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Floor Debate
April 12, 2007

[LB377 LB405 LB476 LB482 LB610 LB658 LR73 LR74]

SENATOR LANGEMEIER: Good morning, ladies and gentlemen, and welcome to the George W. Norris Legislative Chamber for the sixty-second day of the One Hundredth Legislature, First Session. Our chaplain of the day is Pastor Brian Kottas, superintendent of the Southwest District United Methodist Church, from McCook, Nebraska, guest of Senator Karpisek. Would you all please rise. []

PASTOR BRIAN KOTTAS: (Prayer offered.)

SENATOR LANGEMEIER: Thank you. I call to order the sixty-second day of the One Hundredth Legislature, First Session. Senators, please record your presence. Mr. Clerk, please record.

CLERK: I have a quorum present, Mr. President.

SENATOR LANGEMEIER: Thank you, Mr. Clerk. Are there corrections to the Journal?

CLERK: I have no corrections, Mr. President.

SENATOR LANGEMEIER: Are there any messages, reports, or announcements?

CLERK: Mr. President, your Committee on Health and Human Services, chaired by Senator Johnson, reports LB482 to General File with committee amendments attached, and that's the only item I have, Mr. President. (AM932, Legislative Journal, pages 1163-1166.) [LB482]

SENATOR LANGEMEIER: Thank you, Mr. Clerk. (Doctor of the day introduced.) Mr. Clerk, we'll now proceed to the first item on the agenda, LB377. [LB377]

CLERK: Mr. President, LB377 is a bill originally introduced by Senator Ashford. (Read title.) The bill was introduced on January 12, referred to the Judiciary Committee for public hearing. The bill was reported to the floor with committee amendments attached, Mr. President. (AM912, Legislative Journal page 1121.) [LB377]

SENATOR LANGEMEIER: Thank you, Mr. Clerk. Senator Ashford, you're recognized to open on LB377. [LB377]

SENATOR ASHFORD: Thank you, Mr. President and members. And I have an opening on the bill, and I'm going to talk, not about the amendments at the beginning, but talk about some general thoughts and considerations that I think we should all think about. And then when we get to the amendments, I will try to describe the amendments. But what I would like to do today is, first of all, I want to thank Senator Flood for his

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willingness to continue this debate, and I want to thank all of the members for the conversations that I've had with them, and their concerns, their sharing of concerns and ideas. Let me just start out--I'm going to try to chat about the things that motivate me and why I think we should be there, and why we should be having this discussion and quite frankly, why we should move LB377 to Select File. First of all, let me start out by saying what...I would say, what this bill is not about, and it's very simply this: We're not here, I'm not here, my fellow senators on the Judiciary Committee are not here to please Senator Chambers, my good friend and colleague, Senator Chambers. We're not here to please Senator Chambers because he's the senior senator. We all know that's a fool's game. We all know that's a fool's game. There are no deals on this bill. This is not about Senator Chambers. But I'll tell you what this bill is about, and why I think it is so incredibly important to me, and I know it is to many of you, the many of you whom I've talked to about it. We are a body of ideas, and this is a debate about ideas. Certainly, the death penalty is the context of the discussion, and eventually today, hopefully, we will all vote on whether or not to advance LB377, an amended version of the death penalty bill, to Select File. But to me, this is really a discussion about ideas. But let me start out...I have to listen to Senator Synowiecki who's doing a great job here on the phone, but (laugh) let me start out by saying something that's been on my mind for years. Senator Chambers likes to tell us that he has no heart anywhere in his being, and I have known Senator Chambers for a long time, and I've also known people in my life, and we all have, that probably, if they have a heart, it's hard to find. And knowing those people, I can tell you that, I'm sorry to tell you, Senator Chambers, but I think you do have a heart. And I think that's what this debate is all about. It's about where we are going as a culture, as a society, in dealing with the tough issues of our time. It's a debate about ideas, and it's a discussion about ideas. And the ideas that we're going to be talking about and the ideas that are incorporated in LB377, as amended, are ideas that weren't my ideas; they're ideas that were brought to me by my friends and colleagues, including Senator Chambers, though I will say that when I went up to Senator Chambers and said, this is too compelling, Ernie. We have to move forward with this. He said, well, why would you ever do that? Why would you ever gut LB377? Why? Are you sure you want to do that? And I said, I'm sure I want to do that. And the reason I want to do that is because there are too many compelling ideas and too many compelling thoughts out there. Some of those thoughts were given to us on the debate on LB476. Senator Kopplin talked eloquently about the death penalty, the arbitrary nature of the death penalty and the discriminatory impact of the death penalty. Senator Chambers talked about that, and has talked about that, members, for over 30 years--30 years. That's an idea that has been talked about for over 30 years, and sometimes ideas move from the column of idea to the column of truth, and I would suggest to you, members, that the issue of whether or not the death penalty, as imposed in Nebraska or in many...the 37 other states where it is imposed, is arbitrary. It is arbitrary. It is inconsistent. That is not an idea--that is an absolute, unrefutable fact. The question that we must answer, therefore, is when we are as a state imposing the ultimate penalty of death, why would we impose such a penalty if it is arbitrary, if it is not consistent? Or

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should...on the other hand, should we strive for a system that is less arbitrary, that is less inconsistent, that is fair to all of our citizens? I've been...this is the ninth year that I've been there, and one of the issues that has dogged me throughout my political career is the issue of the sanctity of life and how it relates to legislation. And I was brought up as a Lutheran, and in my Lutheran theology I was taught that the sectarian life is the life of the church, and the secular is the life of government, and the two really don't have anything to do, one with the other. And that's how I was taught in my Swedish Lutheran Church on 38th and Lafayette in Omaha. That's what I was taught by my parents; that's what I was taught by my church. But as I was here before for eight years and we debated this issue, and we debated issues involving abortion, I was struck by that issue. What is the relationship between legislation and the church and theology? And it's tough issue, and I don't have any answers for you today, but here's what I think, for me, where it falls. We're not here to take one's theology and impose it on others in law. That's not our job. We're not a theocracy; we're a democracy. But on the other hand, we must not ignore the theology that has been with us all of our lives. We must not ignore it, the moral standards that are set by our churches and our synagogues and our mosques, or wherever we worship. They're as relevant to our decisions as anything that we can bring to our decision-making process. And this kind of thinking and thought process was brought home to me by my friend, Senator Carlson, whom I never met and never knew until three and a half months ago. But he talked about the sanctity of life as it related to the death penalty. He could have been talking about the abortion issue, he could have been talking about the cloning issue, he could have been talking about many other issues. But he talked about the sanctity of life as it relates to the death penalty, and it was to me one of the most moving talks that I've heard in the nine years that I've been here, because Senator Carlson, you really put it where it belongs, and that is, is the sanctity of life, is life...from the beginning of life to death, worthy of protection by our laws? I don't have all the answers to that question, but if we ignore the debates about that, we're ignoring a fundamental role that we have as legislators, because we're not just legislators in this place. We're from our neighborhoods, we're from our churches, and we can't ignore that issue. And Senator Carlson, at three this morning...and I was thinking about this debate, it kept coming back to me, your challenge to all of us, that the sanctity of life is a key issue. We may differ and vote differently on different issues, but we can't forget that lesson. And I thought about my friend, Jim Cunningham, who represents the Catholic Conference, and we're not supposed to talk about established religion, I guess, that much in here, but I admire Jim Cunningham. I've worked with Jim Cunningham for many, many years, and I've disagreed with him on issues that the church has brought...has supported in this body. But his commitment and the commitment of the Catholic Church and of John Paul II to finding alternatives... [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR ASHFORD: ...to the death penalty is very, very compelling, and I admire what he says. I admire Senator White and Senator Fulton for coming to me and saying,

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you know what? There's another idea here. And I don't know if Senator Fulton and Senator White agree on one other thing. They may not, but they're good guys, and they're my colleagues, and they came to me and they said, there is another way, Brad, here. And they came to me after that vote, which was 25 to 24, and they said, there's another way, and that was a compelling idea. If we can make this penalty, this process, more fair, why wouldn't we do it? Also, I want to talk about the ideas of the Judiciary Committee and my friend, Senator Lathrop, the Vice Chair, Senator Schimek,... [LB377]

SENATOR LANGEMEIER: Time. [LB377]

SENATOR ASHFORD: ...who has so many years...do I have the amendment? [LB377]

SENATOR LANGEMEIER: One moment. We'll get there. As the Clerk has stated, there are amendments offered by the Judiciary Committee, and Senator Ashford, as Chair of the Judiciary Committee, you are recognized to open on the committee amendments. [LB377]

SENATOR ASHFORD: And I have ten minutes; is that correct? Thank you, Mr. President. And the members of the Judiciary Committee, who took this very, very seriously--Senator Lathrop, Senator Schimek, Senator Pedersen, Senator Pirsch, Senator McDonald, Senator McGill, and of course, Senator Chambers--who thought about this a lot and gave it a lot of thought. Not everybody on the committee agreed with this amendment, but every single member of my committee--it's not my committee--but of the Judiciary Committee gave comments and added to the discussion, and they're worthy of thanks for that. Lastly, there's the idea, and I read in the paper this morning...I just briefly met Bud Welch outside yesterday, and Bud Welch is from Oklahoma City, and his daughter was killed in the Oklahoma City bombings. And he owned gas stations in Oklahoma City, and his daughter was 23 years old when she was killed in that terrible event. And she spoke five languages and she had just been engaged, and she worked in the federal building and she was killed at 23. And he told me that he met with Mr. McVey, Tim McVey's son (sic), after Tim McVey was put to death. And he...the discussion was, you know, well, we both lost something out of this. We both lost our children. And he said, let's stop the killing. Now that's an extreme example, but the concern and the comments of Bud Welch, the ideas that he talked about are worthy of our consideration and are part of the discussion that goes into LB377 and must go into LB377. Senator White and Senator Fulton talked about the right of society to defend itself. It's a legitimate right; it's a right that's recognized by the Catholic Church in its opposition to the death penalty. And it's a right that's recognized by many. LB377 is our effort, the committee's effort, to put together a balance between the necessity of utilizing the death penalty balanced against what should be anathema to our society, which is to impose such an ultimate penalty in an arbitrary and inconsistent fashion. There may be other ways to do it. I'm not perfect, though I may seem so. (Laughter) But we can talk about it. But I think today's debate is about whether we want this idea, the ideas that

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were voiced to me by my friends, Senator Fulton, Senator White, by Senator Carlson and others, the ideas that are worthy of discussion, and they're worthy to be moved across, and to be looked at carefully as we do so. Now many of us before we were elected to the Legislature were asked, do you support repeal of the death penalty? And many of us, me included--there are 37 of us, I think, or 38--said, we are not for the repeal of the death penalty. You know, I'm reminded of Justice Harlan, who was a Supreme Court justice before the turn of the 20th century, who in a decision involving early civil rights legislation said, when he voted contra to what he had done in the past to approve legislation in the civil rights area, and he said, you know, it's better to be right than to be consistent. And that's a good comment. That's a good comment. But I think what we're offering to the body today is, you can have it both ways. You can be right and you can be consistent. And we're not alone, we're not alone. I've passed out to you a poll that was commissioned by an advocacy group opposing the death penalty. It was done by a polling firm out of Washington, and the poll indicates, in one of the most interesting parts of it, when asked the question regarding this particular legislation, do you support...would you support legislation like LB377, and 60...I believe the number, and I'll find it here, but I believe it says that 62 percent would favor the approach in LB377, and 22 percent would oppose it. Members, we only go through this once in our lives. When we're...as I was mentioning earlier to somebody, I don't plan to be governor or senator or president. This is it. And to me, "this is it" is a great deal. I love this place. But when we leave it, we're going to look back on votes that we take, and a lot of them we won't remember, and some of them we will. But I guarantee you we'll remember this one. We're going to remember this one because we have a shot at doing something absolutely right here. We have a condition in our state, a circumstance that nobody intentionally did. It wasn't some nefarious plot to just put a few people to death and not others. The system just is not efficient, the system just doesn't work, the system is not fair--is not fair. We have an opportunity, in my view, members, to change the culture, maybe by just a little bit, by addressing life...the lives of people who are really the true outcasts, who have committed heinous crimes. If we can approach this issue with the idea that we are creating a culture of life, respecting the sanctity of life, as Senator Carlson so aptly put it, and apply that to the people that we least respect in society, we have elevated ourselves to an incredible height. And ladies and gentlemen, and members, we will not be less safe. I guarantee we will not be less safe. Will it be harder on county attorneys? Maybe. But you know what? That's their jobs. We will not be less safe, but we will be, I guarantee you, more fair, and that is what we as Nebraskans...I'll guarantee you, that's why I live here, because I love this state and I love every person in it, because they're Nebraskans. And we have a chance here to be fair and do something that is not done anywhere else, that will change the culture, that will be more fair. We're here to do the right thing, members, and I urge you to advance LB377 with the amendments, so that we can continue the debate throughout this session. Thank you. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Ashford. You have heard the opening

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on LB377 and the committee amendment, AM912. The floor is now open for discussion. Wishing to speak we have Friend, Erdman, White, Flood, and others. Senator Friend, you're recognized. [LB377]

SENATOR FRIEND: Thank you, Mr. President and members of the Legislature. You sit up in that chair for two days, and your emotions get a little bound up, don't they, Senator Langemeier? You know, Senator Ashford is right. Let me preface that, or let me qualify it. It's a miracle that I'm here, standing in this building, working with you folks. And I don't say that tongue in cheek. It truly is. There was a point in my life where all I ever wanted to be was a baseball player. That's what I wanted. I wasn't ten years old saying I'd like to be a state senator, I'd like to be a mayor, or I'd like to be a governor. There was another point in my life where I wanted to be a sportswriter. I actually did accomplish that, to a certain degree. Some would argue that point, but I did. It is truly a miracle that I'm standing here. I don't know why, really, and I do think that God drove me in this direction. There's no other way to explain that. It leads me into this discussion matter today, and the discussion matter we had a couple weeks ago. I've been reading news articles, and quite frankly, praying about this subject. I mean, I don't know what else to do with it, because of the fact that a person like me standing here, dealing with subject matter like this, it's the only place I could turn. So I came up with some analysis, I think, or some conclusions. One of them was flawed. Maybe that was God's answer. One of the conclusions was that what we're going to be dealing with with this particular bill is not about philosophy. It's not about how we feel philosophically about the death penalty. It's not about philosophically how anybody has felt about it over the last 2,000 years. It's about the practical nature of capital punishment. Then there was a second conclusion that I came to, and I said to myself, LB377 isn't fair. A person like me, it's a miracle that I'm in here. I already had to deal with this subject matter. Now I'm dealing with it again. I was feeling sorry for myself. It's not fair that I should have to deal with this again. But you know what? Then I stepped back. That was flawed. Then I stepped back and I said to myself--I talk to myself a lot, looking in the mirror at this point, didn't like what I saw--I said, fairness has nothing to do with it. People say Mike, what are you dealing with all those issues down there for? There's more important issues to deal with. Your constituents will say that. Why are you dealing with those issues? The answer should be, because life is not fair. Mike, why is it fair--my Millard friends--why is it fair that Omaha tries to take us over? Why is it fair that OPS comes after us? Because life is not fair. Mike, why is it fair that OPS gets divided three ways? That's not fair. Life is not fair. Mike, why is it fair that LB1024 didn't even beat a cloture vote last year and shows up on the schedule again the next morning? [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR FRIEND: Because life is not fair. It's not about fairness, at all. It's about the practical nature of this bill. Is this bill...we have a question to answer here. Is this bill functionally flawed criminal code, or is it legitimate? It is appropriate, it's legitimate, and I

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would even venture to say that it's fair that this bill is out here, and I'll deal with it. What we have to deal with is the practical nature of the criminal code that this promotes. I will debate, and I would submit to you that this is functionally flawed legislation. There are others that are more...have more expertise in this area than I do, but I will make that argument. [LB377]

SENATOR LANGEMEIER: Time. [LB377]

SENATOR FRIEND: Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Friend. Senator Erdman, you're recognized. [LB377]

SENATOR ERDMAN: Mr. President, I would yield my time to Senator Flood. [LB377]

SENATOR LANGEMEIER: Senator Flood, you're recognized. [LB377]

SPEAKER FLOOD: Thank you, Mr. President, members. And Senator Ashford, good remarks to start off the morning. NyQuil had me sleeping at three this morning, so I wasn't up like you, thinking about it. But it is an important issue, and I guess it brings us back to the place I think we started the last death penalty debate at, and I'm very proud of the way the Legislature handled the discussion on LB476, Senator Chambers' bill, that would have repealed the death penalty. And I think the Legislature is going to have a very similar thoughtful, high-level discussion of the issues that are presented, especially in the Judiciary Committee amendment to LB377. AM912, in my opinion in practice, is a repeal of the death penalty in Nebraska, and I'm going to make several comments during the discussion that focus on the costs, the practical considerations, the future dangerousness issues, but I think one of the topics that must be explored by the Legislature is the retroactivity discussion, as to whether this does apply or does not apply to those currently on Nebraska's death row. And it's a complicated issue, because we have plain language in the amendment that simply states, this is not retroactive. But that's an issue that I think we need to get in and get our hands around, as this debate goes forward. As for the practical concerns that I have, in this case you're actually forcing a jury, in my opinion, on whether the executive branch can safely confine an inmate to protect the public safety of other inmates and corrections officers. That's quite a burden to predict the future dangerousness of a convicted murderer in Nebraska, beyond a reasonable doubt. Won't the state at some point find itself in the position of arguing that a defendant should die because it is too expensive for the executive branch to control an inmate or defendant? I think this concept that we're asking juries to find beyond a reasonable doubt that an individual cannot be safely confined in the Department of Corrections is next to impossible, first of all because you're essentially guessing beyond a reasonable doubt what this inmate is capable of in the future, and we certainly have examples of the future dangerousness of inmates. David Dunster is

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an example. He committed two murders while in prison, one in Montana before he killed again when he was imprisoned in Nebraska. Is this the type of case that we are anticipating that would be death eligible under AM912? Certainly the proponents of this amendment are not arguing that one must actually kill in prison before the threshold can be met, but it's impossible to predict the future public safety risk of an offender, beyond a reasonable doubt. I think that's a legitimate question that has to be answered, and I think the proponents of AM912 will give us, hopefully, and make a very good record, as to what kind of behavior or future dangerousness they are identifying that would qualify somebody for the death penalty in Nebraska. Retroactivity analysis--that's very important to me. Does passing this amendment and the bill apply retroactively to defendants that are in Nebraska,... [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SPEAKER FLOOD: ...that are on death row? I want to get into that issue and review some of the cases that I've looked at, one from 1978 and one from 1980, following the passage of LB711 in the late seventies. But since I have just a few seconds left, I want to call your attention to, and I'd like to hear some discussion on, on page 14, line 13 of the committee amendment. It says, a sentence of death is appropriate only when necessary to protect society; therefore, no persons shall be sentenced to death or executed unless the finder of fact has determined that such person possesses a present and substantial risk to the lives of others. Then it goes on. But my question is, no person shall be sentenced to death or executed--that seems to be a problem, if you look at the language that says it's not retroactive, and I think that's something that I'd like to hear more discussion on. I'm not suggesting one way or the other,... [LB377]

SENATOR LANGEMEIER: Time, time. [LB377]

SPEAKER FLOOD: ...but I think there's got to be...you know, that is a finding, so it's something we should hear more about. Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Flood and Senator Erdman. Wishing to speak we have White, Flood, Kruse, Chambers, Ashford, Friend, Erdman, and others. Senator White, you're recognized. [LB377]

SENATOR WHITE: Thank you, Mr. President. As many of you know, I voted against the repeal of the death penalty. I do not support repealing the death penalty. I did not speak in that debate. I listened carefully and I learned a lot. There are, however, a number of issues that I don't think were adequately addressed in that debate, and I'd like to just raise them for you, and hopefully, we'll have time to go through them as we move forward. First, please note the concept of deterrence. Deterrence has several aspects. There's something called general deterrence and specific deterrence. It's important that we understand the difference and that we talk about that at length later. Second, what, if

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any, role does the death penalty play in a state's ability to govern? Third, what Senator Flood just raised is, does this threaten existing sentences? In other words, those who have been sentenced to death for crimes under law as they then exist, will this bill threaten that? I submit to you that it will not, that it cannot, and under governing Nebraska Supreme Court precedent, we have no power to affect their sentences at all. I will also tell you, however, that the biggest single threat to the actual execution of prisoners in this state has nothing whatsoever to do with this law. In fact, this law offers one of the best opportunities to preserve an effective and constitutional death penalty going forward. In fact, I would submit and I will defend this, if you are interested, the biggest threat to the death penalty in this state at this moment is the fact that we are the only state in the country--indeed, I think the only government in the world--that executes by electricity. A fair case can be made that we torture people to death. At any moment our entire death penalty could be struck down because of our reliance on the electric chair, and that may explain why Senator Chambers, in part, has always opposed changing the nature of the death penalty. The most important thing I think I would like to talk to you about is, when can we kill? Given a clear Biblical injunction, "Thou shalt not kill," at what point, if ever, can we, in fact, kill? If you believe as I do, in a just God, and that you are judged at some point, you approach this with great concern for your own mortal soul, not just for whether you've done right by another human being. I would submit to you that despite that Biblical injunction, there are times, not only when the state may kill; there are times philosophically and logically, the state must kill, in order to act in a moral manner. I would also like to explain to you, if interested, that in fact they argue that this bill places an impossible burden on the legal system, that we cannot predict the future dangerousness of a person, that we are not equipped as a legal system to make such predictions. To that I tell you, every day, every working day in this state alone, dozens, if not hundreds of times a day, the legal system does exactly that. Every time a person comes for sentencing and a judge is required to determine whether they should be eligible for probation and a chance immediately to reenter society, or whether they must be incarcerated to protect society, that judge is predicting future behavior. What we would ask in this bill is absolutely nothing different than we have asked judges to do in this state for well over 100 years. The only difference is, in this case, the fate of a life will hang in the balance. [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR WHITE: Finally, on a personal matter, I wish you to know that those who are victims of capital crimes and who have gone through the process, that my brother-in-law was murdered in Nevada, my wife was a witness. She helped put him on death row in a trial in 1983. He still lives on death row today in Nevada--24 years later. Equally interesting, perhaps, my brother Patrick is a public defender in Chicago. They recently let over 50 men out of death row, because DNA evidence flat out proved they did not commit the crime they were accused of--did not do it, but yet were sentenced to death. We must ask ourselves as a group, especially those who are conservative among us,

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who do not trust the government to administer taxes--and I'm beginning to understand why--how we then trust it to be competent in dealing out death. [LB377]

SENATOR LANGEMEIER: Time. [LB377]

SENATOR WHITE: Thank you. [LB377]

SENATOR LANGEMEIER: Thank you, Senator White. Senator Flood, you're recognized. [LB377]

SPEAKER FLOOD: Mr. President, I'd yield my time to Senator Erdman. [LB377]

SENATOR LANGEMEIER: Senator Erdman, you're recognized. Five minutes. [LB377]

SENATOR ERDMAN: Thank you, Senator Flood. Mr. President and members of the Legislature, I, unlike Senator Friend, that may also recognize that life isn't fair, I'm not necessarily disappointed that we're having the debate. One of the things that I think is important, and we just got done going through a process over the past two days about ignoring issues. And had we not ignored issues over the past 20 years, we probably wouldn't have been in the position to address water issues and others in the way that we've been forced to, or at least attempting to this session. And so I think it's healthy, if there is the will and there is the need, that it needs to be addressed. I have never been of the opinion that controversial issues or issues of great magnitude, whether they're political or policy, should be left off this floor, even though in regards to Senator White's comments, I carried a bill, prioritized it in back-to-back years, dealing with one of the issues he pointed out, only to have the then Speaker tell me twice that for the sake of the body we would not be discussing that bill. So I share in the opportunity that we've been presented, and I shared in the opportunity that was presented in LB476. LB476 was a philosophical debate. It was a straight up or down decision on the merits of having the sentence of death and the death penalty process in the state of Nebraska. Are you philosophically in favor of that, believe it has a value, or are you philosophically opposed to that and believe it has no value, or can never be implemented effectively and therefore, shouldn't be used? That was the philosophical debate on LB476. You're probably going to hear some of that philosophical debate on this bill. However, in what I have analyzed in reading AM912, is that I think this is a policy debate. As Senator Ashford has pointed out, and it can be speculated as to whether or not you are actually repealing the death penalty, but the actual definition or the determination on whether that's true is whether or not you can effectively utilize the law that is in place in AM912. So this is a policy debate. How does this work? Not to the extent that there's a reasonable expectation that a prosecutor will be successful, because one, you can't do that, and two, that's unethical, that you can guarantee a result. And there was testimony at the public hearing on that exact issue regarding the United States Supreme Court's determinations and principles, regarding the sentence of death. So this is a debate, as I

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hope it will be, about policy, about the practical application of the law. Is it attainable, is it useful, and most importantly in the language that was pointed out, is it contradictory to itself? As a member of this Legislature, I recognize fully that when I bring a bill to the Legislature, that it is my burden to prove to you that the law needs to be changed. It is not my burden necessarily to defend the law that's in place, because that decision has already been made. Our job is to analyze the law and to make a compelling case for changing that. A case was made for repealing the death penalty outright--that failed, at least it failed this session; it has failed in previous sessions to become law. So we come back at a different approach and decide whether or not we can practically accomplish what's outlined in AM912, which is something, in the opinion of the Chairman, short of repealing the death penalty. And I think, again, that answer comes back to the policy on whether or not... [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR ERDMAN: ...the law is actually able to be utilized and to be done effectively, so that anyone would ever be sentenced under this new procedure. Finally, I don't think you can ignore some of the politics, and I think that's a reality of the body that we're in. We were elected through a political process; we are a political body, in the sense that we are elected that way, and we will make practical policy decisions on a number of reasons. Senator Ashford would have you believe that this is more palatable to the electorate by politics, by polling. I think the palatability or the ability for the public to accept that is based, again, on the application of the law, and we have some very talented and knowledgeable individuals in this body that can walk us through the provisions of AM912, and I would hope that the Judiciary Committee that has taken this burden upon themselves will... [LB377]

SENATOR LANGEMEIER: Time. [LB377]

SENATOR ERDMAN: ...go through and explain that, and I look forward to that discussion. Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Erdman and Senator Flood. Senator Kruse, followed by Senator Chambers. Senator Kruse, you're recognized. [LB377]

SENATOR KRUSE: Mr. President and colleagues, I thank you. I stand in support of the bill and the amendment, and as others have indicated, I welcome this chance to talk about it. I have talked about it before, so this will be quite brief, because I'm not going to try to repeat myself. The system is broke. That's the bottom line to what we're talking about. Others have said there has to be a compelling reason, and I respect that. Well, the compelling reason is, the system is broke. The proposed punishment that is now in place is delayed 20 years, and we all get all kinds of e-mails saying, let's shorten up that time. Well, you can't shorten up that time if you are talking about the death penalty,

