

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

[LB736 LB794 LB808 LB810 LB844]

The Committee on Judiciary met at 1:30 p.m. on Thursday, January 24, 2008, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB736, LB794, LB808, LB810, and LB844. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Ernie Chambers; Vickie McDonald; Amanda McGill; Dwite Pedersen; Pete Pirsch; and DiAnna Schimek. Senators absent: None.

SENATOR ASHFORD: Good afternoon, everyone. This is the Judiciary Committee, so if you don't have a bill in front of Judiciary, you can still watch, but otherwise, go find another room. We're glad to have you here today. We have a number of bills--five bills, all of which I'm sure we'll have some significant testimony. So we'd ask you to kind of follow our guidelines, and we'd ask you to limit your testimony to around three minutes. We're going to have light system, most of you or many of you are familiar with. When the orange light comes on, we'd ask you to sum up, and when the red light comes on, the chair goes backwards and folds over backwards so you land on your...(Laughter) So you can go from there. But my name is Brad Ashford. I'm from Omaha, and I'm Chairman of the Judiciary Committee. Steve Lathrop, from Omaha, is the Vice Chair of the committee. Dwite Pedersen from Elkhorn has been on the committee for a number of years, and then Amanda McGill from Lincoln is here. So the left of everyone will...rest of the senators will be here soon. LaMont Rainey is our legal counsel. Jonathan Bradford is the clerk. Pete Pirsch is here from Omaha. Senator McDonald is here. Senator Schimek, from Lincoln. Only Senator Chambers isn't here, but we're going to go ahead anyway. Senator McGill, LB794. How many testifiers do we have on LB794 today? Okay. [LB794]

SENATOR MCGILL: Senator Ashford, fellow members of the Judiciary Committee, I'm Senator Amanda McGill, M-c-G-i-l-l, and I represent the 26th District in northeast Lincoln. LB794 holds criminals accountable for their behavior. This bill would make it clear that a person is still responsible for their actions in an intoxicated condition. Intoxication cannot be utilized as a defense to negate the intent element of a criminal charge, unless a defendant first provides, by clear and convincing evidence, that the intoxication was not voluntary. Further, the bill establishes that mental conditions caused by voluntary intoxication are not included as part of the affirmative defense of insanity, as set forth in Section 29-2203. Any evidence of the same shall be inadmissible. And finally, the legislation prohibits the use of repeated criminal or antisocial conduct from acting as the basis for a claim of insanity as an affirmative defense to a criminal charge. We modeled this bill after similar statutes already in place in Delaware and Montana that had been upheld by the highest court in the land as constitutional. These states and 32 others have addressed this issue through the passage of legislation similar to this. Many of us, at least here in the Lincoln community, remember the heartbreaking story of a young Lincoln man named Andy Lubben who

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

was stabbed to death by a friend in February of 2006. This horrific event is something Andy's family will never forget. Shane Tilley stabbed Andy more than 20 times while under the influence of cough medicine. Tilley was charged with first degree murder, and he was found not guilty by reason of insanity. Becoming voluntarily drunk or high does not make you insane. If you make a conscious choice to drink or get high, you should be responsible for your behavior. The Lubben family resides in my district and I've gotten to know them well. They're here with us today in the second row. Following me, representatives from the Office of the Attorney General and the Lancaster County Attorney's Office will be here to answer questions about this legislation. I appreciate your consideration and look forward to your support on this important issue. Thank you. [LB794]

SENATOR ASHFORD: Thank you, Senator McGill. Any questions of Senator McGill? Senator. [LB794]

SENATOR MCGILL: Um-hum. Thank you. [LB794]

SENATOR ASHFORD: Proponents. [LB794]

COREY O'BRIEN: Good afternoon, Senators. My name is Corey O'Brien, and I'm a prosecutor in the criminal division of the Nebraska Attorney General's Office. Today I come before you to testify in support of LB794. The chief objective of the criminal justice system is, of course, justice--justice not for those accused of crimes, but justice for the alleged victims and society as a whole. In order to pursue this objective properly, the criminal justice system must have available to it the mechanisms of rehabilitation, deterrence, and restraint. The purpose behind LB794 is to ensure that these mechanisms will remain available to the criminal justice system in all situations where alcohol or drug use alone needs to criminal conduct. It is irresponsible of us in the criminal justice system to allow persons who have committed crimes solely at the hands of drugs and alcohol to walk free from our courthouses without ever giving the criminal justice system a chance to address the underlying cause of their criminal behavior. But that is the very real possibility these defenses currently allow. At present the criminal justice system prohibits those accused of a crime from asserting numerous societal factors and influences in order to exonerate them of their offenses. So, too, must be prohibit drug and alcohol use from becoming a gateway to acquittal. LB794, modeled after existing state statutes that have withstood constitutionality claims in the nation's highest courts, has two key components: The first would prohibit the claim that one was too high or too intoxicated to form the requisite intent to commit a crime. The second would prohibit the claim that one in the absence of any other mental diagnosis was too high or intoxicated to appreciate the differences between right and wrong. LB794 is not saying that consideration of a defendant's drug or alcohol use should be barred altogether. Instead, LB794 says simply that those factors should remain outside of the guilt or innocence phase of a criminal prosecution. Those considerations are best left for

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

sentencing. Senators, I would appreciate your support of LB794 and holding those accused of offenses to be held responsible for their offenses. Thank you. [LB794]

SENATOR ASHFORD: Thank you, Corey. Any questions? Senator Pedersen, and we'll go down the... [LB794]

SENATOR PEDERSEN: Thank you, Senator Ashford. Mr. O'Brien, in drafting this bill and looking at it legally, is there...under insanity, is the blackout stage considered insane, both in the same category? [LB794]

COREY O'BRIEN: Frankly, Senator, when we talk about insanity, me as a criminal prosecutor, I can't say that I ever went to medical school, so I am not usually smart enough to make that determination whether or not that qualifies as a mental illness sufficient for a finding of insanity. I usually leave that up to my psychological profilers, including...I have one here with me later that will be following me to testify, Dr. Mario Scalora. And I usually rely upon their judgment as to whether or not a blackout constitutes a sufficient basis upon which a finding of insanity is justified. In my opinion, normally, it probably does not. [LB794]

SENATOR PEDERSEN: Okay, thank you. I'll wait and ask the doctor also. Thank you. [LB794]

SENATOR ASHFORD: Senator Lathrop. [LB794]

SENATOR LATHROP: I do have a few questions, Mr. O'Brien. The bill, as you say, does two things--there may be three in there, and I want to ask you a couple of questions. The first piece of it takes voluntary intoxication out of the realm of the insanity defense; is that it? [LB794]

COREY O'BRIEN: Correct. [LB794]

SENATOR LATHROP: So I correctly understand that. And if I understand the insanity defense, it requires a mental disease in the first place, doesn't it? [LB794]

COREY O'BRIEN: It does. [LB794]

SENATOR LATHROP: And so existing law in the state of Nebraska is that simply being intoxicated does not support an insanity defense; am I right? [LB794]

COREY O'BRIEN: That would be my understanding, and my complete argument is that standing alone, being too high or intoxicated should not suffice to serve the purposes of the insanity defense. [LB794]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR LATHROP: If that's what the existing law is, then what is the purpose of that piece, the first piece in your bill? [LB794]

COREY O'BRIEN: The purpose is, is to make that abundantly clear, because I'm not sure that that was abundantly clear in the absence of language to this effect,... [LB794]

SENATOR LATHROP: I looked at the... [LB794]

COREY O'BRIEN: ...given the Lubben opinion. [LB794]

SENATOR LATHROP: Yeah, I looked at the NJI when I saw this bill the first time, and it's...I mean, right in the comments it says voluntary intoxication is not a...does not support an insanity defense. [LB794]

COREY O'BRIEN: And I would agree with that fully, Senator, and the only reason that we considered this is because we were not abundantly sure that the silence of our statutes, as it currently sits, serves as enough of a warning to our judiciary that that isn't a proper basis to make an insanity finding, because if you read the Lubben decision, it's not clear at all if that was the sole basis upon which the finding was for insanity. [LB794]

SENATOR LATHROP: Okay, and so...but would you agree that if a person is psychotic to the point where they don't know...they're not in touch with reality, that that does provide the basis for an insanity defense? [LB794]

COREY O'BRIEN: Absolutely, and I am sure Senator Pedersen can tell you, because I've had discussions with him about this, is that, you know, people that are dual diagnosis--they suffer from a mental illness as well as for drug and alcohol abuses--we're not trying to end their possibility of being found insane. So if they have a dual diagnosis, certainly not. [LB794]

SENATOR LATHROP: Okay. And then the second piece of this bill is to take away somebody who drinks or gets high to the point where they can't formulate an intent, which is an element in many crimes, what you're saying is that essentially you're not going to accept that they didn't have intent because they were intoxicated? [LB794]

COREY O'BRIEN: That's correct. [LB794]

SENATOR LATHROP: Even though they might not have had intent in the first place? [LB794]

COREY O'BRIEN: That's correct. [LB794]

SENATOR LATHROP: There is, it seems to me, a third piece to your bill, and that's

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

Section 2, Paragraph 5. It's on page 4, lines 1-3. And this seems to not be a part of the other...the insanity defense or the diminished capacity defense, but it says for purposes of this section, insanity does not include an abnormality manifested only by repeated criminal or other antisocial conduct. That really doesn't have anything to do with voluntary intoxication at all, does it? [LB794]

COREY O'BRIEN: No. And the... [LB794]

SENATOR LATHROP: So what... [LB794]

COREY O'BRIEN: I'm sorry. [LB794]

SENATOR LATHROP: So what we're doing is, there's actually a third piece. Tell me what you're shooting at with that language. [LB794]

COREY O'BRIEN: That component came directly out of a statute from Montana, both Section 4 and Section 5. Both came from that statute out of Montana, and that was taken all the way to the United States Supreme Court in a case called Montana v. Egelhoff. And they found that the statute was completely constitutional on all grounds, including Section 5. The reason we included that is because we wanted to make it perfectly clear that becoming an habitual drunk driver does not count as a mental illness. Becoming a serial killer does not make someone legally insane because you're a serial killer by your basic habitual criminality. [LB794]

SENATOR LATHROP: I feel like I'm going to sound like Senator Chambers now,... [LB794]

COREY O'BRIEN: Okay. [LB794]

SENATOR LATHROP: ...protecting the integrity of those red books and say, we want to stick something in there to make something abundantly clear that's already the law, which is, you've got to have a disease, the disease has to put you in a place where you don't know right from wrong, and that would never sell as a disease, running around being an habitual drunk or an habitual shoplifter. That would never qualify in and of itself as a disease, would it? []

COREY O'BRIEN: I would think not,... [LB794]

SENATOR LATHROP: Okay. [LB794]

COREY O'BRIEN: ...but I don't necessarily have the confidence that everyone probably needs to have, in making sure that the laws are absolutely abundantly clear on those issues, just by the fact that they're omitted. [LB794]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR LATHROP: Could you not have somebody, though, who is psychotic to the point where they are not in touch with reality, and they engage in repeated criminal or antisocial conduct? [LB794]

COREY O'BRIEN: Absolutely, if they have a... [LB794]

SENATOR LATHROP: And if you're a defense lawyer, and we're after the truth now, if you're a defense lawyer, you need to be able to put that on to show these are symptoms of his underlying disease, right? [LB794]

COREY O'BRIEN: Absolutely. [LB794]

SENATOR LATHROP: I know you want to be abundantly clear, but I'm wondering if you aren't creating some confusion for a judge who has to decide what comes in and what doesn't come in, as somebody is trying to prove somebody is...a defendant is psychotic. [LB794]

COREY O'BRIEN: I believe by including this that we're eliminating the confusion about what is and what is not covered to be come into court, in terms of what will establish a valid insanity defense. [LB794]

SENATOR LATHROP: Okay. Thanks for answering my questions. [LB794]

SENATOR ASHFORD: Any other questions? Corey, I might...and that is my concern, when I looked at this earlier today, is Section 5. And I think we have to think a lot about that, because it's any...does not include any abnormality manifested. [LB794]

SENATOR SCHIMEK: Only. [LB794]

SENATOR ASHFORD: Well, does not include any, only by repeated criminal or other antisocial conduct. And "other antisocial conduct" is a pretty broad... [LB794]

COREY O'BRIEN: I would agree with that, and I would... [LB794]

SENATOR ASHFORD: Five is very broad, and I'm not certain whether you're getting at your...at what you need to get at in five, but that's obvious from Senator Lathrop's questions. Those would be my concerns, as well. [LB794]

COREY O'BRIEN: Okay. I appreciate that. [LB794]

SENATOR ASHFORD: Thanks, Corey. [LB794]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

COREY O'BRIEN: Um-hum. Thanks. [LB794]

MARIO SCALORA: (Exhibit 1) Good afternoon, Chairman Ashford and members of the Judiciary Committee. I am Dr. Mario Scalora, and I'm here to speak on behalf of LB794. My testimony will be solely focused on Section 4 of the bill, changing the provisions of insanity defense related to involuntary intoxication. I would like to briefly describe my background. I am an associate professor of psychology at the University of Nebraska-Lincoln. For the past 15 years I've had the privilege of serving in the Forensic Mental Health Service of the Lincoln Regional Center as an evaluator, providing services to all our courts throughout the state. For the past 20 years I've performed a range of evaluations, including a substantial number of insanity evaluations for courts in the state of Nebraska. Because of the prevalence of drugs within our communities, both mental health and legal systems have been dealing with criminal behavior from folks under the influence of drugs with more significant pschoactive effects. While voluntary intoxication, per se, has not been allowable under the insanity defense, there is now a subset of cases that could qualify, in which a person may display very temporary psychotic symptoms or difficulties with reality testing, resulting strictly as a result of the use of or withdrawal from controlled substances. These symptoms usually dissipate when the drug wears off or is no longer in the body, and this could result in a diagnosis or descriptive classification of substance-induced psychosis. Because the effects of this substance-induced condition is temporary, unlike the vast majority of people with mental illness who come before our system, these people may pose a challenge in terms of our ability to manage them, if they are found not responsible by reason of insanity. Folks with mental illness of a long standing nature typically receive rehabilitative services and have the symptoms of the mental illness managed through medication. Folks with these more temporary symptoms tend to require more strict observation and basically abstinence from controlled substances, and would not qualify for most traditional mental health services that we offer for people in this circumstance. While many people with serious mental illnesses also deal with substance abuse--we refer to this population as dual diagnosed--I believe the proposed language would not preclude their insanity defense as an option for these individuals if the nature of the behavior is the result of the symptoms of mental illness. So I would believe, as a matter of policy, to exclude folks who have disorder as the result of temporarily induced substance use, that it would make a great deal of policy sense to exclude them for consideration of the insanity defense. Happy to answer any questions. [LB794]

SENATOR ASHFORD: Thanks, Doctor. Senator Pedersen. [LB794]

SENATOR PEDERSEN: Thank you, Senator Ashford. Dr. Scalora, same question I asked Mr. O'Brien. Where would the state of a blackout, an alcoholic blackout, come into the...versus mental illness? [LB794]

MARIO SCALORA: It could come in one of two ways, Senator. Typically, when we

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

evaluate that, we're looking at--and I'm thinking in terms of insanity, if I understand your questions correctly--either in terms of the person's awareness of the behavior at the time they were performing the behavior. So one, we would be assessing, was the blackout of a nature that would influence their knowing whether they were performing a certain act? Or in the case of some blackouts, is it strictly a lack of memory for the act, where people at the time may have been engaging purposely in the act and knowingly in the act, but afterwards cannot remember it well, because they blacked out secondary to intense substance use, sometimes after the act? So the blackout situations that I see, so to speak, could come in, in one of those two frameworks. Obviously, the latter, when we're dealing with just straightforward recall, in my mind would not fit--and typically hasn't fit--under insanity. The former perhaps may, depending on the nature of the behavior being alleged and the nature of how it's allegedly influenced a behavior or the person's awareness of their behavior at the time. [LB794]

SENATOR PEDERSEN: Well, the blackout...like schizophrenia or one of them, a diagnosis, compared to just alcoholism, I can see a difference. But when you're talking about the blackout itself, I mean, people have been...alcoholic blackouts, people have committed murder under blackouts and not known that they had done so until they sobered up. [LB794]

MARIO SCALORA: But again, Senator, the question would be, for the purpose of evaluation, were they at the...for insanity, the standard is "at the time of the act." Were they aware, were they behaving in a manner that demonstrated they were aware of the nature and consequence of their behavior, but now can't remember it because...as you know, blackouts could be retrograde in nature. I may be very well aware of what I'm saying to you now, as I'm saying it to you, but if I decide to go to the bar, wherever the nearest bar may be from here, and decide to overindulge, I could blackout and not remember that. That's obviously two very different things. You are correct--there may be folks who may engage in some behaviors under a blackout state at the time, and then that would have a different implication, and then we would have to assess. Were they aware of the nature and consequences of their behavior at the time of the offense? Nature and quality of their behavior, I should say, at the time of their offense. [LB794]

SENATOR PEDERSEN: Doctor, would you also be willing to tell us, the committee here, what your definition of "voluntary intoxication" would be? [LB794]

MARIO SCALORA: Sir, typically--and as I said, I'm only speaking to the insanity piece--when we are doing evaluations, typically, the...we rarely find situations of involuntary intoxication. Obviously, in cases where people were deceived as to what they were consuming, or literally physically, or somehow otherwise coerced against their will to take something, I would certainly consider as involuntary. I can't assert whether that comports totally with what the legal definition is. I'm telling you what I would see as an evaluator. [LB794]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR PEDERSEN: A person who has a physical addiction to alcohol and has to drink in order to stay alive--I know there would be a lot of controversy on either side of that, but we do know that there is such a thing as a physical addiction to alcohol. [LB794]

MARIO SCALORA: Um-hum. [LB794]

SENATOR PEDERSEN: And without a medical detox, those who are physically addicted need to drink to stay alive. So I don't know what that would come under--voluntary, because they haven't volunteered to go to detox or through detox. [LB794]

MARIO SCALORA: I think, sir, as you mention, there would be some controversy as to whether that would be considered voluntary or involuntary. And I think generally, most people in the field would still see that as voluntary. I could conceive of circumstances in which, particularly in the throes of withdrawal, for example, where that would be questioned. And that would be aligned with what you're suggesting. I guess the bottom-line answer is, there's no set opinion or agreement among the professionals, I would believe, as to where your scenario would fit in, under the notion of voluntary or involuntary, as evaluators would see that. [LB794]

SENATOR PEDERSEN: Thank you. [LB794]

SENATOR ASHFORD: Senator Chambers, welcome. We are on LB794. [LB794]

SENATOR CHAMBERS: Thank you. [LB794]

SENATOR ASHFORD: Any other questions of...yes. [LB794]

SENATOR LATHROP: I do, a few. Doctor, thank you for coming down here today. You told us that you do some of these insanity evaluations in your role at the Regional Center? [LB794]

MARIO SCALORA: That is correct, sir. [LB794]

SENATOR LATHROP: Can you tell us just roughly how many you've done, round numbers? [LB794]

MARIO SCALORA: Sir, probably several hundred, easily. [LB794]

SENATOR LATHROP: Okay, okay. So you've evaluated...you know what the standard is, as well? [LB794]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

MARIO SCALORA: Yes, sir. I hope so. (Laughter) [LB794]

SENATOR LATHROP: Okay. And would it be, if I can reduce it to its simplest terms, you have to have a disease, a mental disease, and mental illness or a disease, and it has to deprive you of the appreciation of the wrongfulness of your conduct. [LB794]

MARIO SCALORA: Yes, sir. [LB794]

SENATOR LATHROP: Would that be a fair summary of what the standard is? [LB794]

MARIO SCALORA: I believe so. [LB794]

SENATOR LATHROP: Okay. I want to ask you about the mental disease or the disease, and since you're done several hundred of these, is alcoholism a disease that is recognized as a mental illness, for purposes of the insanity defense? [LB794]

MARIO SCALORA: It is recognized as a mental illness or disease, but for the purpose of insanity, generally, by itself, has not been, by itself. [LB794]

SENATOR LATHROP: Okay. So there is no, in terms of what the current state of the law is, we don't have a problem with people who voluntarily get intoxicated meeting the standard of insanity today? [LB794]

MARIO SCALORA: Generally not, sir. There is this sort of interesting subgroup of persons who would technically get diagnosed with a mental illness, or at least receive a diagnosis...for the record, the DSM4, Diagnostic and Statistical Manual, 4th edition, which is basically our bible of diagnoses, lists a range of conditions that a person may have, related to their mental state. And any of those conditions would be a descriptor of what the person went through, and in some cases, would describe the etiology or cause of what the problem may be. Some of those are merely descriptive, but may not necessarily speak to culpability issues. Alcoholism, for example, is one where people see that as a... [LB794]

SENATOR LATHROP: So it can show up as a disease or a mental-health-related disease, but may be a different way to put it. [LB794]

MARIO SCALORA: Right. [LB794]

SENATOR LATHROP: Have you ever done an evaluation where someone was voluntarily intoxicated to the point where they couldn't remember what they did or perhaps even appreciate what they did, and recognize that as a disease under the current law in Nebraska? [LB794]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

MARIO SCALORA: Someone...yes. We've done those evaluations. They are diagnosable. In some cases they would receive a diagnosis of substance-induced condition, depending how severe the condition--something like substance-induced psychosis. [LB794]

