

SENATOR EBKE: Any questions for Mr. Kelly? No? [CONFIRMATION]

SENATOR PANSING BROOKS: I'll just (inaudible). [CONFIRMATION]

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SENATOR EBKE: Okay. [CONFIRMATION]

SENATOR PANSING BROOKS: Okay. Thank you. Yeah, thank you so much for coming, Mr. Kelly. We appreciate your work and effort and thanks for take...I know some people just don't even show so it's very nice to be able to see you and have you appear. So thank you very much. [CONFIRMATION]

JOE KELLY: You bet. Thank you. [CONFIRMATION]

SENATOR EBKE: Thanks for being here today. Next up, Rita Sanders. Mayor, welcome to the committee. [CONFIRMATION]

RITA SANDERS: Thank you. Good afternoon, Senator Ebke and committee. My name is Rita Sanders, Bellevue, Nebraska. I'm here for reappointment of the committee. [CONFIRMATION]

SENATOR EBKE: Go right ahead. [CONFIRMATION]

RITA SANDERS: You have any questions for me, I'm here to answer. [CONFIRMATION]

SENATOR EBKE: Okay. [CONFIRMATION]

RITA SANDERS: I'm just going to echo exactly what Joe said. [CONFIRMATION]

SENATOR EBKE: You like everything Joe said. [CONFIRMATION]

RITA SANDERS: (Inaudible) what Jeff is going to say. (Laughter) Yes. [CONFIRMATION]

SENATOR EBKE: Okay. Are there any things in your experience on the committee that have stood out to you as being especially good, beneficial, enjoyable? [CONFIRMATION]

RITA SANDERS: I'm glad to see the other two here for reappointment... [CONFIRMATION]

SENATOR EBKE: Yeah. [CONFIRMATION]

RITA SANDERS: ...because we've been able to work through some issues together. There has been a few disturbing issues that we've had to deal with, but I think the team isn't afraid to ask

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questions, staying within the confines of our rules and our policies, and come up with the best solution. And sometimes they're pretty tough, so...but we're able to do that. [CONFIRMATION]

SENATOR EBKE: Senator Chambers has joined us and we are looking at the Crime Victim's Reparations Committee right now. [CONFIRMATION]

RITA SANDERS: And if there's any questions for me (inaudible). [CONFIRMATION]

SENATOR EBKE: Okay. Any other questions? Thank you for being here. [CONFIRMATION]

RITA SANDERS: Thank you. Thank you for your time. [CONFIRMATION]

SENATOR EBKE: Sheriff Davis, welcome back. [CONFIRMATION]

JEFFREY DAVIS: Thank you. Jeffrey L. Davis, J-e-f-f-r-e-y L. D-a-v-i-s. I've been in law enforcement for a little over 43 years. As I said yesterday, I'm currently the sheriff. I don't want to be repetitious but I'll say it's a little bit different for me. Obviously, in law enforcement you see a lot of victims you don't get the opportunity help. I think that's what I like most about the Crime Victim's Reparations Committee. We do a lot of good in that respect. I'll reiterate, though, what Mr. Kelly said. I think the state employees do an unbelievable job trying as hard as they can to help innocent victims with this, with the finances, and we're able to help in that respect also. I will say I'm a little bit nervous today because I was here yesterday and I thought that went very well. (Laughter) And I'm kind of afraid that Senator Chambers in a minute is going to say that he's glad that I get to go home and tell everybody that I batted 50 percent over the last two days, (laughter) which would mean it didn't go so well today. But I have my fingers crossed. So if you have any questions, I'd be glad to answer them. [CONFIRMATION]

SENATOR EBKE: Senator Krist. [CONFIRMATION]

SENATOR KRIST: Not a question, but for all three of you I don't think there's any better organization to work with than the Crime Commission. Mr. Fisher and his friends that work with him I think do an excellent job across the board in everything, and I wish you'd pass that back to the Crime Commission for me and for this committee. [CONFIRMATION]

JEFFREY DAVIS: Thank you. [CONFIRMATION]

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SENATOR EBKE: Any questions? Thank you for being here. That concludes our appointment hearings. At this point, Senator Blood, LB...do we have any letters, nothing that goes with that, right? Okay, LB84. [CONFIRMATION LB84]

SENATOR BLOOD: (Exhibit 1) Like to put a plug in for the two Sarpy County people, Mayor Sanders and Sheriff Davis, good people. Good afternoon and thank you to the committee Chair, Senator Ebke, and the Judiciary Committee for allowing me to present LB84 today. My name is Senator Carol Blood, C-a-r-o-l B-l-o-o-d, and I represent District 3 in Sarpy County, Nebraska's fastest growing county. Today I am here on behalf of Nebraska's victims of drunk driving. I believe we have an issue that needs to be corrected in state statute as a way to slow down the revolving door of offenders who make the decision to drive while intoxicated. While you listen to proponents and opponents of this bill, I encourage you to imagine yourself a juror. Is it really justice when you are not allowed to hear all the evidence about how a wreck occurred? Should a jury be asked to decide how much a victim should be awarded based on speculation? With current state statute, that is exactly what is going on every day in Nebraska courts. Drunk driving accidents are very different than any other types of auto accidents because the cause of the crash is highly predictable, clearly foreseeable, and so dramatically more dangerous, and is definitely the results of a choice by the drunk driver to go ahead and do it anyway. We can't compare these types of accidents to fender benders of small rear-end collisions that may have caused property damage, sore necks, or bumps on the head. Drunk driving tends to result in what is often catastrophic and more significant harm where people become permanently disabled, families are torn apart, employers lose valuable employees, and the victims may experience emotional hardships, such as mood swings, flashbacks, depression, anxiety, and a truly broad spectrum of posttraumatic stress related issues. You may not believe that this is significant but it is. These victims or their surviving families live with the knowledge this was not an accident but a selfish, dangerous, impaired, and unrepentant act from a driver who didn't care what happened once they got behind the steering wheel of that vehicle. As a jury, you can easily understand these incredible damages but only in the context of drunk driving. When you are not told why the victim has such significant damages, you as a juror do not have the full context of the injury and you are left to possibly doubting such significant emotional impacts from the accident. This happens because drunk drivers in Nebraska are allowed to get behind two...hide behind something called admitting negligence. A drunk driver only needs to express to the judge that, hey, I'm negligent, and then request the court prohibit the victim or any medical or psychological experts from providing any testimony about the fact that the person causing the harm decided to do so while intoxicated. Courts permit this line of argument and keep the evidence out by then saying, this case is just about damages now and there's no mention of drunk driving. LB84 is addressing this imbalance in state statute by providing that evidence of driving under the influence is admissible for any purpose notwithstanding such objections. Then a jury will have the details of how the accident occurred to better assist them in determining what caused the injuries claimed and holds these drunk drivers truly accountable. I have spoken with several

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defense attorneys and the impression that I've gleaned from these conversations is that telling a jury that the driver is drunk will inflame their passions and make them angry at the defendant. This brings to mind several questions on my part, and I hope they do to you as well. First, LB84 is about being fully accountable for an individual's stupid, selfish, and dangerous actions. With this in mind, what is the argument against this principle? Second, unfortunately, there is currently only occasional social outcry regarding drunk driving because one of the most sensational criminal cases...only the most sensational criminal cases tend to be media worthy. Allowing civil courts to hold public hearings on the harms caused by drunk driving will raise public awareness, possibly even providing a deterrent to those who may otherwise choose to drink and drive. Third, Nebraska does not allow for punitive damages. Fourth, if any jury verdict in a case such as this were to come back under the new law, the drunk drivers would always have the right to appeal and argue that the jury's verdict was improper. Fifth and final, who is it that these defense attorneys argue would be harmed by this change? Are they arguing that we're being too tough on drunk drivers? Are they arguing that a good jury, knowing all the facts, will disobey the law? Do these same attorneys admit that these harms are most often worse for a victim or remaining survivors, some of who are here today, and loved ones in a case of drunk driving? If they are not, I personally think they're being dishonest. So I'm sure insurance companies are concerned as well because, ultimately, the verdict is often paid by insurance companies, the same insurance companies who have chosen to ensure these dangerous and high-risk drivers. This is often the only reason these drunk drivers are on the road and not on a bus, in an Uber, or riding a bike, because somewhere an insurance company ultimately chose to provide insurance to a dangerous driver. They charge a lot more money for these policies and they want to prevent from paying for all the harms they cause on the other end when these proverbial ticking time bombs finally explode. So let's be frank. Drunk drivers who get behind the wheel of a car become killing machines that are draining our economy, destroying our families and our communities. And insurance companies want us to treat them the same way as if they simply dented a bumper in a fender bender. These accidents are different and I am personally incensed that the two words I have rarely heard spoken in civil court is "drunk driver." It doesn't seem to matter that they're leaving a path of destruction in our communities, for if it did we would quit giving them a free pass by allowing their defense attorneys the ability to utter the words "stipulated liability." The jury is then stripped of the truth, this jury, whose job is to not only compensate the victim but to act as the conscience of Nebraska communities. And so today I ask you to please support Nebraska's victims of drunk driving and their families, help jurors have the tools they need to make the right decisions, and let society know that there is nothing acceptable when it comes to anybody getting behind the wheel of a vehicle if they are intoxicated. Everyone's life has intrinsic value. Do this, please, by voting this bill out of your committee to General File. I also want to note that I have included an amendment I would like the committee to adopt. This is just a technical amendment that polishes up the bill with some language we received from committee counsel. Thank you for your time today and I hope you'll support the victims of Nebraska. [LB84]

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SENATOR EBKE: Thank you, Senator Blood. Questions? Senator Chambers. [LB84]

SENATOR CHAMBERS: Senator Blood. [LB84]

SENATOR BLOOD: Yes, sir. [LB84]

SENATOR CHAMBERS: Drunk driving is a crime and the criminal law punishes. Civil law is to... [LB84]

SENATOR BLOOD: Compensate. [LB84]

SENATOR CHAMBERS: ...compensate for the damage that was done, not to punish or say how angry society is. I understand people feeling that way but I have an obligation to do what I can to make sure that the law is not turned into something that is it's not intended to be. And the Nebraska Constitution does not allow punitive damages. [LB84]

SENATOR BLOOD: Right, which I did say. [LB84]

SENATOR CHAMBERS: So even if the Legislature wanted to do that, they couldn't do it. [LB84]

SENATOR BLOOD: Right. Punitive damages, where you're personally punishing the offender, is not allowed. However, what I'm saying is that if indeed we're truly compensating these people that are victims that how can you truly compensate for an accident of this nature if you don't truly know that it's been caused by a drunk driver? [LB84]

SENATOR CHAMBERS: Well, suppose it was somebody who wasn't drunk... [LB84]

SENATOR BLOOD: Then... [LB84]

SENATOR CHAMBERS: ...but they still are responsible for it? [LB84]

SENATOR BLOOD: They are indeed but those types of accidents tend not to be as detrimental to the community and families that are the victims of these types of drivers. We're not talking about a fender bender. We're talking about a drunk driver, as you're going to hear behind me, who take the lives of loved ones. [LB84]

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SENATOR CHAMBERS: And I'm not talking about a fender bender either. But there are accidents that can occur that cause devastating injury and even death where no drinking is involved. But I'll listen to what the people say. But I have to make it clear that I am not one who will say that the anger of the community should be addressed in these situations because the law has a purpose and it's not going to be what the community may say they want. Because if you were going to go by that then this white kid, who was...had rich parents, killed four people, and his lawyer created a special defense for him. The parents were affluent so he said he was...his defense was "influenza," a new word. He had never been made to feel responsible for what he was doing and because of that he had no awareness or consciousness of wrong as he should have. And such being the case, he should not bear the amount of culpability as somebody else, and the judge accepted it and did not impose the punishment that would have been on somebody else. And it never occurred to anybody connected with that trial to say, well, judge, if you're going to accept what his family and his attorney will say, are you going to fall into that same category and not hold him accountable for what he did because he was a rich kid? But I knew of cases that you had and this was a case with that judge where a Latino young man was given a humongous sentence and hadn't done anything as bad as that, because certain people are accorded a greater degree of culpability based on their race, their color, their ethnicity, or their financial or social standing in the community, and I don't think that should be brought into the law, just to make it clear what I'm looking at. But I will listen to what people say. [LB84]

SENATOR BLOOD: Well, and, Senator, I respect the fact that I have white privilege. I know I have white privilege and I know that there's a reason there's the expression "just us" when we're talking about people of color, people with lesser income, that they don't have the benefits that many Caucasians do. I understand that. But what I look at, and at the very beginning of my presentation I talked about, imagine yourself a juror. If you were a juror, and I know you're about facts and information and I hear what you're saying, to be cautious that we're not talking about punishing because this is...we're talking about a civil manner. What I'm talking about is as a juror you have the right to as much information as possible to make a good decision and I feel that this is one piece of the puzzle that they're missing. Again, I respectfully... [LB84]

SENATOR CHAMBERS: Is their injury more severe because the person was drunk driving?
[LB84]

SENATOR BLOOD: I'm sorry, I didn't hear the entire sentence? [LB84]

SENATOR CHAMBERS: Is the injury more severe? You're looking to compensate the person for the injury that he or she suffered. So if you have an injury, and rather than try to describe it I'll assign it letters: ABCD. [LB84]

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SENATOR BLOOD: Uh-huh. [LB84]

SENATOR CHAMBERS: And the driver was drunk. ABCD and the driver was not drunk. Why should there be a greater recovery with a drunk driver than the one who is not drunk? [LB84]

SENATOR BLOOD: There shouldn't necessarily be, but you should be able to have all the information because if ABCD, the driver was drunk and killed somebody, or ABCD, the driver was drunk and permanently disabled somebody, ABCD nondrunk driver did the same, all I'm saying is that they deserve all the information to be able to make a good decision because a juror's job is to be the conscience of society. [LB84]

SENATOR CHAMBERS: Is that information that you're talking about designed to inform the jury... [LB84]

SENATOR BLOOD: Yes. [LB84]

SENATOR CHAMBERS: ...of what was involved or to inflame the jury... [LB84]

SENATOR BLOOD: Well,... [LB84]

SENATOR CHAMBERS: ...and bring in their attitude toward somebody who is in a certain status who does something, whereas somebody not in that status who did the same thing is not going to be accorded the same consideration or lack thereof? But anyway, I don't want to be argumentative with you. [LB84]

SENATOR BLOOD: No. No, and I would just end, and of course I am not an attorney and don't pretend to be one nor--no offense--would I want to be one. I would liken it to a jury hearing about a robbery. Is it right that a jury hears that somebody comes in and robs a convenience store with a gun or should we leave that out, because somebody that comes in and robs without a gun, it's not as dangerous of a factor? So to me a person that's drinking and driving has a weapon when they're at that steering wheel and I feel that it's our job to have state statute that makes sure that jurors are allotted as much information that pertain to facts, not hearsay but facts, as we can allot them. But I think that people that are better qualified than I when it comes to law can probably speak more on that. [LB84]

SENATOR CHAMBERS: I'll save any other questions that I have for others if I feel the need to ask any. [LB84]

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SENATOR BLOOD: Yes, sir. [LB84]

SENATOR CHAMBERS: Thank you. [LB84]

SENATOR EBKE: Any other questions? Senator Pansing Brooks. [LB84]

SENATOR PANSING BROOKS: Thank you. Well, as I'm reading the summary and some of the information--thank you for coming, Senator Blood--I guess I have a concern because I'm seeing language like that the information would be admissible in any civil action for any purpose. And that is so broad. And with my...with the current knowledge that I have of the law, the reason that there is that need for looking at the probative value is because jurors will grab on to certain facts that they hear and decide that those facts make the case so heinous that they then make a decision based on a fact that doesn't necessarily have the same weight as the general tests, such as reasonable cause or whatever is necessary to make the test to prove guilt. So I guess that's my problem with the whole thing. And again, I would like to hear the rest of the people coming forward, but there have been so many cases on this about the fact that we have to weigh and balance... [LB84]

SENATOR BLOOD: Right. [LB84]

SENATOR PANSING BROOKS: ...the probative value of something versus its prejudicial weight and the weight it is given and the weight in a juror's mind to assume guilt to a higher degree and a higher level just because of that fact and whether it really does provide the justice required in our system. So anyway, that's what I'm interested in listening to. [LB84]

SENATOR BLOOD: And I think that's a valid point and hopefully you've also seen the amendment because I think that addresses a little bit of what you said, but... [LB84]

SENATOR PANSING BROOKS: Okay. I'll look at that. (Inaudible) see that. [LB84]

SENATOR BLOOD: And again, you know, we're trying to keep it as narrow as possible and I do...I do liken it to again put yourself in the juror's position. Are they truly being given...and I hear what you're saying. It's a gray area. But if I were a juror and I were asked to compensate somebody for damages and I didn't have the whole story, I can't do my job efficiently. And I'm saying that just as a citizen. And so that's my concern with that, what's going on right now in Nebraska in courts every day. [LB84]

SENATOR PANSING BROOKS: Thank you for bringing this issue. [LB84]

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SENATOR EBKE: Senator Morfeld. [LB84]

