

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

Floor Debate
May 18, 2009

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SENATOR LANGEMEIER PRESIDING []

SENATOR LANGEMEIER: Good morning, ladies and gentlemen. Welcome to the George W. Norris Legislative Chamber for this, the eightieth day of the One Hundred First Legislature, First Session. Our chaplain for today is Father Jim Kramper from St. Peter's Church, Ewing, Nebraska, Senator Dierks's district. Please rise. []

FATHER KRAMPER: (Prayer offered.) []

SENATOR LANGEMEIER: Thank you. I call to order the eightieth day of the One Hundred First Legislature, First Session. Senators, please record your presence. Mr. Clerk, please record. []

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

SENATOR LANGEMEIER: Thank you. Are there any corrections for the Journal? []

CLERK: I have no corrections. []

SENATOR LANGEMEIER: Thank you. Are there any messages, reports, or announcements? []

CLERK: Mr. President, your Committee on Enrollment and Review reports they've examined and reviewed LB675 and recommend that it be placed on Select File with Enrollment and Review amendments attached. Enrollment and Review also reports they've reviewed and examined and engrossed LB35 and find it correctly engrossed; LB35A, LB63, LB63A, LB626, and LB630. That's all that I have, Mr. President. (Legislative Journal pages 1507-1514.) [LB675 LB35 LB35A LB63 LB63A LB626 LB630]

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SENATOR LANGEMEIER: Thank you. Speaker Flood, you are recognized for an announcement. []

SPEAKER FLOOD: Thank you, Mr. President. Good morning, members. To put an end to the speculation, I want to let you know that it is my intention to structure the next two weeks of session to allow the body the opportunity to adjourn sine die for the 2009 session on Friday, May 29, 2009. This is not a decision made solely by the Speaker, but by the Legislature as a body, as any motion to adjourn to sine die will take a majority vote. However, to afford the body the opportunity to adjourn for the session early, I will be making scheduling decisions with that in mind. In the next few days, I will be speaking with each one of you individually on this issue, seeking your input and thoughts on early adjournment. Several factors have gone into my decision to allow an early adjournment for the session. By May 29, the Legislature will have addressed each of the 104 priority bills designated by the individual members and committees as priorities for 2009 that were advanced to General File for consideration. As of today, the Legislature has passed into law 42 of the 104 priority bills with another 34 sitting on Final Reading. The only priority bill on General File available for scheduling is on today's agenda, that's LB36. Only nine priority bills remain to be addressed on Select File. Addressing each of the available priority bills is the goal of each legislative session, but has not always been accomplished, even in 90 days. We will have done it in 87. As a body, we have tackled the state's most significant issues within our designated priorities that will impact the lives of Nebraskans. To name a few: taking steps to follow through on our promise to address behavioral health services for adolescents as identified through the safe haven law; providing oversight to the state's developmentally disabled population and prioritizing through our appropriations services for those who remain on the DD waiting list; developing a sound state budget with a very conservative 1 percent General Fund increase during these tight economic times; adjusting the state aid to schools' formula to fit within our existing financial resources and work for the needs of both urban and rural school districts; appropriating \$1.3 billion out of the stimulus package in the best manner to benefit all Nebraskans; adopting procedures to ensure public benefits are not utilized by illegal immigrants; advancing anticrime legislation to address gang and illegal weapons activity; advancing towards further utilization of wind power and development in Nebraska; the state's retirement programs will be on solid footing after making tough decisions now instead of kicking the can down the road; and we dealt with our budget situation with no tax increases. We are considering one of the largest consent calendars in recent history, allowing several of the easy measures to be dealt with quickly. It's also important to note that the body has amended 77 bills or portions thereof into other bills. Of those 77 bills, 38 are currently sitting on General File and will be IPPed prior to sine die adjournment. These 38 bills are listed on the worksheet currently and provide an "inflative" picture of what bills have not been dealt with. At the end of this session, we will leave only about 55 bills on General File. This is far fewer than the 100-plus bills left on General File in many prior years, including the two years the Legislature adjourned one day early in 2003 and 1999. Plus, we will be

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taking up bills on day four of the Second Session that starts on January 6, 2010. It's important to remember when we come back next year we will not have priority bills designated by day four. We will be back on General File. So if your bill is on General File early, there's a very good chance it's going to come up on worksheet order. I will structure the agenda in the next two weeks to ensure that early adjournment sine die will not endanger any bills with a pocket veto. That is our prerogative as a Legislature to ensure that you have the opportunity to override a Governor's veto if that happens. Some might question how we were able to do so much in a shorter time frame than usual. I believe, personally, the reasons include the following: (1) Fewer bills were introduced this year, allowing us to use and address a greater percentage of the bills introduced and advanced by committee for consideration by the full body; (2) Committees have worked hard in committee on bills to address issues before they come to the floor; (3) The Appropriations Committee made hard decisions in committee and fought to find consensus; (4) In tight budget years, less money means fewer programs that can be created or expanded; (5) Our members work with each other in a collegial manner. To date this session, we have had only one cloture motion. And finally, we have worked late, we have worked through lunch, we have stayed long, and we've done our work. And it's what was accomplished that matters. It's not how many bills you pass. It's have you addressed the state's problems? I'm proud of this session. I'm proud of this Legislature. And I believe, personally, that we can go home on the 87th day knowing we have done the people's business. While the specifics of the next two weeks remain fluid based on how much is accomplished each day, I do want to provide you with a general outline. Today, as you can see from our agenda, we are considering Final Reading this morning of bills that have no General Fund impact. This afternoon we will begin debate of LB36, the lethal injection bill. By midnight Tuesday, the Governor has to get any vetoes back to us on our budget. We will take up any overrides on Wednesday. Once the budget is finalized, we will take up the Final Reading bills that have a General Fund impact within a couple of days of handling any override motions. And additionally, I will be filling in the agenda around these items with bills on Select File, Final Reading, and our consent calendar bills and other Final Reading bills as they become available to read. Again, this isn't my decision as the Speaker; it's our decision as a Legislature. I'm going to talk to each one of you to determine if there is consensus as to what the date of adjournment sine die will be. It is important that we make this decision as a Legislature. Once those discussions take place, I will announce the agreed-upon sine die adjournment date. Thank you, Mr. President. []

SENATOR LANGEMEIER: Thank you, Speaker Flood. Mr. Clerk, we will now move to Final Reading. Members should return to their seats in preparation for Final Reading. []

SPEAKER FLOOD PRESIDING []

SPEAKER FLOOD: (Visitors introduced.) Members, please find your seats. Mr. Clerk, the first bill on Final Reading is LB155. [LB155]

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CLERK: Mr. President, Senator Rogert would move to return LB155 to Select File for specific amendment, specifically AM1432. (Legislative Journal page 1503.) [LB155]

SPEAKER FLOOD: Senator Rogert, you're recognized on your motion to return LB155 to Select File for specific amendment. [LB155]

SENATOR ROBERT: Thank you, Mr. President. Good morning, members of the body. Today we are going to do some things that we do once in awhile as we're moving through and especially in a year when we have a budget problem. First thing we did last week on Select File is I added an amendment that added a little bit of language. It was drafted incorrectly. This amendment reinserts...it strikes that, what we added, and reputs it...puts it in there in the correct form. We also added LB190, which is a bill from Senator Avery that talked about DNA collection for felony convictions. And with the addition of that bill, we've come up with an A bill for that, of which we don't have money to pay for this year, so this amendment also strikes that. So I would encourage your vote to return this back to Select File and then I will open on the amendment. Thank you, Mr. President. [LB155 LB190]

SPEAKER FLOOD: Thank you, Senator Rogert. Members, you've heard the opening on Senator Rogert's motion to return LB155 to Select File for a specific amendment. There are no senators wishing to speak. Senator Rogert, you're recognized to close. Senator Rogert waives his opportunity. The question before the body is, shall LB155 return to Select File for a specific amendment? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB155]

CLERK: 49 ayes, 0 nays, Mr. President, to return the bill. [LB155]

SPEAKER FLOOD: LB155 is returned to Select File. Mr. Clerk. [LB155]

CLERK: Mr. President, Senator Rogert, AM1432. [LB155]

SPEAKER FLOOD: Senator Rogert, you're recognized to open on AM1432. [LB155]

SENATOR ROBERT: Thank you, Mr. President. First of all, I want to say I don't think I've ever gotten 49 greens on anything, so I'll take that. Thanks for your vote to return this back to Select File. Once again, what we're doing, the language we added referenced Section 87-302 to talk about the way some deceptive advertising is done and gas pump provisions. What we did in this amendment, we actually have to reference that section, which we added a new section, Section 21, and then put the language in there on page 2 of the amendment in lines 9 and 10. We also are striking my other amendment from last week that was poorly drafted and my Avery amendment, which was AM1399, which was LB190. Unfortunately, we are in a position where we

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don't have a bunch of extra cash to spend on some things that I believe are good public policy and we'll get to it someday. I...Senator Avery and I have promised to work on that together. But I encourage your adoption of this amendment. With that, I'll yield the rest of my time to Senator Avery. [LB155 LB190]

SPEAKER FLOOD: Senator Avery, you have 8 minutes, 55 seconds. [LB155]

SENATOR AVERY: Thank you, Mr. President. Good morning, colleagues. Senator Rogert and I have discussed pulling off LB190 from LB155. This is in recognition of the fiscal problems the state faces. I believe the fiscal note on LB190 was somewhere in the range of \$232,000 in the first year and \$97,000 in the second year. I recognize that we can't afford that. I have an agreement with the Attorney General's Office that we will spend the interim looking for alternative financing for what I think is an important bill to require DNA testing of all convicted incarcerated felons in this state. The hope is that we'll be able to find federal grant money but I can assure you that the Attorney General is committed to making this work and finding the funding and finding it outside the General Fund. Thank you. [LB155 LB190]

SPEAKER FLOOD: Thank you, Senator Avery. Members, you've heard the opening on AM1432. There are no members wishing to speak. Senator Rogert is recognized to close. He waives his opportunity. The question before the body is shall AM1432 be adopted? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB155]

CLERK: 46 ayes, 1 nay, Mr. President, on the adoption of the Select File amendment. [LB155]

SPEAKER FLOOD: AM1432 is adopted. Mr. Clerk. [LB155]

CLERK: I have nothing further, Mr. President. [LB155]

SPEAKER FLOOD: Senator Nordquist for a motion. [LB155]

SENATOR NORDQUIST: Mr. President, I move LB155 to E&R for engrossing. [LB155]

SPEAKER FLOOD: Members, you've heard the motion. All those in favor say aye. Those opposed say nay. LB155 is advanced to E&R for engrossing. Mr. Clerk, we now proceed to LB97E, where the first vote is to dispense to with the at-large reading. All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB155 LB97]

CLERK: 40 ayes, 0 nays, Mr. President, to dispense with the at-large reading. [LB97]

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SPEAKER FLOOD: The at-large reading is dispensed with. Mr. Clerk, please read the title. [LB97]

CLERK: (Read title of LB97.) [LB97]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied with, the question is, shall LB97E pass with the emergency clause attached? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB97]

CLERK: (Record vote read, Legislative Journal pages 1515-1516.) 48 ayes, 0 nays, 1 present and not voting, Mr. President. [LB97]

SPEAKER FLOOD: LB97E passes with the emergency clause attached. Mr. Clerk, LB97A. [LB97 LB97A]

CLERK: (Read LB97A on Final Reading.) [LB97A]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied with, the question is, shall LB97A pass? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB97A]

CLERK: (Record vote read, Legislative Journal page 1516.) 48 ayes, 0 nays, 1 present and not voting, Mr. President. [LB97A]

SPEAKER FLOOD: LB97A passes. (Visitors and doctor of the day introduced.) Mr. Clerk, the next bill on Final Reading is LB187E. [LB97A LB187]

CLERK: (Read LB187 on Final Reading.) [LB187]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied with, the question is, shall LB187E pass with the emergency clause attached? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB187]

CLERK: (Record vote read, Legislative Journal page 1517.) 49 ayes, 0 nays, Mr. President, on the passage of the bill. [LB187]

SPEAKER FLOOD: LB187E passes with the emergency clause attached. Mr. Clerk, we now proceed to LB195 where the first vote is to dispense with the at-large reading. All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB187 LB195]

CLERK: 48 ayes, 0 nays, Mr. President, to dispense with the at-large reading. [LB195]

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SPEAKER FLOOD: The at-large reading is dispensed with. Please read the title.
[LB195]

CLERK: (Read title of LB195.) [LB195]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied with, the question is, shall LB195 pass? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB195]

CLERK: (Record vote read, Legislative Journal page 1518.) 49 ayes, 0 nays, Mr. President. [LB195]

SPEAKER FLOOD: LB195 passes. Mr. Clerk, LB232. [LB195 LB232]

CLERK: (Read LB232 on Final Reading.) [LB232]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied with, the question is, shall LB232 pass? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB232]

CLERK: (Record vote read, Legislative Journal page 1519.) 47 ayes, 0 nays, 2 present and not voting, Mr. President. [LB232]

SPEAKER FLOOD: LB232 passes. Mr. Clerk, LB342. [LB232 LB342]

CLERK: (Read LB342 on Final Reading.) [LB342]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied with, the question is, shall LB342 pass? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB342]

CLERK: (Record vote read, Legislative Journal pages 1519-1520.) 49 ayes, 0 nays, Mr. President. [LB342]

SPEAKER FLOOD: LB342 passes. Mr. Clerk, LB342A. [LB342 LB342A]

CLERK: (Read LB342A on Final Reading.) [LB342A]

SPEAKER FLOOD: All provisions of law relative to procedure, the question is, shall LB342A pass? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB342A]

CLERK: (Record vote read, Legislative Journal page 1520.) 49 ayes, 0 nays, Mr.

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President, on the passage. [LB342A]

SPEAKER FLOOD: LB342A passes. Mr. Clerk, LB402E. [LB342A LB402]

CLERK: (Read LB402 on Final Reading.) [LB402]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied with, the question is, shall LB402E pass with the emergency clause attached? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB402]

CLERK: (Record vote read, Legislative Journal page 1521.) 49 ayes, 0 nays, Mr. President, on the passage of the bill. [LB402]

SPEAKER FLOOD: LB402E passes with the emergency clause attached. Mr. Clerk, LB463. [LB402 LB463]

CLERK: (Read LB463 on Final Reading.) [LB463]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied with, the question is, shall LB463 pass? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB463]

CLERK: (Record vote read, Legislative Journal pages 1521-1522.) 49 ayes, 0 nays, Mr. President, on passage of the bill. [LB463]

SPEAKER FLOOD: LB463 passes. Mr. Clerk, LB463A. [LB463 LB463A]

CLERK: (Read LB463A on Final Reading.) [LB463A]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied with, the question is, shall LB463A pass? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB463A]

CLERK: (Record vote read, Legislative Journal page 1522.) 49 ayes, 0 nays on the passage of LB463A. [LB463A]

SPEAKER FLOOD: LB463A passes. Mr. Clerk, LB476E. [LB463A LB476]

CLERK: (Read LB476 on Final Reading.) [LB476]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied with, the question is, shall LB476E pass with the emergency clause attached? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB476]

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CLERK: (Record vote read, Legislative Journal pages 1522-1523.) 49 ayes, 0 nays on the passage of LB476, Mr. President. [LB476]

SPEAKER FLOOD: LB476E passes with the emergency clause attached. Mr. Clerk, LB476AE. [LB476 LB476A]

CLERK: Mr. President, I have a motion. Senator Stuthman would move to return the bill for specific amendment. [LB476A]

SPEAKER FLOOD: Senator Stuthman, you are recognized to open on our motion to return LB476AE to Select File for a specific amendment. [LB476A]

SENATOR STUTHMAN: Thank you, Mr. Speaker and members of the body. I just want to have a moment here to get something on the record. There was a little bit of confusion when it passed the last time as far as the funding of this bill and the maintenance of effort, but since that time we've been assured and the Department of Education has been assured by the federal Perkins Grant Program that the maintenance of effort will not be a concern with LB476. So we have pretty well cleared that up and we wanted to get that on the record, that it is not a concern as far as the maintenance of effort. And at this time, I would like to ask that we remove this amendment. [LB476A LB476]

SPEAKER FLOOD: Your motion is withdrawn, so ordered. Mr. Clerk. [LB476A]

CLERK: (Read LB476A on Final Reading.) [LB476A]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied with, the question is, shall LB476AE pass with the emergency clause attached? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB476A]

CLERK: (Record vote read, Legislative Journal pages 1523-1524.) 49 ayes, 0 nays, Mr. President, on the passage of LB476A. [LB476A]

SPEAKER FLOOD: LB476AE passes with the emergency clause attached. (Visitors introduced.) Continuing with Final Reading, Mr. Clerk, LB532. [LB476A LB532]

CLERK: (Read LB532 on Final Reading.) [LB532]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied with, the question is, shall LB532 pass? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB532]

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CLERK: (Record vote read, Legislative Journal page 1524.) 45 ayes, 4 nays, Mr. President, on the passage. [LB532]

SPEAKER FLOOD: LB532 passes. Mr. Clerk, LB160. [LB532 LB160]

CLERK: (Read LB160 on Final Reading.) [LB160]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied with, the question is, shall LB160 pass? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB160]

CLERK: (Record vote read, Legislative Journal page 1525.) 36 ayes, 12 nays, 1 present and not voting, Mr. President. [LB160]

SPEAKER FLOOD: LB160 passes. Mr. Clerk, LB224E. [LB160 LB224]

ASSISTANT CLERK: (Read LB224 on Final Reading.) [LB224]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied with, the question is, shall LB224E pass with the emergency clause attached? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB224]

ASSISTANT CLERK: (Record vote read, Legislative Journal page 1526.) Vote is 43 ayes, 2 nays, 3 present and not voting, 1 excused and not voting, Mr. President. [LB224]

SPEAKER FLOOD: LB224E passes with the emergency clause attached. (Visitors introduced.) Mr. Clerk, we now proceed to LB263. [LB224 LB263]

ASSISTANT CLERK: (Read LB263 on Final Reading.) [LB263]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied with, the question is, shall LB263 pass? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB263]

ASSISTANT CLERK: (Record vote read, Legislative Journal pages 1526-1527.) Vote is 44 ayes, 4 nays, 1 excused and not voting, Mr. President. [LB263]

SPEAKER FLOOD: LB263 passes. Mr. Clerk, LB440. [LB263 LB440]

ASSISTANT CLERK: Mr. President, Senator Adams would move to return LB440 to Select File for specific amendment, that being to strike the enacting clause. [LB440]

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SPEAKER FLOOD: Senator Adams, you're recognized to open on your motion. [LB440]

SENATOR ADAMS: Thank you, Mr. President, members of the body. I'll only take but a moment. Basically, what I want to do is clarify the record. On this particular bill last week, we moved into the bill an amendment that would adjust, if you recall, the thresholds for approval for building construction on the part of the Postsecondary Coordinating Commission. When the bill was first brought to the committee, the Coordinating Commission had some serious concerns about it. The institutions of higher education worked with the Coordinating Commission to resolve most but not all of those concerns, and the committee amendment that was moved last week reflected most of those changes but not all. So I simply want to clarify the record that even though the committee amendment does address most of the Coordinating Commission's concerns, it does not address all of them. Thank you, Mr. President, and with that, I will withdraw the motion. [LB440]

SPEAKER FLOOD: Motion is withdrawn, so ordered. Mr. Clerk. [LB440]

ASSISTANT CLERK: (Read LB440 on Final Reading.) [LB440]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied with, the question is, shall LB440 pass? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB440]

ASSISTANT CLERK: (Record vote read, Legislative Journal pages 1527-1528.) Vote is 44 ayes, 0 nays, 4 present and not voting, 1 excused and not voting, Mr. President. [LB440]

SPEAKER FLOOD: LB440 passes. Mr. Clerk, LB494. [LB440 LB494]

ASSISTANT CLERK: (Read LB494 on Final Reading.) [LB494]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied with, the question is, shall LB494 pass? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB494]

ASSISTANT CLERK: (Record vote read, Legislative Journal pages 1528-1529.) Vote is 48 ayes, 0 nays, 1 excused and not voting, Mr. President. [LB494]

SPEAKER FLOOD: LB494 passes. Mr. Clerk, LB568. [LB494 LB568]

ASSISTANT CLERK: (Read LB568 on Final Reading.) [LB568]

SPEAKER FLOOD: All provisions of law relative to procedure having been complied

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with, the question is, shall LB568 pass? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB568]

ASSISTANT CLERK: (Record vote read, Legislative Journal page 1529.) Vote is 48 ayes, 0 nays, 1 excused and not voting, Mr. President. [LB568]

SPEAKER FLOOD: LB568 passes. While the Legislature is in session and capable of transacting business, I propose to sign and do hereby sign LB97, LB97A, LB187, LB195, LB232, LB342, LB342A, LB402, LB463, LB463A, LB476, LB476A, LB532, LB160, LB224, LB263, LB440, LB494, and LB568. Mr. Clerk, we now proceed to LB392. [LB568 LB97 LB97A LB187 LB195 LB232 LB342 LB342A LB402 LB463 LB463A LB476 LB476A LB532 LB160 LB224 LB263 LB440 LB494 LB568 LB392]

ASSISTANT CLERK: Mr. President, with respect to LB392, Senator Adams would move to return the bill to Select File for specific amendment. That amendment is AM1409. (Legislative Journal page 1490.) [LB392]

SPEAKER FLOOD: Senator Adams, you're recognized to open on your motion. [LB392]

SENATOR ADAMS: Thank you, Mr. President. Very simply, what this amendment will do is to add the emergency clause. If you recall, and probably not, but in this particular bill dealing with the learning community we did change a lot of the reporting dates for the Learning Community Council and we recognize now that those dates, the changes that we've made, are not going to work without the emergency clause added to this particular bill. Thank you, Mr. President. [LB392]

SPEAKER FLOOD: Thank you, Senator Adams. Members, you've heard the motion opening by Senator Adams. There are no lights on. Senator Adams, you're recognized to close. Senator Adams waives his opportunity to close. The question before the body is, shall LB392 return to Select File for specific amendment? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB392]

ASSISTANT CLERK: 46 ayes, 0 nays on the motion to return the bill, Mr. President. [LB392]

SPEAKER FLOOD: LB392 is returned to Select File for specific amendment. Mr. Clerk. [LB392]

ASSISTANT CLERK: Mr. President, Senator Adams would offer AM1409. [LB392]

SPEAKER FLOOD: Senator Adams, you're recognized to open on AM1409. [LB392]

SENATOR ADAMS: Thank you, Mr. President. AM1409 merely adds the emergency

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clause so that all the dates we put in the bill will work for the 11 school districts. Thank you, Mr. President. [LB392]

SPEAKER FLOOD: Thank you, Senator Adams. Members, you've heard the opening on AM1409. There are no members wishing to speak. Senator Adams, you're recognized to close. Senator Adams waives his opportunity. The question before the body is, shall AM1409 be adopted? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB392]

ASSISTANT CLERK: 46 ayes, 0 nays on the adoption of the amendment, Mr. President. [LB392]

SPEAKER FLOOD: AM1409 is adopted. Mr. Clerk. [LB392]

ASSISTANT CLERK: I have nothing further, Mr. President. [LB392]

SPEAKER FLOOD: Senator Nordquist for a motion. [LB392]

SENATOR NORDQUIST: Mr. President, I move LB392 to E&R for engrossing. [LB392]

SPEAKER FLOOD: Members, you've heard the motion. All those in favor say aye. Those opposed say nay. LB392 is advanced to E&R for engrossing. Mr. Clerk, we now proceed to LB218, Select File, 2009 Speaker priority bill. [LB392 LB218]

CLERK: Mr. President, with respect to LB218, I have Enrollment and Review amendments first of all, Senator Nordquist. (ER8132, Legislative Journal page 1430.) [LB218]

SPEAKER FLOOD: Senator Nordquist for a motion. [LB218]

SENATOR NORDQUIST: Mr. President, I move the E&R amendments to LB218. [LB218]

SPEAKER FLOOD: Members, you've heard the motion. All those in favor say aye. Those opposed say nay. The E&R amendments are adopted. Mr. Clerk. [LB218]

CLERK: Mr. President, Senator Giese would move to amend with AM1423. (Legislative Journal page 1501.) [LB218]

SPEAKER FLOOD: Senator Giese, you're recognized to open on AM1423. [LB218]

SENATOR GIESE: Thank you, Mr. President and members of the body. LB218 would take three existing programs, the aid to county program, the County Property Tax Relief

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Program, and the county jail reimbursement program, and merge them into one new program. This new program would distribute the funds from three prior programs and allocate them based on a new formula. Under LB218, under the LB218 formula, each county would receive \$30,000 and any remaining funds would be distributed based upon the county's percentage of the total real and personal property valuation statewide. Under LB218, the total amount of funds appropriated by the Legislature as aid to counties each year must equal a percentage of the total real and personal property valuation statewide, not less than .0075 percent and not more than .0125 percent. One of the problems with the current jail reimbursement programs and one of the reasons that some counties which benefit from the jail reimbursement program are begrudgingly throwing their support behind LB218 is that the state has historically underfunded jail reimbursement. The base amount under LB218 of .0075 represents a number that is generally approximate to the current funding under the existing three programs. AM1423 would require that the Legislature fund the LB218 formula to the floor level and goes further to provide counties with a recourse if the Legislature resumes its longstanding pattern of underfunding aid to counties. AM1423 would enable counties to file a claim with the State Claims Board for the difference between the amount of funds actually appropriated by the Legislature and the amount the counties received. Let me make one thing perfectly clear: I oppose LB218, but this amendment is not designed to kill the bill. I believe very strongly that the jail reimbursement program should be retained but if it is not retained we as a Legislature should keep the promises that we are making in LB218. As Senator White stated repeatedly on General File, the state hasn't been paying its bills when it comes to these county aid programs. By adopting AM1423, we will finally admit that while we may not have paid our bills in the past, we are committed to paying our bills in the future. Thank you, Mr. President. [LB218]

SPEAKER FLOOD: Thank you, Senator Giese. Members, you've heard the opening on AM1423. Senator Cornett, you are recognized. [LB218]

SENATOR CORNETT: Thank you, Mr. Speaker and members of the body. The Giese amendment will provide that counties file claims to receive full funding of the new formula found in LB218. Our goal in LB218 is to establish a required minimum funding amount in law. Last week, Senator White asked me what the guarantee would be that we funded this when we hadn't fund jail reimbursement, and I probably answered that poorly. Under jail reimbursement, there was never any minimum amount established; there was only a maximum cap. So the Appropriations Committee could fund it to what level they wanted as long as they didn't exceed that cap, and they never funded it to the full amount. That is why we put in LB218 a statutory floor. It is quite different from the current jail reimbursement provisions. Under that program, like I said, the Legislature amended the law to impose a cap on funding. In LB218, we have established a minimum mandated funding amount in the law. This minimum amount of aid is found in the law and will increase if valuation increases. The Giese amendment does not provide

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a stronger guarantee and we would recommend you oppose it. If the Legislature does not wish to fund the minimum provided by the .0075 factor found in the new formula, they can change that factor in the formula, at the same time change the factor found in the claims statute section altered by the Giese amendment. It is bad policy to give the State Claims Board, an executive branch agency, legal authority to override this Legislature's budgeting decisions. We have to trust that future Legislatures will fund the budget and fund priorities, as determined they need...as they determine they need to be funded. We cannot bind future Legislatures to any greater extent than we already have in this bill. Thank you very much. [LB218]

SENATOR CARLSON PRESIDING []

SENATOR CARLSON: Thank you, Senator Cornett. Senator White, you're recognized. [LB218]

SENATOR WHITE: Thank you, Mr. President. I rise in support of this amendment. It does nothing more than codify what we promised on the floor would occur if we adopted this bill, so it's literally one of those deals where, if we meant it, let's do it. And if we didn't mean it, we shouldn't have said it. Even under this amendment my county, Douglas County, loses almost \$1 million a year in jail reimbursement and other support. If it's not fully funded at the floor level, the losses go even higher. I don't think there's anything at all wrong with the state telling the counties we are going to fund it at this level and, if not, you can file a claim for your unreimbursed jail expenses. I would much prefer it just simply get rid of it and allow every county to file a claim for the full reimbursement of the jail expenses at an amount we set. That's not possible but Senator Giese's amendment here seems to be the minimum. It actually makes and ensures that we keep the political promises we make, which would be revolutionary on our funding for jail reimbursement that we actually kept our word. So I support this amendment. On behalf of your counties, I think you should look at it and support it as well. Thank you, Mr. President. [LB218]

SENATOR CARLSON: Thank you, Senator White. Those wishing to speak: Senators Gloor, Heidemann, and Cornett. Senator Gloor, you're recognized. [LB218]

SENATOR GLOOR: Thank you, Mr. President, members of the body. I also rise in support of Senator Giese's AM1423. I had a conversation with a constituent over the weekend, not an elected official, I should point out, no one who has a specific vested interest in this as a county board member but somebody who's a community leader who was well aware of the fact that our county for years has realized a dramatic shortfall in jail reimbursement and who also is quite concerned about what this new formula may mean in terms of lost reimbursement, not only mad at us legislatively but also mad at the executive branch for, as he explained it, promises not kept. In our discussion, we decided that the name of this bill is that we'll-take-what-we-can-get bill, and we'll talking

