Stephen L. Nass
Wisconsin State Representative

Testimony on 2013 Senate Bill 637 – Repeal of the Voluntary Intoxication Criminal Defense
Representative Steve Nass
March 12, 2014

Thank you, Chairman Glenn Grothman and members of the Senate Judiciary and Labor Committee for the opportunity to testify on SB 637, a bill repealing the voluntary intoxication defense to criminal liability. SB 637 has a companion in the Assembly, its AB 780. AB 780 did pass the Assembly Judiciary Committee on a 9-0 vote last week. AB 780 is scheduled for an Assembly floor vote on March 18, 2014.

First, I would ask the committee's indulgence with the fact you will hear testimony today from people who are not lawyers (including myself), but recognize a fundamental flaw in the law being addressed in this legislation.

To begin our discussion, I would quote from the Legislative Reference Bureau's analysis of SB 637:

> *Under current law, if a person is intoxicated or drugged when he or she is alleged to have committed a crime, the intoxication or drugged condition is a defense to criminal liability if:*
>
> *1) the person was involuntarily intoxicated or drugged at the time of the alleged offense and the person's condition rendered him or her incapable of distinguishing between right and wrong; or*
>
> *2) the person's condition, whether voluntarily or involuntarily produced, made it impossible for him or her to have had the intent necessary to commit the crime. Voluntary intoxication, however, is generally not a defense in the second situation if the offense charged is based on the person's criminal recklessness.*
>
> *This bill eliminates the defense of voluntary intoxication.*

The two key statutes affected by SB 637 are ss. 939.24 (3) and ss. 939.42. This particular criminal defense was inserted into law as part of a budget bill in 1988. Research shows that this issue was a matter of debate and scholarly discussions amongst lawyers in Wisconsin going back to at least the 1950's.

However, the fact remains that this particular criminal defense never received a thoughtful legislative review or public input, since it was inserted into a budget bill in 1988. As legislators, we all know of the great risks associated with sticking policy into fiscal legislation and the significant potential for adverse consequences when that policy fails to receive a proper vetting.

The language inserted in 1988, at the request of criminal defense attorneys, has faced four attempts at repeal. Those attempts were:

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A.) 2003 AB 768 – It passed committee 9-5 and passed the Assembly on a voice vote. The State Senate took no action.

B.) 2005 AB 838 – It passed committee 7-0 and passed the Assembly on a voice vote. The State Senate took no action.

C.) 2007 AB 330 – No action in either the Assembly or State Senate.

D.) 2013 AB 780/SB 637 – AB 780 passed committee on a 9-0 vote and awaits an Assembly vote on March 18, 2014. SB 637 is receiving a public hearing today.

Prosecutors and law enforcement have regularly raised concerns regarding this statutory criminal defense and its impact in charging those alleged to have committed serious crimes in which voluntary intoxication was a factor. Previously, prosecutors complained of being compelled to consider lesser offenses as part of plea bargains when they fear that the defendant may utilize the voluntary intoxication defense if certain cases went to trial.

However, in the early morning hours of August 19, 2012, the tragic and horrible murders of 21-year old Alisha Bromfield and her unborn child Ava, by the hands of Brian Cooper, in Door County Wisconsin launched a series of events that would ultimately lead to this family being victimized a second time by our flawed state law.

This confessed murderer went to trial in 2013 facing two counts of first-degree intentional homicide and a single count of third-degree sexual assault. The evidence in this case wasn't in dispute including the confessions Brian Cooper made on a 911 call and during interviews with investigators.

According to the jury foreman in a media interview after the initial trial, two members of the jury became confused over the voluntary intoxication defense and the concept of intent leading to a 10-2 vote in favor of convicting Brian Cooper of first-degree intentional homicide. The jury was unable to resolve their differences on those two charges. The jury did convict him of third-degree sexual assault. Cooper will face a re-trial later this year on the two murder charges.

Last year, the family and friends of Alisha and Ava Bromfield turned to the Wisconsin Legislature calling for repeal of the voluntary intoxication defense and seeking a way to have such a change apply retroactively. After months of research, it was deemed unlikely that a route existed to make a change to state law that could legally apply to this tragic case during the re-trial.

However, I ask the members of this committee to consider the vicious crimes that resulted in the extinguishing of two promising futures for Alisha and Ava, the plight of the family and friends in being denied justice in the first trial, and the questionable morality of a law that allows for a poor excuse to be used to avoid or lessen criminal liability. I believe that all of the factors, both moral and legal, support the passage of SB 637 and the removal of the voluntary intoxication defense from our state statutes.

I now ask you to consider the testimony of the family and friends of Alisha and Ava Bromfield.

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March 7, 2014

FROM: Remington Center
University of Wisconsin Law School

TO: Wisconsin State Legislature
Senate Committee on Judiciary and Labor

SUBJECT: 2013 Senate Bill 637
(2013 Assembly Bill 780)

Statement of Interest

We respectfully write to share our concerns that 2013 Senate Bill 637[1] in its current form is flawed in two important respects.