SENATOR LATHROP: In some sense you're a gatekeeper. I'm going to try to simplify this. [LB794]

MARIO SCALORA: Right, right. [LB794]

SENATOR LATHROP: I'm just trying to find out if there's even a need for the first provision relating to the insanity defense, and let me just ask it this way. As a person that does these evaluations, you have to make an initial judgment that they have a disease that qualifies for the insanity defense. [LB794]

MARIO SCALORA: Right. [LB794]

SENATOR LATHROP: Okay? Otherwise, they can talk about whatever they did on a weekend, and it doesn't matter if it doesn't qualify as a disease; am I right? Do you recognize someone's voluntary intoxication as a disease that qualifies under the current state of law? [LB794]

MARIO SCALORA: By itself, no. But there are conditions close to that, that could, such as a substance-induced psychosis, which is what I described earlier, which is very temporary and... [LB794]

SENATOR LATHROP: You would recognize that and give a professional opinion that someone meets the Nebraska current criteria for an insanity defense, because they have gotten intoxicated to the point where they...did you call it a temporary psychosis? [LB794]

MARIO SCALORA: Become psychotic. Right. Technically, under the law now, that would fit under the statute. Or some might disagree with that, but they're...we have people now in the Regional Center under that rubric currently. [LB794]

SENATOR LATHROP: Okay, okay. And let me go on to the other thing, which is Paragraph 5 of Section 2, that says insanity does not include an abnormality manifested only by repeated criminal or other antisocial conduct. Is there a disease that fits the insanity defense criteria that is manifested only by repeated criminal or other antisocial conduct? [LB794]

MARIO SCALORA: That would meet the insanity defense criteria? Not that I would see,

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

sir. [LB794]

SENATOR LATHROP: Okay, that's what I was after. Thank you. [LB794]

MARIO SCALORA: And I was careful not to speak to that in my testimony. I'm not sure what the legal reasons are for putting that in. [LB794]

SENATOR LATHROP: I know. I'm just going to use...I'm going to borrow you, though. (Laugh) [LB794]

MARIO SCALORA: I figured you would. [LB794]

SENATOR LATHROP: Thank you. [LB794]

MARIO SCALORA: Thank you. [LB794]

SENATOR ASHFORD: Senator Chambers. [LB794]

MARIO SCALORA: Yes. [LB794]

SENATOR CHAMBERS: Maybe you can help me now, Doctor. Are we dealing with the green copy of the bill? [LB794]

SENATOR ASHFORD: Yes. [LB794]

SENATOR CHAMBERS: Okay. Do you have a copy of it? [LB794]

MARIO SCALORA: I don't know if that's the green copy. [LB794]

SENATOR CHAMBERS: LB794? Yours might be white in color, but if we have an amended version, it would not be this bill, okay. When it says that, paraphrasing, that intoxication cannot be an affirmative defense, that a person in an intoxicated condition is responsible for his or her conduct or misconduct, and the only way that any evidence of intoxication could be offered is if the person did not know that it was an intoxicating substance that was being ingested, smoked, or whatever, is that basically what your version of the bill says? [LB794]

MARIO SCALORA: Could you point to which section, sir, so I could... [LB794]

SENATOR CHAMBERS: Section 1. And you can scan it. [LB794]

MARIO SCALORA: Yes, sir. Thank you. The language may be slightly different, but it meets the same spirit of what you're raising, sir. [LB794]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR CHAMBERS: Okay. If a person who is intoxicated is responsible for his or her conduct, what difference does it really make how that person got into that condition? Because it's not a condition which affects a person's ability to distinguish right from wrong. [LB794]

MARIO SCALORA: That's a good question, sir, and as I testified, I can't speak to those issues. In my mind those are more legal distinctions, not mental health ones, and so I have no qualification to speak to the... [LB794]

SENATOR CHAMBERS: That's why I said maybe you could help me, so I just thought I'd just throw it out there, because whoever else comes who might can answer will be aware of an issue that I have. Thank you. [LB794]

MARIO SCALORA: Thank you, sir. [LB794]

SENATOR ASHFORD: Thank you, Doctor. [LB794]

MARIO SCALORA: Thank you, sir. Been a privilege. [LB794]

SENATOR ASHFORD: Any other proponents? Yes. [LB794]

AMY JACOBSEN: Good afternoon, Mr. Chairman, members of the committee. My name is Amy Jacobsen. I am a deputy Lancaster County attorney, and I'm speaking today as a proponent of LB794, on behalf of the Nebraska County Attorneys Association. I prosecuted the case of State of Nebraska v. Shane Tilley that Senator McGill talked about earlier. Shane Tilley, without a doubt--it was the opinion of both psychiatrists involved, both the defense and state psychiatrists--was psychotic and out of touch with reality when he stabbed his friend, Andy Lubben, more than 20 times. This state's psychiatrist said that the only reason Shane Tilley was psychotic on that weekend was because of his consumption of over-the-counter cough medicine, Coricidin D. He took, by his own report, 32 tablets, and there was medical evidence to suggest that he had that many tablets of Coricidin Cough and Cold in his system. The defense expert agreed that he was psychotic, actually took a little further, said he was in a state of delirium, which is a step even higher than psychosis, and that it was caused by taking those drugs. The defense expert also said that Mr. Tilley was bipolar. The state's expert disagreed with that--did not think that Mr. Tilley was bipolar, that the psychosis simply came from the drug use. He was found not guilty by reason of insanity. He had an Axis I diagnosis of substance intoxication delirium, that his psychosis came from taking that substance, and he was committed to the Regional Center for treatment. This bill--and I'm speaking most as it relates to Paragraph 4--would have given, I think, the state an opportunity to argue against a finding of not guilty by reason of insanity. It offended the sensibilities of myself, certainly, that

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

someone who chose to take drugs could not be found guilty in a court of law for stabbing to death someone 25 times. Mr. Tilley reported that he had a history of using Coricidin...abusing Coricidin Cough and Cold. He said that he did it because he liked the trip. He told the psychiatrist that on the weekend that he consumed the 32 pills, the weekend he killed Andy Lubben, that he was doing it to test himself, kind of like playing Russian roulette, to see how much his body could take. I inquired of the psychiatrist about whether Mr. Tilley had an addiction to this drug, that was it a situation where he had used six maybe before, ten the next time, or whatever, and so this time he was craving a little more. Coricidin Cough and Cold didn't have that kind of addictive effect. It did not have a physiological addiction that caused him to want to take more drugs. He did it to get high, and the result was that Andrew Lubben died, and that's why I'm in support of this bill, and I think Paragraph 4 would have put my office and myself in a better position to argue. Any questions? [LB794]

SENATOR ASHFORD: Senator Chambers. [LB794]

SENATOR CHAMBERS: Are you contending that he got high for the purpose of killing his friend? [LB794]

AMY JACOBSEN: No. [LB794]

SENATOR CHAMBERS: That he got high knowing that he would kill his friend while he was high? [LB794]

AMY JACOBSEN: No. [LB794]

SENATOR CHAMBERS: What difference would it make if the person intentionally took the intoxicating substance or unintentionally took it? Because what we're talking about is a condition brought out, apparently, by the intoxicating substance, rather than an underlying condition that might, on its own, be a basis for that plea, correct? [LB794]

AMY JACOBSEN: Correct. [LB794]

SENATOR CHAMBERS: Okay, so that's why I'm asking it like I did. What difference does it make? Senator Lathrop gets intoxicated. I don't. He gets intoxicated. He bashes Senator McGill in the head with a hammer. I get intoxicated because Senator Ashford thought it would be fun to see me in that condition, and I bash her in the head with a hammer. The result is the same. We both can be shown to have done it because we're in this particular condition, because we don't practice doing that. I'm trying to focus on the question I'm asking: What difference does it make whether it's voluntary or involuntary, if the substance will cause us both to act the same way? [LB794]

AMY JACOBSEN: Well, when you engage in conduct, such as getting intoxicated...and

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

I...if all of you were to be prosecuted for that--and I would prosecute it if this was the report, that's everybody is beating everybody down in the Legislature. I would file those charges. (Laughter) And you... [LB794]

SENATOR ASHFORD: Don't we have immunity for that, Senator Chambers? [LB794]

AMY JACOBSEN: You'll probably successfully be prosecuted. You aren't going to be excused because you were using the alcohol. I've been a prosecutor for 15 years, and it doesn't fly very often to say, I was drunk. I wouldn't have done it when I was sober. But when people make choices to drink, when they make choices to drink and drive, whatever they do, they're making a choice to put themselves in a position that they might do things that they wouldn't otherwise do when they were sober. And that's what Shane Tilley did in this case. [LB794]

SENATOR CHAMBERS: So then... [LB794]

AMY JACOBSEN: He was putting himself in a position to do things that he would otherwise not do, if he was sober. [LB794]

SENATOR CHAMBERS: So it can be conceded that he didn't know the difference...he didn't know that his act was wrong. You'll concede that. [LB794]

JACOBSEN: At the time he committed the crime, that's what both the experts were telling me. [LB794]

SENATOR CHAMBERS: And culpability is based on knowledge and intent, but you want to say that we'll fly in the face of what we know to be the fact and attribute knowledge and intent, because there was an underlying voluntary act that brought him to this condition where he did not know or intend...he didn't know the wrongfulness of the act? That's what you're asking us to do with this legislation, correct? The person is being punished for voluntarily becoming drunk, in other words? Or intoxicated with the substance? Because a person can't be punished for the act, under ordinary circumstances, if he or she did not appreciate the wrongfulness of the act. If you cannot appreciate the wrongfulness of the act, culpability cannot attach. [LB794]

AMY JACOBSEN: And that's where I would disagree and think...and is why I think this law needs to be changed, that it's a wholly different thing if you're in a psychosis because you simply can't help it. There's a lot of mental disease out there. Those people should not be criminally held responsible. They should be found not guilty by reason of insanity and have their insanity treated. But... [LB794]

SENATOR CHAMBERS: But when we do find people not responsible by reason of insanity or whatever the phraseology is, it's because you cannot hold somebody

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

culpable for an act, the nature of which that person did not appreciate. A baby is not culpable for urinating or vomiting on a person. There's no culpability. If a person had the mentality of a baby, that person wouldn't be held culpable for an act that was committed by society may say is wrongful and ought not to be committed, because the person had no appreciation of what was being done and no choice was made. Now if that's an incorrect of why people are found not responsible, then I'd like to be corrected. [LB794]

AMY JACOBSEN: No, I think that's a correct statement. But I am saying I think you need to take it back a step further and why you don't appreciate what you're doing at the time, and it's because you're choosing to get high. [LB794]

SENATOR CHAMBERS: Well, let's say I rode a motorcycle without a helmet, chose to ride it without a helmet, suffered a brain injury which did not incapacitate me as far as moving around, but it impaired my ability to appreciate the acts that I did. If I did something wrong, since a chose to ride the motorcycle without a helmet, and that resulted in the injury that led to my inability to appreciate the nature of my act, I shouldn't be able to use the fact that I didn't know what I was doing as a defense, since I rode the motorcycle voluntarily; is that correct? In other words, would you prosecute me under those circumstances? [LB794]

AMY JACOBSEN: Prosecute you for what? For not wearing a helmet? [LB794]

SENATOR CHAMBERS: No, for having done something...the injury took away my ability to appreciate the nature of my acts. [LB794]

AMY JACOBSEN: And so then you committed some kind of crime after that, after you had the head... [LB794]

SENATOR CHAMBERS: Yes. [LB794]

AMY JACOBSEN: No, I think that's different. [LB794]

SENATOR CHAMBERS: But I chose to ride the motorcycle without the helmet, knowing what could happen. But I chose to do it anyway. [LB794]

AMY JACOBSEN: Shane Tilley knew he was getting high that day. He said that's why he was doing it. [LB794]

SENATOR CHAMBERS: Does the proximity... [LB794]

AMY JACOBSEN: You didn't know you were getting in an accident when you weren't wearing the helmet. [LB794]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR CHAMBERS: But I assumed the risk, and when people drink and drive, they don't know they're going to get in an accident. They don't intend to, but we say you did something that could lead to an accident, so all that stuff doesn't matter. [LB794]

AMY JACOBSEN: Exactly. [LB794]

SENATOR CHAMBERS: If I ride...well, let's put it like this. It's an icy road, and the advisory is, don't go out on this road. There should be no driving. Beyond that, the interstate has been closed by the State Patrol. And I go around the barrier, I'm barreling down the highway, my bike slides out from under me, and I get the injury. Everything associated with that act would let a reasonable person know that it's likely that something bad is going to happen. Now the question: If the precipitating act that brought me to the condition of not appreciating the nature of my conduct is close in point of time, that means something, as opposed to if the act was farther removed in terms of time? The accident may have been farther removed, but it was my doing. The getting high was closer in proximity to the act that was wrong. So does the proximity, in terms of time, determine whether or not a person is going to be allowed to plead through his or her counsel that there should be an excusing of that conduct, because the nature of the act was not appreciated? [LB794]

AMY JACOBSEN: My answer is, I think, yes. I think this Paragraph 4 doesn't much change the way the evidence would come in. In, for instance, the case I'm talking about, I told you a moment ago that the defense was saying Mr. Tilley also had...was also bipolar. Now their expert was also saying the psychoses came from taking the drugs. But I think if this law, Paragraph 4, was in place, they could still plead not guilty by reason of insanity. We would still argue those issues. They would probably go a little deeper into this idea of, he's bipolar, maybe the reason is was using those drugs is because of the disease of bipolar. [LB794]

SENATOR CHAMBERS: But this... [LB794]

AMY JACOBSEN: I think...there's plenty of experts that would probably say there's plenty of bipolar people that also have poly-substance abuse, that they self-medicate and so that disease caused them to use the drugs. [LB794]

SENATOR CHAMBERS: Well, most people... [LB794]

AMY JACOBSEN: I would refute that, because I had an expert saying he wasn't bipolar. He just was using drugs, and again, just trying to get high. [LB794]

SENATOR CHAMBERS: Well, expert John... [LB794]

AMY JACOBSEN: And so I think those would be facts that would be taken into

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

consideration certainly. [LB794]

SENATOR CHAMBERS: John F. Kennedy said, I listen to the experts. The Bay of Pigs invasion fiasco, the Cuban revolution, and we have Prime Minister Castro. But what you're talking about in this language is not the weight of evidence, but that these factors are inadmissible. You cannot even offer it, even though it clearly has a bearing on culpability. Remember: We here are policymakers. We're not the judge or the jury to weigh the evidence or determine guilt or innocence, but to establish a policy. And in establishing a policy, I have to look at the act that is committed, and if the same act is committed by two people, and both of them have the same mental state, and one is not responsible because of his or her mental state, but the other one is, it's difficult for me to grasp, in terms of a logical distinction sufficiently weighty to change the law. But to get away from that, because all you could do is repeat your answer to question, have you looked at page 4 where it says, for purposes of this section, insanity does not include any abnormality manifested only by repeated criminal and other antisocial conduct? Do you agree with that language? [LB794]

AMY JACOBSEN: I guess I'm not going to comment on that paragraph, because I'm not entirely clear, and Mr. O'Brien was talking about that earlier. I think you missed that. But I guess for my purposes, Paragraph 4... [LB794]

SENATOR CHAMBERS: Okay. [LB794]

AMY JACOBSEN: ...is the paragraph that would have helped me in my prosecution. []

SENATOR CHAMBERS: And I've asked you all I want to, because I don't want to beat it under the ground. Thank you very much. [LB794]

SENATOR ASHFORD: Thank you, Senator Chambers. Any other? Senator Pirsch. [LB794]

SENATOR PIRSCH: Is this the same type of issue that Senator Chambers has brought up now, with one involving alcohol use and the effects on the body, and then whether culpability that is implicated in a statute such as 28-306 involving, say, a motor vehicle felony, motor vehicle homicide, where drunk driving is the proximate cause of death? [LB794]

AMY JACOBSEN: I don't think it is the same issue entirely. I have never seen a case, not that I've seen every case ever prosecuted in the state of Nebraska, where somebody--I feel like I have, some days--but where somebody is claiming to have been psychotic and out of touch with reality when they're drunk. They may be describing something like the question Senator Pedersen was asking, about being in a blackout. They maybe don't remember it. But I see it as two different things. So I don't see this

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

change in the law in Paragraph 4 affecting cases involving alcohol. I see it affecting cases involving the misuse of cough and cold syrup, and we are going to see that again. That's a problem. People are using--usually younger people--using cough and cold syrup, and methamphetamine. I think methamphetamine...I have seen cases where people are using methamphetamine and so high that they are claiming not guilty by reason of insanity. I haven't seen it actually litigated. It's usually something that's been sort of toyed with by defense attorneys, and they're getting their evaluations and things like that. And I haven't seen it on a major enough case where there's been violence involved, that sort of gets anybody's attention. But I see it as slightly different. [LB794]

SENATOR PIRSCH: I guess what I'm getting at is, with respect to cases of driving under the influence, in which there is a death that results with that, there's enhanced penalties, are there not, if a death results as a result of the person...the person, in those cases, if you're familiar with them, the person who sets out, you know, understanding that he engaged in drinking and driving, is it their intent to have a collision with someone on their home from the bar? Are they intending to injure or kill someone? [LB794]

AMY JACOBSEN: No. [LB794]

SENATOR PIRSCH: Are there enhanced penalties that occur in law now, under that motor vehicle homicide, because of just the result, even though their intent is not to injure or kill someone? [LB794]

AMY JACOBSEN: I don't believe so. I don't prosecute those kind of DWI-type cases, so I'm not the best person to ask. But I'm not answering very well. Sorry. [LB794]

SENATOR PIRSCH: Well, I guess what I'm saying is, if your drunk driving...are there certain penalties that are different for drunk driving, as opposed to drunk driving where you've killed someone? [LB794]

AMY JACOBSEN: Yes, I believe so. [LB794]

SENATOR PIRSCH: Okay. And in those cases where...as far as culpability, you've commented that the individuals who set out for that night, driving home, both individuals in both those cases didn't have the intention, in most of the cases, to kill anyone on the way home; is that correct? [LB794]

AMY JACOBSEN: Correct. [LB794]

SENATOR PIRSCH: Yet different penalties to the result, then; is that correct? [LB794]

AMY JACOBSEN: Right. [LB794]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR PIRSCH: Okay. That's all the questions I have. [LB794]

SENATOR ASHFORD: Any other questions of Amy? Thank you. [LB794]

AMY JACOBSEN: Thanks. [LB794]

SENATOR ASHFORD: Any other--well, we'll wait a second--proponents? Any further proponent testimony? Opponents? How many opponents do we have? Okay. [LB794]

CHUCK STEPANEK: Good afternoon, Senator Ashford, members of the committee. My name is Chuck Stepanek, S-t-e-p-a-n-e-k, and I'm here appearing on behalf of myself, in opposition to this bill. When I look at the issue before us, it is something that is generated by a single, specific incident. And as Senator Chambers mentioned, you are not the judge or the jury or those to make the decision. You are the policymakers, so a decision that comes out of this body is one that does not affect simply that one very unfortunate incident, but hundreds if not thousands of instances that are out there. We look at the issue of dual diagnosis, the combination of mental illness and substance abuse, and in many, many cases, there are people with mental illness, myself included, who decide to self-medicate first. That is the first course of action. You can't understand what the voices are in your head, you can't understand the ups and the downs, so you go to the first thing available, and it's usually a brown bottle or something else what's perhaps stronger, because you're in denial. You want to deny that there is something truly wrong within my head, and there is that gap of time between when that mental illness is initiated, a gap of time during that self-medication, and a long period of time before there is an actual diagnosis. So any kind of action can occur between that time, when a person truly does have a mental illness before the diagnosis actually takes place. Therein, that creates a problem. In the context of this bill, a person can have a mental illness, be self-medicating, and unless the psychiatrist comes along from day one and gives the marker, the sign on that person's forehead and says, you've got the diagnosis, there can be problems. Are we abiding by the light system today? [LB794]

SENATOR LATHROP: Yes, we are. [LB794]

CHUCK STEPANEK: Okay, thank you. [LB794]

SENATOR LATHROP: And you've got till it turns red. [LB794]

CHUCK STEPANEK: Okay, I've got until the red. That being the case, my experience, my personal experience, is that the courts are more interested in finding offense. In my own case, I had a case of psychosis that we've talked about. I ran my car into a tree. I thought it was the end of the world. And rather than the courts looking at it and saying, Chuck, you had a case of psychosis, they said, ooh, the EMTs, when they came to the scene, they filled you up with morphine. Oh, my gosh! Morphine. That's a second cousin

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

to heroin. You must have been on heroin. So they are more inclined...there was a bias to look towards the incrimination rather than for something like hospitalization, and I think these are the issues that we're dealing with. I see the red light is beyond me, so I'll respond to any questions that you may have. [LB794]

SENATOR LATHROP: Thank you. Senator Pirsch. [LB794]

SENATOR PIRSCH: Were there any other points that you'd like to make? I know that you weren't aware that the light system was in effect. So if there's anything else that you'd like to just briefly touch upon that you didn't have a chance,... [LB794]

CHUCK STEPANEK: Thank you for that opportunity, Senator. I think I've covered everything that I had in mind, and at the risk of getting a little bit too manic and going on and on (laugh), I'll just allow for questions from the group. But thank you. [LB794]

SENATOR LATHROP: Thank you. [LB794]