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about predictable funding at a lower level but with a growth factor versus what we've currently been stuck with and that's no predictability, little if any jail reimbursement for most counties. I think there's a lesson here for us legislatively. And we all have a shared concern about unfunded mandates, whether we're responsible or whether the federal government is responsible. It seems to me, as you look into the history of why we got where we're at, that there was unmandated funding as opposed to unfunded mandates. As I understand it, the current model or method of reimbursement was agreed upon or derived because of levy lids and was a promise, not mandated but a promise. So apparently we'll take what we can get with LB218 and at least we know that it's a funded mandate. Nonetheless, this is a problem. Senator Giese at least is putting us in a position of a simple method of keeping track, or as Senator White said, codifying this, that the promise is not being kept in the future if that should be the case. Again, I rise in support of AM1423 and I would yield the remainder of my time to Senator Giese. [LB218]

SENATOR CARLSON: Thank you, Senator Gloor. Senator Giese, 2 minutes and 45 seconds. [LB218]

SENATOR GIESE: Thank you, Mr. President, and thank you, Senator Gloor. Colleagues, this is, in my opinion, this is a way that we, as the Legislature and state, can say that we're going to fund this program and give some counties...put some teeth into this bill. My amendment addresses that issue. If we don't fund it to the level that we're going to say now, and I've already heard this morning mentioned that we may not, the Legislature, we should have the option to change the amount if we so desire, and I understand that, but we're talking...LB218 is two years down the road and we're already talking we may potentially change that if we have to. So I would urge you to take a long look at this and look at the amendment, and all it does is give the counties some teeth and it says to the citizens of those counties and the citizens of the state that we will pay our bills. Thank you. [LB218]

SENATOR CARLSON: Thank you, Senator Giese. Senator Heidemann, you're recognized. [LB218]

SENATOR HEIDEMANN: Thank you, Mr. President, fellow members of the body. I rise in opposition to AM1423 to LB218. I believe, as somebody that's worked on LB218 for quite some time, we are making a commitment right inside of LB218 that we will fund this. There is a floor to the amount of funding that will go out to the counties with this bill that we have before us. We do not need AM1423 to tell the Legislature that they shall, they shall do something, because we are already telling them that they will do it. It's also my thought that we don't bind future legislators. The only thing that can bind a future legislator or tell the future Legislature what to do is the constitution. We actually can do that ourselves, because with 25 votes we can change anything. And Senator Wightman actually had a bill this year that did that and there was a commitment by the state of

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Nebraska that we was going to take over assessor duties in the state of Nebraska and we did that for awhile. There was an obligation to do that. And actually with Senator Wightman's bill, we no longer will do that. You could put this amendment on there and in future years, if you for some reason couldn't fund it, if the resources weren't there, you would strike that language out and you would also strike this language out and you would be no better off than before the amendment was adopted. So I do stand in opposition of AM1423 to LB218. Thank you. [LB218]

SENATOR CARLSON: Thank you, Senator Heidemann. Senator Cornett, you're recognized. [LB218]

SENATOR CORNETT: Thank you, Mr. President and members of the body. When I was working on LB218, I took into consideration the past and the fact the state hadn't fully funded jail reimbursement. And jail reimbursement was a bill that I have carried and prioritized myself over the past five years. That is why in the bill I put in the statutory minimum. Let me be very clear, and this is where I was even...I did not explain it again last week, jail reimbursement did not have a minimum in it. It only had a maximum that the Appropriations Committee could fund it. So therefore, they didn't have to fund it to the full level. I have put the floor in so they have to meet a basic funding level. The only way not to is either break the law or change the law. And like Senator Heidemann said, we cannot bind future Legislatures in regards to statutes. If they choose to change that, they can do that, that floor. I would urge the body to oppose the Giese amendment and support the underlying bill. Thank you. [LB218]

SENATOR CARLSON: Thank you, Senator Cornett. Senator White, you're recognized. [LB218]

SENATOR WHITE: Thank you, Mr. President. I would have to take issue with Senator Heidemann's observation. I may be wrong but if, for example, this bill passes with this amendment and then we don't fund the support, at that point claims have arisen already and we cannot ex post facto erase those claims. So what it would do is tell the succeeding Legislatures, look, you can repeal this but to the extent claims have arisen already because we haven't funded, then they exist in the counties. That would be at least my interpretation. We cannot, once a claim has arisen and been given to the counties, just say, oh, never mind, which is what we do now. And second thing is, I seriously ask this of any member, if we don't mean that we are going to fund this, despite representations from Senator Heidemann, from Cornett that that's what we will do, then why even make this bill? I mean if it's not truly going to be funded and we cannot...and that was my point, we cannot bind future legislators, although I thought Senator Giese's idea was really innovative, we would give them, instead, a claim for the jail reimbursement to which they are entitled and that would, at least until it is repealed, be valid, then I think that's the minimum we can do. I mean we either mean what we say and we're going to fund this at a minimum level or, once again, as I predict, we are

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simply playing another game of switching the pea under the shell and in fact there's no pea under the shell. So I would submit to the members of the Legislature this is nothing more than the embodiment in law, to the extent possible, the promises made by Senator Heidemann and Senator Cornett, nothing more, nothing less. And if we are to be taken seriously and if we really are working with the counties to reduce the property tax burden on our citizens then this simply states we mean it, we're going to do it, even if it hurts we're going to do it, and that is all to the good. It is both fiscally responsible because the money is going to the counties, quote, spending it, is going to pay for prisoners if we fail to make the aid available, hardly wasteful, and yet it forces fiscal discipline on us that we truly mean what we say and we're going to fund the counties to reduce the property tax burden. I still think this is a very poor substitute for what we should be doing, which is simply paying our bills, but it is a baby step towards more real integrity in our budgeting process. And that's the reason I fully support it and I really ask each member here, if we mean what we say, how could you be against this amendment? Thank you. [LB218]

SENATOR CARLSON: Thank you, Senator White. Senator Price, you're recognized. [LB218]

SENATOR PRICE: Thank you, Mr. President and members of the body. This is more of a rise of a personal nature. Today we mark the passing of a constituent who is truly a great American and a hero and I'd like to take a moment to read his citation that I was able to find for the award of the Silver Star. Award of the Silver Star: Under the provisions of the Army Regulation 600-45, as amended, Frank R. Cockerill, Jr., staff sergeant, Armored Company B, 765th Tank Battalion, for gallantry in action. On March 1945, from 0600 to 1200 hours, Staff Sergeant Cockerill, tank commander, attacked the Siegfried line near Medebach, Germany, driving the enemy from their positions in line, despite a hail of small arms fire, machine gun, mortar, artillery, and self-propelled gunfire. During most of the action, he, as partially exposed outside his tank for better observation at one point during the action, when our forces were ordered to pull back. However, he returned to the battlefield and, under heavy fire, picked up 11 wounded and 9 other men who were unable to move because of the fire. After making several trips with these men, he pulled farther into the enemy territory to cover the withdrawal of a pocket of our troops so that they could be reorganized to continue the attack by the command Brigadier General Sexton. Mr. Cockerill told me about this night. He told me how five tanks went on the attack. It wasn't like we saw in the movies where they show hundreds of tanks, five tanks. Even before the battle had been enjoined, they'd lost a tank or two. Then, as they pushed forward, one tank was set back. They were out of munitions. And there he is, with one tank that he commandeered to go forward fighting the battle, and when it ran out of munitions, Mr. Cockerill took it on his own to walk back to another tank and get more munitions, pinned down by gunfire, continued to bring the fight in one part of the Siegfried line, very important in that battle. And I think more importantly for Mr. Cockerill to be known that he was a tremendous father and a

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tremendous Nebraskan, a great farmer, and he just passed today and I wanted to make note of that. I'd also like to note that he is a longtime friend of Senator Pankonin, Nebraska, and the United States. Thank you. []

SENATOR CARLSON: Thank you, Senator Price. Continuing with discussion on LB218 and AM1423, Senator Giese, you are recognized. [LB218]

SENATOR GIESE: Thank you, Mr. President. I'm wondering if Senator Council would yield to a question. [LB218]

SENATOR CARLSON: Senator Council, would you yield? [LB218]

SENATOR COUNCIL: Yes, Mr. President. [LB218]

SENATOR GIESE: Thank you, Senator Council. Would you explain for myself and members of the body, as a member of the Business and Labor Committee, how the process works when you file a claim in your committee? [LB218]

SENATOR COUNCIL: All right. Well, to explain the process, Senator Giese, it begins with the State Claims Board. The Business and Labor Committee only addresses a claim after the claim has been presented to the State Claims Board. The State Claims Board will either decide to approve the claim, which then has to be approved by the Legislature, or it will vote to deny a claim and that decision also has to be approved by the Legislature. So the claims don't come directly to the Business and Labor Committee. They come to the committee through the State Claims Board and the State Claims Board has a defined statutory process for submission of claims. [LB218]

SENATOR GIESE: And could you tell me, please, why would a claim be denied? Is it just statute of limitations? Is that... [LB218]

SENATOR COUNCIL: There are...there are various reasons that a claim can be denied, Senator Giese. There is a time frame of statute of limitations for filing claims which could affect whether or not the State Claims Board approves a claim. There could be no underlying basis for a claim against the state, and we did have such a finding this year on one of the claims that was submitted. The State Claims Board decision was that there was no basis for that claim to be made against the state so they recommended that the claim be denied, and the Business and Labor Committee came to that same conclusion. So there are various reasons, but I would suggest to you that the two principle reasons are the statute of limitations, that the claim wasn't timely filed, or that the claim does not state a cause of action against the state so that there's no underlying authority for the state to have made the payment that's being requested. [LB218]

SENATOR GIESE: And have you seen this amendment, Senator Council? Have you

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read this amendment? [LB218]

SENATOR COUNCIL: I have scanned the amendment, Senator Giese, and understand that what the amendment proposes is that if...and in order for that process to work there is a statutory basis for the claim and then the claim is not paid, then there would be a statutory basis if the...and I haven't read it in depth enough to see whether it meets the requirement of the State Claims Board statute in terms of identifying those who have standing to bring a claim. So if your amendment addresses the standing issue under the State Tort Claims Act, and I see no reason why it cannot be accomplished through a state...a county making a claim, but you have to meet both of those. And again, I apologize, I haven't read the amendment to that level of detail. [LB218]

SENATOR GIESE: No, that's quite all right. And thank you for the information. Thank you, Mr. President. [LB218]

SENATOR CARLSON: Thank you, Senator Council and Senator Giese. Senators still wishing to speak: Campbell, White, and Gloor. Senator Campbell, you're recognized. [LB218]

SENATOR CAMPBELL: Thank you, Mr. President. I rise in support of LB218 but opposed to the amendment, AM1423. I think the process that has been put into place in LB218 gives a very good plan in terms of how the county reimbursement would work and certainly sufficient. In the years that I served on the county board, I would often say that county government is really an arm of state government and I think that's important to keep in mind here, that finally we are being honest with county boards. Instead of saying we're going to reimburse you for this program and that program, we are being honest in saying we're putting together a plan of state aid to counties. That's much more forthright since I can't, in my memory, recall when we were fully reimbursed for the jail program. Consistency for counties in their budget planning is extremely important and that is what LB218 would bring to county government. County boards can understand changing fiscal pictures. They themselves have to work on when you do not have enough revenue or your changing picture looks different under a lid. So therefore, I think counties can adjust under LB218 in a far better stance than they were ever able to do certainly in recent history. I would encourage you to vote against AM1423. Thank you, Mr. President. [LB218]

SENATOR CARLSON: Thank you, Senator Campbell. Chair recognizes the Chair of the Executive Committee, Senator Wightman, for an announcement. [LB218]

SENATOR WIGHTMAN: Thank you, Mr. President, members of the body. It's just a final reminder that today is the last day for introducing interim study resolutions, so if you introduce them tomorrow morning, they won't be considered. The Executive Committee will be meeting on Thursday for referencing purposes with regard to the resolutions.

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Thank you, Mr. President. [LB218]

SENATOR CARLSON: Thank you, Senator Wightman. Senator White, you're recognized. This is your third time. [LB218]

SENATOR WHITE: Thank you, Mr. President. I am curious whether Senator Campbell would yield to a question. [LB218]

SENATOR CARLSON: Senator Campbell, would you yield? [LB218]

SENATOR CAMPBELL: Yes. [LB218]

SENATOR WHITE: Senator Campbell, how on earth does ensuring that, if we don't fund at a minimum level, counties now at least get the claim for their jail reimbursement in any way undercut this bill? [LB218]

SENATOR CAMPBELL: Well, Senator White, I would say that over the years I served there, the jail reimbursement was somewhat of a...what would I say, a hoax in the sense that it was never fully...never fully funded, at least reimbursed to the level that we would expect. It was contentious at times on who was a state prisoner and who was not. I feel that LB218 is at least more forthright in terms of how it's going to approach this. I understand your point about saying, well, we will now receive this money, but in many cases, Senator White, Lancaster never received the money. [LB218]

SENATOR WHITE: Well, I guess I'm not talking about the underlying concept. That battle is done. The question is this amendment. Doesn't it improve that matter, saying to us we will fund this or, in lieu of that, they will have valid claims for jail reimbursement? How on earth could that...could you possibly oppose that? It seems that it's completely consistent with what you said your experiences were and that it really puts the onus on us as the Legislature to fund and keep our promises. I mean I understand our disagreements on the underlying bill but not on this amendment. It doesn't make...seem consistent with your earlier statements. [LB218]

SENATOR CAMPBELL: Senator White, I would hope that I would always be consistent and I'm sorry that it didn't come across that way. I feel that the amendment may go too far in terms of hampering the state in the future on its fiscal picture and my comment only replied to the point that county government can certainly understand a shifting fiscal picture. Through the 16 years that I served, there were oftentimes in which the state Legislature and the Governor had to speak and say the amount of money that you were expecting in state aid to counties is not going to be there. That's prior to the jail programs. And I apologize because I probably wasn't clear enough for you. [LB218]

SENATOR WHITE: Okay. Well, and I guess then what we're saying is exactly what I do

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underlie...the objection to underlying LB218, and that is we take a definite promise for which we are accountable and make it a vague intention. And if the purpose of LB218 really is just political cover and it appears to be, that we're just going to make vague intentions that if money is there we'll throw your requests into the pot with the others and kind of consider them. And if that's the purpose, then it's going to do a very good job and Senator Giese's amendment will mess that up. If, on the other hand, it's really to introduce integrity and mean what you say legislation, in terms of our funding of counties and our effort to drop property taxes, then you can't oppose Senator Giese's amendment consistently. It tells us either/or. Either fund it at a minimum level of aid or pay our bills for the jail reimbursement. The only thing it does do, Senator Giese's amendment is a mirror and we have to look ourselves in the mirror and live with the consequences of our decisions. And some people don't like to look in the mirror. Thank you, Mr. President. [LB218]

SENATOR CARLSON: Thank you, Senator White and Senator Campbell. Senator Gloor, you're recognized. [LB218]

SENATOR GLOOR: Thank you, Mr. President. I believe I was clear when I stood up the first time that I am in support of Senator Giese's amendment, AM1423. I did not state and will state now that I am in support of LB218, the underlying bill. I think it is appropriate. And I've had some discussions with a senator or two about not looking back, commiserating about the fact that we did not and are walking away from unpaid bills to certain counties, a significant amount of dollars as relates to my county. But that is in the past. What we're trying to do is come up with a better method, something that we can live up to. I do understand that about LB218. And although LB218 may not be perfect, it at least is a look forward in trying to come up with a solution so that we're not faced with this rancor, unfulfilled promises in the future. And I applaud all those individuals who rolled up their sleeves and made LB218 a reality and I will be supportive of LB218. But I still think it is appropriate for constituents of mine to ask me, how are you going to make sure this doesn't happen again? How are you going to make sure that the Legislature doesn't walk away from responsibilities it has to pay its bills? And I think Senator Giese's amendment is a way that we can tow the line on that. I haven't heard a better option. And I applaud Senator Giese for spending sometime trying to think of a way that we don't find ourselves in this same predicament in the future and, therefore, I again am supportive of AM1423, also in support of LB218. Thank you, Mr. President. [LB218]

SENATOR CARLSON: Thank you, Senator Gloor. (Visitors introduced.) Senator Dubas, you're recognized. [LB218]

SENATOR DUBAS: Thank you, Mr. President, members of the body. I, too, rise in support of AM1423 and the underlying bill, LB218. This bill is a concession on the part of county governments, a recognition that county jail reimbursement has never been

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fully funded. Many of these counties have been left holding the bag. And in essence, this bill or the fact that we haven't honored our obligation in the past has had a direct negative impact on property taxes. So the counties have kind of just thrown up their hands and says, okay, we can keep fighting this battle but we're not getting anywhere. This bill is an intention and a hope on the parts of counties that maybe the state will fulfill their obligation through this type of a formula. I think Senator Giese's amendment puts a little substance in that promise of the state stepping up to the plate and helping with...although it's not direct county jail reimbursement, it is the ability to funnel some aid into our counties to use as they see fit. And the counties that do have jails will be able to use this money to support those efforts. So I think as Senator White has stated and Senator Giese stated, this is just the Legislature's promise that, while we haven't upheld our promises in the past, it's our intention to in the future. So I hope that the body will give this amendment serious consideration and lend its support. And should Senator Giese want my time, I would yield it to him. [LB218]

SENATOR CARLSON: Senator Giese, there are no other lights and, if you'd like to close, you're welcome to close on your amendment. [LB218]

SENATOR GIESE: Thank you, Mr. President. Just summing up, colleagues, we've already discussed that we may potentially change the formula somewhere down the road and I just want to reiterate that I appreciate Senator Cornett's work on this, on LB218, and I did not support it but this is what we're left with after the jail reimbursement program. Senator Flood mentioned some of the things that we've accomplished before this morning, LB63 dealing with violent crimes. Well, where are these people that are convicted of these violent crimes going to end up? They're going to end up in county jails. And we've just...LB218 takes away the jail reimbursement and, in Senator Campbell's words, the hoax of the jail reimbursement program, it does away with that. We've also done away with the assessor program earlier in this session, another one that we decided to start and then stop because we couldn't continue our commitment to fund that. In summary, LB...or, excuse me, AM1423 only asks that we as a Legislature fund at the minimum level, the minimum level. That's all we ask. And I still have not heard and have failed to hear anyone mention to give a solid reason to vote against AM1423. So as members of the Legislature and members of the state of Nebraska, I would urge your support of AM1423 and tell counties that we are going to fund things that we are giving them now. Thank you, Mr. President. [LB218 LB63]

SENATOR CARLSON: Thank you, Senator Giese. You've heard the closing on the amendment. The question is, shall AM1423 to LB218 be adopted? All those in favor vote aye; all those opposed vote nay. Senator Giese. [LB218]

SENATOR GIESE: I'd like to request a call of the house. [LB218]

SENATOR CARLSON: There has been a request to place the house under call. The

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question is, shall the house go under call? All those in favor vote aye; all opposed vote nay. Record, Mr. Clerk. [LB218]

CLERK: 38 ayes, 0 nays, Mr. President, to place the house under call. [LB218]

SENATOR CARLSON: Thank you. The house is under call. Senators, please record your presence. 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 McGill, would you check in? [LB218]

SENATOR GIESE: Roll call vote, please, in regular order. [LB218]

SENATOR CARLSON: Senator Avery, Senator Lathrop, the house is under call. Senator Avery, the house is under call. A roll call in regular order has been requested. Mr. Clerk, please proceed. [LB218]

CLERK: (Roll call vote taken, Legislative Journal pages 1530-1531.) 16 ayes, 26 nays on the amendment. [LB218]

SENATOR CARLSON: The amendment does not advance. Mr. Clerk. [LB218]

CLERK: I have nothing further on the bill. [LB218]

SENATOR CARLSON: Senator Nordquist. Senator McGill for a motion. [LB218]

SENATOR MCGILL: Mr. President, I move LB218 to E&R for engrossing. [LB218]

SENATOR CARLSON: You've heard the motion. All in favor say aye. Opposed, nay. The bill does advance. Mr. Clerk, items for the record. [LB218]

CLERK: Mr. President, resolutions: LR155 through LR168 are various interim study resolutions introduced by different members; all will be referred to the Executive Board. LR169 is a resolution by Senator Campbell; that will be laid over. LR170 is a resolution by Senator Pirsch; that, too, will be laid over. LR171, a resolution by Senator Ashford; that will be laid over. Pursuant to its introduction, a communication from the Speaker directing LR171 to Reference Committee for purposes of conducting a public hearing. Notice of hearing from the General Affairs Committee. Bills read on Final Reading this morning were presented to the Governor at 11:34 a.m. (re LB97, LB97A, LB187, LB195, LB232, LB342, LB342A, LB402, LB463, LB463A, LB476, LB476A, LB532, LB160, LB224, LB263, LB440, LB494, and LB568.) And one final resolution, LR172, Senator Harms; that will be referred to the Executive Board. (Legislative Journal pages 1531-1543.) [LR155 LR156 LR157 LR158 LR159 LR160 LR161 LR162 LR163 LR164 LR165 LR166 LR167 LR168 LR169 LR170 LR171 LB97 LB97A LB187 LB195 LB232

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LB342 LB342A LB402 LB463 LB463A LB476 LB476A LB532 LB160 LB224 LB263
LB440 LB494 LB568 LR172]

Priority motion, Mr. President: Senator Langemeier would move to recess until 1:30 p.m. []

SENATOR CARLSON: Motion is to recess until 1:30 p.m. All those in favor say aye. Opposed, nay. Motion carried. We recess till 1:30. []

RECESS

SENATOR LANGEMEIER PRESIDING []

SENATOR LANGEMEIER: Good afternoon, ladies and gentlemen. Welcome to the George W. Norris Legislative Chamber. The afternoon session is about to reconvene. Senators please return to the Chamber and record your presence. Mr. Clerk, please record. []

CLERK: I have a quorum present. []

SENATOR LANGEMEIER: Thank you, Mr. Clerk. Are there any items for the record? []

CLERK: Mr. President, a series of study resolutions: LR173 to LR180, all will be referred to the Executive Board. That's all that I have. (Legislative Journal pages 1543-1548.) [LR173 LR174 LR175 LR176 LR177 LR178 LR179 LR180]

SENATOR LANGEMEIER: Thank you. (Visitors introduced.) Mr. Clerk, we'll now proceed to the first item on this afternoon's agenda. Mr. Clerk. []

CLERK: Mr. President, LB36, introduced by Senator Flood. (Read by title for the first time.) Introduced on January 8, at that time referred to the Judiciary Committee. The bill was advanced to General File. There are Judiciary Committee amendments, Mr. President. (AM828, Legislative Journal page 1081.) [LB36]

SENATOR LANGEMEIER: Thank you, Mr. Clerk. Senator Flood, you're recognized to open on LB36. [LB36]

SPEAKER FLOOD: Thank you, Mr. President. Members, good afternoon. This is a serious issue. This is a matter that deserves thoughtful, high level debate. As Speaker, I realize respect and recognize most importantly the differences in members' views regarding the death penalty. I believe that those who commit the most heinous of crimes deserve the state's most significant criminal sanction. For the balance of today and most likely well into tomorrow I will make the case for changing Nebraska's method of

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execution from electrocution to lethal injection. I first want to recognize the work of our Judiciary Committee. These men and women painstakingly reviewed, researched and probed Nebraska's death penalty. Senators Ashford, Lathrop, Lautenbaugh, the rest of this committee, spent hours sorting through a very complicated issue. This was no small task and I want to thank them for their work. LB36 is the bill I brought to the Legislature. It changes the method of execution under Nebraska law from electrocution to intravenous injection of a substance or substances in a sufficient quantity to cause death. A written execution protocol would be created by the Nebraska Department of Corrections to include the processes and procedures by which an execution is to be carried out. I support the committee amendment to LB36. It requires the Department of Corrections to follow the Administrative Procedures Act to develop the processes and procedures relating to an execution by lethal injection. The committee amendment also includes changes to the green copy that make the use of legal injection more transparent. I have worked with Media of Nebraska and the committee to resolve all of their issues on these matters. In 2008, the Nebraska Supreme Court, in State v. Mata, ruled that electrocution, the state's sole method of execution, violated the state's constitutional prohibition against inflicting cruel and unusual punishment. The court made it clear that the individual conviction at issue was proper and that the sentence of death remained valid until a constitutionally acceptable method of carrying out the sentence was available. In 2008, the U.S. Supreme Court ruled, in Baze v. Rees, on a 7-2 decision, that the state of Kentucky's use of a three-drug lethal injection protocol is constitutional. This ruling was used by my office and the Nebraska Attorney General's Office in preparing LB36. The two justices that dissented in Baze, indicated that if Kentucky had used consciousness checks they would have joined the majority and upheld Kentucky's protocol. This bill includes consciousness checks which are also used in Florida, Missouri, California, and Alabama. These consciousness checks are done in order to be sure the convicted person is unconscious before injection of an additional drug or drugs. This Legislature has thoughtfully considered repealing the death penalty three times in three years. Each time, senators in this body chose not to repeal the death penalty and to keep it on the books. LB36 completes our statutes and it closes the loophole. If we are going to have the death penalty, and we do in Nebraska, we have to have a method of execution. It doesn't make sense to have a death penalty in our statutes and no method of carrying it out. Today's discussion is about adopting a method. We already have the death penalty in Nebraska. In fact, 11 men have been sentenced to die and are in Tecumseh on death row right now. The state has a right and a duty to impose a sentence commensurate with the gravity of the criminal offense committed. Some crimes are so heinous and so grave that the only proportionate punishment is execution. I realize this is a difficult issue, it's difficult for me. The subject matter is something that none of us really want to talk about. But we must remember the victims, those left behind following vicious, needless acts of senseless human behavior. Norfolk witnessed arguably one of the nation's most deadliest bank robberies in 2002. I represent Madison County. I was there outside that bank on that day where minutes before three men shot and killed five innocent people. I saw gun smoke coming out of

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the front doors of that bank when I arrived. I talked to a customer who was shot in the back as she ran out of the bank to her car by these cowards. Five people died that day. The way they died is too difficult to talk about and discuss. We have a death penalty for this reason. Let's talk about Jose Sandoval, the ringleader of this botched bank robbery, who has been convicted of murdering seven people, note I say seven people. He smiled for the cameras and waved gang signs at his trial as he was tried on these murders at that bank. On his own admission, he tried to kill others on death row. Guards found the shanks that he made to kill again, on death row. Since he was convicted of those bank murders, of killing five people, he's pled guilty to two more murders. He's killed seven people from Madison County, think about it, seven people. He, like the ten others on death row, have been sentenced to die and they deserve the state's most significant criminal sanction. During this debate I plan to make the case that, number one, lethal injection as proposed in LB36 provides a constitutional means for enforcing the death penalty. Number two, the death penalty is appropriate for certain crimes. Number three, certain crimes warrant spending. And finally, the individuals on death row belong there. I urge you to advance LB36 and adopt the committee amendment. Thank you, Mr. President. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Flood. As the Clerk has stated, there are Judiciary Committee amendments offered by the Judiciary Committee. Senator Ashford, as Chair of that committee, you're recognized to open on the Judiciary Committee amendment. [LB36]

SENATOR ASHFORD: Thank you, Mr. President and members. Speaker Flood has gone over really the committee amendments. They're quite straightforward. They deal with the application of the Administrative Procedure Act. They are...promote transparency in the process. And I certainly urge their adoption. I'd like to, though, talk just a little bit about the Judiciary Committee and their efforts in this matter. Senator Ernie Chambers, who served on the Judiciary Committee for many, many years, on several occasions attempted to have the death penalty by electrocution repealed. And he fought that fight for 38 years. When we came into the Legislature two years ago, those who are here today will remember that the state of the law on the death penalty was in total confusion. The lethal injection issue was before the Supreme Court in the Baze case and related cases. The case involving electrocution, the Mata case was on appeal before the Supreme Court, and eventually in February of 2008 the Nebraska Supreme Court, as Speaker Flood suggests, found that the mode of execution, electrocution, was violative of the Nebraska Constitution. In April of 2008, the United States Supreme Court, after this body adjourned in the One Hundredth Legislature, found that lethal injection law, the lethal injection law of Kentucky was constitutional, it did not violate the Eighth Amendment of the United States Constitution. When this body voted with 24 votes to repeal the death penalty, in 2007, it is fully understandable why it did so. Not only did Senator Chambers make a persuasive case, which he was eventually proven to be correct on in his judgment, that electrocution was violative of the