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especially when you have chances that you're making mistakes. And Nebraska has made a mistake twice; others have made it many more times, but that just means you have to give every chance to it. It's also broken because it's applied unevenly. My wife was not very pleased with my bringing her in as a horrible murder in my last speech, so I'll be very careful not to do that again. But I'll just jump right to the conclusion. My wife, however horrible her crime, is not going to be sent to...in for a death penalty. It's just not going to happen. Nor is it going to happen for any of your relatives and family members, except for two of you who are minority members. That's part of the problem. And we all know it, that a minority member is more likely to receive this. But the rest of us are home free in terms of death penalty. The system is broke. Some of you have talked about a little struggle with the boldness to deal with people back home. Well, there's no boldness at all in my taking this stand, because my district is made up of persons who are going to be first in line for the death penalty if we continue it, and they don't deserve it any more than anybody else. We cannot change the delay on execution, but life in prison is immediate, and that's what is understood by gang members and low-type thugs that I've visited with. They're not afraid of the death penalty. They don't expect to live to 25 anyway. You know, a death penalty means they're going to live 20 more years. Wow! What a promise! But they are afraid of jail. They are afraid of the doors. If we make it life imprisonment, there will be a killing, they will soon be caught, say within a week, and the cell door closes behind them, and it closes behind them forever. There's court processes going on, but within one week, the justice is swift and sure. Detention is a deterrent, if we know that it's going to happen, and if we know the results of it. I also would emphasize that there's no softheartedness involved. We're sometimes accused of being that. A terrible crime was committed--a terrible crime--and it has to be documented as a terrible crime. A change of heart to that person is the human thing to do, and all of us would welcome it, but the crime and the serious punishment stands. Life in prison... [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR KRUSE: ...is serious punishment--I would insist more serious than death. It would certainly be a greater deterrent to me, though we all think differently than the persons we're targeting here. I ask you to think about the persons that we're trying to impress, that we're trying to deter from crime. Life in prison is a serious punishment. And finally, I do not want to kill someone, even if that person has terrible behavior, because that's imitating that person's behavior. I do not want to be a part of that, and as a member of the Legislature, but as a citizen in the state, if the state executes someone, we are all involved. I find that a serious challenge to my moral standards. Thank you. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Kruse. Senator Chambers, followed by Senator Ashford. Senator Chambers, you're recognized. [LB377]

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SENATOR CHAMBERS: Thank you. Mr. President, members of the Legislature, Senator Brad Ashford gave a bit of background regarding how this bill got to us in the form that it is in, or will be in, when we adopt the committee amendment. And regardless of the ultimate fate of the bill, I think that committee amendment ought to be adopted. There was discussion as to whether or not I should amend my pending bill, which would abolish the death penalty, with this provision, and I rejected that out of hand. I will never carry a bill under my name which acknowledges and legitimizes the state killing anybody. So I would not let my bill be used for this purpose. The reason I will support what the Judiciary Committee has presented is that it narrows the category of persons who are eligible to receive the death penalty. I will do any and every thing I can from this point onward, as I've done in the past, to kill the death penalty itself, or cripple it, or restrict its application, however that may be achieved. And because of some efforts in the past, people who are mentally retarded cannot be executed, and Nebraska preceded the U.S. Supreme Court in reaching that position. A person who is under the age of 18 or a juvenile at the time a crime was committed that would make a person ordinarily eligible to be considered for the death penalty was removed from that consideration by a bill the Legislature passed before the U.S. Supreme Court arrived at that position. Senator White is correct in stating that I have fought against substituting lethal injection for the electric chair, hoping that the day would come, which is now here, when Nebraska is the only state which uses high-tech burning as the only method of extinguishing the life of a prisoner. That there is burning has been established from autopsies after executions, and the photographs--fourth degree burns around the scalp where one electrode was placed, around the lower calf and behind the left knee, where the other electrode is placed. On Wili Otey or Robert Williams there was blistering the size of a baseball found, fourth degree burns around the scalp where the electrode was placed, as I mentioned. There were burnings and bruising to the corpses. John Joubert's chest was sunken, and it appeared that a rib had been broken, and this is because once the electricity is applied, the current passes through the body, all of the muscles contract simultaneously. And they contract with such force that bones are broken, ligaments are torn. And a district court judge, Robert Hippe, found and made a determination, after reviewing evidence presented by experts representing the state, experts representing a condemned person, that it is a myth to say that the application of electricity during a judicial execution results in immediate death or immediate unconsciousness. For some it may, but beyond question, that is not the case for all. Some have read about people struck by lightning. [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR CHAMBERS: In some cases a person dies instantaneously; other cases the person does not die. In some cases a person is rendered unconscious; in others, the person remains conscious throughout. There is no way to predict what effect electricity is going to have on any human body, because of the differences in makeup of the body, the amount of resistance provided by various parts of the body. But to touch on what

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Senator Kruse mentioned, there's a man on death row now who has chosen execution over remaining incarcerated. So obviously, incarceration is more of a punishment to him than dying in the electric chair. Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Chambers. Senator Ashford, you're recognized. [LB377]

SENATOR ASHFORD: Thank you, Mr. President. I just want to comment very briefly on a few things, and I'm going to ask Senator White if he would mind finishing his analysis. But it was mentioned that this is a political--by Senator Erdman, my good friend Senator Erdman, who speaks very well--mentioned this was a political...we could not escape the politics of this, and certainly we can't escape the fact that we're in a political body, but I think we can escape the politics of it, by talking about what's really important. The politics of this is not important, Senator Erdman. The only thing I comment...what I would say about that issue, as it relates to this particular debate I say with some trepidation, because I certainly respect political parties and their willingness and their desire to get involved in debates. But my own party, the Republican party, without any discussion at all with me, sent out e-mails to Republicans, I guess, but certainly we got copies of them, talking about how we had to fight efforts, as Republicans, fight efforts to change the death penalty statute. No rational reason given for it--just we had to do it, because it's in our platform. My good friend Attorney General Bruning, who does a good job, who's a good attorney general, he's my friend--I supported him for the Legislature, and I supported him for Attorney General--never once came to me and said, I understand what you're doing. Clearly, this is an arbitrary kind of an application. We need to fix it. Or even if that wasn't his opinion...I'd like to offer you some suggestions on language--I'm the Attorney General. Instead, what the comment was, I'm going to fight the constitutionality of this statute, even before the statute passed, even before it went from General File to Select File to Final Reading. That's incredible. I've never had that happen (laugh), in the eight years I was here. And my good friend Governor Heineman, who is a good governor, not one comment to me about this issue, but certainly comments to the public about, I'm going to fight this death penalty effort. He has a right to say that, and I respect that right, and he should voice his opinion. But he should also, I think, take...look a little bit at our processes. I'm Chairman of the Judiciary Committee. I was chosen by this body to deal with these tough issues. I don't need his agreement, but a nice conversation--Brad, we just can't support this because of...for this reason. None of that! That isn't how we do business in Nebraska. I don't care what the issue is. This is not a political issue in that way, it must not be a political issue in that way. Senator White, I would ask if you would...would you mind yielding to some questions, or go ahead with your comments? [LB377]

SENATOR LANGEMEIER: Senator White, would you yield? [LB377]

SENATOR WHITE: Certainly. I guess the first point I would like to make is regarding

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whether or not this will affect existing sentencing. To understand that, you have to understand the basic structure of our government. We have three branches. We have the executive branch, the Governor. The Governor is in charge of executions, in charge of the prisons, and is solely in charge of giving pardons. There's the legislative branch, ourselves. We pass laws, and our laws can only really apply, in a criminal sense, prospectively, going forward. There is an exception. The courts can choose to change our laws which are procedural, as opposed to substantive, retroactively, if they wish, or we can change them. A procedural law would be, an example, is the statute of limitations, would be a procedural law. And then there's the court system, and the court system, in the criminal sense, is in charge of sentencing. Under the laws we pass,...

[LB377]

SENATOR WHITE: One minute. [LB377]

SENATOR WHITE: ...they apply the facts and the sentences. The Nebraska Supreme Court has repeatedly stated that when the Legislature passed laws and asked that sentences be reduced, that we were violating the separation of powers provision of the constitution. Only the Governor can pardon and give relief from a sentence. Only the court can resentence or revisit it. Once a sentence is final, there's been an appeal completed, nothing we do here can require the court to resentencing, at all. Now the court can resentence because they review the constitution. The court could change sentences because they find an electric chair a barbaric instrument of torture, and they could end up refusing to allow anybody to be executed. [LB377]

SENATOR LANGEMEIER: Time. [LB377]

SENATOR WHITE: But under...thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator White and Senator Ashford. (Visitors introduced.) We return now to discussion on AM912. Wishing to speak we have Friend, Erdman, Fulton, Dierks, White, Engel, Lathrop, and others. Senator Friend, you are recognized. [LB377]

SENATOR FRIEND: Thank you, Mr. President and members of the Legislature again. I had pointed how, in a lot of ways, as I had mentioned earlier, for a certain period of time--a short period of time--I was feeling sorry for myself, because we are here again. Well, that, just to make it clear for Senator Erdman or anybody else that I may have potentially sent down the wrong path, I don't feel sorry for myself anymore. I'll stand up and deal with this issue, and I'll vote. And it was interesting that Senator Ashford brought up the Republican Party, and we bring up the Catholic Church. I'm a person who was baptized a Catholic at a month old or whenever, and studied theology for a year at Creighton. Have a pretty good understanding of the catechism of the Catholic Church. I've read it, can't say that I know it front to back, but I've read it. Republican

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Party, I've read the platform, I know that. But just for myself, I'd like to make something clear, and for Senator Ashford's edification, and I think anybody that knows me and seen the way I vote and the things that I do should know this and take heed. The Republican Party doesn't dictate to me how I vote and what I do, nor does my family, nor does the Catholic Church. Nobody does. I do it...I dig down. I do what I feel is right. In some ways, I dictate--and this sounds arrogant, but it's true--I dictate to what the Republican Party thinks. I am a policymaker. I do it. They respond. I carry Republican water. I carry Catholic water. I carry my family's water. I carry my own water. I don't feel sorry for myself anymore. This isn't fair--that's what I was saying to myself, right? Tough! We're dealing with it, we will deal with it. I just think we need to deal with the practical aspects of it. That's it. Philosophically, this is a nonstarter. If you do not like the death penalty, if you believe that it's fundamentally immoral, then you will find this language still fundamentally immoral. If you believe you ought to practically remove it, Senator Chambers is right, this will do it and I think that that would be a lot of folks' goal. That's fine. We need to talk about the criminal code. As I already mentioned, I'm not an expert in regard to the criminal code. One of the things that does concern me a little bit, though, is that I have a feeling, to a degree, that we're reinventing the wheel here. It was pointed out in testimony at the hearing that I believe three states--Texas, Virginia, and Oregon--are using language like this. They're not using this language, but they're using language like this. But there is a significant difference, the way I understand it. Texas, Virginia, and Oregon, for example, are using language that relates to a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Well, Section 7, Subsection 3, on page 14 of this amendment, we use what I would consider fundamentally different language. [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR FRIEND: "Unless the finder of fact has determined that such person poses a present and substantial risk to the lives of others that cannot be reasonably and effectively controlled by institutional security measures." The argument could be, and I think it is, that we're reinventing the wheel here. We don't know what this is going to do. What are our prosecutors going to do with it, how are our judges going to interpret it? I think those are legitimate questions, they're practical questions. We need to have them answered. Philosophically, we'll all deal with those on our own, off to the side. But I think the philosophical arguments are irrelevant here. I think the practical arguments are. Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Friend. Senator Erdman, you're recognized. [LB377]

SENATOR ERDMAN: Mr. President and members of the Legislature, my new friend, Senator Ashford, got it part right. Politics is not simply partisan, politics is politics. I received a letter, actually with less...I didn't receive the original e-mail he responded...or

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he referred to. I received a letter from the Lancaster County Democratic Party; didn't have any explanation as to why, it just says, vote to abolish the death penalty in LB476. So there you have, fair and balanced. Both sides are clearly engaged in the debate. Let me address something that I think I heard, and again, as a...someone who is not trained in the law, other than the seven years I've been here, let me see if I can understand, as Senator Friend has pointed out, the practical application of this. The state of Nebraska has--and Senator Chambers' example was correct--set policy prior to court ruling, limiting the death penalty. The issue of the limitation on individuals that we would consider, or as was described at the hearing on LB377 to be mentally retarded could not be executed. That was a policy decision made by this Legislature, and an individual was on death row. The sentence was reduced for individuals that met that category, and they had the opportunity to go back to court to prove that they truly fit that new definition. And I believe in one case, Mr. Victor did that, and his appeal was successful, and his sentence went from a sentence of death to a sentence of life in prison. That is true. I believe that the history would show, as I understand it, that there was an explicit right implied to those individuals that fit that definition, to be able to exercise that right in going to court. However, it's also my understanding that in the event that there is no explicit or implied or direct opportunity for an individual to be given that right, when we as a Legislature choose to reduce a sentence, they'll still have that opportunity. Now we can't raise the sentence. If we sentence somebody for 20 years for something, we can't arbitrarily come back and go, no, it's now 30, and everybody that's been sentenced for 20 is now at 30. We can't do that. But it's my understanding that in the event that we do reduce the sentence, that those individuals will have a right to make their case. This is an appeal. And I'm willing to be corrected. But in visiting with individuals that litigate and that try cases under these existing provisions of law and understand the greater breadth of the court and the entirety of their deliberations, I believe that's accurate. So whether you intend it to be retroactive or not, retroactive in the sense that everyone gets commuted by the passage of this bill, no; but retroactive in the sense that I believe that you give the opportunity for individuals currently sentenced to be able to make the case, in court, that this is a reduction in the sentence, and they don't fit under this new definition, as other individuals have challenged it successfully before the court. Those are the practical types of discussions. I appreciate the 35,000-foot view of this discussion that we had on LB476. This is not a touch-and-go when we go back to 35,000 and say, no, no, that's not what this is--trust us--we need to land the plane, and we need to examine it. That's the practical application that I believe needs to be undertaken here. If the system is broke, so let's break it more. I believe that would be an accurate reflection of Senator Kruse's comment, that he believes the system is broke, and if this would limit it even more, instead of a straight-out repeal, that we should break it more. There's an individual recently convicted, that is in the sentencing process and the appeal process, this White. He didn't get off home free. And in fact, if you read AM912, the committee won't even state what Senator Kruse said was a fact. What they'll say is that there's inequalities related to social and economic status. The first finding of the study that we referred to on LB476 also states that there is no significant

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evidence that disparate treatment on the basis of race of the defendant or race of the victim. [LB377]

SENATOR LANGEMEIER: Time. [LB377]

SENATOR ERDMAN: Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Erdman. Senator Fulton, you're recognized, followed by Dierks. [LB377]

SENATOR FULTON: Thank you, Mr. President, members of the Legislature. On LB476 I voted red. I believe the death penalty must exist as a means for society to protect itself and its members. It should not be abolished, lest we are willing to admit that we can always safely incarcerate dangerous individuals. Let me give an example. I've done a lot of research on this. I knew that this day was going to be coming. There was a man who was executed in the state of California. His name was Clarence Ray Allen. My understanding of that case was that he murdered somebody--it was in 1974--a young lady. He murdered her. There were three witnesses to that murder. He received a life sentence for that first murder. While he was serving that life sentence, he conspired and colluded with another individual in prison to murder those three witnesses. There is speculation as to what his intentions were, but regardless, while he was in prison, he conspired and plotted and planned to murder three people that he probably wanted to murder in the first place. He received the death penalty because of those three subsequent murders. When I presented my position as to the necessity for societal self-defense, I received some feedback that said, we can always incarcerate these bad guys. We don't need to put them to death. That may be the case in many instances, but to make that judgment does not therefore mean we should repeal the death penalty. I did a little more research on what the...how available the public is to death row inmates. Today, death row inmates are afforded the following: They get face-to-face visitation on Wednesdays and Sundays, from 8 a.m. to 11 a.m., in the general population visiting room. That's twice a week, three hours. It comes to six hours a week of visitation. Fifteen minutes on the phone everyday. All of this, of course, is monitored--I'll grant that. Forty-five minutes a day in a room adjacent to their cell to watch TV and to read, and then there are some other items that are available. And the reason I think it's important to say this is because we operate under the premise sometimes that these bad guys are locked up; that's it. They actually have access to the public more than some of us have--six hours a week to sit and visit? I don't get that. That causes me concern, and that's why I believe...that only emphasizes the importance of what we're doing here. Now, to the bill, LB377, and specifically the amendment. I have heard from our Governor, from our Attorney General, through the newspapers. They have grave concerns over what the pragmatic reality behind this amendment does. I have talked with a number of attorneys for and against the death penalty, and with the exception of a couple, this new amendment... [LB377]

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SENATOR LANGEMEIER: One minute. [LB377]

SENATOR FULTON: ...will make application of the death penalty nearly impossible. That is what I have learned through jurisprudential opinions. So I'm concerned, if indeed that's what this language does. I do have ideas as to how to make this bill more realistic, but my ideas didn't find their way into AM912. I have an amendment drafted, and I'm going to talk about that a little bit more later today. But I want to emphasize that if indeed this amendment effectively repeals the death penalty, that's a bad thing, to put it simple, for the reasons I elucidated earlier. Folks in prison, at this stage, are not isolated from the public. That's not the case, and it has been shown that individuals can effect destruction from a cell. We have a responsibility to disallow that, and so I'll pay close attention to the pragmatic realities of AM912 and how it plays out jurisprudentially. [LB377]

SENATOR LANGEMEIER: Time. [LB377]

SENATOR FULTON: Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Fulton. Senator Dierks, you are recognized. And he waives. Senator White, you are recognized. [LB377]

SENATOR WHITE: Thank you, Mr. President. Let's talk for a minute about when a society can morally kill. We deal from a long tradition that killing is wrong, and yet I would submit to you, regularly with regard to the state, it is sometimes, in fact, required. The principle that will govern this at all times is, we are only permitted to kill when it is necessary to defend ourselves or other innocent lives. Now an individual, as did Christ, has the opportunity, even if they have the means, to decline to defend themselves at the expense of a life of another. This is the position of the pure passivist, and many Christians share that. However, the state makes a different bargain with its citizens. When the state takes away many of the "freedoms," I guess you could call them, of a citizen in a state of nature, including the ability to shoot, kill, take what they wish, they make a trade. They state that we will protect you from aggression by your neighbors, and in turn, we will deter you from aggression against your neighbors. And the basic bargain is on the level of life. Imagine the situation, because it is a common one, of a person holding a citizen hostage at knife or gun point. We put a police officer right in front of that person. That police officer, for every meaningful distinction, is the state. It is government. The police officer sees the criminal making a move to kill the innocent hostage. At that point the police officer is not only allowed to use deadly force, the police officer is obligated to use deadly force--obligated as a matter of their oath, obligated as a matter of morals, obligated as a matter of law. The police officer, in order to uphold the state's fundamental bargain with its citizens, must act, including using deadly force, to protect that child or that hostage. There is no distinction on a moral level between that and use of the death penalty. Senator Fulton is absolutely correct. I

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represent a large number of guards. I've also represented a fair number of prisoners in civil rights cases. There are human beings who are simply too dangerous to be left alive, because they present an ongoing and real risk to the innocent lives of those around us. We as the state have made a bargain with our citizens, that we will protect them, and we will use deadly force. The same principle applies in the concept of a just war. We as a state will go to war. We will kill people, including innocent people, if necessary, to protect other lives, or protect the innocent lives of our citizens. And we are morally entitled to do that, but only on the condition that it is necessary to protect innocent life--same principle. Same principle governs the police officer, same principle governs our troops, same principle should govern our exercise of the death penalty. We are morally entitled to kill only when it is necessary to protect innocent life. Anything else is murder, period. Now, our law does not conform to that. That is morally unacceptable to me. It should be morally unacceptable to any thinking person. The arguments that we are gutting, ending the death penalty, are not accurate. It is true the courts could determine... [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR WHITE: ...to resentence. That is absolutely true. They don't need this law to decide that. They can do that on their own, through the constitution. It is true we're going to make a prosecutor carry a burden as to future dangerousness. We do that all the time now anyway, and I will, if given the opportunity, explain a large number of cases where not only is the death penalty warranted, it is morally required. Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator White. (Visitors introduced.) Returning to discussion on AM912, wishing to speak we have Engel, Lathrop, Pedersen, Chambers, Aguilar, Ashford, and others. Senator Engel, you're recognized. [LB377]

SENATOR ENGEL: Mr. President, members of the body, I too welcome this debate today, and I hope it proceeds in the calm and civilized manner that we debated the LB476 a couple weeks ago. But I do agree with Senator Flood, when he referred to, no person shall be sentenced to death or executed unless the finder of fact has determined that such person poses a present and substantial risk to the lives of others and cannot reasonably and effectively be controlled by institutional security measures. This raises a concern with me. I don't know how someone else can predict that. Nostradamus did a lot of predictions in the past that we find come true, but I don't think we have a Nostradamus, and he isn't always right himself. So that's what concerns me with this amendment...or this bill itself, or the amendment. I would consider as life...I said this a few years ago, I would consider even life without parole. If you could limit the appeals, and they're reminded every day of their life, graphically, of what they did, so they can see graphically and reminded of the heinous acts that they committed. The only reading material they'd have were the Koran, Bible, or something similar, and hard labor, and

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again, limit the appeals. With that, I think that would be worse than death. But I know, no matter what they say here, you're not going to be able to do that. They're not going to be able to do that. That will not happen. And I, like Senator Carlson, I would trade in a minute the death penalty, if we could get rid of abortion, and that's not going to happen here in this Legislature for some time, either. But I would do that. And with that, I'd yield the rest of my time to Senator Erdman. [LB377]

SENATOR LANGEMEIER: Senator Erdman, 3 minutes. [LB377]

SENATOR ERDMAN: Thank you, Senator Engel. Members, I've heard...and I guess, depending upon how we proceed with this amendment, I've got three times to speak, and others will have three times to speak, but so far, I've heard others in favor of AM912 talk about the broad perspective, and maybe this is a...maybe it should be more of a question and answer than an opportunity to explain why people are doing what they're doing, because I am interested. I have the perceived--I think Senator Engel did--the perceived notion that this does not do what the proponents say it will do. In other words, it has a far-reaching implication. Senator White is very eloquent and says that it doesn't. But we haven't gotten to the language. Senator Ashford is ready to go. Senator Ashford, would you yield to a question? [LB377]

SENATOR LANGEMEIER: Senator Ashford, would you yield to a question? [LB377]

SENATOR ASHFORD: Sure. [LB377]

SENATOR ERDMAN: Senator Ashford, I would characterize this first question as a softball. Is it your opinion that LB377, with the committee amendment, would effectively end the death penalty? [LB377]

SENATOR ASHFORD: No. [LB377]

SENATOR ERDMAN: Okay. So that's the basis that which we're operating from, is the fact that what the committee has advanced, it is not the intent of the committee to end the death penalty in the state of Nebraska. [LB377]

SENATOR ASHFORD: No. [LB377]

SENATOR ERDMAN: Directly or indirectly. [LB377]

SENATOR ASHFORD: Correct. [LB377]

SENATOR ERDMAN: Okay. As we go through the process, and I'll start with the question that I...or the comment that I responded to Senator White, is it accurate to state that when we change the law in criminal code, that an individual who is currently

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sentenced has the opportunity, if they fall into that new definition, to challenge their sentence or to appeal their sentence? [LB377]

SENATOR ASHFORD: Absolutely, they have the right to file an appeal, that they do in every case. We've changed the law several times in the last 20 years, and appeals always follow. And this does not change that. [LB377]

SENATOR ERDMAN: So it would be a fair characterization of the process going forward, should AM912 become law, that an individual currently sitting on death row could file an appeal, in addition to the appeals that they currently have available to them,... [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR ERDMAN: ...which some of them have exhausted, and state that they believe, under the new language, that they have never been found...I believe it's a substantial risk to the lives of others, and therefore, should have their sentence reviewed. [LB377]

SENATOR ASHFORD: They would first have to convince a court that this has retroactive effect and that they deserve a resentencing, or that they're entitled to a resentencing. If they have exhausted their direct appeals, I think the chances are very remote, though they can file effectively. If they have not exhausted their direct appeals, they may include this language in their appeal. It's done all the time. Nothing in this statute...or any time we change the death penalty, as we've done several times, would impact the right to appeal. [LB377]

SENATOR ERDMAN: Senator Ashford, we may run out of time here. Senator...are we out of time, Mr. President? [LB377]

SENATOR LANGEMEIER: Time. Thank you, Senator Erdman and Senator Engel. Senator Lathrop, you're recognized. [LB377]

SENATOR LATHROP: Thank you, Mr. President and colleagues. There is a debate going across the country on the death penalty--this subject is not unique to Nebraska--and the debate goes across this country because of an uneasiness with the death penalty, an uneasiness that comes out of the fact that we as mere mortals pass judgment and then take another human life, an uneasiness that goes across the country because, since the death penalty reemerged in the seventies, 123 people have been exonerated. They were on death row; they were to die for crimes they didn't commit. An uneasiness that grows from the fact that most civilized countries have gone away with the death penalty, an uneasiness that grows out of the fact that more lives are taken by the death penalty of minorities--it affects minorities in a disproportionate manner--and

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an uneasiness that grows out of our collective sense that the death penalty is inconsistent with those of us who hold pro-life views. There is an uneasiness in the state of Nebraska that grows out of the fact that there were 178 death-penalty eligible people committing the worst of the worst murders, yet only 38 of them have been sentenced to death, an uneasiness in the state over the cost of a system that is broken, an uneasiness across the state that grows from the fact that more families are disappointed by the death penalty system than are served, a system that has a track record of imposing this penalty in only 8 percent of the time. There is an uneasiness in this country with the death penalty, and there is an uneasiness in the state of Nebraska. LB377 is an attempt to rectify the arbitrariness and to relieve the uneasiness. There is a demand in this country that the citizens be safe, and they look to the Legislature to do that. The death penalty, as it is currently composed, has no relationship to safety. It does not provide our citizens with a safe community. We are sentencing people to death that no longer present a risk. We are not imposing the death penalty in more cases than we are. LB377 is a bold move by this body. It may well provide not just a new standard in the state of Nebraska, but a new standard in this country. We are concerned, many of us--those of us that call ourselves pro-life--with the inconsistency between a pro-life position and continued support of the death penalty. LB377 provides us with a new way of sorting out who gets the death penalty and who does not. It does not repeal the death penalty. Many people have taken to their feet this morning and to the mike and said, this is an effective repeal of the death penalty. It is not. This is not a repeal of the death penalty. It merely changes the standard by which we determine who gets it and who does not. Yet people who have talked to someone besides me... [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR LATHROP: ...have suggested that this is a repeal, because no one can satisfy the requirements of LB377. That information comes from someone who fundamentally doesn't understand trial work, and fundamentally doesn't understand death penalty. Death penalty cases currently become a battle of the experts. Psychologists, psychiatrists, sociologists, and now corrections officers, will be called upon to make these predictions. They are no different than the predictions we hear in the courtroom every day. This is not a difficult standard. This is not an impossible standard. It is a fair standard, and it is a standard that can be met. This standard will apply to those who commit the worst of the worst crimes, from this day forward. It is not intended to apply to those who sit on death row today. LB377 is the right thing to do. LB377 and the standard that we set with this bill... [LB377]