SENATOR PIRSCH: Sure. I appreciate your testimony. With respect to, I guess you're saying a gap between the point in time in which you, without knowing it, suffered from a mental illness or attempting to self-medicate and the actual point in time, which may have occurred much later, where you're actually diagnosed with that, usually these come to light, you know, only...we're talking about the setting where there is a purported criminal act, correct? At that point in time the evaluations are conducted, though, correct, wouldn't that, at that point in time, wouldn't the defense's diagnosing psychiatrist have the opportunity to give the individual a thorough kind of working through, and if there was such a hidden or latent state of being, wouldn't that come out, then, at that point in time? [LB794]

CHUCK STEPANEK: But I think there's the concern that there wouldn't have been an established history leading up to that, or circumstances leading up to that. We're looking at just an incident this case opens up, or this mental case opens up on the same day of the criminal case. So I think therein lies the problem. But the evaluation could take place, but I think a lot of the history has to be looked at, as well. In addition, we look at people who are indigent, or those who haven't had access to the mental health system or don't have insurance and go for years and years and years thinking, this is just the way I am, that I have to live with these voices or whatever the case might be, and not have the opportunity to get appropriate treatment. And it takes daily treatment, self treatment, to be able to live through these issues, and yet to be incriminated for something that may not have been a factor, is just reprehensible. [LB794]

SENATOR PIRSCH: I appreciate your testimony. [LB794]

CHUCK STEPANEK: Thank you. [LB794]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR LATHROP: Are there...Senator Chambers, I can't tell if you're raising your pencil or your hand. Okay. Senator Chambers. [LB794]

SENATOR CHAMBERS: Mr. Stepanek, in Paragraph 4 it doesn't talk just about intoxicating liquor or the kind of pills that this person had taken. One of the early cliches you hear in law school--hard cases make bad law. I've often said on the floor of the Legislature, something will happen that everybody agrees is atrocious. It creates such a stir, because it's out of the ordinary. So somebody says, we need to pass a law against that, but it's hard to pass a law against that, because they don't know precisely what made that happen. They're looking at a result, but they don't know what led up to it for sure. Now this language doesn't just talk about intoxicating liquor, but any mentally debilitating substance. What could some mentally debilitating substances be? Could they be these mind-altering drugs that are given by way of prescription, or that is never considered to be debilitating? [LB794]

CHUCK STEPANEK: That's a good question. [LB794]

SENATOR CHAMBERS: In other words, what does mentally debilitating mean? What would debilitate a person mentally? [LB794]

CHUCK STEPANEK: The first thing that comes to mind are the illegals--glue sniffing, meth, heroin, those types of things. But you raise a good point. If a person were to take a mentally debilitating drug--an overdose of Xanax or something comparable to that--potentially those could be included in that list. [LB794]

SENATOR CHAMBERS: And it could possibly be, under the way this language is given, a prescribed medication that the person voluntarily ingests. Let's say the person knows that too much of it can have a bad effect, but the first time around doesn't even know what it is, because the person may want to commit suicide, and takes this substance. And then to be sure, jumps out a window and lands on top of somebody, and that person dies. The death was caused by the action of this person. The person did not intend to kill that individual. I know this seems a lot different from the case that brought this bill to us, but an individual took a substance which put him a frame of mind, where from what I've heard, everybody agrees he did not know what he was doing or appreciate the nature of it. So whether the act you perform is intended to be benign or malignant, if the outcome is the same, but one person ingested voluntarily and the other didn't, then they're treated differently. Have I lost you yet? [LB794]

CHUCK STEPANEK: No, you have not. [LB794]

SENATOR CHAMBERS: Okay. I should have asked the lawyer. When they say voluntary, if I go back to Section 1--she was just talking about Section 4, so I didn't--they

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

talk about a person knowing. Well, if you're going to say it was involuntary, the person did not know that it was intoxicating. Suppose the person knows that it might have a debilitating effect but doesn't know that that effect would be considered intoxicating. So you voluntarily took it and you became intoxicated. They could say, well, that let's you out because you didn't know it would intoxicate you. I in the same mental condition you are, I take the same medication and I know it will intoxicate me, so I take the same thing you took. But while I'm under the influence of this, you bash Senator Lathrop in the head--not my good friend here; she doesn't need to be picked on--and I did, too. What I'm trying to get at is the difficulty that I see in this, when we're asked to put in law a policy that is going to apply across the board to all these situations. I don't think we know enough, I don't think we've been presented with enough evidence to put something like that into the law. And frankly, if the law is going to hold a person accountable, meaning you can be punished--not that you can be removed from society where you will not hurt yourself or somebody else, that is therapeutic or for healing or protection--but you're going to be punished for what you did, how can you punish somebody for something they didn't know that they had done? [LB794]

CHUCK STEPANEK: Precisely. [LB794]

SENATOR CHAMBERS: So in saying all this to you, I'm hoping that others who come up here might be able to help me through this briar patch that I think we're entering with this legislation. And I didn't ask too many things in the way of a question, but maybe I ought to formulate a question. Under this bill, do you think there are people who could be prevented from offering evidence as to their condition, who ought to be allowed to offer that evidence? [LB794]

CHUCK STEPANEK: Absolutely. Myself--perfect case in point. During the course and time in which they have been looking at my automobile accident and inferring that there was heroin present, not once have I had the opportunity to even bring up the issue of mental illness or psychosis. So perhaps along the lines, someday, during the course of that ongoing litigation--and if I've compromised in the case, I'm sorry about that, Gary Lacey--but somewhere along the line perhaps I'll have the opportunity to do just that. But until now, no. [LB794]

SENATOR CHAMBERS: That's all I have. Thank you. [LB794]

CHUCK STEPANEK: Thank you. [LB794]

SENATOR ASHFORD: Thank you. [LB794]

CHUCK STEPANEK: Thank you. [LB794]

SENATOR ASHFORD: Next opponent? Jim. [LB794]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

JAMES MOWBRAY: Senator Ashford, members of the committee, my name is Jim Mowbray, M-o-w-b-r-a-y, chief counsel with the Nebraska Commission on Public Advocacy, here in opposition. I'm going to basically be talking about primarily Section 1, but my comments basically are the constitutional issues raised by this bill. There will be a couple other members from my office, so we'll talk about especially the insanity, since we did represent Mr. Tilley. I agree--and I heard what Senator McGill said in her opening statement--that the bill does mirror that of Montana. I haven't look at Delaware, but Montana statute is essentially the same as what is proposed. There was a Supreme Court decision in 1996 that upheld the constitutionality of the Montana statute, and the primary issue that was raised was whether it violates due process. Well, that was 1996. It's my position, having done some additional research, that by basically prohibiting the introduction of relevant evidence as a defense, does violate due process. Under more recent cases, specifically the Supreme Court case in 2006, of Holmes v. South Carolina, and then another case that was in the Third Circuit called Wallace v. Price, where they actually talked about the Montana case and why that was very specific...the ruling was very specific to the issue of due process, as to...number one, it was a 5-4 decision, which really doesn't mean that the justices really were too excited about whether it did or didn't apply due process, and in fact, the swing vote was Justice Ginsberg, and what she specifically said was, is that she agreed with the general statement that the law was constitutional, but she said that you can't limit or exclude relevant and reliable exculpatory evidence, because that would run afoul of due process, and that's essentially what this bill is doing. You're creating a rule of evidence that prohibits a defendant from putting on relevant, admissible evidence as to their state of mind. Some of the other states I did look at, speaking of state of mind, do say that intoxication is not a defense, voluntary; however, if it goes to specific intent, it can be used as evidence. And there's nothing in this particular language that allows the issue of intoxication, voluntary intoxication, to be used for specific intent. You mentioned, Senator Lathrop, the jury instructions on intoxication. That's one of the first things they talk about, you know, looking at voluntary intoxication. It's only available where the crime requires the state of mind as specific intent or purpose or deliberation. And we're concerned that basically, by eliminating intoxication as admissible evidence, that you're creating a strict liability crime, because you're not able to put on any evidence dealing with deliberation, premeditation, etcetera. And so that's why, in our opinion, that under the current case laws, that this would violate due process, because it is excluding evidence, and you're taking that question away from the jury, which I think is always a mistakes. Jurors complain, I hear it all the time, that they don't get to hear everything. They hate the rules of evidence; I think we kind of do at some times, depending upon what we're trying to get into evidence. But the juries are concerned about that, and they should hear this, because it wouldn't make any sense, if you're accused of murder and you can't explain what happened or how you got there, other than the gun went off. I'll be happy to answer any questions. [LB794]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR ASHFORD: Thanks, Jim. Yes. [LB794]

SENATOR PIRSCH: Thanks, Jim, for your testimony. So you think in light of the case that involved...was it the 5-4 decision, that upheld it, do you think that can be distinguished, that the issue that was being regarded with respect to whether or not it violated the due process, is a little bit different than that which is implicated in this issue, then? [LB794]

JAMES MOWBRAY: Well, when you read the Montana case, Justice Scalia, who is known as a strict constructionist, gets into this huge argument with himself about what was the common law, whether or not this particular statute...they talk about the fundamental bulwark kind of law at the time. So then he gets into a discussion of since late 19th century, most states did recognize intoxication as a way to negate intent, but whether or not that was fully accepted by the states at the time the 14th Amendment was passed, and he goes through a lot of those. And as I say, when you look at it, Justice Ginsberg is actually the swing vote, but she specifically said that--and the other four judges that were in the dissent agreed with her--that a state can't exclude relevant, reliable exculpatory evidence. And that's what they were saying this case in Pennsylvania that the Third Circuit affirmed in Wallace v. Price, saying that this is really a limited restrictive reading of Chambers, which is the controlling case, Chambers v. Mississippi. So I guess to answer your question, yes. I think that under the Holmes decision, Holmes v. South Carolina, the courts are getting very concerned about rules of evidence restricting the defendant's ability to put on a defense. [LB794]

SENATOR PIRSCH: Thanks. [LB794]

SENATOR ASHFORD: Thanks, Jim. Thank you. Oh, Senator Chambers. [LB794]

SENATOR CHAMBERS: This again goes to the policy issue, the policy setting which we deal with. The Legislature is not bound to enact into law any and everything that may happen not to be unconstitutional. We can determine that something would not make sound policy, even if a bill were enacted into the law that was not unconstitutional. [LB794]

JAMES MOWBRAY: Correct. [LB794]

SENATOR CHAMBERS: Okay. I just wanted that on the record. Thank you. [LB794]

JAMES MOWBRAY: Okay. [LB794]

SENATOR ASHFORD: Thanks, Jim. [LB794]

JAMES MOWBRAY: Thank you. [LB794]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

JERRY SOUCIE: Good afternoon. [LB794]

SENATOR ASHFORD: Good afternoon. [LB794]

JERRY SOUCIE: Senator Ashford, my name is Jerry Soucie. I'm an attorney with the Commission on Public Advocacy. I want to address some concerns that we have regarding Paragraph 4...excuse me, Section 4. I think you need to remember about this bill is it contain two different sections: One is relating to what I would call substantive law, and that is the actual elements of the offense and what constitutes an offense or an affirmative defense. The second aspect relates to the procedural problems, and this is essentially a legislative determination of the relevancy or irrelevancy of evidence that can be presented in connection with a particular case. Now this bill does absolutely nothing to address the situation of prescription medications. If an individual is prescribed prescription medications for some sort of a mental illness or anxiety disorder or something of that nature, and the intent of him taking that medication may be to have some sort of, what you would call debilitating impacts on whatever illness he says--anxiety and so forth--drugs such as Prozac, which you take to reduce anxiety and so forth, can have adverse effects that cause you to go into either a suicidal or a homicidal state. It's in the literature. And if that is the case, then the fact that you took Prozac, you had an adverse reaction, would be prohibited under the evidence portion of this bill. The second bill that this bill doesn't do, is you take one drug which has, even if it's illegal, may have known effects; for example, marijuana, all right? You may have taken marijuana in the past, but you go to a party and somebody gives you a marijuana...a cigarette that happens to be what is called "wet." "Wet" is a use of putting PCP or phencyclidine or a drug. Wet is a very nasty, nasty chemical. The effect of the PCP will be different than the effect of marijuana. Marijuana, you'll get high, you'll sit down, you might drive down to the store and get a bag of Cheetos. You have PCP, you start seeing things crawling on the wall, you become aggressive and extremely dangerous. But I think, Senator Pirsch, I think you hit something on...you hit it on the head. It's something that I didn't realize till I came in here, is that what this whole bill is about is a case in which an individual was charged with first-degree premeditated murder. And in that particular case, both the state's experts and the defense experts agreed, I thought, with Tilley that this was either manslaughter or it was not guilty by reason of insanity. And Mr. Kortus will discuss that. But when you mentioned the situation regarding DWI, I now...I think that there's a problem you need to recognize as a policy decision. In Lancaster County, DWIs, which is a motor vehicle homicide, which requires the state to prove intoxication when somebody died in that accident, that's charged as a manslaughter in Lancaster County. They use intoxication as an unlawful offense, or they're driving too fast, or they made a left turn, and they make it a 1-20, rather than a 0-5. Assume that the prosecutor charges...I see my time is up. [LB794]

SENATOR ASHFORD: Well, just finish up, Jerry, but as quickly as possible. [LB794]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

JERRY SOUCIE: Assume the prosecutor charges somebody who's driving down the road drunk, makes a left-hand turn and drives into a family of four, killing them all. If he decides to charge first-degree, premeditated murder under this bill, because we want to show that he was voluntarily intoxicated and it's some sort of different crime, we couldn't present evidence that he was intoxicated. The evidence would be that he made a left-hand turn and killed these six people, he did it deliberately, intentionally, and there would be no evidence to the jury that this guy was intoxicated and didn't have the capacity to deliberate, premeditate, or plan this killing. [LB794]

SENATOR ASHFORD: Thanks, Jerry. [LB794]

JERRY SOUCIE: Are there any questions? [LB794]

SENATOR ASHFORD: Any questions? Thanks, Jerry, very much. Looks we have one more opponent; is that correct? [LB794]

ROBERT KORTUS: Opponent, thank you. My name is Rob Kortus, with the Commission on Public Advocacy, and I represented Mr. Shane Tilley at trial in Lancaster County. And the first thing I want to point out to you is that this was not a voluntary intoxication case, ever. Mr. Tilley was right out of high school less than one year. He was hospitalized in the a Lincoln hospital for psychiatric conditions, or some conditions that weren't diagnosed, and he was receiving psychotic medication for those that were. Less than a year later we had the...we come to an event, right about Super Bowl Sunday, close to where we are now. On a Friday evening he takes 32 Coricidin pills--perfectly legal to take. He takes those on a Friday evening. Saturday he calls a friend--he needs help. He's worried about the conditions that he's having, and the conditions are bizarre, they're scary, they're devastating. His eyes, his friends see, are completely different. Pupils don't be recognized, or no color in his eyes. He's saying things that are completely incoherent and never consistent with the hallucinations, both visual and auditory, he's experiencing. His friends know there's something wrong. Friends come and gather--he's at his house. They come gather; they try to help him out by giving him Everclear, a very high potent alcohol, which continues to dehydrate his body, as if the drugs he had taken weren't doing that already. Sunday comes around and he's now acting violently. He's punching holes in the walls. His friends start to leave. One of his friends gets killed--stabbed 22 times. Mr. Tilley is still acting psychotic, just like he was. He has slashed his throat, he has stabbed himself in the chest, he has tried to cut off his penis. When the cops come, he won't answer the door. They Tazer him, and they Tazer him again, because he doesn't respond to the Tazer, because he is so psychotic. They go to the hospital, because he needs treatment for those injuries and needs treatment for his psychosis. They can't Mirandize him, they can't talk to him, and they can't talk to him for weeks and weeks. He ends up in the Regional Center because he's too dangerous for himself to be in the jail. I come to represent him; he doesn't know

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

who I am. I become part of his delusional system. This man is psychotic. Now we get to the point at trial where we have to figure out what happened, and both psychiatrists agree that it had nothing to do...or that it was not the substance-induced psychotic, that to get to the decision that it was psychotic or that he was delirious, they have to rule out some things, and they had to rule out that it was either withdrawal from the intoxication or that it was under the influence of intoxication. So we have something with a preexisting condition, and we have somebody with a condition that exists independent of his intoxication. And that's the person that committed the killing of Mr. Lubben. But that's a very different person. Now go back to that trial, and part of the reason for the bill was to get clarity on a situation that's already clear--that you can't have voluntary intoxication anyhow. Now imagine the difficulties a prosecutor would have if they had to prosecute that case, with all that bizarre behavior, and not say anything about the pills. It wouldn't make their job any easier than mine. This bill creates more problems than it needs. It's unnecessary. We already know what the law is. I couldn't present involuntary intoxication if I wanted to, a defense for that, and I didn't, because it wasn't an involuntary intoxication case. Thank you. [LB794]

SENATOR ASHFORD: Thanks, Robert. Any questions of Robert? Seeing none, thank you very much. Do we have any neutral testimony? [LB794]

MARVIN HAVLAT: Good afternoon, Chairman Ashford. My name is Marvin Havlat. I live at 1828 Sunrise Road, Milford, Nebraska. It's a rural farm. [LB794]

SENATOR ASHFORD: Can you spell your name for us? [LB794]

MARVIN HAVLAT: Pardon? [LB794]

SENATOR ASHFORD: Can you spell your name, your last name for us? [LB794]

MARVIN HAVLAT: H-a-v-l-a-t. I just want to give you a little bit of an actual experience of something happened to me. In 1987 I was working undercover for the Nebraska State Patrol on the Denise Stankowski murder. And I was with this house on about the 29th and Y area here in Lincoln, and it was the middle of the afternoon and I was, you know, I had a Coke. I was sitting at the party, just milling with a full house of people. And all of a sudden this guy brings in this quart bag. It looked like...it was (inaudible), large sugar crystals. I had never seen it before. But it wasn't very long and I was waking up a bedroom, 24 hours later. I had no idea what happened in that time, except for what someone told me, that what had happened. I was...someone had taken a pinch of those crystals and put it in my Coke, and apparently I was...I went through strange behavior. I don't remember any of it for 24 hours, except for what I was told, what I did. I was out in front of the house surrounded by Lincoln police, trying to open this trunk with a coat hanger. So somehow this lady, young lady, befriended me, got me back into the house, and made me lay down in the bedroom where I woke up. But I can assure you...I think

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

this was what you call crystal meth, but I had no recognition of what I did in that 24 hours. And I have a degree in psychology from Doane College, Crete, Nebraska, so you know, I'm not psychotic or anything, I don't believe. Thank you. [LB794]

SENATOR ASHFORD: Thanks, Marvin. Senator McGill. [LB794]

SENATOR MCGILL: Members of the committee, I'd like to thank everyone here for testifying. I know this is a very interesting issue, and the case that brought this bill about was a very unique case. And I want to let everyone know that after hearing some of the testimony, I'd love to work with some of the issues in the bill and see what we can do. And this is something where we're trying to ensure that justice is served in our system. And I firmly believe that in Lubben's case, this just wasn't the case--that justice wasn't served. Tilley is in the Regional Center now, but analysis now shows that he didn't have a preexisting condition, that it is just an addiction problem that he had. He chose to take those 32 pills. His defense attorney painted it very pretty on this case, but as the testimony in the case showed, he chose to take those pills to get high. Someone lost their life in this case. He was stabbed 20 times, and as of next year, because he doesn't have a mental illness, he could be released from the Regional Center, after about only two years there. I don't think that that's justice. We're not the only state looking to do something like this--32 other states have laws on the books about this. Some states have guilty by insanity, where you go to the Regional Center, you serve out whatever time you need there, and then if you're ready to be released, you still serve out the rest of a longer sentence in the correctional system. Now there are various approaches that different states take to this. This is the first one we chose to look at here, working with the Attorney General's Office. And like I said, it's something I do intend to continue to pursue, to find justice for families in the future that are facing a case like the Lubbens. [LB794]

SENATOR ASHFORD: Thank you, Senator McGill. And that concludes the hearing on LB794. Okay, let's keep going. LB736, I believe, is next. Is that correct? Senator Fulton. Is Senator Fulton here or his surrogate? LB808, no just kidding, (laugh) just kidding. We'll give Senator Fulton a few minutes to get here. How many are interested in LB736? How many are here to talk about LB736? Okay. Good afternoon. You're here, we almost skipped you, Senator Fulton. I'm just kidding you. All right, let's proceed with...that's okay, you can. Let's proceed with Senator Fulton and LB736. [LB794 LB736]

SENATOR FULTON: Thank you, Chairman Ashford. Thank you to the Judiciary Committee for allowing me to introduce this bill to you today. My name is Tony Fulton, T-o-n-y F-u-l-t-o-n. I represent Legislative District 29. LB736, this bill represents a paradigm shift in way in which our state penalizes the crime of driving under the influence. Under this proposal, the current DUI sentencing structure of license revocation of impoundment would be replaced by shortened period of license