First, as currently drafted, the bill is likely to be found unconstitutional because it purports to prevent a person accused of a crime that requires intentional action from offering evidence to show a lack of intent – either due to intoxication or for any other reason. The Due Process Clause of the U.S. Constitution requires that criminal defendants be allowed to introduce evidence that might negate any element of the crimes with which they are charged. The current draft appears to violate that principle by prohibiting evidence of voluntary intoxication.

Second, by repealing Wis. Stat. § 939.24(3), the bill creates a new defense that does not now exist for persons charged with reckless crimes – that a person can't be found guilty of a reckless crime if he was too intoxicated to realize how dangerous his behavior was. Current law does not permit such a defense. Instead, Wisconsin law today specifically provides that when a person chooses to become so intoxicated that he does not realize the seriousness of the risk he creates to others, his lack of awareness does not prevent a finding of recklessness. Nothing in the limited information surrounding either the Assembly or Senate version of the proposed legislation suggests that this change was intended, and we cannot think of a reason such a change would be warranted.

Our interest in this matter is to share our experience and knowledge to contribute to an informed discussion of proposed legislation that would impact our criminal justice system. The Remington Center at the University of Wisconsin Law School consists of a collection of projects designed to serve educational, research, and service objectives in our criminal justice system. The work of our faculty and students positions us to offer experience-based insights on a range of criminal justice issues to advance cost effective public safety policies. Ours is a long history of contributions to the Wisconsin criminal justice system, including participation in the creation of the original Wisconsin criminal

[1] This bill originated in the Assembly as 2013 Assembly Bill 780.

code in the 1950s, the creation of the Wisconsin Criminal Jury Instructions Committee, the revision of our criminal procedure code in 1969, and the revision of our homicide laws in the late 1980s, to name a few.

Intent Crimes, Voluntary Intoxication and a Defendant's Right to Present a Defense

A core principle of criminal law is that conviction requires the prosecution to prove all elements of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970) A parallel principle is that the accused has the right to defend himself against whatever charge is brought against him. *Chambers v. Mississippi*, 410 U.S. 284 (1973). These principles are constitutionally based and not subject to revision or abrogation by Congress or state legislatures.

What this means with intent crimes–that is, crimes that require the defendant to have intended the prohibited harm–is that a defendant will always have the right to try to convince a jury that he lacked the intent required for conviction.[2] Stated otherwise, neither a complete repeal of Wis. Stat. § 939.42, the revision proposed, nor any other revision could prevent an accused from presenting evidence to try to show that intent was lacking, whether because he was intoxicated or for any other reason. The only way evidence of intoxication could be excluded would be to redefine the crime to eliminate the element of intent.

That does not mean the defense evidence will invariably be successful. Intoxication is a good case in point. Defendants often argue that, because they were highly intoxicated, they lacked intent at the time they committed their crimes. We are not aware of a single Wisconsin case in which voluntary intoxication has ever been successful as a defense–that is, where proof of intoxication resulted in the acquittal of a defendant charged with an intentional crime.

It seems clear that this is because people can and do act purposely when intoxicated–even though they make poor choices they might not make if sober. That their judgment is poor has little if anything to do with whether they intended their actions and consequent results at the time they acted. Studies confirm our experience, and show that intoxication impairs judgment, but not the ability to engage in purposeful actions.

Reckless Crimes and Voluntary Intoxication

Wisconsin crimes involving recklessness involve a mental state that is different from intent. Wis. Stat. § 939.24(1) provides, " 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk . . . ." (Emphasis supplied.)

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[2] Wis. Stat. § 939.23(3) provides that intent "means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result . . ."

Although intoxication rarely if ever negates intent, it often limits a person's ability to accurately recognize and assess risk. Nevertheless, it seems clearly undesirable to allow one accused of causing death or serious harm to another to defend on the ground that he was too intoxicated to realize how dangerous his actions were. Recognizing this, after careful deliberation the Wisconsin Homicide Revision Committee added subsection (3) to the definition of recklessness in Wis. Stat. § 939.24. This subsection provides:

> A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The purpose of this subsection is clear: to make sure there is no defense to recklessness for persons too intoxicated to realize the risk of harm they create. For unexplained reasons, 2013 Senate Bill 637 and its Assembly counterpart would repeal this subsection. Doing so would reward irresponsible behavior by allowing a defense for reckless homicide or reckless injury if the defendant was too intoxicated to realize how dangerous his actions were. This potential defense was rejected as unwise in 1989, and it seems equally unwise today.

We feel it important to share our views with you because it appears that this bill seeks to achieve something beyond the legislature's power and in so doing, create an unintended defense for culpable reckless intoxicated behavior and lead to unnecessary Constitutional litigation. We hope our comments are helpful.