SENATOR MORFELD: Thank you for coming today, Senator Blood. I guess part of me...at first glance when I saw the intent of this bill and what it was doing made sense. I'm hearing Senator Chambers and Senator Pansing Brooks bring up some good points. One of the things I'm struggling with is, since we have a ban on punitive damages in Nebraska, if we're bringing this information into the jury room and allowing them, or the judge or whatever the case may be, to take this into consideration, and then instead of giving \$100,000, say, \$100,000 for damages which would cover all the damages and whatever the case may be, they find out then, oh, well, this was drunk driving so then they go, well, \$150,000 instead, isn't that \$50,000 punitive in nature just by virtue of? I mean how is that not...I'm just trying to get across that in my head what... [LB84]

SENATOR BLOOD: Well, again, not an attorney, but... [LB84]

SENATOR MORFELD: Yeah. No, I know. [LB84]

SENATOR BLOOD: ...I'll speak... [LB84]

SENATOR MORFELD: You don't need to be an attorney. This is just kind of first blush. [LB84]

SENATOR BLOOD: ...I'll speak as a citizen who potentially could be a juror. [LB84]

SENATOR MORFELD: Yeah. Uh-huh. [LB84]

SENATOR BLOOD: So if I find out that I am compensating somebody, compensating somebody for damages and those damages happen to be PTSD, I need to know what caused that PTSD. So am I giving them that \$50,000 because they're going to have to have years of therapy or they have to get a service dog or... [LB84]

SENATOR MORFELD: Uh-huh. [LB84]

SENATOR BLOOD: ...I need to know how I compensate somebody for what's been caused...the damages that have been caused to them. So I hear what you're saying. I mean punitive damages aren't allowed in Nebraska... [LB84]

SENATOR MORFELD: Uh-huh. [LB84]

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SENATOR BLOOD: ...and you're not necessarily punishing, although I like the idea that we're kind of punishing. [LB84]

SENATOR MORFELD: That's fair. [LB84]

SENATOR BLOOD: Right, (inaudible) which I share. [LB84]

SENATOR MORFELD: I know we can have a reasonable argument or disagreement on that. [LB84]

SENATOR BLOOD: Right, I mean but that's not the intent of the bill. The intent of the bill is if we're asking jurors to do their job and do it well, they need all the information. And again, I likened it to the convenience store robbery. If you were a juror and you found out that you were going to sit on a jury and a convenience store had been robbed or Grandma Jones down the street, her house had been broken into, would you want to know that there was a weapon? Probably. Drunk driving, when a drunk driver gets behind a steering wheel of a car, they've got a weapon,... [LB84]

SENATOR MORFELD: Yeah. [LB84]

SENATOR BLOOD: ...a really...I don't know how much a car weighs but multiton... [LB84]

SENATOR MORFELD: Yeah, certainly, Senator, and I don't, you know, for me, I don't condone the drunk driving and, to a certain extent, my gut reaction is, yeah, we should punish them a little bit maybe in civil court. But Senator Chambers brings up a good point. That's why we have criminal... [LB84]

SENATOR BLOOD: It's not about punishment; it's about compensation. [LB84]

SENATOR MORFELD: It is but... [LB84]

SENATOR BLOOD: It's about making sure that jurors have the information they need to do their job. [LB84]

SENATOR MORFELD: It is. But to a certain extent I think that what we're doing is creating de facto punitive damages by doing this but not really saying that. And so that's my concern. And you know, we all take oaths and ours is to uphold the constitution, and so I think that we have to

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create laws that are in line with that, that both fall in line of the black letter of the law but then also the spirit and intent. [LB84]

SENATOR BLOOD: Uh-huh. [LB84]

SENATOR MORFELD: And so that's my concern. That being said, again, I am not sympathetic to drunk drivers in any way whatsoever. So I'll have to reconcile this in my head. We can talk more off... [LB84]

SENATOR BLOOD: No, and I respect the fact there's so many attorneys and people with law degrees on the committee. My mind does not work that way. My mind works like I'm a citizen, what would I want as a juror. [LB84]

SENATOR MORFELD: Uh-huh. [LB84]

SENATOR BLOOD: And as a juror I would want all the information. And I feel the way the state statute reads right now I'm not provided that. [LB84]

SENATOR EBKE: Let me ask one question. We have negligent driving or distracted driving statutes. [LB84]

SENATOR BLOOD: Uh-huh. [LB84]

SENATOR EBKE: We have criminal prosecutions for those kinds of things just as we do with drunk driving. What about a cell phone? What if somebody has an accident while they're talking on the cell phone? They are subject to criminal penalty, okay? Should a jury also be told that they had a cell phone and should they be punished then twice? [LB84]

SENATOR BLOOD: Well, again, not a punishment. [LB84]

SENATOR EBKE: Well, sure it is. [LB84]

SENATOR BLOOD: We're compensating the victim. Well, one that you got on yourself. You know this is... [LB84]

SENATOR EBKE: But that's what the criminal...that's what the criminal case is for. [LB84]

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SENATOR BLOOD: Right, that's what I'm saying. There's a difference between criminal and civil. And again, not a lawyer, but, yeah, if indeed, that's not what this bill is about, but would I support a bill like that? Absolutely, because people choose to be on their cell phone while they're driving this giant weapon and they should be held accountable. [LB84]

SENATOR EBKE: So in a civil case, what's the purpose of a civil case? [LB84]

SENATOR BLOOD: To compensate the victim or the victim's family. [LB84]

SENATOR EBKE: Okay, but how do you determine what that compensation is? I mean isn't the...and counsel can correct me or any of the assorted attorneys, but isn't the purpose of civil procedures to make whole at some level, I mean to make sure that we compensate to the point where, you know, the jury decides that we have made you whole to the best (inaudible)? [LB84]

SENATOR BLOOD: To our ability. [LB84]

SENATOR EBKE: Right. [LB84]

SENATOR BLOOD: Still, I guess I'm confused. Are you asking me would I support one in reference to cell phones or... [LB84]

SENATOR EBKE: Well, but...well, anything. [LB84]

SENATOR BLOOD: Well, yeah. Yeah, I... [LB84]

SENATOR EBKE: When you add that, when you add that, if they've already accepted negligence, okay, then the jury's role then is to decide what do you need in order to make the person whole. Right? [LB84]

SENATOR BLOOD: Right. [LB84]

SENATOR EBKE: Okay. So are you more whole then if you are...is the jury supposed to make somebody more whole if the cause... [LB84]

SENATOR BLOOD: I hear what you're saying. To me, and again I think it's time to start bringing up people that are more knowledgeable in this area than I. But for me personally as a...we'll take my senator name off right now and say I'm just Joe Blow on the street. For me

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personally as a juror, if they left that information out--because that's again it's negligence, all I know is that there was a car accident and people got hurt--I would want to know if there's circumstances that pertain to the reason the accident was so bad. You know, did this person get hit head-on because it was just an accident and they got hit head-on? Or did this person get hit head-on and they lost their loved one because somebody decided to text their boyfriend and said they were on their way to their date? Somebody decided to take a phone call and the call...the phone happened to be in their purse and so they were digging down into their car. I'd want to know that as a juror. If I don't get that information, how can I be a good juror, because a lot of it is intent? Accidents are accidents. On purpose things are not an accident. So how can you fully compensate a person who's lost a loved one if you don't know the intent of the person that did the act? Again, I'm going to let an attorney come and...attorneys come up and speak but that's...as a citizen, that's how I feel. [LB84]

SENATOR EBKE: Senator Baker, do you have a question? [LB84]

SENATOR BAKER: Oh, thank you. I'd made notes to myself before anybody spoke on this and that, so for you it's not enough that people know that the driver said, yeah, there was negligence. Do you believe there's different degrees of negligence that would impact the award? [LB84]

SENATOR BLOOD: I don't know if that's the correct phrasing. I think that a juror is entitled to have all the facts. [LB84]

SENATOR BAKER: Okay. But do you think there are? You know, the drunk driver versus a nondrunk driver who caused the same accident, do you think they're more negligent? [LB84]

SENATOR BLOOD: I think it's that it's a probability that if there's drunk driving involved, based on statistics which I should have brought forward, is that you'll find that those accidents tend to be more detrimental (inaudible) more. [LB84]

SENATOR BAKER: Okay. Say the same result, actually had the exact same result, is one more negligent than the other? [LB84]

SENATOR BLOOD: I guess I cannot...until I hear an actual...until I'm sitting there in the juror box, case-by-case basis. I don't think that every drunk driver on the planet should have to pay more compensation than somebody who's not a drunk driver. However, if indeed that person was a drunk driver and I'm a juror, I want to know that because it's like I just said, you're choosing to drink and drive. You don't choose to have accidents. They are accidents. But you're choosing to

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drink and your choice caused an accident. As a juror, I would want to know that you made that choice because that would probably affect how I compensate. [LB84]

SENATOR BAKER: So for you, if the person was drunk, you, in your mind, the proximate cause of the accident is firmly established? [LB84]

SENATOR BLOOD: I'm sorry, say that again. [LB84]

SENATOR BAKER: For you, if you know that the driver was drunk and caused a particular accident, for you it's already established that the drunkenness was the proximate cause of the accident? [LB84]

SENATOR BLOOD: It was a contributing cause. [LB84]

SENATOR BAKER: Do you know that? [LB84]

SENATOR BLOOD: You would know that if they told you he was a drunk driver. [LB84]

SENATOR BAKER: And I don't...there's nobody I know that likes the idea of people driving drunk. [LB84]

SENATOR BLOOD: And I hear what you're saying, but as a jury you'd be getting the police reports. The police report is going to tell you this is the level of intoxication that the driver had, which you're not allowed to have. [LB84]

SENATOR BAKER: Well, that's beside the point here. There's negligence established, this amount of damage, these things happened, person is going to be compensated. So does it matter what that negligence was (inaudible)? [LB84]

SENATOR BLOOD: I hear what you're saying and I think that based on some of the testimony we hear today you're going to hear people say, yeah, it makes a difference. And that's why I'm here. [LB84]

SENATOR BAKER: Thank you. [LB84]

SENATOR EBKE: Any other questions? Thank you, Senator Blood. Okay, we'll have our first proponent. [LB84]

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JAMES HARRIS: (Exhibits 3 and 4) Thank you. My name is Jim Harris, J-i-m H-a-r-r-i-s. I'm an attorney in Omaha with Harris and Associates and I'm here in support of LB84. Good afternoon. According to the National Highway Traffic Safety Administration, in 2015, 10,265 people died in drunk driving crashes--1 every 51 minutes; 290,000 were injured in drunk driving crashes--1 every 2 minutes. What bring us to the Legislature today are the safety Rules of the Road that protect all of us. These safety rules, as well as all safety rules, protect us from the mayhem only if the law allows juries to enforce them. Safety rule one: Drivers must obey the Rules of the Road to prevent mayhem, to protect all of us. Safety rule two: Drivers must drive sober in order to prevent mayhem and to protect all of us. Now let me tell you the story of what happened in this case. You have that before you. It's a warm, sunny Mother's Day, just past noon. CL is driving a Chevy pickup truck. While driving, he's inhaling or "huffing" from an aerosol Dust-Off can and he loses consciousness. He drives the pickup truck over the painted median, enters the oncoming southbound lane crashing head-on with a Chevy Equinox SUV. The simple truth is driving drunk or on drugs causes death and mayhem. So why must the law be changed? Here's the deal. If a lawyer made those statements, the truth about what happened, to a jury, it would result in a mistrial. The simple truth is that two words that are rarely, if ever, spoken in civil courts are "drunk driver." Despite the tremendous destruction of lives in our communities, drunk and drugged drivers are nearly always given a free pass when their defense lawyers merely utter the words "admitted liability." The Nebraska Supreme Court Opinion in Huber v. Rohrig is the poster child for keeping the truth about drunk driving from the juries. In that case the court stated counsel's references to alcohol created a narrative that this was a drunk driving case rather than a damage case. The district court determined that the references to alcohol would have significantly prejudiced and impacted the jury. What the court did not say is hiding the truth from the drunk driving from the jury had a substantial and unfair prejudicial effect upon the victim. Two important points to remember: It's always plaintiff's burden to prove defendant's negligence proximately caused injuries and damages. The Opinion in Huber ignores that basic tenet of the law about proximate cause and makes the plaintiff prove that the injury resulted from an accident. Drunk driving is no accident. And I'm going to deviate from my statements just a bit here to answer the question that was posed to us earlier, and I'm going to let Matt Lathrop answer it more fully. But the jury, when they have to decide damages, is given an instruction that's standardized. It's Nebraska Jury Instructions and it would be 3.41. But it would say you have to...the jury, in deciding damages, has to only find those that were proximately caused by the negligence of the defendant. How can they decide that proximate cause issue when they don't know what the negligence of the defendant was? Did he run a red light? That would come into evidence. Was he speeding? That would come into evidence. But drunk driving does not. They get the free pass. So when did this case change to a damage case? The moment they deflect blame and put the spotlight on the plaintiff, demand psychological tests, challenge their credibility. The jury is stripped of the truth. They are the conscience of our communities. Their job fundamental to the negligence law is not only to compensate victims but, in black letter law, to promote safety and prevent or deter future unsafe acts. Juries can only do their job and enforce

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our laws if they are allowed to reach their verdict based on the whole truth. We teach our kids that withholding the truth or telling half-truths amounts to a lie. The same holds true for a jury and results in half justice or less. Half justice is no justice at all. Defense counsels lament that they want evidence to inflame the jury. Even if true, the corollary holds equally true. The defense counsel wants to keep out the truth in order to diminish or minimize the damages. When balancing these two competing arguments, truthfulness should emerge the clear victor. We don't reward the drunk driver and further harm the victim. Important life lessons must prevail. The truth must be told. Wrongdoers must be held accountable, not protected. Our communities will be better off if our juries send the message that we expect and deserve safe roads and that drunk driving is not tolerated. Thank you. [LB84]

SENATOR EBKE: Thank you, Mr. Harris. Senator Chambers. [LB84]

SENATOR CHAMBERS: As a lawyer, you know the term...the meaning of the terms "probative" as well as "relevance." You know what undue prejudice means. Now what difference does it make if a person...and again, I'm going to assign letters. The person is injured to the extent of ABCD by a drunk driver; the exact same injury, ABCD, by somebody who wasn't drunk. If the individual who is being charged or being sued--that's what we have in a civil action--not charged with anything. You're being sued, citizen to citizen. The criminal is designed to punish by the state because the act was deemed to be against the dignity of the state. And some of these boilerplate chargings are done in that fashion. And in England, it used to be that if I did a harm to your family, you could do a harm to my family, and a blood feud could result. In England it reached the point where the king said, there are so many of these feuds, so many of my subjects dying that it's not going to be allowed for a citizen to punish another citizen for a wrong. There will be a different action where the citizen who was wronged is compensated to the extent that money can compensate. The perpetrator is not going to get away scot-free, but the charge is not going to be that you send or you committed an offense against Mr. A or Ms. B. You committed a sin against the king. So all criminal prosecutions are brought in the name of the state. Your act was against the state, not the individual. The individual has to get justice by going to court. When people mention the old law of an eye for an eye and a tooth for a tooth, even in that the Rabbi said that is not literal. The issue, and I don't know if they ever used the term, is measure of damages. If we allow, because you lost your eye, to take the eye of the one who took your eye, the perpetrator may have an eye with greater acuity, greater everything in the way of the ability of the eye. And this is the way they reasoned. So this does not mean that if somebody took your eye that person's eye will be taken. You will determine the value of the eye, then how much the value of that eye had to this individual based on what that individual did, and all such things. The same with tooth for a tooth. They never took somebody's tooth who knocked out a tooth. They never took somebody's limb because that person took the limb. So when we come to situations like this, I think it's not a service to the public to suggest that the same factors obtain in a criminal prosecution as in a civil. In a criminal prosecution, you know that it's not enough to

just show that you committed this crime. There can be aggravating circumstances which, although it is an assault, can make it a higher degree of assault and you'll be punished to a greater extent. And your frame of mind and other circumstances play into it because punishment is what you're looking at. When you have an injury, you're looking only, first of all, evidence presented to establish that this person committed the act that injured the other person. If that is admitted, there is no need for any evidence to be presented. Then I'm going to let you say everything you want to say. I'm putting it all out here so I don't have to ask you a series of questions. [LB84]

JAMES HARRIS: Okay. [LB84]

SENATOR CHAMBERS: This admission of guilt, whether it's going to be called negligence, recklessness, whatever, when that is admitted then the only thing the jury needs to look at: What harm did this act cause and what amount of money should be allowed to make it right? And jury verdicts, even when they come in, are set aside because the guy who was driving that....I think it was a Walmart truck ran into the back of the vehicle in which a comedian was riding and his friend and others. The friend was killed. The comedian had brain damage. A multimillion dollar judgment was given against the driver, and upon appeal the court set it aside. It didn't say no damage. So whatever the jury presents is not necessarily going to stand. And when you have language like this, it's the loosest I've ever seen in a law, even with the amendment. It says...I've got to get my amendment, but anyway it says it can be introduced in any civil case for any purpose. "Any" allows for no exception. The purpose is to inflame the jury. With this law, that's allowed. There are no exceptions. [LB84]

JAMES HARRIS: Well, I think "inflame the jury" is something that shouldn't be allowed. I'm going to start off... [LB84]

SENATOR CHAMBERS: (Inaudible.) [LB84]