SENATOR LANGEMEIER: Time. [LB377]

SENATOR LATHROP: ...will become a standard for the nation, I'm telling you. Thank you. [LB377]

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SENATOR LANGEMEIER: Thank you, Senator Lathrop. Senator Pedersen, you are recognized. [LB377]

SENATOR PEDERSEN: Thank you, Mr. President, members of the Legislature. Senator Friend said it best for me when he said, I do not answer to the Republican Party, I do not answer to the Catholic Church, which I'm a member of both. I choose to be members of both of them because of...they have, for me, what I want. LB377, I believe, is the right thing to do. If it was complete repeal of the death penalty, you know I'd vote for that, too. I think killing by the state is wrong. Senator Chambers mentioned a prisoner whose name is Carey Dean Moore, who the state will probably be killing next month at his request. But how many people in here are against state-assisted suicides? That's what we'll be doing in his case because he's choosing to die. And the main reason he is, and I know this man personally, is because he does not like what's happened to him in the system. Death is a better thing for him than prison. I had a constituent the other day, said to me, an old friend who's very pro-death penalty, question me about my beliefs. And when I told him about some of the inequities or the unfairness of the death penalties--minorities and some that have been exonerated because of DNA, showing us fact that we've probably killed people who did not commit the crime--he said, well, that will happen once in a while, send them up to God and let him sort that out. Are we of that frame of mind? I know all of you. I don't know all of you real personally but I know most of you personally, and can't believe that what we hear and what we read is not true. If we're killing only because of that's what our constituents want, then why are we not educating them more on what the death penalty really does and what it is? I cannot and will not support state killing, but I did support AM912 because it is better than what we have. And I think it would be fair for those people who are in favor of the death penalty. Please search your minds and hearts to do what is right here, not just what is political. Thank you. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Pedersen. Senator Chambers, you are recognized, followed by Senator Aguilar. [LB377]

SENATOR CHAMBERS: Mr. President, members of the Legislature, just so that some of the terms that we use are accurate, when a person is sentenced to die, he or she has an automatic appeal to the Nebraska Supreme Court based on the constitution. Since we're dealing with the death penalty, I'll talk about that sentence. But when a person is convicted of any crime and exhausts his or her appeals, there is not another appeal. There is what is called post-conviction relief. That means you go back to the sentencing court and you raise issues that were not available to you at the time of your direct appeal. And that court will determine based on your filing whether there should be what they call an evidentiary hearing where you actually present evidence for and against, and then a ruling is made. But it's not enough to just show that maybe a right of yours was violated. That right must rise to the level of a violation of the constitutional right that you might have. If any person is convicted of a crime and the punishment is serious,

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that person is going to do whatever he or she thinks is available under the law to mitigate that punishment. People on the floor of this Legislature do that when we try to talk to each other to say what can I do to cause you to lessen your opposition to this bill. So sometimes we become sanctimonious, self-righteous, and want to put ourselves in the position of the god that people claim to worship. Senator Fulton wants absolute guarantees that certain contingencies that are very tenuous will not happen. And that cannot be given. He's an engineer. He can set out a formula and say that if we construct a pillar according to these specifications, it will bear a certain amount of weight if that weight is placed in a certain relationship to this pillar. He can say that. The formula may work on paper. But when you build the pillar, there could be a defect in the material that is used and that pillar will not support that weight. So even when he likes to talk about empirical evidence, even in his realm of engineering there is nothing that is guaranteed to work the way that the formula says it should work. On paper, things are going to come out a certain way. Who in here can predict what any one of us is going to do at 12:01 p.m. today? Predict it right now. We don't know. When is Senator Fulton's foot or Achilles tendon going to be completely healed? He doesn't know and the doctor doesn't know. But he is in that position where he wants some kind of ironclad guarantee that cannot be given with reference to any human conduct. Right now if a sex offender is convicted, sentenced, serves all of his time, because of the possibility or probability that he may offend again, they can continue locking that person up. That is predicting the future. When a person is convicted of being a habitual criminal, that is based on the notion that this person has chosen a life of crime and is likely to continue it because that final felony of which he or she is convicted does not carry a sentence as stiff as that of the habitual criminal statute. So you are punishing that person and holding him or her in the lockup based on what you think is likely to happen in the future. That's already done. And you know what prosecutors do? They use the threat of a habitual criminal charge to get somebody to plead guilty to a lesser offense. Well, if the person is really that dangerous, why should you plea-bargain and let that person get a lesser offense if you've already concluded he or she is likely to offend again? There is so much hypocrisy in this system, and I wish our colleagues were better informed on the way the law works right now. Do you all know, and it had to be acknowledged under questioning by me to some prosecutors, that there can be codefendants and the trigger puller can win the race to the prosecutor, turn state's evidence, and the codefendant who did not pull the trigger can get the death penalty and the triggerman doesn't? [LB377]

SENATOR LANGEMEIER: Time. [LB377]

SENATOR CHAMBERS: Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Chambers. Senator Aguilar. [LB377]

SENATOR AGUILAR: Thank you, Mr. President, members. I hadn't planned on speaking on this this morning. I just wanted to listen and hopefully educate myself a little

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bit. But I feel like I've been drawn into the conversation by comments of Senator Kruse and Senator Lathrop when they spoke about the unfairness and bias of application of the death penalty towards the minority population. This of course is very true. You know, as a percentage more minorities are executed. And also, another fact that I find interesting is if the victim is not a minority, there's a stronger possibility that the death penalty is going to be applied in that. I think that's interesting, and I think that's something we need to ask ourselves why. Why is this unfairness? The obvious answer, of course, there are prejudices throughout the state of Nebraska whether...you know, many people don't even realize of these prejudices but many people are. And why is this? You know, and I have a, what I feel is a good answer for this. And that is what goes on the media today, what goes on, what comes out of the mouths of people like Michael Savage, of Imus in the Morning. You've heard...those two have been in the news quite recently because of the hate they spew. And why we as a nation allow them to get away with it and promote prejudices and hate the way they do is something I will never understand. I have never heard such out-and-out hate, lies come out of the mouth of anybody, and we accept that as public information. Many people form their opinions by what they hear on the radio. They think that's gospel. Well, think about what some of those people are saying sometimes. It's wrong, it is deadly wrong. And with that, I'd yield the rest of my time to Senator Chambers. [LB377]

SENATOR LANGEMEIER: Senator Chambers, 3, 20. [LB377]

SENATOR CHAMBERS: Thank you, Mr. President. Thank you, Senator Aguilar. And I agree with what my colleagues just said. Members of the Legislature, Senator Erdman talked about specifics. You all are not going to pay attention to specifics and I know it. And I know the Governor has people working to try to keep this bill from reaching his desk. That's where the politics are, Senator Erdman. The vast majority of first-degree murderers are not even made eligible for the death penalty based on the way the prosecutor proceeds with the case. Most of the time, there is a plea bargain. Now if this person is deemed to be dangerous, why the plea bargain to let that person be in the general population and not on death row? Even Senator Flood has not paid attention to the realities. Senator Friend has not paid attention. The prosecutors before the Judiciary Committee responded to my questioning and acknowledged that there are people not on death row in Nebraska who have committed far worse murders than those who are on death row. The prosecutors admitted it. So where is this fear that Senator Fulton keeps talking about of the harm and the danger that these people pose? Senator Flood mentioned a guy named Dunster who sent some threatening stuff to me. But it made me no difference. That man was transferred here from Colorado, and the transfer should never have been accepted by Nebraska. But based on what he had done in Colorado, he should have been incarcerated differently from the way he was. In other words, he should not have had a cell mate. That was preventable. So that doesn't make their point. What you have to look at is the vast number of first-degree murderers who are out there in the prison population and haven't harmed a hair on anybody's head.

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And Senator Fulton had to scramble and scratch to find a case in California where somebody from a jail cell allegedly put a hit on somebody outside that jail cell. [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR CHAMBERS: He's not going to find that in Nebraska. That is an aberration. And to show you how skewed this system is, the worst murderers, if you want to say there is such a category, would be those who kill for money. Do you know what happens to the contract killers in this country? They are turned into snitches. They are put in the protection program and given a different identity. They don't go to the death house. The worst murderers always escape--the news, the gas, the electric chair. Those are the realities that Senator Erdman, Senator Flood, and others ignore, and that's going on in the real world right now and in Nebraska. Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Chambers, Senator Aguilar. (Visitors introduced.) Wishing to speak to AM912 we have Ashford, Friend, Flood, Nantkes, Erdman, Schimek, and others. Senator Ashford, you are recognized. [LB377]

SENATOR ASHFORD: Thank you, Mr. President. And this is my third time, I believe, but I'm just going to reinforce a couple of things. First of all, just following up on Senator Fulton. Senator Fulton, quite frankly, gave me the idea to go forward with this amendment. I respect Senator Fulton for doing that. And Senator Fulton has come to me now with some additional language, and which we will be happy to look at. That's the duty of this committee and we will continue to do that. This process that we're going through, as I said before, is a process to correct an unfairness. I don't support the abolition totally of the death penalty because I believe there are people who should...cannot be incarcerated, that the public safety does not permit us to allow that person to remain alive. But the system is so flawed under...our job in the Judiciary Committee is to sit there and listen to the testimony. The first time we had a hearing before the committee; no one appeared in opposition. The bill came out of committee, there was support on the floor. Some opposition has since then arisen from certain public officials and others, and that's fair. But no one came to the committee the first time to offer other ideas or suggestions. And we did have some opposition at the second hearing. But essentially, what is absolutely unequivocal--and Senator Chambers has said it, Senator Lathrop has said it--is, there is no way that we can look at the death penalty as it is imposed in Nebraska, three executions in my lifetime or four, hundreds of criminals, deplorable acts committed by these people, are not on death row. How, with that sort of inconsistency, can we in good conscience apply the death penalty as it now is? So we're trying to find another standard, trying to narrow it down to people who cannot be incarcerated. I don't know what other standard you apply other than that. And that was really Senator Fulton's idea. And I think it's a good one, I think it's legitimate, and I grasped it because I think it makes sense. To me, it answers the question that I've

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been posing to myself for a long, long time, which is there are those where the death penalty is appropriate. But it is such an ineffective and inconsistent and arbitrary system, maybe the only thing to do is to throw the whole thing out. So I appreciate Senator Fulton's help in bringing this idea to me. But I think we need to continue to talk through that. It's not a reason to not vote for this because the language may not be perfect. Let me make another comment, and that is that the death penalty, you cannot debate the death penalty in a vacuum. Since Furman v. Georgia, where the death penalty was abolished across the country, and the Gregg case, and the Ring case, the most recent case, there have been significant changes in the application of the death penalty. That is one of the reasons why people, persons on death row are not put to death because, in fact, the appeal process is lengthy. That bothers me. But what really bothers me and the reason that I support this bill and the essence of it is the example that Senator Chambers gave, and there are many others like it, like the Lotter case, where two people equally culpable, one person is on death row and one is not. That is fundamentally unfair. We cannot have that in Nebraska. [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR ASHFORD: And I think Senator Lathrop made a very, very good point. And that is, this is a new way...maybe it was Senator Erdman or Senator Friend, and they've given good comments. But there is nothing wrong with having a new way. There's nothing wrong with looking at another way to deal with this problem. It's a new way. Senator Lathrop is absolutely correct. And it hasn't been tested. The language that we proposed has not explicitly been tested. But we do that all the time here. So I'm trying to find a good reason to change my mind, and I can't find one. There is not a good reason to...not one reason at all to continue this system as it is, under any circumstances. And that is our job and the job of the Judiciary Committee to bring to you what we think is the best language. Is it perfect? As Senator Chambers suggests, there is no perfect language or perfect result. But it is an advancement. It is a narrowing. But when you are talking about the death penalty,... [LB377]

SENATOR LANGEMEIER: Time. [LB377]

SENATOR ASHFORD: ...a narrowing is not an inappropriate response. Thank you. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Ashford. Senator Friend, and this is your third time, you are recognized. [LB377]

SENATOR FRIEND: Thank you, Mr. President and members of the Legislature. You would have an easier time convincing me to vote for LB476 than this bill. If we'd have...look, Senator White made, as always, very eloquent arguments and they were philosophically based to a certain degree. He did deal with some practicality. But they

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were philosophically based. I don't know that I disagree with him; I don't know that I can. Philosophically, for the most part, if you choose to bend this argument into this, and it looks like we have to a certain degree, you must analyze this subject matter through 3,000 years of discussion--Socrates, Aristotle, Thomas Aquinas, Saint Augustine, Immanuel Kant, Pope John Paul II. You have to go back and you...we can't handle that. We cannot handle that. Do you know, the Summa Theologica, I believe is the proper pronunciation, Thomas Aquinas, it was a work of theology. Do you know that our American jurisprudence system, there's a piece of that associated with our American jurisprudence system, Thomas Aquinas. Senator Ashford and I were kind of laughing. He said, well, what did Aquinas think of abortion, ha ha, we laughed about it. You know what? Irrelevant. If we want to have the philosophical discussion, it will take us years. I think we have to break it down, and we have to break it down this way. The practical piece of this--and we can talk about this if we bring philosophical elements into it--the practical piece of this is we don't even know whether this standard is fair or understandable, okay? No one has used it, and Senator Ashford pointed that out. That's okay, we do that all the time. And if this passes, we'll find out. But my two years on the Judiciary Committee--and I know that's not much and I would defer to Senator Chambers any day of the week on this one--my two years there indicate to me, and he and others have taught me that when you're dealing with criminal code, you have to be particularly careful, right? That's what I think based on my knowledge. Many have pointed out here that there are all kinds of people sitting on death row, others that should be, so the system is broken. How does this fix the system? Honestly, folks, there's language in here that says a sentence of death is appropriate only when necessary to protect society; therefore, no person shall be sentenced to death or executed unless the finder of fact has determined that such person poses a present and substantial risk to the lives of others. Now the finder of fact here is going to be a court, is going to be the court, it's going to be a jury or it's going to be a panel of three judges, correct? That's rhetorical, but somebody could speak to that. This fixes that? We've got a bunch of people out there in our American jurisprudence system that are flawed because they're human beings, right? How does this fix that? We've got a bunch of people making determinations as to whether another human being is going to live or die. How does this fix it, folks? I hearken back to the original point that I made. You would have an easier time convincing me to vote for the original bill that Senator Chambers brought out than you would for this. I believe that because then I know what we're doing. [LB377 LB476]

PRESIDENT SHEEHY PRESIDING

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR FRIEND: Look, I would submit that I don't think this solves any problem. We've got a bunch of human beings making value judgments based on criminal code that could cause us problems that we just can't anticipate, okay? So if we want to go

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back and talk philosophically for six hours, let's do it. I would love to have that discussion. I'll have it with my priest back at home--I'll have that. I've had it with priests before. I'll have it with my family members who don't agree with me, some of them. I'll have it with lobbyists. I'll have it with everybody in here off the mike. We can have that discussion. But Senator Chambers' original bill changed the philosophical discussion. This doesn't. We are still, as a state, going to sanction the killing of another human being. We have to figure out whether this solves the flaws in the system that Senator Aguilar spoke of eloquently... [LB377]

PRESIDENT SHEEHY: Time, Senator. [LB377]

SENATOR FRIEND: ...and others. Thank you, Mr. President. [LB377]

PRESIDENT SHEEHY: Thank you, Senator. (Visitors introduced.) Next we have Senator Flood, followed by Senator Nantkes, Senator Erdman, Senator Schimek, and others. Senator Flood. [LB377]

SPEAKER FLOOD: Thank you, Mr. President, members. I want to touch on two topics here in my five minutes, the first of which deals with the cases that the Nebraska Supreme Court dealt with in the late seventies with regard to retroactivity language. Senator Chambers, in 1978, passed LB711 which essentially added the proportionality excessiveness review by the Nebraska Supreme Court and by the sentencing judge or panel at that time. And we had a number of cases that the court then reviewed. And a question was, did LB711 apply to those cases retroactively? And they were State of Nebraska v. Holtan, found at 287 N.W.2d 671, and State v. Rust, found at 303 N.W.2d 490, and the Rust case was a 1981 opinion of the Nebraska Supreme Court. And essentially the Rust and Holtan language, in both of those cases we were talking about a collateral appeal or a collateral issue on post-conviction. It wasn't a direct appeal from the Supreme Court was dealing with. It was what the federal court called more of a habeas action. And the court said, and I think this is very good, in State v. Rust, defendants...LB711 was not an enacted until after the sentence in this case had been imposed and became final. Having become a final judgment prior to the effective date of LB711, it is not affected by the adoption of LB711. And I think that's important, having become a final judgment prior to the effective date of LB711. In the U.S. Bank murder cases from Norfolk, I think the Mata case and Hessler, those five individuals have not had a final order from the Nebraska Supreme Court on the direct appeal. So they would be, in my opinion, or at least the door has been opened to retroactivity language from this amendment should it be adopted. Now that being said in all fairness on the issue, this bill specifically contains nonretroactive language, which is and would be a hurdle for the defendants. However, when you're imposing the death penalty, and I think Senator Chambers would agree with this, this is the only criminal sanction that is truly final in every level. The death penalty is different, it is unique, it is subject to a little bit different interpretation, I think, from the Supreme Court's level. And if we pass this, I don't know

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how the Nebraska Supreme Court could execute somebody in Nebraska looking at what the bill..say it was passed unamended, read the language--Legislature finds, Legislature finds. I think it would be very difficult for the Supreme Court, even on its own motion, not to call Mr. Carey Dean Moore's case into question, and I'd be interested in some discussion on that. The other thing I want to talk about, and I think the proponents of AM912 should spend some time making a record of what they think the court has to find, as far as evidence that somebody cannot be safely incarcerated. I find that troubling because we've essentially said, okay, now the burden is on the state to prove that it can't safely incarcerate somebody. What kind of evidence are you... [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SPEAKER FLOOD: ...suggesting should be presented to establish the burden that's outlined in AM912? It is a future dangerousness argument and it becomes, as Senator Chambers said, a battle of expert witnesses--psychologists, psychiatrists, the Department of Corrections. I'd like to hear a discussion of what exactly the state would be required to prove if they sought the death penalty under this bill and what constitutes future dangerousness. That's the discussion I'd like to have. And later this morning or this afternoon maybe we can talk some more about Nebraska in relationship to the state of Texas, which has similar but not exact language. And I think there's quite a difference that we can parcel out and make a case for, that this amendment is not the right way to go. I think this still has strong elements of a repeal bill. In fact, I wish we were... [LB377]

PRESIDENT SHEEHY: Time, Senator. [LB377]

SPEAKER FLOOD: ...still talking about repeal. Thank you, Mr. President. [LB377]

PRESIDENT SHEEHY: Senator Nantkes. [LB377]

SENATOR NANTKES: Mr. President, colleagues, this morning I rise in support of LB377 and the committee amendment, AM912. In law school, I spent a semester studying the death penalty and related issues in great detail. Since that time, I've continued to actively study these issues. One sentence from that jurisprudence that continually is in my mind as I explore and further try and increase my understanding of issues surrounding this ultimate issue of life and death were written by Justice Harry Blackmun in a seminal Supreme Court case, Callins v. Collins, that was published in February of 1994. He expresses his frustration with the longstanding history within Eighth Amendment's jurisprudence and announces to the world from that day forward he shall no longer tinker with the machinery of death. In some ways, at this moment, at this moment in my career and at this moment in this body, I think that would be a great luxury to be able to sit back and not have to tinker with the machinery of death, which is what we are in fact doing here today. But we do have an opportunity to further narrow and more appropriately impose this ultimate sanction. I have heard, like most of you, a

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lot of communication from our district and the general public who are concerned about revisiting this issue. They say, well, we have educational policy to deal with, we have a budget to pass, we have water policy solutions to find, and we need to ensure tax relief for all Nebraskans. These are truly important issues and I couldn't agree more. But it is entirely appropriate that we revisit this issue. The debate on LB476 helped the Judiciary Committee and other members of this body glean that there was in fact more common ground on these issues and that we could find other solutions to dealing with them. I applaud the committee for the work that they have done, and it's been hard work to find another option to address and improve Nebraska's system. A few points that I did want to address from other members' comments this morning, making comparisons to other aspects of our criminal justice system. While generally interesting, I'm not sure if they're particularly relevant. The United States Supreme Court has told us in countless cases that death is different. See Furman v. Georgia, Gregg v. Georgia, McCleskey v. Kemp, Atkins v. Virginia, and finally, Ring v. Arizona. It's different because of its finality and its severity. And I believe that LB377, as amended by the committee through AM912, appropriately addresses all underlying principles on this issue in an appropriate way. It addresses the morality, the utility, the fairness, and deterrence issues underlying our state's use of its most ultimate penalty. Thank you, Mr. President. [LB377 LB476]

PRESIDENT SHEEHY: Thank you, Senator Nantkes. Senator Erdman, followed by Senator Schimek, Senator Wightman, Senator Dierks, and others. Senator Erdman. [LB377]

SENATOR ERDMAN: Mr. President and members of the Legislature, thank you. Would Senator Ashford yield to some more questions? [LB377]

PRESIDENT SHEEHY: Senator Ashford, would you yield for a question? [LB377]

SENATOR ASHFORD: Yes. [LB377]

SENATOR ERDMAN: Senator Ashford, I can't speak for the other members of the Legislature, but I am interested in the language that you have advanced from the committee, and that's why I'm going to ask you the questions, to make sure that I am clear. And I will (laugh) not speak for them ever. They have the opportunity afforded to them. If we look at the issue of where we ended up with the no person shall be sentenced to death or executed, and I think this is where Senator Friend was as well, I find that in Section 7 of the amendment, which is 29-2519. I notice that when we went through Ring, and I was here for that special session with LB1, there was language added to the law, the criminal code, that says that the changes made by LB1 are intended to be procedural. And then later there's an additional section added that says the changes are not intended to alter the substantive provisions of those sections. So what we did with Ring was procedural but not substantial. There was not a substance change there. Can you explain to me then, Senator Ashford, as we proceed with the

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new language that you're adding and further the questions we were having about the appeal process and the opportunity--I thank Senator Chambers for his additional insight--we don't see that same language here. [LB377]

SENATOR ASHFORD: I don't... [LB377]

SENATOR ERDMAN: Is that language unnecessary? Was that just simply a marker, if you will, or is that language necessary to comply with where we're at? But we are making a substantial change in the actual individuals who would be eligible for this sentence. Is that accurate? [LB377]

SENATOR ASHFORD: We are, yes, because we're making a finding in this bill. You know, we talk about, and Senator Flood mentioned this, these findings are such that the court would have to apply these procedural changes retroactively. Well, that's not true, I don't believe. The findings are accurate. There is no way you can find otherwise than what we have found, that the death penalty is inconsistently applied. To answer your question, I can't tell you what a court would find, that this particular statute is procedural or substantive. It has elements of both. But to answer your question, as in all these cases, the 100 or the 204 cases that were death-penalty eligible, there are endless appeals of 34 people on death row--endless appeals. So this statute change cannot predict that, to your point. [LB377]

SENATOR ERDMAN: Could the language that's in the existing law have predicted that? In other words, could the language that was in LB1, which I believe was written by then-Chairman Brashear at the assistance of the Judiciary Committee, which included some of the same membership, could that have that effect, given the balance of power between the judicial branch and the legislative branch? In other words, did that do anything...did that finding do anything and does this finding then do anything, to the extent that it effects a change of the existing sentences? [LB377]

SENATOR ASHFORD: I just can't answer that, Senator Erdman. I do think that the findings are relevant and that...but I felt, and I think the committee felt, that the findings had to be there because otherwise there's no reason to address the law. I can't tell you how...and I cannot tell you whether... [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR ASHFORD: It is somewhat different from the Ring case and the application of the Ring case. That was a constitutional change involving a jury determination. Again, it has both procedural and substantive elements to it. I think...I just don't know or cannot predict how a court will do it. I think we just need to figure out the best policy here and as best we can, make it as best we can constitutional and then let the court deal with it. But there will be appeals and there will be appeals. The only reason there's not an

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appeal in the Carey Dean Moore case right now, of course, is because he has asked that there be no more appeals. And that's part of the problem. I mean, if we narrow it--three people have been put to death in the last 35 years--that's a narrowing right there caused by the Supreme Court cases to a great extent that have occurred since Furman v. Georgia. [LB377]

SENATOR ERDMAN: In addition to the other statutory limitations... [LB377]

SENATOR ASHFORD: Correct. [LB377]

SENATOR ERDMAN: ...that have been adopted since that same time. And just to clarify for the record... [LB377]

PRESIDENT SHEEHY: Time, Senator. [LB377]

SENATOR ERDMAN: ...the Ring decision didn't have substantive changes. It was only procedural. Thank you, Mr. President. [LB377]

PRESIDENT SHEEHY: And Senator Erdman, that was your third time. Senator Schimek. [LB377]

SENATOR SCHIMEK: Thank you, Mr. President. I'd like to give my time to Senator Chambers. [LB377]

PRESIDENT SHEEHY: Senator Chambers. [LB377]

SENATOR CHAMBERS: Thank you, Mr. President. Thank you, Senator Schimek. Senator Flood mentioned two cases in which the Nebraska Supreme Court made various comments. They were the cases of Rust and Holtan. He may not know, but both of those men left death row other than by way of execution. The vast majority of people who've wound up on death row in Nebraska--this is for Senator Erdman, Senator Friend, and Senator Flood, who profess so much concern about specifics--the majority of those who wound up on death row in Nebraska left death row, not by way of execution nor by natural death. Some died. So why is that? Why aren't you all concerned about that? You don't even know about it, because you don't care. Your side is the political side; our side has to come up with the facts, and the facts are there. What Senator Friend needs to realize is that every law is philosophically based. There is no crime that exists in Nebraska unless the Legislature says it is a crime. A crime exists when the Legislature criminalizes certain conduct. And that criminalization occurs because of a philosophical process that is gone through and a decision is made to say that if you engage in this conduct from this day forward, you're going to be punished by the state. All of them are philosophically based. As for Thomas Aquinas and the Summa Theologica, I read more and forgot more than Senator Friend ever knew. I studied

