



Rob Hutton

STATE REPRESENTATIVE • 13TH ASSEMBLY DISTRICT

***TESTIMONY OF REPRESENTATIVE ROB HUTTON
IN SUPPORT OF ASSEMBLY BILL 128
TO THE ASSEMBLY COMMITTEE ON CORRECTIONS***

January 28, 2016

Good morning. Assembly Bill 128 is the product of the Legislative Council Study Committee on the Review of Criminal Penalties, of which I served as its chair. This legislation has earned wide-spread support, including unanimous votes in favor of introduction from both the Study Committee and the Joint Legislative Council.

The committee was directed to review the penalties for misdemeanor and low-level felony offenses. Specifically, the committee was directed to determine: whether current misdemeanor or low-level felony penalties are appropriate; whether any current unclassified crimes should be classified; and whether any offenses are outdated or should be decriminalized.

Along with 5 legislators, the committee's membership included: three judges, a district attorney, the director of the Department of Justice's Office of Crime Victim Services, two defense attorneys, a law professor, and the

adjutant to the Milwaukee County sheriff (a list is provided on the back page). The professional experience and judgment these public members brought to the committee was invaluable in crafting a piece of legislation that fulfills the task with which this committee was charged.

The committee also heard from various criminal justice professionals and other stakeholders throughout the course of its study. These individuals included a law professor, a district attorney, the Director of State Courts, a county sheriff, a court of appeals judge, and numerous state agency staff.

To accomplish our assignment, we created two subcommittees to work on particular aspects of the Study Committee's scope and make recommendations to the full Study Committee. First, we tasked the Subcommittee on Obsolete Misdemeanors with identifying misdemeanor offenses that may be repealed because they are obsolete or no longer relevant. Second, we directed the Subcommittee on Penalty Alignment and Organization to make recommendations about aligning misdemeanor penalties so that crimes of similar severity have similar penalties; to determine whether any unclassified misdemeanors should be classified; and to identify misdemeanors that the Study Committee might consider either reducing to a

forfeiture or elevating to a felony. The leadership of Representative Neylon and Representative Spiros, the chairs of these subcommittees, was instrumental in developing the committee's final product.

In response to testimony, and based on the professional experiences shared by its members, the committee approved Assembly Bill 128. This bill makes the following four changes:

First, the bill classifies the majority of unclassified misdemeanors in the Wisconsin Statutes. Under current law, misdemeanor offenses in the Criminal Code are classified as a Class A, B, or C misdemeanor, each with a corresponding maximum fine and term of imprisonment. The bill uses these three classes to organize most unclassified misdemeanor offenses. That is, misdemeanors located outside the Criminal Code.

The committee's decision to classify these offenses made the task of determining the appropriate penalties easier for the committee and will afford future legislatures the same benefit. In developing principles to guide the classification of misdemeanors, the committee made it a priority to defer to prior legislative determinations about the severity of offenses. In addition, the

committee decided to not classify, or otherwise affect the penalties, for crimes relating to OWI, drug offenses, crimes related to elections and public officials, crimes related to public assistance, crimes related to mining, crimes related to federally delegated environmental protection programs, and various other misdemeanor offenses.

Second, the bill repeals misdemeanors identified by the committee as obsolete or no longer relevant. Examples of the types of crimes repealed are crimes that relate to obsolete technology such as telegraphs and corn shredders. According to data provided by the Office of the Director of State Courts, none of the crimes repealed have been charged for at least the last 10 years.

Third, the bill changes the penalty for certain misdemeanors to civil forfeitures. Most of these misdemeanors are offenses currently punishable by a fine only, not by a term of imprisonment. The bill generally changes the penalty for an offense punishable by a fine of a certain amount to a forfeiture of the same amount.

Finally, the bill addresses two important issues related to forfeiture prosecutions that were raised by law enforcement, district attorneys and judges. First, current law only authorizes a law enforcement officer to issue a citation for select forfeiture offenses. Second, under current law, the civil procedure rules of discovery apply to most types of forfeiture prosecutions. The bill resolves these issues by authorizing law enforcement officers to issue a citation for any civil forfeiture offense and by applying the criminal procedure rules of discovery to certain forfeiture offenses initiated by a citation.