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

revocation, coupled with a requirement that an ignition interlock device be installed. For example, the current 6-month license revocation period for a first conviction would be lessened to 60-days and followed by a mandatory 120-day ignition interlock period. For a second conviction or for a first conviction with a blood alcohol content level of .15 or above the current 1-year license revocation period would be lessened to 120 days and followed by a mandatory 245-day ignition interlock period. Requiring ignition interlock is critical to achieving the Legislature's goals of protecting public safety, reducing crime, and rehabilitating offenders. National Highway Transportation Safety Administration studies indicate that the use of ignition interlocks cut DUI recidivism at least in half when compared with offenders without interlocks. Such a dramatic decrease in recidivism stands to reason when one considers that modern ignition interlocks are calibrated to a zero tolerance standard and thus prevent an impaired driver from even beginning what could be a fatal journey, thereby effectively reducing the causal element of accidents involving intoxicated drivers. Not only are ignition interlocks effective in reducing recidivism and accident rates, but the deterrent nature of the device, together with the lessened license revocation period allows offenders to reintegrate into their lives, maintain a living, and improve the efficacy of alcohol treatment and counselling concluding the continued incidence of driving under the influence in our state ought not be tolerated when we, through the legislative process, have the opportunity to better recognize our responsibility to the citizens of this state. It seems evident that using ignition interlocks are effective and that DUI offenders are better reintegrated into their livelihoods, tragedies are averted, and lives are saved. I hope the committee will look favorably upon this proposal. And I look forward to any questions that you may have. [LB736]

SENATOR ASHFORD: Thank you, Senator Fulton. Any questions of Senator...yes, Senator Chambers. [LB736]

SENATOR CHAMBERS: Senator Fulton, until I saw the nature of your bill, I was going to ask you would you rather be called Cardinal Ximinex or Cardinal Torquemada? (Laugh) But this is a little different. If...let me ask another question. Which do you feel is better in most instances--prevention or cure? [LB736]

SENATOR FULTON: Are you asking as a general statement or... [LB736]

SENATOR CHAMBERS: General, um-hum. [LB736]

SENATOR FULTON: I think that they're...I think they're... [LB736]

SENATOR CHAMBERS: Well, prevent...let's say preventing a crime or catching a criminal, which would be more important? [LB736]

SENATOR FULTON: It would preferable, I think, to prevent the crime. [LB736]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR CHAMBERS: And I thought you would, and so do I. [LB736]

SENATOR FULTON: Um-hum. [LB736]

SENATOR CHAMBERS: Why don't we require any vehicles driving by the residents of Nebraska to have an ignition interlock and prevent anybody from driving a vehicle if they have alcohol in their system? [LB736]

SENATOR FULTON: I could give you the...could answer that in two levels, I guess. There's a pragmatic... [LB736]

SENATOR CHAMBERS: Do. [LB736]

SENATOR FULTON: ...as well as a philosophical. Philosophically, that's certainly...if our goal is simply to reduce drunk driving, then utilizing ignition interlocks on all vehicles, philosophical, would be a way to go. [LB736]

SENATOR CHAMBERS: Um-hum. [LB736]

SENATOR FULTON: ...at least ostensibly it would seem that way. Pragmatically, I don't believe that that's realistic, nor do I think it's realistic politically to move forward to require every driver in Nebraska operating a motor vehicle. [LB736]

SENATOR CHAMBERS: But it could be done practically speaking, because it's practical to fit every car with an ignition interlock, isn't it? [LB736]

SENATOR FULTON: I would disagree to say that it would be practical to do. I think it would be possible to do. But whether or not it's pragmatically able to be...practically able to be accomplished, I think I would have to disagree with that. [LB736]

SENATOR CHAMBERS: Why could it not be accomplished? [LB736]

SENATOR FULTON: Well, first, there would have to be a bill to that effect. [LB736]

SENATOR CHAMBERS: Yes. [LB736]

SENATOR FULTON: And it would have to pass muster of you, first, and then those of us out on the floor, as the Legislature as a whole, and then the Governor. And I don't believe that politically that is realistic. [LB736]

SENATOR CHAMBERS: So now you've jumped from the practical and pragmatic to the political. [LB736]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR FULTON: Ah, I consider them both. [LB736]

SENATOR CHAMBERS: But realistically vehicles could be fitted, every vehicle could be fitted with an ignition interlock. [LB736]

SENATOR FULTON: That's true, it's possible. [LB736]

SENATOR CHAMBERS: But because there might be political opposition to that, you think nobody would undertake to have that done legislatively? [LB736]

SENATOR FULTON: That wouldn't be the only reason, but that would be one...the most approximate reason to what we are trying to...at least what I am trying to accomplish. [LB736]

SENATOR CHAMBERS: So all of our bills that relate to DUI, can come with a caveat or a little temporization that we're really not opposed to all DUIs. We're opposed only when somebody gets caught by the law. That's the only DUI we're opposed to, realistically speaking, isn't it? [LB736]

SENATOR FULTON: In the pragmatic sense that... [LB736]

SENATOR CHAMBERS: Yes. [LB736]

SENATOR FULTON: ...I've been operating, I'd grant that, yes. [LB736]

SENATOR CHAMBERS: Okay. That's all I have. Thank you. [LB736]

SENATOR ASHFORD: I think Senator Chambers is absolutely right. I think we should do something similar to what he's talking about. The cost of DUIs, the cost of what happens when someone drives while intoxicated far exceeds, and I'm not lecturing you, but I mean this is...I remember years ago having this conversation. And I think he's right on point. I think we should do that. I think we should require all vehicles sold in Nebraska to have that device, because we would make an impact. And I think your logic is sound, up to the point where you tell me that there's a political impediment. And there's a political impediment to everything. But I absolutely think we should do that. And I would support an amendment today, in Executive Session, to require that. You know, I...what is the cost of an ignition interlock? [LB736]

SENATOR FULTON: There is...and this isn't...and there are different companies. [LB736]

SENATOR ASHFORD: I just...I don't even know. I mean, is it like 200... [LB736]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR FULTON: About 70...there's an installation fee, as I understand it, typically around \$70, and then there is a repeating fee which comes out to be about \$2.30 a day, or about \$70 per month, give or take, as I understand it. [LB736]

SENATOR ASHFORD: Well, I'm for that. I think that's a good...anyway, enough said, I guess, Senator Fulton. But I think we ought to do that. Senator Lathrop. [LB736]

SENATOR LATHROP: I do have a couple of questions... [LB736]

SENATOR ASHFORD: Okay. [LB736]

SENATOR LATHROP: ...about his...and that is, I look at the fiscal note, and it looks like...the bill says that anybody that can afford the device has to pay for it, people that can't will have one, like a public defender, provided to them. That's the substance of the bill? [LB736]

SENATOR FULTON: Yeah, and are you looking at the green copy or are you looking at the fiscal note? [LB736]

SENATOR LATHROP: I'm looking at the...well, I read the green copy, and now I'm looking at the fiscal note,... [LB736]

SENATOR FULTON: Okay. [LB736]

SENATOR LATHROP: ...and I see two things about it. One is that by dropping our sentence, our DWI sentences below some threshold, we're in danger of losing a good deal of highway money. [LB736]

SENATOR FULTON: Yeah. So there are two points on the fiscal...your first was, who's paying? [LB736]

SENATOR LATHROP: Who pays for the indigents to have one of these devices? [LB736]

SENATOR FULTON: Um-hum, right. [LB736]

SENATOR LATHROP: Because that looks like...I mean, I look at that number and I'm thinking...I've spent a little time in the county courts and I've seen an awful lot of those people come in with public defenders. And all of them are going to walk out with a state paid for device. [LB736]

SENATOR FULTON: Um-hum. My intention, and I would like to point out in the green

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

copy of the bill, this has been brought to my attention, and I think that the green copy could use some amendatory language to effectuate what my intention is here. My intention would be that offenders would cover this cost. So nonindigent offenders would effectively pay for those indigent offenders. That's what my intention would be. Other states have addressed this issue in such a way and... [LB736]

SENATOR LATHROP: So the entire cost of the program is paid for by the people that can afford it... [LB736]

SENATOR FULTON: Offenders who can afford it. [LB736]

SENATOR LATHROP: ...that have been convicted, right? [LB736]

SENATOR FULTON: Right. [LB736]

SENATOR LATHROP: And as for the state losing its roads money, have you gotten to the bottom of that? [LB736]

SENATOR FULTON: Yeah, there will be... [LB736]

SENATOR LATHROP: ...because it looks like it's not a certainty in the... [LB736]

SENATOR FULTON: Right. There will be others to follow who will testify with, I think, more authority than me. But what I understand, Senator, is that there is a likelihood that there will be amendatory language at the federal level which will cause this concern to disappear. [LB736]

SENATOR FULTON: Okay. [LB736]

SENATOR FULTON: In the event that that's not the case, I've actually prepared language for this. In the event that this does not occur, it is important, of this...this 3 percent that we're talking about or the concern, the 3 percent concern would not be lost to the state, it would simply be transferred to the Highway Safety Fund. [LB736]

SENATOR FULTON: Okay. [LB736]

SENATOR FULTON: So there will be others to address that more consistently or coherently, perhaps, than I did. [LB736]

SENATOR LATHROP: Very good. Senator Pedersen. [LB736]

SENATOR PEDERSEN: Thank you, Senator Lathrop. You are aware, Senator, that we have this same bill in committee already and it's pending, which was a bill I introduced

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

last year. It's somewhat different than yours. And we can't do anything with it until the feds make a move and change their policies. [LB736]

SENATOR FULTON: Yep. And we...as to when an answer will be forthcoming, I don't know for certain. But I do understand that that's anticipated that we'll have an answer at the federal level. [LB736]

SENATOR PEDERSEN: We've been waiting for three years. [LB736]

SENATOR LATHROP: Yeah, maybe I can ask you this question and either one of you can answer. But should we put this on ice until your...I mean, hold it until the feds do something and clarify the landscape? [LB736]

SENATOR FULTON: No. [LB736]

SENATOR LATHROP: You think it can go out notwithstanding the uncertainty? [LB736]

SENATOR FULTON: I think so. I think that...I'd like to be prepared. And my intention would be to have something move forward with the cooperation of the committee, of course, something to move forward. I would hate to have, how do I say this, I would hate to have federal decision-making take precedent over this policy decision on the part of state. I look at this as there are lives...if we implement this, there will be lives that will be saved that would not otherwise have been saved. And if we're waiting for someone in Washington to make a decision, we're holding the ball, so I think we should act. [LB736]

SENATOR LATHROP: Okay [LB736]

SENATOR ASHFORD: It would be interesting, though, if I could just...it would be interesting to look at the data to determine how many motor vehicle homicide cases involve someone who is on probation or has committed some kind of an offense. It would be interesting. I would guess probably it would be a small percentage. And that the people who are committing...who are involved are people who are not in some sort of probation or they are someone that's just drinking and if you had ignition interlocks they wouldn't be driving. [LB736]

SENATOR FULTON: If that would be informative to the committee, we could probably find out. [LB736]

SENATOR ASHFORD: No, that's all right. Thanks, Tony, I appreciate it. [LB736]

SENATOR FULTON: Thank you. [LB736]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR ASHFORD: Yeah. Proponents? Yes. Welcome again. [LB736]

DEBRA COFFEY: (Exhibit 2) Thank you. Good afternoon. Thank you, Mr. Chairman and honorable committee members. My name is Debra Coffey, C-o-f-f-e-y. I'm director of Judicial Services at Smart Start, Incorporated, based in Irving, Texas. I'm here to testify in support of LB736. We would like to commend Senator Fulton for his support of legislation to reduce drunk driving in Nebraska and to save lives. We appreciate his leadership, his passion in bringing this issue before this Legislature and this committee. If none of you have seen what interlock looks like, just very briefly, it looks like a cell phone from the nineties. It's a very robust device. It's wired into the ignition system of the car, requires the person to take a test before the vehicle will start. The technology has advanced to require alcohol-specific technology, which means that it is only specific to alcohol. And there's advancements in the technology that can also require a photo to be taken of the person giving the test, therefore answering the questions that a lot of our probation officers and our court officials have as to how do I know that it was actually Debra that took the test. We respectfully would like to comment on some technical concerns on LB736. First off, there is language in the bill that should tie the installation of the interlock device to any vehicle operated by the person required to install the device, not the vehicle ownership. The reasoning behind that is that experience in other states have shown that those states have had to go back quickly and amend that requirement. The interlock offenders quickly learn that they can transfer the ownership of the vehicle to a spouse or another relative and avoid the interlock requirement entirely. Secondly, we encourage the committee to change the requirement of interlock to 6 months for first offenders with that 30-day hard suspension, high BAC offenders to have a 60 days hard suspension with 12 months of the interlock, and second offenders to have 2 years of interlock with a 60-day suspension. The reasoning is that MADD's model legislation supports and recommends interlock for these terms. The period of interlock is already linked to research that shows it's an effective tool in reducing DWI recidivism. Thirdly, to require that there is interlock on first offenders with high BAC and subsequent offenders. The current bill language does not require the interlock until the third offense. The reasoning behind that is that research shows that first offenders are not really first offenders, they're just first caught, that high BAC offenders are 386 times more likely to be involved in a traffic fatality than other drunk drivers, and the high BAC offender is the most deadly drunk driver out there on the road. High BAC is defined as .015, 0.15, excuse me. Fourth, that the term of interlock should be for the term of probation, not in days. The reasoning behind that is that in the event that the court extends the term of probation, the interlock stays on for the entire term of probation. And lastly, to do away with the language of immobilization or impounding and just require the ignition interlock. Many times in some jurisdictions it's an unfunded requirement to place on jurisdictions to have to tow, to have to store and manage those impounded vehicles. And it's just an under utilized penalty. It's been a privilege and an honor to appear before this committee. And I'm happy to answer any questions that you have concerning programs and their application. [LB736]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR ASHFORD: Any questions of Debra? [LB736]

DEBRA COFFEY: Yes, sir. [LB736]

SENATOR ASHFORD: Senator Chambers. [LB736]

SENATOR CHAMBERS: If this device can be taken off...can it be removed from a vehicle without the authorities being aware of it? [LB736]

DEBRA COFFEY: We hope that your...and thank you, sir, for that question, it's excellent and I'm glad I have the opportunity to respond to it. We hope that either in your legislation or in your administrative requirement that you require the interlock providers to not remove without court authority. [LB736]

SENATOR CHAMBERS: But the vehicle owner could not remove it? [LB736]

DEBRA COFFEY: They could go in and jerk it out,... [LB736]

SENATOR CHAMBERS: Um-hum. [LB736]

DEBRA COFFEY: ...but immediately when that would be the case, the interlock providers have systems set up for reporting data. And the interlock provider would in turn report to the authority that the device has been tampered with or removed. [LB736]

SENATOR CHAMBERS: Okay, that answered that part of the question. What company or are there several companies that produce there interlocks, if you know? [LB736]

DEBRA COFFEY: Yes, sir, I do. There are about seven or eight actual manufacturers of interlock devices. And currently in the state of Nebraska I believe that there are five companies that are certified to currently do business in Nebraska. [LB736]

SENATOR CHAMBERS: Is there one considered to be the flagship manufacturer or the Cadillac of interlocks or are they all about the same? [LB736]

DEBRA COFFEY: Well, I would say that the technology is all pretty much the same and that how the companies market that technology or how, maybe, they report the information could be a little bit different. [LB736]

SENATOR CHAMBERS: Okay. Thank you, that's all that I have. [LB736]

DEBRA COFFEY: Thank you, sir. [LB736]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR ASHFORD: Senator Pirsch. [LB736]

SENATOR PIRSCH: Just quickly. Who certifies this? Is it the Nebraska Department of Highway Safety or it the courts? [LB736]

DEBRA COFFEY: The Department of Motor Vehicles here. And Nebraska sets those standards and certifies the devices for use. [LB736]

SENATOR PIRSCH: Thank you. [LB736]

SENATOR ASHFORD: The information...you've given us some information on states. How many states again, and you probably said it and I wasn't listening. How many states have this legislation or similar legislation? Do you know? [LB736]

DEBRA COFFEY: Forty...I think it's approximately 43 states have some... [LB736]

SENATOR ASHFORD: It's almost all. [LB736]

DEBRA COFFEY: ...for of interlock requirement. [LB736]

SENATOR ASHFORD: Okay, okay. I know Senator Pedersen has a bill, too, don't you, on this issue. [LB736]

SENATOR PEDERSEN: Yes. [LB736]

SENATOR ASHFORD: Okay, thanks, Debra. [LB736]

DEBRA COFFEY: Thank you. [LB736]

SENATOR ASHFORD: Thanks for coming up here from Texas. [LB736]

DEBRA COFFEY: Thank you, appreciate it. [LB736]

SENATOR ASHFORD: Yes, sir. [LB736]

RUSSELL ZEEB: Good afternoon, Senator. My name is Russell L. Zeeb. I'm a lieutenant with the Sarpy County Sheriff's Department. Last week I started my 35th year and have been doing this job for a long time. I'd like to start my testimony by quoting Senator McGill with her testimony on LB794. And her testimony was that she wants to hold criminals accountable for their actions. That's exactly what I want to do with the interlock device. I think that's a huge thing. Several months ago, I had the honor of being chosen to attend a Mothers Against Drunk Drivers conference and simply fell in love with the interlock device. I think it's a great thing. I applaud Senator Chambers and

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

Senator Ashford for your thoughts and I support you wholeheartedly on that. What I'd like to speak to you about is a little bit of what's been spoken here today already with some of the repeat offenders. And I speak from facts of actual cases. Last month, and these are all recent cases, last month we arrested a 27-year-old man for his sixth time for DWI. He was currently under a 15-year suspension. He had four, or I'm sorry, three arrests for driving under suspension. He was currently a 15-year suspension. He was involved in a crash that injured several people. And his blood alcohol content was over six times the legal limit at the time of the collision. Interlock device on that person's vehicle would have prevented that crash, would have prevented him from driving down the road. As you can tell from my testimony, I've been around a long time. Now I get into generations of arresting people. Twenty-five years ago, I arrested a gentlemen two or three times for DWI, now we're arresting his son. Last month, his son got his driving privileges back on December 19 from a DWI conviction in Sarpy County. on December 22, three days later, my department arrested him again for driving while intoxicated. These things are just a continual battle, and it's a battle that the interlock will help us win. And I applaud your efforts and I applaud Senator Fulton and Mothers Against Drunk Drivers' efforts on this. And I'll answer any questions that I can. [LB736]

SENATOR ASHFORD: Thank you, Lieutenant. Yes, Senator Pirsch. [LB736]

SENATOR PIRSCH: Just a question. I don't know if you'd be the appropriate person to kind of comment on this or maybe a probation officer would be better. But as it...it gets tougher and tougher to allude this type of devices with the photo feature now that's in them and records, say, you were to have a high breath and the car wouldn't start, records that as well, I understand. So I've had some experience with them, they seem to be...is...have you...is there a methodology in place that then if a person who is placed on probation is thinking, you know, maybe the better thing to do is to get to a...us a vehicle that isn't covered by an interlock. What is the basic methodology, do you know, employed by the probation offices to make sure that doesn't happen? [LB736]

RUSSELL ZEEB: Well, I guess, the court order would indicate that they have to drive a vehicle with that. Of course, we can't...if someone decides they're going to drive somebody else's vehicle that doesn't have that, that's a chance that individual offender is going to take. I hope that we're there to catch them without that device on. I can tell you, maybe, answering the first part of your question, with this technology and everything that is demonstrated on these machines it's just unbelievable. One of our judges was so impressed with it, sentenced someone to it the next day after viewing it because of the technology and the fail-safe of not being able to have someone else give a breath sample with the picture identification. With the computer download and everything else that it is, it's just a huge, huge technological advance and I applaud the efforts 100 percent. [LB736]

SENATOR PIRSCH: Well, you bet, I'm very impressed by the...how the technology has

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

evolved over the years. [LB736]

RUSSELL ZEEB: Thank you, Senator. And maybe just to look, if anybody does want to see it, I know the Lancaster County Sheriffs Department is going to demonstrate this tomorrow morning at 8:30 a.m., so it's very worthwhile seeing and to be able to see the product. And, Senator Pedersen, if I can help on your bill, I'd be honored to. [LB736]

SENATOR ASHFORD: Lieutenant, thanks for all your service. [LB736]

RUSSELL ZEEB: Thank you, sir. [LB736]

SENATOR CHAMBERS: Excuse me, Lieutenant. [LB736]

SENATOR ASHFORD: Wait. [LB736]

SENATOR CHAMBERS: Are you willing to help me in any way you can? (Laughter) [LB736]

RUSSELL ZEEB: Senator Chambers, you and I had a discussion at a grocery store a month or so ago, and you know that I would always help you, if I could. And I applaud your long service and I applaud your efforts on this bill especially. [LB736]

SENATOR CHAMBERS: I just wondered if you remembered me. Thanks a lot. (Laughter) [LB736]

RUSSELL ZEEB: Thank you, sir. [LB736]

SENATOR CHAMBERS: Okay. [LB736]

RUSSELL ZEEB: Bakers Grocery Store. [LB736]

SENATOR ASHFORD: Lieutenant, it sounds like your service, time of service is about the same time, isn't it, about the same number of years. [LB736]

RUSSELL ZEEB: I think so, I think so. And the one thing I will say is it's been an honor. We have not agreed on everything. I think that's an easy way to put it, Senator, but we still maintain a professional relationship and I applaud that. [LB736]

SENATOR ASHFORD: Well, Lieutenant, it's a breath of fresh air to have you here. Thanks. [LB736]

RUSSELL ZEEB: Thank you. [LB736]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR ASHFORD: How many proponents do we have on this bill? Okay. If we could try...sit down. Don't...I'm not...don't get me wrong. But if we could...so we don't repeat each other, let's try to, you know, if we have new information, that will be great. Because I think we kind of get it, but go ahead. [LB736]