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Thomas Aquinas for four years at Creighton, and this man whom they say is so brilliant believed in what was called spontaneous generation of life. You know why he believed in spontaneous generation? Because you could have a pile of garbage, then for no reason life sprang up, and he was giving a logical explanation. But he deviated from what his master teacher Aristotle had taught, that you ought to begin your inquiry with investigation of the natural phenomenon. Had he done that, he would have learned that flies lay eggs in garbage, eggs hatch and produce maggots, and those maggots are what Thomas Aquinas saw and thought sprang up spontaneously because he didn't know, and he could have found out if he had observed. Much of that flawed thinking occurs on the floor of this Legislature. Senator Friend asked will this bill fix the death penalty if it's broken. Nothing can fix it, Senator Friend. The U.S. Supreme Court approved of attempts by states to fix it when they put in place aggravating and mitigating circumstances. Furman v. Georgia struck down all death penalty laws, not because they said the death penalty itself violated the constitution, but the way it was applied. There was nothing that guided the discretion of the jury or the judge, whoever was setting the penalty, and that allowed for too much arbitrariness, capriciousness, and discrimination, and most of that discrimination went toward minority groups, the poor, and the unpopular. If you read Supreme Court decisions for yourself, instead of going by these anecdotes which are nonsensical, you'd understand what we're talking about. [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR CHAMBERS: But you don't care enough to do that. So when these aggravators and mitigators came into being and Nebraska adopted some, Nebraska had to change, the Supreme Court had to change, through interpretation, those aggravators adopted by the Legislature because they were too vague and violated the constitution. So even though the Supreme Court upheld aggravators and mitigators, they did not fix it. And the Supreme Court of Nebraska had to rule that one of its proceedings it used in a death penalty case to reconsider evidence, and I'm simplifying it, violated the constitution. So the Nebraska Supreme Court had to admit that itself had engaged in an interpretation and a process that was unconstitutional. The court can do it, and you're going to ask Senator Ashford or anybody else to tell how a court is going to rule on any law that we pass? That is preposterous. Thank you, Mr. President. [LB377]

PRESIDENT SHEEHY: Thank you, Senator Chambers. (Visitors introduced.) Senator Wightman. [LB377]

SENATOR WIGHTMAN: Thank you, Mr. President, members of the Legislature. I arise in opposition to LB377. I stated the first time we considered this issue on Senator Chambers' bill that I thought if there was any deterrence there, that it justifies existence of the death penalty. I know that Senator Flood spoke at length on the first bill to abolish

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the death penalty about the dual reasons for the death penalty--one being retribution, the other being deterrence. I'm not a strong believer in retribution, but I am a strong believer in deterrence. I know that it's been argued numerous times by numerous speakers that there's no statistical proof that the death penalty is, in fact, a deterrent. I'm sure that it is very difficult to prove statistically. But I think that there have been a number of studies made, and I was just furnished by Senator Pirsch with a number of these. In some of the inquiry he has made into this particular bill, there have been eight recent studies within the last seven years at various universities from 2001, I believe, until the present time, I think, through 2006, that found that it was a deterrent, that examined through interviews with death penalty inmates, through a number of sources. And at least those studies found that there was a deterrence factor, and in some instances, a rather large deterrence factor. Can I say these are correct? Probably not. I think that every study that's made is probably somewhat biased, maybe substantially biased in favor of the person's view when he starts that study. But nevertheless, the fact is that there are a substantial number of studies that have found that the death penalty is a deterrence, and those aren't all studies that were made in ancient times. Many of those were made within the last few years. I said before that I think that if the death penalty deters one murder in 1,000 crimes that are being committed or even if it was 10,000, that I still think that it justifies the availability of the death penalty, and I would still say that. So I don't think that LB377 corrects any problem that I had with the death penalty. It may limit it somewhat. I think it's going to be just as difficult to probably impose and see it as being no real addition or change from the death penalty that we have today. I do think that probably fewer people would be sentenced, however. I know one of the arguments that we hear frequently on this legislative floor is that the system is broken. I don't know how many times...I would hesitate to count how many times I've heard that with regard to legislation that's being proposed. I guess I'm not sure at what point we determine that the system is broken. I think really when people say that, they're saying that it's less than perfect. Certainly I think the death penalty is less than perfect. In a perfect world, we wouldn't need to have the death penalty. Many here would argue that we don't need to have the death penalty at all. [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR WIGHTMAN: But I still strongly believe that it is a deterrent, that there are many studies that show that it is a deterrent. And as long as that thought is in my mind that it is a deterrent, I will continue to support the death penalty. Thank you, Mr. President. [LB377]

PRESIDENT SHEEHY: Thank you, Senator Wightman. Senator Dierks, followed by Senator Carlson, Senator Avery, Senator Fulton, and others. Senator Dierks. [LB377]

SENATOR DIERKS: Thank you, Mr. President, members of the body. I missed the last ability to speak because in the Rotunda I had met the gentleman from Oklahoma that

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Senator White was talking about whose daughter was killed in that federal building. He was out there for a press conference, and it was interesting to me to get his view on some of these issues we're talking about today. And we talk about a number of things. You know, we talk about deterrence, we talk about those sort of things. There's two issues, to me, that stand out that make me sure that I'm going to support this legislation. One of those issues is that I think Senator White mentioned it in his first talk about the 50 inmates that had been released from prison in Illinois because they were found not guilty by way of DNA evidence. But they were on death row. And the other evidence is that there have been 120, over 120 men and women who have been put to sleep in this country and later found to be innocent. One of those is enough for me not to support the death penalty. So I find it difficult to believe that with that information this legislation is not going to be supported. I think we all should think about that. Thank you, Mr. President. [LB377]

PRESIDENT SHEEHY: Thank you, Senator Dierks. Senator Carlson. [LB377]

SENATOR CARLSON: Mr. President, members of the Legislature, in thinking about the debate that would be taking place this morning, I asked my legislative aide, Nanette, to bring me a definition of the word "hypocrite." Hypocrite is the false appearance of virtue. A hypocrite is one who pretends to be or believe what one is not. I'm a little uncomfortable with the hypocritical nature I perceive in AM912. Maybe, as Senator Lathrop spoke earlier, I don't understand. Conceptually, it doesn't eliminate the death penalty. From a practical, realistic sense, I think it does eliminate the death penalty. It, so far, has made me more uncomfortable than comfortable. Now my comfort is not the issue. Your comfort is not the issue. My reelection can't be the issue, nor can yours. This is a moral, spiritual, ethical decision. Our consciences must guide our votes. I admire Senator Ashford and his passion for this bill. But I admire even more his struggle to deal appropriately with the sanctity of life and the protection of the unborn. Both concern the sacred value of life and the two concerns are married--they can't be divorced. Senator White earlier today referred to laws concerning the death penalty are morally unacceptable. I believe that the laws concerning the unborn are also morally unacceptable. What I'm going to share in the next couple of minutes will not be welcome by some people in this body. Senator Chambers told me earlier I have every right when I get up to speak to share my views, and I'm going to do that. I don't like the term "choice." But in evaluating how I think, I've come to realize that I subscribe to choice. I believe a woman has several choices. She has a choice not to get pregnant. She has a choice to have, love, and raise her baby. She has a choice to have, love, raise her baby, and make the father accountable, at least financially. She has the choice to have, love, and give the baby up for adoption to a loving family. She can choose life. She should not be able to choose to kill her infant. This is America. We value life. Convenience is no justifiable reason to choose death. If women have a convenient choice to kill their unborn baby, we as a society certainly have all the freedom we want to conveniently kill any prisoner in our prison system. I thank you for listening. [LB377]

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PRESIDENT SHEEHY: One minute. [LB377]

SENATOR CARLSON: I will listen to the rest of this debate. Thank you, Mr. President. [LB377]

PRESIDENT SHEEHY: Thank you, Senator Carlson. Senator Avery. [LB377]

SENATOR AVERY: Thank you, Mr. President. The last time we debated this issue, I confessed to you that I was undergoing a great personal struggle in my own mind and in my heart over this issue. Before I was sworn in as a member of this body, my opinions on important issues such as that which we discuss today didn't matter much. To be sure, I was fully confident that my opinions were correct and that they were fully informed by fact and reason, and I could debate those issues with anybody that wanted to with tireless energy and vigor. Now however, my opinions have taken on a new dimension. I can no longer casually be confident that I have arrived at the correct position on every issue, because now I have to assume responsibility for the consequences of my opinions. Now I have a responsibility to vote and that vote has serious consequences. It is not a responsibility I take lightly. That responsibility requires me to search my conscience and my heart to make certain that I am doing the right thing. I suspect that many of you share my feelings. Many of you probably continue to struggle over this issue. We all know that what we do in this body matters. And because it matters, we must be sure that we get it right. I'm not so certain about the absolute correctness of my opinions today as I was a couple of months ago. Things are different now. So I have reexamined my conscience and examined again some of the empirical evidence on the death penalty. For the sake of argument, let's set aside the argument that the death penalty is immoral. Good and honest people can disagree on that. Let's also set aside the argument that the death penalty is a deterrent to further capital crime. Good and honest people can disagree on that, too. But what we cannot set aside so easily is the compelling evidence of disproportionality and bias in sentencing. Proponents of the death penalty do not adequately deal with this issue, in my opinion, and I've looked for the arguments. There may not be much difference in the crimes that are selected for the death penalty, but there certainly is a significant difference in who gets sentenced to death. Who are they? We've talked about this on the floor. They are minorities, the poor, and those whose victims are white. This we know. Is this significant or is it sufficient to vote to put these people in prison for life without the possibility of parole and spare the death penalty? I have come to think the answer is probably yes. AM912 is, for me, a reasonable compromise with those who are concerned about murderers who are committed to life in prison and then continue to be a threat to society. I am sympathetic to that point of view. In my opinion, this amendment does not eliminate completely the death penalty. It would still apply to people like David Dunster, who has now murdered two people while in prison. It also would apply to terrorists who likely could control a murderous network on the outside while in prison. This also would

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apply to organized crime figures... [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR AVERY: ...who might control such murderous networks. I admit that this places an additional burden on prosecutors. But is this unreasonable? I think not. The death penalty is the most extreme punishment the state can apply and it should not be easy to do so. For these reasons, I plan to support this amendment because, for me, it is the right thing to do. Thank you, Mr. President. [LB377]

PRESIDENT SHEEHY: Thank you, Senator Avery. Senator Fulton, followed by Senator McGill, Senator White, Senator Wallman, and others. Senator Fulton. [LB377]

SENATOR FULTON: Thank you, Mr. President, members of the Legislature. For the record, I love Saint Thomas Aquinas. Maybe sometime after session Senator Chambers would indulge me to debate a little bit about Aquinas and Albert the Great and Aristotle and some of these other philosophers. That's neither here nor there, but I wanted to get it out there. After reading through this amendment, I think I have identified where there is going to be the greatest concern. Let's see, AM912, page 17, subsection F, and I'll start in line 19. If the jury unanimously finds beyond a reasonable doubt that the offender poses a present a substantial risk to the lives of others that cannot reasonably and effectively be controlled by institutional security measures, it shall then proceed to consider the existence of aggravating circumstances and so forth. So the prosecutor is going to need to prove that, number one, beyond a reasonable doubt the offender possesses a present and substantial risk to the lives of others. Number two, he or she will also need to show that such person cannot reasonably and effectively be controlled by institutional security measures. I've struggled here for about a week and a half or so with whether or not this amendment does pragmatically and effectively eliminate the death penalty. And I think there is a word in there which encapsulates what my concern has been. Line 21, cannot reasonably and effectively be controlled. I've not studied law but I've studied philosophy, and I know that it's very difficult logically to positively prove a negative. That's what's being asked here, cannot reasonably and effectively be controlled. So with that, I'd like to pose a question to some of the attorneys here. Maybe I'm all wet on this, barking up the wrong tree, so to speak. Senator White, would Senator White yield to a question? [LB377]

PRESIDENT SHEEHY: Senator White, would you yield to a question? [LB377]

SENATOR WHITE: Certainly. [LB377]

SENATOR FULTON: Am I correct in my assessment that there are two items which the prosecutor is going to need to prove beyond a reasonable doubt? [LB377]

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SENATOR WHITE: Would you identify what you believe those to be? [LB377]

SENATOR FULTON: Number one, that the offender poses a present and substantial risk to the lives of others, and number two, that he or she cannot reasonably and effectively be controlled by institutional security measures. [LB377]

SENATOR WHITE: It can be analyzed that way or it can be analyzed as one requirement that, given existing institutional capacity, does this person still present a reasonable threat to the lives of others? In other words, you take it as...I mean, every person theoretically poses a threat to others because they have the capacity to harm. I think it's given this person and given existing means to control them, do they still present a reasonable threat? So I would analyze it as one requirement. [LB377]

SENATOR FULTON: Okay. Thank you, Senator White. I notice that Senator Pirsch is here. Would Senator Pirsch yield to a question? [LB377]

PRESIDENT SHEEHY: Senator Pirsch, would you yield to a question? [LB377]

SENATOR PIRSCH: I would. [LB377]

SENATOR FULTON: Senator Pirsch, in your assessment, would there be these two circumstances that I'm putting forward? Would it be reasonable to believe that these are the two elements which the prosecutor will need to prove beyond a reasonable doubt? [LB377]

SENATOR PIRSCH: And I'm sorry, I don't have that language in front of me currently. But I have heard the... [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR FULTON: Okay. [LB377]

SENATOR PIRSCH: ...data and that seems logical to infer. [LB377]

SENATOR FULTON: Okay. Senator Ashford, would you yield to a question? [LB377]

PRESIDENT SHEEHY: Senator Ashford, would you yield? [LB377]

SENATOR ASHFORD: Yes. [LB377]

SENATOR FULTON: Go ahead, Senator Ashford. [LB377]

SENATOR ASHFORD: The intent is that there's one...the jury is given one question to

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answer. The jury hears--and this hasn't been talked about--the jury hears all the evidence on the aggravators at one time. They then deliberate. And the first thing they're...the judge says would you please tell us the answer to one question. So Senator White is absolutely correct. The intent is that the jury amalgamate those two concepts in answering one question. It really is two parts of the same question. So they'd answer one question, yes or no. If it's no, then they would not go to the other aggravators. If it's yes, then they would go to the other aggravators. [LB377]

SENATOR FULTON: Okay. How much time do I have, Mr. President? [LB377]

PRESIDENT SHEEHY: Time. [LB377]

SENATOR FULTON: Time enough to say thank you. [LB377]

PRESIDENT SHEEHY: Thank you, Senator Fulton. Senator McGill. [LB377]

SENATOR MCGILL: Mr. President, members of the Legislature, my views are very similar to those of Senator Avery. I know along the campaign trail we talked a lot about this, that we aren't completely against the death penalty or would not have been in favor of an entire repeal of the system. But my views also echo those of Senator Ashford, in that there are inconsistencies in the system that cannot be denied. When I voted for the repeal, that is why I voted for it, not because I am philosophically and completely ethically against the death penalty. That's why I was very pleased when I saw this amendment, AM912, come to us because I felt it was a better solution. We could limit the number of people that could be facing the death penalty while, at the same time, keeping it there for those extreme cases that Senator Avery detailed. I had some of the same questions that many of you do about the practicality and the ethics of this particular approach to limiting the death penalty. But after asking many questions of my fellow senators on both sides of the issue, I came to peace with believing that this is something that is practical, and I hope that my fellow members will continue to ask questions of folks like Senator Pirsch on one side or Senator White or Lathrop or Ashford on the other. And with that, I will yield the remainder of my time to Senator White. [LB377]

PRESIDENT SHEEHY: Senator White, you have about 3 minutes, 30 seconds. [LB377]

SENATOR WHITE: Thank you very much, Senator McGill. I would like to address some of the questions that were raised by Senator Flood and others. First of all, how are we making this law better? Senator Flood, I think that question was addressed in connection of, we are arbitrarily applying the law. If you look at those who are sentenced, those who receive death penalties and those who don't, we find ourselves pondering and trying to compare horrors. This man chopped a child up and fed it to a dog. This one tortured somebody for two days. This one tortured somebody for an hour.

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This one left four children. This one left one child. All of those are retrospective. And those who are on the death penalty, we're looking backwards and we're comparing and trying to apply a moral framework to what was essentially amoral, animalistic behavior. That is the kind of screen that will always result in arbitrary decisions. This law, however, is unique in that it does look forward--which, I want to address, is not unusual or difficult for the law to do; we do it all the time. But it then asks us as the jury, as the state, to ask a simple question prospectively. What is this individual's physical and mental characteristics and capacities? What are this individual's relationships? As Senator Avery so eloquently put it, is he a member of a terrorist organization with the capacity to act beyond the walls of the prison? Is he a member of a criminal organization? Has this person before the murder, for example, had a history of arrest and escape? I will give you an example in Omaha. Several years ago, a gentleman escaped, kidnapped, shot at people. Had someone died, I think a jury in this state would have absolutely no problem finding, given his history of escape, that he was not able to be reasonably detained and safely incarcerated. Similarly, a gentleman who just I think last week was sentenced--and I use the term "gentleman" in the broadest sense--to 350 to 400 years for rape who had a history of escape. Had that man committed a murder with that history...actually, he didn't make the escape, he stole a handcuff key and hid it... [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR WHITE: ...in his rectum. Had that man come up for sentencing for murder, which he will on the Amber Harris case, given the fact that he has a history of near escape, stealing handcuff keys, hiding them, secreting them in himself, and has committed murder, no doubt in my mind a jury could fairly, adequately, and probably will justly sentence him to death because of his capacity, his past history before he committed that crime. This law, however, will focus us that those on death penalty from here forward will share one characteristic and one characteristic only: they are too dangerous to be left alive. We will not compare their victims. We will not compare how horrible they behaved in the past. [LB377]

PRESIDENT SHEEHY: Senator, Senator McGill's time has expired, but you're next in the queue to speak. You may continue. [LB377]

SENATOR WHITE: Thank you, Mr. President. We will not compare those things that cannot be compared anymore. We will simply make, to the best of our ability, a reasoned judgment going forward. Senator Flood asked a very, very good question. He said, what is the state required to prove and how can they possibly prove it? Let me give you a broad example of people that I believe, without question, will continue to face the death penalty and properly and morally so. I have given you an example of the gentleman who faces trial for the murder of Amber Harris. Should that gentleman be convicted because of his history of escape, I have no doubt as a trial lawyer that he can

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and likely could be sentenced to death because of that. Others: inmates who kill in prison, inmates who kill guards--no question in my mind, given the fact they were incarcerated, given the fact they took life--will certainly face the likelihood of being sentenced to death. Others: the Aryan Nation is a most insidious criminal organization. Its roots and its strength is based in the penal system. It recruits, it disciplines, it trains, it educates, it operates largely out of the penal system in California. It is reputed to regularly order executions through membership, both among those in the inmate population and those outside. It runs drug rings, it runs murder for hire. People associated with that who commit crimes can reasonably be concluded to have the capacity to threaten innocent life, both inside and outside of the prison system, and they can be, in my mind, justly and morally executed and deservedly so; similarly, terrorist organizations. I have no question that such are the case. People who are serial killers; a jury could reasonably conclude that they are so driven to kill that they remain a real risk despite our ability to incarcerate, because they operate from a compulsion that cannot be controlled. I want also to point out that our capacity to incarcerate, while fairly considered in this, does not eliminate the need or the use for the death penalty. There have been instances of prisoners held at the highest levels of security in both state and federal institutions that have attempted to murder guards. Given that situation, should they succeed, again, without question, they can be executed and should be executed. Those who plot and would plan and try to commit mass murder, whether that is in our schools, whether that is through poison gas, through other methods, can reasonably be concluded that they are doing it from an ideological basis and will continue to act in the future. They surely can and should face the possibility of a death penalty. Now I'd also like to address the issue of procedure versus substance and how do we know the difference. Senator Erdman, I would suggest to you the following as just a guideline. When a jury determines it, it has to be substance. Juries never determine procedural issues. They determine factual questions. And the United States Supreme Court has clearly indicated a jury must determine issues... [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR WHITE: ...like this. Given that fact, I would say to you that this penalty, along with our language, virtually assures that it will be only applied proactively as it is intended. I think, therefore, the argument that this in some way overturns existing sentences is not well-founded and indeed is done only to try to derail what is a good-faith effort to bring rationality and, indeed, long-term viability to the death penalty. And the fact that I may be lending whatever skills I have to ensuring the execution of people in the future is nothing, if not a heavy burden for me. And I urge the members to seriously consider the weight of what we are trying to do here. Because I submit to you, we are actually probably prolonging the death penalty by this measure. Thank you. [LB377]

PRESIDENT SHEEHY: Thank you, Senator White. Senator Wallman, followed by

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Senator Harms. Senator Wallman. [LB377]

SENATOR WALLMAN: Thank you, Mr. President. And I would...I think, too, this...we have to seriously consider this. And I would yield the rest of my time to Senator White. [LB377]

PRESIDENT SHEEHY: Senator White. [LB377]

SENATOR WHITE: I would like to talk about deterrence on that issue as well. And I know Senator Wightman believes that there is evidence of deterrence, and indeed there is some. I do not think statistically that anybody can argue, given the frequency of capital crimes in states that have abolished death penalties prior and before, that there's any clear evidence. But we should talk in fairness about deterrence in terms of two concepts. General deterrence means, will executing this prisoner deter me and other members of the public at large from committing the same crime? Specific deterrence means, if we execute this person will he kill again? There is no argument but that the death penalty is wonderfully effective at specific deterrence. There is substantial evidence to say that it is woefully ineffective at general deterrence. One of, and I'm sure Senator Wightman knows this, the most common offenses in Victorian England for the death penalty, which was held by way of public hanging, was pickpocketing. Pickpocketing was...the punishment for that was death. The most commonly reported crimes at public executions were pickpocketing. It did not work to deter even those who were gathered to watch the execution, much less did it affect those who weren't there. The reality is that executions only confirm in those who are intended to be law abiding their desire to be law abiding. There is another legitimate, potentially legitimate reason for executions that should be fairly discussed. And that is that in certain situations, society is so unruly, so difficult to govern, the consent to govern is so tenuous, that the only way the individual citizens can be convinced that government is effective is by way of public executions. By somehow being final and brutal, we convince the public that we are, in fact, effective. The difficulty with this is the point that we have uncovered and Senator Dierks alluded to. We regularly convict the innocent, especially the poor. We convict them because they do not have the resources to retain the talent necessary to ensure that they are not convicted, unless the proof establishes it beyond a reasonable doubt. Given that reality, I suggest to you this bill is a huge step forward. The difficulty of executing someone just because they're poor becomes...well, the reality of that becomes very unlikely. Now we will only place them on death row, not if they are poor or if they are accused of having committed a crime, but if they present an ongoing clear danger to the community going forward. That is essential in reducing the arbitrariness of this death penalty. Once again, I'd ask the members of this body to consider what I believe to be the most important aspect of the bill. And with all deference to my friend, Senator Friend,... [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

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SENATOR WHITE: ...philosophy is essential. If you wish to govern justly, if you wish our government to survive in the long term, if you wish to sleep with a clear conscience at night, philosophy is essential. The only way that we can assure a reasonable opportunity of those things is to act morally, to act properly, to act in a considered, intellectually, honest manner. That is not possible without philosophy. And I don't think anyone can fairly stand up here and debate one simple fact. Thou shalt not kill except to save life. Thank you. [LB377]

PRESIDENT SHEEHY: Thank you, Senator White. Senator Harms. [LB377]

SENATOR HARMS: Mr. President and colleagues, thank you very much. And Senator Ashford, I thank you for bringing this forward again. Quite frankly, I don't think we can say that this Legislature has ducked any tough issues this year because we've definitely taken them on. I really rise to oppose both AM912 and LB377. And when I look at the bill and the amendment, one thing they talk about in the amendment is the execution is revenge. It's not revenge, it's justice. And the other issues that I read in the actual bill itself, it talks about all these errors, all about these frustrations, all about these delays, constitutional mistakes in the statutes, defective legal procedures, implementation of the statute, lack of uniformity and application. That's what's wrong. Why are we not talking about those issues? Because that is the issue. Since 1978, folks, this body has been aware of these. And I've gone back and historically looked, and I can't find many places where this has been discussed. If we're going to talk about these issues, let's clean up the system first. And then you know what? I don't mind talking about the death penalty. I don't mind dealing with these issues. If this is what it's about, then it's wrong. You know, I told you when we talked about the repeal, when I look at the Raymond Mata case and the Jeffrey Hessler case, I can't go home and do that. I can't look at these people. When we're saying right in our own law that we have all these mistakes and all these errors and I'm going to say to these people because, you know what? We don't have the ability to correct our justice system. We don't have the ability to make these adjustments. I can't do that. Can you do that? Can you look at these people and can you look in their eyes and see the fear and the sadness? I can't. And what I'm saying to you, that's what we ought to be fixing today. That's what we ought to be dealing with today. And then I don't mind coming back and debating whether we should or we shouldn't. But if this is what's causing it, then that's what we ought to fix. And I oppose where we are today because of those issues. Until we're willing to fix this, until we're willing to correct these issues and make this judicial system the best we can possibly make, I will battle this and I will fight this until we finally correct it, because that's what we're arguing about here. That's what I heard my friend Senator Ashford say. Those are the issues. Why are we not addressing these? Why are we not fixing these? And that's what I pose to you as a legislative body. That's the issue. Thank you very much, Mr. President. [LB377]

PRESIDENT SHEEHY: Thank you, Senator Harms. Mr. Clerk. [LB377]

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CLERK: Mr. President, some items. Senator Chambers would offer LR73. Pursuant to that introduction, communication from the Speaker referring LR73 to Reference for referral to standing committee for public hearing. And the resolution has been referred to Health and Human Services. Amendments to be printed: Senator Johnson to LB610; Senator Fulton to LB377. And I have a priority motion, Mr. President. Senator McGill would move to recess until 1:30 p.m. (Legislative Journal pages 1166-1169.) [LR73 LB610 LB377]

PRESIDENT SHEEHY: The motion before the body is, shall the Legislature recess until 1:30? All those in favor say aye. Opposed, nay. We stand at recess.

RECESS

PRESIDENT SHEEHY PRESIDING

PRESIDENT SHEEHY: Good afternoon, ladies and gentlemen. Welcome to the George W. Norris Legislative Chamber. The afternoon session is about to reconvene. Senators, please record your presence. Please record, Mr. Clerk.

CLERK: I have a quorum present, Mr. President.

PRESIDENT SHEEHY: Thank you. Messages, reports, or announcements?