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eighth...well, of the Nebraska Constitution, but he convinced this body that enough was enough, that if there was going to be such confusion, if there was going to be such inconsistency that the best thing for this state to do was to repeal the death penalty. We were never going to get there from where we were. And this body did so, this body with one vote, only one vote away from 25 votes, voted to repeal the death penalty. And it's perfectly understandable, and many in this body here today were there and gave talks about that very, very point that if this is where we were going to be that this state should not...no longer be involved in the death penalty. We're in a different place now, as Senator...Speaker Flood has suggested. We have in the Baze case a,...it's as clear as the constitutional law in this issue can be, pronouncement by Justice Roberts that lethal injection in a form that was described in the Baze case is constitutional under the Eighth Amendment of the United States Constitution. In fact, I don't believe the United States Supreme Court has ever struck down a mode of execution in its history. So we're faced today with a much clearer picture, a picture that is at least to my satisfaction clear that the form of execution, of lethal injection as suggested by Speaker Flood, is constitutional. And this body has struggled with it in the past, it will struggle with it again today, I'm sure, because it is such a difficult issue, as Speaker Flood has said. The Judiciary Committee not only thought about the mode of execution, but it thought a lot about the process and how we get from A to B, are defendants in capital cases afforded the safeguards and protections that are appropriate not only under the Constitutions of the state of Nebraska and the United States but our own standards of decency and fair play in the state of Nebraska. And we struggled over this. We struggled over this issue of fairness and consistency for many, many weeks, many, many hours not only this session but the last two sessions. But a lot of our discussion this session was on that issue. And I want to thank Senator Lathrop for his efforts in discussing this matter with all sides of the issue, with the Attorney General, with the county attorneys, with the defense attorneys. And we thought about many, many ideas for committee amendments, whether we would require two aggravators, whether or not it would be more appropriate if we had some sort of committee process in place before the decision was made to proceed with filing a capital case or a murder case as a capital case. And we thought we were there once, and we thought we were there twice. And finally, what happened was we came down on the side of the existing law. We came down on the side of the existing law because all sides, in my opinion two of the finest trial attorneys in the criminal law in...certainly in Nebraska and probably in the country, Tom Riley on the defense side, and Don Kleine on the prosecutors side, concluded that the system we have in place is the best system we could put together as a matter of public policy. Once we concluded that, and I can tell you Speaker Flood is right, we did not, you know, we did not ignore our responsibilities. We looked at cases, we looked at processes, we looked at every state law on this issue, and we concluded that the process we had in place was constitutional and in my view protective of the...and safeguarded the rights of the accused. So with that, Mr. President and members, I stand in support of the committee amendments. They do promote transparency, as Speaker Flood suggested. Though I have been extremely skeptical of the application of the

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death penalty and the consistency and the cost and all of the issues that we'll hear some discussion about today, there are those who have given up by their acts the safeguards that the rest of us have in the sense that they have not given up their constitutional rights, but they have given up quite a bit, and they sit on death row and it's my opinion that the death penalty in those cases is appropriate. With that, Mr. President, I would urge the adoption of the committee amendments and advancement of the bill. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Ashford. You have heard the opening on AM828, the committee amendment offered to LB36. The floor is now open for discussion. Those wishing to speak, we have Ashford, Flood, McGill, White, Nordquist, Janssen, Harms, Hadley, and others. Senator Ashford waives that opportunity. Senator Flood, you're recognized. [LB36]

SPEAKER FLOOD: Thank you, Mr. President, members. Mr. President, one clarification. Is Senator Avery's amendment drafted to the bill and not the committee amendment? [LB36]

SENATOR LANGEMEIER: It is to the bill. [LB36]

SPEAKER FLOOD: Okay. This is going to get more difficult as we go on because these are difficult topics to talk about. And certainly I come from a community that knows firsthand how painful this is. The fact is there's 11 people on death row in this state. Senator Harms knows the pain, two cases from western Nebraska and the Scottsbluff area. Senator Heidemann knows the pain, in and around the Rulo area. Folks in Lincoln and especially the county attorney's office know about a guy by the name of David Dunster who killed while in prison. Obviously, there are people in this state who juries have said meet the criteria in the aggravators, mitigators system to die in what was before thought to be the electric chair. Today we're obviously using lethal injection. There's going to be discussion about who are these people. I want to talk about the aggravating circumstances that a court has to find, that a jury has to find following a review of the evidence. What qualifies somebody for the death penalty in Nebraska? Aggravating circumstances include, and this is found in Section 29-2523, the offender was previously convicted of another murder or a crime involving the use of the threat of violence to the person or has a substantial prior history of serious assaultive or terrorizing criminal activity. The murder was committed in an effort to conceal the commission of a crime or to conceal the identity of the perpetrator of such crime. The murder was committed for hire or for pecuniary gain, or the defendant hired another to commit murder for the defendant. Number four, the murder was especially heinous, atrocious, cruel or manifested exceptional depravity by ordinary standards of morality and intelligence. At the time the murder was committed the offender also committed another murder, multiple killings. The offender knowingly created a great risk of death to at least several persons. The victim was a public servant having lawful custody of the

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offender or another in the lawful performance of his or her official duties, killing a police officer. The murder was committed knowingly to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws. The victim was a law enforcement officer. I said that previously. Beyond a reasonable doubt a jury has to find that an aggravator, at least one, exists. And the men from the Norfolk bank robbery, they found five on each one of the defendants. On the other side of that coin you have the mitigating circumstances, which do not require proof beyond a reasonable doubt. Giving the defendant's attorney or the defendant himself or herself a chance to raise mitigating circumstances. This bill, LB36, will take awhile, I think, to sort through. But some of the provisions I want to point out to you, you're going to read the bill in the green copy form and you're going to notice that it doesn't identify the drugs that will be used to cause death. It talks about intravenous injection of a substance or substances to cause death. Why did we do that? We did that because that's the way the federal government does it. That's the way over 20 other states do it. The Department of Corrections will make rules and regulations pursuant to the Administrative Procedures Act, if you adopt the Judiciary Committee amendment, that will identify the drugs used to cause death... [LB36]

SENATOR LANGEMEIER: One minute. [LB36]

SPEAKER FLOOD: ...through lethal injection. I believe that is the best course of action so that Nebraska, if standards change, if the U.S. Supreme Court rules again on the specific protocols of another state, so that Nebraska can change those rules and regulations. But at the end of the day these convicted persons were sentenced to die in Nebraska. We should have a method to carry it out. Thank you, Mr. President. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Flood. Senator McGill, you're recognized. [LB36]

SENATOR MCGILL: Thank you, Mr. President, members of the body. My heart is thumping like crazy because I have not yet honestly decided whether I'm going to vote for LB36 or not. And I know my time is running out on making this decision. I know I have voted to abolish the death penalty in the past. And if that's what we were debating, that is what I would vote for now again because, you know, I am not morally opposed to the death penalty. Like Speaker Flood, I do believe there are crimes that rise to that heinous level that deserve death. But I do feel the system is flawed, that there are people who commit just as heinous crimes that don't end up on death row, and that is why I opposed the death penalty in past. But I also see that what we're discussing here today is, you know, the majority of the body has concluded that they want the death penalty in Nebraska right now. And so we're debating or we can approach this as debating the issue of what kind of method that is. And I can appreciate that and it's why we spent so much time in the Judiciary Committee trying to figure out how do we make the death penalty, if we're going to have it, the best that we possibly can. It's why I

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initially voted not to vote the bill out of committee, to give Senator Lathrop and others the time necessary to determine if this really is the most slimmed down version of the death penalty possible. And I committed that when he came to a conclusion, when the parties came to a conclusion on that, that I would then vote to advance the bill out. What may help me make my ultimate decision is actually the amendment that is up after this, which is Senator Avery's amendment, which I stand in support of now. I want to get it out there right now so people, if you haven't had a chance to look at it yet, you can take a look. What Senator Avery is trying to do is what we were trying to do in the Judiciary Committee. And it's to make sure that now and in the future that the death penalty is only used on the worst of the worst and on people who absolutely did it, not just beyond a reasonable doubt but absolutely did it. His amendment requires DNA evidence or video recording of the person confessing or a video recording concluding conclusively proving that the person committed the offense, such as in the Norfolk case. Those men are on video. I have seen the video because I covered those court cases as a reporter. I saw Jose Sandoval shoot someone on that video. That is beyond a reasonable doubt that man absolutely committed that crime. So I do hope, regardless of how any of you end up voting on LB36, that you will advance both the committee amendment and Senator Avery's amendment because I don't think any of us like the death penalty or that it has to take place or that we do use it. But I feel with amendments like these it will help get to those who truly did commit these crimes. And with that, I will yield the rest of my time to Senator Nantkes so she can continue the debate on other sides of the issue. [LB36]

SENATOR LANGEMEIER: Senator Nantkes, 2 minutes. [LB36]

SENATOR NANTKES: Thank you, Senator McGill. Thank you, Mr. President. Colleagues, I rise in opposition to AM828 and LB36. LB36 and as amended through the Judiciary Committee offers the citizens of Nebraska and the families of the victims of these horrific crimes false hope. It's also full of flaws in terms of its drafting and implementation. And the other piece that I think is critical to the debate is that without addressing the underlying imperfections in the system, without addressing the appropriateness and utility of capital punishment as a whole, it is a bill that is drafted full of laws, offering false hope, and with no understanding about what these costs are to our citizenry. There's been debate recently in the media and otherwise about why there was not a fiscal note attached to this... [LB36]

SENATOR LANGEMEIER: One minute. [LB36]

SENATOR NANTKES: ...legislation. The Attorney General's Office and Department of Corrections stand by their statement that there are no costs. Then why would I ask you would J. Kirk Brown, the Nebraska Solicitor General, the state's chief deputy penalty attorney, say, January 15, 2008, the costs of Nebraska's death penalty system are staggering. There's a major inconsistency there. And at the very least, we among us

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deserve to have a full and fair debate about all of the information that is at play in regards to this issue. Colleagues, we'll have time today, as we should and as according to the way the Speaker has decided and cooperatively agreed to conduct the structure of this debate, have time to talk about fairness, appropriateness, utility, and whether or not the execution of an innocent person should be on our minds. [LB36]

SENATOR LANGEMEIER: Time. [LB36]

SENATOR NANTKES: Whether or not...thank you, Mr. President. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Nantkes and Senator McGill. Senator White, you're recognized. [LB36]

SENATOR WHITE: Thank you, Mr. President. I know that many of my colleagues here are religious men and women. I know that many of you get together regularly to study the Bible. I know that my own faith teachers that the death penalty is wrong, that it is unnecessary. And yet I will vote for this bill and I will support the death penalty. And a minimum amount of respect for those who I respect demands that I explain why I believe what I believe. I start with the obligation that as a legislator I carry on a tradition of representative government. And one of the fundamental agreements that make this kind of government possible is that the government will try to protect citizens from certain harm. If someone breaks into their house, we will send a police officer there with a gun. If someone threatens their life, that officer will, if necessary, take the life of those who threaten them. We also agree to protect them from outside invasions and throughout it is a basic theme. It's not complicated but the theme is this, that when taking life is necessary to protect innocent life, citizens surrender the right to do that to the government and in exchange one of the things the government promises them back is that it will do its very best to protect their innocence, their lives, their families lives. So now the question becomes is it ever permissible to take the life of somebody who's incarcerated. Because the argument now is, in my tradition, my religious tradition, that it is no longer necessary to take life because we can safely incarcerate people. But rarely we may have to still wage war, but we cannot do it unless it is also justified to protect innocent life. But I would tell you that not only are we empowered and entitled to wage war, to take life, to protect innocent lives morally. We are honor and contractually bound with our citizens to do that when it is necessary to keep that part of the social contract, that is to protect them from the risk that they will be killed or their families will be killed. One of the great flaws with our statute that causes me enormous concern is it only looks backward. Our statute only says, well, you were so bad, that deserves death. There's another word for looking at it that way, and that's called revenge. If all we are doing is looking back at what has occurred and what you did do, then make no bones about it, we are engaged in an official sanction campaign of government revenge. My religion teachers that it's forbidden to man, that revenge is the Lord's and not ours. The only exception to that, the only exception to that is to protect innocent life prospectively. Now

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I have had a number of long conversations with men and women far more educated and more intelligent than I. And we have always come down to one basic problem. Is our ability to incarcerate a person such that they can be held with no future risk to others? Because if they can then if you're really consistent with your tradition, if you're really consistent with the Christian method it is absolutely forbidden to kill him. Unfortunately, I don't think we're there. I know John Gotti... [LB36]

SENATOR LANGEMEIER: One minute. [LB36]

SENATOR WHITE: ...ordered a hit successfully while he was incarcerated in solitary confinement at Marion prison. I know that many of the large criminal enterprises are run from the security of prisons, high security prisons throughout California and other states. I know that many belong now to terrorist organizations and retain their contacts and their ability to kill even though incarcerated. We can argue about whether that's accurate or not or whether we could do more or less, but that is a question for a jury. In our system juries make determinations. So I will support a means of killing through lethal injection but only, and only so long as we cannot safely incarcerate all of those who may kill. I looked at what happened in Norfolk... [LB36]

SENATOR LANGEMEIER: Time. [LB36]

SENATOR WHITE: ...and I recognized those men would kill again if given the opportunity. [LB36]

SENATOR LANGEMEIER: Time. [LB36]

SENATOR WHITE: Thank you, Mr. President. [LB36]

SENATOR LANGEMEIER: Thank you, Senator White. (Visitors introduced.) Continuing with discussion on AM828 offered to LB36. Those wishing to speak we have Senators Nordquist, Janssen, Harms, Hadley, Gloor, Nantkes, Friend, and others. Senator Nordquist, you are recognized. [LB36]

SENATOR NORDQUIST: Thank you, Mr. President and members. I rise today with more questions than answers on this issue. I feel the same emotions as Senator Nantkes...or Senator McGill. Since becoming aware that this bill would be coming to the floor, I've been reflecting on it for a significant amount of time. I've been looking at it through two lenses. First, much like Senator White, through the lens of my faith. And because of my faith, I am unconditionally pro-life and that's from conception to natural death. And it's hard for me to take any action supporting policy that will diminish the value of human life. I believe, and my faith teaches, that every human being from the embryo in the womb to the most heinous criminal, every life is a gift from God. And this Sunday, it just so happens that the gospel reading was about, from the gospel of John,

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about...started, "just as my Father has loved Me, I so have loved you, abide in My love." And our priest went into a homily about a discussion that he's had with the evangelical pastor of a large church in west Omaha. And the pastor of that church was asking him, what's the hardest teaching for Catholics to believe in? And he said that it's the belief that God gave his son for us and in tough times we need to realize that there is that love for us; they're also in our interactions with every other person, every other human life that that love is there as well. The other...the second lens that I look through this at is the lens of public policy and is this a good public policy. We need to look at what our policy goals are. And I think pretty much everyone in here would probably contend that our policy goal is to protect society. I don't think there would be a no vote on that...if we put a resolution up there saying that that's what the goal was for. But how do we do it in the best way possible as a public policy. And I agree with Senator White that we shouldn't be seeking revenge here. As Christians, Jesus told us, in the gospel of Matthew, that when you get struck on the right cheek to turn your cheek. And it's...we should not be seeking revenge. It should be all about safety. And that's where on Senator White's idea I think it has some merit. But how are we going to keep public safe? We need to ask ourselves is this a deterrence. And I don't have the answers on that yet either. There certainly is research that contends that it isn't. And I'm sure there's research that contends that it is. Are we doing this in a just way? I don't think there's a lot of research out there, and if you look at case-by-case, there isn't necessarily a correlation between the most heinous crime and those people on death row. I think that's important. And in a report done by our...commissioned by our Legislature in '01, it says that data reveals significant disparities. This is our own report. Data reveals significant disparities in the treatment of defendants based on the socioeconomic status of the victim. That...there is a correlation there, but I don't know that it's...there's a correlation based on the degree of heinousness of the crime. And then finally, you know Senator Nantkes brought up the cost issue. And that's something as policymakers we also have to consider. If we're setting out a policy we need to be looking for the most effective way to carry it out...the most cost-effective way to carry it out. And state by state by state, I'll grant you this isn't Nebraska, and Senator Nantkes and I are trying to get...have tried to get some more data on what it costs in Nebraska. But Kansas has found that death penalty cases were 70 percent more than the cost of nondeath penalty cases,... [LB36]

SENATOR LANGEMEIER: One minute. [LB36]

SENATOR NORDQUIST: ...Tennessee, the death penalty trials cost an average of 48 percent more than the average of when the prosecutor seeks life in prison. In Maryland death penalty cases cost three times more than the cost of nondeath penalty cases. And we can continue, North Carolina, the cost is an extra \$2.16 million per execution over nondeath penalty. Florida estimates that it spends \$51 million per year on death penalty over what it would cost to punish all first degree murders of life in prison without parole. In Indiana their own legislative audit found that since having the death penalty,

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from '79 to 2000, has spent over...an additional \$37.1 million. So I think that all of these issues have to be considered. And I'll yield the little time that's left to Senator Nantkes. Thank you. [LB36]

SENATOR LANGEMEIER: One second. (Laugh) Thank you, thank you, Senator Nordquist. Senator Janssen, you're recognized. [LB36]

SENATOR JANSSEN: Thank you, Mr. President, members of the body. Like Speaker Flood, I also have a very chilling personal story dealing with this...the needless and senseless taking of a friend of mine. And I debated whether or not I was going to discuss that in detail over the open mike today. And for two reasons I have opted not to. One, I'm not certain I could get through the testimony of going through that again. And the final reason was our guests in the balcony today I did not believe needed to hear that as well. I cosponsored LB36 because I feel that it is necessary for Nebraska to have the ability to carry out the ultimate punishment of its worst of worst criminals. Since Nebraska has the sentence of capital punishment on the books it is only appropriate that we have a constitutionally permitted method to administer the sentence that has been handed down by the court. In April of 2008, the United States Supreme Court ruled that lethal injection as a method of administering capital punishment was permitted under our federal constitution. The state of Kentucky argued successfully before the U.S. Supreme Court that their method of administering lethal injection was not cruel and unusual punishment. The court agreed. Nebraska waited for the U.S. Supreme Court to rule and now it is time to adopt LB36. The Nebraska County Attorneys Association submitted testimony to the Judiciary Committee hearing for LB36 that they discussed and debated this bill at length at their annual meeting. The strong consensus among the county attorneys was that there is statutory provision for capital punishment. Then there must be a method of implementation. And their unanimous opinion was that the method of execution should be lethal injection because it can withstand the state and federal court challenges. In the last three years, the Legislature has voted three times to keep the death penalty. It does not make sense to have the death penalty in our statutes and no constitutional method of execution. With that, I ask you to support AM828 and LB36. And I do believe I have constituents, this is a very divisive issue on both sides, both sides of this issue. And with that in mind, I'll yield the balance of my time to Senator Nantkes. [LB36]

SENATOR LANGEMEIER: Senator Nantkes, 2:40. [LB36]

SENATOR NANTKES: Thank you, Mr. President. Thank you, Senator Janssen. Again colleagues, this is important that we take the time to make the record and that's what I'm trying to do here today. Proponents of LB36 will tell you and tell their constituents that because of the Baze decision, from the United States Supreme Court, we can rest assured that if LB36 passes we'll finally have justice for those victims and those families who have been the subject of horrific, horrific crimes in this state. That is false hope,

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colleagues. The case was the first foray among many for the court into legal standards governing lethal injection cases. A plurality opinion, a fractured Supreme Court put forward a very narrow decision in relation to a very narrow procedural issue before the court. The case does not stand for, and any first year law student can tell you that lethal injection is constitutional at any...under any challenge. That is not what the case stands for. LB36, if and when adopted by this Legislature, represents nothing more than years and years and rounds and rounds of painful litigation for our state, for these families, for these victims. To be clear, colleagues, I am not here to defend any of the men specifically on Nebraska's death row and women if there ever are in that capacity. I stand in opposition to this legislation... [LB36]

SENATOR LANGEMEIER: One minute. [LB36]

SENATOR NANTKES: ...and to the death penalty because of what it does to us as a state and how it affects our individual humanity. We wonder how so many good people in Nebraska can frequently end up putting forth policies that attract negative attention on the national level. Colleagues, if we move forward with this bill Nebraska will be the lone state in recent modern history to reinstate the death penalty. Other states because of costs, because of innocence issues, because of litigation have gone the other direction. It is time to recognize that the evolving standards of decency for a humane society to say enough is enough is enough. And we must move forward in opposition to LB36. [LB36]

SENATOR LANGEMEIER: Time. [LB36]

SENATOR NANTKES: Thank you, Mr. President. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Nantkes and Senator Janssen. Senator Harms, you're recognized. [LB36]

SENATOR HARMS: Thank you, Mr. President and colleagues. I rise in support of AM828 as well as the underlying bill of LB36. Two years ago I stood before this body and debated the death penalty and during that debate I shared with you some of the concerns I had as well as some things that happened in my own community. It bothered me then and it bothers me now and it will bother me in the future to have this discussion. Raymond Mata, Jr. was sentenced in 2000 for murdering and dismembering Adam Gomez. He mutilated this 3-year-old boy from my community. He took part of his body, he cut it up for dog food and the rest he tried to flush through the toilet. He kept some of the parts as trophies and he preserved some of Adam's skin and parts of his body in the freezer. On February 11, 2002, Jeffrey Hessler, raped and killed 15 year old Heather Guerrero. He raped her, he shot her, he murdered her gang style after half-clothed in a basement of an abandoned house. Heather was a beautiful child. She was a 15-year-old girl, she was an athlete, she was popular, she performed antidrug

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skits with her friends in school, and she was a leader and she was loved by her community. Colleagues, Adam and Heather never got the opportunity to graduate from high school, will never get the opportunity to go to college, get married, raise a family and be a contributing part of society because we had two people who decided to kill them with a very heinous crime. Both of these men are on death row where they belong and deserve to be. How do I go back to Scottsbluff, Nebraska, how do I go home and look at the members...the eyes of the members of the Gomez family and the Guerrero family and see the sadness still today. How do I go home and say to them, we just made it right, we just fixed it for you as a family, we gave these two men who murdered your children, who took away their lives, took away your hope and the children that you cherished, we just gave them a life sentence. That's what bothers me about this colleagues. I struggle with this every time we get up to talk about this. What's wrong with this picture? Help me understand what is wrong with this. We have the opportunity today and tomorrow to make this right, to do the right thing. And I say this to you with a very heavy heart, because you see it happened in my community, in rural America, I saw the fear, I saw the anger, and most of all, colleagues, I saw the sadness of the families and the community. There are certain acts that are so heinous that they violate our very social conscience and merit the ultimate penalty. [LB36]

SENATOR LANGEMEIER: One minute. [LB36]

SENATOR HARMS: Thank you, Mr. President. In this case it's death. What a terrible thing to say, but it's death. These two men deserve to die for what they did. Thank you, Mr. President. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Harms. Mr. Clerk, items for the record? [LB36]

CLERK: I do, Mr. President, thank you. Government Committee reports LB638 to General File, LB635 to General File with amendments. A series of study resolutions, LR181 through LR192, all study resolutions, all will be referred to the Executive Board. Thank you. (Legislative Journal pages 1548-1555.) [LB36 LB638 LB635 LR181 LR182 LR183 LR184 LR185 LR186 LR187 LR188 LR189 LR190 LR191 LR192]

SENATOR LANGEMEIER: Thank you. Returning now to discussion on AM828 offered to LB36. Those senators wishing to speak, we have Senators Hadley, Gloor, Nantkes, Friend, Rogert, Council, Stuthman, Coash, Avery, and others. Senator Hadley, you're recognized. [LB36]

SENATOR HADLEY: Mr. President, members of the body, between last Thursday and today, this is a very difficult time for members of the body. These are difficult situations but that's what we're elected for is to make hard decisions and to understand the consequences of the decisions we make. Senator Flood mentioned three times in three

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years the death penalty has been debated in...before this body. And I want to say my reading of LB36 and AM828, we're not debating the death penalty today. I think Senator Flood said it correctly, if I quote him correctly, there was three parts--conviction, sentence, and carrying out the sentence. We're not arguing about the conviction. We're not arguing about the sentence. We're talking about carrying out the sentence. We have on the books a law regarding the conviction. We have a law on the books regarding the sentence but we don't have a way of carrying out the sentence. I thought to myself, how would it be if this body was sitting here and debating if we had a conviction of saying that armed robbery of a convenience store is a crime that you can be convicted for, the sentence is ten years in the Axtell prison, and we don't have a prison in Axtell so we have no way to carrying out the sentence. We would be spending our time today talking about changing that so we could carry out the sentence. I think the gravity is much more here but the concept is the same. We're not going...we're not talking about going back and changing the death penalty law. In 37 states, including the federal government that currently have the death penalty according to my statistics that I could find late last night, five different methods of execution are prescribed. And to me that's what we're talking about today. If we get up and talk about carrying out the sentence which of these five methods is appropriate for carrying out the sentence that we have in our statutes right now, and of course the five are--lethal injection, electrocution, lethal gas, firing squad, and hanging. The vast majority of jurisdictions provide for execution by federal...by lethal injection, 20 jurisdictions provide for alternative means of execution. The state of Nebraska is the only one that specifically said electrocution. The state of Nebraska is practically without a death penalty right now because we have no way of carrying it out. So in summary, again we can sit and spend a lot of time, which we probably will, arguing about the underlying concept of capital punishment. But I feel it's my job as a senator to take an existing law that has an existing sentence and to implement that sentence regardless of my feelings about the underlying law. If we want to talk about the underlying law, then we ought to bring forward an amendment or whatever it might be to look at that. Well, we've done that three times in the last three years. [LB36]

SENATOR LANGEMEIER: One minute. [LB36]

SENATOR HADLEY: There was a bill before the Judiciary Committee, I believe, to do away with the death penalty that is not on the floor right now. So I would hope we would look at...really what we're looking at...to hone in on what we're looking at here which is carrying out the sentence, which is our duty, I believe, as senators to come out with a way of carrying out the legal sentence in the state of Nebraska now. Thank you, Mr. President and members of the body. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Hadley. Senator Gloor, you're recognized. [LB36]

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SENATOR GLOOR: Thank you, Mr. President, members of the body. I have been a supporter of the death penalty. I am a supporter of AM828, LB36 because I think we need a means to carry it out. I was asked this question many times during the campaign and I have had spirited discussion with friends who ask how I could have a career devoted towards health and saving lives and yet be in support of the death penalty. What I have told them I have in note form and will try and recreate as best I am able. But I would start by way of saying I am not an Old Testament sort of person. I don't believe in an eye for an eye. I do not believe in the revenge issue and I am sorry but it isn't about cost. This demeans the moral issue that we have to talk about here when we talk about cost. I will turn that around the other way, from a ridiculous standpoint and say, if it were about cost, the cheapest option is to send people home, maybe put an ankle monitor on them. And after they commit crime after crime at home and are weighted down with ankle monitors, they starve to death because they can't make it to the refrigerator. It is not about cost. I agree that some states have horrific reputations. And I use that term knowing that I am talking about horrific reputations in some states for application of the death penalty, numbers, preponderance of poor minorities in those states, but that is not Nebraska. Nebraska has 11 men on death row. And as best I can tell, and I've asked and asked, no one argues that point, they even do not protest their innocence. Some examples have been used. There's no reason to go into that again. I have empirical arguments that I believe would show that the death penalty is a deterrence. And my friends have their own empirical arguments, the death penalty is not a deterrence. And we will go back and forth on that, I'm sure, in the days ahead. But I eventually revert to what I would tell you is an agonizing but well-thought out personal recognition, common-sense that over the past roughly quarter century, which is represented by the number of years that we have had the longest person on death row, surely, surely at least 11 times, that would be the number of people on death row, someone has taken their finger off the trigger, put a knife back in its sheath, loosened a choke grip on somebody's throat because they knew that the death of that innocent person would result in their death, deterrence. Think of the thousands and thousands of times over that quarter century that people have had murderous thoughts in their minds, understanding that sometimes because of passion, because of a cloud of drug influence, because they're just plain evil those individuals could not resist the urge to kill, even then can you not believe the thousands of times people had murderous thoughts that there weren't at least 11 times equal to the number of people on death row that somebody said, if I kill this individual I, too, will be killed. That's a deterrent effect. Can that never be true? Can that never have happened? Can never be logical? I believe it has happened. [LB36]

SENATOR LANGEMEIER: One minute. [LB36]

SENATOR GLOOR: Thank you, Mr. President. In the final analysis it is important to me that my constituents know that I am no blood thirsty vigilante looking for justice, but as always concerned about the greater good and the sacrifice, whether it's long trials,

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agonizing testimony that has to be given, but the sacrifice that entails for people individually in society. As was the case throughout my career in healthcare, my search for the right answer is rooted in trying to save lives, save lives of the innocent and not just in causing death. Thank you, Mr. President. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Gloor. Mr. Clerk, for a motion. [LB36]

ASSISTANT CLERK: Mr. President, I do have an amendment to the committee amendments. Senator Avery would offer AM1455. (Legislative Journal pages 1555-1556.) [LB36]

SENATOR LANGEMEIER: Thank you. Senator Avery, you're recognized to open on AM1455. [LB36]