NICHOLAS ELLINGER: (Exhibit 3) Hello. My name is Nicholas Ellinger, N-i-c-h-o-l-a-s, Ellinger E-l-l-i-n-g-e-r and I'm vice president of Strategic Outreach for Mothers Against Drunk Driving. As...Senator Ashford and members of the committee, thank you for having me here today to testify. I'm going to skip over talking about the effectiveness and the fact that we do support this bill and talk about four things: the nature of the first offender, the results in the states that have tried this, talk a little bit about the federal issues that were alluded to, and then also talk about MADD's campaign to eliminate drunk driving, and some of the advanced technology that's coming down the pipe that will have broader uses. The first thing that I wanted to talk about today is that, as was mentioned earlier, there are 45 states that have ignition interlock laws. They are very widely used. But there are only four states that mandate it for all offenders; Nebraska would be the fifth. And we believe this is a very important step forward, because the first offender that we have today is not the first offender that we had back in 1980. Back in 1980, a drunk driver could be someone who made one simple mistake, didn't understand the consequences of their actions. Now throughout society we know the consequences of drunk driving. And the first offender that we have today is likely to repeat their actions unless stopped in some way. About 82 percent of first offenders have some sort of underlying substance abuse problem that needs to be addressed; 50 to 75 percent of them will drive on that suspended license, unless other action is taken. And the average first offender has driven drunk 87 times before they are convicted. So this is not a social drinker, this is someone who has committed the crime before and will commit the crime again, unless stopped. The results from the states that have done this for all offenders have been very positive. The first one to do it was New Mexico in 2005. They found, as a result of that law, in the first year a 12 percent reduction in their drunk driving fatalities. And while the numbers are not finalized for 2007, it appears that they will have almost a drop of 25 percent since they began. And I see the yellow light is on, so let me go to the federal issues. The federal issues are Section 164 of the Highway Bill, has what's called a soft sanction, for if you have a shorter than a one year hard suspension period, money is transferred out of the general highway revenues to a special alcohol-impaired countermeasures fund. There are two things that I would like to illustrate on that. First, the federal law should be changed. Both the House and the Senate have agreed to a change of this back in 2005. And it being the federal government and it being a good idea and they have already agreed to it, it does take only three years for that sort of thing to happen. It is having some progress in committee, but I agree with the Senator's previous remarks that we don't want to wait for progress in order for that to happen. The second, I want to say that we support the bill as is, but would also support a trap door provision, if that proves politically necessary. I did want to talk about the nature of the sanction. I said it was a soft

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

sanction, and what that means is...you can ask me, if you'd like. (Laugh) [LB736]

SENATOR PEDERSEN: Thank you for respecting our lights. Is there any questions from the committee of Mr. Ellinger? Senator Schimek. [LB736]

SENATOR SCHIMEK: Yes, I would like for him to continue his thought, please. [LB736]

NICHOLAS ELLINGER: And I'm sorry for going long. What I mean by a soft sanction is money is taken out of the General Fund and transferred to alcohol-impaired countermeasures. But there is a loophole in that restriction that allows that money to be allocated for what's called hazard elimination. So they take money out of the construction budget and it can go either to alcohol-impairment countermeasures, or hazard elimination. Now hazard elimination is broadly construed enough that it can be fixing potholes, installing rumble strips, basically, the same types of activities that were done before. In fact, of the states that have had monies transferred in the past, 26 of the 32 states that have had money transferred in the past have used most of it for hazard elimination. And in fact, the General Accountability Office of the federal government said that all it is, is it's an accounting trick. It's taking it out of pocket A and putting it into pocket B, and it can be spent for the same purposes. [LB736]

SENATOR SCHIMEK: I would like to make a comment, but I'll refrain. (Laugh) [LB736]

SENATOR PEDERSEN: Seeing any other questions? Thank you. [LB736]

SENATOR CHAMBERS: I was just going to say that while we're talking about the repetitiveness of drunken driving, it seems a little tricky and disingenuous for the government, while dealing in this area, to pretend that they're imposing a sanction, when in reality they are not. The same thing can be done with the money when the sanction is imposed as was being done before. So why then is there so much consternation and the community trying to prevent drunken driving, when judges and prosecutors will find ways to say that a drunk driving offense ceases to exist if a person finishes, as in Sarpy County, a diversion program? All of that seems disingenuous to me. It's a shell game. It's misleading the public. And the thing very ironic about the case I'm mentioning, it was just in the paper today, I think, it involves a cop. So here's a cop who was fired, as he should have been, for driving drunk with three times the level of legal alcohol content in his blood. If he finishes the diversion program, there is no record of a violation, it doesn't exist. The prosecutor agrees. The judge agrees. But if some shabby, down in the heels person comes up, then by God, we want that person who drove drunk to pay, and we want the record to follow the person. So I find a lot of things that I hear by groups such as yours, I'm not saying yours, but such as yours to turn a blind eye and look the other way, when society is doing, in this area, what it does in others. If you're a person of means, if you have a certain social status, if you're a cop of an ex-cop, where there should be a higher standard met, they relax the standard, they

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

forgive you. If drunk driving is drunk driving is drunk driving, I'm not asking you to justify anything, can you understand at least why I'm saying what I'm saying? [LB736]

NICHOLAS ELLINGER: Absolutely. And I appreciate the opportunity to talk about that. I should say before...the hat that I wore previously, I was in charge of MADD's state Legislative Affairs for four and a half years. And one of the most difficult issues to deal with in terms of effective deterrents and prevention of drunk driving are these diversion programs. Because you have a diversion program and you say you are going to have a certain level of penalty, and then that is pulled out and sometimes does not impact the record, it doesn't benefit the system, it doesn't benefit society, and it doesn't benefit the offender. In fact, a study in the state of Maryland, they looked at people who had received diversion programs, and looked at their lifetimes, basically, did the person die earlier. Diversion versus nondiversion, and in that state you can have multiple diversions. And they found unanimously down the line the more diversions you had, the less likely you were going to survive for one to five and ten years. So the diversion program also does no benefit for the offender. And so I totally agree with you. When we're looking at a problem where repeat offenders constitute one-third of the drunk driving problem, part of MADD's campaign to eliminate drunk driving, the first step is getting the technology on for all convicted drunk drivers. And then as you and Senator Ashford were talking about, somewhere down the road put technology on all vehicles. The reason that MADD doesn't...and if you don't mind me answering an unasked question, the reason that MADD doesn't support putting current technology ignition interlocks on all vehicles as it stands is that right now they are intrusive to a sober driver. You would have to do it every time. And there's what is called a running retest. Every 20 minutes, approximately, you have to breath into the device again to make sure that you haven't had someone else start the vehicle for you. And because of that intrusiveness we've seen, in traffic safety in years past, things like the seat belt interlock, back in the seventies you had...all new cars had to have the interlock that you'd put on...you couldn't start your car unless your seat belt was buckled. Because there wasn't public acceptance for that before it was mandated, that was repealed. And we are still now trying to recover from the blow that that has caused in traffic safety. [LB736]

SENATOR CHAMBERS: Let me ask you another question then. [LB736]

NICHOLAS ELLINGER: Sure. [LB736]

SENATOR CHAMBERS: Because in this subject you're like me on others, you could go on forever. [LB736]

NICHOLAS ELLINGER: Yes. (Laughter) [LB736]

SENATOR CHAMBERS: Here's why I bring that up about the diversion program, I'm not

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

opposed to people being given second chances. But almost to a person we're told that a first offender is one who finally got caught. So we're not looking at somebody who in fact drove the first time and fell into the clutches of the law and a second chance they'll walk the straight and narrow. If a person has three times the level of alcohol that's allowable and is able to drive and motivate indicates that person has a tolerance for alcohol, has probably done it before. So that's...I'm limiting my criticism of some of these diversion programs to the DUI at this point. And I see a certain cynicism when law enforcement agrees with it, because they know. But anyway you don't have to comment on that. I don't want to keep you here forever or my colleagues. [LB736]

NICHOLAS ELLINGER: And I apologize for being long-winded... [LB736]

SENATOR ASHFORD: No, that's all right. [LB736]

NICHOLAS ELLINGER: ...but I (laughter)...I, too, hate diversion. And any other questions? [LB736]

SENATOR ASHFORD: No, but I just want to...I think Lieutenant Zeeb made a great point when he was talking about generational offenders. And my only point, and prior to this I didn't say it very well, is that many people who are not in a probation status commit violations or are involved in accidents related to alcohol. And if someone does have a history and the time frame when these devices should be required should be longer, and not just a year or two years, maybe for repeat offenders. The real problem we have is repeat offenders. And that's what makes the public just go off the charts they're so mad. They can't understand it, how this can be in our society. So I don't want to belabor this, but I thought Lieutenant Zeeb's point was very well taken and... [LB736]

NICHOLAS ELLINGER: And Jerry will talk about compliance-based removal, which helps some of that. [LB736]

SENATOR ASHFORD: Okay. All right, thank you very much. Okay. [LB736]

NICHOLAS ELLINGER: Thank you. [LB736]

SENATOR ASHFORD: Is Senator Fulton going to be closing? Okay. [LB736]

JERRY STANTON: (Exhibit 4) Committee Chairman and the rest of the committee, thank you for having us here today. I'm Jerry Stanton. I'm with Ignition Interlock Systems of Iowa and Nebraska. I've been before this committee several times in the past. We've been installing interlocks in Nebraska for nearly 20 years. I worked with Senator Pedersen on his bill. I've also been in Congress, I've worked on getting the federal legislation changed. Since Nick kind of ran a little over, I am going to make mine short. In the packets we're handing out there's a pamphlet that basically answers every

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

question you'd ever want to have ignition interlocks. It's put together by the Transportation Industry Research Foundation. So it's an unbiased story about the ignition interlocks, how they work, why they work. One of the suggestions that they have in there, as Nick alluded to, is removing the interlock at the point at which the offender has shown that he or she has learned not to drink and drive. So it's based on their success record with it rather than some calendar period of time. Also in the book I put together my thoughts. Again, I've worked with the Nebraska statutes on drunk driving for nearly 20 years, my thoughts on changes to LB736 that would make it more usable within what I know the federal guidelines to be, and also from 20 years in the ignition industry, what works and what doesn't work very well. So I'd welcome any questions. [LB736]

SENATOR ASHFORD: Thanks, Jerry. Yes, Dwite. [LB736]

SENATOR PEDERSEN: Thank you, Senator Ashford. Mr. Stanton, what is the cost of one of these machines? Not what it costs to use them or rent them for you. What do you pay for one of these...the whole machine? [LB736]

JERRY STANTON: We actually lease them from the manufacturer. But I understand that some other manufacturers sell them in the neighborhood of \$1,000 per machine. We lease them out for...effectively, as Deb said, about \$2 a day is the lease fee. [LB736]

SENATOR PEDERSEN: Thank you. [LB736]

SENATOR ASHFORD: Thanks, Jerry. Thank you. [LB736]

JERRY STANTON: Thank you. [LB736]

SENATOR ASHFORD: Any other proponents? How many other testifiers do we have on this bill? One more, okay. [LB736]

BOB SCHMILL: Bob Schmill from Matt's Dream Foundation, and it's S-c-h-m-i-l-l. I've been here before with other things and I shall be here tomorrow too. But the one thing that...Matt's Dream Program that we do is we go out and we speak to at least five or six groups each month. And each time that I go out...and these are first-time offenders, or at least the first time, again, that they've been caught. But when I go out and do this I just see a lot of the people that are there, it goes in one ear, out the other. It's great to give the information. It does touch so many people, but is it actually making the difference? Putting something on that I've now read, too, and gone to some of their seminars, that it does make a difference, it does change the habit. It's a habit that you get into as far as drinking. It's a habit now that you'll...you'll be drinking and now you're going to be blowing into a device to keep you from drinking so that you can drive. What

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

I'd like to see, and really I agree with Senator Ashford and Senator Chambers that, yes, it should be on every car. It would be great. But you know, is that practical? Probably...it would be great in the future. But right now it's being onto that first-time offender. Senator Chambers brought up about the...Sarpy County and their diversion program. I'm one of the main speakers for that program. When I'm asked by the people in...that are there for that event, what do I think about diversion, and everybody in the probation office that's standing around that room knows that my answer is going to be, it's no, I don't believe in probation. But you've given that...you've been given a chance, you've been given one chance, and you better not blow it is my response. So what I'm saying, more or less, is that Matt's Dream Foundation is in agreement with this. We think that it's a good device that needs to be done. And like a lot of the other bills that I see and everything that I see that's going through, we're now...there is how many states? It was 40-some states that already have it. Again, Nebraska is trailing and we need to be up there being one of the forerunners. I thank you and is there any questions? [LB736]

SENATOR ASHFORD: Bob, again, thanks for everything you do for all of us. [LB736]

BOB SCHMILL: Sure. [LB736]

SENATOR ASHFORD: So thank you. [LB736]

BOB SCHMILL: Okay. [LB736]

MATT STRAUSZ: Hello. My name is Matt Strausz and I'm from Smart Start of Kansas, we're the leading ignition interlock installer in Kansas. I wanted to just touch briefly, I know we've beat most of this up pretty good, on... [LB736]

SENATOR ASHFORD: Well, you're on a good run, so I don't know if you want to create any new issues or anything. [LB736]

MATT STRAUSZ: That's right. In 2001, when we passed our DUI legislation, Senator Lathrop had mentioned earlier about the indigent fund, we set up an indigent fund of 2 percent of gross revenue from the interlock companies. So that's just another idea. One thing I will mention though is that in the last seven years no one has ever touched it. There's never been one offender who has come up and said, I want to use the indigent fund program. It's never been touched. Every year we file with the state to show them what we have in our...the balance in our indigent fund, but not one offender in seven years has ever actually wanted to access that. And then just briefly on two other things. Having it installed in every vehicle, there are three major car manufacturers that are working on technology now, and some that actually do offer vehicles that have it in the vehicles: Volvo, Saab, and Toyota all offer something in that neighborhood. And just briefly, the interlock companies... [LB736]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR ASHFORD: Well, in Sweden it's required, isn't it on all their vehicles? Swedish, I believe all Swedish cars have to have this kind of device built into their system. [LB736]

MATT STRAUSZ: I don't know if they're quite there yet. [LB736]

SENATOR ASHFORD: Okay. [LB736]

MATT STRAUSZ: But I know that that's the direction that they're all heading. Then interlock companies do have quite a few people who voluntarily install these. A lot of offenders, after the program is over, decide to keep it on voluntarily just because of trusting themselves and that sort of thing. So it is something that is welcomed and does occur. I appreciate your time. [LB736]

SENATOR ASHFORD: Thanks, Matt. Any...yes, Senator Schimek. [LB736]

SENATOR SCHIMEK: Thank you, Mr. Chairman. I just have a quick question, small point. But how do people even find out about the indigent fund? [LB736]

MATT STRAUSZ: On ours...the state of Kansas they send out to everyone with a second, third, or fourth time offense, or a first-time offender that blows over a .15, or any offender who refuses to take the test, they send them out a sheet of paper, after their suspension period is complete. And at the bottom of it, it has a paragraph explaining that there is an indigent fund for those...now the only thing that they require someone to do is to submit a sheet, it's kind of like a credit check, to prove that their monthly income doesn't equal a certain standard to be able to qualify for the indigent program. And you'll get a lot of people in court that will say, I can't afford this. Then whenever they're asked to fill out the form, they're not...they don't qualify for the indigent program. So it's a matter, in most cases, of do you take our interlock device, or do you take your cable television? And it is a choice, but in some situations if you have a...if you're a habitual drunk driver, you need your interlock program more than you need your cable TV. [LB736]

SENATOR SCHIMEK: Thank you. [LB736]

MATT STRAUSZ: Thank you. [LB736]

SENATOR ASHFORD: Thank you, Matt. Senator Fulton waives. Any neutral testifiers? Do we have any neutral? Senator Fulton waives. That will conclude the hearing. Thank you all. LB808, Senator Synowiecki, Mr. Baseball. (Laughter) [LB808]

SENATOR SYNOWIECKI: Senator Ashford, members of the committee, my name is John Synowiecki. I represent District 7 in the Legislature, and I bring to you LB808, a bill

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

for your consideration. It's a bill that changes penalties for the offense of felony motor vehicle homicide. Currently, under Nebraska statute 28-306, subsection 3A, felony motor vehicle homicide, the law allows the court to revoke a person's driver's license for points only, which in some cases may amount to only a one-year loss of license. But if a person is convicted under 60-698, which covers hit-and-run accidents, the judge would have the option of revoking a license from 1-15 years. Both 28-306, subsection 3A, and 60-698 are both Class 3A felonies. LB808 seeks to give the court the option of revoking one's license for 1-15 years under 28-306, 3A, making it consistent with the sentencing options provided under 60-698. It's my understanding that Senator Pirsch has a very similar bill that I've been reliably informed that you have introduced, that essentially does the same thing, and Senator Pirsch's bill, as I've been led to believe, also includes the Homicide of an Unborn Child Act under the provisions of his bill. I would defer to the committee on whether or not you incorporate the Homicide of an Unborn Child Act into what we're trying to do, in terms of providing some consistency in our statutes. [LB808]

SENATOR ASHFORD: Right. I believe that's up tomorrow. We have that hearing and we can maybe combine those. Okay, great. Any questions of Senator Synowiecki? Thanks, John. [LB808]

SENATOR SYNOWIECKI: Thanks. [LB808]

SENATOR ASHFORD: Do you want to stick around? [LB808]

SENATOR SYNOWIECKI: Yeah, I'll stick around. Thank you. [LB808]

SENATOR ASHFORD: Okay. How many proponents do we have for this? Opponents? Okay. [LB808]

CHRIS YORDT: (Exhibit 5) Senators, thank you. My name is Chris Yordt, Y-o-r-d-t. I'm with the Douglas County Fraternal Order of Police, Lodge 2. I'm here on behalf of our union president, Jim Maguire, who could not make it because of work complications. We are here to...in proponent of LB808, simply because it streamlines...it seems to streamline the law of 28-306, 3A, and make it more consistent and more in line with the statute 60-698, and would give any judge the option of taking a person's license away from them from 1-15 years, and really, that's...I had passed out a letter from our president, Jim Maguire, giving more detailed reasons as to why we are proponents of this, and if you have any questions in regards to that, I'll... [LB808]

SENATOR ASHFORD: Chris, thanks for coming down. Any questions of Chris? Thanks, Chris. [LB808]

CHRIS YORDT: Thank you. [LB808]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR ASHFORD: Joe. [LB808]

JOE KOHOUT: Chairman Ashford, members of the Judiciary Committee, my name is Joe Kohout, K-o-h-o-u-t, registered lobbyist, appearing today on behalf of ABATE of Nebraska. We appear in support of LB808 because it seems especially, during the most recent on the helmet law, that there is concerns that our organization sees with, typically we're victims of these types of offenses, and as such, we would like to see judges being given the option to do the suspension of the license. And I think--you know, I'm kind of looking over it--perhaps there might be some concern on the part of the committee with the "shall" language in there. Obviously, we would be open to any sort of "may" change there, as well. The other thing I would bring to the committee, and it's rare that ABATE would ever look at the AMA, but one of the things that we found when we were doing a little research into this is that the AMA actually makes recommendations in these kinds of situations, with this kind of increased penalty, that actually there is enhancements for if they, in fact, hit a motorcyclist, and the AMA actually recommends enhancements for that purpose. So I will stand for any questions that the committee may have. [LB808]

SENATOR ASHFORD: Thanks, Joe. Thank you. John, do you wish to close? Senator Synowiecki waives closing. That ends the hearing on LB808. LB810. [LB808]

SENATOR KRUSE: (Exhibit 6) Thank you, Mr. Chairman. We were walking down the hallway before he started to close, so that was quick. Mr. Chairman and members of the committee, I am glad to be back. My name is Lowen Kruse, K-r-u-s-e, District 13. This is the Alcoholic Liquor Liability Act, and we're back again. We've been here before. I'm going to keep my comments pretty directed and you can follow up with fill-in with you need it. But I'm guessing you don't because we adopted LB573 last year, which is half of the Liquor Liability Act, creating civil liability for minors. And that's done. In a lot of ways, that's the major part of this act. The specific language within the act makes an institution or a business liable for serving a noticeably intoxicated person. This is defined in rules and regs of liquor liability, very carefully defined. They call it visibly intoxicated. But the point to be made here is that the person...the patron must be noticeably intoxicated. And that would be noticeably by other patrons there or else you wouldn't have a witness when you go to court. The point that we would make on this, this is not related to a roadside test that the person flunks when they get out of the bar. It is violating present rules and regs of the Liquor Control Commission. Then the next point to be made is to just recall that the Nebraska Supreme Court has stated twice that the Legislature must speak before civil liability is reestablished following the time of Prohibition. Seventy years have gone by without this protection of the state. And to me, it's not the key item but this is an important item--the state is more liable since we haven't declared and authorized the civil liability for this particular group of people. But anybody can be civilly liable for breaking the law, but not this particular group. So this will make the state the payor of last resort. And we need to do that. The particular bill, the statute that it establishes will not be used much, but establishes a principle. And you

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

have in the handouts a list of over 40 states that have done this, mostly to protect themselves but also to follow through on pieces of law. There's been laws for decades, even centuries. The other point that I would make is that we are offering with...continue as we did last year, the sweetest deal in the nation. We have rechecked, we cannot find any other state that offers a protection against plaintiff's recovery. You'll notice on page 6, line 18, a very substantial language. This bars the plaintiff's recovery. If the establishment, if the business trains servers, if they take a course that is certified by the state and are certified by the Liquor Control Commission and they follow the tenets of that training, this bars plaintiff's recovery. There are four courses that are being offered. We worked on that two years ago and got those courses set up. And there are thousands in Nebraska who are already certified under this system. So I'll have a little bit more to say about that in a bit. This particular feature was requested by various businesses and then they started to worry about it a bit. Frankly, I'm glad we have their attention. That's the point of this bill. But we left it in and conversations among ourselves and persons that cared about it, not because it's going to be a favor to these businesses but because it is prevention, good prevention. We want the last person to see this offender as he's going out the door and getting ready to do injury to somebody, we want the last person there to be a person who can raise a question and not be dependent upon some officer out on the street. I feel strongly that the servers are the ones who can protect our life and limb. And Mr. Chairman, I heard you earlier stating the immense liability that we suffer as a state and as people. You know, this is huge, this is just huge. You all know that. But...so how are we going to stop it? I think that this is one way of getting person's attention. I would grant I know for a fact that most businesses are responsible in doing this. But again, we have laws for those that are not responsible that aren't paying attention that really don't care about it. We have added that the owner, if this is a person, also should be trained but it does not apply to other employees, custodians and so on, just those who serve and the one who owns. My staff took the course and one of them (laugh) this is not heavy-duty. No, my staff is really sharp, you understand, and all that. But one of them passed the course in a little over 30 minutes; the other one took 2 hours because it was an area he wasn't quite as well acquainted with. I'm going to take the course. But I have two staff that are certified and I'm going to become certified. And Mr. Chairman, then we will have an office that is open for business, ready with certified servers to do what is needful. And I would note here that this bars the plaintiff's recovery, I would think in all things. If somebody comes and complains about the legislation we put out or that we have done an ineffective job on something, we are barred from lawsuit because we are trained to be servers of whatever we're serving. One final serious comment; we debated last year quite a bit about insurance. There is no insurance requirement in this. The bill last year would have an insurance liability since the liability is for a business that's training everybody and keeping them going is really nonexistent. We don't see the need to state insurance within it and we're not adding that in. I would welcome any questions on the matter.