JAMES HARRIS: ...where you started with the legal definitions. And I understand not everybody here is a lawyer and I don't want to become too legalistic. But you, when you started off with the "probative" and the "relevancy," it's very important for the nonlawyers because this answers the question. It's not just we decide damages. The jury is required and the judge instructs them and gives very careful instructions on what the elements of damage are, and those elements have to be proximately caused by the negligence of the defendant. Now when they look back and when we...they admit liability, they don't admit proximate cause. They're denying they caused those damages. So that's the issue. In order to decide proximate cause, they need to know what the negligence was. And the definition of negligence is the foreseeable results that flow from that act. So how can they decide the crucial and only main issue in that case of proximate

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cause without knowing the foreseeability of harm? Because they have to decide the accountability and responsibility of this person, they need to know what he did or didn't do. And it's not there to punish. We have to decide the...the main issue of damages has to be decided based on proximate cause and that's why that language is in there. It's not just to prove liability. We have to prove...if the plaintiff's burden in every single step of this case to sustain their burden of duty, breach of duty, proximate cause, and damages, we have to prove that what the defendant did was foreseeably going to result in harm and damages. [LB84]

SENATOR CHAMBERS: But before you get too deep into it, you think the Supreme Court doesn't understand what you're talking about here? [LB84]

JAMES HARRIS: I think what the Supreme Court did in the Huber v. Rohrig case that I gave you,... [LB84]

SENATOR CHAMBERS: You're getting ahead of me. [LB84]

JAMES HARRIS: ...what they've done... [LB84]

SENATOR CHAMBERS: Wait a minute. Does the Supreme Court understand these elements that you've discussed with us here just now? [LB84]

JAMES HARRIS: They...these elements and this argument hasn't been made because we've got precedence, like the Huber case and there's other cases that I could cite to you, that go down this road. But it's not the accident which is the result of the negligence that causes the injury. It's we have to prove, it's our burden by law and that's not going to change, that the acts or omissions of the defendants, the tortious conduct, the negligence caused injury, not whether it caused the accident. [LB84]

SENATOR CHAMBERS: Here's what I'm asking you. Well, let me state it. You're pushing for a new and different approach to the law. You want new law to be created, not through judicial interpretation but by this Legislature changing what the Supreme Court said is the law now, because what you're telling me, the Supreme Court's decision did not require a proximate cause and so forth. But if that were not present, the matter would have been allowed to go to a jury (inaudible). [LB84]

JAMES HARRIS: Yeah, what I'm telling you is I don't want to change the law. I want to go back to the black letter law, the law that's been in effect for decades and universally accepted, those very basic concepts of foreseeability, proximate cause... [LB84]

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SENATOR CHAMBERS: Are you saying the Supreme Court...? You won't answer me. You're still saying... [LB84]

JAMES HARRIS: I am answering you. I'm telling you what the Supreme Court did in the Huber case was wrong. They said the accident caused the injuries. [LB84]

SENATOR CHAMBERS: Now you're finding... [LB84]

JAMES HARRIS: (Inaudible) negligence caused... [LB84]

SENATOR CHAMBERS: No, the Supreme Court... [LB84]

JAMES HARRIS: ...the injuries. [LB84]

SENATOR CHAMBERS: ...the Supreme Court declared the law. Through that declaration of the law, you couldn't get what you wanted. You're entitled to say the Supreme Court is wrong. [LB84]

JAMES HARRIS: That wasn't my case. [LB84]

SENATOR CHAMBERS: You're entitled to argue in a case that it's wrong. [LB84]

JAMES HARRIS: Okay. [LB84]

SENATOR CHAMBERS: But the Supreme Court will say this is the decision, this is the law, and you just do not want to accept what the law is. [LB84]

JAMES HARRIS: And it's blatantly unfair to victims of this and it gives the drunk drivers a free pass and we shouldn't reward them for their actions. And that's...and, yes, the law needs to change and many of the laws that are on our books are as a result of this committee's reaction to an adverse Supreme Court Opinion that says, we're not going to tolerate this; we deserve better, we expect better, our community demands better, and we're just not going to tolerate this anymore. This can't go on day in and day out. These victims of horrendous crashes going to court and imagine telling one of your friends or family members or constituents or my clients that they're going to walk into court with all the devastation it's caused their family... [LB84]

SENATOR CHAMBERS: That's not a part of... [LB84]

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JAMES HARRIS: ...and not to even be able to mention the fact... [LB84]

SENATOR CHAMBERS: ...it's not part of the law. You know what? You're misleading your client. If you tell your clients that you have a grandmother and she was very hurt by what happened to you, therefore, how your grandmother felt ought to be recoverable in this action that you're bringing because you were hurt in the accident. Then you could say, in addition to that, the grandmother had other grandchildren and they were hurt because the grandmother was upset so that ought to be listed as damages. [LB84]

JAMES HARRIS: Well, the law doesn't permit that. [LB84]

SENATOR CHAMBERS: No, it doesn't. [LB84]

JAMES HARRIS: No, it doesn't and it won't and I'm not advocating for that. [LB84]

SENATOR CHAMBERS: I think you're misleading your clients. [LB84]

JAMES HARRIS: No, I'm telling you... [LB84]

SENATOR CHAMBERS: Then why are you asking to change the law? [LB84]

JAMES HARRIS: What the jury...what the judge...what the judge and the jury are going to get are the NJI, the Nebraska Jury Instructions. There they require an admission of negligence doesn't tell the jury anything to allow them to decide the issue of proximate cause of damages. [LB84]

SENATOR CHAMBERS: That's already been conceded or the matter wouldn't go the jury. If this was not the proximate cause and it wasn't admitted, it wouldn't go to the jury. If an element is missing, it will not go to the jury. When the admission is made by the person, the person has to admit everything that's required to establish liability. [LB84]

JAMES HARRIS: That's not true, because the jury decides all those factual issues. [LB84]

SENATOR CHAMBERS: Look, I'm not going to argue with you. Wait a minute, you're making a point to your lawyer...your client and I'm a member of the Legislature. I'm going to read something to you. [LB84]

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JAMES HARRIS: Okay. [LB84]

SENATOR CHAMBERS: And you tell me if this is true or false. [LB84]

JAMES HARRIS: Sure. [LB84]

SENATOR CHAMBERS: And, Madam Chair, I'm not going to be quiet and let somebody misstate the law and he's going to shout me down. [LB84]

SENATOR EBKE: Go ahead. [LB84]

SENATOR CHAMBERS: Listen to this and tell me that this is incorrect: "Although relevant." Do you know the meaning of "relevant"? [LB84]

JAMES HARRIS: Certainly do. [LB84]

SENATOR CHAMBERS: What does it mean? [LB84]

JAMES HARRIS: It pertains to the facts that need to be proved. [LB84]

SENATOR CHAMBERS: "Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." What does "probative" mean? [LB84]

JAMES HARRIS: It reaches, you know, its depth it goes to. I understand that. The unfair prejudice is... [LB84]

SENATOR CHAMBERS: No, no, what does it mean? [LB84]

JAMES HARRIS: ...it's Rule 403. There's a relevancy rule which is 401, and there's an unfair prejudice rule which is 403. And I'm telling you it may be unfairly prejudice to one side but it's also unfairly... [LB84]

SENATOR CHAMBERS: Excuse me,... [LB84]

JAMES HARRIS: ...prejudice to the other side. [LB84]

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SENATOR CHAMBERS: ...I'm asking you the questions and I asked you before we got into this do you know the meaning of "relevant." You said, yes. I said do you know the meaning of "probative." You said, yes. Now you've told me what "relevant" means. I'm asking you now, what does "probative" mean? [LB84]

JAMES HARRIS: Whether it relates to or is supportive of whatever the issue is, whether it's more likely or not, when that goes to prove whether it's more likely or not. [LB84]

SENATOR CHAMBERS: Even if it has probative value--and I'll accept that--if it is something that indicates that what happened, what is being alleged was more likely to have happened than not to have happened, and that makes it probative. But that alone does not make it admissible. Mere relevance does not make it admissible. Relevance, as you pointed out, means it has something to do with what happened. But if it doesn't bring you closer to what did happen and have some value in proving liability, then mere relevance is not enough if it doesn't have probative value. If that...if there's relevance, if there's probative value, it is excluded if it is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. If guilt has been admitted, it's cumulative to allow the presentation of evidence, which establishes what is already admitted. Would you agree with that? [LB84]

JAMES HARRIS: No, I absolutely will not. [LB84]

SENATOR CHAMBERS: Okay. Then I don't have any questions. [LB84]

JAMES HARRIS: And here's why and... [LB84]

SENATOR CHAMBERS: I don't have any questions of you. [LB84]

JAMES HARRIS: I know. Let me answer. Let me just give a short... [LB84]

SENATOR CHAMBERS: No, you answered my questions. [LB84]

JAMES HARRIS: ...because... [LB84]

SENATOR CHAMBERS: You answered my question. [LB84]

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JAMES HARRIS: Okay. You don't want to be bullied and I don't either. Let me answer if I may, Chairwoman? [LB84]

SENATOR CHAMBERS: Well, here you answer the question and when you've answered it that's all. You've answered my questions. [LB84]

JAMES HARRIS: Well,... [LB84]

SENATOR EBKE: Are there any other... [LB84]

JAMES HARRIS: ...if I may make a statement, this admitted liability, he's right, it may not go to prove admitted liability if it's already admitted, but there's other elements that have to be proved by the jury and those other elements, every legal scholar will tell you and it's been age-old black letter law, we have to prove. In addition to the liability, we have to prove proximate cause and we have to prove what damages were proximately caused by the negligence. And how can the jury decide those issues without knowing what the negligence act was? [LB84]

SENATOR EBKE: Okay. Any other questions? Okay. Thank you. I think we're good. [LB84]

JAMES HARRIS: Anything further? [LB84]

SENATOR EBKE: Okay. Thank you. [LB84]

JAMES HARRIS: Thank you all. [LB84]

SENATOR EBKE: Next proponent. [LB84]

MICHELLE ROOT: Hi. [LB84]

SENATOR EBKE: Welcome. [LB84]

MICHELLE ROOT: I'm Michelle Root and I'm here to testify on behalf of my daughter. My name is spelled M-i-c-h-e-l-l-e, Root, R-o-o-t. My daughter was killed by a drunk driver. He was underage, drinking and driving, and I don't think that should be taken away when he is brought to justice. Of course, he is on the run now so we're probably a long ways off of this. But I believe that that should be told in court when he's found. Sarah deserves that. Her family deserves that. She was 21 years old, starting her life and sitting at a stoplight when she was rear-ended by this

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underage drinker that was racing. All the facts need to be told in order for a jury, I believe, to come to the conclusions of what they need to. Now our motives are different because no amount of money is ever going to bring our daughter back, but I do think the facts need to be the facts and need to be told in her honor. And that's all I have to say. [LB84]

SENATOR EBKE: Thank you, Ms. Root. Any questions? [LB84]

MICHELLE ROOT: Thank you, guys. [LB84]

SENATOR EBKE: Sorry for your loss. Thank you. Next proponent. Any other... [LB84]

ELEANOR JENSEN: My name is Eleanor Nicole Jensen, E-l-e-a-n-o-r J-e-n-s-e-n. I'm also here to support Senator Blood's new law that she wants to change. [LB84]

SENATOR EBKE: Move up just a little bit, see if we can get you. [LB84]

ELEANOR JENSEN: Sorry. I'm also here in honor of my late best friend Sarah. She was like a little sister to me. And I also feel, after hearing the trials and going to different things in this case, it's now been a year gone. The jury did not, in this specific case, I felt it was unfair because when we were at the first trial which the...I'm so sorry, I'm getting emotional. As when the guy that killed Sarah, he did not show up to trial and the jury was not given any information at that point as well. And I just feel like it's very important for them to know everything because, like Michelle said, no amount of money is going to bring Sarah back but in her honor. These are things that are important to all families. Whether it be an accident, you know, because of snow or whatever, I think a decision can't be made unless you know every detail. So I just wanted to say that. [LB84]

SENATOR EBKE: Okay. Yes, any questions? Next proponent. [LB84]

ERNEST NEWQUIST: Hello. My name is Ernie Newquist, last name spelled N-e-w-q-u-i-s-t. I guess I sit in front of you as a citizen of Nebraska, a former educator, a father of three beautiful daughters. You know, talking about these accidents or these issues with drunk driving, my story isn't as tragic as someone losing a member of their family. But you know, we think of the date 9/11, and it has significance to me more so than a lot of others, because on 9/11/11, about five and a half years ago, my wife, my 14-year-old daughter and I had left a Husker football game, headed west on the interstate. At the Pleasant Dale exit, as we were headed west, a drunk driver come down the exit ramp heading east and he hit us. We flew into another vehicle. Eight people involved, no one died, fortunately, but there was a lot of injuries. My daughter still has issues

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with her neck. They thought I had broken my neck. They took me into the hospital. Since then I've had my left shoulder rebuilt, both knees operated on, several procedures on my lower back. Four months ago I had two disks replaced in my upper neck and I live in a virtual state of pain. My wife was also in the vehicle. She didn't have any physical injuries but, near as I could tell, she has suffered from posttraumatic stress disorder. You know, I had been married 29 years, and a year, roughly, after the accident we filed for divorce. I had fallen into a depression because I was broken up so bad physically and she was so traumatized by the accident that, you know, it took a financial toll on me and my family, destroyed my family structure. I hope she's gotten the help she needs to come to grips with it. I'm still doctoring. I've had over ten doctors work on me since this accident. Within the accident, eight individuals, as I mentioned, were injured; the driver was not. In fact, he was angry with all of us because we were in his lane. He blacked out. He didn't have any idea where he was, but he knew he was in the right of way and we had run into him. Again, just the physical toll on my family, myself, the mental toll on all of us, you know, it's a situation where I think it's vital that people know the whole information because this individual has impacted my family, just like these others behind me, forever. And this was something that could be avoided, we all know, but you know it's quite an impact on all the people that have gone through any type of this. I do have several pictures of the accident, which will be distributed to your group when copies are made. So I guess that's the point I wanted to make. Any questions? [LB84]

SENATOR EBKE: Any questions for Mr. Newquist? Okay, thank you. [LB84]

ERNEST NEWQUIST: Thank you. [LB84]

SENATOR EBKE: Any other proponents? [LB84]

MATT LATHROP: (Exhibit 5) Good afternoon. Thank you, Madam Chair and members of the committee. My name is Matt Lathrop, M-a-t-t L-a-t-h-r-o-p. I'm here in support of LB84. I have prepared remarks, but I think I'll direct them straight to the conversation that's already taken place. Currently under Nebraska law, we have two classes of personal injury cases. We have one class of case where a party comes to the courtroom, injured in an automobile collision, and is allowed to tell the whole story about what happened, what caused the wreck, what injuries resulted from it, and how the driver's behavior caused the injuries that are alleged. The second category of cases, a jury is told: Trust us, the defendant in this case did something wrong. Go out and decide how much money you should take away from that person and give to the victim. We're not going to tell you what they did and we're not going to tell you how this wreck happened. We're going to ask you to trust us, the court and the lawyers, who you do not trust in this case, and we won't give you an explanation of what happened. Go decide damages. The jury that's given the full story of what happened is far more likely to come back with a result that will

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compensate the victim in a fair manner. And "fair" is not just an evaluation by a plaintiff's lawyer, which I am. And I apologize, I should have mentioned I'm here on behalf of the Nebraska Association of Trial Attorneys. It's not just fair as measured by what happens to the plaintiff but also what happens to the defendant. In the second category of cases, once that fact of the negligent act is admitted, the defendant then is allowed to set aside his own behavior and to go after the plaintiff. And what we just heard from one of these witnesses was a group of damages that you don't typically hear from, people involved in car wrecks, but I hear from my clients a lot in drunk driving cases: sleeplessness, agitation, anxiety, worry, fear, divorce, posttraumatic stress disorder, nightmares. These are symptoms that we don't hear about when someone is hit in a parking lot. These are symptoms we don't hear about when there is a T-bone collision, no matter how dramatic, at an intersection. Someone runs a red light. The fact that a person gets out of a car with the help of ambulance personnel and as they're being hauled to the ambulance and look over while they're on the gurney and see the driver of the other vehicle being given a sobriety test on the side of the road has an impact on these victims. And these victims carry with them damages that are greater than you would reasonably expect from a normal accident. They are different from what we would expect from a normal accident. And they are life changing. We heard about divorce here in this hearing today. We are not looking to punish drunk drivers. What we are trying to do is provide juries with all the information because, as Mr. Harris was pointing out, proximate cause requires us to demonstrate to the jury what did the defendant do and is that action something that would proximately or reasonably legally cause the harm involved. Can we reasonably expect someone to come into court and say, you know what, I was in a rear-end collision on 90th and Dodge Street in Omaha and my wife and I got divorced? I think a jury would say, I don't get that. If someone came into court with a psychologist who said, he suffered a lot of posttraumatic stress and the family has been broken up about this, they're still angry about being hit by a drunk driver, the jury is given all the information that helps them understand the range and depth and breadth of the harm caused by the drunk driver. So we do believe that this has a probative value, that is, it is a fact that is more like some...it is a fact that is likely to prove something more likely true than not true. The drunk driving helps us establish causation of the harms that we're alleging. A juror has to know what caused the wreck or they will look for an answer about what happened and they will make it up. If they hear a car crossed the center line, they may say, well, there was kids talking in the backseat. They just said it was negligence. We got to cut these guys a break. They may make up any other excuse for the defendant driver without knowing what the defendant driver did, and we can't take that risk when we're talking about the lives and the damages that we've heard about here. I am happy to answer questions. Thanks for your time. [LB84]