CLERK: Mr. President, four appointments from the Governor to the Commission for the Deaf and Hard of Hearing. Those will be referred to Reference for referral to a standing committee. Senator Schimek, an amendment to be printed to LB405. And that's all that I had, Mr. President. (Legislative Journal pages 1169-1170.) [LB377 LB405]

PRESIDENT SHEEHY: Thank you. Do you have an amendment to the committee amendment? [LB377]

CLERK: Mr. President, LB377 on Select File. Committee amendments were offered this morning. Senator Chambers would move to amend the committee amendment with AM989. (Legislative Journal page 1170.) [LB377]

PRESIDENT SHEEHY: Senator Chambers, you're recognized to open on AM989. [LB377]

SENATOR CHAMBERS: Thank you. Mr. President, members of the Legislature, in order that those who are following along can understand what is happening here, there are discussions and what you might call negotiations going on, with reference to this bill. Those who really have an interest in discussing it are rapidly running out of

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opportunities to speak, since we each have three chances. I'm offering an amendment which I want us to consider. It is no way modifies anything in the underlying or existing law or the amendment that Senator Ashford has put before us. But I'm a stickler for language and trying to make the statutory provisions as clear as possible, so in order to allow some time for these other discussions to take place that are not happening on the mike, I'm offering this amendment. If you are interested and you would turn to page 4, I believe, and go to line 26, you will see what this amendment proposes to do. All those who are with me, raise your hand. Wow! Unanimous. I wish I hadn't asked that, because I wanted to do some chastising (laugh), but you pulled my fangs. Okay, on page 4 and line 26, the words "A ruling by" would be stricken, and I would insert in their place the word "if." Then we would go to the top of page 5, and in line 1, after "court"...I may be ahead of myself. Let me go back to page 4. Well, you can...okay. Oh, still on line 26, after the word "court" would be the word "rules" inserted. Then on page 5, in line 1, after "section" would be inserted "such ruling." This would make that sentence easier to read and determine what the various components of the sentence would say. So you would have, "If the court rules that evidence of diminished intelligence introduced by the defendant does not preclude the death penalty under Subsection 2 of this section, such ruling shall not restrict the defendant's opportunity," and so forth. By altering the language in the way that I have, it's clearer what is being said here. We drop the three words that begin that sentence on line 26. Instead of saying "A ruling by the court" we would get rid of that and insert "if," and then the words that I would insert as I've read, and as you can see on your gadget. Since that amendment is easily understood, and I will take a vote on it, because I think it will clarify the language without altering what is intended there...and I may as well make a comment that I've made before. When bills come before us and I see language in the existing law, which means the language that is not underlined, but I think it can be improved on, then I make an attempt to do that, and this is one of those situations. But it serves a double purpose by allowing additional opportunity to discuss the merits of this bill, or the substantive portions of it. When the Eighth Amendment to the U.S. Constitution was being considered a long time ago, and probably the only ones who have a direct recollection of that would be myself and...I'm probably...Senator Engel raised his hand. You weren't even a gleam in your parents' eyes, Sonny. (Laughter) At that time, they were discussing whether or not the Eighth Amendment should be added to the Constitution, which prohibits excessive bails, excessive fines, cruel and unusual punishments. That came from what's known as the English Bill of Rights, which came into being in 1689, in Merry Old England. Many things happened in England in the old days. There was a time when punishments and crimes were kind of worked out together so that the punishment would fit the crime. Now Senator Carlson may remember when the Norman Invasion occurred, but after that took place--I'll give you a hint--10-something--after that took place, that equivalency between a crime that was committed and the punishment had evaporated, and very arbitrary, exceedingly harsh penalties were created. But they were reserved for the people who were at the lower reaches of society. It operated something like the Hindu system, where if you looked at their society like a pyramid, at the top sat the Brahmin.

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The Brahmin have all of the rights and privileges. As you proceeded down the sides of that pyramid, it got wider and wider. Look at that increasing width as the kind of punishments that could be inflicted upon people. And when you got to the lowest level of society, where the pyramid was at its widest and broadest, those were the people who were treated the most unjustly. And that paradigm operates in practically every society. But in England, some of these harsh punishments were falling on people who were of the better sort, so they came up with the Magna Carta, the English Bill of Rights, and other documents that form the basis of the U.S. Constitution, and to some extent, the Declaration of Independence. And the notion was to protect people from arbitrary, unfair punishments. In other words, let there be an equal application of the law on all those who are accused of a certain crime, so that people similarly situated, people equally guilty, would be treated the same way under the law. When the Eighth Amendment to the Constitution was being considered, one of the representatives said, I don't like that, because right now, a person can be subjected to a whipping, can have his ears cut off, can have his nose clipped, and we should not take away the right of states to impose such punishments. Patrick Henry was there, and he mentioned that the constitutions of some states carried a prohibition on cruel and tortuous punishments, but nevertheless, some of the worst abuses that could be imagined were occurring under those very constitutional provisions. A fellow whom Senator Engel might know, named Bingham, was talking about the fact that when these tortuous punishments were annexed to crimes by the state legislatures, there was nothing the federal government could do to protect citizens from these kind of abuses. So it was necessary to have an amendment such as the Eighth, which would prohibit those cruel and unusual punishments. [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR CHAMBERS: Since the Eighth Amendment dealt with what the federal government could and could not do, Bingham recommended the Fourteenth Amendment, which would make the Bill of Rights apply to the states. So in the same way that the Eighth Amendment prohibited the federal government from inflicting cruel and unusual punishments, the Fourteenth Amendment would draw that protection down to the citizens in their individual states, so that state legislatures could not do it, either. And I guess I'll stop now, because my time is up. [LB377]

PRESIDENT SHEEHY: Thank you, Senator Chambers. You've heard the opening of AM989 to the committee amendment, AM912. The floor is open for discussion. We have Senator Chambers, followed by Senator Aguilar, Senator Karpisek, Senator Pedersen, and others. Senator Chambers. [LB377]

SENATOR CHAMBERS: Thank you, Mr. President. And the Norman Conquest took place in 1066, and Senator Wallman gave me the high sign. But at any rate, there was a fellow from South Carolina at these proceedings named Smith, and he said that he

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didn't like the wording of the Eighth Amendment, because it was too vague and too indefinite. How would anybody know what cruel and unusual meant? What was excessive bail? What was excessive fines? Who would be the judge? There was another fellow named Livermore, not Liverwurst (laughter)--that's for our sausage-making friends--Livermore, who said that the wording of the Eighth Amendment did express a great deal of humanity and idealism, but it didn't mean much of anything, so he wouldn't necessarily be against it. When the vote was taken, however, there was an overwhelming majority of the delegates who voted for the Eighth Amendment. Because of the Eighth Amendment, there are certain things which states nor the federal government can do in imposing punishments without being in violation of the Constitution. In that case which has been mentioned, Furman v. Georgia, Judge Brennan had joined the other four judges who voted to strike down existing death penalty laws in 1972, because they were unequally and unfairly applied. The racial discrimination was documented by studying specific states, and on and on. So the court had all of the evidence it needed, and Brennan pointed out that the Eighth Amendment deals with the very dignity of human beings, and that the state, even as it punished, could not treat any of its members in such a way as to deny their intrinsic humanity. And the death penalty, being the ultimate punishment, may not seem to be unconstitutional on its face, but there's a difference between a law whose terms seem to be appropriate, yet when it is applied, it is applied in a way that violates the standards laid out by the Constitution. And that's why even though those five judges did not strike down the death penalty itself as being unconstitutional, but struck down the way it was applied, was because the application was so spotty, so unfair, so discriminatory, that it could not withstand constitutional muster. One judge said it's arbitrary in the same sense that being struck by lightning is arbitrary--just random, no reason for it. You happen to be where the lightning struck. Another judge said there is nothing to distinguish those who receive the death penalty from those who do not. If you read that opinion, the five opinions, and even the dissenting opinions, you will see much that will show you why those judges were concerned about how the death penalty is administered. And for those reasons,... [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR CHAMBERS: ...you cannot constitutionally shorten the period of time between when a person is convicted and a person is actually executed, if that terrible contingency occurs. If the courts behaved appropriately, if legislators were not so politics driven, there would not be so much arbitrariness in the death penalty and its administration. Thank you, Mr. President. [LB377]

PRESIDENT SHEEHY: Thank you, Senator Chambers. Senator Aguilar. [LB377]

SENATOR AGUILAR: Thank you, Mr. President and members. When I first come to the session this year, I was a supporter of the death penalty. I'm not ashamed to say that.

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I've always been a supporter and always said I will remain that, until I hear evidence that tells me that it's unfair and it's not right the way we do things. That indeed happened this year when we had the original debate on the repeal. Some great information come (inaudible), but the most compelling for me, of course, is the racial bias in which it's applied. And that's something that's disturbing to me, because other than Senator Chambers and myself--Senator Lathrop touched on it, Senator Kruse touched on it--I haven't heard any discussion from the proponents of the death penalty on this particular issue, and it's troublesome to me that nobody will offer some explanation, or to get up and say, no, that's not true. That's not the way it really is. Nobody has taken that step, and that's troublesome to me. I ask myself why is that. Is it because it doesn't directly impact them, or is it because there is no logical argument for what happens in the application of the death penalty? I submit to you that's probably the case. Senator Harms got up and spoke very passionately about the unfairness, and why don't we fix that? Well, I submit to you, this amendment, AM912, is a first step in fixing that, and I think that's the direction we need to go. I feel very strongly about that. There is inequity here, and the majority of this body refuses to admit that, refuses to have that discussion and take it any further. I ask you to think about that, think about your position on this. I'd yield the rest of my time to Senator Chambers. [LB377]

PRESIDENT SHEEHY: Senator Chambers, about 3 minutes. [LB377]

SENATOR CHAMBERS: Thank you, Mr. President. Thank you, Senator Aguilar, and once again, I agree with my colleague. In 1978 I did bring a bill, which carried the number 711. I wrote that bill when I was sitting in a law school class, bored to death. The issue of the death penalty has always troubled me, so I began to think about the areas where the most arbitrariness existed and where corrections needed to be made, and if you read where LB711 is codified, 27-25-something-or-other--29-dash. But anyway, it's somewhere in the statute book, and I can get the specific site for you, if you're interested. But I talked about the fact that in various parts of the state, no death penalty would be imposed, how there would be plea bargains, that when it comes to taxation, there must be uniformity across the state. Yet when it comes to taking a life, that was not the requirement. It was known and acknowledged by everybody that the death penalty was not imposed in a fair and equitable manner, that no rich person had ever faced it, and that was pointed out in the Furman case, that you search the chronicles, as they said, of all of the opinions ever written in this country, and you'd find not one instance where a rich person suffered the death penalty. Leopold and Loeb were mentioned by name--rich people. They commit the crimes, but they don't pay the ultimate penalty, and how in the world somebody can say, I don't care about that--I don't care that innocent people are killed. Makes me no difference. I love the death penalty. The more you fight it, the tighter I'll hug it. Remember what was pointed out earlier--11 men removed from death row in Illinois because they were innocent--not a technicality! [LB377]

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PRESIDENT SHEEHY: One minute. [LB377]

SENATOR CHAMBERS: They were innocent! Now if you read executions and see how many people were executed in Illinois, you will know that they killed some innocent people. Were it not for DNA, those 11 would have been electrocuted, also. They have killed innocent people at the hands of the state in this country, and Senator Wightman, when he was in law school, and he knew this before he forgot it...but one of the cardinal principles they say of Anglo Saxon jurisprudence is that it were better that 100 guilty escape than that one innocent person suffer any penalty, let alone the death penalty. But my good friend has forgotten that, and now, even though he knows that innocent people have been executed, he still loves the death penalty and will always be for it, as he said this morning. We have a lot of work to do, and we're going to try. Thank you, Mr. President. [LB377]

PRESIDENT SHEEHY: Time, Senator. Senator Karpisek. [LB377]

SENATOR KARPISEK: Thank you, Mr. President, members of the body. Haven't said much on this issue, either. I think it's a very serious, very serious issue, and Senator Chambers is, of course, passionate about it. He does a wonderful job. I would not like to see anyone put to death innocently, either, and we keep bringing up DNA evidence showing that they were innocent. What about the DNA that proves that they are positively guilty? If we can, beyond a shadow of a doubt, know that they are guilty, how do we tell that they can never, that they won't ever kill again, from inside? I would venture to guess a lot of these people we would have thought wouldn't have killed the first time. I guess to me this bill makes us almost start looking at everyone on the street and trying to get them off the street before they kill. That bothers me a little bit, because how can we know? And I don't think that we can know. And again, I think it is terrible if an innocent person is put behind bars, number one, much less put to death. But I think we talk about retribution, we talk about is it the right thing to do. I think it's the punishment--the punishment fits the crime. To me, if someone kills a member of my family or one of my friends, takes the most important thing that we have as human beings--our life--as this bill starts out, then I feel they should lose theirs. Retribution? Probably. And I understand that emotions should be taken out of this, but I guess I cannot on that, take my emotion out of it that far. Some of the heinous things that some of these people have done, and to say, well, we'll make them stay in jail. I value life, and I value my life, and I'll tell you what. If it came to my time, if I can sit in jail or be dead, I'll take jail. I think, you know, we all fight and fight and fight to stay alive, and I feel these people made the decision. We know what the consequences are. You get a speeding ticket--Senator Chambers, I know that's not a very good analogy--but you know the consequences when you get there, when you do something. Does it stop someone from killing another person? I guess that's hard to know, other than looking at statistics. Maybe many near murders have been avoided. We'll never know that. It is very serious, and I feel that this would just put another layer of amendments into our court systems.

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And who can ever say whether that person is going to harm someone again? That person doesn't know that. We don't know when we leave here what we're going to do. We're pretty sure that we're not going to do anything like that. But in a rage, you see a friend of yours or someone get killed, how do you know that you wouldn't turn around and do the same thing back? I don't know, so...it is very serious. I just want to put in that I do feel that we as a state need to try to protect our people, and my feeling is, this is how we can protect our people. I had a constituent call and say, we need to stop the murders. [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR KARPISEK: And I said, I agree. I don't think the state started this. Once the murders stop, so will ours. Thank you, Mr. President. [LB377]

PRESIDENT SHEEHY: Thank you, Senator Karpisek. Senator Pedersen, followed by Senator Lathrop, Senator Flood, Senator Schimek, and others. Senator Pedersen. [LB377]

SENATOR PEDERSEN: Thank you, Mr. President. Members of the Legislature, this morning I passed out this piece of paper to you people. Look at it. It's a very important piece of information that every senator should look at. It comes from the Department of Corrections on almost a monthly basis. It tells you what our population is in every one of our facilities, what it costs to keep an inmate in each one of them facilities, telephone numbers, the types of crimes, and so forth. On the bottom of the second page, on the back, on the left side you'll see life sentences, May 21, 2007. Total inmates sentenced to capital punishment, 10; total inmates serving first-degree life sentences--same types of crime--211. Out of this 211, there's a lot of them who have committed a lot more heinous crimes than we have in the 10. Prior to me coming into the Legislature, one day I was asked to accompany a friend who was a police officer to a murder scene, because how startled and feared he was of just the scene. It was a young lady who had been raped multiple times and murdered. Being a mortician many years ago, I have seen many death scenes, but I had never seen the terror on the face of a body that was like on that young lady. That man I know today, he's doing life sentence. The death penalty was not even considered. He's doing time in the state of Nebraska. If I can't appeal to anything else, can I appeal to your fairness of the way we distribute this death penalty? It has not been given out fair, either racially, poor people, and yet if you've got the defense and the money for defense, those people have come out in much better situations. There are also lots of cases where they came out even a lot better, and they didn't even get a life sentence. They're on the streets, and yet we say we are fair, consistent people. I don't condone killing somebody. I would do anything in my power to defend somebody from getting killed--same thing I'm doing here. If you got fish in the barrel, why do you have to shoot them? They're not going anywhere, they're not doing anything, and we aren't getting anything of it but revenge. They're still killing people in

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Texas, people. Murder is very high in that state, and their value for life down there is not much,... [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR PEDERSEN: ...because they kill a lot of them in their capital punishment. Is it helping? No. And I'm not even concerned at this point about deterrent. I'm concerned about fair and consistent. And we have proof, right here on this piece of paper, that that isn't being done. If all you want is revenge, you will never get it. You will just have a burning heart. Fairness is one thing. With this amendment, we're making sure that those who would kill from inside could still be put to death by the state. Let's not condone it any further than that. Thank you. [LB377]

PRESIDENT SHEEHY: Thank you, Senator Pedersen. Senator Lathrop. [LB377]

SENATOR LATHROP: Thank you, Mr. President and colleagues. I want to talk a little bit about the judicial branch of government, talk about trials a little bit. I think that...as you know, I've been a practicing trial lawyer for now almost 26 years. I've had the privilege, truly the privilege to try cases in the state and federal courts here in Nebraska and Iowa, even Missouri, and I think people have this notion, because we have the best judicial system in the world, the pillar of which is a jury trial, that somehow our system of justice comes to the right conclusion in every instance, that it works perfectly, and that at the end of every trial perfect justice has been done. And I have to tell you, after having tried an awful lot of cases, that if I tried any particular case ten times I'd probably come up with ten different results, and that should tell you something about our system. As good as it is, as perfect as we try to make it, it is the work of mortals, working at something that we think is justice, some notion of justice, and we have in place all the safeguards for justice, and sometimes it doesn't happen. We have across the country 123 people that have been put to death that have been later exonerated. Senator Harms earlier spoke and suggested that we shouldn't be involved in a discussion about the death penalty or some limitation on the death penalty--we should be involved in a discussion in fixing the system. Senator Harms, and for the rest of you who share Senator Harms' point of view, this is as good as it gets. We have human beings that sit in judgment, we have juries that come into the courthouse with their own points of view, their own biases, their own predisposition to see things in one particular way. That is our system. It is not perfect, and so there is nothing left. Our Supreme Court has done a good job. Our Legislature has done a good job. We've made the system as good as it can get for human beings to administer, but it's not perfect, and now the question today is whether we are going to argue about the fact that our human system is imperfect, or whether we're going to do something about it. We have as a measure a confounded list of aggravators and mitigators, and that system is made more complicated by prosecutorial discretion and immunities that are granted. All we're asking for in this bill and in this amendment is that we use a rational basis for determining who should be put to death

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and who shouldn't. Thank you. [LB377]

PRESIDENT SHEEHY: Thank you, Senator Lathrop. Senator Flood. [LB377]

SPEAKER FLOOD: Thank you, Mr. President, members. When you listen to our colleagues talk on the floor, whether they support or oppose LB377, I'm reminded of how personal a decision this issue is. Senator Lathrop makes valid points when he talks about our justice system, but it is the system that we have--it's the one we live under. But that being said, I recognize that your vote today on this is personal. It has to be. It's that kind of an issue. This isn't a vote that you make in the hallway or in the Rotunda; it's the one that you defend because you believe in it, one way or the other, when you go back home. And saying that is one thing, doing it is another. But for me, this is a very personal issue, in part, because of what I saw in Norfolk--a lot like Senator Harms in Scottsbluff. And a lot of my feelings about the death penalty were fortified when that happened in 2002. And so I guess I should, while standing up and talking about this, lay out my feelings on the death penalty again, and from where I sit, the death penalty is an appropriate criminal sanction for the most heinous and atrocious criminal acts committed by our state's criminals. Whether it be a bank robbery where five people are killed, or the brutal rape and killing of a young person out in the western end of the state, the death penalty, from where I sit, is a warranted sanction from the state of Nebraska, because I think it does serve several other principles that criminal justice aims to address, and I'll just lay them out for you. The first one is retribution. The second one is deterrence. The third is public safety. And the amendment before you, AM912, is a public-safety oriented amendment, as well, albeit a little different directed than the position I have. And the fourth is rehabilitation. And really, if you're going to sentence someone to death, there is no rehabilitation in such a sanction, because of the finality of the death penalty. But I believe in the death penalty for those reasons, and if anybody wakes up in the morning and looks forward to having this discussion because they can't wait to push for their side, I'd say you're in the wrong place, and I don't think anybody in here does. I certainly don't look forward to this discussion. I don't like thinking about the death penalty. I don't like thinking about discussing it at length. But I am sent down here by 35,000 folks in Madison County, and I believe I speak for my district when I say it is an appropriate sanction. But that's my opinion, and it's a personally held belief. And I don't hold it against people that have a different view of mine, because you're the one that has to go to bed at night and make the decision that you made. And so I'd hope that the decisions we make are rather personal, but at the same time, if you are on the fence, I would ask you to think about the crimes that these men on death row currently, have committed, the types of crimes they are, and the victims. [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SPEAKER FLOOD: That's what drives me in these discussions. And I really think that the death penalty in Nebraska should stay in force the way it is right now, without

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amendments to our framework. I do have concerns about retroactivity, especially for the five that have not received a final order on their direct appeal. I think it would be retroactive. I don't know how it couldn't be. But looking forward, I don't know and remain unconvinced that the state can prove, beyond a reasonable doubt, the present danger of an offender as such, that they cannot be safely incarcerated. And that's where I'm at. Thank you, Mr. President. [LB377]

PRESIDENT SHEEHY: Thank you, Senator Flood. Senator Schimek, followed by Senator Howard, Senator Erdman, Senator Avery, and others. Senator Schimek. [LB377]

SENATOR SCHIMEK: Thank you, Mr. President. If I may, I'd like to yield my time to Senator Ashford. [LB377]

PRESIDENT SHEEHY: Senator Ashford. [LB377]

SENATOR ASHFORD: Thank you, Mr. President, and I understand Senator Harms' comments, and I understand Senator Flood's comments, and I hear you. I don't think it's retroactive, and I...over the lunch hour I had an opportunity to talk to Senator Fulton. We had a good long talk about it, and I don't think it's retroactive because of the existing law, the Ring case and others. But aside from that, some of the discussion--I think Senator Harms brought it up--some of the discussion about the findings in the bill, and I think it was rightly stated. And I'm more than willing to take those findings out, and I intend to do that. I don't see any reason to put them in there. It's not our intent to make this bill retroactive, and if there is any question about retroactivity, the findings will...being removed, will certainly, I would think...and I think Senator Flood would agree with me, that that would go a long ways toward solving that problem. And I heard Senator Harms; he made persuasive arguments. I want to address Senator Fulton for a moment. Senator Flood made the point about the burden of the state beyond a reasonable doubt. I...what Senator Fulton is proposing--I hope I get this right, Senator Fulton, because I may ask yes or no--what Senator Fulton is proposing essentially is to...and the way the amendment is now drafted, Senator Fulton's amendment, I think we both agree probably needs some work between now and Select File. But not because Senator Fulton drafted it (laugh), but I'm sure it's because I was confused when he originally approached me with it. But I think that the intent here is to have the defendant have the burden of proof to establish this issue of dangerousness, and that would be done in a separate hearing, it would be done in a hearing not...apart from the assessment of aggravators, done by the jury. In all likelihood, though, we haven't drafted it yet, it would probably be a hearing that would be held prior to--Senator Synowiecki, you're the loudest talker I've ever heard! (Laugh) I'm sorry. This is not a funny debate, but I just...anyway, and I didn't know my hearing was that good. I...anyway, but I...this would be addressed in a hearing that would occur prior to the...I believe the proper way to do it would be a hearing prior to the aggravators being

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considered by the jury. And I might ask Senator Fulton, if I could...he's talking to Senator Synowiecki, I think, but (laugh)... [LB377]

PRESIDENT SHEEHY: Senator Fulton, would you yield to a question? [LB377]

SENATOR FULTON: Yes. [LB377]

SENATOR ASHFORD: If you'd hop over there, I could ask you. Is that...Senator Fulton, is that generally the discussion we had? Hopefully, I've encapsulated it correctly. [LB377]

SENATOR FULTON: Yeah. Yes, Senator Ashford. My concern was...I mentioned it a little bit earlier when I talked. It's difficult, if not impossible, to positively prove a negative, and that is, I think, what my problem with AM912 to LB377, that's my problem right now. We'd have to show that one...the prosecuting attorney would have to show that one cannot, or that we cannot safely incarcerate this dangerous individual. [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR FULTON: And so I...in my amendment I'm trying to reformulate that. Rather than saying the burden of proof is that we cannot safely incarcerate beyond a reasonable doubt, to say that we can safely incarcerate, to reformulate the negative by way of positive, and then it would logically have to fall under the mitigating circumstances. [LB377]

SENATOR ASHFORD: Yeah, thank you. And that's my understanding, Senator Fulton, and I certainly...I would support that idea, and we will work together, I believe, to get that done between now and Select File. I was very interested in what Senator Harms said, because I have the same problem (laugh). I think we need to get at the whole criminal justice system, and why do we have the disparity in sentencing, not just at the level of capital punishment, but all the way through. Why are people getting out of prison and committing crimes when they should be in prison for a longer period of time? Many of those people on... [LB377]

PRESIDENT SHEEHY: Time, Senator. [LB377]

SENATOR ASHFORD: Thank you, Mr. President. [LB377]

PRESIDENT SHEEHY: Senator Howard. [LB377]

SENATOR HOWARD: Thank you, Mr. Lieutenant Governor and members. I would like to give my time to my friend, Senator Ashford, so that he may continue. [LB377]

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PRESIDENT SHEEHY: Senator Ashford. [LB377]

SENATOR ASHFORD: Thank you, Mr. President. I think Senator Harms is right. I...we do need an overhaul. We do need an overhaul. So many of the people that are serving life sentences today are there because they committed another crime, got out early, and there they are. The problem is, how do we do that? I'm committed to doing that during my years here in the Legislature, and I will do that. But I don't think, Senator Harms, though I agree with you, that that means that we not address this issue. If we can find some language, find a way to do it, where we are incarcerating people for life without parole, unless they are dangerous to society, that if we can carve out a language, carve out a piece of legislation that is, as Senator Lathrop says, a new way, that meets some of the concerns that Senator Flood has raised, Senator Friend, Senator Erdman, I think we're doing what we're supposed to do here. We recognize the problems that exist in the system as it is today, we try to put together a piece of legislation that does not repeal the death penalty but makes its application admittedly narrower. But I would suggest that it is very possible that the number of people that are actually put to death under this amended, hopefully amended law, will not be any less than the three people that have been put in death in Nebraska since 1976. In fact, there are those who would argue that there would be...the possibility of the death penalty would be greater. It is not our intent--at least mine, and I know we...some of my supporters of this bill have different motivations and I respect that entirely--is that...what I'm after is fairness. What I'm after is fairness, and what I'm after is consistency. And I want to address what Senator Harms is talking about, because that really is the issue. Those are the day-in and day-out criminal justice issues that need to be addressed. Sexual assault on a child--my brother is a district court judge in Douglas County, and he said, Brad, if there's any way that you could increase the penalty, minimum penalty on sexual assault on a child, maybe we wouldn't have had some of the heinous crimes that we've had in Douglas County lately, involving children. Those issues need to be addressed. But I think if we could simply get a death penalty statute in place that reflects an acknowledgment that the system--not necessarily broken, Senator Harms, but needs reform, and so that we can then focus our attention on some of these other crimes and really get at deterrents, really get at reducing crime, because...and really get at enhancing public safety, because that really is the issue. It's to protect the public, and that is a very valid point. It's a point...it's something I absolutely agree with. But in conclusion, Senator Fulton and I are going to work this through, between now and Select File, and when I conclude, I'm going to ask you to please vote this bill across, so that Senator Fulton and I have an opportunity to do that. We're not ready for that yet, but we are going to work on it. When the committee advanced this bill with its amendments initially, I was listening to what Senator Fulton was telling me and Senator White, and we took what they gave us, and we talked to a number of people, and we came up with some language. It's...as Senator Flood points out, maybe it's not perfect, and maybe...it's certainly not perfect enough for a number of senators. I think we can get at it. We're not going to be able to satisfy everybody. [LB377]

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PRESIDENT SHEEHY: One minute. [LB377]

SENATOR ASHFORD: Senator Karpisek raises some good points, and listening to him I doubt if we're going to be able to convince him, but I'll try. But I think we're on the road to some kind of a resolution here, and I hope the body will give Senator Fulton and I and Senator White, who's also involved in discussing these issues, an opportunity to pursue our discussions. Thank you, Mr. President. [LB377]

PRESIDENT SHEEHY: Thank you, Senator Ashford. Senator Erdman. [LB377]