[LB810]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR ASHFORD: Any questions of Senator Kruse? Senator, you do a great job. [LB810]

SENATOR KRUSE: Thank you. [LB810]

SENATOR ASHFORD: Now social hosts aren't included in this bill. They were last year, I think. [LB810]

SENATOR KRUSE: Social hosts were last year but are not within this. [LB810]

SENATOR ASHFORD: Okay. Thanks, Senator. Chris, are you next? Let me ask, how many testifiers do we have on this? Okay, great. [LB810]

CHRISTOPHER WELSH: Good afternoon, Chairman. Christopher Welsh, W-e-l-s-h, on behalf of NATA. We think this is a good bill the way it's drafted. It would be good law to have. The only thing that we're concerned about is the statute of limitations is only two years. We think the statute of limitations should be consistent with the current statute of limitations for negligent cases, which is four years and two years if you're talking about bringing a wrongful death action. The other part of the bill that we do not...we'd rather not have is the immunity provisions for the obvious reasons. But this is a good law. There is no current protection for somebody who's harmed from something like this. And we feel that this law would protect those people. Any questions from the committee? [LB810]

SENATOR ASHFORD: Any questions of Chris? Thanks, Chris. [LB810]

CHRISTOPHER WALSH: Thank you. [LB810]

SENATOR ASHFORD: Next testifier? [LB810]

NICK ELLINGER: (Exhibit 7) Nick Ellinger once again from Mothers Against Drunk Driving. Thank you once again for the opportunity to testify. MADD is in support of this bill and in dram shop liability generally, and I will be shorter this time. Want to cover only three points: the incidents of overservice, the economic incentives that are based in this bill, and then the effectiveness of dram shop liability. The first thing to know is that there is a significant amount of overservice going on in a lot of establishments. The average BAC of someone pulled over in a drunk driving arrest is .16 or .17. To give you an idea of the amount of alcohol that is, if you lined up eight shots of tequila right here and I hit them down one after the other, I would be at about a .15, .16 at my maximum. At that point you're about 380 times more likely to be in a fatal crash than a nondrinking driver. So that's a significant amount of intoxication. And about half of the people who are pulled over for drunk driving say that their place of last drink was a bar or restaurant, someone who serves drinks professionally. What dram shop liability does is it brings the

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

economic incentives of the establishment into line with public health. Those establishments that are doing a good job that are training their services should be welcoming dram shop liability because it takes that bar down the street that does overserve, that does have irresponsible serving practices, and it calls them to task. It sanctions them and puts them at a disadvantage in the marketplace. And if you do not have dram shop liability, and Nebraska is one of only eight states that does not, then the people that are doing the responsible work are at an economic disadvantage. So this levels the playing field. And as a result, it is effective. The states that have passed this have found that it increases the rates of server training, the more thorough checking of identification, both for underage drinkers and for overservice, and it has fewer drinks served past the point of intoxication. In sum total, dram shop liability works and it works to stop traffic fatalities. When Texas passed its dram shop liability law it experienced an immediate 6 percent decrease in nighttime fatal crash rates, and in addition, after the first case was filed and another 5 percent after the second case was filed. So there is a significant deterrent value. And so when researchers took a look they found a 5.8 percent decrease in fatal crashes because of dram shop liability. I welcome any questions that you have. [LB810]

SENATOR ASHFORD: Any questions of Nick? Thanks, Nick. I would like some data, if you can get it for me, on the impact of these laws, maybe the most recently passed ones, last five years. [LB810]

NICK ELLINGER: Dram shop liability hasn't been passed in the last five years in any state, but I can find you some studies on that, yes. [LB810]

SENATOR ASHFORD: Okay, just to give me some data on that, if you could. [LB810]

NICK ELLINGER: If you don't mind, I'll send those to your office. [LB810]

SENATOR ASHFORD: Great, thanks. Next testifier? [LB810]

TARA KUIPERS: Good afternoon, Senator Ashford and the rest of the members of the committee. My name is Tara Kuipers, T-a-r-a, last name is Kuipers, K-u-i-p-e-r-s. I'm from Beatrice. I'm the coordinator of the Gage County Coalition. We're a group of citizens, law enforcement officials, educators, substance abuse treatment providers, and a lot of other sectors of our community who work hard toward curbing substance abuse and underage drinking and all of the ancillary effects that it has on our communities. I'm here speaking on behalf of that organization to support this bill. This is something that I think can have a dramatic effect on one of the key pieces that contributes to substance abuse and its negative consequences in our community. And that is those who serve it without responsibility and safety and the health of those consuming. I think that alcohol retailers do have a very high level of responsibility in the part that they play in substance abuse and the related effects in our communities. And

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

it's a responsibility that I think this legislation will help them take more seriously. I especially am applauding the effort of Senator Kruse by including the responsible beverage service training as one of the provisions in this bill. I think that is something that many community members and community coordinators such as myself have been attempting to do, and retailers have not been...in some communities they have been very supportive of engaging their employees in beverage server training. A legislation piece like this will, I think, help us get those retailers at the table. We want them to do it well. We don't want alcohol to be unavailable to people but we do want it to be done well. We want it to be done responsibly. We want it to be done safely. We want it to be done legally. And that's where you come in. This is a way to help us help the retailers do this better by requiring and encouraging them perhaps to do some training for their servers. I thank you for your time. If you have any questions, I'd be happy to answer those. [LB810]

SENATOR ASHFORD: Any questions of Tara? Thanks, Tara. [LB810]

TARA KUIPERS: Thank you. [LB810]

KATHY BURSON: (Exhibit 8) Good afternoon, Mr. Chairman and members of the committee. My name is Kathy Burson, B-u-r-s-o-n. I am coexecutive of PRIDE-Omaha, which is a parent community organization dedicated to preventing the use of alcohol, tobacco, and other drugs by our young people. I'm here today to support LB810, the Alcoholic Liquor Liability Act. First, I would like to thank this committee and the entire legislative body for passing LB573 during the 2007 legislative season, which focused on social hosts liability when providing alcohol to minors. This bill takes the issue one step further and its intent to prevent intoxication-related injuries, deaths, and other damages among Nebraskans by increasing the liability of alcohol beverage retailers and their serving practices to adults. One major issue LB810 addresses is alcohol-related traffic crashes. In 2001, more than a half a million Americans were injured in crashes where police reported that alcohol was present, an average of one person every two minutes. In 2002, an estimate 17,500 people died in alcohol-related traffic crashes at an average of 1 every 30 minutes. About 1 in every 5 Americans will be involved in an alcohol-related traffic crash at some point in their life. Dram shop liability laws can reduce alcohol-related motor vehicle crashes. As stated previously, alcohol beverage retailers are in the best position to observe those consuming alcohol and control the amount they are consuming. This bill would provide an incentive for owners of alcohol establishments to train their employees in responsible beverage service, to check IDs, and to eliminate happy hour and other reduced drinking promotions which encourage excess alcohol consumption. As stated, we are one of the few states in the nation that does not have some type of dram shop liability on the books as it relates to adults. LB810 could be a strong deterrent against irresponsible alcohol-serving practices because it holds alcohol beverage retailers responsible for their actions. It's important to note that LB810 provides many built-in protections for responsible retail alcohol license

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

holders; so this bill is clearly not an antibusiness, it's a pro-public safety. Committee members, this is a life and death issue in our communities and I urge you to pass LB810 out of committee and onto the floor for debate. Thank you. [LB810]

SENATOR ASHFORD: Thank you, Kathy. Any questions of Kathy? Thank you. Any further proponents? Bob. [LB810]

BOB SCHMILL: Senator Ashford, members of the committee, again, Bob Schmill, S-c-h-m-i-l-l, Matt's Dream Foundation. I'm going to give a little different slant here. I've been here the last three years for this bill in different forms. And the way I'm kind of looking at this a little different, I play in a 50s and 60s rock-and-roll band. And when I'm out there and I've seen, since been working with this, that I've seen the bars and the facilities, the places that we play that somebody that's obviously intoxicated that they were still being served, over and over and over. And eventually some time during that evening, the person walks out the door with car keys in hand. My thinking, as I'm sitting there playing--and I play the drums--but as I'm sitting there playing, I'm thinking, okay, who is this person going to kill now? I mean, the possibilities are there, the percentages are there that they're going to go out and either they kill themselves or they're going to kill somebody else. So hopefully it's changed. But what I've seen since, you know, the bars know who I am now or they recognize it themselves. It's been in the media more with this particular law or bill, that I've seen it change. I've seen that now all of a sudden the people at these same bars are now saying no. The person comes in and the person is being told no, we're not going to serve you. There's a little altercation there but the thing is they've been told no. They also take their car keys. How they get them, I don't know, but they do get their car keys. Or...and along with that, they say we need to get you a ride home. We need to make sure that you do not get in your car. I can see that happening at every facility when this bill goes back to the floor and becomes law. It will make a difference and it starts with you all. Any questions? [LB810]

SENATOR ASHFORD: Any questions of Bob? Thanks again, Bob. [LB810]

BOB SCHMILL: Thank you. [LB810]

SENATOR ASHFORD: Any other proponents, opponents, neutral testifiers? Neutral? The state. (Laugh) [LB810]

HOBERT RUPE: Good afternoon, Senator Ashford, members of the committee. My name is Hobert Rupe. I'm the executive director of the Nebraska Liquor Control Commission. We're primarily neutral because it is a liability, civil things, but I was here to answer any questions based upon two grounds. Senator Kruse went through that due to previous legislation the commission has adopted rules and regulations outlining how we certify server training programs. Those rules and regulations became effective last fall. As of now, we currently have four entities which are certified by the state to offer

server training courses. That would be TIPS, which is techniques and prevention; CARE, I'm sorry I can't remember what CARE stands for; ServSafe, which is promoted through the restaurant association; and then NU Directions on-line, that's the one that actually the commission sort of adopted as its own. According to that statute, the commission could sort of adopt one and help finance and the commission thought that the one that's available through the widest utilization because it's an on-line server training would be the most effective for the state of Nebraska. So that's the one that we've sort of put our rubber stamp on. I believe that's the one that Senator Kruse and his staff took place because I was a person who had to, under my admin authority, allow a nonlicensee to take the course. The other aspect that Senator Kruse said is that there are some rules and regulations that the commission has had for many years dealing with how we deal with service who are visibly intoxicated in the realm of sanctioning licensees for service to a visibly intoxicated. So I would make myself hopefully present to answer any questions you may have regarding the specifics of that or how that has worked so far [LB810]

SENATOR ASHFORD: Okay. Any questions? Seeing none, thanks. [LB810]

HOBERT RUPE: Thank you. [LB810]

TIM REGLER: Good afternoon, Senator Ashford, Senators. My name is Tim Regler, R-e-g-l-e-r. I'm here on behalf of Parents and Communities Together of Otoe County, nonprofit organization dedicated to reducing teenage alcohol use. I'm here specifically to talk about the server training program as mentioned in Section 3 here on page 6. Last year, last summer in Nebraska City we had a compliance check. And out of 23 businesses that were checked by our local police, 10 of those businesses failed the compliance check. In discussing why that happened with the local business owners, I was given two reasons. One, we haven't had server training for two years and two years previously we had had a 100 percent success rate in Nebraska City on compliance check. The other one was we have too much turnover to keep people properly trained. When we're talking about convenience stores, bars, and restaurants there is sort of a revolving-door effect on employees there. Now I don't necessarily agree with that. I think as far as compliance checks go, given the horizontal and vertical nature of reading a Nebraska driver's license, nobody should ever fail a compliance check in Nebraska. It just shouldn't happen. But I think public perception is going to be well, yeah, if they can't get the proper training how do we expect them to pass these compliance checks. And so I wanted to take those arguments off the table basically in my community. So I began talking with other prevention workers in Nebraska and we decided, why can't we be the ones to offer the server training? As Mr. Rupe said, there are right now four organizations giving server training in Nebraska. However, I know that at least a couple of those charge fees. When people are making the wages that they make at convenience stores and restaurants and bars, they shouldn't have to pay a fee to become properly trained. They've got enough strain on their budgets and I don't see the

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

bosses of these restaurants and convenience stores picking up the tab for them. Let's offer it free of charge. However, in trying to put together some sort of curriculum where we could do that on a monthly basis in our counties, we really discovered a number of gaps that are in existence in Nebraska in terms of server training. So what I'm here today to do is to point out to you that these gaps do exist. As a prevention worker, I'm very much in favor of this bill. I am excited that the server training program is in here. I think we could really take a look at how we offer that to our business communities. If we come at this in an adversarial approach, we're not going to get very far. But if we come to our business communities as partners and ask them how can we help you comply with this law, we're going to have a much easier time educating the community and bringing about the type of environmental change which this bill will provide for the state of Nebraska. So I guess what I'm asking is, could we really take a look at that server training issue and could we establish some sort of program so that people who do what we do, alcohol prevention workers, so that we could become trained? And I know that there's a network statewide of us who would love to be able to offer that to our business communities on a monthly basis free of charge so that we can keep people certified as beverage server trainers. [LB810]

SENATOR ASHFORD: Thanks, Tim. [LB810]

TIM REGLER: Thank you. [LB810]

SENATOR ASHFORD: Any questions of Tim? Actually, I think that's a great idea. One of the concerns that I have with the exception or the exemption here is that, is it meaningful training. I mean, one of the by-products of this act would be that we have more awareness. [LB810]

TIM REGLER: And you know, that's just it. We also have local law enforcement that would be more than willing to come in and help us conduct these sessions to make it more impactful. [LB810]

SENATOR ASHFORD: And I also--just your point, if they could actually go into the establishment and talk about what to observe and how to observe it and build up a relationship... [LB810]

TIM REGLER: We would love to do that. [LB810]

SENATOR ASHFORD: I mean, I think that's extremely good idea and one that I would like to think more about. I think that's a great idea and I...welcome back, thanks for coming back, Tim. [LB810]

TIM REGLER: Thank you very much. [LB810]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR ASHFORD: Yeah, okay. Any other testifiers? Neutral? Got some more neutrals, here. [LB810]

JIM PARTINGTON: Actually, opposed. [LB810]

SENATOR ASHFORD: Oh, you're opposed? I didn't...well, we'll go to opposed then. [LB810]

JIM PARTINGTON: (Exhibits 9 and 10) Good afternoon, Chairman Ashford, members of the committee. My name is Jim Partington, P-a-r-t-i-n-g-t-o-n. I'm the executive director of the Nebraska Restaurant Association. I have a letter here from Jim Otto, the president of the Nebraska Retail Federation in opposition to this bill, as well as my written testimony, which I would like to include in the record. And in the interest of brevity, I will basically just summarize. We believe in the Restaurant Association that Senator Kruse has made a great good faith effort to try to craft a legislation and reach out to the various constituencies as broadly as he could. And we're very enthusiastic about the training aspect of this legislation. We in the Restaurant Association have a course that's developed by the National Restaurant Association and modified to meet Nebraska requirements that we think is very effective and probably the best one there is. And I agree with the previous testifier that if we could find a way to make that more broadly available throughout the state, it'd be very beneficial to the industry as a whole. The third-party liability is the part that brings us to pause and brings us to oppose this legislation because it's based on basically subjective requirements such as visible intoxication, and it has some criteria in there that can be open to interpretation. We also believe that it falls short because restaurants are not primarily places that people go to drink. The alcohol consumption is incidental to coming there for a meal but we don't know where the patron was before he came to the restaurant and we don't know where he goes afterwards and we don't know how much alcohol he's consumed before he got there and after he leaves. And third-party liability will continue down that chain if he has an incident that causes some damage to anybody. And we feel that that's a burden that the hospitality industry should not have to bear, that there are other ways to deal with the situation. So basically that sums up my position. I'll be happy to answer any questions that any of you have. [LB810]

SENATOR ASHFORD: Yes, Senator Chambers. [LB810]

SENATOR CHAMBERS: Not just any institution or establishment can serve liquor. Isn't that true? You must get a license. [LB810]

JIM PARTINGTON: That's true. [LB810]

SENATOR CHAMBERS: And the liquor industry is probably the most heavily regulated industry in society. [LB810]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

JIM PARTINGTON: That's true. [LB810]

SENATOR CHAMBERS: So there are not only obligations and burdens placed on the license holder, but privileges which only a license holder can enjoy. Is that correct, as far as the serving, selling of liquor? [LB810]

JIM PARTINGTON: As far as the serving of alcohol, that's true. [LB810]

SENATOR CHAMBERS: So since it's heavily regulated now, society is free to place additional burdens on those who are going to have this kind of license. Isn't that true? [LB810]

JIM PARTINGTON: I think additional burdens in the form of training and other aspects I probably haven't thought of are probably reasonable. I think the burdens based on subjective requirements are probably more onerous than we would find acceptable. [LB810]

SENATOR CHAMBERS: But we can do that as a Legislature at the drop of a hat, can't we? We have the authority to do that. [LB810]

JIM PARTINGTON: Certainly. [LB810]

SENATOR CHAMBERS: If serving liquor is only incidental to what you call the hospitality industry, if you did not serve liquor you could still flourish as a moneymaking enterprise, couldn't you? [LB810]

JIM PARTINGTON: That is obviously true in some cases because have many restaurants that don't serve alcohol. [LB810]

SENATOR CHAMBERS: Okay. So you see it as onerous, perhaps members of the Legislature don't, when we look at the terrible results to society when people who have consumed too much alcohol drive and hurt others. And we may impose a policy which those who will bear the weight of it disagree with. But our job is to make difficult decisions and a lot of times they are opposed, as we on the Judiciary Committee know because seldom do we have a bill with which everybody agrees. What is the strongest argument against this that you can give other than what you said, that somewhere down the line you may be liable? If that's the strongest argument, then you don't have to repeat it. Is that the strongest argument you could give? [LB810]

JIM PARTINGTON: I think the strongest argument is that a person can be subjected to liability for an act that they did not actually have a part in committing, as we go through this process, and be brought into court to testify to either...probably have to hire

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

attorneys to help represent them through this process and... [LB810]

SENATOR CHAMBERS: Isn't that the way of American and entrepreneurship and free market and capitalism and all these other things? That's not unusual, is it? [LB810]

JIM PARTINGTON: It's not unusual to require attorneys but I think in this case we're asking people who may or may not have any direct knowledge or any participation in the act. [LB810]

SENATOR CHAMBERS: Then can they...they can place a limit on how much liquor is sold to any person who comes there, can't they? You can get... [LB810]

JIM PARTINGTON: They can. I guess... [LB810]

SENATOR CHAMBERS: We will let you have a shot glass at max of alcohol. Then that should protect you pretty well, shouldn't it? [LB810]

JIM PARTINGTON: I'm sorry, I'm a little hard of hearing, Senator, and I missed that last question. [LB810]

SENATOR CHAMBERS: Okay. Have a maximum amount of liquor that can be sold to any person who comes to one of your establishments. And you can say the maximum amount is that which would fill a shot glass. Then if that's all that you serve, it's not likely you're going to be held accountable for something that may happen down the line. Isn't that true? [LB810]