SENATOR EBKE: Questions? Senator Chambers. [LB84]

SENATOR CHAMBERS: Mr. Lathrop,... [LB84]

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MATT LATHROP: Hello. [LB84]

SENATOR CHAMBERS: ...are you a member of that firm Wolf, O, Lathrop, and the other one? [LB84]

MATT LATHROP: Hauptman, O'Brien, Wolf, and Lathrop. [LB84]

SENATOR CHAMBERS: Oh, you... [LB84]

MATT LATHROP: No. [LB84]

SENATOR CHAMBERS: Oh, you're not? [LB84]

MATT LATHROP: No, I'm not. [LB84]

SENATOR CHAMBERS: Oh, okay. [LB84]

MATT LATHROP: They threw me out for being too good a lawyer. (Laughter) [LB84]

SENATOR CHAMBERS: But anyway, if you take the first letter of each one it spells howl,... [LB84]

MATT LATHROP: Howl. [LB84]

SENATOR CHAMBERS: ...like a howl and wolf was on purpose. And it was clever if it was on purpose. But anyway, can speculative damages be compensated? For example, the example that I gave and may have been outlandish but to make the point, if this injury happened to person A and grandmother is person C, and as a direct result of what happened to person A grandmother C fell into deep depression. No longer can person A visit and do the things that gave them their connection. And it can be shown that but for this accident involving A, the grandmother wouldn't have any problem nor would those others, as you let the tentacles go out. Could all of those damages be included and given to the jury to show what ought to be compensated for as a result of this accident? [LB84]

MATT LATHROP: This is a foreseeability question, if I understand you. Are you saying is this something we would...a jury is allowed to compensate all victims of any harm that is foreseeable. [LB84]

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SENATOR CHAMBERS: And is that, in your experience, what I've mentioned too tenuous or is that deemed foreseeable? [LB84]

MATT LATHROP: I would think...now, assuming Grandma is not in the backseat of the... [LB84]

SENATOR CHAMBERS: Right, wasn't there. [LB84]

MATT LATHROP: ...right, Grandma is just at home. I think that that's probably too tenuous. It would be very difficult to bring that case. [LB84]

SENATOR CHAMBERS: And when we say foreseeable, from whose standpoint are we concluding that? [LB84]

MATT LATHROP: Foreseeability is always a decision that's made by the jury. [LB84]

SENATOR CHAMBERS: But who is supposed to have been able to foresee that such and such might be the result? [LB84]

MATT LATHROP: Well, it's not an individual standard. It's a community standard. [LB84]

SENATOR CHAMBERS: And that is supposed to be the objective standard. You don't base it on what actually happened in this case. Is that true? [LB84]

MATT LATHROP: No, I think what happens is the jury is told that they have the job of deciding whether the harms that are involved in the case were reasonably foreseeable when the defendant chose to participate in a dangerous act. [LB84]

SENATOR CHAMBERS: Foreseeable by the defendant. [LB84]

MATT LATHROP: No, foreseeable by the community as a group. [LB84]

SENATOR CHAMBERS: Is that the way the way the jury instruction goes? If you think the community would feel this way, then that's the way it's supposed to be. Is that the way the jury instruction is given? [LB84]

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MATT LATHROP: That's exactly the purpose of the jury is to decide issues of foreseeability, yes. [LB84]

SENATOR CHAMBERS: No. Are those the words in which the jury instruction will be given, that what you are doing is determining how the community feels about this, not really what pertained to anybody who perpetrated the accident or the one who was in it, but how somebody else may...? [LB84]

MATT LATHROP: The jury is told that the action, the dangerous or the negligent act that the defendant participates in, they are to evaluate that action. They evaluate the action for foreseeability. So the jury doesn't...for instance, I don't ask a defendant, could you foresee that Grandma would be hurt here, because if I'm a smart defense lawyer I tell my client, tell them no to everything; I had no idea. [LB84]

SENATOR CHAMBERS: Well, if the defendant pleaded guilty, there doesn't have to be that exchange because there's no trial. There's no... [LB84]

MATT LATHROP: Well,... [LB84]

SENATOR CHAMBERS: ...courtroom proceeding. There's no question and cross-examination (inaudible) anything. [LB84]

MATT LATHROP: Like now are you talking about a criminal case or a civil case? [LB84]

SENATOR CHAMBERS: Say it again. [LB84]

MATT LATHROP: I'm sorry. Were you talking about a civil or a criminal case? [LB84]

SENATOR CHAMBERS: Oh, civil. [LB84]

MATT LATHROP: Okay. In civil cases, if a defendant admits that he was negligent, the case still goes to trial. Just because he says he was at fault, he has denied that he caused the injuries that my client suffered, absolutely. And I have this hearing on a monthly basis in district court in Douglas County where lawyers come in and admit that they caused...they were negligent and deny everything else. We deny we injured your client. We deny your client has any harm. And we deny your client is entitled to anything from us. [LB84]

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SENATOR CHAMBERS: When you present your client's case to the jury...are you allowed to present your client's case to the jury? [LB84]

MATT LATHROP: Not all of it... [LB84]

SENATOR CHAMBERS: ...when the person...when the person pleads guilty, you're not allowed to talk to the jury about the injuries suffered by your client? [LB84]

MATT LATHROP: Yes, I am. [LB84]

SENATOR CHAMBERS: And you're entitled to mention, as the gentleman mentioned, all these different things: broken bones, all of that can be presented... [LB84]

MATT LATHROP: Sure. [LB84]

SENATOR CHAMBERS: ...to the jury. [LB84]

MATT LATHROP: Yep. [LB84]

SENATOR CHAMBERS: What difference does it make whether the person who caused the injury was drunk or not drunk? You're compensating for the injury that was caused, not punishing. [LB84]

MATT LATHROP: You're missing a step. The step that we're missing in this conversation is that I have to prove the injury that I'm saying was...my client has. And I'm going to use the divorce. I have to prove to the jury that the divorce, which is part of my client's damages, that my client suffered a broken marriage and a broken home, was caused by defendant's negligent act. And I think... [LB84]

SENATOR CHAMBERS: What difference...excuse me. Go ahead. [LB84]

MATT LATHROP: Sure. I'm sorry. I didn't mean to interrupt. [LB84]

SENATOR CHAMBERS: No, go ahead. [LB84]

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MATT LATHROP: I don't think a jury is likely to believe that my client suffered a divorce because he was in a rear-end collision. I think a jury is more likely to believe my client's family was broken up because they were involved in an accident with a drunk driver who was in a blackout. [LB84]

SENATOR CHAMBERS: So the purpose is to inflame the jury (inaudible). [LB84]

MATT LATHROP: Not at all. [LB84]

SENATOR CHAMBERS: You're familiar with Rule, what is it, 403? [LB84]

MATT LATHROP: 403. [LB84]

SENATOR CHAMBERS: And you think that rule is wrong,... [LB84]

MATT LATHROP: No. [LB84]

SENATOR CHAMBERS: ...is incorrect in what it says. [LB84]

MATT LATHROP: No, I don't. [LB84]

SENATOR CHAMBERS: Then you think the court misapplies it. [LB84]

MATT LATHROP: I do. [LB84]

SENATOR CHAMBERS: Then you have to try to get the court to change what it said. [LB84]

MATT LATHROP: Well, there's two ways to do exactly what you said. [LB84]

SENATOR CHAMBERS: (Inaudible) you try to persuade the Legislature that the court was wrong also. [LB84]

MATT LATHROP: Where I have a lot more friends. [LB84]

SENATOR CHAMBERS: Then should every time somebody loses a case they bring it to the Legislature to reverse what the court said? [LB84]

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MATT LATHROP: Absolutely, if that's what...the law isn't settled until it's right, and the law isn't right until it's just. And if we cannot change what happens in the courts because the courts are in a state where they think they've taken care of things, I think we take it to the electorate. And we take it to the electorate through their elected people to evaluate whether courts are doing what we think they should do. [LB84]

SENATOR CHAMBERS: And if they can get somebody to introduce it who will come before us. [LB84]

MATT LATHROP: Exactly. [LB84]

SENATOR CHAMBERS: But the Legislature is not going to reverse every case that the Supreme Court decided because the losing side brings it to the Legislature. [LB84]

MATT LATHROP: I agree. [LB84]

SENATOR CHAMBERS: They brought things like this before. [LB84]

MATT LATHROP: Sure. [LB84]

SENATOR CHAMBERS: So... [LB84]

MATT LATHROP: And I think this is probably one of the greatest things about our democracy is that we don't turn over decision making to a single branch of government. We have checks and balances and this is checks and balances at its finest right here. [LB84]

SENATOR CHAMBERS: But one of the things that outsiders need to understand about...I meant those who are not a part of the Legislature, the Legislature doesn't agree with every bill that is introduced. Sometimes the introducer doesn't even agree with it but was asked by a constituent to bring it and will sometimes say, I'm bringing this because so-and-so asked me to but you don't have to do anything with it. So politicians can be prevailed on to do certain things. Now I'm trained in the law but I cannot practice because I won't join the Bar Association, but that doesn't mean I don't know what I know, and I've argued cases for myself before the Supreme Court and have won. So the knowledge is there but now I'm functioning as a member of the Legislature. And if I win a case that I argue, that can be said to be the law. But it's still a case-by-case basis to bring your case within the rule that was established by the court or the rule of that case. When we change a Supreme Court decision we have now set a policy that affects everything that that case pertained to. So in a sense, the Legislature has to be far more careful than what the court

does because the court can reverse itself. The Legislature can amend laws but we need to be far more circumspect and careful before--this is my opinion and my concept of lawmaking--before we change a law because we're sympathetic to people who didn't get the response that they wanted in court. There are a lot of people I sympathize with, but that is not enough to make me put a law in place that covers every situation that might have similar facts. So it has nothing to do with not understanding how hurt individuals who are injured might be, how broken up the family members might be, how far-reaching it might be, the fact that divorces may occur. And if two people are divorced and one ex-spouse marries somebody else, this spouse may kill the other one that was married and their spouse too, and somebody could say, well, all that came because somebody got drunk and caused an accident. Maybe so, but if you're a philosopher, you know that there's a difference between...well, let me put it like this without using philosophical terms. [LB84]

MATT LATHROP: Thank you. [LB84]

SENATOR CHAMBERS: A chain of causes can exist where if A happened it triggered B, it triggered C, which in turn triggered D. But you can remove any one of those in between and still have what happened after that. But if it's what they call a necessary cause-and-effect relationship, it's like a chain. You have to have every link in the chain in order for that chain to remain intact. The accidentally subordinated causes would be like my father is the cause of me, I am the cause of my child, but I and my father can cease to exist and the child goes on. So we are...I can't get away from that term. It's an accidentally subordinated series of causes. But if it's existentially subordinated, it means that everything has to remain in existence in order for everything to still be there. You could start with a guy going to the bar, getting a drink. People talk to him and he gets drunk, which was not his intent but he got drunk. He got into the car, had the accident. And then all these other bad things that will happen with families can be said to have been caused by that accident. But in my view, they were not caused in the sense of causation that should allow a recovery in court by all these other people because of the damage done to individual A. And what I see you pushing for, and I could be mistaken, that where your argument would go all these other things that the public may feel grew out of this first cause. In this community if a drunk driver did this then all these other things he could have known would happen because he's seen how people feel when somebody has a problem with a drunk driver. Is that what you're saying when you say the community's feeling? [LB84]

MATT LATHROP: Well, the jury, as the community, the representative body of the community. That's why we have juries. That's why we pick 12 of them and not just have judges do this. If the jury feels through the instructions and the evidence that they heard that the plaintiff or the person, the victim, has proven that the damage they claim was, more likely than not, a result of the drunk driver, then the jury is asked to give that. [LB84]

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SENATOR CHAMBERS: Now this wouldn't happen in any cases you handle, but have you been aware of cases where jury verdicts were set aside by the court? [LB84]

MATT LATHROP: Absolutely. [LB84]

SENATOR CHAMBERS: So then the court is saying that that does not represent the community's values. Is that what the court is saying? [LB84]

MATT LATHROP: No, I think actually you're making a wonderful point for me which is the court is allowed to do one of two things: remittitur or additur. Either motion on the court's...or either action on the court's own motion can change the jury verdict up or down depending on whether the court thinks that there was undue passion or prejudice as part of the jury's deliberation. So the concern that we have in any case where a jury might be inflamed to where someone, as Senator Morfeld was talking about, is entitled to about \$100,000, the jury comes back and says \$1 million because it was a drunk driving case, a judge can come...the trial judge can say that is an unreasonable verdict and I think it was affected by passion; I'm bringing it down. [LB84]

SENATOR CHAMBERS: And isn't that the judge's job? [LB84]

MATT LATHROP: Yes. [LB84]

SENATOR CHAMBERS: And we know that not all judges will see things the same way. [LB84]

MATT LATHROP: I agree. [LB84]

SENATOR CHAMBERS: So if the juror...if the plaintiff feels that that decision by the judge was incorrect, an appeal can be taken. [LB84]

MATT LATHROP: Yes. [LB84]

SENATOR CHAMBERS: And if the Supreme Court agrees with what the trial court decided, then that becomes the final word in the case. [LB84]

MATT LATHROP: Yes. [LB84]

SENATOR CHAMBERS: And then you'll come to the Legislature. [LB84]

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MATT LATHROP: Correct. [LB84]

SENATOR CHAMBERS: And if the Legislature legislators agree with the judge having done what should have been done, will not amend the court rules, will feel that the court rules give adequate notice to those trained in the law and practice in the law, what the state of the law is, then they should know, within reason, what they can expect when a jury verdict...I meant when a jury instruction is given. But nobody can determine how the jury is going to interpret the instruction, so the judge is still going to sit and look at what they come back in. And if it's within reason then it will stand. If not, the judge will set it aside. [LB84]

MATT LATHROP: Right. [LB84]

SENATOR CHAMBERS: So are you the one who lost the case? [LB84]

MATT LATHROP: No. No. [LB84]

SENATOR CHAMBERS: Okay. [LB84]

MATT LATHROP: I'm the one who has to tell client after client after client that the person who was texting and driving and smashed into your car, that will never...the jury will never hear that. The person who was drunk and killed your daughter, the jury never gets to hear that. And then I get an offer from some defense lawyer that says, well, we're not going to give your lady anything for her emotional loss for her daughter because she had some psychiatric care when she was 16 and we think that that's really why she has the problem she has today. [LB84]

SENATOR CHAMBERS: So that's what practicing law means. And you love it, don't you? [LB84]

MATT LATHROP: I... [LB84]

SENATOR CHAMBERS: You love the law and you love... [LB84]

MATT LATHROP: I don't work a day of my life because I love what I do. [LB84]

SENATOR CHAMBERS: Right. And people who study the law but may never be able to practice law can also be beguiled and fall in love with the law... [LB84]

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MATT LATHROP: I hope so. [LB84]

SENATOR CHAMBERS: ...and develop the kind of respect where the law has to be placed above many other things. And sometimes when you are building a system, there are going to be some failures of that system along the way. There are going to be some injustices, no matter what. But we in the street on many subjects will say, it ain't much but it's all we've got. The law may not be much in certain cases, but it's all that we have and we have to try to make it behave in the way that we would like it to behave and we're never going to achieve perfection. In fact, somebody said if all people were angels we wouldn't need laws. Look, I'm in disagreement with some of what you said but I'm not in disagreement with your coming here, with you presenting very capably your point of view, and you may prevail on enough members of the committee to see it your way. But I would rather you have some idea of what I'm thinking on this instead of me giving the impression that I'm agreeing with it and then I don't do the same thing. I don't owe that to you. I don't have to ask you a question. I don't have to indicate anything one way or the other. But I feel that people who deal with the law, whether like you they can practice and defend others, or like me, cannot practice but can defend myself and win cases, see the law differently from the way that citizens and laypeople do. It's not based on logic. It's not based in feeling. It's not based on what seems to be. We have to find predictability by reading court decisions, looking at who the judge or who the judges were if it's an appellate case, how they have looked at this. And when we file our appeal and write our briefs, we have to play to what these judges have shown us they're going to look at and how they're likely to respond. So it is, in a sense, like a chess game, not a checker game. You have to go a little deeper than that. And I, because of my approach, which is very direct, not with ordinary citizens but lawyers, doctors, and others who are professionally trained, may seem too harsh. I even had a colleague go to a luncheon and tell people that I need to treat witnesses better. He'll probably go to another lunch, sponging off the lobbyists, and say that Chambers needs to not treat witnesses like that. But when people who are trained come before the committee, they can always expect questions from me based on what I presume their knowledge is and their ability to talk back to me. And by me talking back and forth to you, it gave you an opportunity to present more of your case than would have been if I had not said anything, and when the red light came on that's all you could have said. I genuinely feel, and I still do, you have information that will help committee members reach a decision and it may be entirely different from mine. But the more information out there the better. Everything we say is recorded, it will be transcribed, and others can gain the benefit of it too. So when I go on record like this, if a fool I am when I'm talking, a fool I am frozen in that transcript forever. But I do appreciate your coming and having been willing, very frankly and forthrightly, to have this interchange with me. [LB84]