SENATOR ERDMAN: Mr. President, members of the Legislature, Senator Chambers, thank you for the opportunity to speak (laugh). Those of us that had spoken three times on the committee amendment had gone to Senator Chambers and asked how he would like to handle that, and he graciously found a technical change of the language, and that enabled a number of us to be able to speak again, and so I do appreciate your graciousness. I'm interested, I guess, in what happened over the lunch hour, and if I understand our process, we're going to take some time to talk about what this looks like. I've visited with Senator Lathrop. He has some additional information. I've shared my concerns with Senator Lathrop, that I don't know if you can ever obtain this sentence, and so I am interested as to what their discussions are. What I don't understand is that--and maybe it's just my perspective--this isn't a bill that you say, let's send it over to Select File--trust us. At least in my opinion, I'm amazed that over the lunch hour, in an hour, they could have this discussion and come to the point that they are now. I would give them leave to go continue that discussion. It doesn't really matter if you take that up or not. I guess I was just sharing that perspective. The most heinous crimes were committed by those who were sentenced to life in prison today. That's the analysis that we're given by Senator Pedersen, and as far as I know, he's probably right. He has more experience; he deals with the inmate population of our state probably more so than any of us. And to have him make an analysis of the individuals that are currently sentenced in the state to our institutions, I find no fault with that, and I'll take his word on it. The consideration that I also balance that with is that an individual in the state of Nebraska in the future goes into a bank building and guns down a number of people, and now, as we have heard in the past, we're going to contain them for life, and there's no concern that they're going to get out. They're not now eligible unless they're proven, under the new scheme, to meet the new definition of who's eligible for a death penalty, or for the sentence of death to be carried out. However, you have somebody who is in prison for a lesser offense--and we actually have someone who is there, and I don't know all the details, but it was actually a murder charge that put them in prison, in other states as well as Nebraska--but they commit one murder on a prison inmate, and all of a sudden they're eligible for the death penalty. And I'm...I really am struggling with this. I want to understand how that's the worst of the worst. I think it meets the definition of, we can't contain that, or ensure that that individual is not a threat to someone else. I think

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that threshold is there, but if we keep coming back to the idea that we have to get this to the worst of the worst, we still haven't obtained that goal. We know...and I would encourage you to do this if you haven't, before I begin to carry any legislation or look into this area of law, I studied what we did in Ring, I read the transcripts of that Special Session hearing. I read--I haven't read it completely through, but I've read the transcript on LB377. You're going to learn a lot from the perspectives, as to how we should proceed. We cannot--this is from Senator Chambers, this is a reflection of the United States Supreme Court--we cannot sentence or set a mandatory death sentence. We do not have that right, and I hope that I am reading that correctly. The case... [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR ERDMAN: ...the Supreme Court, time and time again, has made that observation. But we keep coming back to the idea that we should...we have ten cases, ten different outcomes...somehow we want to predetermine those. My question of Senator Ashford this morning wasn't whether or not the court would hear their case and overturn it but whether or not what we're doing leads us down the path of retroactivity. I don't believe I ever asked Senator Ashford whether or not the court would overturn their sentence. I'm simply trying to understand this process, now that we have changed the standard. But I am extremely interested, again, where I begin this afternoon with the discussion of, what happened over the lunch hour? And I'm informed that Senator Lathrop is going to share some of those perspectives. At this point, I think this language is an impossibility to attain a conviction, and I think Senator Lathrop has some insight that may help me and better understand this, and I look forward to that. Thank you, Mr. President. [LB377]

PRESIDENT SHEEHY: Thank you, Senator Erdman. Mr. Clerk, do you have an announcement at your desk? [LB377]

CLERK: Mr. President, the Health Committee will meet in executive session at...now in Room 2022--Health Committee now, Room 2022. [LB377]

PRESIDENT SHEEHY: Thank you, Mr. Clerk. Senator Avery, followed by Senator Wallman, Senator Friend, and Senator Loudon, and others. Senator Avery. [LB377]

SENATOR AVERY: Thank you, Mr. President. Earlier this morning Senator Nantkes quoted Supreme Court Justice Harry Blackmun. He was commenting on a case involving the death penalty in 1994. He was pointing out that the court had declared, in reinstating the death penalty, that it must be imposed fairly and consistently. I want to continue with that quote, because there's much more in it than she had time to relate. From this day forward--this is Supreme Court Justice Blackmun--from this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored to develop rules that would lend more than the mere appearance of

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fairness to the death penalty endeavor. Rather than continue to coddle the court's delusion that the desired level of fairness has been achieved, I feel obligated to simply concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations can ever give the death penalty...save the death penalty from its inherent constitutional deficiencies. Perhaps one day this court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital sentencing scheme. I am not optimistic that such a day will come. I am more optimistic, though, that this court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness in the infliction of death, is so plainly doomed to failure that it and the death penalty must be abandoned altogether. Then he goes on to say, I may not live to see that day, but I have faith that it will arrive eventually. Well, I suggest to you that that day is much nearer today than it was when he wrote these words 13 years ago. I note here that there are two states, Illinois and New Jersey, that have a formal moratorium on executions already in place. New York in 2004 declared unconstitutional its existing death penalty. Eleven states have effectively halted executions because of the lethal injection issue. There are 18 states that are currently considering repeal of the death penalty, and I have to admit that there are a few states that are expanding the scope of its application. These facts plus public opinion, evidence that we have heard here today--that is, evidence from the state of Nebraska--indicate that the tide may be turning. More and more people are questioning the fairness and the consistency of the death penalty. We're doing it in this state. Nebraskans are questioning. So my question to you is, will we join other states and the majority of our own citizens, to make the death penalty a bit more consistent and fair? And I hope we do. Thank you. [LB377]

PRESIDENT SHEEHY: Thank you, Senator Avery. Senator Wallman. [LB377]

SENATOR WALLMAN: Thank you, Mr. President, members of the body. And I should thank Senator Ashford, but he cost me a lot of sleep last night. And this is a very emotional issue. My church secretary got murdered, a shot to the head. Did that family ask for the death penalty? No. I asked the brother-in-law...son-in-law, why not? And they couldn't take the appeals. And another man in Beatrice, his son was tortured, his fingers shot off. He was skinned alive. How much more heinous crime can you get? The family did not ask for the death penalty. The mother went insane. But they didn't ask for the death penalty. If families like that--and I was always a staunch supporter for the death penalty; go get them, you know. If that happened to my family, you wouldn't have to worry about a court trial. I got a rifle; I got a shotgun. I'm going to take care of my problem. Put me in jail, and if you got the death penalty, put me away. You know, I got training how to kill people in the military. In basic training they tell you how to kill people. And so this has been...I promised my staff I wasn't going to talk, so I'll turn the rest of my time over to Senator Chambers. (Laughter) [LB377]

PRESIDENT SHEEHY: Senator Chambers, about 3 minutes, 30 seconds. [LB377]

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SENATOR CHAMBERS: Thank you, Mr. President. Thank you, Senator Wallman, and not only did you talk, you spoke. I don't know what religion Senator Karpisek is, and I'm not even going to ask him. But somebody that he may have heard of said, you have heard it said by them of old time, an eye for an eye, and a tooth for a tooth, but I say unto you, render not evil for evil. Now obviously, you don't belong to that religion and you don't believe what that guy said. But I just thought I'd let you know that there are some people who don't see it the way you do. And I stated on the floor some days ago, when we were discussing the repeal of the death penalty, that the Hebrews were the ones who came up with that notion of an eye for an eye, and a tooth for a tooth. They were the ones of old time. But they didn't carry it out. The rabbis would not let it be carried out. You could not take an eye because you had lost an eye to somebody. You could not break out a tooth because your tooth had been broken out. Such things debase and vulgarize society. The growth of violence is not what that law is for. It's to set a measure of damages. You're going to be assessed an amount that will compensate that person who was harmed to the extent that money can, for the harm that was done. But we're not going to be walking around here with a society, half of whom have one eye, and most of whom are missing a tooth. That never was put in place. What these people who call themselves Christians don't know about their own history--they don't know--is that the Caesars, these guys that headed Rome, they said don't let the members of this new sect--talking about the Christians--be involved in any legal or judicial proceedings, because they do not believe in the imposition of the death penalty. That's what was done by the people who were closer to the time of the man you all say you worship. But you don't believe that, because it's not convenient and it doesn't fit your political philosophy. That's why I say all that talk of religion is nonsense! If it doesn't influence conduct, all it is, is conversation. That's why I say we do better... [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR CHAMBERS: ...talking about Mickey Mouse, Donald Duck, and Goofy, and Pluto, and all the rest of them, because all this talk you all give about religion immediately goes out the back door when you have to make a decision where those principles are to have a bearing and come into play. If any of you all read the newspaper recently, you saw that when it comes to racial profiling or stopping people for tickets, the ones who wound up being arrested most were the nonwhite people. Does that bother you all? No! Because you're not like me and you're not like Senator Aguilar, and you cannot understand what it does to us, because it doesn't happen to you. But when it happens to one of yours, I get the call. And do you know why they say they call me? Senator Chambers, you understand and you'll help people, and they're white. Why don't they go to you all? They go where they think they can get help. Thank you, Mr. President. [LB377]

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PRESIDENT SHEEHY: Thank you, Senator Chambers. (Visitors introduced.) Senator Friend. [LB377]

SENATOR FRIEND: Thank you, Mr. President and members of the Legislature. Senator Erdman had pointed out that Senator Chambers did us a, you know, I guess a one-up by providing an amendment that allowed bloviating blow-hards like myself and others to actually continue talking, without trying to get too creative about it, as to what you'd need to throw up on the board. Over the lunch hour, you know,...Senator Flood summed it up fairly well, but he didn't totally capture it for me. I go back to my office and, I'm usually...I guess maybe can be considered a cheeky or jovial person, I hope. Sometimes you just feel empty. And over the lunch hour, I said, I've got to go get some, you know, gas for my car, and I just sat in my car. I didn't read anything, I didn't listen to the radio. I just sat and thought about this debate. And sometimes I may come off a little bit insincere, but I'm sincere about this. I don't think anybody is having a fun time here. I think Senator Flood pointed that out, and I would totally concur. I have a lot of fun out here with you guys. This doesn't qualify. Senator Lathrop mentioned...and I mentioned earlier, though, that I'm glad I'm here. I'm glad we're working on this, because I, quite frankly, can't think of--and this is going to sound like I'm patting you all on the back--I can't think of a whole lot of people that I'd rather be working with it on. Senator Lathrop had mentioned earlier that he's looking for a rational basis. We're all looking for a rational basis in regard to the distribution of the ultimate penalty that we have. I would submit to you that--and I did it earlier--that individuals based on this language are still going to be making those decisions. Does this law make those decisions any more...more arbitrary or less arbitrary? I think that an argument can be made and logic would dictate that there would be less arbitrary behavior, judicial behavior. The route we're taking here, however, prevents us from eliminating it. I don't mean to be redundant about that. I know that I've said that before, but it prevents us from eliminating the arbitrary behavior. The arbitrary nature of decision making by human beings was removed by Senator Chambers' original bill. It's not here. The language in this bill requires the finders of fact to speculate on the potential future behavior of an individual. Other states have done this with different language, that I mentioned earlier--three other states. But the language is important, and if our standard that we're setting here...the language that we establish is different, to me it's going to be difficult to quantify. Senator White gave examples earlier of the terrorist behavior and crime lords and folks like that as potential individuals that this type of legislation would target. If these individuals are targeted as prospective candidates for the fair and equitable usage of capital punishment,... [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR FRIEND: ...then juries or judicial panels are going to be making those arbitrary decisions. That's simply just the fact of the matter. What happens if a terrorist, you know, gets into prison and says, you know what? For whatever reason I've found

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religion, I won't hurt anybody ever again. Somebody has got to make an arbitrary decision about that particular guy. He's killed hundreds of people. That's the hypothetical. We're heading down a strange path here, folks. That's all I'm saying. The stuff we were dealing with two weeks ago wasn't that strange. Tough, but not strange. This to me is a little bit strange. That's all I'm trying to decipher here, and I want to continue listening to the discussion. I know these things are going...I know these things... [LB377]

PRESIDENT SHEEHY: Time, Senator. [LB377]

SENATOR FRIEND: Thank you, Mr. President. [LB377]

PRESIDENT SHEEHY: Senator Louden, followed by Senator Ashford, Senator Chambers, Senator Fulton, Senator Pirsch, and others. Senator Louden. [LB377]

SENATOR LOUDEN: Thank you, Mr. President and members of the body. As I've listened to the debate all morning and part of the afternoon, I of course have arrived at some questions I have myself. One of the questions is that there's been very little consideration given to the victims. We've talked about the people that are going to be incarcerated, what would happen to them, but what about the victims? When you talk about the torture of the...what they went through, probably, when they were mixed up in these horrendous acts like this. So I think that has to be taken into consideration. Myself, I think we're not talking about language in the bill, we're not talking about the well-being of incarcerated people. What we should be talking about is what kind of philosophy are we going to bring forward for the state of Nebraska, and how are we going to handle it? Right now there's ten people on death row. My observation is, is that that's probably about the same as life without parole. We put them on death row; they don't necessarily progress any farther, but they certainly don't get paroled. And the system can work out where they will get paroled, if the law is put in there, life without parole. There will be some negotiating or something somewhere along the line in the future, I'm sure of that. There's some questions, since I'm not a scholar of jurisprudence, nor do I desire to be one, I would like to ask Senator Ashford questions, if he would, please. [LB377]

PRESIDENT SHEEHY: Senator Ashford, would you yield to a question? [LB377]

SENATOR ASHFORD: Yes, sir. [LB377]

SENATOR LOUDEN: Senator Ashford, on page 12 of this amendment, AM912, I think line 15, it has in there...it talks about the victims, and for any pain and suffering of the victim caused by the offense, and the costs, and that sort of thing, which is a monetary deal. Then on the handouts you handed out, I think one of the handouts said 51 percent of the people thought it would be a good idea if there was restitution to the estate of the

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victim. And then on the other handout, I think it was copied out of the Journal Star that a 20-year veteran, Lincoln department person put in, but it said an indignant (sic) defendant charged with serious crime is appointed counsel at taxpayers' expense. Well, if most of the time these people are indignant (sic) and they have to be defended by the county, isn't that language more or less moot? Is it of any value whatsoever, unless you have an O. J. Simpson case or something? And that could be done with a civil case, couldn't it? [LB377]

SENATOR ASHFORD: I'm not sure I totally followed the question, but that's my error, Senator Louden, for writing rather than listening. But...so could you repeat the question? [LB377]

SENATOR LOUDEN: Well then, just explain to me line 15 on page 12, I guess. [LB377]

SENATOR ASHFORD: Line 15, page 12? Just a second. Let me go to that, line 15, page 12, very quickly. [LB377]

SENATOR LOUDEN: As it goes, it said if the offense results in the death of the victim, the court may require payment to be made to the estate of the victim, and you put in, for any pain and suffering of the victim caused by the offense. [LB377]

SENATOR ASHFORD: Oh, sure. Right, and that...Senator Louden, that was in there because at the hearing we had testimony that would indicate that there are certain defendants that profit from their case, and we wanted to make certain that the...in most...if you have an indigent defendant, it's very unlikely that... [LB377]

SENATOR LOUDEN: But should that be in a death penalty bill or a repeal the death penalty bill, because that can be done in civil action, if the people so desired, couldn't they? [LB377]

SENATOR ASHFORD: I suppose that a civil action could be brought, Senator Louden, but we just...it seemed to us from the evidence at the hearing that... [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR ASHFORD: ...it was appropriate to address that sort of thing, so that if someone were to profit from their crime, that the money would go to the victims and not to anyone else. That was the intent. [LB377]

SENATOR LOUDEN: Well, I'll, you know, I'll go with what you said. Like I say, I am not a scholar of jurisprudence, so this is the reason I have to ask questions. Another one in here I think was on, oh, page 14, and that goes on about, unless the finder has determined that such a person poses a present and substantial risk to the lives of

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others, he cannot be reasonably and effectively be controlled by institutional security measures. Now my understanding is, then they're susceptible to a death penalty? [LB377]

SENATOR ASHFORD: Yes. [LB377]

SENATOR LOUDEN: Then in other words, they could murder one person, but until they murdered a second one in a prison or in incarceration or something like that, then they would be, I guess you might say, eligible for the death penalty? [LB377]

PRESIDENT SHEEHY: Time, Senator. Senator Ashford. [LB377]

SENATOR ASHFORD: Yes. I might just answer that question, Senator Louden, if I might. The...yes. That's one case where the death penalty would most likely be imposed under this bill. There are several other types of cases. I think Senator White did a very good job of outlining cases that he felt...where the death penalty would apply in the cases where someone is extremely dangerous. And I can't enumerate all of them for you, but the one example you gave me is correct. That would most likely be a death penalty case under this statute. Thank you. Just to respond a little bit to Senator Louden's points, because he asked...all the questions that are being asked are good questions. Life without parole means life without parole. The individuals who...and there's an amendment...part of the amendment clarifies the language which was left a little bit up in the air, as a result of a prior...well, of a case last year, so...and we made...it's absolutely clear. Life without parole means life without parole. That means they're not eligible to apply for parole, they cannot get parole, they will not get parole. Now you suggested that maybe there would be deals made or that things may change, and that is possible, Senator Louden. But it's no different than a situation we have now, where we have many, many cases of people who have been incarcerated on death row for any number of years. I mean, your chances of being put to death are less in Nebraska than they are of dying of old age on death row, is what it boils down to. So you know, there could be changes in the law either way. But I...and as far as taxpayer expense, I think, again, I come back to Senator Harms, because he's voicing a lot of the frustration many people have, and that is, why doesn't this system work better than it does? Why do we have people on death row for 10 years, 20 years, 15 years, whatever it is? And the answer is, the system is what it is, and that defendants who are, for example, defendants who are indigent are afforded attorneys in this state, and for the most part they're afforded significantly experienced attorneys, and that's the way it is. That's not going to change no matter what we do with the death penalty. And in many respects it's constitutionally required. So I think that's simply the way it is, and that's why it's such a slow process. The victims--that's a tough one. I don't think anybody...certainly myself, I've never experienced what Senator Wallman has experienced and others in this body that have talked about personal experiences in their communities or in their families. It's...I am not...I have no standing to talk about what a victim wants or doesn't

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want. I certainly was touched by Bud Walsh, the gentleman from Oklahoma City, and his comments about his daughter and Tim McVey. You know, we can all take that as we will, but those certainly were heart-wrenching comments. Also, in the Carey Dean Moore case, the newspaper accounts of the victims in that case, most of the victims' family members say things such as, this is ridiculous--30 years. I wish the money had been spent on education, one of the victims mentioned. I just don't think this works, members. I don't...under any reasonable interpretation, and the fact that we have the death penalty, yes, possibly there would be a better chance that they would remain in prison for a longer period of time--I don't know. [LB377]

PRESIDENT SHEEHY: One minute. [LB377]

SENATOR ASHFORD: That's not what really happens. What really happens is that the hundred or so first-degree murder cases are individuals who are in prison today, will be in prison for the rest of their lives. So I think it really comes back to what we all...how we look at this, and how we evaluate the facts. Just very briefly to Senator Erdman's question, for the record, I just don't think, in a case where the Legislature enacts a prospective statute, that the retroactivity rules that you talk about, apply. And you know, we can debate that, but I'm fairly convinced that the Teague standard does not apply in cases such as this, where the Legislature is making a prospective pronouncement. We can discuss that further, but I'm fairly convinced, and with some of the changes we're going to do between now and Select File, that the retroactivity issue should be clearer, as we get to Select File. So with that, Mr. President, thank you. [LB377]

PRESIDENT SHEEHY: Time, Senator. Senator Chambers. Senator, this is your third time. [LB377]

SENATOR CHAMBERS: Thank you. Mr. President, members of the Legislature, I'm going to touch on a few things that have been said by others. Senator Harms wondered why the system wouldn't be fixed. Senator Harms, I've brought more legislation than anybody to fix the system, and I can point out the statutory changes, not just with reference to the death penalty. But there was a time when the giving of radar tickets was very random, very carelessly done, so I got legislation to address that issue, and it has not really corrected the matter, because you have human beings carrying out the requirements of the law, as was pointed out by Senator Lathrop. Senator Loudon asked about the victims. We're not here talking about the victims. Executions are not carried out to benefit victims. The crime is committed against the state. That's why it's the state versus so-and-so, and to bring the victims in during a discussion like this is a diversionary matter, because the ones who talk about doing something for victims in this context do not show compassion for people in any other set of circumstances. So that, to my way of thinking, is a cheap attack against the bill. Killing in prison--well, you've got 211 first-degree murderers there right now, and they're not going around killing everybody. But because the discussion has gone on awhile and I think people's thinking

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has gotten fuzzy and their comments have, there can be no mandatory death penalty in America. The Legislature cannot say, if a person kills an individual in prison, the death penalty is the punishment. No! If the Legislature put that on the books, that would be struck down as unconstitutional. You cannot have a mandatory death penalty in this state, country, for anything. The Supreme Court has said you have to look at the specifics of the offense, you have to look at the specific characteristics of the individual, and that's why you have this weighing of aggravating and mitigating circumstances. You'd still have to do that. Maybe somebody who committed a murder wound up in a prison, because he or she didn't get the death penalty, and that person kills a person in prison. One of the mitigators is to have mental illness. The person maybe shouldn't have been in prison in the first place, but be given treatment. But because of the vengefulness, the desire for retribution, mentally ill people are in the penitentiary. So when that person commits the murder and comes up for a trial, and let's say that the prosecutor decides to go for the death penalty, which most of them are not going to do--and that's something that Senator Flood, Senator Friend, Senator Erdman, don't want to deal with; they just gloss right over that, but they pretend to be so concerned. The mitigator is mental illness. You can't execute somebody who is mentally retarded, but there's a difference between mental retardation, which is immutable, and mental illness. That mental illness can be shown to have had such a role to play in this murder that that person is not going to get the death penalty, even though the murder was committed in prison. You all cannot focus long enough to continue dealing with this issue, based on what the law is in the statutes, the requirements under the constitution, as handed down by the Nebraska Supreme Court and the U.S. Supreme Court. So to say that somebody committed a murder, or two murders, in prison, means he or she will get the death penalty, is false. That won't happen even now. So all these bogus arguments, people ought to just stand up and say, I want the death penalty, no matter what you do, and stop bringing up these bogus arguments, because that's what they are. But who other than me is going to take the time, maintain my focus, not get empty, not get tired, but continue to battle after we've been at it... [LB377]

SENATOR LANGEMEIER PRESIDING

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR CHAMBERS: ...12 hours, like I would after we've been at it for 12 minutes. Did you say time? [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR CHAMBERS: Oh, thank you, Mr. President. Maybe I can touch on one or two other things. Senator Erdman can see that there are ten people on death row and 211 who are not. What about when we were talking about banning cell phones. He didn't want to go after just the young people. He didn't think you should single them out.

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Treat everybody the same way who are doing the same thing. That was my position. And I said if it's the cell phone that's the problem, get the adults the same way. He was just interested in the young people. My principles go across the board. His don't. He doesn't want the young people mistreated, but if others are, it's all right. It's not all right with me if anybody is singled out for unfair treatment. And it's been a long, long time since I could be qualified as young, and all of my children are well grown. I have grandchildren. [LB377]

SENATOR LANGEMEIER: Time. [LB377]

SENATOR CHAMBERS: Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Chambers. Senator Fulton, you're recognized. [LB377]

SENATOR FULTON: Thank you, Mr. President, members of the Legislature. The...firstly, there's something that I want to address. I've been refraining from addressing, but I think I should. Senator Chambers had made reference to himself and Senator Aguilar with respect to minority status, and with due respect to the senior senator, my mom is from the Philippines, she's 100 percent Filipino, so I think that would make me at least half minority, and though we disagreed on LB476, I'm hopeful that this...that the identifying of one's minority status has more to do with ancestry than it does with a position or a vote on a certain issue. What occurred over the lunch hour, I spoke with Senator Ashford, and I want to clarify what my position is, and what we talked about over the lunch hour. I think that needs to be done, after what has been said here this afternoon. I have concern that LB377, as it is drafted with AM912 right now, cannot be applied, that the death penalty cannot be applied, were that to go forward, and the reason I have that concern is because the burden of proof on the prosecuting attorney is to show that the state cannot safely incarcerate. He needs to prove a negative. I would think that the defending attorney would simply bring someone in from the Department of Corrections and ask the question, can we safely incarcerate this person? The person from Department of Corrections would say, yes, and there you've gone beyond the reasonable doubt. So that's my concern. Whether it's founded or not, we can debate that. That's my concern, and that's why I'm not able to...I will not be able to support LB377 and AM912, as a matter of law. Now I introduced a...I have an amendment that has not been introduced that is sitting on Select File. There's some work that needs to be done to the amendment, I'll acknowledge that, but what that amendment does, it takes...again, I had said earlier there are two things that have to be proven: number one, that this person is a danger; number two, that this person cannot be incarcerated. I'm having a problem with number two--cannot incarcerate. And so I would like to reformulate that, not as a negative but as a positive, and say this person can be incarcerated, therefore, he shouldn't be put to death. If you re-present this as a positive, this person can be incarcerated, it then becomes logically a mitigating factor, a

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mitigating circumstance that should be pondered. So that's what this amendment on Select File would do. Now I don't have enough experience...well, I have no experience jurisprudently. I'm not an attorney so I don't know whether this principle that I've laid out is workable jurisprudently, and so I'm hopeful to get to the bottom of that. I can only speak for myself in saying that my position on the death penalty, we can't repeal the death penalty, but we can clarify to whom it ought to be applied. That's where my position is. Those people that we can't incarcerate safely, we have an obligation, as a matter of societal self-defense, to execute those individuals. If we can identify them, those are the ones for whom the death penalty should remain. That's my position. So I'm...I, at least for me, I'm willing to move forward to Select File so that my amendment could get adopted. Now that places a number of others in a position of having to trust,... [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR FULTON: ...and I'm not going to try to move you off of your position based on trust. We don't know each other that well. I'll ask you to take a look at this amendment that's sitting on Select. If you think it's something you can work with, great; if not, then you shouldn't vote to move this forward. But that is what my concern is, that as LB377 is now it's not workable. I think it does repeal the death penalty, at least pragmatically, and so I'm trying to do something to alleviate that, and that's what's sitting out there on Select File. Hopefully that clarifies what was talked about earlier today. Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Fulton. (Visitors introduced.) Those wishing to speak to AM989 to AM912, we have Pirsch, Wightman, Lathrop, Schimek, Carlson, Flood, and others. Senator Pirsch, you're recognized. [LB377]

SENATOR PIRSCH: Thank you, Mr. President, members of the body. I appreciate the high level of deliberation that's been going on today, all the comments. And again, this is following on the heels of the discussion we had a number of weeks ago. I think it's a good testament to the body. It's right that we are focusing today on the actual contents of the bill. Process is very important for this body. I think that, you know, as a legislator my role here today is different than that which it was as a candidate. As a legislator, I represent and have a duty to all the people in the district that I represent in the state of Nebraska. I have purposely made a conscious effort towards this responsibility to listen to both the proponents and the opponents and carefully research and consider both sides of view, and so I can see that that concern for process has been mirrored in each one of you here in the body today. So I appreciate that. Just kind of a quick address to Senator Aguilar's question with respect to his questions on the disparities, disparate impact of this particular penalty, and to other questions of innocence. I would urge, I think he might find it useful, to see the 2001 Baldus study with respect to that matter, particularly beginning on page 78. I won't get into that too much right now, but I think it