JIM PARTINGTON: I don't know that that is true, the way this legislation is crafted. And I guess if you'll allow me to elaborate a little bit on this. So give an example of what it is we're concerned about, it goes back to the individual restaurant owner and the serving staff not knowing where this individual had been before he comes there and not knowing where he goes when he leaves. So he may have consumed, or she may have consumed quite a bit of alcohol but not enough to make them staggering and recognizably intoxicated under the criteria. [LB810]

SENATOR CHAMBERS: Suppose they smell. People who drink don't smell, you can't smell them? I can, and I don't have to be too close. [LB810]

JIM PARTINGTON: I think that there's a level of consumption of alcohol where people, especially those are used to consuming it, can function quite well and come into a restaurant where you have maybe 100 patrons in there having a meal and one server waiting on them. And they don't exhibit no visible signs of intoxication that anybody can tell and they may have one glass of wine in this restaurant and then they may go to another establishment and buy a six-pack of beer and drink it in their car on the way

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

home. And all three of these establishments that have served alcohol become liable under this legislation. That's my concern. [LB810]

SENATOR CHAMBERS: What's wrong with that? They all contributed. What's wrong with that? Yours could have been the straw that broke the camel's back. [LB810]

JIM PARTINGTON: I think the question that we started out on this was, though, it should be easy for one establishment to regulate the alcohol consumed in that establishment. And that can only be done in that establishment. You don't know how much they've consumed before they get there or after they leave. [LB810]

SENATOR CHAMBERS: And you feel that if you limited the amount of alcohol your restaurant served, then you would be caught up in that net and held as liable as those bars and other places that may have served... [LB810]

JIM PARTINGTON: I think that is very possible and that just generally is the way these dram shop laws work and are interpreted in other states. [LB810]

SENATOR CHAMBERS: That's the way courts have interpreted them? No matter how small an amount of alcohol one malefactor served, he or she is held as liable as all the others? [LB810]

JIM PARTINGTON: No, I don't think he, in fact, is as liable but I think that they are going to wind up in court and go through the same process to either prove or disprove their liability. [LB810]

SENATOR CHAMBERS: Okay, thank you. That's all that I would have. [LB810]

SENATOR ASHFORD: Jim, you did a good job representing your client, but I'm having...with the absolute defense of the training, if what the argument...the best argument that I hear from the proponents of this is that the bar owners, your clients who have a license to be in this business are, in a sense, they are to do their business but also they have the opportunity to protect society and that individual. Nobody else...they probably have the best chance in some instances of protecting society, and that's part of the license in a way, or implied, I would suggest. And if...and as Senator Chambers said, and we had the same discussion last year, you choose to be in that business you have certain obligations that go with it. The training is an absolute defense in this bill. And that is, in my mind, is a lot...these dram shop bills came before me years ago when I was in the Legislature, and I'm sure Senator Chambers has heard it many times, and Senator Pedersen, but the line of defense argument is pretty strong when all you have to do is go through the training. And then, in effect, you're going to be looking...you're going to be able to observe a little better, think about it more. But whether or not you think about it or not, it's still an absolute defense. I mean, I'm not arguing with you. I'm

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

just having a hard time understanding if it's an absolute defense, why we... [LB810]

JIM PARTINGTON: That is a very good observation. [LB810]

SENATOR ASHFORD: Well, I don't know how good it is, but I mean, that's just my observation. (Laugh) [LB810]

JIM PARTINGTON: And that is a very strong component of this legislation. And that's why...I guess I didn't have to tell the Chairman that's a good observation. (Laugh) [LB810]

SENATOR ASHFORD: No...me you do, I don't know. (Laughter) Go ahead. [LB810]

JIM PARTINGTON: And we believe very strongly in that training component. I am not a lawyer. Maybe I'm paranoid about going to court, and I'm sure that most of my members are not lawyers and maybe they're paranoid about going to court... [LB810]

SENATOR ASHFORD: I understand that. [LB810]

JIM PARTINGTON: ...because they incur a lot of expenses in the process of doing this, to small business people. They would like to...and they look at this basically as an invitation to the court house, at the very least. [LB810]

SENATOR ASHFORD: I understand. I understand that argument. [LB810]

JIM PARTINGTON: If, in fact, we could make this legislation...that component of the training definitely understood by everybody so strong that it does what you have just said, I could probably... [LB810]

SENATOR ASHFORD: Well, I mean, I read it as any of the defenses as described, if established, bars the plaintiff's recovery. I mean, that seems like an absolute defense to me. But, I mean, I'm not...I understand. That's... [LB810]

JIM PARTINGTON: I don't know how an opposing lawyer would deal with that when it came to court. I don't know how Senator Chambers against you in court would deal with that particular... [LB810]

SENATOR ASHFORD: That would be an interesting battle. But thanks. [LB810]

JIM PARTINGTON: So that is...that's why we're so strong for training. We think that this training and the broader we can get it to spread across the state, the better off we'll all be. [LB810]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR ASHFORD: Okay. Thanks, Jim. Yeah, I don't want to force you to sit up there any longer than you need to. Thanks a lot. Thank you. [LB810]

JIM PARTINGTON: Thank you very much. [LB810]

KATHY SIEFKEN: Chairman Ashford and members of the committee, my name is Kathy Siefken, S-i-e-f-k-e-n, and I am the executive director of the Nebraska Grocery Industry Association and we are here today in opposition to this bill. And to sort of pick up where Jim left off, one of the issues we have is that if someone is sitting in a bar all night long, the bar is closed--or at the same time a shift could end, we don't know--someone comes in, they decide to pick up a 12-pack of beer. They buy it in our grocery stores. They've got...our clerks have a six-second window to determine whether someone is intoxicated or not. A lot of people can consume alcohol and they talk, they walk, they act as if they hadn't been drinking at all. They take breath mints before they come in, you can't smell them. There's no way to tell. They get in the car after buying their 12-pack. They drive home and, on the way, have an accident. We are then, according to this bill, pulled into that lawsuit. And that's what we would like to try and avoid. With a six-second window and we're off sale, we don't get to sit there and watch people drink all night long. And that six-second window really gives us a...it's very difficult for us to tell if someone is intoxicated in some instances. I know we have had some stores that have refused the sale to people that they thought were intoxicated and then ADA came after them because the individual wasn't intoxicated, they had a condition that caused them to weave or stagger a little bit. And so, you know, we're kind of caught between a rock and hard place. Should people be responsible for what they do? Absolutely. Should people not drive once they've been drinking? Absolutely. But how are we as grocery store owners supposed to control that when we're caught right in the middle of this and we haven't contributed to the fact that they're doing that? As far as the training, we have for the last couple of years supported mandated training. We have no problem with that. We need to have training that's accessible and that is cost-effective. And I believe that the web-based server-seller training that the Liquor Control Commission is underwriting right now fits that bill because everybody has access to it. One of our challenges though is the fact that our turnover is as high as it is. You get a small store that may have two employees, they leave. Do you close the doors because you don't have someone trained? You can't have somebody working 24-7 so you run into problems there and those are some of the issues that we have. If you have any questions, I'd be happy to try to answer them. [LB810]

SENATOR ASHFORD: Any questions of Kathy? Thanks, Kathy. [LB810]

KATHY SIEFKEN: Thank you. [LB810]

TIM KEIGHER: Good afternoon, Chairman Ashford and members of the committee. My name is Tim Keigher, that is K-e-i-g-h-e-r. I appear before you today as a registered

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

lobbyist for the Nebraska Petroleum Markets and Convenience Store Association. I guess I won't be redundant in repeating what others before me have said. I guess I have figured out one thing, that when someone goes into a grocery store, they're in there a lot less time than they are in a convenience store. But if they can go in and out of a grocery store in six seconds, that's pretty quick. I guess that is one of our concerns too, though. You know, someone is consuming alcohol at another establishment, either a bar or at home, and they stop at our place on their way in between places to pick up another six-pack, you know, we're being asked to make a judgmental call. Obviously if they're intoxicated I think that's in some cases obvious, but in others it's not as obvious as you think it is. And we get into the legal loop, too, of who is liable, who is the one that caused this action. So without being redundant I'll leave it at that and try to answer any questions if you have them. [LB810]

SENATOR ASHFORD: Senator Chambers. [LB810]

SENATOR CHAMBERS: Just one. Who did you say you represented? [LB810]

TIM KEIGHER: The Nebraska Petroleum Marketers and Convenience Store Association. [LB810]

SENATOR CHAMBERS: And the what? The petroleum markets and who else? [LB810]

TIM KEIGHER: Convenience store association. [LB810]

SENATOR CHAMBERS: Oh, convenience stores. Okay, thank you. [LB810]

TIM KEIGHER: You're welcome. [LB810]

SENATOR ASHFORD: Thanks, Tim. I believe we already took the neutral testifiers so... [LB810]

SENATOR CHAMBERS: You don't want them to do an encore and keep us here all night? (Laughter) [LB810]

SENATOR ASHFORD: They're welcome, if we have another neutral under the chair somewhere. Senator Kruse. [LB810]

SENATOR KRUSE: Mr. Chairman and members, some quick comments on what we've heard. First, there's a letter in your packet from Project Extra Mile. They're out of town and they wanted to testify, so make note of that. [LB810]

SENATOR ASHFORD: The whole project is...never mind. [LB810]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR KRUSE: The whole project is out of town. The whole office staff, yes. (Laugh) No, there's a little pun on that. Yeah, keep going. Second, several have talked about dram shop and I understand there's a lot of history in terms of legal language. I am not using that term because this is not your mother's dram shop bill. It just does not relate to what other states have done. I'll have another comment later on that. Partners, that's a wonderful term and that's really what we're after. I think the discussion in the committee, on the floor, and my own staff and stuff, we're not trying to hammer anybody. We're trying to figure out how can we stop the mayhem out there on the street, and we want to do that. In terms of the course that's offered, Liquor Control has carte blanche on that. And that was intentionally designed in there. And be assured that when I graduate from this particular job, I'm going to be coming in on that because they can tighten this up. They can make it more educational. They can have role-playing in there. They're, you know, this thing is far too simplistic. But they have the right to set up the standards and they determine it. We won't be micromanaging that as a Legislature. And then the comments from those who opposed, I appreciate all who have testified to this because it helps the discussion. But I would respectfully say they're not talking about this bill because they're talking about somebody that's been someplace else ahead of time. This bill doesn't refer to where somebody has been at ahead of time. It refers to what happens within the establishment and it has the term "noticeably intoxicated." A couple of testifiers said some people hold their liquor well and you can't tell if they're drunk. Can't tell if they're drunk (laugh) that removes them from liability of this particular bill because not only the clerk with that six-second window but some other people in the store have to be the witnesses in this civil suit and they have to say, this guy is drunk. So...also what happens afterward, it is the moment in that store. It is not where the person went later on. I'll conclude with a quick...put a face on this. In one of our small towns a person, a patron left the bar with help because he was not able to walk to his car. The bartender watched the patron. The bartender was not the one helping, but the bartender watched that this person, unable to leave the bar, was helped by a patron who took him out. He was not able to put his key into the lock of his car. The person helped him do that. He was not able to find the place to put his switch key in the car and somebody helped him do that. He did not know how to get the car started. The person reached in and started the car. And he wasn't sure how to put it in gear. All this was done by a person who left the bar in that kind of condition. Two people were killed within the first mile. That's what we're trying to watch out for. And the last person of responsibility there was that bartender who could have stepped in there. And I know this is hard, but that's where the role-playing comes in. How do you help a person accept a designated driver or, in this case, how do you intercede with that patron and say this person ought not to be driving? How can you do that in an effective way? It won't be guaranteed but I think this bill is going to sensitize all of us to the cause that will help us save lives and property. Thank you. [LB810]

SENATOR ASHFORD: Thank you, Senator Kruse. That concludes the hearing on LB810. LB844, Senator Karpisek. [LB810]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR KARPISEK: I know you're just trying to out wait me, but... [LB844]

SENATOR ASHFORD: We knew you'd come, Senator Karpisek. [LB844]

SENATOR KARPISEK: (Exhibits 11, 12) Thank you, Chairman Ashford and the Judiciary Committee. I'm here today to introduce LB844. My name is Russ Karpisek, R-u-s-s K-a-r-p-i-s-e-k, and I represent the 32nd Legislative District. LB844, which deals with the penalties associated with the possession of marijuana. Currently, anyone possessing less than one ounce of marijuana on their first offense is charged with an infraction and a \$100 fine, and may be ordered to attend a course on drug abuse by the judge. Less than one ounce, second offense, will be guilty of a Class IV misdemeanor and be fined \$200 and may be imprisoned, not to exceed five days. The less than one ounce third offense and all subsequent offenses will be guilty of a Class IIIA misdemeanor, be fined \$300, and be imprisoned not to exceed seven days. How much is an ounce of marijuana? According to NORML, which stands for National Organization for the Reform of Marijuana Laws, a typical marijuana joint is estimated to weigh about four-tenths of a gram, so an ounce of standard pot equals roughly 60 joints. My reasoning for introducing LB844 is that I feel we are sending our youth and the general public the wrong message. I've structured LB844 so that possession of one ounce or less of marijuana would carry the same penalty as our minor-in-possession of alcohol law. MIP is a Class III misdemeanor carrying a sentence of up to a \$500 fine and/or 90 days imprisonment. I feel we are sending the message that marijuana is less dangerous than alcohol, since the penalty is so much less. I do not agree with this message and have handed out some study data that will help support my view. To add to my belief we're sending the wrong message, possession of tobacco by a minor would be charged with a Class V misdemeanor, with a maximum of a \$100 fine, with no minimum. I also feel that the penalty for more than one ounce to one pound of marijuana, of a Class IIIA misdemeanor is far too lenient. If roughly 60 marijuana cigarettes can be produced from one ounce, 960 could be made from one pound. A person with almost 1,000 joints would get a lesser penalty than a minor with one can of beer. LB844 would change the penalty to a Class II misdemeanor carrying a penalty of up to six months in jail, or a \$1,000 fine, or both. LB844 would also increase the possession of drug paraphernalia from receiving an infraction to a Class IIIA misdemeanor, again with a maximum sentence of seven days imprisonment or a \$500 fine, or both, and a minimum of none. Although some may feel that marijuana is safe and has no consequences, we'll hear testimony today that contradicts this belief. Today's marijuana is not the same as it was in the seventies, when this law was changed. THC--I'm going to butcher this, but--tetrahydrocannabinol, is the main psychactive substance found in the cannabis plant. These levels in marijuana have increased from 6 percent to 13 percent in the past two decades, which is far higher than the 1 percent potency levels of marijuana in the seventies. Marijuana has also been proven to be a gateway drug to the use of other illegal drugs like methamphetamine, heroin, and cocaine. Studies show that very few

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

young people use other illegal drugs without first trying marijuana. There are, of course, many, many studies, some of which I have handed out today. Those that I have handed out include how powerful marijuana is in 2008 compared to 1978, and how its designation of a gateway drug...how marijuana is associated with crime and violence, that marijuana is addictive and poses significant health consequences, and what our youths' perceptions of marijuana use are. I personally feel that marijuana is even a more dangerous drug than alcohol, especially to our youth, but in Nebraska it is not treated that way in our laws. Even though I do not feel that it is more dangerous, LB844 would make minors in possession of alcohol or less than one ounce of marijuana face the same penalties. As for the stiffer penalty for one ounce to one pound of marijuana, the current law increases the penalty the way it is. LB844 would increase it more. As far as the people over 21 who are in possession of marijuana, in my opinion it is still an illegal drug. The higher penalties are meant to be a deterrent for its use. Thank you very much for bearing with my reading, and I'd be glad to entertain any questions. [LB844]

SENATOR ASHFORD: Yes, Senator Schimek. [LB844]

SENATOR SCHIMEK: Thank you, Senator Ashford. Senator Karpisek, I've already been asked by the press about this bill, and I said I wasn't sure how I felt about it yet, but I had some kind of preconceived notions or thoughts about it. One of my thoughts is this: I think for a first-time offender this would be pretty steep in terms of having jail time. I do not disagree that the fines are too small the way they are. It's no deterrent at all, I'm sure. And I just wonder if you've had much input along that line. One of the things that we have struggled with in this Legislature is having to build new prisons, and I...we've got to be really careful what we do here. Would you be open or amenable to some kind of amendment which would do away with some of that jail time? [LB844]

SENATOR KARPISEK: I would definitely be willing to work with the committee, but I do want to point out that that is the minor-in-possession of alcohol law. Nothing would be different. [LB844]

SENATOR SCHIMEK: And I understand what you're saying, and that's why these bills all come to this committee, is so that the penalties, we can kind of keep things on an even track. So your thoughts are appropriate and good. I'm just suggesting that I'm...I don't think the way the bill is right now that I could vote to advance it, but I just wanted to see how open you were to working with the committee. [LB844]

SENATOR KARPISEK: Well, and I'd like to say, Senator Schimek, that jail time is not what I am trying to push, but more of a deterrent. And the MIP cases that I've seen around my hometown, maybe on their third offense they will do some jail time, but they've usually been getting the full amount of jail time on their third offense. [LB844]

SENATOR SCHIMEK: And I have to tell you, I don't know anybody who smokes

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

marijuana, so it's hard for me to make judgments on this. Thank you. [LB844]

SENATOR KARPISEK: Well, my case is just to make it equal. [LB844]

SENATOR ASHFORD: Yes, Senator Chambers. [LB844]

SENATOR CHAMBERS: Your pronunciation was as good as that of the President, I just want to tell you. (Laughter) [LB844]

SENATOR KARPISEK: Well, thank you, Senator Chambers. I don't know that that was a compliment, but... [LB844]

SENATOR CHAMBERS: Senator Karpisek, the only reason you've brought this bill is because you heard some people complain about the difference between the sentencing or the penalties for marijuana and alcohol when it comes to minors; isn't that true? [LB844]

SENATOR KARPISEK: No, that is my feeling, not other people complaining. That is my feeling. [LB844]

SENATOR CHAMBERS: Then I misread what was in the paper or they misstated why you were bringing it. But down through the years an attempt was made to decriminalize marijuana. I supported those efforts, to be best of my recollection, and I'm not a drug fiend, I don't know drug fiends. You would have heard, if you sat on this committee like we have, the numerous cases of people killing others while driving under the influence of alcohol--not so with marijuana; people being served too much liquor and going out and having problems--not so with marijuana. Marijuana cannot be shown to have created the havoc in society that alcohol has. You don't have binge marijuana parties like you have on university campuses with alcohol, where they drink themselves to death, where they jump out of buildings and do terrible things, and this is not an aberration--the conduct is--but the activity is so widespread you can say it's a part of campus life. They put out publications about the top partying schools. Creighton opened their facility so that they can serve hard liquor, wine, and beer. Students therefore can go to class under the influence of alcohol, and they get it at a Jesuit university--I attended it. They talk about moderation, they talk about morality, they talk about family values, societal structure and infrastructure, yet alcohol, I guess, can produce money. Now you can't convince me that marijuana poses the problem that alcohol does. You can probably convince some people. When I read about the ravages of alcohol...I meant tobacco, I read about the number of cases of emphysema, cancer, and other related ailments--not so with marijuana. And you're going to tell me, are you, that marijuana is as big a problem in terms of societal problems, as alcohol and tobacco? Is that what you're saying with this bill? [LB844]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR KARPISEK: Yes, sir. [LB844]

SENATOR CHAMBERS: Okay. [LB844]

SENATOR KARPISEK: May I interject just a little? [LB844]

SENATOR CHAMBERS: No, you answered my question. [LB844]

SENATOR ASHFORD: Go ahead. [LB844]

SENATOR KARPISEK: Well, I just want to say that there is no way that we can measure the amount of... [LB844]

SENATOR CHAMBERS: Look at him; you're answering him, not me. [LB844]

SENATOR KARPISEK: Oh, okay. I like to watch you, Senator Chambers. (Laughter) [LB844]

SENATOR ASHFORD: I just said go ahead, I didn't...no. (Laugh) [LB844]

SENATOR KARPISEK: Oh, okay. We can't measure the amount of marijuana smoked in the system. We can on BAC for alcohol, but we cannot on marijuana. We can't tell how high someone is. That's part of my argument, that we don't know that all these things haven't happened. And I've heard of bong parties--that's why they have bongs, so they can all get together and smoke marijuana, the same as a kegger. [LB844]

SENATOR CHAMBERS: And what do they do after one of these parties? Do they go out and hit people in the head, or do they sit around, laze around, and float? Have you heard of somebody taking marijuana to get high enough to go commit a crime, or does it tend to have a settling, stabilizing influence? [LB844]

SENATOR KARPISEK: I guess in my experience with people, they have not just sat around. They've been very obnoxious, very destructive. [LB844]

SENATOR CHAMBERS: The consumers of alcohol or marijuana? [LB844]

SENATOR KARPISEK: Marijuana. And they probably were having alcohol, too, Senator Chambers. (Laughter) [LB844]

SENATOR CHAMBERS: I don't have anything else. Thank you. [LB844]

SENATOR ASHFORD: They had rock bands, too, Senator Chambers. (Laugh) [LB844]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR KARPISEK: That's my next year's bill. Don't...(Laughter) [LB844]

SENATOR CHAMBERS: Thank you. [LB844]

SENATOR ASHFORD: Thank you, Senator Karpisek. [LB844]

SENATOR PIRSCH: Yeah, I just have one question. [LB844]