MATT LATHROP: Thank you. [LB84]

SENATOR CHAMBERS: And I don't have any more questions... [LB84]

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MATT LATHROP: Thank you. [LB84]

SENATOR CHAMBERS: ...but if you want to respond, you can. [LB84]

MATT LATHROP: Thank you. That would be my response. You did bring up change in the outcome of a case and I just wanted to address, you know, 120 years ago common case law was that if the wife of a man was injured, that was treated as property and it was a property damage only claim. And through legislative processes we changed that law to more adequately and accurately reflect the current state of society's expectations. And that's, you know, again, if the law isn't just, it isn't settled. And that's what we're here trying to do. [LB84]

SENATOR CHAMBERS: And if we go back a little farther, if I belong to Senator Morfeld and they kill me, it was no crime against me. It was a crime against his property. [LB84]

MATT LATHROP: Precisely. [LB84]

SENATOR CHAMBERS: So I understand. [LB84]

MATT LATHROP: And we had to change the constitution to do that. [LB84]

SENATOR CHAMBERS: And it's still not accepted by some people as a legitimate change. [LB84]

MATT LATHROP: Amen. [LB84]

SENATOR CHAMBERS: See what happens when you get people trained in the law and they also have a little philosophic bent too? (Laughter) Thank you very much. [LB84]

MATT LATHROP: Thank you, Senator. [LB84]

SENATOR EBKE: Okay. Any other questions? Senator Hansen. [LB84]

SENATOR HANSEN: Thank you, Chair Ebke. Mr. Lathrop, this is more of a technical drafting question or maybe I'm just putting legal counsel on notice, but here we're essentially putting an exemption to our state rules of evidence inside of our Rules of the Road. Is that something that we have done in other instances that you're aware of or would you support a more accurate, if we

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do go with this change, putting it inside of the rules of evidence and changing maybe 403?
[LB84]

MATT LATHROP: If I may, the change in the law is where we are focusing our attention. I will tell you in drafting this there was a lot of angst and head scratching as only lawyers can do in drafting changes. We didn't know whether to put it in the rules of evidence or in the Rules of the Road. It just seemed, because it refers to those other sections of the statute, to be more germane there. But I don't know that we care if it goes into the rules of evidence or the Rules of the Road. The problem with changing the rules of evidence is those are generally mirrored off the federal statutes. [LB84]

SENATOR HANSEN: Thank you. [LB84]

MATT LATHROP: Yeah. [LB84]

SENATOR HANSEN: I appreciate it. I figured another lawyer looped in a third lawyer on this question. So... [LB84]

MATT LATHROP: Perfect. [LB84]

SENATOR HANSEN: ...appreciate it. [LB84]

MATT LATHROP: Thank you. [LB84]

SENATOR EBKE: Okay. Any other questions? And as a nonlawyer but a political historian, it was Madison in Federalist 51 that made the comment about if men were angels no government would be necessary. [LB84]

SENATOR CHAMBERS: And do you know why he didn't say women? Because there's no...
[LB84]

SENATOR EBKE: We're all angels. [LB84]

SENATOR CHAMBERS: ...there's no "if." Right. (Laughter) [LB84]

SENATOR EBKE: Thank you, Mr. Lathrop. [LB84]

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MATT LATHROP: Thank you very much. [LB84]

SENATOR EBKE: Any other proponents? [LB84]

CHRIS WAGNER: (Exhibit 6) My name is Chris Wagner, C-h-r-i-s W-a-g-n-e-r. Good afternoon, Senator Ebke and members of the committee. I'm the policy and research coordinator for Project Extra Mile, a network of community partnerships across the state working to prevent excessive alcohol consumption, including underage drinking and its tragic consequences. Unfortunately, our interim executive director, Diane Riibe, was unable to attend in person today, but I'm here to deliver testimony on behalf of our organization and offer my subject matter expertise. We are here today in support of LB84. According to the most recent data from the Centers for Disease Control and Prevention, Nebraska is the second-worst state in the country in terms of our annual rate of self-reported alcohol-impaired driving episodes. In 2012 Nebraska adults reported 995 episodes per 1,000 population, a rate so high that the CDC expressly indicated it was significantly higher than the national rate of 505 episodes. Nebraska was only one of three states to receive that footnote. Our state has a number of public health policies aimed at preventing and reducing DUIs on the books, but much more work needs to be done. Sadly, Nebraska continues to be in the top ten worst states for binge drinking. The most recent data indicates that we're 8th worst among the 50 states and the District of Columbia with 19.5 percent of adults reporting that they binge drink. Additionally, excessive alcohol consumption costs our state \$1.16 billion in 2010, \$491 million of which was paid by taxpayers and more than 75 percent of which was attributable to binge drinking. I would also note that binge drinkers are 14 times more likely to report driving under the influence than nonbinge drinkers. And between 2003 and 2012, 682 people were killed in crashes involving a drunk driver in Nebraska. At this point, I would just deviate slightly from my prepared testimony and kind of comment on what's been touched on already. I would note that, and I will be corrected, I'm sure, if I'm incorrect, but we do have civil liability for underage drivers in terms of dram shop laws in Nebraska, so if a business or an adult provides alcohol to a minor, that minor goes on to damage property as the result of a crash or injure or seriously injure or kill someone, there is civil liability for that. That's my understanding. And I would also note that the Community Preventative Services Task Force, which is a nonpartisan independent group of public health experts, have reviewed a number of studies and have concluded that on...based on the evidence that dram shop liability laws for both underage and adults is a recommended evidence-based strategy as well. So for these reasons, we fully support Senator Blood's effort to change the Rules of the Road to allow evidence of driving under the influence in a civil action, and we would respectfully urge the members of this committee to vote to advance the bill. Thank you for your consideration of our comments. [LB84]

SENATOR EBKE: Senator Chambers. [LB84]

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SENATOR CHAMBERS: Do you believe...oh, excuse me. [LB84]

SENATOR EBKE: Go ahead. It's fine. [LB84]

SENATOR CHAMBERS: Do you believe this figure in the second paragraph, 995 episodes per 1,000 population? [LB84]

CHRIS WAGNER: That's a survey that was carried out by the CDC in 2012. [LB84]

SENATOR CHAMBERS: I'm asking if you believe it? [LB84]

CHRIS WAGNER: Yes. [LB84]

SENATOR CHAMBERS: Now these are self-reported incidents. [LB84]

CHRIS WAGNER: Correct. [LB84]

SENATOR CHAMBERS: That means people tell...they could have been exaggerating, couldn't they? [LB84]

CHRIS WAGNER: They could have. That's true. [LB84]

SENATOR CHAMBERS: How do you know they weren't, not being argumentative? [LB84]

CHRIS WAGNER: I guess we don't...we can only take them at their word. We could say that they overexaggerated or they "underexaggerated." [LB84]

SENATOR CHAMBERS: Could it be that they are so naive that they're more honest and truthful than people in these other states where they lower, because it's self-reported? [LB84]

CHRIS WAGNER: Correct. [LB84]

SENATOR CHAMBERS: None of this is documented. It's just what people say. [LB84]

CHRIS WAGNER: It's...sure. [LB84]

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SENATOR CHAMBERS: So we don't have 995 drunk driving arrests per 1,000 population. [LB84]

CHRIS WAGNER: That is correct, Senator. [LB84]

SENATOR CHAMBERS: Okay. Now what is...what constitutes an episode for purposes of this self-reporting? [LB84]

CHRIS WAGNER: I would have to get back to you on that, Senator. I just pulled the statistics from the CDC so I'm not really sure what their methodology is. [LB84]

SENATOR CHAMBERS: Could it mean you took one drink? [LB84]

CHRIS WAGNER: Well, no, I don't believe so. So driving under the influence would be .08 or greater. [LB84]

SENATOR CHAMBERS: Say it again. [LB84]

CHRIS WAGNER: A .08 blood-alcohol content level or greater, I believe, so... [LB84]

SENATOR CHAMBERS: Well, how would they...oh, how would the person know that's what his or her alcohol content is if they were not arrested and tested? [LB84]

CHRIS WAGNER: So what the CDC, the guidance that they have in terms of binge drinking, that's considered drinking to intoxication, so .08 or greater. And what they kind of general guidelines, of course, it's not on an individual basis, but five or more drinks in a couple hours is going to get you to that level of intoxication or four or more are going to get you to that level of intoxication if you're a female. Now that's just generalizations but that's...that may be what...and I'm just speculating because I don't know what the CDC's... [LB84]

SENATOR CHAMBERS: If I had...if a little fellow like me had three drinks and a guy seven feet tall had three drinks, it wouldn't have the same effect on him that it has on me, would it? [LB84]

CHRIS WAGNER: That is correct, Senator. [LB84]

SENATOR CHAMBERS: So I might be intoxicated, drunk as a skunk, and he might not even have much more than a buzz. So self-reporting is not very reliable, in my opinion, but they might

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have it for different purposes. But in the second paragraph, which is what I'm talking about, it says self-reported alcohol-impaired driving episodes. But they are self-reported. [LB84]

CRAIG WAGNER: Correct. [LB84]

SENATOR CHAMBERS: Well, how does a person know whether he or she is impaired if not based on his or her personal opinion as to what constitutes being impaired. There's no objective standard in paragraph two, is there? It could be guessing as to what makes...what impairment means. When they pose the question, how do they pose it? Do they tell the person, this is what being impaired means? [LB84]

CHRIS WAGNER: Senator, I would have to follow up on that. I do not know. [LB84]

SENATOR CHAMBERS: Oh. [LB84]

CHRIS WAGNER: I do not know their methodology of their questioning so I'm not sure. I can't speak... [LB84]

SENATOR CHAMBERS: Oh, I'm...I shouldn't have asked you any of these questions then, okay, because I wasn't asking you beyond your depth. I mean I didn't want to ask that kind of question. So that's all that I will have then. [LB84]

SENATOR EBKE: Any...Senator Baker. [LB84]

SENATOR BAKER: Thank you, Senator Ebke. Mr. Wagner, I would stipulate that I think drunk driving is bad. There's probably not a person in the world who doesn't think drunk driving is bad. So now you alluded us to consequences. It's against the Criminal Code, drunk driving is against the Criminal Code, right? [LB84]

CHRIS WAGNER: Correct. [LB84]

SENATOR BAKER: And so it's dealt with there. Do I hear you saying that you think there should also be consequences for drunk driving through civil actions above and beyond damages caused? [LB84]

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CHRIS WAGNER: It is my understanding that it currently exists as a result of our minor dram shop law. So I do believe that it currently exists for underage youth if they've been served or provided alcohol and they go on to have an accident and injure someone. [LB84]

SENATOR BAKER: But not on the driver. In the case you just gave, someone... [LB84]

CHRIS WAGNER: Correct. That's correct, yes. [LB84]

SENATOR BAKER: ...provided alcohol, would not be additional consequence on that driver. [LB84]

CHRIS WAGNER: Correct. [LB84]

SENATOR BAKER: Okay. Thank you. [LB84]

SENATOR EBKE: Any other questions? Okay. Thank you for being here, Mr. Wagner. [LB84]

CHRIS WAGNER: Thank you. [LB84]

SENATOR EBKE: Any other proponents? Do we have any opponents? And if there are other opponents that are planning on speaking, if you could kind of move to the front so that we can facilitate. [LB84]

ANDREA SNOWDEN: Good afternoon, Madam Chairwoman, members of the committee. My name is Andrea Snowden, A-n-d-r-e-a S-n-o-w-d-e-n. I'm here on behalf of the Nebraska Defense Counsel Association. We urge you to oppose LB84. To begin, let me state very clearly the Nebraska Defense Counsel Association does not condone drunk driving. We are not here to minimize the risks and dangers posed by drunk drivers. We certainly appreciate the concerns brought before this committee by Senator Blood and the other testifiers this afternoon. The Nebraska Defense Counsel is an organization, and just to give you a little bit of background, comprised of lawyers from across the state of Nebraska who defend businesses and individuals who are sued for money damages. It is our position that LB84 should be...should not be advanced by the committee. Under the Nebraska Constitution, punishment is reserved for criminal justice, not civil actions. Nebraska's criminal justice system is designed to penalize and punish people who are guilty of violating criminal law, such as the laws prohibiting drunk driving. The Nebraska Constitution reserves punitive action for those criminal cases. In civil cases, on the other hand, which this statute is aimed at, punishment is not allowed. Instead, persons who sustain injury or property damage are awarded actual compensatory damages

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intended to make them whole to compensate them for their losses. The damages suffered by individuals who sue in civil court are what is at issue. LB84 confuses the two systems in such a way that's not allowed under Nebraska's Constitution by allowing for awards of damages unrelated to the damages actually suffered by those people suing. LB84, I submit, turns tort law on its head. Rather than compensating plaintiffs who suffer damages, it would punish those who are defendants in the actions. That is something that is reserved for criminal law and has no place in the civil justice system. A second point I'd like to make is that LB84 threatens the integrity of the civil judicial system. Nebraska's civil justice system permits a defendant who is negligent and is sued for monetary damages to admit that he or she was negligent and caused the accident. This means that the defendant who was negligent in any manner, whether it be negligent for driving under the influence of alcohol, negligent for texting and driving, or talking on the phone, or by being inattentive, for whatever reason that defendant can admit that their negligence caused the accident. LB84 would upset this process for no reason that is permitted under the Nebraska State Constitution. The position urged by those testifying in support of LB84 would seem to create a prohibition of admission of liability in any case, and that brings me to the third point, which is that LB84 would increase litigation and costs. Nebraska judges and our court system are already at high capacity. LB84 will only make matters worse by forcing parties in lawsuits to litigate the issue of negligence. Currently, as I've said, once negligence is admitted, the case is resolved by focusing the attention on damages and evaluating the injured party's damages that they suffered as a result of the accident. Forcing admission of evidence related to the question of negligence, which LB84 would mandate, would discourage admission of liability in civil cases. Parties would, instead, have reason to contest and litigate the issue, leading to unnecessarily protracted and expensive litigation in a system already at high capacity. Taxpayers will end up paying for these escalated costs. [LB84]

SENATOR EBKE: Okay. Thank you. Are you done? [LB84]

ANDREA SNOWDEN: I am. [LB84]

SENATOR EBKE: Oh, okay. [LB84]

ANDREA SNOWDEN: If you have any questions, I'm happy to... [LB84]

SENATOR EBKE: You looked like you were getting ready to... [LB84]

ANDREA SNOWDEN: Yes, I'm happy to answer any questions of any of the committee members. [LB84]

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SENATOR EBKE: Thank you, Ms. Snowden. Anybody have any questions? Senator Chambers. [LB84]

SENATOR CHAMBERS: Would anybody who is a member of the association which you're representing have an occasion to represent somebody who has been injured in one of these types of accidents? [LB84]

ANDREA SNOWDEN: Certainly. Our group is broad and our members have varied backgrounds. The lawyers that are members of our organization, their practice primarily involves the defense of civil actions, but that's not to say that any individual defense lawyer hasn't handled a case on behalf of a plaintiff before. [LB84]

SENATOR CHAMBERS: So this would not be an organization of lawyers who are only interested in representing somebody who caused an accident but may represent those who are the victims of an accident and are trying to recover. They may represent victims also in civil actions? [LB84]

ANDREA SNOWDEN: Potentially, Senator. However, I would just say that primarily the lawyers in our group are primarily involved with defending civil actions, but it's certainly possible that someone could also handle plaintiffs' cases. [LB84]

SENATOR CHAMBERS: That's all I would have. Thank you. [LB84]

SENATOR EBKE: Any other questions? Thank you for being here today. [LB84]

ANDREA SNOWDEN: Thank you. [LB84]

SENATOR EBKE: Next opponent. [LB84]

REX REZAC: Good afternoon, Madam Chairperson, members of the committee. My name is Rex Rezac. I'm an attorney from Omaha. I practice with the Fraser Stryker law firm. I'm also appearing on behalf of the Nebraska Defense Counsel Association. I've been doing this kind of work for over 30 years and there certainly have been instances in which I have urged my client to admit liability for a variety of reasons. It could be because they were texting on their phone. It could be that they fell asleep because they hadn't gotten enough sleep. It could be, you know, simply because there wasn't any basis to argue liability. Once...in a civil litigation context there are two aspects of the case. There's liability and there's damages. Once liability has been admitted, evidence that would relate to that liability part of the case simply becomes irrelevant.