SENATOR AVERY: Thank you, Mr. President. This is the amendment that you will see on your computer as AM1410. I decided to refile it because I believe this needs to be a part of the discussion that's going on now. This amendment would add to Section 28-105.01 in the death penalty statute the following language, "Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person unless at least one of the following was admitted as evidence at the person's trial: (a) Deoxyribonucleic acid", that is DNA, "conclusively proving that the person committed the offense; or (b) a video recording of the person confessing to the offense, including video recordings of all prior interrogations of the person by a peace officer; or (c) a video recording conclusively proving that the person committed the offense." Before I explain why you ought to consider passing this, let me explain a couple of things. We know that DNA evidence is conclusive and we know that often these murders that we've been hearing about often have DNA evidence. The second point about the video recording of the person confessing to the offense, note that there is language there that would include taping all prior interrogations so as to establish whether or not intimidation and coercion existed in the process of getting the confession. And the third one, a video recording conclusively proving that the person committed the offense, this might be a video recording from a surveillance camera at a bank that positively identifies the criminal. It might also be an undercover operation with a video tape secretly done that tapes a contract being concluded. This will tighten it up and it would address one of my biggest concerns with the death penalty and that is that we do sometimes make mistakes. In the process of drafting this amendment I consulted with the Federal Bureau of Investigation. I also had a lengthy discussion with a Maryland State Senator. They recently passed similar language in Maryland. And these three evidentiary requirements, I believe, are reasonable to add to our death penalty statute. If you look at some of the work that's been done by the Innocence Project, this is the leading authority on public policy dedicated to exonerating wrongfully convicted people, they report that 238 innocent people have been exonerated by DNA evidence since 1989. And what's even more shocking, too, in the last week 17 of the 238 people exonerated

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through DNA evidence served time on death row, the average amount of time spent was 12 years. In the wake of a tragedy here in our own state, the Beatrice Six case, we are again reminded that human reason and judgment are subject to error. Nebraska put away six innocent people based on fabricated claims and faulty investigation. It just proves that there are too many opportunities in the criminal justice system for failure. Let's try to get it right. We have plenty of evidence of false testimony, misinterpretation or misrepresentation of evidence, incompetent legal representation, unreliable expert testimony. In fact a mistaken or skewed eyewitness or informant accounts are the single greatest cause of wrongful convictions nationwide, playing a role in more than 75 percent of convictions overturned through DNA testing. Any one or a combination of these factors can result in individuals being wrongly convicted, wrongly sentenced, and sometimes wrongly executed. Electronic recording of an interrogation provides an objective record of a critical phase of the investigation of a crime that provides tangible evidence in the case of a confession. Courts have historically judged the admissibility of confessions by considering the totality of circumstances, something that can be achieved with video recording. Only if we review the entire interrogation process, however, from start to finish can judges and juries accurately determine whether the confession was not coerced. The idea that someone can falsely confess to serious crime seems counterintuitive, but we have false confessions that are well documented. They are a reality and resulted in wrongful convictions of innocent people. DNA profiling is an accepted form of forensic evidence. Scientists analyze short repeated sequences of DNA. Because different unrelated people have different numbers of repeated units, DNA can be used to discriminate between people. It's the closest thing we have to infallibility. I would also point out that the Nebraska Legislature, in 2001, acknowledged in statute 29-4118, that DNA testing has emerged as the most reliable forensic technique for identifying persons when biological material is found at the crime scene or transferred from the victim to the person responsible and transported from the crime scene. Every time an innocent person is convicted and the real assailant is out there committing more crimes, we have to be concerned about that. We are guardians of the state's interests. We take our job seriously. It is our responsibility to ensure that we intend to pursue...if we intend to pursue lethal injection that we get it right. I have struggled with this issue, the Beatrice Six and the mistakes that were made, I've struggled with other aspects of this debate. And I can tell you that I know you have, too, and this is not easy. I am simply asking you to take a close look at putting some evidentiary standings on the books so that we can know with a rather high degree of certainty that we are getting it right. I feel confident that if you adopt this amendment and we have these new evidentiary standards established that this will ensure that in the future capital punishment, if it is necessary to achieve justice in our state, that it's applied in a fair, consistent, and accurate manner. With that, Mr. President, I will end my discussion of the amendment and invite questions and discussion. Thank you, sir.
[LB36]

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

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on AM1455 offered to AM828 to LB36. The floor is still open for discussion. Those wishing to speak, we have Senators Nantkes, Friend, Rogert, Council, Stuthman, and others. Senator Nantkes, you are recognized. [LB36]

SENATOR NANTKES: Thank you, Mr. President. And with all due respect to Senator Avery's amendment that he's just recently refiled, I haven't had a chance to review it and get a good understanding about whether or not...how it would apply in terms of retrial for the men who are currently on death row if it's prospective only, and since it was just placed before us, I think that we'll need some time to digest that. But I wanted to address a few points that we have already heard this morning in terms of rules and arguments that have been made. To be clear, and I don't want to speak for Senator Nordquist, he can do that for himself quite well, but neither Senator Nordquist or myself have made the case that cost alone should dictate how an individual member or this state looks at this public policy and what that means to execution and to capital punishment in our state. But when conducting a comprehensive review of this policy all pieces, all factors need to be looked at. And we don't even have basic, basic information on that discreet issue in front of us, which is problematic. Secondly, with all due respect to my friend, Senator Hadley's ideas about legislative role in addressing this issue, implementation alone without policy decision is the province of the executive branch. They carry out the laws. The Legislature sets the public policy. Right now for over 14 months the state of Nebraska has had no method to carry out capital punishment. LB36 seeks to address that issue. Again, I'll argue that it does not. But we as the Legislature have the ability to make a public policy decision whether or not we should replace the method. And that does, that clearly does, clearly will implicate broader discussion surrounding capital punishment, and the abolition thereof, and the necessity thereof, and all component parts. A vote for LB36 is a vote to reinstate Nebraska's death penalty which we, in effect, have not had for some time. Again colleagues, other states are moving in the opposite direction, whether it be because of cost, whether it be because of innocence issues, whether it be for a variety of different reasons involving standards of decency, etcetera, etcetera. And Nebraska, your vote would help to move Nebraska in the opposite direction, a move backwards in time. Colleagues, we're going to have, I believe, a fair and lengthy debate today about these and other issues. And to be clear, I'll be quoting extensively from cases and materials on the death penalty by Rivkind and Shatz, 2001, and also various "Law Review" articles authored by Professor Burger at the University of Nebraska College of Law. And I'll provide a specific citation on that as well, just to be clear that I think it's important to cite your sources when they don't come from yourself individually. But I think there's additional logistical problems with this legislation. This legislation contemplates that medical professionals will be involved in carrying out lethal injection in Nebraska. The American Medical Association, the American Society of Anesthesiologists have all come together and said, in terms of medical ethics, in terms of their licensing their memberships, doctors and anesthesiologists cannot in good faith carry out or involve themselves in these types of procedures. It would violate their medical ethics,... [LB36]

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SENATOR LANGEMEIER: One minute. [LB36]

SENATOR NANTKES: ...it would put at issue their very license to practice medicine. LB36 attempts to address this through some sort of a kind of safe harbor provision to those medical professionals which is inconclusive at best in terms of how that would actually affect medical ethics and medical licensing, and a very open, very serious question in a very conservative sense. We...and if we do not involve medical professionals in these types of activities then we leave to state employees, the Department of Corrections to carry out these medical procedures in a way that they're not trained to do, in a way that they're not capable of doing. And that poses additional constitutional concerns on this process, on this procedure now and into the future. [LB36]

SENATOR LANGEMEIER: Time. [LB36]

SENATOR NANTKES: Thank you, Mr. President. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Nantkes. Senator Friend, you're recognized. [LB36]

SENATOR FRIEND: Thank you, Mr. President and members of the Legislature. For part of the session I'd mentioned on a couple of occasions specific deterrents. And we're here again because when you're talking about an individual who could actually end up either murdering again, coercing another in one way or another to murder again, or before they even committed the murder to actually make a decision based on that particular crime, specific deterrents could be quite important as an aspect or a thought process. Murders that require reflection and forethought, time for somebody to sit back and say, this is what I'm going to do, this is what is going to happen. And somebody with the type of intelligence, a reasonable intelligence or capabilities, there is all kinds of data out there, all kinds of information that shows reports from criminals and victims that indicate that the death penalty does provide a specific deterrence, that the death penalty does deter crime. We have instance after instance. We've found criminals reporting that they didn't commit a particular murder because, because they were afraid of the potential ramifications or the consequences. Here's an example. It's of historical context. In Kansas, this is a decision to reinstate the death penalty for first degree in 1935. They did it in the wake of a spat of deliberate killings that were committed by Kansas...and criminals who had previously committed such crimes in surrounding states. In those states their punishment, if captured, would have been the death penalty. These criminals admitted having chosen Kansas as their sight for those crimes solely for the purpose of avoiding the death sentence in the event that they were captured. There are other statistics. There are many ways to analyze the data. One measure, of course, is to take a time frame that a particular state has had the death penalty in place

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and try to measure that deterrence, criminologists have been doing it forever. I would just say that while it can be debated and argued, and it will be out here, that I could go down four or five pages of list after list of victim or criminal saying, yeah, this person made this point, this person made this part of the discussion, I didn't do X because I was afraid of Y. Obviously, we can go on forever and I have a lot more to say, but I also wanted to at this point yield the remainder of my time to Speaker Flood. [LB36]

SENATOR LANGEMEIER: 1:56. [LB36]

SPEAKER FLOOD: Thank you, Mr. President. Thank you, Senator Friend. I respectfully, rise absolutely against AM1455 to AM828, Senator Avery's amendment. Just for starters, if you read Senator Avery's amendment he creates magically a brand new burden of evidence, a brand new burden of evidence that is going to have to be litigated for years and years and years. "Conclusively proving" is what I read in the amendment. That's unacceptable. Not only is it unacceptable, but his amendment displays and illustrates, in my opinion, a fundamental lack of faith in our courts, a fundamental lack of faith in juries and evidentiary statutes to our entire court system. He's watching CSI. There is simply not DNA evidence... [LB36]

SENATOR LANGEMEIER: One minute. [LB36]

SPEAKER FLOOD: ...in every case. This is a fantasy that you see on television, a sniper does not leave DNA. The Nebraska Legislature should address whether video recordings are required in any criminal case before we start excluding penalties based on the lack of video recordings. DNA evidence produces probabilities about the likelihood the defendant contributed the DNA. That's what that proves. And unlike the Norfolk bank robberies, we don't have video of any other killer. We have eyewitness testimony, we have people at the scene that witnessed it. We have law enforcement officers sworn to uphold the law that saw the crime committed. That's how you prove a case. And I don't agree with changing the evidentiary standard, I don't agree with creating a new burden of proof. [LB36]

SENATOR LANGEMEIER: Time. [LB36]

SPEAKER FLOOD: Thank you, Mr. President. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Flood and Senator Friend. Those still wishing to speak, we have Senators Rogert, Council, Stuthman, Coash, Avery, and others. Senator Rogert, you're recognized. [LB36]

SENATOR ROGERT: Thank you, Mr. President. Members, this is the fourth time in three years that I've listened to the debate over capital punishment. This is my first opportunity to speak. And I chose to do so because this is my first year on the Judiciary

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Committee and I was one of the three folks that voted not to advance this bill several weeks ago. And I have some reasons why I voted not to do that. But I'll tell you first of all what my reasons were to vote to advance it more recently. I believe if we have capital punishment on the books then we need to have a method to carry it out. I didn't feel that it was the right of five committee members, followed by a decision by five judges or a few judges, to make electrocution unconstitutional, that we shouldn't figure out a way to carry out laws we have on the books. With that said, I decided not to advance it because I wanted to make sure we had looked at every possible way to make the application of the death penalty correct by means of three simple things--innocence, fairness and, yes, we have to talk about the costs. Earlier this year you folks helped me pass LB260 which gave those folks who were wrongly convicted a method for which they could petition the state for compensation for that wrongful conviction. One of those folks was on death row. His sentence was thrown out and thank goodness we hadn't put him to death. I think there are fairness issues with the application of the death penalty in whatever version it may be. Cost fits into that. Does a rural Nebraska county have the resources to take a capital punishment trial to court versus Lancaster or Douglas County, who have...or Sarpy that have the resources to do that, or Madison. I think there are socioeconomic application problems--class, race, geography, and the discretion of the prosecutor. I wanted to make sure that when I voted to advance this that we had not...that we had looked at every possible way of maybe making it as fair as we can in application. And that if we had addressed that and it was proved to me that the only way to make it more fair and even in application was the outright repeal of capital punishment in this state, then I would accept that. And that is what has been brought to me today. To make it more fair we have to repeal it. LB36 is not about the repeal, in my opinion, it's about carrying out what we have on the books today. Cost is a factor, it's 15 to 16 times more expensive to put somebody to death than it is to put them in jail for the rest of their life. Are some crimes so heinous that some people may need to be put to death? Maybe. But what do I have here. The overall rate in death penalty cases of error is 68 percent in the state. Most of these convictions are overturned or reduced. Why is that? What happened to the ones that weren't overturned or reduced? [LB36 LB260]

SENATOR LANGEMEIER: One minute. [LB36]

SENATOR ROBERT: Did they just not have the best...I don't know. You know, those are things that I have to consider when I vote to put this out of committee. I thank the committee members, I thank Senator Flood, I thank Senator Nantkes for the debate today and the discussion we've had, and Senator Lathrop for his carrying me through this as well. Thank you, Mr. President. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Rogert. Senator Council, you're recognized. [LB36]

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SENATOR COUNCIL: Thank you, Mr. President. It's somewhat fortuitous that I should follow Senator Rogert because, Senator Rogert, the only way to address this is to repeal the death penalty. And, you know, we've heard the discussion about what the Judiciary Committee did. I voted consistently against advancing LB36 in any form. But I was a member of that committee and I cooperated in terms of their attempts to try to fashion a way to come up with a fair, equitable, consistent method of applying the death penalty, one that wouldn't be arbitrary, capricious or discriminatory. And I did that knowing full well that it could not be done. And after all the efforts of Senator Lathrop and others the final analysis is it can't be done. It's inherently arbitrary, it's inherently capricious, it is inherently discriminatory. You know, there are so many problems with LB36 and all of its amendments and some of the arguments in support of it that I really don't know where to begin. I think I'll begin with the issue of deterrence that was addressed by Senator Friend. And, Senator Friend, I don't know where your data comes from but my data says that the greatest deterrent to serious crime is the risk of getting caught, not the penalty imposed, it's the risk of getting caught. And renowned, noted criminal researchers and professionals far more learned than I or anyone in this body will tell you that. Data also shows that consistently, since 1991, consistently states without death penalties have lower murder rates than states with death penalties. And we talk about people making conscious decisions, if that were the case, John Joubert was 100 yards from Iowa, they had no death penalty. If those are the conscious thoughts that are going through people's minds, all he had to do was jump across the Bellevue Bridge. Those are not the things that deter people. We talk about safety and safety of the public. And I hear my colleagues expressing a genuine concern, we don't want people in this state being at risk of being harmed by someone who's previously committed a homicide. The reality, folks, is we live under that fear every day because while we talk about the 11 people on death row and we talk about Mr. Sandoval who admitted to killing someone beforehand, believe me, I can take you over to the Lincoln Correctional Center where there are over 100 people, over 100 inmates who are there for taking the life of another, many of whom have taken lives of others before and all of whom at some point in time will be back in our communities. And when we talk about the worst of the worst, who decides the worst of the worst. Do we...is it the most recent worst of the worst? Is it the one that people are talking about the most? Because we want to take Norfolk, I have a recollection of a homicide in Norfolk about 15, 20 years ago where a man brutally murdered his wife or girlfriend, I can't remember,... [LB36]

SENATOR LANGEMEIER: One minute. [LB36]

SENATOR COUNCIL: ...and sodomized her. And when it came to a decision as to whether he should get the death penalty, the judge said, well, it's heinous but it's not especially heinous. So who decides who the worst of the worst is? When I go back to my district I have to look in the face of the Williams family whose daughter was brutally, senselessly snuffed out while she was sitting in a drive-through line trying to get a taco by a man armed with a high-powered rifle with the magnification set at eight times. So

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he knew exactly what he was shooting at. And I have to look at her family and see their grief when they know that this guy will be back on the streets, potentially, in ten and a half years because, you know what, folks, that 12-member all white jury... [LB36]

SENATOR LANGEMEIER: Time. [LB36]

SENATOR COUNCIL: ...didn't believe this guy should be convicted of first-degree murder when he'd kill a black girl. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Council. Senator Stuthman, you're recognized. [LB36]

SENATOR STUTHMAN: Thank you, Mr. President, members of the body. I do rise in support of AM828 and LB36. I had constituents of mine that were victims of that Norfolk bank murder and I look at it as people that were going there to work, as they have done, you know, days before, leaving their family, leaving their husband, leaving their children to go to school, never to come back. And that is very tough for me to take. Because there was an individual there, a youth, that was in high school at the time, and I spoke to the group and that was very, very hard to speak to that group knowing that individual's mother never did come home, was never there to enjoy that youth's graduation, will never be there to see the grandchildren, gone forever. I think that is so sad that people have to go through this, that their life was taken. Just by the pull of the trigger, their life was taken from there. That is why I do support the fact that we do have to have a method and I think that is very important because of the fact that these individuals' lives were taken for no reason at all, just by a group of people that came in and just unloaded. And people witnessed it. I mean, it was proof of the individuals that committed the crime. So I do, I do support, you know, the LB36 and I...also AM828, like I had stated, because I have a very soft part of my heart for the victims of these individuals. And I would like to give the balance of my time to Senator Lautenbaugh. [LB36]

SENATOR LANGEMEIER: Senator Lautenbaugh, 2:20. [LB36]

SENATOR LAUTENBAUGH: Thank you, Mr. President. Thank you, Senator Stuthman, for that courtesy. I do have to rise in opposition to this amendment and I do serve on the Judiciary Committee and I believe AM1455 is coming to an issue this important in the absolute wrong way. As some of the other speakers have alluded to, this bill, LB36, was held up in committee while members of the committee worked on ways to...I don't even know what word to use, to somehow address perceived inadequacies or inequities in capital punishment, and they worked for weeks. They worked for weeks. As Speaker Flood referenced, we consulted the experts in this area, in the AG's Office, County Attorney Don Kleine up in Omaha, Public Defender Tom Riley up in Omaha, and the consensus was, even for people who don't necessarily like capital punishment, as I

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understand it, the system is adequate, it's what we can do, it's the best we can do, and it's going to go forward. They did not say it's so arbitrary, capricious, and riddled with flaws that you can't improve it. That's a misrepresentation of what was said. No changes were recommended and this change was not recommended, and I don't think this is the right way to make this change in such an important area of the law, to add these additional evidentiary requirements. As I understand it, we couldn't convict Timothy McVeigh and give him the death penalty if this amendment, AM1455, were the law and that had happened here. I don't know if there was DNA evidence or video evidence involved in that case. I do believe that the sentence is just and the right thing to do in certain circumstances. I don't believe anyone on death row currently maintains his innocence. I do believe the cost issue is somewhat a red herring in this because the appeals will go, appeals will come and they will go regardless of what we do here, whether we have lethal injection or electric chair. And the Attorney General's Office handles it. [LB36]

SENATOR LANGEMEIER: Time. Thank you, Senator Lautenbaugh and Senator Stuthman. Senator Coash, you're recognized. [LB36]

SENATOR COASH: Thank you, Mr. President, members of the body. I appreciate the tone of the debate. It's appropriate. One of the things I did learn through my campaign was Nebraskans expect us to deal with this issue. No matter which side of the debate you're on, they expect us to get something done. I, personally, have struggled, I'm conflicted. This is about justice. Let's not forget about that. It's about justice but it's also about fairness. I agree with the Speaker on a few points. This penalty should be reserved for the worst of the worst. I believe this bill accomplishes that. This bill assures that there are safeguards to assure innocent people are not put to death. Believe this bill accomplishes that. Senator Avery's amendments may assist with that. I'm not sure. There is no doubt in my mind that the 11 people currently on death row are now guilty, no question about that. There's no doubt that people in the future put on death row are guilty as well. This is not about proof of guilt. This is about fairness. The Supreme Court has told us that this is constitutional. It's not unusual or cruel. That's not my concern. I'm not concerned if the 11 people currently sitting on death row feel a little pain towards the end of their life. This is not about cruel or unusual. This is about fairness. This is not about community safety. We have the means to keep our community safe. I asked Director Houston if my family was safe from the 11 people on death row and those who could follow them. He said, yes, we're safe. He said, Senator Coash, you don't have to worry about the 11 people on death row. They're not a threat to you or anyone else. As many people do, in trying times I've turned to my faith and I'd like to read a quote that I passed out as well from Pope John Paul II: Public authority must redress the violation of personal and social rights by imposing on the offender an adequate punishment for the crime as a condition for the offender to regain the exercise of his or her freedom. In this way, authority also fulfills the purpose of defending public order and assuring public's safety while at the same time offering the offender an incentive and help to change his

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or her behavior. It is clear for these purposes to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon and not to go to the extreme...not to go to the extreme of executing the offender except in cases of absolute necessity, in other words, when it would not be possible to otherwise defend society. Today, however, as a result of steady improvement in the organization of the penal system, such cases are rare and if not practically nonexistent. If we had a corrupt government or inadequate penal system, we'd need this bill. But this is not about public safety. This is about fairness. I'm not an attorney so I'm going to ask some questions of one. Senator Council, would you yield to two quick questions? [LB36]

SENATOR LANGEMEIER: Senator Council, would you yield? [LB36]

SENATOR COUNCIL: Certainly, Senator Coash. [LB36]

SENATOR COASH: Senator Council, when a crime is committed that meets the criteria of pursuing the death penalty, who has the discretion on whether to pursue that death penalty? [LB36]

SENATOR COUNCIL: Well, I think you understand our criminal justice system, Senator Coash. The prosecuting attorney makes the decision in the first instance as to what charges to bring against an individual, and if a county attorney does not want to pursue a first-degree... [LB36]

SENATOR LANGEMEIER: One minute. [LB36]

SENATOR COUNCIL: ...murder trial, they can go second-degree murder. [LB36]

SENATOR COASH: Okay. Thank you. What might go into a prosecutor's decision to pursue the death penalty? [LB36]

SENATOR COUNCIL: There could be a number of factors that go into it. [LB36]

SENATOR COASH: Would resources be? [LB36]

SENATOR COUNCIL: Resources could be and, in fact, during the Judiciary Committee there was some discussion of how resources play a part in whether some rural county attorneys pursue... [LB36]

SENATOR COASH: Okay. [LB36]

SENATOR COUNCIL: ...death penalty cases. [LB36]

SENATOR COASH: Thank you, Senator Council. Colleagues, this is about fairness. We

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have a system that does not address the fact that the same crime can be committed in two areas of the state and, because of resources, because of geography, be prosecuted differently. The death penalty can be administered justly. It can be administered justly. It cannot be administered fairly. LB36 and its underlying amendment is as good as it gets. It's justice but it's not fairness. Thank you, Mr. President. [LB36]

SENATOR STUTHMAN PRESIDING []

SENATOR STUTHMAN: Thank you, Senator Coash and Senator Council. Senator Avery, you are recognized. [LB36]

SENATOR AVERY: Thank you, Mr. President. I know that we're discussing lethal injection. We're discussing not whether we will have a death penalty but how we're going to carry it out. But I would submit to you that the two are inextricably linked; that you can't really talk about how you're going to use the death penalty without also talking about whether the death penalty itself is justified and ought to be preserved. I voted three times on this issue already, and when I ran for office I was pretty certain that I supported the death penalty. And when I got to this Chamber, I began to realize that my personal views were not quite so perfect as I had thought them to be before I was elected. Before I was sworn in, my opinions on important issues such as this didn't have much importance. Oh, I thought they were correct and that I could debate them with anybody. I thought they were based on fact and reason. Now, however, my opinions have taken on a different dimension. I can no longer be casually confident about how I arrived at them. I can't be so confident they're correct because now my opinions have consequences because I have to push a green or a red button, and that has serious consequences and this is not...the responsibility of voting is not something that any of us take lightly. That responsibility, when I first addressed this issue back in 2007, forced me to search my conscience and my heart to make certain that I was doing the right thing, and I suspect that many of you went through the same process. Many of you still struggle with this issue. I still struggle with it. We all know that what we do in this body matters and, because it matters, we have to make sure we get it right. Yeah, I'm not so certain about the absolute correctness of my opinions today as I was several months ago. Things are different now because what I do matters and carries consequences. So I reexamine my conscience, I reexamine my heart, and I examine 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 crimes because good and honest people can disagree on that. In fact, my study of the literature shows that there is good evidence on both sides of that question. 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. Look at the literature; they don't. 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

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gets sentenced to death. Who are they? They're minorities, the poor, those whose victims are white. This we know. The evidence is clear. We know the factual problems also in administering the death penalty, that's what my amendment seeks to address, a very large factual problem which occurred right here in our own state, where six people were wrongfully convicted and imprisoned. But I don't remember that a lot of people seriously questioned the appropriateness of those arrests and convictions. But we did get it wrong. [LB36]

SENATOR LANGEMEIER PRESIDING []

SENATOR LANGEMEIER: One minute. [LB36]

SENATOR AVERY: We did make a mistake. In fact, we made six mistakes. I would like to address something Speaker Flood said. If we don't have DNA evidence, video, or taped confessions, then put them in jail for life. This adding new evidentiary standard is not unheard of in legislative bodies. Put them away for life. I'm not saying that we should do away with the death penalty and that's not what this amendment seeks to do, but we should want to make sure that we get it right. We should not set standards lower. We should set them higher. For the sake of justice, let's make it not easier to impose the death penalty. Imposing the death penalty should be subject to a very high standard. If we're going to have the death penalty, let's add an element of confidence that we're getting it right. Justice requires that. [LB36]

SENATOR LANGEMEIER: Time. [LB36]

SENATOR AVERY: Morality requires it. Thank you, Mr. President. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Avery. Those still wishing to speak, we have Senators Wightman, Mello, McCoy, Loudon, Fischer, Dubas, Flood, and others. Senator Wightman, you're recognized. [LB36]

SENATOR WIGHTMAN: Thank you, Mr. President, members of the body. First of all, I do support LB36 and the committee amendment, AM828. I guess I'm still debating on AM1455. I don't think in its present form that I can support that. As previous speakers have stated, we have a death penalty on the books. We not only have it on the books but we have reaffirmed that death penalty three times in the last two years. I've been a member of this body when we've considered it. It's been difficult but that was the position of the body on all three occasions and so it seems to me that we've gone way beyond having it on the books. We've very recently considered it. I believe that the death penalty is supported by a substantial majority of Nebraskans. I think almost every poll would indicate that. So if this body has upheld the death penalty three times in this short a period and if a substantial majority of the residents favor the death penalty, then I think it behooves this body to find a means of carrying out that death penalty, and

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that's what we're really considering here today. We're not considering, at least on the surface we're not, considering abolishing the death penalty. There is a bill that would do that. I think it is out of committee but is not going to be considered, apparently, and I don't think it's necessary that it be considered at this particular session in light of the fact that it has had three hearings before this body over the last few years. We have neither...and it was suggested that we would be the first state to be reinstating the death penalty after it's once been abolished. Senator Nantkes suggested that. We have neither reinstated or are we now considering restatement of...or reinstatement of the death penalty. Quite to the contrary, we have not only not repealed the death penalty but, as I stated, have reaffirmed it three times. The big issues seem to be, as we discuss the death penalty, number one, fairness and proportionality, cost, deterrence, or at least those would be the three biggest arguments supposedly against the death penalty. I know there are all kinds of studies that show that the death penalty is not a deterrence. Contrary to what Senator Council may have suggested, I have read...I don't have any in front of me right now, studies that indicate that it is a deterrent. I think Senator Gloor mentioned this. I think common sense tells you that somewhere sometime this is a deterrence. To show that statistically is probably almost an impossibility, although there are certain...a number of studies that would clearly indicate that it is a deterrent. So I continue to believe that it is a deterrent. I think that if it saved one innocent life a year, maybe across the nation even, that would be sufficient reason to retain the death penalty. So I'm not...first of all, I truly believe it is a deterrent. I will continue to believe it is a deterrent, maybe not in a large number of situations but certainly in some situations. The next argument against the death penalty seems to be one of proportionality, that it doesn't represent fairness, that certain groups of people are far more likely to receive the death penalty than others. I don't know, if you looked at the number of crimes, the number of murders that have been committed where the death penalty has been imposed, whether that would really be statistically correct as some have suggested. It may very well be that those groups of people have committed more of the murders. I have not seen those statistics. But as long as we have however many district judges we have in this state, we're not going to have proportionality. We can't have complete proportionality because each of those judges bring with them a whole different set of values and you're never going to have it exactly proportional. We've tried to address that in legislation. We've used aggravators. We have a number of aggravators and at least one of those must be proven to impose the death penalty. We have statutory sections that provide for emeliation... [LB36]

SENATOR LANGEMEIER: Time. [LB36]

SENATOR WIGHTMAN: ...or ameliorating circumstances. Did you say time? [LB36]

SENATOR LANGEMEIER: Time. [LB36]

SENATOR WIGHTMAN: Thank you, Mr. President. [LB36]

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SENATOR LANGEMEIER: Thank you, Senator Wightman. Senator Mello, you're recognized. [LB36]