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is...bears mentioning at this point in time some advice that Senator Chambers actually provided just a number of days ago as we were debating the Recreational Liability Act. And I think his admonition is equally valid in this particular deliberation; that is, as you consider points of view and statements with respect to the various issues implicated here, I suggest that it is more persuasive when you consider and address facts as they are...occur here in the state of Nebraska. This is a very state-specific issue and I think Senator Chambers had pointed that out, that also occurred in the recreational liability; that what occurs down in other areas of the country and even internationally is all good and well, but we need to...we have...and this was pointed out in the Legislative Research Division's report that revolved around the death penalty back in January of 1995; that there are differences, great differences, in criminal procedure, sentencing laws, allocation of state and local financing responsibility, and a number of other different types of factors that makes what goes on in other states, in other countries, not anywhere near as relevant as what has...what the facts are and how this particular penalty has been applied in the state of Nebraska. So I'd urge you to, as you listen to the debate, as this goes on, and as you address the issues yourself, try to address your remarks to those particular state-specific factors that we're experiencing here in Nebraska. I think that that...those are going to be the most persuasive and really important if we're going to reach a just result here. I do have a number of questions and concerns about this particular amendment to the bill and I will address those. I know we're kind of low on time, but I'll yield the balance of my time to Senator Friend. [LB377]

SENATOR LANGEMEIER: Senator Friend, one minute. [LB377]

SENATOR FRIEND: Thank you, Mr. President. Thank you, Senator Pirsch. One of the things that I wanted to...another one of the things that I wanted to point out, it's more of a rhetorical question, I would like to ask, just kind of let it linger up in the air, is it constitutional to expose a person, terrorist, a mob boss, anybody, to possibly some increased punishment based on what the finder of fact believes he may do, he or she may do? I think I read the other...I'm going to run out of time here, but I think I read the other language earlier, some of the other language around the nation that other states have used. [LB377]

SENATOR LANGEMEIER: Time. [LB377]

SENATOR FRIEND: Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Friend and Senator Pirsch. Senator Wightman, you're recognized. [LB377]

SENATOR WIGHTMAN: Thank you, Mr. President. Senator Chambers, you have suggested that I have forgotten the precept that rather 100 guilty people should go free than 1 innocent person should be convicted. While I generally agree with this precept, I

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suppose carried to its logical extreme probably wouldn't be 100. It could be 10,000. It could be 100,000. Perhaps we should try no one for a crime. I'm certainly not suggesting that be done. It is a great concern to me that DNA has proven in other states, I don't think it's happened in Nebraska yet, but DNA has proven people on death row innocent. That is probably the biggest concern that I have in the imposition of the death penalty. I think that's something that we should address. If Senator Chambers would want to introduce a bill or suggest an amendment to LB377 or one of the amendments to that bill that provides that the death penalty could not be imposed in the absence of DNA proof, irrefutable eye witness, evidence, a video, or other equally compelling evidence, I would probably support such an amendment. That could be added to the aggravators or found...require a finding of a court or a jury, as a separate finding, before the death penalty could be imposed. Because it is my biggest concern that innocent people have been convicted and have been executed. I think there's no question about that. At any rate, this would allow one of the big concerns that I think people have in the imposition of the death penalty. And do we have overzealous prosecutors in Nebraska or in the United States? You bet, we have a lot of them. That's part of the reason, I'm sure, that we have had convictions when there should not have been a conviction. I wouldn't say that it's all overzealous prosecutors, but certainly that occurs. I will not support LB377 in its current form, but certainly would consider supporting it if it was amended to include only that exception. Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Wightman. Senator Lathrop, you're recognized. [LB377]

SENATOR LATHROP: Thank you, Mr. President. I want to, this afternoon, commend Senator Fulton for approaching us at the end of the morning session. So often we can sit in our chairs on floor debate and do one of two things: we can offer constructive concerns, express our concerns; or we can sit there and give reasons why we won't support something we wouldn't support in any form. And what happened at the end of the morning was Senator Fulton approached us, some of us that are on the Judiciary Committee, and he said I understand the concern. And he expressed this when we've talked about the death penalty before and said here's my concern with the bill, and that is it seems to me that it is in some respects effectively repealing it, because we have placed such a burden on the prosecution that I don't think the prosecutor can prove it, even when we have somebody who is that dangerous. And we thought about it, and we talked to Senator Fulton about his concerns and, I think he's right. We are not, the Judiciary Committee, if I can speak for them, trying to come up with a left-handed or a back-door way of repealing the death penalty. That's not our purpose. Our purpose is genuinely to find a different manner to sort out to whom the death penalty is imposed upon from those who spend the rest of their lives and die in prison. Senator Fulton and I and some others visited over the lunch hour, and this is the concept, so that you know what we're talking about, and that is this. In the bill as presently formulated, and the

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amendment, the prosecutor would be called upon to prove beyond a reasonable doubt that a person could not be safely incarcerated. Senator Fulton, I think correctly said, I don't think that can ever be established even with somebody that can't be safely incarcerated. And what we came to--and it is more than just a concept but it needs some to go into an amendment, is this--that after a person has been found guilty of first-degree murder, that there would be a step before what we now do; that is, going to the aggravating and mitigating circumstances. There would be a step before that, and in that step it would be the defendant's burden to prove to a judge or to the judges who might be impaneled to hear the evidence at that point, that he can be safely incarcerated. And if the defendant doesn't carry his burden of proof, then the judge will make that finding and proceed to the aggravating and mitigating circumstances. I want you to know that that is a significant movement away from where we were at. You can't, with that amendment that we will offer at Select, call this a repeal of the death penalty. It is not. It is what we have indicated it is. It is an improvement with Senator Fulton's input, and so I'm going to urge you to pass LB377 on to Select File. Now Senator Erdman suggested that this isn't the kind of bill you take somebody's word for it, and then you move it to Select on a promise. Yesterday I voted on the water bill. I'm going to tell you something about the water bill. The water bill has many, many, many significant concerns. I think the Speaker would agree with me. Many of us have expressed concerns about the water bill. But we have the assurance of those people who are involved in that process that they will sit down with us between now and Select File to work out those differences. I'm asking you to do the same with respect to AM912 and understand that our goal that we have committed to Senator Fulton, at least I have and I think Senator Ashford has as well, is that we will make this a system that is not impossible to get to and sort out who cannot be safely confined, but a system that will do a good job as well as we can and as humanly possible, to sort out those people who should be given the death penalty and those who should not. Thank you. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Lathrop. Senator Schimek, you're recognized, followed by Carlson. [LB377]

SENATOR SCHIMEK: Mr. President, I would yield my time to Senator Chambers. [LB377]

SENATOR LANGEMEIER: Senator Chambers. [LB377]

SENATOR CHAMBERS: Thank you, Mr. President. Thank you, Senator Schimek. Senator Lathrop did a masterful job. I said when I stood up that I am opposed to the death penalty in every case, under all circumstances, regardless of who the victim is, regardless of who the perpetrator is, regardless of the circumstances. I pointed out that I had engineered legislation through this body which said that the mentally retarded cannot be executed, minors cannot be executed. I've said in the past that if I were like a hippopotamus and could swallow the death penalty in one gulp like a hippopotamus can

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swallow a bucket of fruit in one gulp, I'd do it. But since I can't even swallow an apple whole in one gulp, I do it by nibbling away incrementally. This is only an incremental step in narrowing the universe of people who will be subject to the death penalty. I would never bring a bill like this, or attach my name to a bill like this, which acknowledges that it is valid under some circumstances for the state to kill anybody. I would never do that. But I'll vote for a bill which is before us that narrows the reach of the death penalty, however it does it. I will support that, but I would not bring a bill that compromised that principle. To touch on something that Senator Nelson continues to bring up, and that's the issue of abortion. He views it from the standpoint of the zygote, the fetus, or the embryo. So he is an absolutist. He thinks that when an egg is fertilized that's a full human being, and I don't, just like I don't think an acorn is an oak tree. I don't think a fertilized chicken egg is a chicken. I don't go in a restaurant and say I want scrambled chicken. It's an egg and we know the difference. But if somebody's religious belief brings him to the place where Senator Nelson is--Senator Carlson--that's his belief. And when we're debating an abortion issue I say, you can say all you want to that abortion is a sin. That's your belief, but you will never get me to vote that it's a crime, ever, because I look at it from the standpoint of the woman. And I'd venture to say that we wouldn't have so many antiabortion bills brought by men if men were to carry a fetus nine months, or could have been raped and impregnated and that man would say, this that's in me, I got to carry it to term and I want to, or let somebody force him to. See, it's easy for us to do like those Pharisees. They bind heavy burdens, grievous to be borne, lay them on other men's shoulders and will not touch them with one of their fingers. Now when it comes to Senator Carlson I acknowledge for him and as I did with Senator Foley and others: Their belief is their belief, and I wouldn't try to move them from it. But on this floor where we're talking about legislation, not salvation, I will not vote with them on that issue. But let that child come into the world, Senator Carlson, and let somebody take the life of what I believe to be a full-fledged human being, and you'll see something different from what you see and hear when I talk about the right of a woman to decide whether or not she's going to carry a pregnancy to term. That's between her and her doctor and, if she's religious, between her and her God. [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR CHAMBERS: And that's why I will always vote for a woman's right to determine whether to carry a pregnancy to term, while at the same time fighting strenuously, unwaveringly against the death penalty. There's a myth in the Bible about Samson who, as long as he had his hair and did not tell the secret, he was strong. But he let Delilah insinuate herself into his mind with her charms and he said, if you cut my hair I'm through. Senator Fulton got a haircut, and now he's lost his ability to reason. When he had some hair, then that hair kept those brains and those proper thoughts inside his head. Now that he got that skin-up haircut, everything has left him. But we're going to bring him back home before it's over. Thank you, Mr. President. [LB377]

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SENATOR LANGEMEIER: Thank you, Senator Chambers. Senator Carlson, followed by Flood. [LB377]

SENATOR CARLSON: Mr. President, members of the Legislature, had two little topics to use and, with Senator Chambers' remarks, I changed what I'm going to talk about. First of all I'll correct you, Senator Chambers. The story of Samson is not a myth; it's a reality. I believe that in the history of our country there were two calamities. The first calamity is slavery. Slaves, thousands and thousands of slaves died, were mistreated, were given life imprisonment. Because of that eventually we had the Civil War, and thousands and thousands of people were killed. Second calamity in the United States is abortion. Millions of babies, when an egg is fertilized it becomes life, millions of babies were conveniently, painfully tortured, dismembered, and murdered. We go back to slavery. The slave owner, the plantation owner, the family members, when it came to a debate on abolishing slavery their attitude is, what's the big deal? Slaves aren't really humans, they can't think, they can't feel real pain, they can't learn, they can't manage, they can't survive on their own; what's the big deal? I'll contend that we may have some individuals in this Chamber that parallel slave owners, plantation owners in today's debate on the sanctity of life. Some say about the live, viable, functioning, innocent, defenseless, vulnerable unborn, what's the big deal? The unborn are really not human, by convenient definition; they can't think, they can't feel pain, they can't learn, they can't manage, they can't survive on their own; what's the big deal? This is a huge deal--a matter of the sanctity and value of life. And I ask all of us to remember, as this comes to a vote, to use a term that I heard just a little bit ago, let's take our principles straight across the board. If you vote to value the lives of the worst people in our society, you are, in my opinion, very hypocritical if you aren't then willing to take a strong stand and vote to severely limit the barbaric procedure of abortion. [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR CARLSON: Let's apply our principles across the board, following the eventual vote on LB377. Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Carlson. Senator...Speaker Flood, you're recognized. [LB377]

SPEAKER FLOOD: Oh, Mr. President, I'd give Senator Lathrop my time. [LB377]

SENATOR LANGEMEIER: Senator Lathrop, 4, 50. [LB377]

SENATOR LATHROP: Thank you, Mr. President and Senator Flood. I appreciate the opportunity to address the body again. I would like to visit with the body for a few moments, if I can, about what happens in a process that we're setting up, because so oftentimes what you understand about the judicial system, and certainly my clients

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come in with these same notions as what you see on television, but if this system were in place it would involve a separate hearing, and it would involve many, many expert witnesses. And I think that there is...one hesitation to support this bill may be the idea of how do we know who these people are. How do we identify them? How can we tell who is going to be too dangerous to incarcerate from the person that isn't? In trials every day across the state of Nebraska, every day across the state of Nebraska, we deal with similar issues. There is nothing unique about this question for a judge to determine, compared to what they're called upon to do every day in trials in Nebraska. Generally speaking, a case like this would involve expert witnesses. It would involve testimony from psychiatrists, psychologists, experts in corrections, people who would know what the defendant is about, know what his proclivities are, know what his tendencies are to harm again, to kill again or to generally be a danger to society. We would have psychologists and...psychologists and sociologists testify about that, and then we would have, in all likelihood, have corrections officers. And you might think we would pull somebody from Lincoln or from Tecumseh and have them come to the courthouse, sit them in a chair and say, can we keep this guy safely, and then that's the end of the hearing. Oh, no. An issue like this would be the subject of a good deal of testimony about the defendant, a good deal of testimony about corrections, and ultimately a decision would be made by a judge with the benefit of expert testimony. And I can tell you, you may think everyone will draw the same conclusion and that we are repealing the death penalty by this measure; it is not. There will be experts who will come in and testify in the right case that someone cannot be safely confined. We will have people that will pass through this sorting-out process and on to the aggravating and mitigating circumstances, and we will impose the death penalty in Nebraska. We will only do it, however, when the person cannot be safely confined, and that's a fairer standard to use than the arbitrary standard that has only 31 people out of 200-and-some death-eligible cases. The trial and the use of expert witnesses happens every day. Last year we had a bill--I was not here for it--on sexual assault, people that perform sexual assaults. After they have completed their sentence they are then subject to, after they've done everything and spent all the time that we've imprisoned them to, they are then subject to review by mental health professionals. And if they are still a danger, we keep them. [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR LATHROP: That is an example of what we will be doing in this case. The mental health professionals are not unaccustomed to these issues. They happen in the aggravating and mitigating hearings already. I'd venture to say that up in Madison County that both the defense and the prosecutor probably called two or three psychiatrists apiece. That is the nature of litigation. Expert witnesses help judges and juries make decisions, and they would be involved in this process. It is not a foregone conclusion. It is not a repeal. It is a legitimate sorting-out process and a new standard for determining who gets the death penalty and who does not. Thank you, Mr.

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President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Lathrop and Senator Flood. Senator Kruse, you're recognized, with Senator White to follow. Thank you. [LB377]

SENATOR KRUSE: Mr. President and colleagues, thank you. In an earlier time I said the system is broke. I would repeat that not to be repetitious, but to respond to some comments that this bill would break it more. I think everybody on this floor would understand that that's not the case. This bill will help to help our system, will improve the system. It's not a total fix, as has been said several times. But Senator Harms raised a good question: Why don't we fix the system in some other way? Well, my direct response to that is because it takes some of this bill to fix the system. Someone else said we have now removed the arbitrary. Hello. We have not removed arbitrary in our application of the death sentence. We have arbitrary big time. I lived for eight years in a county where I guarantee you no one will ever be charged with a death penalty murder. It is not going to happen because the county attorney doesn't know how to do it. That county attorney is unlikely to charge you with first-degree murder because he hasn't done that much. And I'm not speaking absently here. I have talked with other prosecutors who get calls from him and part-time prosecutors in these counties. They are not going to prosecute it. So I'm not going to say on the air, but you know, if you want to know where to go to commit the heinous crime that you're thinking about, I can tell you a couple of the counties to go to and I guarantee you, you won't ever be challenged with the death penalty. It is an arbitrary application. We can make it more equitable. We can make it more swift and sure by removing endless appeals. That's the basic problem of the system that is broken and that we can change. We can remove the endless appeals. We can make it closer to equal for rural and urban. At present, if you live in a city, you are much more likely to be in jeopardy of the death penalty. We can make it more equal for wealthy and poor. We have noted before, I just again in passing, you are not subject to the death penalty if you have wealth and if you have position and if you have general appraisal of value to a community. And we can make it closer to equal for the variety of racial backgrounds that we have in our society. In other words, if you've got an advocate and if the public thinks well of you and will say it, you are not liable to the death penalty. But if you don't have those kind of persons in your community, or if some worry about the way you look, and I could add others, you know, if you are overweight and others, there's a lot of other factors that would put you in more jeopardy. And again, the victims were raised, you know, as we ought to think about the victims. Well, I'm thinking about the victims. The victims are left on the hook for 20 years and they really want off the hook. Senator Wallman, directly and with eloquent passion, documented that with an example. So I urge that we do what we can here to fix the system. [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

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SENATOR KRUSE: It doesn't do it completely, but it sure moves us further down the road and, like this whole discussion, makes us all more sensible and sensitive to the issue of life. Thank you. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Kruse. Wishing to speak we have White, Erdman, Adams, Preister, and others. Senator White, you're recognized. [LB377]

SENATOR WHITE: Question. [LB377]

SENATOR LANGEMEIER: The question has been called. The question is, shall debate cease? All those in...do I see five hands? Thought so. The question is, shall debate cease? All those in favor vote yea; all those opposed vote nay. Have all those voted that wish to? Senator White, for what purpose do you rise? [LB377]

SENATOR WHITE: A call of the house, Mr. President. [LB377]

SENATOR LANGEMEIER: There has been a request for the call of the house. The question is, shall the house go under call? All those in favor vote yea; all those opposed vote nay. Record, Mr. Clerk. [LB377]

CLERK: 33 ayes, 0 nays to place the house under call. [LB377]

SENATOR LANGEMEIER: The house is under call. Senators, please record your presence. Those senators outside the Chamber, please return to the Chamber and record your presence. The house is under call. Senator White, for what purpose do you rise? [LB377]

SENATOR WHITE: I would accept call-in votes. [LB377]

SENATOR LANGEMEIER: Thank you. We will proceed with call-in votes when everyone has arrived. Senators McDonald, Mines, Synowiecki, Johnson, please return to the Chamber. The house is under call. All senators are present and accounted for. There has been a request for call-in votes. The question was the calling of the question--shall debate cease? Mr. Clerk. [LB377]

CLERK: Senator Engel voting yes. Senator Karpisek voting yes. Senator Hansen voting yes. Senator Gay voting yes. [LB377]

SENATOR LANGEMEIER: Record, Mr. Clerk. [LB377]

CLERK: 26 ayes, 6 nays, Mr. President, to cease debate. [LB377]

SENATOR LANGEMEIER: Debate does cease. Senator Chambers, you are recognized

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to close on AM989. [LB377]

SENATOR CHAMBERS: Thank you. Mr. President, members of the Legislature, I had explained this amendment at the outset. It makes the reading of a sentence in the existing law more grammatical, more logical, more easily understood, and nobody had any problem with the amendment, so I hope you will adopt it. But I have a couple of things I want to say in response to my good friend Senator Carlson, and if I didn't speak now I would burst. He said that the story of Samson is not a myth. We have a different point of view. One of the things that Samson supposedly did was to slay 1,000 Philistines with the jawbone of a jackass. Now the Philistines were people who wore armor. I presume he struck them either in the head or in the chest, and they wore breastplates and they wore helmets made of metal, and I don't believe the jawbone of a jackass would last long enough to kill 1,000 men in armor. But beyond that, we have to give the Philistines credit for having at least as much sense as little children have. I saw 999 of them--let's say that he could do that--999 of them killed and now there's just me and this killing machine? I'm out of there. (Laughter) So maybe he killed 999, but Senator Lathrop and I are the last two and I say, Brother Lathrop, what do you think about this? Cowardice magnifies itself. He says, you go first. I say, uh-uh, you go first. He said, then together let's get out of here. In other words, I don't believe that story, either. I don't believe he killed 1,000 soldiers in armor with the jawbone of a jackass. But now to get to the more serious issue that Senator Carlson raised. Senator Carlson, I don't believe in dodging any issue that is presented that would involve a question to me, whether directly or indirectly. I stated I will always unwaveringly support the right of a woman to decide whether or not she'll carry a pregnancy to term. That can be characterized any kind of way that anybody chooses, and if my being so strongly in support of a woman's right to make that personal, individual, intimate decision makes me a hypocrite, I plead guilty, guilty as charged, but I feel no shame. I feel no need to apologize, and I will always hold to that position. If 1,000 angels stood and said, change your mind, I'd say all you guys are masculine, too, according to the way the "Bible" describes angels; you're just like these people down here on earth. It's easy for a man to say what a woman ought to do with her body, but I think that belongs to the woman. Having ancestors who were slaves, I do not want to see anybody enslaved any kind of way, and I do not want to see women put in the position of slaves where others than themselves control their body and own them like property, can dictate what they must do with their body. That's my view. I will always hold it. And if everybody here disagreed with me, if everybody in the world disagreed with me, then I'm one against the world. And if the number of people on a particular side determines the rightness or wrongness of an issue, then we can do away with conscience, we can do away with morality, we can do away with intellection, because everything is based on a popularity poll. And that's not the way I operate. So this man, whom Senator Carlson obviously believes is a hypocrite, supports anything that's going to lessen or reduce the reach of the death penalty, and if the day ever comes while I'm still in this Legislature... [LB377]

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SENATOR LANGEMEIER: One minute. [LB377]

SENATOR CHAMBERS: ...that I can persuade enough of my colleagues to abolish the death penalty outright, I shall do it. And whatever that makes me, I accept it. I don't do things lightly. Other people's characterization of me matters not a great deal, but their characterization of others will. Because sometimes their characterizations can hurt others deeply in the way that what Don Imus said about those teenage, female, black basketball players were hurt. And to give white people an example, I said suppose I stood on the floor and meant it and said, I saw these white, female volleyball players for Nebraska play and they are some hard-core whores, they are some stringy-headed whores. Now white people wanted to justify Imus and say it wasn't so bad, but when I put it on white teenage girls, then it's a... [LB377]

SENATOR LANGEMEIER: Time. [LB377]

SENATOR CHAMBERS: ...different matter. Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Chambers. You have heard the closing on the amendment to the committee amendments. The question is, shall the amendment to the committee amendments to LB377 be adopted? All those in favor vote yea; all those opposed vote nay. Have all those voted that wish to? Record, Mr. Clerk. [LB377]

CLERK: 42 ayes, 0 nays, Mr. President, on the adoption of Senator Chambers' amendment to the committee amendments. [LB377]

SENATOR LANGEMEIER: AM989 is adopted. Items for the record? [LB377]

CLERK: Mr. President, before we proceed, a new resolution: Senator Hudkins offers LR74, calls for an interim study; and a Reference report referring certain gubernatorial appointees. (Legislative Journal pages 1171-1172.) [LB377 LR74]

SENATOR LANGEMEIER: With that, I raise the call. [LB377]

CLERK: Mr. President, Senator Erdman would move to reconsider the vote just taken with respect to AM989. [LB377]

SENATOR LANGEMEIER: Thank you, Mr. Clerk. Senator Erdman, you are recognized to open on your motion to reconsider. [LB377]

SENATOR ERDMAN: Mr. President, members of the Legislature, I believe I was 1 of the 42 that voted yes, but given the realities of the debate on the committee amendment, should we go back to that at this point, I have no more times to speak. I did

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have additional times to speak on Senator Chambers' amendment and the question was called, and so now I'm going to pursue the opportunity to provide myself the opportunity to speak, and that's appropriate. You want to move the agenda, fine. If you want to take a vote on this today, fine. I was not prepared, nor do I have lined up as other members may, others to yield them time, and so until such point that I can do that, so that we can go back to the committee amendment, I had to offer a motion so that I can speak. So that's simply what I'm trying to do, and I do not intend to take this to a vote. It's simply an opportunity to allow me...allow me the chance to speak which I would not have been afforded on my own time under the committee amendment. I guess I need to clarify or at least state out loud what I've heard from Senator Lathrop and compare it to what I heard from Senator Ashford earlier, because, depending upon when they have spoken, I don't think it's been a consistent message. But I want to make sure that I understand what we're talking about. And to Senator Lathrop's point about moving the water bill, yeah, we did that. That's a decision that we all had to make. We also did that on the Class I bill, and I didn't like that either. So I can stand your point and say that it's not unprecedented what you're asking us to do to move this to Select File. I think that's a point well taken. It's a precedent that's been set here this Legislature. My comfort level with those bills, even though I have strong concerns with LB658, didn't believe I was going to be able to get that resolved because no one was providing a legitimate amendment at that point that could have addressed concerns. I believe Senator Fulton is trying to. But if the intent is to move this bill today, then I can understand the desire of the body to call the question and to try to move this. But let me go back to where I believe there's some discrepancies. Senator Lathrop aptly pointed out the observation of Senator Fulton, that he came to them after the adjournment this morning and said, I'm not convinced, in understanding the law, that you'll ever get a sentence of death. And I believe Senator Lathrop responded and said I think you're right, or acknowledged his observation as to be somewhat more truthful than fiction. And yet earlier my questioning to Senator Ashford was if we can't attain this, essentially, aren't we essentially repealing the death penalty? The answer was no. So I want to make sure that it's clear within the committee itself that's going to be working on this what your intent is. I know what Senator Chambers' intent is, and he knows what mine is. He wants to repeal the death penalty; I don't. And if we're going to have it, I would like to think that we can actually obtain a sentence of death, because otherwise we have effectively done what we couldn't do before. This is an incremental step, but depending upon how high that step is, you may not be able to climb it. [LB377 LB658]

SENATOR LANGEMEIER: This is big league. [LB377]

SENATOR ERDMAN: (Laughter) I'm not sure if that was directed at me. [LB377]

SENATOR LANGEMEIER: Yes. [LB377]

SENATOR ERDMAN: Okay. I think that's a compliment, I'm not sure. Maybe it was an

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insult. But if you can't climb that step, you'll never reach the goal. And so, Senator Lathrop, would you yield to a question? [LB377]

SENATOR LANGEMEIER: Senator Lathrop, would you yield to a question? [LB377]

SENATOR LATHROP: I'd be happy...yes, I'd be happy to. [LB377]

SENATOR ERDMAN: And, Senator Lathrop, I, in what I have observed of your efforts as a member of the Judiciary Committee, whether it was this issue or others, I believe your intent has always been what you have proclaimed it on this floor, and so I'm not questioning that. I'm just seeing a discrepancy between what I've heard earlier, and maybe you can help me. I've got ten minutes here or a majority of that, and my light is next so we can continue this. But is it an accurate reflection that it is not your intent, nor the intent of the committee under LB377, to effectually, directly or indirectly, repeal the death penalty? [LB377]

SENATOR LATHROP: Yes. And to answer your concern, the suggestion that somehow Senator Ashford wasn't being exactly square with you when he said it wasn't a repeal, I think that even as presently constituted LB377 or AM912 would still put people on death row. I think the prosecutors can meet that burden of proof. So this isn't a deception thing that Senator Fulton caught us at. This is an accommodation to Senator Fulton, who I think fairly brought up his concern that it's difficult, beyond a reasonable doubt, to prove a negative, and our intention being to develop a legitimate standard for who gets the death penalty and who doesn't can accommodate Senator Fulton's concerns. [LB377]

SENATOR ERDMAN: And I think that provides additional clarification to what I heard you say earlier, that where Senator Fulton was at was that this was unattainable. You saw the error in that or the reality in that, and I think your additional information provides the clarity, that this is a high bar; its attainability is going to be affected or maybe changed under a potential amendment from Senator Fulton that would be agreed to by you and others. Is that accurate? [LB377]

SENATOR LATHROP: That's accurate. [LB377]

SENATOR ERDMAN: Okay. Thank you, Senator Lathrop. Members of the Legislature, I just want to point out one other observation, and then I believe there are approximately ten lights on. I will withdraw this motion and then I will pursue the opportunity to speak from other members, should they yield me time. But some of the same observations that Senator Fulton provided the body today and the proponents of LB377 and AM912 were some of the same concerns that were presented to the committee at the hearing. So they're not new concerns. And I'm grateful that at least Senator Fulton has the access to bring up the question and to have the opportunity to be able to work with the proponents of this bill. I'll stop there. Mr. President, I would ask this motion be withdrawn

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and that we proceed to the discussion on the committee amendment. Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Erdman. Your motion to reconsider is withdrawn. We return now to discussion on AM912, the committee amendment itself. We had a number of lights on prior to calling the question. We will run down through them, and some of them have already "spoken" and we'll make that note as I get to them. Senator Erdman, you have "spoken"...spoken three times. Senator Adams, you are recognized. I quit. [LB377]

SENATOR ADAMS: Thank you, Mr. President and members of the Legislature. I tell you I rise with hesitancy, hesitancy because since the first time we spoke to this issue I have wrestled with it, and I'm not done. I'm not. So I'm not going to speak to you in the next moment or two with any great insight. I don't have any, nor can I be very eloquent. I hope I can be somewhat articulate. And there certainly won't be the passion in my voice that there has been from others today--compassion, I hope. That's why I wrestle with this. A few weeks ago we talked long and hard about repealing capital punishment. And I felt then and I still feel somewhere here in the pit of my stomach that there is a place for it, but I listened long and hard to that debate. I didn't speak, and I will continue to listen to this one. And the words that I continually heard which haunted me then and caused me to move that bill to Select File so I could hear more debate, those same words I'm hearing today, and they still haunt me. The words are "fairness," "subjectivity," "consistency," "justice." I guess all that I really have to say is this. I'm concerned about LB377. If we punish people, we need to be just. We need to be fair. I don't need to run through the list of terms for you again. And I was concerned a few weeks ago when we talked about capital punishment that maybe we weren't being just and fair. And I was hoping, too, for a way of narrowing and creating a platform that is more just and fair and less subjective. I'm not sure we've arrived at it yet today with this. I'm going to continue to listen to debate, but I'm still struggling to see in this new language where we have removed the subjectivity, where we have made this more fair. Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Adams. Senator Preister, you're recognized. [LB377]

SENATOR PREISTER: Thank you, Honorable President, friends all. Senator Erdman asked if anyone would yield him time. Senator Erdman, if you would like my time, I would yield it to you. Didn't mean to catch you off guard. [LB377]

SENATOR LANGEMEIER: Senator Erdman, 4, 30. [LB377]

SENATOR ERDMAN: Thank you. And, Senator Preister, I do thank you for that. I've been...went through the list, and there is quite a few there, trying to find that opportunity.