As some of you may remember from last session, members of the Joint Committee on Finance inserted a provision in the 2013-15 budget requesting the Joint Legislative Council create this Study Committee. The bill before you honors this request and represents months of hard work, completed through the unique study committee process where legislators collaborate with informed public members.

I am happy to answer any questions you may have. Mike Queensland and David Moore of the Legislative Council are also available to answer questions. Thank you for hearing my comments today. \

Members of the Study Committee on the Review of Criminal Penalties:

- Representative Rob Hutton – Chair
- Senator Fred Risser – Vice-Chair
- Inspector Edward Bailey – Milwaukee County Sheriff's Office
- Representative Mandela Barnes
- Attorney Keith Belzer – Devanie Belzer & Schroeder, S.C.
- District Attorney Adam Gerol – Ozaukee County
- Circuit Court Judge Scott Horne – LaCrosse County
- Executive Director of the Office of Crime Victim Services
Jill Karofsky – Department of Justice
- Professor Ben Kempinen – University of Wisconsin Law School
- Representative Adam Neylon
- Circuit Court Judge David Reddy – Walworth County
- Representative Daniel Reimer
- Representative John Spiros

- Deputy State Public Defender Michael Tobin – Wisconsin State Public Defenders Office
- Circuit Court Judge Donald Zuidmulder – Brown County

Opposition to and Request for Removal of Assembly Bill 128, Section 354

Again and still, the Human Burial Sites Preservation Law at Wis. Stat. § 157.70 is under attack. The following describes a current, immediate stealth attack on Wis. Stat. § 157.70 – the Human Burial Sites Preservation law.

Assembly Bill 128 (<http://docs.legis.wisconsin.gov/2015/related/proposals/ab128>) was introduced by the Joint Legislative Council in March of 2015. AB128's stated purpose is for "classifying misdemeanors, repealing or modifying obsolete misdemeanors, and changing procedure and discovery in certain civil actions." This bill provides uniformity for many misdemeanor "crimes" that are referenced in non-criminal provisions of the law. Importantly, the current Human Burial Sites Preservation Law at § 157.70(10)(e) contains a significant penalty provision providing that:

"(e) Any person who disturbs a burial site for commercial gain not related to use of the land where a burial site is located or who disturbs a cataloged burial site for commercial gain related to use of the land where a burial site is located in violation of this section may be fined not to exceed 2 times the gross value gained or 2 times the gross loss caused by the disturbance, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred, **or imprisoned for not more than one year in the county jail or both**. In calculating the amount of the fine based on personal injury, any measurement of pain and suffering shall be excluded."

The proposed AB128, Section 354 strips the jail time provision from the law. The new proposal at **Section 354** reads:

"157.70 (10) (e) Any person who disturbs a burial site for commercial gain not related to use of the land where a burial site is located or who disturbs a cataloged burial site for commercial gain related to use of the land where a burial site is located in violation of this section may be ~~fined~~ required to forfeit an amount not to exceed 2 times the gross value gained or 2 times the gross loss caused by the disturbance, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred, ~~or imprisoned for not more than one year in the county jail or both~~. In calculating the amount of the ~~fine~~ forfeiture based on personal injury, any measurement of pain and suffering shall be excluded."

The highlighted portions are the areas in question.

The Study Committee (people who reviewed the law and recommended these changes) established the process they followed for modifying penalties. In part they said:

"Classified criminal offenses are offenses for which the penalty is established by reference to a particular "class" that corresponds to a set penalty range. Under current law, misdemeanors in chs. 939 to 951 of the statutes (the Criminal Code) are classified as follows:

- Class A Misdemeanor, which is punishable by a fine not to exceed \$10,000, imprisonment not to exceed 9 months, or both."

and

“• If the current penalty for an unclassified misdemeanor is exactly the same as the penalty prescribed for a particular misdemeanor class, the misdemeanor is placed into that class” . . .