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The damages side of the case is the only part of the case that remains and the objective of the jury in deciding that damages case is to determine an amount, based upon the evidence, that will fairly and adequately compensate the person who was injured but not excessively. We would suggest to you that this LB84 has the potential to in fact encourage jurors to increase damages awards so that the damages awards are excessive, contrary to Nebraska law. Keep in mind, as Senator Chambers said, that the evidence of someone who's drunk would have the tendency to inflame the passions of the jury. Certainly nobody encourages drunk driving. Everybody disdains drunk driving. But it happens. And when it does happen we believe that plaintiffs' lawyers, if this bill were to be passed, would be able to use that fact of drunk driving to inflame the passions of the jury to create prejudices against the defendant, and it's not hard to imagine how. Once the case is...once all the evidence is in, both sides get to make closing arguments. Already now we have instances in which we've heard lawyers representing the injured person saying, send that person a message, send that insurance company a message, tell them we are not going to allow this sort of conduct to go on. Now in this instance, once liability has been admitted, that is irrelevant. None of that becomes relevant and that those sorts of statements can't be made in closing arguments. You can't say to the defendant, who's sitting over here: That terrible person committed this terrible act and you, jurors, should award "Mr. Plaintiff" over here an amount that will reflect that terrible act that he did. That is not the purpose of civil litigation. In fact, as one of the proponents indicated, the jury receives instructions from the court and amongst those instructions, when it relates to damages, that the instructions specifically say the amount that you should return should be reasonable. There's one of the instructions that actually says, you are instructed that you cannot award damages by way of punishment or out of sympathy. Your damages award has to be based upon the evidence, a reasonable evaluation of the evidence, an unemotional evaluation of the evidence, and one that will fairly and adequately and justly compensate the injured person. Because we think that the bill has a tendency to inflame the prejudices of jurors, to create passion that would be contrary to their obligation to be honest and fair and just, we oppose the bill and would request that it not come out of committee. I'm happy to take any questions. [LB84]

SENATOR EBKE: Okay. Senator Chambers. [LB84]

SENATOR CHAMBERS: To show that I don't play favorites, I have to engage this witness. First of all, I don't endorse people drinking and driving. I have never tasted alcohol in my life except when I've shaved, trimmed my mustache, and I'm putting alcohol on. And if that's what liquor tastes like, I don't know why they drink it. But at any rate, the people that I know who drink, they get tongue lashings from me, not just drinking and driving but because I see how it makes them act and I know they're worthy of something better than what they're doing. So when it comes to drinking, I could be considered a prude in reality. But I don't try to impose my personal feelings on others. This is what I want to ask you based...and I know the answers. They're rhetorical questions to get something in the record. When the court lays out rules as the one we were

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talking about today where certain things, because they might be more prejudicial and so forth, do you think those rules are enacted on whim or are they based on study, discussion, and experience? [LB84]

REX REZAC: Certainly the law in our country is based upon experience. We live in a common law state that relies upon...or common law country that relies upon the collective history of individuals and courts in various and different jurisdictions. So clearly it is based on experience. Hopefully, presumably that experience is fashioned with reason. [LB84]

SENATOR CHAMBERS: Do you think that these...I say I know the answers but for the record. Do you think these rules are contrived by courts, the court rules, to favor one side or the other in litigation? [LB84]

REX REZAC: Sure. Certainly not. Certainly I think the overall objective of the court system, certainly the civil system which I am very familiar with, is to provide both sides with a fair day in court. [LB84]

SENATOR CHAMBERS: And now this goes beyond just civil. A lawyer can know his or her client is guilty. Now the lawyer cannot know that somebody is going to commit a crime and then not do anything about that. But once a crime has been committed, a lawyer can know that the person did it but the lawyer is not allowed to testify against that client on behalf of the state if he or she is defending that client. Is that true? [LB84]

REX REZAC: That is true and I think,... [LB84]

SENATOR CHAMBERS: And...oh, go ahead. [LB84]

REX REZAC: ...Senator, the reason behind that is everyone is entitled to a legal defense, whether they're guilty or not, to make sure that their personal rights are protected, to make sure that the laws are adequately and appropriately applied to them. [LB84]

SENATOR CHAMBERS: And if a person is as guilty as sin, meaning that this person on worldwide television shot the Pope with an AK-47, everybody in the world saw it, and that person went to trial, that person is entitled to the best defense a lawyer can give to that person in such a case. Maybe it's only to keep the person from being executed but also to make sure that every T is crossed, every I is dotted by the prosecution. Would you agree with that? [LB84]

REX REZAC: I would, Senator. [LB84]

SENATOR CHAMBERS: Do you think it would be easier to defend Martin Luther King, Mother Teresa, and Mahatma Gandhi than it would be to defend Al Capone, Jack the Ripper, and Mata Hari? [LB84]

REX REZAC: Well, you can answer that question on a number of levels. Easier from a legal standpoint, it shouldn't be. Each client is entitled to the same qualified representation regardless of their level of fault or culpability. [LB84]

SENATOR CHAMBERS: Now... [LB84]

REX REZAC: Answering that question from a moral standpoint, sure, it would be easier to represent Martin Luther King. [LB84]

SENATOR CHAMBERS: And I'm going to ask it a different way now. If a lawyer had a choice, which trio would he or she rather defend? [LB84]

REX REZAC: I'm sure it depends on the lawyer but, personally, it would be easier for me to defend people who had less culpability. [LB84]

SENATOR CHAMBERS: And I understand that and I think most people feel that way, but there's something in me that feels that Jack, Mata, and that other one are entitled to have somebody who is going to not let personal revulsion make him pull back on the defense, not be ashamed to do what a lawyer says I'm going to do when I say that I'm going to be a defender, the lawyer. So here's kind of the way that I look at it. Let me give an example. Madam Chair, I'm not going to keep us here too long. [LB84]

SENATOR EBKE: Okay. [LB84]

SENATOR CHAMBERS: And I've said this before. John Joubert confessed to killing two little boys. And I'm going to show my colleagues a picture that was given to me by a mother where her little boy, he can't even walk, but a big television, he likes to watch that television when I'm in the Legislature speaking. And there's a picture of him on the floor, a big television with...and I babysit that little boy. I really care about children. But when John Joubert was sentenced to die and the last few days that he had on this earth, I spent those days with him and I talked to him. We didn't talk about guilt or innocence. But the reason I did it, if there was any person who needed to have somebody who'd look out for his interests as a human being, it was John Joubert and that I was the person. And I will do that. I don't apologize to anybody. It doesn't make me noble. I believe in the notion that you should treat people the way you'd want to be treated. If I

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were in his situation, I'd want to know there's somebody there not who's going to say what I did is right because there's no way that could be said but who's going to make sure that they don't do any more to me than the law allows. And I let all those guards who are on the death watch know, just by looking at them, that you're not going to taunt him, you're not going to do anything other than make sure he doesn't escape or that I don't give him any contraband. But all this stuff of glaring, because one big guy was doing that, so I went and I stood in the doorway. It's called a hospital but it's concrete block building and they put you in there. I went and I stood in the door and I'm good at stare downs and I just looked at him and didn't blink. He'd look. Then he'd look away, and he'd look, and I'd still be looking at him. He'd look down and I'd still be looking at him. I didn't say a word and he definitely didn't say a word to me, but his whole attitude changed. I don't know why. But that was not a part of it. So I'm saying this so that maybe civilians or laypeople can understand what a lawyer's job is and what lawyers who take seriously that job are prepared to do for the client. And if any of us were in the position of the defendant, we would want that defense because what has been shown in many cases in this country, somebody who was convicted of murder and sentenced to die and had several appeals were found, when DNA came out, innocent. So I tell people I'm not the one to judge guilt and innocence. I'm here to make sure that those who do judge it go by the laws and rules that they set that made what you do a crime in the first place. And I think if the public could understand this, they would better understand why people who formulate policy like we do are not expressing sympathy for wrongdoers or lack of concern for those who've been victimized. But I don't think laws ought to be enacted by people who get involved in that fashion. Because in the same way a jury can be inflamed and skew the law, we can be inflamed and pass laws that are based on passion and prejudice. And unfortunately, there's no appellate court to correct what we've done. The laws are on the books and there are vicious people who twist them and distort them, and people of my complexion know that, and maybe that's why I'm a bit more sympathetic than my other colleagues in the Legislature. But I just thought I'd use you as a sounding board because you would understand. [LB84]

REX REZAC: Happy to do it, Senator. [LB84]

SENATOR CHAMBERS: Well, see, people with white hair, we understand this. (Laughter)
[LB84]

REX REZAC: Yeah. [LB84]

SENATOR CHAMBERS: That's all I have though. [LB84]

SENATOR EBKE: Any other questions for Mr. Rezac? Okay. Thank you very much for being here. [LB84]

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REX REZAC: Thank you. [LB84]

COLEEN NIELSEN: Good afternoon, Chairperson Ebke and members of the Judiciary Committee. My name is Coleen Nielsen and I am the registered lobbyist for the Nebraska Insurance Information Service. Coleen Nielsen is spelled C-o-l-e-e-n N-i-e-l-s-e-n. The Nebraska Insurance Information Service is a local trade association of property, casualty insurers doing business in Nebraska. I'm testifying in opposition to LB84. We oppose this bill for all the reasons stated by the previous testifiers, Ms. Snowden and Mr. Rezac. My purpose here is to note for the record that, as you all know, this is a compulsory financial responsibility state. Persons are required to prove financial responsibility and they do that by carrying liability insurance in most instances. Insurance contracts provide for the defense of an insured as part of the liability coverage, so in most instances insurance companies are paying for the legal costs as well as the damages in these accident cases. If damages are inflated through a law such as this or for any other reasons, loss cost will increase. Loss costs drive the cost of premiums and eventually we will all share in that cost. Currently here in Nebraska we experience relatively low auto premiums. According to most recent statistics, Nebraska is number 30 in terms of lowest premiums among the states. The highest average premium can be found in Michigan. Any statute that would potentially increase loss cost could affect our premium status. For these reasons, we ask that the committee choose not to move this bill forward to General File. And I thank you for your consideration. Be happy to answer any questions. [LB84]

SENATOR EBKE: Thank you, Ms. Nielsen. Any questions? Senator Chambers. [LB84]

SENATOR CHAMBERS: Did you say; you represent whom? [LB84]

COLEEN NIELSEN: The Nebraska Insurance Information Service. It's a trade association. [LB84]

SENATOR CHAMBERS: In case I happen to go the way they want me to, let them know it has nothing to do with how I feel about insurance companies. [LB84]

COLEEN NIELSEN: Thank you, Senator. (Laughter) I will. [LB84]

SENATOR EBKE: Any other questions? Thank you for being here today. [LB84]

COLEEN NIELSEN: Thank you. [LB84]

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SENATOR EBKE: Are there any other opponents? Anyone in the neutral capacity? Going once, going twice. Senator Blood, would you like to close? [LB84]

SENATOR BLOOD: It's a lot of information to take in when you're not an attorney. First, I want to thank the senator, Senator Chambers, for bringing up the dialogue and helping us become more informed about how the law works, because those are learning experiences that I benefit from. But with that said, I think about what Senator Ebke said in reference to making someone whole. And I go back to, how do you make someone whole when you don't have the whole story? How do you truly make that person whole? I look at Sarah Root's mother and her best friend. I look at the gentleman, whom I had never met before, talk about the losses that he received. These are people. These aren't attorneys that are well, well, well paid. These are people that when I campaigned and I went door to door, and I know Senator Chambers talks about this a lot on the floor, is that you all knocked on doors and you made all kinds of promises and now you're here and how are you going to follow up on those promises. Well, that's what I'm doing today, Senator Chambers. When I brought this issue or discussed this issue with Mr. Lathrop, because I am not an attorney, how do we stop this revolving door, and it isn't about whether they're punished outside of the civil courts. It isn't about inflaming. You say inflaming as attorneys; I say informing as just a Joe on the street. How do we ask these people to make good decisions if they don't have all the information? And so it's interesting when I sit here and I listen to attorneys and they're like it's about making the person whole, it's about compensating them, again, how do you compensate when you don't have the whole story? We're talking about people, and unfortunately these people are protected by laws which unfortunately is dealt with, with attorneys. No offense but I understand now why there's so many jokes about attorneys. It's taking what this bill's true intent is, and the intent is that you know clear negligence is deeply rooted in drunk driving. Our job was to create a safety net of some sort to protect citizens that we want to try and make whole, and this is how I know how to do it, to look to state statute, to look to the people whose voices we are supposed to be, and try and make the laws better so I can address the needs of my district and the needs of other districts that have expressed this same concern to me. I personally am concerned when I hear insurance companies say we're going to insure drunk drivers and we're going to make you pay for it. That takes away from what this bill is truly about. I think it's interesting that many of our defense attorneys are from the same organization and made it clear to Senator Chambers that more than likely who they are defending are the very people we're talking about. I think the law works frequently, and oftentimes it does not, based on how much income that you generate, based on the color of your skin. But the one thing I can tell you is that regardless of what color of skin you are as a victim, regardless of your income level as a victim, regardless whether you're old or you're young, the key word here is "victim" and how do we help these people get justice? So with that, I know that this was a complicated issue but I, again, ask that you put yourselves in the position of the jurors. I ask that you put yourself in the position of the victims. I am not a lawyer. I'm not pretending to be. I'm trying to be the

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best public servant that I can by serving my community and my district, and this is how I know how to do it. [LB84]

SENATOR EBKE: Any questions for Senator Blood? Okay. [LB84]

SENATOR BLOOD: Thank you. [LB84]

SENATOR EBKE: (Exhibit 2) Thank you. We have one letter of support from Colleen Sheehey-Church from MADD. That closes the hearing on LB84. Senator Lowe, let's move on to LB202. And let me just say, depending on how fast this moves, I may have to beat it out of here to get to Fairbury by 6:00, so. Okay. Senator Lowe. [LB84 LB202]

SENATOR LOWE: (Exhibit 1) Good late afternoon and thank you, Senators. Thank you, Chairman Ebke. I am Senator John Lowe, J-o-h-n L-o-w-e, from District 37. I'm here today to introduce LB202. I am bringing this bill in reaction to the Supreme Court decision in Birchfield v. North Dakota in which the court determined that a search warrant must be obtained to require a suspected drunk driver to submit a blood test. After having conversations with proponents and opponents, I believe there's a way to amend this bill that will better satisfy their concerns. I do apologize for not having an official amendment for this idea, but the timing was such that an amendment could not be drafted. Will it be okay with you, Senator Ebke, to discuss the possible amendment at this time? [LB202]

SENATOR EBKE: Go right ahead. [LB202]

SENATOR LOWE: Thank you. The issue I'm attempting to address is what happens if an individual refuses to submit a search warrant for a blood test? Right now there is no major consequence to an individual who refuses the blood test...or the blood draw. This bill and potential amendment would address that issue. The amendment to this bill would strike out the new offense completely and simply update 28-906, obstructing a peace officer. The amendment would add a Section 3 that reads as: A person commits the offense by refusal to submit to a chemical test authorized by a search warrant if he or she intentionally and willfully refuses to comply with a search warrant authorized pursuant to Sections 29-812 to 29-821 for a sample of such person's blood or urine to determine the presence and concentration of alcohol or drugs. We believe this will address the issue of refusing the search warrant and follow previous decisions made by the Nebraska Supreme Court. Many of the opponents of this bill expressed concerns about the length of the penalty in regards to the loss of license as well as the consequences to the potential felony. I believe this language change will address those concerns. I'm now open to any questions. [LB202]

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SENATOR EBKE: Any questions for Senator Lowe at this point? Looks to me like you've got people behind you. [LB202]

SENATOR LOWE: I do have some people behind me. [LB202]

SENATOR EBKE: Okay. [LB202]

SENATOR LOWE: I believe they're more qualified than I to answer these questions. [LB202]

SENATOR EBKE: Okay. If there's no questions, we'll see you at close? [LB202]

SENATOR LOWE: Yes. [LB202]

SENATOR EBKE: Okay. First proponent of this legislation. [LB202]

PATRICK LEE: Senator Ebke, members of the committee, my name is Patrick Lee, P-a-t-r-i-c-k L-e-e. I am a deputy county attorney in Buffalo County and I am here on behalf of the Nebraska County Attorneys Association in support of LB202 as well as Senator Lowe's amendment. The reason that we are here today and this amendment is being sought or this bill is being sought is that throughout the state there are county attorneys, law enforcement officers, and judges who are frustrated by the facts that we have suspects who are blatantly defying court orders and thumbing their nose at both the legal system and judicial integrity. What this bill is seeking to accomplish is to fill a gap that has been created in the law, that being a judicial order that has no remedy for refusal. This is not a new theory, just a brief look at other items that the Legislature has passed in this basic concept, this basic theory of penalizing the failure to follow a court order. There are statutes penalizing the violation of protection orders or child support orders or child custody orders or motions to take physical characteristics of a suspect; failing to appear in court; and most notably, under 28-927, we can penalize a law enforcement officer for neglecting to serve a warrant. But here we're looking to penalize an individual who fails to follow through on the command of the warrant. Additionally, looking at 29-830 and 29-835, violation of an inspection warrant and the penalty thereafter, it's exactly the same basis of legal theory that the bill attempts to figure out, attempts to resolve. As it relates to why this is necessary, almost every state in the country had an implied consent statute and up until 2013, when the United States Supreme Court determined, in Missouri v. McNeely, that implied consent does not necessarily mean consent, that there still needs to be another step before there is the ability to charge them with refusal, that put implied consent statutes in this state and other states on shaky ground. As of June of 2016, there was a case, Birchfield v. North Dakota, which changed the game as it relates to jurisdictions that choose to do blood testing. Buffalo County is one of those. Now I can