SENATOR MELLO: Thank you, Mr. President, members of the Legislature. I rise today, after weeks of introspection and conversations with my priests, the Nebraska Catholic Conference, and many others whose opinions I hold in very high regard. As a practicing Catholic, I firmly believe in the church's teaching of protecting human life and dignity from conception to natural death or, as Cardinal Joseph Bernadin coined, the seamless garment of life. This belief extends culture of life issues beyond abortion and capital punishment to other critical components of the consistent ethic of life, like euthanasia, economic injustice, and racism. This decision comes after much self-reflection and dialogue about where capital punishment falls within our imperfect criminal justice system and how my faith calls on me to protect and support all of human life and dignity. It is unavoidable for me to look beyond the statistics that show capital punishment as a staggering financial burden to the state, as well as a criminal justice system that has both convicted innocent men and women and disproportionately sentenced socioeconomic and racial minorities to capital punishment sentences. Prior to being elected to the Legislature, I publicly stated my support for the Catholic Church's teaching of absolute necessity, where it is morally acceptable for a government to take life in order to protect innocent life. However, while I still believe in absolute necessity, I've come to the conclusion that in supporting life from conception and natural death we best fulfill the consistent ethic of life by sentencing a criminal to life in prison without parole instead of the death penalty. I've also learned through this very emotional deliberation that people of good will can disagree on this very personal issue. However, at the end of this debate on LB36, I cannot in good conscience support reinstating the death penalty in Nebraska because of my belief that we can find a new path forward that provides both justice and builds truly a new culture of life in this state. With that, Mr. President, I'd like to yield the remainder of my time to Senator Nantkes. [LB36]

SENATOR LANGEMEIER: Senator Nantkes, 2:40. [LB36]

SENATOR NANTKES: Thank you, Mr. President. Thank you, Senator Mello. Colleagues, I'm paraphrasing from a favorite and a famous quote issued by Justice Harry Blackmun in the case of Callins v. Collins, and I pose it to each of you today. Yes, we have looked at this extensively in the past many years, but how much longer are we willing to tinker with the machinery of death? That is what is before you today in LB36. And unfortunately, LB36 does not provide any sort of closure or end date but, rather, represents an ongoing, a continuing saga for Nebraska in terms of capital punishment. It provides no true closure, no true justice for families, for victims or for our state. It represents no sound peneological motive. Thus far, we've heard it talked about that it should be reserved as retribution for the most heinous of crimes. We've already had some discussion about how, in fact, many heinous crimes do not in fact receive this

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most serious sanction, so that proves its arbitrary and capricious application. Additionally, we've heard discussions about what the cases in Nebraska and the reviews in Nebraska tell us in regards to its fairness, its bias, its general or specific deterrence factor... [LB36]

SENATOR LANGEMEIER: One minute. [LB36]

SENATOR NANTKES: ...and, at best, again they're inconclusive. To talk about basic fairness and morality, there's a famous principle in law known as the lex talionis, and that's really what...it's Latin for the eye for an eye, a tooth for a tooth, and that's frequently heard as a philosophical underpinning for proponents of capital punishment. However, that was explicitly rejected in the New Testament and is actually, colleagues, an argument in favor of proportionality, which capital punishment in LB36 does not represent. This represents only vengeance, which is not a sound penological concern for a humane society. That's been stated over and over again in Supreme Court jurisprudence. Take, for example, the seminal case of Furman v. Georgia. Marshall concurring, retaliation, vengeance and retribution have been roundly condemned as intolerable aspirations... [LB36]

SENATOR LANGEMEIER: Time. [LB36]

SENATOR NANTKES: ...for government in a free society. Thank you, Mr. President. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Nantkes. Senator McCoy, you're recognized. [LB36]

SENATOR McCOY: Thank you, Mr. President, members of the body. I stand in opposition to AM1455 but in support of AM828 and the underlying bill, LB36. I'd like to highlight the actions of one individual in particular, David Dunster, who has killed two men while in prison. Who is David Dunster? Dunster committed his first murder in 1972 at the age of 17. He shot a 36-year-old mother of eight in the head after torturing and assaulting her, and was subsequently sentenced to life in prison. Because Dunster was accused in a conspiracy to kill the Oregon State Penitentiary superintendent and had other conduct problems, he was sent to a federal prison in Georgia. In 1978, he was sent to a Montana prison where he brutally killed his cellmate. The judge sentenced him to 100 years at hard labor. Based on an August 17, 1997, Seattle Times article, Dunster was shipped to Nebraska "to help him get a new start and to get him involved in some programming." Unfortunately, while in Nebraska Dunster killed again, this time strangling his cellmate with a cord. David Dunster was already serving a life sentence when he committed his second murder. He was serving two life sentences when he committed his third murder. And with that, Mr. President, I would yield the remainder of my time to Senator Flood, if he would so wish. [LB36]

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SENATOR LANGEMEIER: Three minutes twenty seconds. [LB36]

SPEAKER FLOOD: Thank you, Mr. President. Thank you, Senator McCoy. Several speakers ago on this floor the question was raised about somebody's license being taken if they administered a drug to...as part of the lethal injection protocol and it was suggested that you could lose your license; that the American Medical Association or the American Anesthesiology Association or whatever it is would suspend you. They don't license you in Nebraska. First question: Are medical professionals required by this bill to participate in the execution process? The answer: No. The director of the Department of Corrections may designate, quote, any qualified person under the terms of the execution protocol to administer to the convicted person the substances necessary to comply with the execution protocol--page 11, line 21, green copy of the bill. Second question: If licensed medical personnel are involved in the execution process, can they be subject to professional discipline for doing so? Answer: No. Participation in an execution is specifically found to not constitute the practice of medicine--page 11, line 1; page 11, line 16 (sic), green copy. I want to make that very clear because earlier this afternoon you heard that it would compromise your career, your ability in Nebraska. We had some discussion and Senator Council, who I, in my opinion, she knows exactly what's going on with lethal injection, she knows exactly what the statutes say about how to inflict the penalty of death. She's well-versed. And in her discussion she brought up one of the aggravating circumstances, the especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and justice. I want to make it very clear the Norfolk bank robbery convicts were convicted of five aggravators, that one plus four others. Senator Council referenced the Hunt case where in 1984 a young woman was brutally murdered and, as Senator Council said, later sodomized by the perpetrator. In that case, the judge at that time, as she said... [LB36]

SENATOR LANGEMEIER: One minute. [LB36]

SPEAKER FLOOD: ...and she was accurate, did not believe that it met the criteria for the especially heinous, atrocious, cruel, or manifested exceptional depravity aggravator. But it's important to note, when you talk about the death penalty it's all laid out there, Section 29-2523. Look at it. If I were a prison guard at Tecumseh or LCC or the state pen, I'd want the death penalty. What does somebody with life to life have to lose? You are the person protecting the rest of society from this criminal? The only thing that can be taken at that point is their life if they kill a guard. We need the death penalty for that purpose. Multiple murders, we need the death penalty for that purpose. Law enforcement officers, the people we send out at 3:00 in the morning to subdue that suspect that just committed an armed robbery, you kill that police officer, you should die in Nebraska. [LB36]

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SENATOR LANGEMEIER: Time. [LB36]

SPEAKER FLOOD: Thank you, Mr. President. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Flood. Those still wishing to speak, we have Senator Louden, Fischer, Dubas, Flood, Fulton, Lathrop, and others. Senator Louden, you're recognized. [LB36]

SENATOR LOUDEN: Thank you, Mr. President and members of the body. I rise in support of LB36 and also the amendment, AM828 on there from the Judiciary Committee, but I do oppose AM1455. As I look this bill over, I don't see anything in there that says anything about whether or not they needed to be or whether it's a heinous crime or anything. To me, this whole discussion should be about not why but how, how are we going to administer the death penalty. That's been the problem. The court ruled that our electrocution was inhumane and something else had to be done, so there's where we come about with the how and that's what we've come up with LB36. Am I completely satisfied with LB36? No, I don't think I am. Is it probably the best we have at the present time? That probably is. But I think there are better ways. I have a problem with individuals administering drugs to someone if they're not completely qualified, but I'm sure somewhere along the line that will have to be resolved. Part of your problem with all of this is finding people to go ahead and administer this death penalty and, as I passed out some paperwork, some literature here a little bit ago about nitrogen asphyxiation, that hasn't been discussed at all. That is an alternate method there. I still think that in LB36 there should be an alternative method in there because just as sure as we're standing here today and a year or two from now there will be some judges someplace that will decide that lethal injection is cruel and unusual because they have problems finding the veins and inserting needles and that sort of thing. So I think there should be some alternative method. Now whether you pick something as hanging and as Senator Hadley mentioned the five other ways of doing this, then that's up to the body to decide I guess, but there needs to be other alternative methods in there and one of them is coming about. In the future, there probably will be nitrogen asphyxiation, will be one of the other issues that can be used for to do the...to instigate the death penalty. As everyone has discussed already so far, some of the heinous crimes that have been conducted or have been committed in different areas, I agree with most of them. There comes a time when there are heinous crimes that probably that's the only method of...alternative there is, is a death penalty. And when they talk about it isn't a deterrent, I would question that. I think Senator Council said it isn't that...isn't the penalty that's a deterrent; it's the fact that they get caught. Well, yes, when they get caught they know there's a penalty with being caught. So I don't quite understand that reasoning. But to me, I think there is a deterrent in how we administer the laws. Whether it's clear down for DUI or what it is or kids stealing a bicycle, yes, there is a penalty connected with it, and if the penalty suits the crime then it will be taken care of. As we mentioned before, I think we should have an alternative method in LB36 but at this time I will

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support it if that doesn't get put on there. But I think we do have to do something like that because in the future there will be litigation on even lethal injection. As far as using the argument that it...because of the cost, that's out of the question. I think it isn't about the cost. It's about... [LB36]

SENATOR LANGEMEIER: One minute. [LB36]

SENATOR LOUDEN: ...whether we're going to have some type of a deterrent for some of these heinous crimes. And with that, I would...I would submit again that I do support LB36 and the Judiciary amendment. Thank you, Mr. President. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Louden. Senator Fischer, you're recognized. [LB36]

SENATOR FISCHER: Thank you, Mr. President and members of the body. Criminal law bills or issues surrounding the criminal law are not subject areas that you usually hear me discuss on the floor. I haven't participated in our past debates concerning the death penalty. However, because that discussion is continuing today, I would like to briefly talk about the crimes of those on Nebraska's death row, the circumstances that led to these defendants receiving the death penalty. These are just some of the facts. Arthur Gales raped and strangled 13-year-old Latara Chandler and strangled her 7-year-old brother Tamar. Earlier that evening, Gales has severely beaten and left the children's mother Judy dead...for dead near 15th and Grace Street in Omaha. These children are only dead because Gales feared that the children might be potential witnesses who could place him with their mother. So after beating Judy, he returned to the apartment and killed them, the year 2000. Jeffrey Hessler kidnapped and raped 15-year-old Heather Guerrero while she was delivering newspapers early one morning in Gering. Hessler admitted to taking her to an abandoned house where he shot and killed her because she wouldn't agree to keep the kidnapping and rape a secret, year 2003. Raymond Mata, kidnap, dismembered, fed to a dog and tried to flush down the toilet the remains of three-year-old Adam Gomez, year 1999. Michael Ryan sadistically beat and tortured five-year-old Luke Stice before he died. He also sadistically beat and tortured James Thimm to death, year 1985. John Lotter hunted down Teena Brandon and shot her because she had reported to the police that Lotter and Thomas Nissen had raped her. During the murder of Teena there were two witnesses in the farmhouse, Lisa Lambert and Philip DeVine, who Lotter then also killed, year 1993. Jose Sandoval, Jorge Galindo, and Erick Vela committed one of the nation's deadliest bank robberies, shooting and killing Samuel Sun, Jo Mausbach, Lisa Bryant, Lola Elwood, and Evonne Tuttle. Reasons given for the shooting--because it went to hell in the bank--year 2002. David Dunster was convicted of murdering Della Marie Brockamp, a 36-year-old mother of eight in the state of Oregon. He shot her after sexually assaulting her. Dunster was subsequently transferred to a Montana prison where he killed his cellmate and then to Nebraska where he again brutally killed an inmate, year 1997. Carey Dean Moore

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robbed and shot two Omaha cab drivers, Reuel Van Ness, Jr., and Maynard Helgeland. Moore indicated that he had planned the killings for at least a day or two before he actually killed these men. His plan was to call cabs from a telephone booth somewhere on Farnam Street in downtown Omaha to see how quickly each cab would respond to his call. He would then check the driver to determine if he would be a suitable victim, not too young, since Moore stated that it would be easier for him to shoot an older man rather than someone closer to his own age. He determined that he would have to kill the driver so that the victim would not be able to identify him as the robber, year 1980. [LB36]

SENATOR LANGEMEIER: One minute. [LB36]

SENATOR FISCHER: These are the individuals on death row. These are the individuals who have committed such outrageous, horrific, and repulsive acts against our communities. We have the death penalty here in Nebraska. This bill provides the state with the means to carry out that death penalty that is already in our state statutes. I stand in support of the committee amendment and the bill. Thank you, Mr. President. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Fischer. Senator Dubas, you're recognized. [LB36]

SENATOR DUBAS: Thank you, Mr. President, members of the body. Often when we stand up to speak, it's an attempt to convince each other to vote one way or another. We lay out our arguments and hope that we are convincing. If we feel strongly enough about the topic, we may attempt to filibuster or even try to kill the bill. But that is not the case for me today. For most of us, this issue is deeply personal with compelling reasons for either support or opposition, but I do not stand today in an attempt to change your minds or discredit any of your beliefs. It is no secret that I am pro-life and I believe all life is sacred from conception to natural death. That belief is a deeply seated part of my spiritual being. I know that this bill will pass and my vote will not change the outcome of this bill, nor will I fight this bill's outcome. I promised my constituents two things, that I would work hard and that I would be honest, and that promise of honesty is my only reason for speaking today. And I would yield the remainder of my time to Senator Nantkes. [LB36]

SENATOR LANGEMEIER: Senator Nantkes, 3:20. [LB36]

SENATOR NANTKES: Thank you, Senator Dubas. Thank you, Mr. President. Colleagues, to be clear, the Speaker earlier, when he talked about logistical problems in terms of medical ethics, in terms of licensing, told you what he hoped would happen if this legislation moves forward. These issues are under ongoing litigation all across the United States and that is why, at the committee level, the committee heard from

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countless members of the medical community talking about how it would be a violation of their medical ethics to engage in these type of activities. Proponents did not provide one person to testify in support of a position that would allow a medical professional to execute an individual. Additionally, capital punishment is governed by the Eighth and Fourteenth Amendments in the federal constitution and corresponding components in the State of Nebraska's Constitution. That's typically known as the prohibition against cruel and unusual punishments and then also equal protection in due process issues contained within the Fourteenth Amendment. It has been said on countless occasions that lethal injection is the humane thing to do. Colleagues, nothing could be further from the truth. There has been a body of evidence compiled from across the United States talking about real and serious implications and harm that have occurred because either the people who are administering the lethal injection are untrained or unqualified or specific individual circumstances which lead the accused, the convicted to not be readily acceptable to the procedure itself. Thus, LB36, a new method of execution, becomes a litigator's dream and a medical professional's nightmare and offers no assurances and no clarity, in fact, that those... [LB36]

SENATOR LANGEMEIER: One minute. [LB36]

SENATOR NANTKES: ...issues will not be addressed. Again, the Speaker can talk about what his hope is and they can try and put that clearly in the bill itself, but that will not end the question of litigation. That will not end the question of challenge. That will not end those open questions that remain. He can put his hopes and dreams and wishes into the record or into the bill, but that doesn't make it real. We're going to see years and years of additional questions and concerns brought forward if and when LB36 passes. And as Senator Dubas so eloquently stated, I'm not here to debate an individual senator on the merits or demerits of this public policy or this legislation but, rather, to build a record to aid in that future litigation to have... [LB36]

SENATOR LANGEMEIER: Time. [LB36]

SENATOR NANTKES: ...these appropriate questions asked and answered by our courts. Thank you, Mr. President. [LB36]

SENATOR LANGEMEIER: Thank you, Senator Nantkes. Those still wishing to speak, we have Senator Flood, Fulton, Lathrop, McGill, Dierks, White, and others. Senator Flood, you're recognized. [LB36]

SPEAKER FLOOD: Thank you, Mr. President. Good afternoon, members. Senator Nantkes just told you that although I hope and dream that the persons that are in the protocol responsible for delivering these drugs intravenously are not disciplined or called into question for their activities, I'm not just dreaming about it, I'm reading about it. It's on page 11, line 1: Any prescription, preparation, compounding, dispensing,

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obtaining, or administration of the substances deemed necessary to perform a lethal injection shall not constitute the practice of medicine or any other profession relating to the healthcare which is subject to law...by law to regulation, licensure, or certification. The AMA may be against this but they don't take licenses in Nebraska. That is a state function. Only the state of Nebraska can restrict somebody's license. Now I will concede if somebody comes here from the state of Rhode Island to perform services under this bill, to participate in the processes and procedures of lethal injection, may they face licensure problems in the state of Rhode Island? Yes. Nebraska law would not exempt them from that conduct. But under the bill, the protocols developed by the Department of Corrections, it doesn't have to be a quote unquote doctor. So I do not agree with Senator Nantkes' statement and I don't want the record to reflect in any way that my position on this is somehow a hope or a dream. This is a serious matter. I put together a bill that addresses a serious matter and it's a bill that looks like what over 20 other states have right now as a law. Senator Nantkes talks about us moving toward the death penalty while other states are moving away from it. We've never left the death penalty. We still have a death penalty. We're changing the method. And we're not doing it on a whim. We're following the United States Supreme Court Baze v. Rees that says you can do lethal injection if you do it like Kentucky. This wasn't just thrown together. This bill wasn't just some compilation that I thought looked good. It's a very narrowly drawn effort to replace the method of execution which is a very serious topic in this state. Finally, there was some discussion about the idea of retribution and I just want to make two or three comments here before I give Senator Ashford some time. And I want to talk...I want to give you a quote from Justice Scalia in the Baze case quoting Gregg v. Georgia, a joint opinion of Stewart, Powell, and Stevens. He says, "The decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." And finally, Paul G. Cassell, in an article published in The Prosecutor magazine, page 16, states, and I think this is very telling: By imposing just punishment, civilized society expresses its sense of revulsion toward those who, by violating its laws, have not only armed individuals but also weakened the bonds that hold communities together. Again, on Senator Avery's amendment, I oppose AM1455 to AM828. Mr. President, I give Senator Ashford the balance of my time. [LB36]

SENATOR LANGEMEIER: Senator Ashford, 1 minute, 20. [LB36]

SENATOR ASHFORD: Thank you, Mr. President. I'll just very quickly...and actually, Speaker Flood didn't go over a couple of points that I was going to make. I would like to, though, say a word about my colleague Senator Dierks and also Senator Mello, Senator Coash, and Senator Dubas, who are really...made some fundamentally, incredible in my view, statements about their intimate feelings... [LB36]

SENATOR LANGEMEIER: One minute. [LB36]

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SENATOR ASHFORD: ...about this issue. And I think we should listen to them because it is that moral standard that is, you know, is not debatable. And I know Senator Dierks from years, from 1986 on, when I worked with him, he has always had this very firm commitment against the death penalty and for pro-life issues, and I admire the four of them very much. I would like to just reiterate that the committee did two basic things. First of all, we determined whether or not under the Baze case lethal injection, as proposed, is at least theoretically constitutional, and it is. And it is. Senator Dubas is right. There will be many, many appeals that there is no way of guaranteeing that the Baze case will apply to a Nebraska appeal. There's no way that that will happen. [LB36]

SENATOR LANGEMEIER: Time. [LB36]

SENATOR ASHFORD: And that...but...on the point of vengeance... [LB36]

SENATOR LANGEMEIER: Time. Thank you, Senator Ashford and Senator Flood. Senator Fulton, you're recognized. [LB36]

SENATOR FULTON: Thank you, Mr. President, members of the body. Can you tell the difference between the debate that we're having today and other debates that we've had in the past? It's at a higher level today. I remember this when I was sitting in Senator Price's chair in the last session and it was just...it struck me how different the debate was when we were talking about this issue than on all the other issues we've talked about. That's a good thing. I hope that we can remember, remember what it is that is running through your mind and running through your heart and in your thoughts as we debate today, and I hope that we can invoke that same spirit when we debate other issues because, frankly, this serves the people's interest. You may be tempted to believe that you have your position firmly staked out and that you can't be moved. It is precisely at that time when one should tune into debate the most. Such people have the most to offer a debate. If indeed your position is so firm so as not to be moved, then you should be fearless in entering debate, for your position can't be changed. I submit to you those are the people I love to hear from the most. Senator Nantkes and I butt heads last week on an issue, but she said something in her position today which resonated with me. I'm glad that she said it. She said that it's not so much the individual that we're looking at--she said it much more eloquently than I could--but what the death penalty does to society, how it affects us as a society. That's profound. And I'll tell you, that has a lot to do with what my position on the death penalty is. Now I went through this last year. Senator White basically encapsulated what my position is, but if there was a way that would...if there was something that would cause me to say that the death penalty should be repealed, it is the effect that having a death penalty would have on society that would cause me to do that. I remember in college, when there was an execution performed here in Nebraska, the circus atmosphere that occurred outside that penitentiary. I felt sick to my stomach and at that point I was a firm supporter of the

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death penalty. That's something that caused me to change. So Senator Nantkes and I disagree on this issue but something she said resonated with me. Debate, it's a good thing. I heard words such as "religion," "faith," and "morality." I'm happy to hear those words. I'm pleased to hear those words. It suggests that something very important is occurring here. We're talking about life issues. The highest good we as human beings enjoy is our right to life, our experience of living and our experience of life, and we are able to put ourselves into the shoes of other people precisely because we have that experience of life. It is good that we're able to talk about these deeply personal and, as Senator Ashford enumerated or called it, intimate things because here in this Legislature we are free to be able to talk about these things without the fear of reprisal and attacks from our colleagues on the floor. It's not that way outside. I haven't made arguments from my faith in the past, yet I have received some very ugly communications because of my faith. Here, that hasn't been so much the case. This is a special place, the Legislature, and this is where we're supposed to be having these debates. [LB36]

SENATOR CARLSON PRESIDING []

SENATOR CARLSON: One minute. [LB36]

SENATOR FULTON: My colleague Senator Mello brought up an argument that has found favor in this country and it's...the moniker is the seamless garment argument and it's an argument which, if you're not familiar, basically it says that all life will be treated with the pinnacle of respect such that if we are pro-life for those who are unborn we should be pro-life for those who are to receive the death penalty. And so the seamless garment says that we treat each the same. I've not accepted the seamless garment arguments, I never have, and it's precisely because of the inherent precious nature of human life that I don't. Within the seamless garment, there are three individuals. There is the murderer, there is the murder victim, and then there is the comparison to that person which is unborn. It seems to me that the seamless garment assigns a lesser moral relevancy to the murder victim than to the murderer or the unborn child. [LB36]

SENATOR CARLSON: Time. [LB36]

SENATOR FULTON: Thank you, Mr. President. [LB36]

SENATOR CARLSON: Thank you, Senator Fulton. Mr. Clerk, items for the record? [LB36]

CLERK: Thank you, Mr. President. A hearing notice from the Executive Board regarding a hearing on LR171 and a Reference report. Study resolutions: LR193 through LR209 introduced by various members; all will be referred to the Executive Board. That's all that I have, Mr. President. (Legislative Journal pages 1557-1567.) [LR193 LR194 LR195

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SENATOR CARLSON: Thank you, Mr. Clerk. Senator Lathrop, you are recognized.
[LB36]

SENATOR LATHROP: Thank you, Mr. President and colleagues. Good afternoon. This is my fourth time through the death penalty in my three years here. Each time we have taken up the death penalty, we have had hearings in Judiciary Committee. We have heard from victims. We've heard from law enforcement. We have heard from folks like the Catholic Conference. We've heard from experts in criminal justice. We've heard from everyone. And after having sat through four Judiciary Committee hearings and debate on the floor on three separate occasions, I've come to this conclusion: The debate almost always involves people, thoughtful people, friends of mine, thoughtful people that stand up and say we got to have the death penalty because this horrible thing happened. And Senator Fischer a few moments ago gave us a recital of some of these folks who sit on death row. They are awful. I think I could agree with you that they shouldn't be alive. The question about the death penalty does not end with the recital of the terrible crimes these people have committed. It only begins there. You see, I don't think anybody in here could argue that these people don't deserve the worst kind of a punishment. The people in Norfolk, the people in Scottsbluff, this guy that killed somebody in prison, they're awful people. But that isn't the end of the inquiry. It is the beginning of the question about the death penalty, because the death penalty is fraught with problems, and when we voted on LB36 in committee the first time, four of us at least agreed to look at those questions. I talked to a lot of people about those questions, people whom I respect both as prosecutors and as defense lawyers. The conclusion was not that there are not problems with the death penalty. The conclusion was not that it's okay in Nebraska. In fact, it's quite to the contrary. Those who prosecute and those who defend these claims appreciate that there is an arbitrariness to the death penalty. We've heard, we've heard some of the terrible things people on death row have done. You can go into the population and find people that have done as bad of a crime who did not get the death penalty. There are problems with proportionality. There are problems with arbitrary application. There are problems with the expenses. The appeals last 20 to 25 years. Those are the issues that surround the death penalty. And I will tell you, with all respect to those who have recited the terrible things that have gone on in their districts, I hear you. But that isn't the end of the question. We have studied in Judiciary Committee the application of the death penalty in the state of Nebraska. Because there are awful people on death row, we shouldn't ignore the fact that half of the people that get... [LB36]

SENATOR CARLSON: One minute. [LB36]

SENATOR LATHROP: ...the death penalty will have that sentence set aside; that we

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spend millions of dollars every year on lawyer fees, on appeals, on things that take up the 25 years to get somebody ultimately to their death, if that should happen. The batting average of the death penalty is awful. Those are issues, those are legitimate policy issues that we should discuss and we should discuss them notwithstanding the fact that 11 people on death row did awful things. The conclusion of the people that I talked to, the prosecutors and the defense lawyers, is there is inherent arbitrariness in the application of the death penalty. There is no amendment I can offer... [LB36]

SENATOR CARLSON: Time. [LB36]

SENATOR LATHROP: ...to improve that. Thank you. [LB36]

SENATOR CARLSON: Thank you, Senator Lathrop. Senator McGill, you're recognized. [LB36]

SENATOR MCGILL: Mr. President, members of the body, I rise to share with you part of our experience in the Judiciary Committee and how I wish that all of you could sit through that one hearing. Of any of the hearings that we have in the Legislature, I wish you could all be there because, you know, we've mentioned Norfolk a lot today and it was incredible because there were two family members that came down from some of the victims of that crime. One supports a death penalty and one is opposed. And to hear both of them testify and then sit next to each other, having both been through that same experience, you know, really makes me wonder about, you know, kind of as Senator Council was saying, just all of the victims of murder in Nebraska and what makes one victim more important to that family than the other. I've had my staff do some research today and found out there are 70 to 100 murders in Nebraska every year. About 10 percent go unsolved. In fact, there are 300 cases since 1970 that have gone completely unsolved and the victims have had no justice whatsoever. And I look at the variety of cases that are, you know, presented in front of our legal system and not everybody gets the death penalty, a very few do, and to justify one over the other, it's just...it is so difficult to me. In my own district, there was a young man murdered, stabbed 30-some times, and the guy who did it was found not guilty by reason of insanity and could get off within a year or two because he's just at a rehabilitation institution where...or a mental institution where they no longer think he has as serious of a problem as before. He could potentially get off any time after only a couple of years in there. You know, to these families I think the impact on them is all equal. You know, when somebody takes the life of a loved one, we don't offer them all the death penalty. Clearly other states, you know, families are suffering there too and many other states don't have the death penalty. Do our families suffer more? Do their families suffer more? These are just some of the thoughts that are going through my mind that really isn't, you know, whether it's for or against LB36. It is more against the death penalty itself. But I just wanted to share some of those thoughts as we are talking about victims and are bringing up some of these heinous situations with those in the death penalty. Seventy to a hundred

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murders a year in Nebraska, I think every single one of those families hurts equally. Thank you, Mr. President. [LB36]

SENATOR CARLSON: Thank you, Senator McGill. Senator Dierks, you're recognized. [LB36]

SENATOR DIERKS: Thank you, Mr. President, members of the body. Representative government, someone mentioned that in their talk earlier today. Any time I've run for reelection or for, originally, for the first election, the people that I talked to ask me how I would support them, and every time I tell them that I will support what the majority of them want with the exception of the moral issues. Because I've got my mind made up about abortion, I've got my mind made up about the death penalty and I will not vary from that. I figure those are moral issues. And I've never had a bit of problem with my constituents because of what I've told them. We're talking today about so many issues. We're talking about deterrence, which I think is arguable. We're talking about the costs, which again is arguable. We're talking about legal difficulties, for instance, plea bargaining and sentencing agreements. We're talking about mental competency; arguable. We're talking about race, we're talking about wealth, we're talking about resources--how much money does a county have to defend or to try the guilty people or the people that are accused. We're talking about appeals, the amount of dollars it takes. The courts agree that if a method of execution causes extricating pain or the significant risk of such pain, it violates the Eighth Amendment whenever a feasible alternative exists. So what is the feasible alternative? Well, it's life without parole. But you qualify that by saying no more letters from outside, no more letters to go outside, no conversation with anybody, no telephone calls, solitary confinement means solitary confinement. So I guess my question is, are we looking for restitution or are we looking for revenge? Thank you, Mr. President. [LB36]

SENATOR CARLSON: Thank you, Senator Dierks. Senator White, you're recognized. [LB36]

SENATOR WHITE: Thank you, Mr. President. I'd like to just clarify a couple of vocabulary points. It will, I hope, help us have a discussion on this matter so we can understand historically some of the thinking. I've heard the term used "deterrence," that the death penalty does not deter anyone. And what I do want all members to understand, there's two kinds of deterrence. There's specific deterrence and there's general deterrence. General deterrence means if someone commits a murder, is sentenced to death, that will discourage another person contemplating committing a murder from doing it. They would generally discourage, deter commission of crimes in the public at large. There is no question that there is much evidence that the death penalty does not effectively work as a general deterrent. There is, however, also the concept of specific deterrence. Specific deterrence means will it deter this person from doing it again, and obviously the death penalty is incredibly effective at specific

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deterrence. So as we talk about deterrence, please recognize there is both specific and general. I do want to point out to my colleagues that as we went through this debate thus far and we've talked and talked and talked about the horrible things people have done and the anger that we feel--and, by the way, my brother-in-law was murdered and his killer is on death row in Nevada, and my wife was a witness in that trial--I am not a stranger to that anger. But making policy on that anger, making policy solely focused on what happened in the past and how these people deserve it really is revenge. Senator Dierks is quite right, it is nothing but revenge if that's the point. But what I would urge the body to think about instead is this, that often past behavior is an indicator of what people will do in the future; that a person who will kill five people just, even though they have the money and there is no threat to them, to cover up a crime is a whole lot different type of criminal and a type of threat to the general public than a person who gets into a fight in a bar and accidentally or purposely hits someone and kills them. One has a greater degree of moral depravity and is much less likely to be salvageable. People who kill children for sexual gratification, most experts will tell you, are literally beyond salvation. They will commit those crimes over and over again. Also, we're seeing a rise of criminals who are connected either with large organized gangs of criminal activity or they're connected with terrorist organizations. Such people have the resources to remain a threat even while incarcerated and they, too, actually create a different level of risk to the community at large. I would hope that in this debate and going forward we acknowledge when we're talking about revenge because we're angry and horrified about what someone did to another human being, whether it was feeding their body to a dog or murdering them in cold blood to cover up a crime, versus our duty to protect society from future acts of violence, which I would submit to you is the only moral basis on which to move forward. And I would also ask the body to think. [LB36]

SENATOR CARLSON: One minute. [LB36]

SENATOR WHITE: A lot of what Senator Council has said, Senator Nantkes has said is absolutely true. My brother is a public defender in Cook County. He defends folks who are charged with crimes like these. He hates the death penalty because he does see it as arbitrary. If you're poor and if your victim is white as opposed to black, you are far more likely to get the death penalty. Statistically, I think that's beyond conclusion or rational argument that that isn't true. So to me, the answer to solve that problem and the other problems that we face today is to ask a simple question: Is this person that we are thinking about applying the death penalty to a serious risk to future harm? Because, in fact, a person who is connected, who has wealth, like Gotti, who has ties, who can afford good lawyers and belongs to a criminal or terroristic enterprise, is likely actually to far more qualify for the death penalty than someone who is just... [LB36]

SENATOR CARLSON: Time. [LB36]

SENATOR WHITE: ...abominable in their behavior in the past. Thank you, Mr.