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I think we're at that point. We're at that point in this debate that we were just before lunch on the debate on LB476, and I think it's time for a vote to decide where we're at, and I think that's appropriate. I think it's appropriate for the proponents of LB377 and AM912 to have an opportunity to see where they stand today, and I think it's appropriate for the body to decide whether or not this is a more acceptable method than what was presented to the body in LB476. I think it's not. Notwithstanding the work that's been done and the effort that's been undertaken, and it probably won't surprise you of that position, but I am opposed to this amendment. There are things in the amendment that I believe are probably appropriate. If you notice, or maybe you haven't noticed, in AM912 there are probably three main issues that are contained in that. The major one that we have debated today has been the issue regarding the sentencing provisions as outlined as the effective security issue, I believe. That's one of the components. There are other things that are less controversial. In fact, they're probably not controversial at all. But I think the weight of that issue and I think the question surrounding those issues, as they are unresolved at this point, I can't support the amendment and I would ask you not to support it, either. This is more of a...and I asked this to Senator Lathrop earlier, off the mike, and it may be something that simply could be refuted backhandedly, but we have to understand that when we go through this process of making a determination that there is no way that we can ensure the safety of the individuals or the society regarding who would now be eligible for a death penalty, because incarceration is not a viable option, what do we do with those individuals until the time that they actually have their sentence carried out? Because if you can't hold them, for their safety or for the safety of...mainly for the others around them, whether that's society as a whole, as Senator Fulton pointed out, in other states, as outlandish as that is, or whether that's the examples that we have directly here within the population, what vehicles do we use? And maybe they're out there. But then again that comes back to the point that if they're readily available to hold those individuals, you're probably never going to get to the point where you're going to reach a sentence that would prove unanimously by a jury that that threshold has been attained. And maybe that's what the amendment is designed to address. I still think it's problematic. I hope you'll vote against the amendment and, should that fail, I hope you'll vote against the bill. Thank you, Mr. President. [LB377 LB476]

SENATOR LANGEMEIER: Thank you, Senator Erdman and Senator Preister. Senator Ashford's light is next. He has spoken three times. Moving down, Senator Loudon, you are recognized. [LB377]

SENATOR LOUDEN: I'll give my time to Senator Friend. [LB377]

SENATOR LANGEMEIER: Senator Friend, 4, 50. [LB377]

SENATOR FRIEND: Thank you, Senator Loudon. Mr. President and members of the Legislature, Senator Pirsch earlier had given me the opportunity to make this point and I

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don't know if I ran out of time, had about a minute. I wanted to touch on it again real fast. And I asked a rhetorical question, I guess, whether or not it's constitutional--it may be; it's a rhetorical question I'm throwing out there--to expose a particular person, a terrorist, a mob boss, a gangster, whatever, I mean somebody who is striking fear into society, to expose that particular person to increased punishment based on what the finders of fact believe that he may do. Senator Kruse had pointed earlier, and it may have been in reference to me, that we've tossed out the term "arbitrary" quite a bit here, about judicial...arbitrary judicial behavior. I'm concerned about arbitrary judicial behavior. I do assume that we have arbitrary judicial behavior right now and I always point to Senator Aguilar, because he has brought out almost...virtually a fact that there is arbitrary judicial behavior right now based on some of the examples that he gave earlier, not just on this bill but the bill, the previous bill, LB476. While this bill may not exacerbate that arbitrary judicial behavior, it doesn't repair it. It does not fix it. This language doesn't ease my concern, members of the Legislature, it just doesn't. And I truly do appreciate this debate. I'm not going to say much more on this. I appreciate Senator Louden yielding his time. I don't know if I get the feeling that people want to move on now or not, and I guess we'll find out. I just finally wanted to let you know how I felt about it, and thanks for hearing me out. Thank you, Mr. President. [LB377 LB476]

SENATOR LANGEMEIER: Thank you, Senator Friend and Senator Louden. Senator Avery, you are recognized. [LB377]

SENATOR AVERY: Thank you, Mr. President. I had not planned to speak on this issue again, but I felt compelled to do so because there appears to be a lingering feeling in the body that the death penalty may not be administered in an unfair and inconsistent manner. We might hope that is not so. We might hope that people on trial for a capital crime are represented by someone who provides first-rate rigorous and skillful defense. We might hope that the defendant is represented by someone who cares about the possible fatal consequences of a weak defense and would do all within his or her power to prevent that from happening. We might also hope that the courts will carefully follow evidentiary and procedural rules. We might hope that juries are unbiased, not prone to impose the death penalty in an unfair and inconsistent manner. Note that I have been using the word "hope." Hope is like faith. It is the substance of things desired but the evidence of things not seen. We must not place our confidence in the fairness and consistency of the death penalty on hope. Confidence must flow from concrete experience, and we do not have that. And this should make us all very uneasy. It should make us all stop and think about what we are doing. I want, again, to quote Justice Blackmun's comments on the death penalty in 1994: Twenty years have passed since this court declared that the death penalty must be imposed fairly and with reasonable consistency, or not at all. Let me repeat that. It must be imposed fairly and with reasonable consistency, or not at all. That's the Supreme Court's statement in 1974 (sic). He went on to write that despite the effort of states and courts to devise formulas and procedural rules to meet this challenge, the death penalty remains fraught with

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arbitrariness, discrimination, and mistake. I ask you how we can leave the current law unchanged in light of these facts and in light of this assessment of the death penalty by a member of the highest court of the land. I believe that AM912 moves us toward a more just capital punishment system in Nebraska. You know that I struggled with this issue. I came into this body as a proponent of the death penalty. I have reexamined that position. I like this amendment, and I hope that we'll move it to Select File. Thank you. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Avery. Wishing to speak we have Pedersen, Carlson, Aguilar, Schimek, Karpisek, Nelson, Wallman, and Gay. Senator Pedersen, you are recognized. [LB377]

SENATOR PEDERSEN: Thank you, Mr. President. I'd give my time to Senator Chambers. [LB377]

SENATOR LANGEMEIER: Senator Chambers is not on the floor, to my knowledge. [LB377]

SENATOR PEDERSEN: Senator Ashford. [LB377]

SENATOR LANGEMEIER: Senator Ashford, 4, 40. [LB377]

SENATOR ASHFORD: Thank you, Mr. President. I guess I can't give my time to anybody else, can I, at this point. You know, I'm not going to say anything more at this point. I think it would be...I do think it's appropriate that we move towards a vote on this matter. We've had, with LB476, we've had I guess three days of full debate. I am extremely grateful to all of you for participating and for your conscientious willingness to address this issue in its modified form. With that, Mr. President, I would just yield. Thank you. [LB377 LB476]

SENATOR LANGEMEIER: Thank you, Senator Ashford, Senator Pedersen. Senator Carlson, you are recognized. [LB377]

SENATOR CARLSON: Mr. President, members of the Legislature, I would like to address a question to Senator...Speaker Flood, if he would yield. [LB377]

SENATOR LANGEMEIER: Senator Flood, would you yield to a question? [LB377]

SPEAKER FLOOD: Yes. [LB377]

SENATOR CARLSON: Speaker Flood, I think that I understand some things about retribution. Certainly, if you cause an accident and I was injured and I would expect some kind of a payment in retribution, but would you explain your justification for

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retribution as a reason to inflict the death penalty? [LB377]

SPEAKER FLOOD: Senator Carlson, I...my position remains that of the theories of the purpose of criminal punishment and the theories of punishment, among the theories is retribution. In fact, I think it's the oldest form of punishment and the one, in my opinion, which still commands considerable respect from the public. Like it or not, I think our criminal justice system is based on, in part, retribution. And knowing that you were going to ask me that question, I did look up a treatise of criminal law and looked under theories of punishment. It lists prevention, restraint, rehabilitation, deterrence, education, and retribution. And those are similar to the ones we've already talked about. But the U.S. Supreme Court, in its Gregg v. Georgia ruling in 1976, listed and said the death penalty is said to serve two principal social purposes, those being retribution and deterrence of capital crimes by prospective offenders. And I believe that retribution is part of the reasoning central to my decision that we should retain the death penalty in Nebraska. It's your time. I don't want to go any further. [LB377]

SENATOR CARLSON: Okay. I may ask you a follow-up question here to help clarify for me. What do you feel is the difference between retribution and revenge? [LB377]

SPEAKER FLOOD: Honestly, very little. [LB377]

SENATOR CARLSON: Okay. Okay, that's enough for right...I appreciate that, because that's what I would think it is, too, and here's part of the reason. I'll get back to...I'm struggling with this. When we debated the death penalty earlier, I read that Jesus said do not repay anyone evil for evil; do not take revenge, but leave room for God's wrath; it is mine to avenge and I will repay, says the Lord. Part of my struggle in this whole thing is that, talking about Christians and Christian beliefs, I sometimes don't even use the term "Christian" because many times it's used very loosely. If somebody indicated to me they're Christian and I said, why, they may say, because when I grew up we had a Bible in the house. But I use the term "believers," and I've had believers insinuate that I couldn't be one if I support the death penalty. Others would tell me I couldn't be one if I'm against the death penalty. Now I guarantee you my views on the death penalty don't determine whether or not I'm a believer. It's based on my accepting what the Bible says that Jesus did for me in spite of my flaws. And I don't believe retribution can be defended as a reason for the death penalty. I struggle with that. So this is serious business. I hope it's a struggle for the rest of you and maybe, if not, you should ask why. Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Carlson. Senator Aguilar, you are recognized. [LB377]

SENATOR AGUILAR: Thank you, Mr. President, members. I'm just going to speak briefly to something Senator Pirsch, I believe, brought up, talking about he wanted to

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know if I was aware of a study that took place here in regard to racial bias and the death penalty. I believe I was in the Legislature at that time. I'm very much aware of the study. Senator Erdman also asked me about the very same study, if I was aware of it, and same answer. But there's things that weren't asked in that study, and I will relay to you a study by the United States General Accounting Office that took place and asked some of the same questions and went on to ask further questions. In 82 percent of the studies, race of victim was found to be...found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. These findings...this finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques. The finding held for high, medium, and low quality studies. The race of victim influence was found at all stages of the criminal justice system process. Although there were variations among studies as to whether there was a race of victim influence at specific stages, the evidence for the race of victim influence was stronger for the earlier stages of judicial process prosecutorial decision to charge defendant with a capital offense, decision to proceed to trial rather than plea bargain than in the later stages. This was because the earlier stages was comprised of larger samples, allowing for more rigorous analysis. However, decisions made at every stage of the process necessarily affect an individual's likelihood of being sentenced to death. With that, I would yield the rest of my time to Senator Chambers. [LB377]

SENATOR LANGEMEIER: Senator Chambers, three minutes. [LB377]

SENATOR CHAMBERS: Thank you, Senator Aguilar. Thank you, Mr. President. And that study had to have some modifications made in it, and the man who made it had gone away on a trip to the South Seas, so the Governor, the then-Governor and Attorney General represented they said what it meant when they read an executive summary. So that study has been misused by a lot of people. But the Nebraska Supreme Court has a committee--I don't know if they call it the Committee on Diversity or what--but they've been studying the system for years, and Senator Pirsch may not know this, but they found out that there's racial discrimination in the charging, in the sentencing, and in the courtroom treatment. Now while he was prosecuting he probably didn't notice any of these things, but this, you can get this from the Nebraska Supreme Court. Go ask the court administrator for some of the studies they've done, and it deals directly with Nebraska. But there is something I want to get across to my colleagues who may believe Senator Carlson and may not. If I were a Roman senator, Jesus may not have ever been executed. They'd have come to me. They'd say, Senator, we got this little Jewish fellow out there, nobody likes him, the religious people say kill him. I say, well, what for? Well, he said things that they don't like. I say, so what? Well, that's a capital offense. I say, and what are you asking me? They say, what should we do with him? I say, turn him loose, that's what you ought to do with him. But, see, you didn't have a senator like me in the Roman senate, so an innocent man was executed, as

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innocent men have been executed in America. And Senator Carlson, I do think a person's attitude on the death penalty says something about what he or she is, because they know that innocent people have been executed. And if you can be comfortable with the state killing innocent people, your morals don't exist. Everything you say is suspect. Everything you say is flawed. [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR CHAMBERS: And everything is political. And some of you on this floor told me why you couldn't vote against the death penalty, and it had nothing to do with morality. It had to do with what your constituents would say. They ought to be here instead of you. You are supposed to set the standard. You are supposed to be the one who is the teacher, who is the uplifter, the ennobler of society. But like a lap dog you run behind slobbering and going where the ones who are uninformed tell you you'd better go. We all decide what we're going to do and you've chosen one path, I've chosen another. But I'm going to make judgments on you all on the basis of what you say your moral principles are, not mine, but on the basis of what you claim to believe. Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Chambers and Senator Aguilar. Senator Schimek, you are recognized. [LB377]

SENATOR SCHIMEK: Thank you, Mr. President. I'd like to ask if Senator Chambers would like to use my time. [LB377]

SENATOR LANGEMEIER: Senator Chambers, 4, 50. [LB377]

SENATOR CHAMBERS: Thank you, Mr. President. Thank you, Senator Schimek. Members of the Legislature, all these lawyers and all of these righteous people, you're not listening to anything. Senator Wightman is not listening to anything. Senator Harms, who doesn't like to hear us say that we ought to approach it this way instead of correcting everything else. Senator Flood is not listening. Senator Friend definitely is not listening. Let me tell you why, and why what you all say to me goes in one ear and out the other. You can say it's because my head is empty, whatever you want to, but that's what it amounts to. The majority of people sentenced to death row in Nebraska, Senator Harms, were found to have been sentenced contrary to the law and the constitution, and the majority were taken off death row. Senator Erdman is not hearing that. Senator Friend is not hearing it. Senator Flood is not hearing it. You know why? Because there's something other than doing the right thing that's motivating them. Something happened in their district. It's as simple as that. And when Senator Flood has to answer a question by reading what somebody in a treatise said about retribution, it's clear it can't be his conviction. I don't have to read what somebody else said to tell you what my conviction is. But again, I live my life according to different standards from those of the people on

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the floor of the Legislature, so I don't expect you to do like I do. I expect you to be utilitarians. I expect you to do what is convenient, what is easy, what is politically acceptable. But there was a guy named Ralph Waldo Emerson. I don't know what he believed or didn't believe, but he said God does not make his works manifest through cowards. That's what Ralph Waldo Emerson, a white man, said, writing to and about other white people--God does not make his works manifest through cowards. So why do you all pray here every morning? I bring it up because you all do, and it ought to mean something to you. You'd have been right there with them when they said, Jesus is there and Barabbas is there, which one should I let go? And when the crowd said, the religious leader said, release unto us Barabbas, so the crowd said Barabbas. So they say, Senator Friend, who should we release, Barabbas? Senator Erdman, who should we release, Barabbas? And right down the line. I've watched you all on other issues, and I've listened to you. I've listened to you, and some of you have talked to me directly. You ought to wish that I'd be the one on Judgment Day, because as bad as some of you are and as weak as some of you are, not one of you would go to hell. I couldn't do that. I'm not righteous enough to send somebody to hell. I'm not godly enough to send somebody to hell and burn forever. Now this might shock some of you. I don't even think Hitler should have suffered the death penalty if they caught him. I don't Adolph Eichmann should have been hanged by the Jews. I don't think the man who shot Martin Luther King should have been executed, and he wasn't. James Earl Ray died in prison. I don't think anybody ought to be killed by the state, not anybody. My principles are not based on religion so, Senator Carlson, they're not elastic, where today I stretch them to take in something that's convenient, then I contract them tomorrow so that they leave out that which would be inconvenient for me to have to stand up for. [LB377]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR CHAMBERS: Whatever the consequences that go along with my views, whatever the consequences are I bear them, and I'd rather ten years from now look back on what I've said and the positions I've taken than some of the positions that my colleagues have taken, measured against their own words and their own advocacy on other issues. I can look anybody in the eye. I don't have to hang my head. But then, Senator Carlson, I don't believe in all these things, where I walk around with a heavy weight of guilt because I don't have a heaven to send somebody to or a hell to put them in, and I only have to do what I think is right. It just happens that what I think is right is that the state should not kill anybody, the state should lead and guide citizens to a higher level of civilization, refinement, and nobility. And maybe that's naive and foolish, but I think that's what the state should be doing with its policies. Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Chambers and Senator Schimek. Senator Karpisek, you're recognized. [LB377]

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SENATOR KARPISEK: Thank you, Mr. President. Members of the Legislature, as I spoke last time, Senator Chambers wondered what religion I must be. I will confess I'm a Methodist, and many of the Methodists probably will shudder at that, and I am not a very astute Christian. I have learned more from the Bible in these few months, Senator Chambers, from you, whether you like that or not, than I have. So my stance on this also is not from the Bible. Senator Carlson, I am a believer. Again, I'm a very poor believer and I have learned a lot from you, too, and I do enjoy the banter between you two. But I do not go back to that, as my thinking, of going to the Bible. Does that make it a little easier for me than you, Senator Carlson? Probably it does. Again, I'm not proud of that, but that's how I feel in my gut. Senator Chambers said there are people here that don't agree with you. I know that. I know that full well. Maybe no one here agrees with me. But I do feel that I need to say the way I do feel. I don't like that all of this has come down to another racial issue. It's ridiculous that we cannot get over that in how many hundreds of years we've been here, that people are still being treated differently, and I'm ashamed of us for acting like that, because there should not be any of that. Is there? Sure. Senator Carlson asked that we look inside ourselves. I have. E-mailed one of my good friends today and I said, boy, this thing has really turned me inside out. I know how I feel, but I have to start asking myself why. Senator Chambers brings up all these wonderful ideas that I have to ask myself why. You know, I always felt this way, but why? It's tough. And I have thought about it and I have struggled and I have still come up to the same conclusion, although I'm not probably as firm and solid as I was before. I cannot support LB912 nor...or, I'm sorry, AM912 or LB377, but I do appreciate that we have talked about it. I appreciate the thoughtfulness, and I hope that we can all walk away from this and feel that we have done the right thing, because at the end of the day we do have to live with ourselves. Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Karpisek. Senator Wallman, you're recognized. [LB377]

SENATOR WALLMAN: Thank you, Mr. President, members of the body. Call the question. [LB377]

SENATOR LANGEMEIER: The question has been called. Do I see five hands? I do see five hands. The question is, shall debate cease? All those in favor vote yea; all those opposed vote nay. For what purpose do you rise? [LB377]

SENATOR WALLMAN: Call of the house. [LB377]

SENATOR LANGEMEIER: There has been a request for a call of the house. The question is, shall the house go under call? All those in favor vote yea; all those opposed vote nay. Record, Mr. Clerk. [LB377]

CLERK: 34 ayes, 1 nay, Mr. President, to place the house under call. [LB377]

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SENATOR LANGEMEIER: The house is under call. Senators, please record your presence. All those senators outside the Chamber, please return to the Chamber and record your presence. All unauthorized personnel please leave the floor. The house is under call. Senator Raikes, Senator Engel, Senator Stuthman, please return to the Chamber. The house is under call. While we're waiting for them to call, how would you wish to proceed? [LB377]

SENATOR WALLMAN: Call-in vote. [LB377]

SENATOR LANGEMEIER: Thank you, Senator. All senators are present or accounted for. The question is, shall debate cease? The Senator has requested call-in votes. Mr. Clerk. [LB377]

CLERK: Senator Mines voting yes. Senator Nantkes voting yes. Senator Engel voting yes. Senator Cornett voting yes. Senator Pahls voting yes. Senator Stuthman voting yes. Senator McDonald voting yes. [LB377]

SENATOR LANGEMEIER: Record, Mr. Clerk. [LB377]

CLERK: 25 ayes, 10 nays to cease debate, Mr. President. [LB377]

SENATOR LANGEMEIER: Debate does cease. Senator Ashford, you are recognized to close on the committee amendments, AM912. [LB377]

SENATOR ASHFORD: Thank you very much, Mr. President. Thank you all. I would close relatively briefly just by reiterating what my good friend Senator Flood talked about. In response to a question about justification for the death penalty, he named three reasons, at least three reasons that the Supreme Court has talked about, that justify...could justify the death penalty, and one of those reasons is retribution or revenge. And we've talked about that. The other one is deterrence, and we've talked about deterrence in many ways throughout this debate, and certain in the debate...on the debate on...in the debate on LB476. It is not a deterrent. There is no question that it is not a deterrent. No penalty that is as inconsistently applied can possibly be a deterrent. Does...is the death penalty or the imposition of the death penalty justified by...for the reasons of public safety? And I think we have addressed that issue in AM912 very clearly and concisely. And I was struck by what Senator Adams talked about because I think that's where most Nebraskans are, Senator Adams. I think that's where I am, as I come into this body and I look at this poll, and polls are polls. But the question that was asked of 500 Nebraskans was this: The Legislature is considering another proposal concerning the death penalty. This proposal would require life imprisonment without the possibility of parole, but would maintain the death penalty in cases where a jury finds the person to be too dangerous to be in prison for life. Thinking

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about that proposal, would you favor or oppose it? Sixty-two percent of Nebraskans would favor such a proposal. Twenty-eight percent oppose. The actual split on repeal is about fifty-fifty. We are here today because, like the Nebraskans that we represent, we are conflicted by this issue. There can be no other conclusion than that. The reason that I brought this bill to you and the reason that I talked to my colleague Senator Fulton is because I want to resolve it. I want to resolve it for Senator Adams because I think his comments represent the comments of so many, the thoughts of so many across the state. I'm not going to sit here and say, gee, just vote this over to Select File and we'll clean it up. I'm not going to go through that. I'm not...I've been here too long to say that. I think the bill should advance. Certainly we're going to try to work on it. We're going to work on it with Senator Fulton and anybody else who would like to work on it. The Judiciary Committee stands ready to improve it, if that's necessary or appropriate. I believe we've met our burden today. I believe we've met our burden that there is great confusion in this state about the death penalty. There's great uncertainty, as Senator Harms talks about why doesn't this thing work, why doesn't our criminal justice system work? There is tremendous confusion about that. The debate about the death penalty is a debate and a discussion about our criminal justice system. Sure, I'd like to do more. I'd like to reform the criminal justice system if I could. That's a big order, it's a tall order, and Legislatures in the future are going to have to deal with that, as well as our Legislature. In conclusion, members,... [LB377 LB476]

SENATOR LANGEMEIER: One minute. [LB377]

SENATOR ASHFORD: ...I would urge you to move this bill across because the burden has been met. The burden has been met that there is inconsistency and arbitrary application of the death penalty, but that doesn't mean we have to repeal the death penalty and, folks, this does not repeal the death penalty. I urge the advancement...adoption of this amendment and the advancement of LB377. Thank you, Mr. President. [LB377]

SENATOR LANGEMEIER: Thank you, Senator Ashford. You have heard the closing on the committee amendments offered by the Judiciary Committee. The question is, shall the committee amendments to LB377 be adopted? All those in favor vote yea; all those opposed vote nay. Have all those voted that wish to? Record, Mr. Clerk. [LB377]

CLERK: 23 ayes, 25 nays, Mr. President, on adoption of the committee amendments. [LB377]

SENATOR LANGEMEIER: The committee amendments are not adopted. The body will stand at ease for a few minutes. With that, I would raise the call. Mr. Clerk, for a motion. [LB377]

CLERK: Mr. President, Speaker Flood would move to adjourn until Friday morning, April

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13, at 9:00 a.m.

SENATOR LANGEMEIER: The motion before the body is to adjourn until Friday, April 13, at 9:00 a.m. All those in favor say aye. All those opposed say nay. The ayes have it. We are adjourned.