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greatly describe the difference between blood and breath testing for alcohol if you would like me to during the questioning period. Buffalo County and a number of other jurisdictions do blood testing only. Every county has the option to do blood testing. What's required now is, prior to charging someone with a criminal refusal, a search warrant needs to be obtained if that person does not consent to having a search of their body for a sample of blood to determine alcohol or drug concentration. So a number of jurisdictions, myself included, had taken the steps, since June of 2016, to create a process by which warrants can be obtained. Now in Nebraska in 2015, according to the Nebraska Commission on Law Enforcement and Criminal Justice reported in the NDOR, there was 8,199 DUI arrests in 2015. There were 246 fatalities, 83 of which were alcohol related. I don't know how many of those were refusals. But in Buffalo County, since January 1 of 2015 to the end of 2016, there were 435 arrests for DUIs. Of those 435, 34 people refused to submit to a chemical test, that being blood in my jurisdiction. Since June of 2016, when the law changed requiring a warrant prior to charging a refusal under Chapter 60, there were 145 arrests for DUI. We've obtained 12 warrants through this last Monday. Four people after warrants have been obtained have persisted in their refusal to submit to a chemical test and have defied a court order, which brings me to the question then, when the complaint reaches my desk, what am I supposed to charge? Looking at the choices, I have tampering with evidence, which is a Class IV felony; I have contempt of court under 25-2121(3) with no specific penalty allocated; and obstructing. Obstructing currently doesn't work, by Supreme Court determination. I know Senator Chambers mentioned earlier the Supreme Court tells us what the law is defined as. In State v. Yeutter, 252 Neb. 857, it determined there must be a physical act. Mere refusal to provide information or verbal obstruction to an officer is not obstruction under 28-906, and that's why the simple obstruction penalties or the simple obstruction language currently does not work. There's a public policy argument against taking the blood besides...with a warrant besides the...with the consent of the party, so that we're not going to strap someone down and take their blood. And I can elaborate on that if you'd like. But regardless, I would ask the committee to advance a bill through LB202 that provides a tool to law enforcement and a tool to county attorneys and prosecutors to allow for judicial integrity of the warrant process and to allow for law enforcement officers to effectively enforce the laws you have created. I willingly accept any questions you may have. [LB202]

SENATOR EBKE: Senator Chambers. [LB202]

SENATOR CHAMBERS: You said you're the deputy county attorney... [LB202]

PATRICK LEE: I am a deputy county attorney. [LB202]

SENATOR CHAMBERS: ...in Buffalo County? [LB202]

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PATRICK LEE: That's correct. [LB202]

SENATOR CHAMBERS: Who is the county attorney? [LB202]

PATRICK LEE: My boss is Shawn Eatherton. [LB202]

SENATOR CHAMBERS: Who? [LB202]

PATRICK LEE: Shawn Eatherton. [LB202]

SENATOR CHAMBERS: Is Grand Island in Buffalo County? [LB202]

PATRICK LEE: No, that's...Kearney is the county seat of Buffalo County. That would be Hall County. I believe that would be in Senator Halloran's district. [LB202]

SENATOR CHAMBERS: (Inaudible) Hall, but Kearney is in Buffalo County. [LB202]

PATRICK LEE: Yes. [LB202]

SENATOR CHAMBERS: Do you happen to know the name of the county attorney in Hall County? [LB202]

PATRICK LEE: I believe the current county attorney in Hall County is Jack Zitterkopf. [LB202]

SENATOR CHAMBERS: The only reason I'm mentioning it, that county attorney would always come here in support of the death penalty. Then there was a murder, a double murder. The wife of this guy was murdered in Kearney. Then he went to Grand Island and waylaid the lawyer, because he had been in a divorce, and he shot the lawyer, both with high-powered rifles. The Hall County Attorney, who always came here speaking for the death penalty, took the death penalty off the table if the guy would plead guilty, and he'd already gotten a life sentence for murdering his wife. So here was a multiple murder, and after that he stopped coming down here to speak for the death penalty. And what I'd always say, in these little counties where it costs money they don't sentence people to die, yet here you come down here defending the death penalty. Then when he himself did that, a multiple murder, high-powered weapon, clearly there had been premeditation, he'd had time to think about what he was doing. He may have even gone and changed cars or changed clothes, but he went to the other county and waited till the lawyer came out of his office and was lying in ambush and murdered him. And the death penalty was

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not even on the table. But here's what I want to ask you. You're aware that burning the flag has been declared by the Nebraska...the U.S. Supreme Court to be a form of free speech. [LB202]

PATRICK LEE: I am familiar with that, yes. [LB202]

SENATOR CHAMBERS: You're aware that the Fifth Amendment to the U.S. Constitution says a person cannot be compelled to testify against himself or herself. [LB202]

PATRICK LEE: Absolutely. [LB202]

SENATOR CHAMBERS: And some people push the meaning or the spirit of those provisions beyond maybe what a court has even said. And maybe somebody like me would say a person cannot be compelled to testify against himself or herself. Now tell me what it is that is being attempted in this bill. [LB202]

PATRICK LEE: What do you mean "attempted"? What the problem I'm trying to fix in this bill is? Is that what you're asking, Senator? [LB202]

SENATOR CHAMBERS: What would the warrant enable law enforcement to do? [LB202]

PATRICK LEE: Okay. Sure. Currently in Buffalo County we do blood testing only for DUIs and as it relates to what the warrant is for is after a subject is arrested for the DUI, so they've already had the contact and they've already conducted field sobriety, if any are undertaken by the suspect, a preliminary breath test if undertaken by the suspect, and that individual is placed under arrest. At that point in time, up until June of 2016, they would read the poster as a chemical test advisement to them which almost mirrors exactly the current language of 60-6,197. The Supreme Court, in Birchfield v. North Dakota, said that any language discussing that it could be a criminal offense for refusing to submit to a chemical test, which is incorporated in 60-6,197 and was incorporated in the old standardized poster as a chemical test advisement form, cannot be constituting a knowing, voluntary, and intentional consent. [LB202]

SENATOR CHAMBERS: What kind of test is being sought under this law? [LB202]

PATRICK LEE: Under this law, it would be whatever test of the blood or...whatever test of the blood is required for alcohol concentration, or urine for drug concentration. And the reason that the test is being sought is at Good Samaritan Hospital in Kearney they take a vial...two vials of blood to test solely for the blood-alcohol concentration. That's all this is for. It's for the stopgap between what used to happen when in June of 2016... [LB202]

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SENATOR CHAMBERS: But here's what I want to get to. [LB202]

PATRICK LEE: Yeah. [LB202]

SENATOR CHAMBERS: Can bodily fluids be required by the person to be given? What bodily fluids can be required or pursued pursuant to a warrant under this bill if it passes? [LB202]

PATRICK LEE: Pursuant to a warrant under this bill as it relates in the...under the old...I don't have a copy of the amendment but looking at the lines that are listed in the original LB202, lines 16 through 18 of page 2 relates it back to the specific body fluids to prove alcohol concentration. [LB202]

SENATOR CHAMBERS: I'm just asking you can any bodily fluids be demanded pursuant to a warrant under this bill if it passes? [LB202]

PATRICK LEE: No. What I would like to explain is that under 16 to 18, it relates back to alcohol concentration. The Legislature's statutes relate to Title 177 that's promulgated by the Nebraska Department of Health and Human Services and they set forth specific criteria of what can be tested. As it relates to blood-alcohol concentration or breath-alcohol concentration for alcohol testing in DUIs, only breath and blood can be used for alcohol. Urine can be used for drugs. So those are the only possible avenues of prosecuting a DUI, are breath and blood for alcohol, urine for blood (sic--drugs). So under this bill I believe that it would authorize a search warrant for alcohol...or blood or urine to determine alcohol or drugs, which is listed in 17 and 18 of lines...lines 17 and 18 on page 2. [LB202]

SENATOR CHAMBERS: I'm going to ask you my question. What bodily fluids can be sought if this bill becomes law pursuant to a warrant? [LB202]

PATRICK LEE: Blood or urine. [LB202]

SENATOR CHAMBERS: Why didn't you just say that in the first place, or you didn't understand what I was asking? [LB202]

PATRICK LEE: I wasn't understanding what you were asking. [LB202]

SENATOR CHAMBERS: I'm sorry. [LB202]

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PATRICK LEE: I understand now. [LB202]

SENATOR CHAMBERS: Okay. [LB202]

PATRICK LEE: So I guess law school taught me to have the long answer. [LB202]

SENATOR CHAMBERS: I view the taking of bodily fluids under threat of criminal sanction is like compelling a person to testify against himself or herself. Now obviously the courts may not agree with that if they allow...well, this is not allowed under Nebraska law or we wouldn't be having this bill, would we? [LB202]

PATRICK LEE: Well, it's not allowed under Nebraska law. (Inaudible) under the U.S. Supreme Court decision in Birchfield is criminalizing an individual's refusal to submit to a chemical test. What is (inaudible) for blood. It is okay to criminalize them for refusing to submit to a breath test. That was the dichotomy that was listed by the Supreme Court in the Birchfield case. So if a jurisdiction chooses breath, they don't need to seek a warrant. They can simply charge a person with refusal, provided the requisite elements are met. [LB202]

SENATOR CHAMBERS: And let me back up. If this bill were put into law, a warrant could not be sought to compel a person to give urine or blood. Is that what you're telling me? [LB202]

PATRICK LEE: If this is put into law? [LB202]

SENATOR CHAMBERS: If this became law. [LB202]

PATRICK LEE: No. A warrant could still be obtained. This doesn't have any implication of whether or not a warrant is obtained. This law, this bill only has an implication as to what to do with somebody who decides to say, even though a judge has signed a warrant, I don't care. [LB202]

SENATOR CHAMBERS: No, and here's what I'm asking. What would the warrant say that person has to do? [LB202]

PATRICK LEE: The warrant would say that person has to submit to a chemical test of the blood by drawing two vials of blood in accordance with Title 177 and applicable statutes, which would... [LB202]

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SENATOR CHAMBERS: I don't need all that. It would require that person to allow blood to be drawn. [LB202]

PATRICK LEE: Exactly, in a specifically prescribed manner that the Legislature has created. [LB202]

SENATOR CHAMBERS: You answered the question that I was asking. [LB202]

PATRICK LEE: Okay. [LB202]

SENATOR CHAMBERS: And I'm telling you, to me, that's compelling a person to testify against himself or herself and I'll never support a bill like this, just again for the record so you will know. And I know prosecutors try to get every leg up they can. They will even charge a person with an offense that the evidence would in no ways allow that person be convicted for, but prosecutors admit that they overcharge people to get them to plead guilty to a lesser offense. Are you aware that...what percentage of criminal charges are resolved by way of a plea bargain? Do you have any idea of the percentage? [LB202]

PATRICK LEE: Anecdotally, I would say at least 90 percent, at least in my jurisdiction. I can't speak to other jurisdictions. [LB202]

SENATOR CHAMBERS: You're right, and in something over 90 percent. And people plead guilty because they don't want a harsher punishment. And the prosecutors know that the evidence would not lead to a conviction, but citizens don't know that. So I think prosecutors, to my way of thinking, are not ethical. I think they abuse their authority. They make a mockery of the law. And right now we have a county coming here trying to get us to change the law so their county can get a loan from the government to pay off some awards and judgments because the threat of the death penalty made some people plead guilty to crimes they didn't commit, and they served many years for that. One woman was developmentally disabled. And they did such a job on her, even after DNA cleared all of them, she was insistent that she did participate in this murder. That's what they did to her mind. Now this is what prosecutors do. I will never give them another tool like this. And so my colleagues know, if this thing goes to the floor, there's going to be...they're going to have to deal with me. And I don't want you to go away from here not aware of how much opposition I have to this. If that guy who usually comes to represent the county attorneys had been here, he would know, but you're new. And I've always been blunt with that fellow, so I just want to be equally blunt with you. [LB202]

PATRICK LEE: I appreciate that. May I respond to two portions? [LB202]

SENATOR CHAMBERS: Sure. [LB202]

PATRICK LEE: Okay. First, as it relates to self-incrimination under the Fifth Amendment, the U.S. Supreme Court has determined, as it relates to driving offenses, a sample of an individual's blood or breath for that prosecution does not implicate the Fifth Amendment. I don't have that case in front of me. I believe it's Schirmer (phonetic) v. South Dakota, I think. I can get that to you, Senator, if you'd like. But I know that case exists and so I don't think the Fifth Amendment angle, as interpreted by the U.S. Supreme Court, is as crucial as it relates to this bill. The problem that you mentioned about overcharging, if I may address that for a second, one of the issues that's present is this individual is already being arrested for DUI, the hypothetical situation we have in this bill. So now if a search warrant is obtained and they decide to see the court order and say, no thank you, I don't want to do that, I'm not going to listen to a judge's order, and so that's what this bill is seeking to penalize or to punish is the integrity of the judicial system, that being the refusal to submit to the court order. The only tools that the Legislature has given us to provide for that enforcement of the judicial integrity is tampering with evidence, which is a Class IV felony, wherein someone commits that offense by concealing with intent to (inaudible) the availability in an official proceeding; contempt of court, which, as I'm sure you're aware, there's not a specific penalty listed for that; or obstructing. The obstructing language does not allow a prosecution for a mere refusal. This doesn't allow a physical threat. So in hopes of not overcharging, it seems to me that an individual who has a first offense DUI...and anecdotally, of the 435 DUIs that I prosecuted in 2015 and 2016, I would venture a guess, 80 percent are first-time offenders. And most of the time I will never see a repeat offense in my jurisdiction. But if 1 of those 34 people of which was a first-time offender decided to refuse to submit to the chemical test after a warrant was obtained, then there would be the potential of only felony liability, which doesn't seem to be fair. I would agree with the senator in that regard. That would seem to be heavy-handed. That would seem, in my opinion, to be overcharging. So what this bill is attempting to do, it's attempting to create the ability to allow for that middle ground to ensure the integrity of the judicial process as well as to ensure that there isn't the overcharging that you mentioned earlier. [LB202]

SENATOR CHAMBERS: You strayed into what I would analogize to quicksand. What would you have to present to a judge to persuade the judge to issue a warrant? [LB202]

PATRICK LEE: Well, under the Fourth Amendment, I would need... [LB202]

SENATOR CHAMBERS: With this. [LB202]

PATRICK LEE: Under 29-812 to 29-821, it would require probable cause to be presented to the judge. [LB202]

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SENATOR CHAMBERS: And you'd tell the judge what? [LB202]

PATRICK LEE: In my jurisdiction, we tell the judge what the circumstances were relating to the individual, the offense, and what probable cause there is to arrest an offender. I think that probable cause standard is one that's clearly defined by the Supreme Court. [LB202]

SENATOR CHAMBERS: And the defendant is not there. It's just on your word or the word of a cop. [LB202]

PATRICK LEE: The defendant would never be present or have an... [LB202]

SENATOR CHAMBERS: Right. [LB202]

PATRICK LEE: ...ability to challenge a warrant. That's correct. [LB202]

SENATOR CHAMBERS: So it would be just you or the cop. [LB202]

PATRICK LEE: It would have to be a law enforcement officer swearing the warrant. [LB202]

SENATOR CHAMBERS: Yeah, and cops have been shown to lie on warrants. [LB202]

PATRICK LEE: And there's a penalty for that. [LB202]

SENATOR CHAMBERS: They've been shown to lie on affidavits. And I have a case where a cop was kicked off the force in Lincoln and he was hired either by the sheriff's department or the State Patrol, and he lied on an affidavit. So cops lie. And I would never create a situation where a cop could lie on an affidavit. See, I don't drink at all but the cop could say I have probable cause to believe that Chambers was drinking so I want to get this warrant. And then I refuse because I'm not going to go through that. Then I've committed a crime, haven't I, under this bill, what you're asking for. [LB202]

PATRICK LEE: If a judge were to review whatever affidavit was submitted to him and find that that would submit probable cause for a search of your person to determine alcohol concentration and you refused, I would suppose that's correct. However, if there was material misrepresentation there, that is a way later that a defendant can attack the veracity of the statements made by the judge. [LB202]

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SENATOR CHAMBERS: How does that help me when I've been embarrassed, I can be locked up, and there's no way that any facts would indicate that I was drinking? See, you don't believe...you know cops lie. Judges know they lie. And courts have said that when they're questioning a defendant they can lie and make that defendant think things have been said by other people that were not said, knowing it's a lie. The court can know the cop lied, but they're given license to lie. And this is what I know. See, there are new people who come in the Legislature; they don't think I ought to bring these things up but they need to know. And whether it matters to them or not, it matters to me. Cops lie. And there have been articles written all over the country and they have been called things like, if his lips are moving he's lying. There are articles like...and they're talking about cops. So it's one of those situations where, when you are creating an opportunity for cops to lie and hound and harass people, I won't vote for it. And I don't agree with drunk driving but I'm not...this bill is going to be DOA, as far as I'm concerned, because I don't think the Legislature is going to be willing to give as much time as it would take them to do on this as I will take on it. [LB202]

PATRICK LEE: Well, this bill doesn't address the affidavit or the warrant process that's undertaken by the law enforcement officer. The only thing this bill addresses is that second part, after the warrant has been obtained, after a judge has said you need to do this. [LB202]

SENATOR CHAMBERS: How does the...how does...so that people understand, who obtains the warrant from the judge? [LB202]