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President. [LB36]

SENATOR CARLSON: Thank you, Senator White. Senators still wishing to speak: Janssen, Campbell, Wallman, Ashford, Gloor, Nordquist, and others. Senator Janssen, you're recognized. [LB36]

SENATOR JANSSEN: Thank you, Mr. President, members of the body. I rise in opposition to AM828 and also still in favor of LB36 with the committee amendment, AM1455. I see in the Viewer there's other amendments that are out there pending. Whether it be to the bill, I don't think they're toward the amendment, I will gauge those based on the fact of whether they're not...if they are actually dealing with lethal injection as a means to carry out capital punishment. May or may not support them on that basis but will not support amendments if they deal with capital punishment, as I think this debate is about a means of carrying out a law that we already have in statute here, which is capital punishment. And with that, I'll yield the balance of my time to Speaker Flood. [LB36]

SENATOR CARLSON: Thank you, Senator Janssen. Senator Flood, 4 minutes. [LB36]

SPEAKER FLOOD: Thank you, Mr. President. Thank you, Senator Janssen. I listened very carefully when Senator Lathrop talked because he did put in his time, and let me tell you, it was painstaking. He turned over every rock, he read every case. I was preparing briefs. Our county attorney in Madison County was preparing briefs. Senator Lathrop did his homework and at the end of the day he decided to send it to the floor. I know that he has reservations about the death penalty, he was always very clear about that, and his issue was proportionality. And we went back and forth for weeks, literally five or six weeks, trying to determine if there was anything we could do on proportionality, because I think that's the crux of his concern. And what I learned during the process, and I'll let him speak for what he learned because I think he's got a different opinion, but what I learned after going through this is Nebraska has a very good system of determining who gets the death penalty. It is not used very often in this state. We have 11 people on death row. Don Kleine, the Douglas County Attorney, will tell you he does not...he does not seek the death penalty except in the extraordinary cases, the ones that need the death penalty. He uses it judiciously. We have the trial phase. We have the start of the trial where the prosecutor has to have that information in...of aggravators, alleged aggravators, in the complaint. You have the trial. The trial, the defendant is found guilty. Then the next deck is the aggravation hearing, which is proving up beyond a reasonable doubt that the aggravator was met, which I...which, as you know, is the highest burden in the land. I've talked to you about what those aggravators are. I don't need to go over them again. If no aggravator is found to exist, court will enter a sentence of life without parole right there. If one or more aggravators are found to exist, the three-judge panel will be convened for sentencing. And as part of that aggravator process there's also the mitigator process. And then the

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sentencing--three judges convened as a panel. That's when they look at the mitigation. That's when they learn more about the case. There's an automatic review of the Supreme Court. There is a proportionality exercise that the court, the trial court, has to go through. And we looked at that and we looked at that and we looked at that. I just can't see how you can improve what we have. We have a very good system, as far as due process is concerned, for convicting killers of first-degree murder and sentencing them to death, and I'm not prepared to change it. I don't think we should change it. We have the right system in this state. Eleven people are on death row of all the murders we've had. [LB36]

SENATOR CARLSON: One minute. [LB36]

SPEAKER FLOOD: Mr. President, I would give the balance of Senator Janssen's time back to him. [LB36]

SENATOR CARLSON: Thank you, Speaker Flood. Senator Janssen, 50 seconds. [LB36]

SENATOR JANSSEN: Thank you, Mr. President, members of the body. I just wanted to clarify. Looking at the numbers, I got a little bit mixed up when I was up earlier, of course, in support of LB36 with the committee amendment, AM828. I am in opposition to the amendment to the committee amendment, which is AM1455. And with that, I yield the balance of my time back to the Chair. [LB36]

SENATOR CARLSON: Thank you, Senator Janssen. Senator Campbell, you're recognized. [LB36]

SENATOR CAMPBELL: Thank you, Mr. President. I knew that this decision would be one of the most trying ones that any of us would face as we came to the Legislature. After many months and talking to a great number of people, I finally decided that the death penalty does provide a final sanction for those few capital crimes that are so horrific, unspeakable, so inhumane. This decision has, I think, been very difficult for those of us who have looked at it in terms of a person of faith. And yesterday, of all days, in my Sunday class the discussion was what shall be the Christian response to the judicial system, and I probably paid more attention to the discussion than your average Sunday classgoer. One of the points in the class, that we of faith are called to forgive, and my sense would be that many of us can forgive. But in the class it was important that we also know that we are all not called upon to forget. And it is that small point that I want to emphasize today, that we not forget the victims, that we not forget the communities in which they lived in. As state policymakers, we have...we have committed ourselves to remember the responsibility we are given. And Senator Harms and I were talking this morning. Our own personal thoughts, our own personal reflections on this change when you become a state policymaker, because we are

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called to ensure and set a standard for the safety of the state's citizens and to set forth the policy that a final sanction of the death penalty is in place for the most unspeakable, inhumane murders of our citizens. But I do believe that those of us who have said, yes, we need a death penalty, and have it in these state must also make a commitment to three additional things; that we move forward in the coming months and years to know the cost. Each citizen of the state deserves to know what the cost is in the death penalty. When I used to speak as a county commissioner, I used to say 50 cents of every property tax dollar that you put forth in Lancaster goes to the criminal justice system, and it wasn't to make them change their mind but to be fully informed as a citizen. The second thing is, is that we need to support, as best we can, the Public Advocacy Commission started under Attorney General Spire to even out the public defense across the state of Nebraska, and to keep working on an improved coroner system to make sure that our investigations are the best that they can be to protect everyone's rights. Thank you, Mr. President. [LB36]

SENATOR CARLSON: Thank you, Senator Campbell. Senator Wallman, you're recognized. [LB36]

SENATOR WALLMAN: Thank you, Mr. President, members of the body. This should be tough. It should be hard for us. You know, one of the hardest things in the Bible is forgiveness and love one another, and I know three families who have had their child murdered and not a single one of those three families wants a death penalty. They e-mailed me. They talked to me personally. It's easy to be for the death penalty, you know, but vengeance is mine, says the Lord. Will it deter crime? I don't know. If it's a Mafia or a mob-related crime, if you're sitting on the jury you probably will not ask for the death penalty. And one of the most famous court trials in this country on the West Coast, a famous football player, a heinous crime, didn't spend any time in jail. So is that justice fair? It's justice for the wealthy, not for the poor. Also, for the counties, if you seek the death penalty, it's going to...could break your county if it's a big case. So most county attorneys will probably be influenced by the county board members because of monetary cost. We talk cost. Death has a cost. It shouldn't happen. We're one of the most civilized countries in the world, we call ourselves, but yet we have the most highest crime rate in the world, and that bothers me. Is incarceration the answer? Do we rehab? Is that the answer? It should be. And then I would yield the rest of my time to Senator Nantkes. [LB36]

SENATOR CARLSON: Senator Nantkes, 3 minutes. [LB36]

SENATOR NANTKES: Thank you, Mr. President. Thank you, Senator Wallman. Wanted to just talk a little bit about what the Nebraska Supreme Court has told us, has said to the Nebraska Legislature when it made its decision in the Mata case last February. It said that a method of execution will violate the prohibition against cruel and unusual punishment in the state constitution if there is a substantial foreseeable risk

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inherent in the method that a prisoner will suffer unnecessary pain. A court must then evaluate claims that punishment is cruel and unusual in light of contemporary human knowledge. A penalty of death must afford...accord with the dignity of men. And it goes on, colleagues, to talk about how you can craft a public policy that tries to comport with these dictates and this legal structure. But it also adds a burden. It adds a burden of proof on to the state, on to the Attorney General's Office, on to the prosecuting attorneys in these cases to create a record, to carry a burden of proof showing that these risks in fact will or will not occur if you change your method of execution. I wonder, will the record and body of evidence in regards to botched executions under similar protocols across the United States be included in that hearing and in that evidentiary burden? I wonder if issues surrounding untrained medical staff or, if no medical staff are available, state correction or state employees who will be carrying out these procedures, I wonder how those risks change and how that burden will be carried in regards to those factors. And unfortunately, colleagues, if you read the bill, these things are not laid out. [LB36]

SENATOR CARLSON: One minute. [LB36]

SENATOR NANTKES: The Judiciary Committee amendment tries to make the procedures, policies, and practices subject to negotiation, public scrutiny, debate, and full disclosure. But it doesn't go far enough to ensure that we actually have those protocols afforded and conducted and promulgated in an appropriate way. Additionally, there remains significant legal considerations under how the bill is crafted. Have you read in LB36 the elaborate procedures for putting to death a pregnant woman that the state must comport with? Have you had a chance to review that portion of the legislation the Speaker has brought for us today and inherent risks in dealing with those circumstances? [LB36]

SENATOR CARLSON: Time. [LB36]

SENATOR NANTKES: Thank you, Mr. President. [LB36]

SENATOR CARLSON: Thank you, Senator Nantkes and Senator Wallman. Senator Ashford, you're recognized. [LB36]

SENATOR ASHFORD: Thank you, Mr. President. And I know we're making a record here in this discussion and I fully respect that that is going on. The Judiciary Committee obviously had that language in front of it in the Mata case when it put LB36 out. And let me just backup a second. I want to talk just a bit about...very briefly about what Speaker Flood said. Our committee was divided, not necessarily on putting the bill out but on the necessity of having a thoughtful discussion and debate. We read the Mata case over and over again. We read the Baze case over and over again. We read every case over and over again that had direct application to this particular bill. We delayed the vote on

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putting this bill out until we had an opportunity to review whether or not proportionality was appropriately addressed in the Nebraska system, not in LB36 necessarily, but in the Nebraska system. And we determined, we determined that there is no more fair way to deal with proportionality than the system that we have. Senator Lathrop is absolutely right. We could have a perfect system of proportionality and there's still going to be an arbitrary result. There's going to be an arbitrary result because we are human beings. And because we are human beings, there is a degree of arbitrariness. And yes, when we're dealing with the death penalty, arbitrariness has a more impactful sort of result. But the discussion about proportionality is a critical discussion. One of the reasons why I'm going to vote against Senator Avery's amendment is because this needs thorough review. Senator Avery's amendment deals with the issue of consistency, proportionality and evidence. It is an amendment that needs to be addressed in committee. It is a idea very well thought out by Senator Avery that needs to be addressed in committee. It needs to go through that same discussion that we had on LB36. But when we talk about mitigators, when we talk about the ability before the three-judge panel, which must find unanimously beyond a reasonable doubt that the aggravators that were found at this trial stage are such that they trump the mitigators and that has to be found beyond a reasonable doubt unanimously by three judges and then there is an automatic appeal to the Supreme Court addresses proportionality. There have been three people, persons, in Nebraska since 1903 since the Department of Corrections took over the job of executions in our state that have been executed since 1903. That doesn't mean that there's not vengeance in someone's heart when we execute somebody but what it does mean, it does mean is we have a very careful system. It does mean we have a very cautious system and we have a very moderate system. And in the Baze case, after we determined, and thanks to Senator Lathrop and Senator McGill and Senator Rogert and Senator Council for asking the questions that...we thought we had it. We had stuff on the blackboard. We had slide presentations. We had everything and Senator McGill and Senator Lathrop, Senator Rogert said, Senator Council, that's not enough. We got to talk more about this and we did. We continued to talk about it. That doesn't mean that Senator Lathrop or Senator McGill or Senator Council or Senator Rogert have to vote for this bill. What it means is they're incredibly studious people who care deeply about this issue. We are not showing vengeance here. We are trying to come up with a system that gets at the worst of the worst as Senator White talked about last year. We're trying to get at the worst of the worst. Are we always going to do that? No. [LB36]

SENATOR CARLSON: One minute. [LB36]

SENATOR ASHFORD: But on the issue...well, once we determined that we had a system that it was on proportionality that was a good as it was going to get in our estimation, then we, certainly we talked about the issue that Senator Nantkes just talked about. And the Baze case is clear on that issue. The Baze case is clear on the issue. That doesn't mean there won't be appeals on lethal injection but the Baze case determined as Senator Roberts concluded that the method of execution, the protocol in

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the Baze case in their view was constitutional. That doesn't mean that the protocol that we utilize in Nebraska will be determined not to be constitutional. That's not our job. Our job is to put forth the best public policy we can, and the Attorney General, the county attorneys will do their job, the defense attorneys will do their job, and I will bet you that in Nebraska it's been the case since 1903 that we will be very careful... [LB36]

SENATOR CARLSON: Time. [LB36]

SENATOR ASHFORD: ...and very cautious. Thank you, Mr. President. [LB36]

SENATOR CARLSON: Thank you, Senator Ashford. Senator Gloor, you're recognized. [LB36]

SENATOR GLOOR: Thank you, Mr. President. I rise in opposition to AM1455 and it's appropriate that I should follow Senator Ashford. I know something about laboratories. And although I am very empathetic with Senator Avery's plea to get it right, I believe AM1455 does too many things that haven't been appropriately vetted and puts too much confidence in the test. I'd like to know what kind of labs are going to be involved that are going to help us make, and in fact for all intents and purposes, maybe making the decision about whether we're going to put a man or woman to death. Are they certified or do they exist? How often have they done this? Do other states trust them with these sorts of results in these important decisions? There are certifications or credentialings that a variety of labs can have. Is this a forensic lab? What are the training of the technicians? These are all questions that I don't think can be answered on the floor during debate and as Senator Ashford has said, are more appropriate for the committee to talk about and work through and bring back to us. I think this is a big leap for us to take without having it appropriately analyzed, significant, significant issue. I also have a problem with putting too much trust in the tests. Are DNA tests accurate tests? They are incredibly accurate tests but that's the test itself. The technician must get the evidence. The technician or somebody must place it in a container. It must be given to somebody by a person who then stores it. It must be analyzed by somebody. The results must be written up by somebody. The evidence...the hair samples or whatever may be placed and must be placed back in storage again by a person. The problem we have here is that humans are not infallible. Although the test may be incredibly accurate, humans must touch this lots and lots of times. And if I, as a lowly state Senator, can see this as a problem, I see a defense attorney picking this apart and adding it to what seems to be a concern of people and that is the cost associated with drive, driving this out. And Senator Ashford turned that issue around the other way and told me, too much trust in technology, we may find some prosecutors, we may find some judges too quick to sentence somebody to death because they trust these DNA results, and these results are only tests, they're only bits of additional information. Humans come in contact and once humans come in contact the accuracy of these tests begin to drop and drop and drop, and every time they are touched and handled, there is another chance for error,

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another chance that they will be inaccurate. Again, I think AM1455 is well intentioned but I do not believe it will help us get it right. Thank you. [LB36]

SENATOR CARLSON: Thank you, Senator Gloor. Those wishing to speak, Senators Nordquist, Nantkes, Friend, Council, Haar, Harms, and others. Senator Nordquist, you're recognized. [LB36]

SENATOR NORDQUIST: Thank you, Mr. President and members. I, like Senator Fulton, appreciate that we are approaching this from a discussion both of kind of the cultural of life, and I have a hard time believing that keeping the death penalty in place is advancing our culture of life in this state. And outside of our fundamental beliefs of life and death, we do need to take a look at all the issues involved around it as a public policy position. Cost certainly is an issue that needs to be considered. And like Senator Campbell said, I think that's a great idea that we do take a harder look at it. You know, one of the things that wasn't included here that, I don't know why, the Department of Corrections didn't give us a hard number on what it's going to cost to set up a system. Several...a couple other states have gone through this recently spending upwards over \$800,000 implementing the lethal injection, buying equipment, things like that. You know, it would be nice to see some hard numbers on what this is actually going to cost us to implement. But I'd like to go back to the issue kind of our system, and how arbitrary it is, and the issue of proportionality. I hope you all take time to look at the report that the Legislature commissioned in late '99 and was received in '01 about our system. I think it's broken and it is arbitrary. There are...there were, when they looked at it, there were 175 death eligible cases with a total of about 185 prosecutions that, which death sentence was a possible outcome. And if you look at the statistics, 29 of them resulted in 29 death sentences out of those 185 possible prosecutions. But a few findings that are disturbing, if I can get to the right page here, first was the data that says...excuse me...the data out there was not shown, data was not shown to support a conclusion that the system consistently limits death sentencing to the most capable death eligible offenders. We are not sentencing the most heinous victims to death. It is arbitrary. Senator Flood mentioned what the judges have to go through since 78 Nebraska sentencing judges have been required by legislation to consider issues of comparative excessiveness in their sentencing considerations. And there are no doubt, and they are no doubt aware of the legislative concerns about arbitrariness and comparative excessiveness. But the findings shows that in spite of this penalty trial performance, the penalty trial data as a whole suggests that a number of death-row sentences may have been imposed in cases that are clearly not among the worst of the worst. The second concerning aspect is the Nebraska...and I'll read here. The Nebraska system is characterized by sharp differences in charging and plea bargaining practices in major urban counties versus the counties of Greater Nebraska. Our third finding is that the system is characterized by sharp differences. In major urban counties, prosecutors appear more...appear to apply quite different standards than do their counterparts elsewhere in the state in terms of their willingness to waive the death

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penalty, death penalty unilaterally or by way of plea bargain. The geographic disparities in the rates that the cases advance to penalty trial are not explained by differing levels of defendant culpability nor are they explained by financial considerations, the experience of prosecutors in handling and trying capital cases, or the... [LB36]

SENATOR CARLSON: One minute. [LB36]

SENATOR NORDQUIST: ...the attitudes of trial judges. Certainly, that is an issue. And because of that, they also say as a result, because 90 percent of the minority defendants charged with capital murder in Nebraska are prosecuted in the major urban counties, the practical affect of the difference in the rate, in the rates that prosecutors advance these cases to penalty trial is that statewide, minority defendants face a higher risk that their cases will advance to penalty trial. And then the one I mentioned earlier. Another problem is that they also say the data reveals significant disparities in the treatment of defendants based on socioeconomic status of the victim. I don't know why we're going forward with a broken system. It's arbitrary, and we need to take a fundamental look at this again from the top down. Thank you, Mr. President. [LB36]

SENATOR CARLSON: Thank you, Senator Nordquist. Senator Nantkes, you're recognized. [LB36]

SENATOR NANTKES: Thank you, Mr. President. I want to address three points in terms of this time at the mike, issues surrounding cost, issues surrounding the meaning of the Baze or "Bazee" opinion, and specific problems with LB36. And as an overview I wanted to just talk about an issue involving common sense that requires one to not have to be a constitutional scholar, a litigator, or otherwise. But to know that the system itself, a broken system, as Senator Nordquist just talked about, is run by humans, is made up of humans, human beings who are subject to human error. And as Senator Ashford correctly noted, we have good people carrying out and working within our justice system from defense attorneys to prosecutors to judges to court personnel and otherwise. We do have good people, but they are prone to make a mistake as is human nature. And even if we would take into account the procedural safeguards that are available and recognize the fact that certain prosecutors do in fact utilize this most severe sanction judiciously, that doesn't mean all do. And additionally, it doesn't fix the problems that are still inherent in terms of issues that have been posed by the cases of the Beatrice Six in terms of wrongful convictions that happened, that involved good people at every step along the process. That poses doubt into the current structure. Additionally, we have a case now that's recently garnered media attention where the chief investigator, the Douglas County CSI, is accused of manufacturing and tampering with evidence in capital cases. So even if we were to adopt Senator Avery's amendment as he puts forward, to try and bring some, some narrowing, some, some certainty to those who are accused and who will receive the ultimate sanction in terms of their innocence or guilt or otherwise, DNA, in and of itself, will not prove that, it won't if we

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have human actors that are planting evidence or tampering with evidence. You could still have a positive DNA finding based on faulty information. These cases are real. They are not made up by the opposition to this bill to plant doubt. They have been through our court system and they ask us, they demand us to pause and consider whether or not we should continue to move forward with a broken system, run by human beings, subject to human error but yet, at any cost, under any circumstance, decide to move forward with the ultimate sanction, whether or not it actually keeps our citizenry safe on a general or specific deterrence principle, whether or not it cost more or less than life imprisonment. Maybe some of those things don't matter to proponents. I think they do. I think that people want to look at this comprehensively and seriously, but we don't even have the basic information in terms of cost. Senator Nordquist and I have tried to get those from the only people who have them, the Nebraska Attorney General's Office, the Nebraska Department of Corrections. And frankly, the response is disturbing (a) that it comes so late in the process, and (b) that it's incomplete and inconclusive. And that's why we'll be conducting an interim study on those cost issues. [LB36]

SENATOR CARLSON: One minute. [LB36]

SENATOR NANTKES: The other reason that those responses are incomplete are from very statements made by the Attorney General's chief prosecutor saying the Nebraska death penalty costs are staggering. Yet, we get a response back saying the costs are minimal. If they can't get the story right in their own office, how are we supposed to have a legitimate debate about this on the floor of the Legislature. I also want to talk with...about specific problems with LB36 and these are questions and answers provided by Dr. Mark Heath, medical doctor, cardiac anesthesiologist from Columbia University, New York, who was here to testify at the committee level and provide additional supplemental responses. LB36 talks about substance or substances. Nowhere in the language does it restrict or prevent the use of drugs that can cause severe pain or suffering, including potassium and pancuonium. Does LB36 require the use of... [LB36]

SENATOR CARLSON: Time. [LB36]

SENATOR NANTKES: Thank you, Mr. President. [LB36]

SENATOR CARLSON: Thank you, Senator Nantkes. Senator Friend, you're recognized. [LB36]

SENATOR FRIEND: Thank you, Mr. President and members of the Legislature. Senator White had mentioned earlier, talked about the differences between specific and general deterrences and I appreciated his comments because I'm mixed and matched a little bit and with the five minutes and 30 lights in the queue, unfortunately felt necessary to do so. But he was correct. I believe, I guess, that also, and I would submit to you, and that's the arguable part I think, that the general deterrents that I brought up, I think that

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there are instances and indicators of plenty of it. I don't think there's any doubt that there's specific deterrents. If a murderer is actually put to death, that murderer will kill no more. That is the specific deterrence that Senator White was speaking of. I did want to address the amendment and it hasn't been addressed too much. I hope members of the Legislature were not actually seriously considering this amendment. And no offense to Senator Avery, and I told him beforehand that I was going to address some of this amendment. In subsection (a) does having DNA, and Senator Nantkes alluded to this to a degree, does having DNA on the scene actually prove that guilt? I mean, this is not, this is a difficult subsection here. Subsection (b), does having a videotape confession mean that that person unequivocally committed the crime? We've got plenty of confessions from people that didn't happen to be on videotape, that happened to be on tape or happened to be on paper, that were worth the paper or the tape that they were written on. Subsection (c), a video recording proving that the person committed, or excuse me, that the person committed that crime, what would that entail? What would that information entail? That is so vague. A video recording conclusively proving that a person committed the offense. Does that mean that, there's a video showing that person was at that particular site and was standing there? I mean, they have video. What is that? Members, you need to look at...if we're actually considering adopting this amendment, I would respectfully submit, or respectfully ask that you look at this again and start thinking about those questions. The third piece that I wanted to briefly touch on and there's been a lot of...there's been a lot of discussion, appropriately so, of the immoral nature or the moral nature of the death penalty. I've never been a huge believer, and, and...I've never been a huge believer. I would respectfully submit to you that this idea or this code, these code words, the culture of life, are loaded. Let me explain what I mean. The death penalty and abortion, there's no moral equivalent. In my eyes and in my view, it is not a moral equivalent. And we, as human beings with some gray matter and we can actually make these decisions, have to understand that. You're talking about an innocent human being in the womb, and someone who has been deemed to absolutely show no respect for human life. There is a divide in moral equivalency there. I would also submit to you that, and religion has come up in this discussion, and it usually does. Because I've been through a lot of these debates as well, not only in the Judiciary Committee but out here on the floor. Organized religion, and all of us, and every day, every walk of life run into this difficult decision all the time. [LB36]

SENATOR CARLSON: One minute. [LB36]

SENATOR FRIEND: And they can't agree. We can't agree. The Catholic Church can't agree. The Christian churches can't agree. People worldwide cannot agree. You say, well, Friend, you're wrong, the Catholic Church does agree. Let me read this. Not all moral issues have the same moral weight as abortion and euthanasia. For example, if a Catholic were to be at odds with the Holy Father on the application of capital punishment or on the decision to wage war, he would not for that reason be considered

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unworthy to himself to receive Holy Communion. That was written by Cardinal Ratzinger and it was a memo to Cardinal McCarrick, was made public in the first week of July, 2004. For those of you who don't know, Cardinal Ratzinger is now Benedict XVI. Members, we need to be careful and we need to show care in this area. [LB36]

SENATOR CARLSON: Time. [LB36]

SENATOR FRIEND: Thank you, Mr. President. [LB36]

SENATOR CARLSON: Thank you, Senator Friend. We continue our debate on AM1455 to AM828 to LB36. Senator Council, you're recognized. [LB36]

SENATOR COUNCIL: Yes, thank you, Mr. President. There's been a lot of discussion about whether or not we have a death penalty in this state and whether we do. And it's that reason why I did not introduce or offer my death penalty repeal bill initially as an amendment to LB36. Because, in my opinion, we do not have a death penalty at this point in time and that passage of LB36 would constitute the equivalent of reinstating the death penalty. But because there's been such commentary with regard to the question of whether or not death penalty repeal should be a part of this discussion to avoid all doubt and question about that, I have introduced LB306, the death penalty repeal as an amendment to LB36 and it comes as no surprise. This was a part of the discussion during the Judiciary Committee, it was a part of the discussion with the Speaker that LB306, the death penalty repeal bill would probably be introduced as an amendment to LB36. I can tell you it was my hope that we wouldn't have to take that step. It was my hope that the majority of this body would see that LB36 is flawed. And I appreciate greatly Senator Lathrop's statements about the process that members of the Judiciary Committee undertook, because I stand on the statement that I made earlier which was challenged. And that statement was that there was an effort on the part of members of the Judiciary Committee to get the various groups together to come to some type of agreement that would eliminate or reduce the arbitrariness, the capriciousness, and the discriminatory nature of the death penalty. And the fact of the matter is, those parties could not come to an agreement that would result in making the death penalty less arbitrary, less capricious, less discriminatory. And the point I made at the beginning of that process and the point I made at the end of that process was that, you weren't going to be able to do that. You know, despite their best efforts, they weren't going to be able to do that because the death penalty is inherently arbitrary, capricious, and discriminatory. I listened as Senator Fischer recited the examples of what occurred in the cases of the 11 individuals who serve currently on death row, who sit there currently. And most assuredly, those individuals committed horrific crimes. But I ask you, let's talk about the 1,439 other homicides that were committed during the same period of time that these individuals committed their homicides. And for you to be able to stand here and say that those 1,439 other homicides were any less horrific, were any less proportional, and that's the problem with capital punishment. And that's the reason