SENATOR ASHFORD: Oh. Senator. [LB844]

SENATOR PIRSCH: You know, you kind of commented in your neck of the woods, Wilbur there, that it might not be untypical for judges to only start imposing jail upon the third offense or so, and that's generally where judges in Douglas County, my experience is, would start to begin looking at jail, some longer than third, fourth time--I think some, never. But what about other parts of the state? Are you familiar with common sentencing practices in that? [LB844]

SENATOR KARPISEK: As I looked through the Lincoln and Omaha paper, I saw a smaller fine for the minor in possession than I do back home. I do not know on the other parts of the state, on the marijuana. Thankfully this came up a little bit faster than I was anticipating, and didn't quite get all of my across-the-state ammunition ready. [LB844]

SENATOR ASHFORD: I'd rather not have you use the word "ammunition," Senator Karpisek. (Laughter) [LB844]

SENATOR KARPISEK: My back is... [LB844]

SENATOR ASHFORD: That's tomorrow, Senator Karpisek. Okay, I know we have to keep moving here, so thank you for your introduction. [LB844]

SENATOR KARPISEK: Thank you. [LB844]

KATHY BURSON: (Exhibit 13) Good afternoon, Mr. Chairman and members of the committee. My name is Kathy Burson, B-u-r-s-o-n. I appear again this afternoon. I am coexecutive director of PRIDE-Omaha, a parent/community organization dedicated to preventing the use of alcohol, tobacco, and other drug use by young people. I'm here today to support LB844, a bill to increase penalties for possession of marijuana. I am in total agreement with Senator Karpisek's view that smoking pot is just as serious a crime as teenage drinking and that marijuana users should face the same potential penalties as a minor in possession. Our current law is far too lenient. Society in general ties the seriousness of the crime to the punishment. Our kids are growing up in a culture that normalizes the use of marijuana. Surveys have shown that when young people believe that a drug is harmful, fewer young people use that drug. However, with minimal

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

consequences in place, it is hard to convince kids that marijuana is harmful. The critical factor here is that marijuana is a dangerous and addictive drug that can damage the heart, lungs, brain, and reproductive system. The effect on the lungs of each joint is equivalent to smoking up to five cigarettes. The drug also suppresses the immune system and can cause cancer and emphysema. Recent studies have also shown that marijuana can increase the likelihood of mental illness, including depression, schizophrenia, and bipolar disease. One out of every three Nebraska youths have tried marijuana. The average age of first-time use is around 13 years of age. Marijuana is considered a gateway drug, which means marijuana is one of the first drugs tried because it's cheap, available, and believed not to be dangerous. Children who use marijuana are more likely to move on to other dangerous drugs such as methamphetamine, cocaine, and heroin. A recent study showed that the odds of using other illicit were 60 times higher for 15-year-olds who used marijuana weekly, as compared to nonusers. Marijuana is often associated with delinquent and aggressive behavior in young teenagers. In fact, a study found that marijuana had a greater effect on increasing the degree of violent behavior in nondelinquent individuals than in delinquent ones, due a reduction of inhibition towards violent acts. There are tens of thousands of marijuana-related incidents in emergency rooms every year--over 99,000 of them are young people. More teenagers are in drug rehabilitation for marijuana than any other intoxicant, including alcohol. In light of these devastating facts, I urge you to pass LB844 out of committee and onto the floor for debate. Thank you. [LB844]

SENATOR LATHROP: Thank you. Anybody have any questions? You know, something occurred to me when you called...if I can ask one. Something occurred to me when you called this a gateway drug, and the statistics on the people who use methamphetamines, or the likelihood that you'll use. Is beer also a gateway drug? [LB844]

KATHY BURSON: Yes, it is. [LB844]

SENATOR LATHROP: I mean, do many of these kids start out with beer and then go to marijuana, or do they start out with marijuana and go to beer? [LB844]

KATHY BURSON: The four gateway drugs that we see is alcohol, tobacco, marijuana, and inhalants. Those that use those four are more likely to move on to other illicit drugs. [LB844]

SENATOR LATHROP: Okay. Thank you, Kathy. [LB844]

KATHY BURSON: You're welcome. [LB844]

SENATOR LATHROP: Any other questions? Great, appreciate your testimony. [LB844]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

TARA KUIPERS: Good afternoon, again. I hope you guys are comfortable--comfy chairs. You've been in them for a long time today. I appreciate that. My name is Tara Kuipers, and I'll spell that again--T-a-r-a K-u-i-p-e-r-s. I'm from Beatrice and I represent the Gage County Maps Coalition. We're a consortium of individuals, including law enforcement, educators, our county attorney's office is highly involved, along with parents and youth themselves, who are either involved in substance use and abuse, who are just recovering from different addictive habits that they've had, as well as kids who have made the choice to stay substance free. And I come representing them, fully in support of LB844, and I applaud Senator Karpisek for doing this bill. I came with a prepared bulleted list of things that I wanted to share with you; however, by some of the things that were said today, I've completely changed what I had intended to say to you. Because of the testimony of someone who sat in this chair earlier, testifying about LB794, as well as some comments that were made just a few moments ago about the perception that the only thing marijuana will make someone want to do is go buy a bag of Cheetos and veg out. And that is simply untrue. Marijuana is a dangerous substance. It is something that places our youth and adults alike at risk here in our communities. It is because of those inaccurate perceptions that we have youth trying marijuana at astounding rates. It is because of that misperception and because of the very minimal administration of sanctions regarding marijuana that this bill is attempting to fix that we have the problem that we have now. The phrase "gateway drug" is an important one to remember right now. We see youth escalating tobacco, alcohol use into marijuana use. This bill will hopefully allow some of those youths to curb that escalation into harder drugs. If people question the gateway properties or the gateway tendencies of marijuana, all they'll need to do is ask a police officer or a corrections official working in the prison system, a mental health or substance abuse treatment professional. When you ask them to ask their clients or those incarcerated in their prisons, what is the substance that you first began using, they will almost unanimously say alcohol and marijuana. Those two substances, hand in hand, have gone on to create havoc that we see in the prison systems, like you've mentioned earlier today. This bill is one way to provide a deterrent effect to hopefully curb that use and that abuse that we're seeing at such alarming rates. This bill will help us keep our youth and adults and our entire communities safe. And I also urge you to please pass this legislation, for safety's sake in our communities. Thank you. Do you have any questions for me? [LB844]

SENATOR ASHFORD: Thanks, Kathy. Any other proponents? Opponents? Come on up, sir, and...no, go ahead. No, no, I mean, you go ahead. [LB844]

SUSAN KIRCHMANN: I can wait. I've been here all afternoon. Go ahead. [LB844]

SENATOR ASHFORD: Okay. Oh, okay. So have we. Come on up. Of course, that's our job. [LB844]

LEN SCHROPFER: (Exhibit 14) Good afternoon, Chairman Ashford, members of the

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

Judiciary Committee. My name is Len Schropfer, L-e-n S-c-h-r-o-p-f-e-r, and I'm a farmer in Fillmore County. First, let me say that Senator Karpisek makes the best deer wienies in the world. (Laughter) And he has wisely been talking about a water use fee. We have a lot of common ground. I do believe the state of Nebraska has the state's right to regulate possession of alcohol, tobacco, and marijuana by minors, but about that level playing field, the total general prohibition of marijuana is unconstitutional because of the precedent of the 18th and 21st Amendments to the U.S. Constitution dealing with alcohol prohibition. Since it required an amendment to the Constitution to have a general prohibition of alcohol, it would likewise require an amendment to have a general prohibition of marijuana. Because it is possible to prove in court that marijuana is not as harmful as alcohol, government has no defensible or compelling reason to unconstitutionally subject marijuana to a stricter law than alcohol. The myth about marijuana being a steppingstone is invalid. It only appears that way because marijuana has been thrown into the black market with meth and heroin and the rest. Alcohol, with its escapism, is far more likely to lead to harder drugs. Marijuana has been used successfully to treat alcoholism. As for the drug course requirements, I had a friend who, because of DWI, was compelled to attend such a course at the Hastings Regional Center. He phoned me in desperation from Hastings, because both in group sessions and in one-on-one with a professional, he was stopped from saying that if he had access to good marijuana he wouldn't have to get drunk. I would far sooner trust my safety to a driver using marijuana than to one drinking alcohol. You can check the insurance actuarial figures and the traffic accident records. What the Legislature should do is assert its state's right to remove marijuana from the controlled substances list and then regulate and tax it as you do with alcohol and tobacco. All we have ever asked for is constitutional equity. What the Legislature should do, if you truly care about the children, please rescue our water from the \$5 corn and the corn ethanol binge. Thank you very much, and I do welcome questions. [LB844]

SENATOR ASHFORD: Any questions of Len? You were talking about canals, weren't you? Wasn't that one of your... [LB844]

LEN SCHROPFER: I'm sorry, sir. [LB844]

SENATOR ASHFORD: Canals? Didn't you advocate canals in the water issue? Building canals? Isn't that one of your... [LB844]

LEN SCHROPFER: No, sir. That's not me. [LB844]

SENATOR ASHFORD: Okay. [LB844]

LEN SCHROPFER: I agree with Senator Karpisek that a water use fee is probably a good idea. [LB844]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

SENATOR ASHFORD: Okay. All right. Thanks, Len. (Laughter) [LB844]

SENATOR LATHROP: Did Senator Karpisek somewhere advocate a water use fee? [LB844]

LEN SCHROPFER: Yes, sir. I believe he brought it up at the beginning of last session. It never got to be a bill or anything, because he was discouraged from... [LB844]

SENATOR LATHROP: Are you...is Fillmore County inside of Senator Karpisek's district? [LB844]

LEN SCHROPFER: Yes, sir. Yes, sir. [LB844]

SENATOR LATHROP: Okay, great. Thanks. [LB844]

LEN SCHROPFER: Thank you. [LB844]

SENATOR ASHFORD: Thanks, Len, very much. Thanks for staying all afternoon, and... [LB844]

LEN SCHROPFER: Thank you very much. [LB844]

SENATOR ASHFORD: Okay. How many opponents do we have? Three? Okay. Come on up. [LB844]

SUSAN KIRCHMANN: Good afternoon. Thank you for your time. My name is Susan Kirchmann, K-i-r-c-h-m-a-n-n. I am here testifying basically for myself, as a citizen of Nebraska. I practice as a criminal defense attorney, and I also do juvenile court work with abuse and neglect, and so I've had quite a bit of experience in working with people with mental health problems and substance abuse issues. What I have found through my practice is that a lot of people with mental health problems are self-medicating, and I think that was something that was mentioned earlier, too, as part of the insanity bill discussion. Increasing the penalties for marijuana is not going to decrease the demand or the use. I think our nation has shown, over the last 30 years with the increasing penalties throughout its war on drugs, it has done nothing to stop the supply or the demand. Marijuana is a natural substance; it grows wild everywhere. I've seen it growing in several state parks, in fact. It's just something that you can't eradicate, you can't get rid of. I believe if the senator truly wants to increase the penalties for minors, his bill could be tailored to do so, but to increase the penalty for nonviolent adults would be an unfortunate response. Marijuana in and of itself is not a gateway drug. It's a gateway drug, not because of its properties, but because of its availability--same as alcohol, tobacco, and inhalants for other children. That's what they can get their hands on. They can get their hands on the airplane glue, they can get their hands on their

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

parents' cigarettes, they can get their hands on alcohol. That is why it's a gateway drug. It is associated with crime because it is illegal. And I would love to see marijuana and many drugs treated as a substance abuse treatment model by the state, where it is taxed and regulated and controlled, instead of completely prohibited, where the black market controls it and the profits from the black market drive the economy. I'm really nervous (laugh). [LB844]

SENATOR ASHFORD: Well, you're doing a great job so far, so. [LB844]

SUSAN KIRCHMANN: Okay, thank you. I should be more used to speaking in public, I think I'm just going to call it good at this time. [LB844]

SENATOR ASHFORD: I think that is important testimony. Yes. [LB844]

SENATOR PIRSCH: Oh, I just wanted to say, now where do you practice? [LB844]

SUSAN KIRCHMANN: I'm an attorney in private practice here in Lincoln, Nebraska, so I have seen the MIP fines here tend to be about \$250 on a first offense. A lot of times a subsequent offenses require a substance abuse evaluation. [LB844]

SENATOR PIRSCH: Yeah. Could you give me an idea with MIP--do you know at what point in time do the judges generally start imposing jail time? [LB844]

SUSAN KIRCHMANN: Usually a second or third offense. You know, generally a third...you just don't see the jail time before. A lot of it depends on the circumstances surrounding the MIP also, and a lot of the MIPs here in our county I have seen also dealt with in juvenile court, where obviously, you know, rehabilitation of the juvenile is the key. [LB844]

SENATOR PIRSCH: Do you think judges would treat that equivalent? I mean, that is to say...you said about generally third offense MIP. Do you think judges would treat, if this bill were to be passed, do you think that they would treat this differently, that they may tend to go to jail on first offense more, or do you think that the gauge would probably be set just about the same level, third offense or later? [LB844]

SUSAN KIRCHMANN: What I have seen here in Lancaster County on people with--and I'm going to address adults first--on people with third or subsequent marijuana possession charges, basically the court sits there and says, okay, look. Either you've got to get a better habit or better at the habit that you have, because you know, up until, I think, just recently did the Legislature provide for the requirement of a substance abuse course. But prior to that it was, you know, \$300 fine, seven days in jail. Quit breaking the law. But there's not a whole lot that I'm going to do for you. The minors in possession of marijuana run...the biggest risk that they run is losing their eligibility for

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

federal student loan funding, and that's the most dangerous thing for them. The minor with, you know, any kind of drug or alcohol problem is the fact that they can't continue their education. I have not seen jail time on the marijuana possessions, on the infraction ones,... [LB844]

SENATOR PIRSCH: Yeah. [LB844]

SUSAN KIRCHMANN: ...except for third or subsequent. [LB844]

SENATOR PIRSCH: Is it currently, right now, when there's no possibility of jail with the marijuana, that is a disqualifying event, the penalty with respect to the student loan, you said? [LB844]

SUSAN KIRCHMANN: No, actually the penalty is simply any drug conviction will disqualify you from student loans, and that's a federal. [LB844]

SENATOR PIRSCH: Does that include the current \$100 fine for marijuana? [LB844]

SUSAN KIRCHMANN: Yeah, any, any. Yep. Even though it's an infraction, it doesn't matter. You are disqualified. [LB844]

SENATOR PIRSCH: And that's probably the biggest penalty, in your estimation is this? [LB844]

SUSAN KIRCHMANN: Absolutely. And I think that's one of the most devastating ones, too, is when you're telling someone that we're not going to help you fund your education because you made a poor choice, we're really slamming a lot of doors for that person and their future. [LB844]

SENATOR PIRSCH: But that's a federal law, correct? [LB844]

SUSAN KIRCHMANN: But that's a federal law. You guys can't do anything about it. (Laugh) I mean, you could try. [LB844]

SENATOR PIRSCH: Okay. Thank you. [LB844]

SUSAN KIRCHMANN: Thank you. May I be excused? [LB844]

SENATOR ASHFORD: Yes, Susan, you can be. Yes. [LB844]

DAVID SPLICHAL: My name is David Splichal. I'm a resident of Lincoln, Nebraska, and I'm here to oppose this bill. It seems like it's a perennial thing, that every year or two we are faced with this. In 2006 there were 829,627 arrests for marijuana, 738,916 arrests

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

were for possession alone in the United States. In Nebraska there were 7,416 citations for marijuana in 2006. According to a 2005 national survey, 97,000,000 Americans admitted to having tried marijuana. Omaha City Prosecutor Marty Convoy said his office handled 2,500 marijuana cases in 2006, and added tougher penalties might inspire more defendants to fight their charges. Passing this bill would inevitably burden an already taxed criminal justice system, taking law enforcement officers off the street to transport and book nonviolent defendants accused of a victimless crime. The court system, from judges, prosecutors, bailiffs, and especially public defender staff, will all have to deal with an increased load, and finally, corrections will have more people to incarcerate in a system that is frequently operating beyond their capacities. The drug war has led to this overcrowding and contributed to the need to build the Tecumseh facility, as well as new jails in Lancaster, Seward, Hall, and many other counties in the state. Passing this bill will criminalize people, create an stigma that will limit educational and vocational opportunities, eliminating their ability to be productive and contributing to our society. Other states have more draconian penalties for possession of marijuana, with no apparent deterrent effect. While creating criminal status may deter professionals like doctors and lawyers from this behavior, it probably will not even enter the thought process for most pot smokers. Legalization and regulation would better control access to marijuana. Liquor and cigarette dealers have learned to check IDs, limiting access to young people. The black market is not regulated. Let's not move backwards with this issue and criminalize citizens who for the most part are otherwise law-abiding. And besides that, I've heard a lot of "mistruths" stated by other people who have appeared as proponents of this. Marijuana has never been found to be addictive. The whole gateway theory has been debunked since the nineties. Even the Institute of Medicine has debunked that. It's not...it doesn't...it's never been found to be carcinogenic. There's no known level of toxic level for marijuana, and already there's like a...by the third offense, we have gotten to the point where you can get a misdemeanor conviction, and to stigmatize young people for a first offense, for a bad idea, for a bad choice, is just going to do a disservice. As we heard about the, well, let's make it the same penalty as minor in possession, and then we went ahead to hear that minors in possession frequently they don't even get to jail until their third offense. So how much of a deterrent effect has criminalizing the youth actually enabled us to see? Are we seeing beneficial results from it or not? And if the system is not broke, we should not fix it. My time is up. [LB844]

SENATOR ASHFORD: Thanks, David. [LB844]

DAVID SPLICHAL: Thank you. [LB844]

SENATOR ASHFORD: Any questions of David? Thank you, sir. Okay, looks like you're the batting clean-up here. [LB844]

MARVIN HAVLAT: Good afternoon, Chairman Ashford. My name is Marvin Havlat. The

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

last name is H-a-v-l-a-t. I rise against the bill because I'm a hemp proponent. Every time I turn around, oh, you can't grow your hemp because you got the marijuana. I just get really tired of that, because hemp is not marijuana. I really think we need to grow hemp here in this state, because it will solve a lot of our water problems and a lot of our energy problems. Last year \$450 million of marijuana money was taken out of this state by the drug cartels. The entire...the Mexican government, it ran, in the San Diego Union Tribune the entire United States, they weren't going to give up their drug war, because it provides \$69 billion to that country from the United States. I've been arguing with this with Senator Landis for six years now. And he and I both know that this cash cow, this drug war, helps the judicial system, and I told him if we'd give that up, we could...you know, legalize it like California. Currently, California legalizes their growers of marijuana. California sells it for \$25 a gram in their stores. And it costs you about \$150 to get a prescription to do it, and they don't seem to have too many social problems. The real truth of the matter is you never know about somebody smoking marijuana. They can go any direction. Some people see God, some people see the devil. So I would like it legalized so we can keep some of that \$450 million here and then use that money to solve some of our other state problems. Thank you. [LB844]

SENATOR ASHFORD: Thanks, Marvin. Any questions of Marvin? All right. Thank you all very much. Senator Karpisek, do you wish to close? [LB844]

SENATOR KARPISEK: I would. Thank you, Senator Ashford. I have passed out the studies. They are studies. They're all referenced back to where they came from and when, so you can see that they are real studies. There are real dangers. And they're done by universities, they're done by other countries--they're all there. We hear a little bit about marijuana being a medicinal drug. I thought I'd hear more of that today, but we haven't. There is a prescription drug called Marinol that has the THC in it. If that is something that people need to have to be a pain reliever, they can get a prescription, much like morphine or other drugs that we use in hospitals or prescriptions. There are some good effects to the cannabis plant. Like I say, the THC, and our pharmaceutical companies are working on that. So just because I was in an accident and aspirin don't help, to smoke pot I don't think is a good enough defense. Another issue is that it will clog the court system. It doesn't have to. The MIPs, again, they don't go to jail right away. We heard that it's not making a difference to have the jail time on alcohol for minors. How do we know that? Shall we take it off and see how many more of our youth do drink? I don't think we want to do that. I think it's there for a reason. I think it's a fine idea. Put a little scare into somebody. That's why it's there. The educational funding, we heard that that is not a problem. So if we're worried about funds being taken away, it sounded like to me, by the testifier, that that's not an issue. And yes, to give someone, the kids, for one bad choice, I agree. I don't want to throw them in jail, and we're not locking away the key. But if they are caught with one half a beer, they get nailed, but they can have up to an ounce of marijuana and pay \$100 fine. Now I didn't point out that it is a \$100 fine now, first offense. In LB844, it would make it be up to, a minimum of

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

zero. So the judge could take into consideration something happened that shouldn't have happened--I won't give any of that fine. So I'm trying to leave it in the hands of our judicial system, much as we do with the alcohol. I would be willing to work with the committee to try to do some things that would make it better, if you see fit. Of course, in my opinion, it's fine as it is. But I'm always willing to work with the committee. Thank you. [LB844]

SENATOR ASHFORD: Thanks, Senator Karpisek. That concludes the hearing. [LB844]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 24, 2008

---

Disposition of Bills:

LB736 - Advanced to General File, as amended.

LB794 - Held in committee.

LB808 - Held in committee.

LB810 - Advanced to General File, as amended.

LB844 - Advanced to General File, as amended.

---

Chairperson

---

Committee Clerk