“○ For offenses in which the maximum term of imprisonment corresponds exactly to the term of imprisonment prescribed for an existing class, the offense is placed within that class.”

and

“Certain misdemeanors classified by this bill are not placed in classes according to the principles described above because after initially applying these principles to each unclassified misdemeanor, the Study Committee reviewed the preliminary class assignments and adjusted them as it deemed necessary.”

The Study Committee did not follow its own primary guidance when it came to the Burial Law. The Committee could have made this penalty a Class A Misdemeanor (9 months imprisonment), similar to what it is now (1 year imprisonment).

Who were the members of the Study Committee? Who did they consult on this? How did they decide to eliminate the jail-time provision?

One can imagine a scenario where a landowner with mounds on his property has thoughts of future development. So he comes up with an idea to get rid of those mounds: He decides that he will sell top soil and other clean fill dirt. So he bulldozes the mounds, selling the dirt for a few hundred or a few thousand dollars. His penalty now will be perhaps 2 times the amount he gained – a few thousand dollars at most – by selling the “dirt.” He will not be subject to jail time. And now, in 5 or 10 years, he can develop his land without any Burial Site “encumbrances!!” This is not what was intended by the law when it was passed. The jail-time was a significant deterrent, included to prevent exactly this situation!!

Given the huge effort raised to stop the damaging legislation posed last month that would have undermined the burial sites preservation law, this proposal must not pass! There should be no modifications to the substance of the law in any way until a committee can review the law in its entirety.

Sincerely,

Harry Brown
Madison, WI

HO-CHUNK NATION



Good Morning. My name is David Greendeer and I am a tribal member and Representative of the 2nd District of the Ho-Chunk Nation. I thank you, Mr. Chair and committee members for this opportunity to speak on behalf of our tribe.

Assembly Bill 128 contains a substantial number of modifications to the statutes including changing the penalty for certain unclassified misdemeanor offenses to a civil forfeiture . We are concerned that one of the modifications contained in Section 354 of the bill may inadvertently have an effect on the Burial Site Preservation Law. We believe this would be counter to Wisconsin's longstanding legal and cultural tradition of protecting burial mounds.

As you may know, Wisconsin's burial site preservation law was enacted to provide the same degree of legal protection for all burial sites, including prehistoric sites, without regard to their age or the extent they resemble recognizable cemeteries. Burial mounds are sacred for both religious and cultural reason. They are the sites where my relatives conducted religious ceremonies for the burial of our ancestors.

Under the Burial Site Preservation law, Chapter 157.70 (10) (e), *"Any person who disturbs a burial site for commercial gain not related to use of the land where a burial site is located or who disturbs a cataloged burial site for commercial gain related to use of the land where a burial site is located in violation of this section may be fined not to exceed 2 times the gross value gained or 2 times the gross loss caused by the disturbance, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred, or imprisoned for not more than one year in the county jail or both. In calculating the amount of the fine based on personal injury, any measurement of pain and suffering shall be excluded."*

AB 128 eliminates the imprisonment penalty for Chapter 157.70 (10) (e) and changes the fine to a forfeiture. The Nation would like to advocate for an amendment to go back to the current language of the statute.

In the alternative we are willing to work with the committee to amend AB 128 to address our concerns regarding this provision. One possibility would be an amendment to make 157.70 (10) (e) a Class A Misdemeanor in order to bring back in the jail or prison time provision and provide a fine of up to \$10,000. We would like this in addition to the forfeiture of 2 times the value of the commercial activity that the mound was destroyed for. With this change, we feel it is reasonable to keep the penalty as forfeiture instead of a fine as the bill seeks to do.

Wisconsin is one of the few places left where these ancient structures still exist. As a core belief in the Ho-Chunk tradition, there is no measurable cost that can be placed on the protection of burial mounds in Wisconsin and they should be treated as the historical treasure they are.

Thank you again for the opportunity to speak today. I am happy to answer any questions and look forward to working with everyone on this bill.

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