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why I've offered eleven, LB306 as an amendment to LB36 because that's where we need to go. Senator Avery, I respect your effort to make a bad bill better. But you can't make a bad bill better. And... [LB36 LB306]

SENATOR CARLSON: One minute. [LB36]

SENATOR COUNCIL: ...your amendment, it unfortunately, particularly with regard to videotape confessions, try to explain that to Matthew Livers, who has a videotape confession of the homicide of the farm family in Murdock. Who...it was discovered that neither he nor his cousin committed that homicide. Yet there's a videotape, I'm sure, of his confession to committing that. And it's this very same case that Senator Nantkes just referred to that involves the CSI administrator in Douglas County, who is under indictment in federal court with regard to that. The fact of the matter is that you can't make this bill better. The Supreme Court's decision does not make this law constitutional. It's provides a... [LB36]

SENATOR CARLSON: Time. [LB36]

SENATOR COUNCIL: ...framework for constitutionality, but not make this law constitutional. [LB36]

SENATOR CARLSON: Thank you, Senator Council. Senator Haar, you're recognized. [LB36]

SENATOR HAAR: Mr. President and members of the body, I'd like to give my time to Senator Avery, please. [LB36]

SENATOR CARLSON: Senator Avery, 4:50. [LB36]

SENATOR AVERY: Thank you, Mr. President. I've been listening very carefully to the discussion and let me just say that I believe that all 11 that are currently on death row today are probably guilty. I suspect that we have DNA evidence to prove that in some cases, if not most. I've had some off mike discussions about my amendment and there's been some concern that the 11 on death row now might somehow avoid the death penalty if this amendment passes. You can be sure that there will be appeals filed no matter what we do. If we pass LB36 without my amendment, there will be appeals. If we pass it with my amendment, there will be appeals. If it would assuage some of the concerns about the current people on death row, I would be willing to entertain an amendment to this, on Select File, to prevent its retroactive application. The 11 now on death row might still try new appeals but they probably would fail with new language applying the new standards only to future cases. I'd like to address Senator Friend's concerns about what he thinks are flaws in the three evidentiary pieces of information that would be required. DNA evidence is the best we have, the best science we have for

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determining guilt and innocence. In fact, the state of Nebraska, as I indicated in earlier comments, the state of Nebraska has, in 2001, stated so that it is the best evidence that we have for establishing guilt. And I had that actual section, if I can find it. I believe it is in Nebraska Statute 29-4118. "The Nebraska Legislature finds," "The Legislature finds that DNA testing has emerged as the most reliable forensic technique for identifying persons when biological material is found at a crime scene." I didn't realize that that was in dispute. The Legislature in 2001 did not see it as a disputable point. With respect to video recordings take a look at that subsection that Senator Friend was mentioning, the second one, a video recording of the person confessing to the offense. This would also include all prior interrogations of the person. So you can establish whether or not the person was intimidated or coerced into making a confession. I think that's a pretty significant safeguard. And the last point that Senator Friend needed clarification on was the video recording that conclusively proves a person committed the offense. I'm talking here about surveillance cameras in banks and other places where you can clearly identify the person committing the act. I'm also concerned here about undercover videotapes that might have someone... [LB36]

SENATOR CARLSON: One minute. [LB36]

SENATOR AVERY: ...setting up a contract for a murder. I believe those are adequately covered here. Have we covered everything? No. Have we made it more likely that we'll get it right? I think we will. I believe that if you're concerned about whether we get it right in the application of the death penalty, then you ought to vote for this amendment. I would like to hear more discussion about the amendment itself. I know we all want to talk about the death penalty, but this amendment is a serious amendment and I would like to have more discussion of it. With that, I will end and perhaps talk about it again later. Thank you, Mr. President. [LB36]

SENATOR CARLSON: Thank you, Senator Avery and Senator Haar. Those wishing to speak: Senators Harms, Wightman, Lautenbaugh, Pankonin, McCoy, Avery, and others. Senator Harms, you're recognized. [LB36]

SENATOR HARMS: Thank you, Mr. President and colleagues. You know as we get into this kind of discussion, one thing I always think about is what about the people who sent us here? What about the people in your district that you represent? How do they feel about this issue? They're the second house. What are their views? Sometimes I worry about whether or not I'm really truly representing their views and not representing my own personal views. That's a tough line to follow as a Senator. Let me share with you a study that was done. As Senator Lathrop indicated earlier, this is the fourth time we've been through this issue about the death penalty. And last year just before we started on the death penalty a study was released that was done by McGrain, Berryman and Mines that surveyed the public, a small segment of the public about what their views were in regard to the death penalty. And here's what the public said to us as senators:

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78 percent of the respondents said they supported the death penalty for heinous crimes, 78 percent of the public. I would guess that the farther west you go and get closer to where I live, I would almost guess that percentage probably would go up. But the survey also had several other questions about the methods of execution I would like to share with you. It said that 60, 60 percent said they disagreed with the state Supreme Court ruling that Nebraska's use of the electric chair constituted cruel and unusual punishment. I find that interesting. Here we're debating this whole issue and I've heard that discussion all last year about cruel and unusual punishment and about the whole process that we use, but yet the people who sent us here are saying, you know what, we don't agree with what the Supreme Court said. I find that almost amazing and surprising to a certain degree. What I find also interesting is that 57 percent said they would support legislation to make lethal injection the sole means of execution in Nebraska. Now again, this was released February 14, 2008. That's the latest data we have. So as senators, as we continue this debate and we go through whatever other amendments might be placed on the board, think about who you represent. Think about what they've just said to us. Are we representing our own views? Well, I find that hard sometimes. I sometimes get those intermixed and I try not to do that. But this is, these are facts and this is the latest we have and I hope you'll take that into consideration. And I'd like to yield the rest of my time to Senator Flood. [LB36]

SENATOR CARLSON: Thank you, Senator Harms. Senator Flood, 2 minutes. [LB36]

SPEAKER FLOOD: Thank you, Mr. President. Thank you, Senator Harms. Senator Council earlier was talking about the broken system, talking about the 1,439 other homicides. Others in here have said, why was the death penalty given on this case and not on that case. We live in a world much different than that of a prosecutor or a judge. We are presented a list of issues at the beginning of the session that we weigh in on, and we determine whether or not we're going to be for the death penalty or against the death penalty. Prosecutors look at the evidence. That evidence changes from case to case, it's obviously different, it's different defendants. But you wonder why somebody isn't charged with first-degree murder in an aggravator and the information, well, think about the evidence. Maybe it was a heinous act. Was there a confession? Was there not a confession? Was there physical evidence? Circumstantial evidence? [LB36]

SENATOR CARLSON: One minute. [LB36]

SPEAKER FLOOD: Did anybody else participate? Is there a codefendant? Is there a credibility issue? Was the evidence circumstantial? It is not apples to apples. What you read in the newspaper in June about a case where the prosecutor doesn't ask for the death penalty doesn't necessarily mean that it wasn't heinous. It just means the prosecutor didn't, in that prosecutor's opinion, have the evidence to prove his case up beyond a reasonable doubt. You read about five people dying in a bank robbery in Norfolk, it's on videotape, your darn right they're going to go for the death penalty. Is

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there somebody in our prison system today in Nebraska that should have the death penalty that doesn't? Maybe so. They benefited from the prosecutorial discretion, maybe so in that case. But it's a question of evidence. It isn't for us to judge because we don't know what the evidence is. We don't know if there's a credibility issue. We don't if we're relying on the testimony of an inmate to convict somebody. [LB36]

SENATOR CARLSON: Time. [LB36]

SPEAKER FLOOD: Thank you, Mr. President. [LB36]

SENATOR CARLSON: Thank you, Speaker Flood. Senator Wightman, you're recognized. [LB36]

SENATOR WIGHTMAN: Thank you, Mr. President and members of the Legislature. I rise again in support of LB36 and in support of the committee amendment. I don't feel that I can support AM1455, Senator Avery's amendment. First of all, I don't think it takes into account all of the things that need to be considered, and I furthermore believe those matters can best be considered by a judge in the individual case, and certainly the judge is making that decision. You know, he doesn't have a single one in which an eyewitness under any circumstance or any number of eyewitnesses might result in the death sentence because he's talking about having it on video, sometimes having the crime on video, having DNA evidence. But under no circumstance would just witnesses alone be sufficient to satisfy the rule that Senator Avery would propose in AM1455. I think Senator Flood is absolutely right when he says that we have it about as right as we can get it with all the aggravators and mitigators under Section 29-2523. The judges consider this and do consider this and have to consider this in order to impose the death sentence. And then it's considered by three judges, a panel of three judges. I don't know how much more protection you can have. Am I saying that it's going to be applied proportionately in every single case? I don't think anybody can ever say that. Because as I say, judges come in with all of their life that they've lived up to that time, and certainly that might make some difference in their mind as to whether, what evidence would justify the death penalty. So if we're looking for absolute proportionality, I'm not ever going to stand here and contend that we're ever going to satisfy that type of a requirement. But I think that we have protected it through Section 29-2523 and the added protections that they would have under LB36. With that, I would yield, with that I'd yield the remainder of my time to Senator Lathrop. Thank you, Mr. President. [LB36]

SENATOR CARLSON: Thank you, Senator Wightman. Senator Lathrop, you have 2:40. [LB36]

SENATOR LATHROP: Thank you, Senator Wightman and Mr. President. Colleagues, I've been...let me address AM1455, because while I appreciate what Senator Avery is trying to do, I think there's a practical problem with it's application. And I don't want to

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discourage him from filing amendments but when we say that the DNA has to conclusively establish guilt, that presents a lot of questions I suppose if you're a prosecutor or a judge trying to apply this were it to become law. Here's the question. If you have a rape followed by a homicide, then there might be body fluid left behind that you can conclusively establish who did the killing. But what if the DNA is taken from a strand of hair that's found on the carpet in somebody's office where somebody was killed. The secretary's hair is found in there, does that conclusively establish through DNA evidence? DNA comes in a lot of different forms. It could come off a strand of hair, it could come off of a drop of blood, it can come off of a lot of different body fluids, I suppose. And I think there are too many circumstances where it could be used for this to be workable as a gatekeeper for when the death penalty is imposed. Just seems to me a judge could look at that and say, well, yeah, there's DNA evidence and I'm pretty sure this guy's guilty, so does that mean we've met the burden that's now found in what would be the law if AM1455 were to pass. Perhaps Senator... [LB36]

SENATOR CARLSON: One minute. [LB36]

SENATOR LATHROP: ...Avery's thought that through. And if I can, I'll yield the balance of the time I've been yielded, if I can, to Senator Avery if he likes. He's not here. [LB36]

SENATOR CARLSON: You can't do that, Senator Lathrop. [LB36]

SENATOR LATHROP: I can't do that, so I've learned something else today. Thank you, Mr. President. [LB36]

SENATOR CARLSON: Thank you, Senator Lathrop and Senator Wightman. Senator Lautenbaugh, you are recognized. [LB36]

SENATOR LAUTENBAUGH: Thank you, Mr. President and members of the body. I again rise in opposition to this AM1455 and in favor of the underlying bill and the Judiciary Committee amendment. And let me again reiterate, this is too much of a substantial change to be bringing about as a floor amendment in an area as serious as this. I'm sorry, it wasn't a floor amendment. It was filed last week. But something that hasn't had a hearing, something that hasn't gone through the committee process, I just think we are playing with fire when we proceed in this way. I again want to address the phrase that's thrown around here today, I believe a little haphazardly, arbitrary and capricious. That the people that worked on this all concluded that the system is just so arbitrary and capricious that we can't fix it, so no additional amendments should be offered. I would urge you to contact Don Kleine in Douglas County and ask him if his conclusion was, as he was one of the parties involved in the negotiations regarding amendments, if he actually concluded that our death penalty as it exists is so arbitrary and capricious that you can't fix it so you shouldn't try. I would suggest to you that he would tell you that is not what he said and with good reason, because that is not the

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case. And this is an emotional debate and we get passionate about this, as we probably should. But I would caution us to remember that people are watching what we're saying and that we do need to have a certain amount of measuredness, if you will, in our remarks. We learned about the case of Kyle Bormann, up in Omaha. This was evidence of the lack of the proportionality and the arbitrariness and capriciousness of this penalty, it was represented to us. And we were told he was convicted of second-degree murder, not given the death penalty, and his victim was African-American and we learned his jury was all white, we were told. Well, here's some things that weren't mentioned. The prosecutor vigorously sought first-degree murder in this case. The jury concluded that he did not have the requisite premeditation because he was too drunk. So they convicted him of second-degree murder. Those are the facts. I think it is incredibly reckless to stand here and say only, the victim was African-American and the jury was all white. Because that leads us to a conclusion that I don't think is justified in that case and I think it impugns the jurors in that case, I think, unfairly. We heard someone else say, well, there's a gentleman who was convicted of murder but he did not get the death penalty because of an insanity defense. Well, how do we justify that? Mental illness is one of the mitigators. We have aggravators and mitigators that have to be considered before capital punishment is appropriate. And mental illness is one of the mitigators. That is how we justify it. And I'm to the point of echoing what the Speaker just said, yes, if we go case-by-case, we can say, well, look, there were 1,439 murders but only 11 people on death row. How do you justify it? Well, if we want to wheel in the 1,439 cases and sift through the evidence, I'm sure more often than not we can. Because we can't be in a position of knowing all the factors, but the prosecutor is and the jury is and the defense counsel is and the judge is, and three-judge panel is, and the courts that sift through it inevitably on the automatic appeals are. So it is very dangerous, I believe, to stand here... [LB36]

SENATOR CARLSON: One minute. [LB36]

SENATOR LAUTENBAUGH: ...and say that this is done arbitrarily and capriciously and cherry-pick random cases and say, see, this person committed a crime that we considered particularly heinous but he or she did not get the death penalty, so the system is broken. I reject that. I don't think that's a valid way to argue here, and I don't think that's an indictment of the entire system. Every case is different. The evidence is different. The aggravators differ, the mitigators differ, whether or not the crime is a capital crime to start with, first-degree murder versus second-degree murder, we don't know all of those things. But we have a very elaborate and, I would submit to you, a very fair system to sift that out. And I think the conclusion of the people who reviewed this in working with the Judiciary Committee was, no additional amendments were warranted, that the system is as good as it's going to be. And that's not the same as saying, it's so broken that there's nothing you can do to fix it. The other way of saying it is, you shouldn't... [LB36]

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SENATOR CARLSON: Time. Thank you, Senator Lautenbaugh. (Visitors introduced.) Mr. Clerk, for an announcement. [LB36]

CLERK: Mr. President, Enrollment and Review reports LB155, LB218 and LB392 as correctly engrossed. Education Committee, chaired by Senator Adams, reports LB281 to General File with amendments and the following bills indefinitely postponed: LB22, LB215, LB558, LB607, LB654, LB665. I have a hearing notice from the Education Committee, confirmation hearing notice; and study resolutions LR210 through LR222 all calling for interim studies introduced by various members will be referred to the Executive Board. Thank you, Mr. President. (Legislative Journal pages 1568-1575.) [LB36 LB155 LB218 LB392 LB281 LB22 LB215 LB558 LB607 LB654 LB665 LR210 LR211 LR212 LR213 LR214 LR215 LR216 LR217 LR218 LR219 LR220 LR221 LR222]

SENATOR CARLSON: Thank you, Mr. Clerk. We return to discussion on LB36. AM828, and AM1455. Senator Pankonin, you're recognized [LB36]

SENATOR PANKONIN: Thank you, Mr. President and members of the body. This afternoon I've been very impressed with the discussion on this serious subject. I think it validates to me why I admire my colleagues so very much. Serving here in the Legislature this past three sessions, I also have a much greater appreciation for our Nebraska legal system and law enforcement capabilities. Think for a minute what our lives and our citizens lives would be like without our legal protections and those who serve and protect us as law enforcement professionals. Mexico and Russia are two current countries that come to mind that have compromised legal and law enforcement systems and we can see the results. Many citizens and public officials live in fear every day in Mexico as ruthless gangs have overwhelmed local governments, threatened legitimate businesses with the protection money demands, and terrorized families with the threat of kidnapping or harm. That is why Senator White's arguments have always resonated with me in these discussions. I don't think being vindictive is a good reason for the death penalty, but it is a reason to protect our citizens from harm from very evil people who can kill or were killing while even in prison. On the other hand, what tears on me from the other perspective is this, pressing these buttons here are relatively easy compared to expecting someone to inject a human being with life-ending drugs. I think about those citizens as well. That's not an easy task to expect others to do on our behalf. So this is a complicated decision for me as well. Yet the bottom line for me is this, I think we need this ultimate sanction and a method to protect others from deadly harm. Our federal government has this sanction and this method, lethal injection. And it has used this method in recent years against Timothy McVeigh, the Oklahoma City terror bomber. This is why I will be supporting LB36 and AM828. Thank you. [LB36]

SENATOR CARLSON: Thank you, Senator Pankonin. Senator McCoy, you're recognized. [LB36]

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SENATOR McCOY: Thank you, Mr. President and members of the body. I would yield my time to Senator Flood. [LB36]

SENATOR CARLSON: Senator Flood, 4:50. [LB36]

SPEAKER FLOOD: Thank you, Mr. President and members. Thank you, Senator McCoy. The last time I spoke we were talking about prosecutorial discretion. I want to talk about the role of a jury. These aren't nameless unknown folks. They are in the media for good reason because they enjoy anonymity while sitting in that gallery. But I know firsthand when those defendants were tried in Madison County, those jurors are people that I cross paths with all the time. I know a pastor that sat on there, farmer's wife, teacher, person working in industry. Sure they'd probably heard about the murders at the bank, but they were vetted by the prosecutor and they were vetted by the defense attorney in each case. Peers, people living in Madison County, some of whom had real objections to the idea, I am sure, of wanting to be responsible for causing anyone's death. And I think some of us here in this room feel like that's what we're doing today. We're setting the policy. These jurors have to find the aggravators. No, they don't sentence somebody to death but they find out, they determine beyond a reasonable doubt whether the defendant committed a crime that meets with the standards located in the statute in Chapter 29. That's a pretty big deal. Those jurors are the ones that listened to that evidence. Those jurors are the ones that look at those pictures. Those jurors are the ones that watch the victims families testify up there, that listen to any evidence as it relates to the mitigators. Well, I strike that. A three-judge panel listens to the mitigators, but certainly during the scope of the trial they're hearing all about the character evidence of the defendant. These jurors who serve on these juries, we ask so much of them. We ask them to sit through and listen to some of the most horrific testimony they're ever, ever going to hear. And then we send them into that room and we close the door and we say, tell us whether or not there's an aggravator in this case. And these ordinary men and women, without legal training in most cases, they sit around and they talk about what they heard in the evidence. They sift through all of that stuff, through some of the most disgusting things you've probably ever heard, and they come out of that room and they say, Your Honor, we found in this case five aggravators. And they well know that finding an aggravator is an important part of the process when the prosecution's seeking the death penalty. Maybe they don't. They do their job. And after Ring v. Arizona , LB1, 2002, we changed our law in Nebraska. We now have juries doing that heavy lifting. Three-judge panels hear mitigators. They conduct the proportionality exercise. They make the final decision and then we ask three judges on a panel to unanimously agree that somebody should be sentenced to death. We have, in my opinion, a process that works in Nebraska, it involves jurors, it involves evidence, it involves a proportionality analysis, it involves the listening to...by three judges listening to mitigators offered by defense counsel. And then a unanimous... [LB36]

SENATOR CARLSON: One minute. [LB36]

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SPEAKER FLOOD: ...decision by the three-judge panel. And after you follow all of those steps, it goes to the Nebraska Supreme Court on automatic review. And the Nebraska Supreme Court begins looking at it. And you know what, that's the right way to do it. That's why we have 11 people on death row. The bar is awfully high. Beyond a reasonable doubt is the burden on those aggravators and that's not easy. And that's why I feel the death penalty in this state is appropriate. Thank you, Mr. President. [LB36]

SENATOR CARLSON: Thank you, Senator Flood. Senator Avery, you are recognized. This is your third time. [LB36]

SENATOR AVERY: Thank you, Mr. President. I've heard repeatedly today that we have the death penalty about right, about as right as we can get it. That it works in this state. Really? Have you forgotten about the mistakes we made in Beatrice. That should be sufficient evidence to counter this argument. We certainly didn't have it right in that case. Thank God, none of the people who were wrongfully convicted and wrongfully incarcerated were executed before we discovered the error. We didn't get it right. And we were using similar procedures then that we still have on statute. I don't want to have it on my conscience that we wrongly convicted and wrongfully execute anyone. Let me say this again. This amendment is not about repeal of the death penalty. If someone fails the evidentiary test proposed in AM1455, they can still be imprisoned for life. We're not talking about sending them back home. They can still be incarcerated for a long time, perhaps even life without the possibility of parole. But I think we need to be extremely careful when we're talking about putting people to death. We have to make sure that we do everything we can to get it right. I remember a column written in 2007 about the time we were discussing the death penalty in my first term. The column was written by Mr. Harold W. Andersen, former publisher of the Omaha World-Herald. I was quite surprised when I read that column because he came out in strong opposition to the death penalty. I cut that column out and I've kept it because I thought he made some very compelling arguments. And I'll paraphrase one of the arguments he made and that is that failure of the system to function with a reasonable degree of uniformity and fairness can be more easily accepted in the case of crimes that don't call for the death penalty. But when you are dealing with the death penalty you can't afford to have those kinds of errors because it is so final. It is the ultimate punishment that the state can mete out. He went on to say that achieving the greater goal of abolishing the death penalty would simply have to involve accepting that on occasion a Michael Ryan or a Charlie Starkweather would escape the death sentence. I recognize that my amendment carries that risk. That there will be some that perhaps we would all agree deserve the death penalty but they will escape. Is that a reasonable risk to take? I think it is, if what we're trying to do is get it right, if we want to make sure that what we're doing is imposing the death penalty on those who we really know are guilty. And I think you ought to take a serious look at AM1455. And I'm not suggesting that there is

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anybody in here who is bloodthirsty. Don't get me wrong. I think though that the perception is that AM1455 unnecessarily and excessively... [LB36]

SENATOR CARLSON: One minute. [LB36]

SENATOR AVERY: ...weakens the standards that we have in place now. I do admit that the amendment strengthens those standards but I think it does so for a very worthy purpose, and that is doing it right. Making sure we're not wrongfully executing people. This is a moral issue, folks. It's a moral issue. We're not talking about repeal of the death penalty with this amendment. We're talking about strengthening it. Thank you. [LB36]

SENATOR CARLSON: Thank you, Senator Avery. Those senators still wishing to speak includes Senator Schilz, Hadley, Flood, Fulton, Giese, Rogert, and others. Senator Schilz, you're recognized. [LB36]

SENATOR SCHILZ: Thank you, Mr. President and members of the body. Well, we've been on this since 1:30 this afternoon and I...you know, we've gone around and around. I guess, you know, in my mind, you know, when I started my campaign almost a year and a half ago this was the issue we were talking about. Everybody asked me, well, how are you on the death penalty? How are you on lethal injection? And so at that time I had to form an opinion and I had to do the studying up front to see where I would be. So that's what I did. And I, you know, I worked to make sure that I actually understood what we were talking about and I actually understood what my support or nonsupport would mean to this issue and what it would mean to me personally and spiritually and everything like that. And, you know, I guess when it comes down to it, I sit here today in 5:30 in the afternoon and wonder how much more can be said. I am in support of LB36. I am in support of AM828 and when I looked at it today, I thought we would be debating the lethal injection bill. It seems that this issue always turns back to the same thing. And that's okay. I mean we can continue to do this but you know we've heard time and time again that the people of the state of Nebraska have and do support the death penalty, as I have and do support the death penalty today. So with that I would yield my time to Speaker Flood or Senator Lautenbaugh or Senator Pahls, if you would like the time. I'll yield it to him. So thank you very much. [LB36]

SENATOR CARLSON: Senator Pahls, you have 2:40. [LB36]

SENATOR PAHLS: Thank you, Mr. President and members of the body. I have been listening as all of you have the last several hours, and on this particular amendment I'm going to ask Senator Avery to sort of think about his philosophy. He has several times throughout this session, and some of it was directed to me, that we need to take a look at the committee process. Sometimes some of these amendments do not deserve to be heard until they have been really ran through the committee process and by listening to

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a number of the senators the last hour or so, I think that you ought to probably take a look at your amendment and perhaps come back with this concept in the future after the committee process, process has been entertained. I think that would give your idea more credit and do away with some of the concerns that some of the senators have on the floor. And one reason why I'm saying this again is, because throughout this session I've heard you a number of times state that we need to use the committee process to really clean up some of these areas, especially when they carry so much weight. And I think some of the concept behind your amendment carries a lot of weight. So I wish you would entertain at least the thought of relooking at your amendment. Thank you. [LB36]

SENATOR CARLSON: Thank you, Senator Pahls and Senator Schilz. Senator Hadley, you're recognized. [LB36]

SENATOR HADLEY: Mr. President and members of the body. We come a long...we've talked a long time since I talked the first time. At that time I talked about the fact that LB36 dealt with the method we were going to use, and now we've certainly gotten off and talked a lot about capital punishment. So I decided to weigh in with just a couple thoughts on that. And it's just some of the things that I've heard recently that it seemed to me that a lot of things we're talking about the person who is being charged with the crime and facing the punishment, capital punishment. But I wonder if the same laws don't apply to the victim and the victim's family. A comment was made about how a senseless killing impacts society. Is that the senseless killing of a person in capital punishment or is that the senseless killing in a bank in Norfolk? We talk about a culture of life. Do we have a culture of life when 35 young people have been killed in Chicago on the streets already this year? The priest that is flying the flag upside down as a distress sign because of a culture of life that kills young people? We talk about, somebody brought up about conception to natural death. Is natural death being shot in the back in a bank by a killer who has no other reason than just to shoot you? Is that a natural death? I don't know what the definition of a natural death is. We talk about cruel and unusual punishment. Is it cruel and unusual punishment to your family to learn that you've been shot in the back and killed just because you happen to be in a bank? Capricious, discriminatory, proportionality, arbitrary, again, you happen to be in a bank and get shot. You're dead. Is that arbitrary? I think Senator Avery has it right when he says we have to get it right, but I stand in support of LB36 and AM828 because I think the bill and the underlying amendment do try to get it right. With that in terms of fairness, I will yield the rest of my time to Senator Nantkes. [LB36]

SENATOR CARLSON: Senator Nantkes, 2:30. [LB36]

SENATOR NANTKES: Thank you, Mr. President and thank you, Senator Hadley. The act of true statesmanship, we stand on opposite sides of the issue but allowing us to, in the minority opinion on this, to make an appropriate record. We've heard about arbitrariness in terms of which crimes, which cases receive the ultimate sanction, but

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colleagues, there's another component in relation to the arbitrary nature of this issue that we haven't had a chance to talk about. And that's in relation to the language that exists in the very bill. The arbitrary and capricious and violative of equal protection and due process in terms of the process is laid out in the bill. I started to get into this before. This is a continuation of Q&A with Dr. Mark Heath. In terms of LB36 calls for the use of substance or substances. It does not mirror exactly what happened in Kentucky and had been upheld in terms of the Baze case. In relation to, does LB36 require the use of long-acting barbiturates such as pentobarbital? No, the broad language in LB36 is substance or substances. It permits the use of ultrashort acting drugs such as penthanol. Does LB36 meet veterinarian standards in Nebraska? No, it falls below these standards. Does LB36 address the widely recognized problem of attaining IV access for lethal injection? No, LB36 does not address the problem... [LB36]

SENATOR CARLSON: One minute. [LB36]

SENATOR NANTKES: Thank you Mr. President. ...of IV access. Other states are setting in place measures to address the problem and complexity of IV access for executions. Nowhere in the language of the committee amendment or the underlying bill are these policy practices or procedures spelled out. That makes them violative of due process. That makes them arbitrary and capricious. Does LB36 require the Department of Correctional Services to obtain medical advice or any advice regarding the design of the protocol? No, LB36 permits the Department of Correctional Services to create the protocol without any medical input or advice from other states. Under LB36 can lethal injection protocol be modified without review? Yes, during an execution under the bill as written. The protocol can be modified at any time without informing the prisoner, without informing the public. Doesn't that cause a pause for concern? [LB36]

SENATOR CARLSON: Time. [LB36]