PATRICK LEE: The law enforcement officer would present an application and an affidavit in support of a search warrant. [LB202]

SENATOR CHAMBERS: So the law enforcement officer goes to the judge to get the warrant. [LB202]

PATRICK LEE: Yes, in essence, yes. [LB202]

SENATOR CHAMBERS: And if the lawyer...if the law enforcement officer lies, the warrant is issued because the judge takes the cop at his word. [LB202]

PATRICK LEE: Well, they swear in the affidavit the statements are true and correct to the best of their knowledge. [LB202]

SENATOR CHAMBERS: Well, they lie under oath. [LB202]

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PATRICK LEE: And if they lie, that is...there's a remedy provided in law for... [LB202]

SENATOR CHAMBERS: They're not worried about that. No cops are ever charged with perjury for lying to get a warrant. [LB202]

PATRICK LEE: I'm not talking about charging with perjury. I'm talking about suppressing the evidence obtained through a warrant that has been signed by a judge or magistrate under false pretenses. [LB202]

SENATOR CHAMBERS: So what are you talking about when if the cop lies and gets the warrant. [LB202]

PATRICK LEE: Yes. [LB202]

SENATOR CHAMBERS: And then is the warrant presented to me? [LB202]

PATRICK LEE: The warrant would have to be presented to you, yes. [LB202]

SENATOR CHAMBERS: And I say, no, I'm not going to give any urine. [LB202]

PATRICK LEE: Yes. Okay. [LB202]

SENATOR CHAMBERS: Then what happens? [LB202]

PATRICK LEE: Then you would be charged...well, two things. You'd be charged with refusal to submit to a chemical test under 60-6,197. That's already existing. And under the current framework, at least in my jurisdiction, we would charge you with contempt of court for willfully...willful disobedience or resistance offered to any lawful process or court order. [LB202]

SENATOR CHAMBERS: What, would I then be released on the spot? [LB202]

PATRICK LEE: That would depend on the jurisdiction. In our jurisdiction, you'd be booked in and then you could make bond. [LB202]

SENATOR CHAMBERS: I go to jail. [LB202]

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PATRICK LEE: Yes. [LB202]

SENATOR CHAMBERS: If I don't make bond, I would stay in jail till I made bond? [LB202]

PATRICK LEE: Until you saw a judge and had an opportunity to have your bond be lowered if you didn't make the initial bond that's set. [LB202]

SENATOR CHAMBERS: And if all this is a result of cop lying, how does that help me? It doesn't. [LB202]

PATRICK LEE: It doesn't help you that night. I disagree, first, with the premise that every situation like this would be a result from the lack of truthfulness of an officer. But I think that more over the premise that there's nothing that can be done in the rare occasion that that would be the basis of the issue is also faulty because there's mechanisms by which a defendant can bring a motion to suppress evidence where there is a ability to point to specific facts that are materially misrepresented or material admissions or complete, in your opinion or as you're pointing out, untruths. And there would be the ability then to have the evidence, the blood or the urine, suppressed. That's already existing law. [LB202]

SENATOR CHAMBERS: All right. I'll wager that when you go back to your County Attorneys Association they'll say how did you get along with Chambers? See, they know. They wouldn't want to come and present a bill like this with me on the panel. Did you draw the short straw? [LB202]

PATRICK LEE: I didn't draw the short straw. I drew this straw. I volunteered for this straw because DUIs is all I do. For six years, DUIs is all I've done. I've presented... [LB202]

SENATOR CHAMBERS: You volunteered. [LB202]

PATRICK LEE: I volunteered, sir, to try to both educate the committee and to present the issues that law enforcement is currently having because DUIs are a serious issue and this is an area of judicial integrity that's not being fulfilled. [LB202]

SENATOR CHAMBERS: You're not going to give it up. Aah, the sweet innocence of youth! But anyway, that's all that I have. [LB202]

PATRICK LEE: All right. Thank you. [LB202]

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SENATOR CHAMBERS: Okay. [LB202]

SENATOR PANSING BROOKS: Okay. Thank you, Senator Chambers. Anybody else have a question? I have a quick question. What about implied consent? How does this all fit in? And it's my understanding that we have complied consent that we will go ahead and submit to the test... [LB202]

PATRICK LEE: And that's... [LB202]

SENATOR PANSING BROOKS: ...and that there are penalties for not. So why is this necessary if we already have penalties in place for those refusing the test? [LB202]

PATRICK LEE: So the problem with implied consent is that in Birchfield v. North Dakota in June of this last year they determined that the implied consent alone cannot provide the consent necessary under the Fourth Amendment to submit to the blood test. Even our own state Supreme Court has determined in State v. Modlin, which I believe was in 2014, that the implied consent statute which is contained in 60-6,197 does not present consent under the Fourth Amendment. So even though there is a statute that creates implied consent wherein your operation or my operation of a motor vehicle on our public roads or highways would that imply...impliedly consent our ability to test our fluids for concentration of alcohol or drugs, that statute does not actually have the effect of law, of consent under the Fourth Amendment. Instead, it is a portion that can be determined under the court whether or not consent in the totality of the circumstance... [LB202]

SENATOR PANSING BROOKS: Okay, but there's also already a penalty for not...if you do not give consent. Is that correct? [LB202]

PATRICK LEE: Correct, under 60-6,197. [LB202]

SENATOR PANSING BROOKS: And that's still valid. [LB202]

PATRICK LEE: That is valid for breath immediately if you refuse to submit to a breath at the request of the officer. It is not valid for blood tests unless and until a warrant is obtained and you refuse that warrant. [LB202]

SENATOR PANSING BROOKS: But I thought that there was something like a field sobriety test that allows you to take the test. If the breath works then you have to submit to the... [LB202]

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PATRICK LEE: There is a preliminary breath test. The preliminary breath test functions wholly separate from the implied consent statute. The preliminary breath test is not admissible when we get to a trial phase to prove that your blood alcohol concentration was whatever that result was because of its potential issues with that (inaudible). [LB202]

SENATOR PANSING BROOKS: So and why is the penalty that already exists for refusing the blood test not sufficient? [LB202]

PATRICK LEE: It's not sufficient because that's not what we're seeking to penalize. The refusal to submit to the chemical test under Chapter 60 is taken care of at the point in time that the individual is served a warrant and decides not to comply. What this statute is seeking to enforce is to have an additional stick for an individual's failure to follow through with a court order. The judges in my jurisdiction have brought this up on a number of occasions where we obtain warrants from them. In at least four occasions since June of 2016 the paper that it's written on doesn't have any value because they have still refused and then law enforcement and my office is left... [LB202]

SENATOR PANSING BROOKS: Okay. [LB202]

PATRICK LEE: ...hamstrung with what to do. Looking at almost nearly every other situation where a warrant would be issued, if there was a action that stopped the warrant from being served, we already penalize that. If there was a search warrant to enter my home and take my phone and I see you coming, I know you have a warrant, I put it on the world's largest magnet and wipe my entire phone, that's tampering with evidence. [LB202]

SENATOR PANSING BROOKS: Okay. [LB202]

PATRICK LEE: If there would be a search warrant to search... [LB202]

SENATOR PANSING BROOKS: That's enough. Thank you very much. I appreciate. I'm sorry to interrupt you but this is...I understand where you're going... [LB202]

PATRICK LEE: Okay. [LB202]

SENATOR PANSING BROOKS: ...and I don't need any further explanation on that. Thank you. [LB202]

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PATRICK LEE: Okay. Thank you. [LB202]

SENATOR PANSING BROOKS: Any other questions? Senator Chambers. [LB202]

SENATOR CHAMBERS: Who did you say drafted this bill? [LB202]

PATRICK LEE: What's that? [LB202]

SENATOR CHAMBERS: Who drafted this bill? [LB202]

PATRICK LEE: I assume a bill drafter put it together. [LB202]

SENATOR CHAMBERS: Well, who gave the language? [LB202]

PATRICK LEE: I worked with other individuals from the County Attorneys Association to provide the initial language. [LB202]

SENATOR CHAMBERS: Other individuals you said in the County Attorneys Association? [LB202]

PATRICK LEE: That's correct. [LB202]

SENATOR CHAMBERS: And they didn't really...they didn't understand what the law of obstructing an officer is based on Supreme Court decisions? They didn't know that? [LB202]

PATRICK LEE: No, we did know that. That's why the law...the bill has been presented. [LB202]

SENATOR CHAMBERS: And you put it in the obstructing section of the statute? [LB202]

PATRICK LEE: I put it in...correct. [LB202]

SENATOR CHAMBERS: And what did you say about the court saying what has to be present? [LB202]

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PATRICK LEE: Well, to be present for obstructing under Section 1 of the statute, the definition they have for some of those terms relates back to a physical act. But adding Section 3, this language would be separate from those definitions. [LB202]

SENATOR CHAMBERS: And you're offering an amendment? [LB202]

PATRICK LEE: I'm not but I believe Senator Lowe did, yes. [LB202]

SENATOR CHAMBERS: What would the amendment be? [LB202]

PATRICK LEE: The amendment, is my understanding, would be to change the language that's now encompassed between lines 13 and 18 of page 2 to make that the new Section 3 of the obstructing statute 28-906. [LB202]

SENATOR CHAMBERS: Why didn't you ask...do you agree that this is a technical bill? [LB202]

PATRICK LEE: I'm not fluent, I'm not learned enough in legislative procedures to understand what your definition of "technical bill" is. [LB202]

SENATOR CHAMBERS: But, well, you're learned in the law, aren't you? [LB202]

PATRICK LEE: I am absolutely. [LB202]

SENATOR CHAMBERS: Well, you know that this you're dealing with a technical issue of law with a bill like this, aren't you? [LB202]

PATRICK LEE: Yes. If that is the definition of technical bill then, yes, this would be a technical bill. [LB202]

SENATOR CHAMBERS: So I'm just curious why did you bring it to a new senator instead of an experienced senator who may have had some understanding about the seriousness and technicality involved in a law? New senators don't know what they're getting into, do they? [LB202]

PATRICK LEE: I do not necessarily agree with inexperience,... [LB202]

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SENATOR CHAMBERS: Okay. [LB202]

PATRICK LEE: ...lacking that, but I brought it to my senator, Judge, or excuse me, not judge, Senator Chambers. [LB202]

SENATOR CHAMBERS: No, that's all right. I don't want to get you all... [LB202]

PATRICK LEE: You've been promoted, or separate agency, separate branch of government. [LB202]

SENATOR CHAMBERS: I think you all did pick a rube on purpose. [LB202]

PATRICK LEE: A what? [LB202]

SENATOR HALLORAN: Pick a what? [LB202]

PATRICK LEE: I didn't hear you. [LB202]

SENATOR CHAMBERS: A rube. That means somebody who's inexperienced and not knowledgeable in the premises, as they say in the law. [LB202]

PATRICK LEE: I'm not familiar with that word. [LB202]

SENATOR CHAMBERS: Then I've improved your education. [LB202]

SENATOR PANSING BROOKS: Thank you. [LB202]

PATRICK LEE: Thank you, sir. [LB202]

SENATOR PANSING BROOKS: Okay. Thank you very much for your testimony. [LB202]

PATRICK LEE: Thank you. [LB202]

SENATOR PANSING BROOKS: Appreciate it. Further proponents. [LB202]

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CHRIS WAGNER: Chris Wagner, C-h-r-i-s W-a-g-n-e-r, with Project Extra Mile. I don't have any prepared comments on this, just would rereference my testimony on LB84 and answer any questions you may have. [LB202]

SENATOR CHAMBERS: So you won't feel I'm shortchanging you, based on the limited role in which you're testifying, I don't have any questions. [LB202]

SENATOR PANSING BROOKS: Thank you, Senator Chambers. Okay. Any other questions? Thank you for coming today, Mr. Wagner. [LB202]

CHRIS WAGNER: Sure. [LB202]

SENATOR PANSING BROOKS: Next proponent. Proponent? Then we'll go to opponents. [LB202]

SPIKE EICKHOLT: (Exhibits 3 and 5) Madam Vice Chair, my name is Spike Eickholt. First name is S-p-i-k-e, E-i-c-k-h-o-l-t is my last name. I'm here on behalf of the Nebraska Criminal Defense Attorneys Association opposed to LB202. I know it's late. I know the committee has heard a lot of testimony today so I'm not going to...I was going to try to summarize as generally and as quickly as I can some points that I'd like the committee to consider if the committee is going to act on this bill and this concept. The proponent, the prosecutor Mr. Lee, I think is his name, talked about implied consent. Implied consent is this notion that when you get a driver's license in Nebraska you sort of consent when you drive on the public roads to get a chemical test, a blood, breath, a sample of your blood, breath, or urine, and it's a privilege of the right to drive. States provided that if you refuse to give a chemical test your license could be revoked or suspended or taken away by the state. States over the years began to get more and more tough on DUI, so they began to criminalize the act of refusal to submit to a chemical test. The U.S. Supreme Court in Birchfield v. North Dakota said that the state cannot criminalize refusal to submit to a blood test without a warrant. And as Mr. Lee explained that an officer advising a person who's driving that they have the option, if you will, to submit to a blood test and if they refuse that they could be prosecuted criminally, is involuntary and, therefore, the results of that test can be suppressed. Birchfield said nothing about urine. That's still an open question and there are other cases litigating that issue. Birchfield said that breath can be collected incident to a lawful arrest for driving under the influence. Birchfield explicitly said that a state can still administratively sanction someone for driving under the influence if they refuse to give a blood test. So in other words, if you refuse to give a test, you may not be able to be prosecuted criminally for refusing to give a blood draw if the officer does not have a warrant, but you're likely going to lose your license because the states, almost all states, have some sort of sanction administratively for refusing to give a test. I brought copies of 60-6,197 because I think it's

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important for the committee, if you're going to look at this issue, to look at that statute. Arguably, and I think Mr. Lee sort of alluded to this, the state can still prosecute for refusal to submit to a chemical test of someone's blood if they have obtained a warrant. I know that the statute doesn't explicitly accommodate or say anything about a warrant but the officer is armed with legal authority that is similar to the probable cause he or she is armed with to collect the breath test. To collect a blood test they've got the warrant. (Statute) 60-6,197 arguably still applies. That provides for a criminal sanction and it provides for license revocation. This bill would be double-charging that. It would allow for an additional criminal penalty and it would allow for an additional 18 months to 3 years license revocation. And the bill explicitly says on page 3, lines 4 through 8, that this obstruction by government operations by refusal to submit is a "separate and distinct offense from any other offense." So I can easily see a person who refuses to give a blood draw being charged with, one, DUI; two, violating 60-6,197; and then three, this new law that this bill proposes. So it is double charging. It is enhancing additional offenses. We've mentioned this a few times this year. This is a bill that creates, if you will, a new penalty. It does increase a possible penalty. And I just want to remind the committee that the committee recently, and the Legislature, did do some significant overhaul of the Criminal Code. If you look at the fiscal note, it doesn't actually calculate a cost but the Department of Corrections does submit, if you look at the narrative, some I would suggest it is caution regarding making this a crime because they...whoever wrote it or authored it sort of alerts to the number of people who are serving sentences for DUI offenses that this could cause additional penalties and additional time in custody. But if the committee is going to do something about that, I'd suggest the committee and the committee counsel look at Birchfield to see exactly what Birchfield says. And if anything is going to be done, I think something needs to be done with 60-6,197. And we are opposed to the bill. [LB202]

SENATOR PANSING BROOKS: Okay. Any questions for Mr. Eickholt? Thank you for coming, Mr. Eickholt. [LB202]

SPIKE EICKHOLT: Thank you. [LB202]

SENATOR PANSING BROOKS: Additional opponents? Opponents? Are there any in the neutral? Neutral testifiers? Okay, Senator Lowe, would you like to close? [LB202]

SENATOR LOWE: Thank you for the lively discussion, Senator Chambers. I believe by your description there may be only one person here that people can bring bills to, the senior senator. LB202 and this idea of an amendment is designed to do two things. First and foremost, it is designed to allow our law enforcement officers an enforcement tool to ensure drunk drivers can be taken off our roads. And I think everyone here can appreciate the hard work our law enforcement has done when it comes to drunk drivers so giving them this tool is something

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worthwhile. The second thing that this bill helps to accomplish is respect for the judiciary. There are penalties in place for when an individual refuses law...a lawful order from a police officer when it comes to DUI law. With the Supreme Court decision, we now have a situation where an individual could potentially not only refuse a law order from an officer but also from a judge. I believe it would create a bad precedent if we allow individuals to refuse a court order with no extra punishment. To (sic) potential amendment to LB202 goes about addressing that problem while addressing some concerns I've heard made from opponents of this bill. Are there any more questions I can answer for you at this time? [LB202]

SENATOR PANSING BROOKS: Any questions from anybody? No. Thank you, Senator Lowe. [LB202]

SENATOR LOWE: Thank you. [LB202]

SENATOR PANSING BROOKS: (Exhibits 2, 3, and 4) That will close...oh, before we close I have three letters: one from Colleen Sheehey-Church who is writing on behalf of Mothers Against Drunk Drivers; a letter of opposition from Mr. Spike Eickholt representing the ACLU of Nebraska; and then one in the neutral from Rhonda Lahm of the Department of Motor Vehicles. And that closes the hearing on LB202. Thank you all. Have a good weekend. [LB202]