SENATOR NANTKES: Thank you, Mr. President. [LB36]

SENATOR CARLSON: Thank you, Senator Nantkes and Senator Hadley. Those wishing to speak: Senator Giese, Rogert, Nantkes, Council, Nordquist, and Dierks. Senator Giese, you're recognized. [LB36]

SENATOR GIESE: Thank you, Mr. President and members of the body. As Senator Schilz mentioned before, during the past year and a half or two years people wanted to know where we stood on the death penalty and the lethal injection. Well, I am just one of 16 new freshmen senators this year, and I have not been involved in the discussion for the last three times to repeal the death penalty. So we have to deal with what we have today and that is the lethal injection. Over 1,000 executions per year have occurred worldwide with over 90 percent happening in basically six countries. Unfortunately, the United States is one of those countries. The issue of cost has been

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brought up time and time again. To me the issue of cost is completely irrelevant. We have seen again and again as a body that we are committed to do whatever it takes to make our streets safe. When a person commits a crime, whatever the crime, we, as a society, must convict or acquit. Certain crimes, I believe, have no deterrent, but I do know all crimes have a punishment. One of the things that I forgot until recently on a recent issue, was that as a member of the Legislature or any public body, that we have to make decisions and we have to vote on those decisions and sometimes you just don't feel good about it at the end of the day. And a lot of the general public will never know how it is to face someone in your district, in your church, in your hometown that does not share the same view as you. I support AM828 and LB36 and I have a feeling that this is one of those days. Mr. President, I would yield my time to Senator Nantkes. [LB36]

SENATOR CARLSON: Thank you, Senator Giese. Senator Rogert, you're recognized. [LB36]

SENATOR GIESE: I yield my time to Senator Nantkes. [LB36]

SENATOR CARLSON: Oh, I'm sorry. I'm sorry. Senator Nantkes, you have 2:20. [LB36]

SENATOR NANTKES: Thank you, Mr. President and thank you, Senator Giese. I am, colleagues, going to continue on here in terms of the arbitrary and capricious nature of the legislation itself, and the potential violation of due process contained in the language of the bill and the committee amendment themselves. Does LB36 place any limits on the level of experience or training that is needed to place IV lines, prepare the drugs, prescribe the drugs, or inject the drugs? No, LB36 leaves the personnel selection and training entirely open to the choice of the director of Correctional Services. Does LB36 require the director of Correctional Services to perform recordkeeping and basic quality assurance for the execution process? No, there's no requirement for any records or documentation. LB36 says that someone, again someone doesn't necessarily have to be anybody with any sort of medical training, has to conduct a conscious or unconsciousness check before administering additional drugs. Is that sufficient to ensure humane execution? No, a one-time consciousness check is not sufficient to ensure... [LB36]

SENATOR CARLSON: One minute. [LB36]

SENATOR NANTKES: ...a humane execution. If an ultrashort acting drug like, for example, penthanol is used. To ensure that euthanasia is humane and in the context of veterinary practice, an animal needs to be monitored throughout the procedure until it is dead. Monitoring of consciousness is difficult if a person or an animal is paralyzed and that requires specialized training. Does LB36 ensure that witnesses from the press will be able to observe the execution and report on whether or not it's humane? The

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Judiciary Committee amendment does, in fact, address some of those issues. But it makes it very difficult, if not impossible, for witnesses, including the press, to know whether or not the inmate died in an agonizing or a peaceful manner. Those facts are critically important to the state's ability to prove that this method is not violative of the Eighth Amendment. [LB36]

SENATOR CARLSON: Time. [LB36]

SENATOR NANTKES: To prove that this...thank you, Mr. President. [LB36]

SENATOR CARLSON: Thank you, Senator Nantkes. Senator Rogert, you're recognized, but you are nowhere to be seen, so Senator Nantkes, you're recognized. [LB36]

SENATOR NANTKES: Thank you, Mr. President. Colleagues, I want to continue on and talk about some of these issues in terms of how LB36, even as amended by the committee and subject to the amendments of Senator Avery or others, remains itself an arbitrary and capricious measure that may violate due process or equal protection provisions of the Nebraska Constitution or the federal Constitution. Again, in regards to the Kentucky case which we've heard limited amounts in terms of its meaning and scope and will, I imagine will hear much, much more about, we have again a very, very fractured court, a plurality opinion. None of the opinions joined by more than three justices and yet we're hanging our hat, we're placing our reliance on that fractured plurality opinion to provide assurances to the Nebraska citizenry that if we move forward with LB36, we can finally have closure. We can finally put in place a method that will be found to be constitutional. That simply cannot be the case. That case in Kentucky looked at very discreet and narrow issues surrounding Kentucky's protocol. And in fact, the language of LB36 and the committee amendment itself does not specifically mirror those specific protocols. It leaves many, many unanswered questions in terms of how Nebraska will actually implement, will actually carry out, will actually create, defend, and design the procedures, rules and regulations, and protocols that must be considered before carrying out this sanction. This isn't even a good overview or a framework for dealing with those very elementary and very important considerations. So to say that these issues have already been decided, is not an accurate reading of the cases at hand. Instead, we've seen...across the country in terms of lethal injection, in terms of the procedures and protocols with changing a method of execution, or changing any of the related issues or procedures surrounding a capital case, that's going to spur litigation for the people who are currently on death row and who were sentenced under a previous method of execution which is no longer available because of Supreme Court ruling in Nebraska. You're going to see additional challenges from that small discreet group of people. You're going to see additional challenges on the state and the federal level in terms of what ultimately Nebraska decides to do as protocols and procedures in terms changing the method of lethal injection and whether or not those comport with our

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constitutional values and strictures, which are unclear in this legislation or in the committee amendment. And to think that that's not going to end up before the federal U.S. Supreme Court is either reckless or understated. Because even in the dissenting opinion from Chief Justice Michael Heavican in the Mata case from last year, he says, those issues surrounding method should be fought on the federal level instead of before the state courts. So to have the Attorney General provide you with an assurance that this will maybe take a year, we'll have a state court decision and we can move on, is absolutely incorrect. There will be challenges from those currently on death row. There will be challenges... [LB36]

SENATOR CARLSON: One minute. [LB36]

SENATOR NANTKES: ...for those sentenced while Nebraska was without a constitutional method of execution. There will be challenges for those perspective people who will be sentenced to capital punishment, no matter what the method of execution. So to say that this is a humane answer is wrong. The record in other states show that lethal injection is replete with actual problems in terms of the executed's health and can inflict serious pain. And that needs to be part of the record. And there's nothing in this bill to talk about how those issues are going to be presented by the accused and the convicted. There's nothing in this bill to talk about how that record could get, be considered. Those are serious problems. And the Nebraska Supreme Court said in the Mata opinion, state, the burden is on you to show us a method of execution that passes constitutional muster. And by simply saying we're going to mimic... [LB36]

SENATOR CARLSON: Time. [LB36]

SENATOR NANTKES: ...something that Kentucky upheld is not sufficient. Thank you, Mr. President. [LB36]

SENATOR CARLSON: Thank you, Senator Nantkes. That was your third time. Senator Council, you're recognized. [LB36]

SENATOR COUNCIL: Yes, thank you, Mr. President. First, before I get to portions of a problem, and then following up with Senator Nantkes, I must address a statement made by Senator Lautenbaugh who took issue with my reference to the Bormann-Williams case in my earlier comments. And quite frankly, it was absolutely appropriate for me to make reference to that case in the context in which I was using that case. And if Senator Lautenbaugh had listened to the context, maybe he would have been able to understand it. What we were discussing was how you arrived at the worst of the worst and I started with making reference to Senator Flood's statement about the bank robbery in Norfolk and how that was considered to be the worst of the worst. And then I went to the other case in Norfolk where there was a judge who decided that in that

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case, that was not the worst of the worst, while there had been others who had thought that was the worst of the worst. And then I used the Bormann-Williams case for the example that in that case, a jury didn't believe that that act, which was, I don't know what's, could be more worst of the worst than a sniper. I mean, that's the highest act of cowardice. You know, we were talking about someone mentioning the cowardice of the individuals involved in the bank robbery. I don't know what's more cowardice than to leave your house with a high-powered rifle and just take a shot at someone. That's a sniper. Now, Senator Lautenbaugh did make a correct statement. I did not mention the fact that the prosecutor had sought first-degree murder in that case. I didn't mention that fact because that wasn't the point I was making. The point I was making is that in that case that 12-member white jury did not believe that the taking of that young woman's life rose to the level of the worst of the worst. And in that instance, I believe that that's just an example of the discriminatory application of the death penalty. Anybody who knows anything about criminal law knows the conviction you get is based upon the evidence that's presented. But we also ignore the fact that the conviction you get is based on the charge that's brought, and the deal that's negotiated. No, I don't want to go through all 1,439 of the other cases of homicide, but I bet you there's a significant percentage of them where there was sufficient evidence of first-degree murder, premeditation, and the decision was made that if this person pleads guilty, we'll charge him with a lesser offense. Because what, folks, many times that results in a quick resolution at lower cost to the county and it happens. And sometimes it happens because of the quality of your defense counsel. Sometimes it happens because of the caseload of the county attorney. There are a variety of reasons. But the point that I was making and a point that I maintain is that we cannot stand here and definitively state that we need to have this to protect society from the worst of the worst because we don't. We have more people in general population who will be soon released into society that are as great a risk if not a greater risk than the 11 people who are on death row. And when we talk about this case, we need to look at our history of the imposition of the death penalty in this state. [LB36]

SENATOR CARLSON: One minute. [LB36]

SENATOR COUNCIL: In a 30-year period, there were about 25 people and someone gave the number 29, 25 people who were sentenced to death. You know, of that 11 some of those are the same people who were in that original number between 1975 and 2000. So we have people who have been housed for 25 years who are the worst of the worst and we've been kept safe from those people, because they are in a penal system where you've heard commentary from the director that we are safe from those people. And I firmly believe that we have a reasonable alternative to the death penalty and that's life without parole and it will be addressed when my amendment comes up to LB36. [LB36]

SENATOR CARLSON: Thank you, Senator Council. That was you're third time. Senator

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Dierks, you're recognized. [LB36]

SENATOR DIERKS: Thank you, Mr. President and members of the Legislature. I just wanted to visit with you a little bit about some of the things that have been going on here today. Senator Nantkes talked about lethal injection and about veterinarians being able to do that. I think I'm probably the only person in here that's ever done that and I've done it a number of times. It's never been pleasant for me. It's never been unpleasant for the animal. Never. I've never seen the animal struggle. And if they have struggles in the part of the human process, I think they need to take a look at the cocktail they put together to start the process. I've even put down 1,500 pound horses. I did one one day in the pasture. I was the only one there. He had broken his leg. It was a tibia and it stuck through the hide. It was sharp enough with his struggles, he cut through his own hide with it. There was no way to repair that. I didn't have enough what I call euthanasia solution to put him down, but I remembered from my veterinary school classes that you could use magnesium sulfate in a heavy solution, IV. And I had some of that and I mixed it up. The horse never quivered once. He just went quietly to sleep and he continued to sleep until he quit breathing. The same thing is true with the dogs and cats. And like I say, I never enjoyed that ever. I used to stand there and cry with the people I was doing it for. It's difficult to do, but I think done properly it can be done without that much difficulty. And I would urge those people who get ready to do this injection, this lethal injection, to prepare themselves very ably to do that. I was reading part of the bill and I see over on page 11, line 1, it says that any prescription, preparation, compounding, dispensing, obtaining, or administration of the substances deemed necessary to perform lethal injection shall not constitute the practice of medicine or any other profession relating to healthcare, which is subject to law by regulation, licensure, or certification. And then on down in subsection (4) on line 16, on page 11, it says, it's to the effect that can a member of the execution team be exempted from reprimand or suspension by their licensing board. I think that both of these statements are subject to a tremendous amount of litigation. That's...I think that's relatively new business. I think that this would be one of the things that would extend the discussion and cost more dollars. I'm...I remember reading the book In Cold Blood by Truman Capote, and it was a story of the Herb Clutter family who were killed in Kansas back in the, oh, late fifties, early sixties, I think maybe sixty or sixty-one. I was still a student in the veterinarian school at Kansas State University, and a member of the family, one of the daughters...two of the daughters were away from home. If they'd been home they would have been killed as well. One of the daughters was married to a veterinarian student who was a good friend of mine who practiced later in Nebraska. And so I was very interested... [LB36]

SENATOR CARLSON: One minute. [LB36]

SENATOR DIERKS: ...I was very interested in reading what happened to the two gentlemen, two guys who did the killing. They were actually hanged in Kansas, that was

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the method of execution. And I think there was a lot of discussion about the hanging and how it affected the people that watched it. With that, Mr. President, I will tell you that I do not support AM1455, nor do I support AM828, nor do I support LB36. Thank you.
[LB36]

SENATOR CARLSON: Thank you, Senator Dierks. Speaker Flood, you're recognized.
[LB36]

SPEAKER FLOOD: Thank you, Mr. President. By way of reference, I also don't support AM1455. Senator Nantkes was talking a little bit ago about what her problems with LB36 were. She talked about you don't know how it's going to work, it's wrought with problems, raised issues as related to who would do it, how it would be done. And I want you to know this bill was drafted after reading the U.S. Supreme Court's case in Baze v. Rees and I quote on page 1527 of the Westlaw citation here, "Kentucky replaced electrocution with lethal injection in 1998. The Kentucky statute does not specify the drugs or categories of drugs to be used during an execution, instead mandating that every death sentence shall be executed by continuous intravenous injection of a substance or combination of substances sufficient to cause death." Same as we have in Nebraska. The exact same protocol. In fact, this case got to the Supreme Court because the protocol itself was challenged as being allegedly violative of the Eighth Amendment constitutional prohibition on cruel and unusual punishment. The United State Supreme Court looked specifically at a state that had adopted a law that we have proposed here in LB36. And the Department of Corrections in Kentucky went through the process. There is a road map here for the Department of Corrections to assess exactly what our processes and procedures should be. Kentucky's protocol called for the injection of 2 grams of sodium thiopental, 50 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride. In 2004, as a result of the litigation that got this to the U.S. Supreme Court, the department chose to increase the amount of sodium thiopental from two grams to three grams. And then I go over here to where it says specifically we granted review, essentially, to determine whether Kentucky's lethal injection protocol satisfies the Eighth Amendment. The United States Supreme Court says and I quote, "Yes it does." This bill isn't some sham. This bill isn't some effort to try and lead people down a road that's not responsible. This is the most serious sanction the state can impose. This is a life or death decision. It's an important one. It's maybe quite possibly the most serious bill you're ever going to vote on as a state senator in Nebraska. I reject the implication that this was done haphazardly or that it was done recklessly, just the opposite, we read the law. We read what the U.S. Supreme Court says is permissible and we tailored it very narrowly to that. In fact, we read the opinion so far down the line that we adopted the consciousness checks. This isn't reckless. The answers are in this case. The answers are in this bill. If Senator Nantkes has a problem with the way it's done, guess what, I agreed to and the committee felt strongly enough about including the APA requirement that the rules adopted by the Department of Corrections follow the Administrative Procedures Act. Well, a couple of years ago, a

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senator by the name of Pat Bourne passed a bill, found at Section 84-907.06 that any member of this Legislature can call the agency on the carpet and they can come to the Capitol, the Executive Board, and explain to the legislators why they passed a rule under the APA or a regulation. That's one more avenue we have, in addition to the fact that this is going to be reviewed by a court. And you know what? It should. [LB36]

SENATOR CARLSON: One minute. [LB36]

SPEAKER FLOOD: The executive branch's rules and regulations should be reviewed by a court. But I reject any implication or any suggestion that this was done haphazardly. I know that we're not talking about putting dogs and cats to sleep. We're talking about humans and it's serious and it's done after a jury and a prosecutor, a three-judge panel has felt strongly enough that they deserve to die for the actions that they took as far as criminal behavior. So I just want to make sure that's on the record. This was done with foresight, it was done responsibly, and it deserves to pass. Thank you, Mr. President. [LB36]

SENATOR ROBERT PRESIDING []

SENATOR ROBERT: Thank you, Senator Flood. Seeing no other lights on, Senator Avery, you're recognized to close on AM1455. [LB36]

SENATOR AVERY: Thank you, Mr. President. Finally. Let me say that if you struggle with this matter the way I have, and I think many of you do, if you struggle with the manner in which the death penalty is administered in our state, then this amendment can be a reasonable option for you. If you're concerned that mistakes can be made, and they have been, and that we should do all we can to prevent them, then this amendment should have your support. If you have even a shred of doubt about the death penalty and its application in our state, you should support this amendment. If you support the death penalty but you want greater confidence in whether we get it right, vote for this amendment. This amendment sets reasonable evidentiary standards that add some confidence that we are not wrongfully executing anybody. That is not asking too much of the state. It's not asking too much of this body. It's not asking too much to require conclusive proof of guilt when we are considering issues of life and death. This is not a trivial matter. It is the least we can do, the least we can do. And I would also add that we ought to be concerned about the best we can do. The best we can do to get it right. We have to get it right or we have to not use it at all. That has always been one of my most serious difficulties with this issue. This amendment will help us do I think what we really want to do, and that is to make sure we're not wrongfully executing anybody. It deserves your support. I urge you to search your conscience, examine your heart. You're not being asked to repeal the death penalty. You're being asked really to take a step toward assuring that those we execute are in fact guilty of the crime for which they've been convicted or for which they have been accused. This is the least we can

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do. It's the best we can do to ensure justice. I urge your vote on this in the affirmative. Thank you, Mr. President. [LB36]

SENATOR ROBERT: Thank you, Senator Avery. Members, you have heard the closing to AM1455 to the committee amendments on LB36. The question is, shall the amendment be adopted? All those in favor vote yea; opposed, nay. Mr. Clerk, please record. [LB36]

CLERK: 7 ayes, 31 nays, Mr. President, on the amendment. [LB36]

SENATOR ROBERT: AM1455 is not adopted. Items for the record, Mr. Clerk. [LB36]

CLERK: Mr. President, amendment, Senator Pirsch to LB288; Cornett to LB218A; Langemeier, LB561. Resolution, LR223 offered by Senator Council. That will be laid over. I have a communication from Speaker directing its Reference. LR224, Senator Mello, likewise laid over. That will be directed to Reference pursuant to communication of the Speaker. And study resolution LR225 through LR236, five various members all calling for interim studies. (Legislative Journal pages 1576-1592.) [LB288 LB218A LB561 LR223 LR224 LR225 LR226 LR227 LR228 LR229 LR230 LR231 LR232 LR233 LR234 LR235 LR236]

I have nothing further pending to the committee amendments at this time, Mr. President. [LB36]

SENATOR ROBERT: Senator Nantkes, you're recognized. [LB36]

SENATOR NANTKES: Colleagues I want...thank you, Mr. President. Thank you, members. I want a continuation of discussion about costs and about the different methods that we can utilize, whether it's through the course of the interim study that we are going to conduct or look at this over the interim or in response to why cost matters, not just as a factor in the overall debate but because of the trust and the credibility that we have to be able to have in our chief prosecutor for this issue and for the state. And this is really beyond the comprehensive policy look, something that I think does deserve attention. If we can't get basic communication, responsiveness, and accurate information in terms of something as simple as cost based on accepted methodologies, how can we trust our Attorney General, our chief prosecuting officer to carry out the rest of the policies and procedures appropriate in moving for this ultimate sanction? Over 14 months ago when the Nebraska Supreme Court decided the Mata case and found that the states sole method of execution, the electric chair, was in fact violative of the cruel and unusual punishment provisions within the Nebraska Constitution, Nebraska knew clear well that this issue was going to need careful study and how to move forward. And along the way no one including the Speaker, the Governor, the Attorney General's Office thought to look at this issue comprehensively. Instead they waited for a decision

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to come down in the Baze case, they tried to basically mimic the protocol that occurred in that state, and put it out there as a fix to the problem. It's not a fix to the problem. LB36 and the committee amendment are full of flaws and offer false hope. All along the way wouldn't it have been the citizens and to this body if anyone had thought to talk about cost in a sound methodology. For example, the report Criminal Justice Limited Data Available on Costs of Death Sentence issued in 1989 by the U.S. Government Accountability Office constructed a chart that could be used for gaging differences in costs between capital cases and noncapital cases. It's based upon the National Center for State Courts Research. It's resulted in comprehensive cost studies. Thus far today in 1993 Duke University used this very method. It's widely known, it's widely accepted, it's widely available to be utilized. But nowhere along the way in the past 14 months did anybody think to look at it, to employ it. That's troublesome, not only from a public policy perspective, but from a credibility perspective. And, again, the cost issue is not raised to be dispositive but is part of the overall comprehensive look that we must consider, just as innocence is, just as racial and socioeconomic bias is and are and should be considered. That is the context from which it is brought up. And none of those issues whether it be cost, whether it be the arbitrary and capricious nature of the procedures as outlined in LB36 or the penalty itself as afforded and accorded to different defendants and different counties under different prosecutors... [LB36]

SENATOR ROBERT: One minute. [LB36]

SENATOR NANTKES: ...for similar crimes, those are the broader issues to look at that are not addressed in LB36 or not addressed in the committee amendment. And to be clear, colleagues, and with all due respect to the Judiciary Committee and the Speaker questions remain in terms of whether or not this will shore up Nebraska's capital punishment system. I pose to you that they will not. Litigation will be ongoing. Public policy debates will be ongoing. So, again, we'll have justice delayed, justice deferred. Ongoing tragedy and ongoing victimization of these issues in terms of the media, in terms of this body. And instead of being able to really focus on ways that we can get tough on crime... [LB36]

SENATOR ROBERT: Time. [LB36]

SENATOR NANTKES: Thank you, Mr. President. [LB36]

SENATOR ROBERT: Thank you, Senator Nantkes. Members, we are discussing the committee amendments AM828 to LB36. Those wishing to speak: Senators Flood, Council, Hansen, and Haar. Senator Flood, you are recognized. [LB36]

SPEAKER FLOOD: Thank you, Mr. President. Good evening, members. Senator Nantkes has been beating the same drum on costs, and I think she's obviously got a point there that has to be looked at. I've always said, you always look at costs when we

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talk about state government operations. But I wonder if people in 2002 in this body, when they were adding all the extra due process that our state has in comparison to all the other states, were worried about costs. Or is that the convenient argument now? Because we have a system that has super due process protections in it. We have a system that after you go through trial you go through the aggravators phase, the mitigators phase, you go through the proportionality exercise that was added by this Legislature, you go to the three-judge panel, you go to the automatic review at the Nebraska Supreme Court. And you know what? I'm willing to pay those costs to make sure if we execute somebody in this state they are guilty, they do deserve it, and it was legitimate. You're not going to hear me talk about costs. Obviously you have to be concerned about it. But today Senator Nantkes who favors the abolition of the death penalty is raising the cost as it relates to changing the method. And you know what? It will be litigated. And you know what? It should. I'm sure the administrative rules and regulations will be challenged. And you know what? They should. I'm sure one member in here will call the agency on the carpet and someone should do that. Those are the checks in the system to make sure what the executive branch comes up with after reading the blueprint in the Baze v. Rees case, which is exceptionally well laid out, those things should be a check on the system. Fundamentally what Senator Nantkes doesn't want is the death penalty. And you know what? I respect that as her position. And she's right to ask questions about the cost. But as you know from the Attorney General's letter if you've received one...if not, that needs to be handed out at some point if we're going to continue to talk about it. The Attorney General's Office has the Solicitor General on staff hired as a full-time employee who handles the one to five new appeals filed each year in the Supreme Court on behalf of convicted killers on death row. The fact is it's part of his work day. And do you know what? He knows what he's doing. His name is Kirk Brown and that's his job. And the Attorney General's Office was unable to parcel off, out of the 50 to 100 cases he has in a given year, what time he spends on one case over another because they don't keep their time like an attorney in private practice. So when you talk about the cost, I want to talk about the cost of innocent human lives. I want to talk about those five families in my area whose loved ones were brutally executed at the hands of three killers. I want to talk about that family out in Scottsbluff, the two families. There is a cost. And it's incumbent upon us that we have a death penalty so that we as a society express our complete disgust with the unbelievably out-of-bounds behavior of a defendant in one of these cases. And I think having a continual discussion about costs is legitimate, but I wanted to get on the record where I was coming from because there are two sides to that. Senator Nantkes has a point when she talks about, you know, have we looked at this. And I am satisfied after reading the Attorney General's letter that he provided a straight forward response. Does it cost more to try somebody of capital murder in Nebraska? Yes. [LB36]

SENATOR ROBERT: One minute. [LB36]

SPEAKER FLOOD: I'll stipulate to that. But when you look at the facts of the case, the

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evidence after it goes through all the different sensory levels of looking at what should happen I believe it's appropriate and I'll stand up and defend that. Thank you, Mr. President. [LB36]

SENATOR ROBERT: Thank you, Senator Flood. Senator Council, you are next and recognized. [LB36]

SENATOR COUNCIL: Thank you, Mr. President. Just to tag onto the last discussion basically between Senator Flood and Senator Nantkes, you know, with all due respect, Senator Flood, it was Kirk Brown who said the cost of Nebraska's death penalty system are staggering. So he and his boss need to have a conversation because he made that as a public representation of the cost of the death penalty system, and that was what the question went to. I'm going to try to focus my comments on LB36 and AM828 and the Supreme Court decision in the Baze case. I think that Senator Nantkes has done an excellent job of setting forth what the courts ruling was in that case. And I think we have to be careful because what the court ruled in that case by a plurality, which is a lot different than a majority, is by a plurality is what it ruled was the specific written protocol used in Kentucky met the standards that the Supreme Court had set forth in terms of determining whether or not lethal injection was cruel or unusual punishment. And they went through the specifics of the Kentucky protocol. Now, if this body were really concerned about advancing a piece of legislation on the death penalty that would have the greatest opportunity of withstanding judicial scrutiny we would model those protocols in the legislation. But we don't do that. We leave that determination up to the director of Corrections. And I know that the amendment now strikes that provision because original bill prohibited the development of the protocols and having those subject to the Administrative Procedure Act. It wasn't until that issue was debated during the hearing of the Judiciary Committee that that was amended out through AM828. But if you look at the written protocol in Kentucky...and I'm not talking about the specific drug protocol, you know, what percentage of this drug or what percentage of that drug and when it's administered. And the Supreme Court went through all of that, but it also looked at other aspects of the protocol which are glaringly absent in the case of this legislation. This legislation says that the director of Corrections will develop the training that the individuals who will be a part of these execution teams would be required to have. Well, if you look at what the Supreme Court looked at in the Baze case, what Kentucky had done was that it had specific training requirements for each of the members of the execution team. As we sit here today nobody in this body knows what kind of training will be required of the individuals that we are going to entrust with carrying out lethal injection. Nor do we know how often they have to have mock exercises. [LB36]

SENATOR ROBERT: One minute. [LB36]

SENATOR COUNCIL: Nor do we know whether the protocol establishes both primary

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and backup lines. And just one statement, Senator Flood. I know there's been a lot of discussion back-and-forth between yourself and Senator Nantkes on the medical professional issue. One point of information. Kentucky specifically says: No physician shall be involved in the conduct of an execution except to certify cause of death provided that the condemned is declared dead by another person. So under Kentucky law, a medical professional can't even...a doctor cannot even be involved in any stage of the execution except confirmation of the inmate's death after someone else has already declared him/her dead. [LB36]

SENATOR ROBERT: Thank you, Senator Council. Senator Haar, you're recognized. [LB36]

SENATOR HAAR: Mr. President, members of the council...of the body, I'm sorry, unfortunately as the discussion has gone today there's no limit to the depravity of human beings. What's even more surprising is the depravity of nations. And if you look back not too far in history you see what Nazi Germany did or if you look back in history even further, there was somebody called Vlad the Impaler who became the model for Dracula. And his method of terror was to take the defeated soldiers and impale them on posts set along the road. So after his victory you'd see 1,000 warriors of the defeated army impaled on posts along the roads. There's no limit to human depravity. And so we can come up with obviously terrible examples of human beings and what they've done, and there is always a question, should they really be allowed to live? I guess what bothers me the most...well, first of all, I'd just like to say...and I'm not so sure exactly where Nebraskans stand, although I'm sure a majority favor the death penalty. United States-wise, in 2006 a Gallop poll showed that 48 percent of the people supported life in prison without parole, which is what I would support, and 47 percent favored the death penalty. In March 2007, Myers Research and Strategic Services performed a poll which concluded that 62 percent of Nebraskans would support legislation that would limit the death penalty to only those who were found to be too dangerous for life in prison. So I guess for me as we continue this discussion, if there's some way to make sure that we make no errors such as I think Senator Avery was attempting, I could support that. The trouble is as we've heard the discussion, I've listened to every minute of the discussion today. We heard a lot of terms like, I don't know, I don't know for sure, in perfect justice system, infallible. I think if the state, if the state, and we're talking about if nations and states, exercised justice where they take the life of an individual it must be a flawless system. It must be a flawless system and it is not flawless now. We've learned...maybe not in Nebraska with a death penalty case, but we saw the case of the six in Beatrice where there were confessions, there were eyewitness reports, and so on and so forth, and yet it was all lies. The people did not commit the crime. So as we go through this discussion, I keep waiting for something that says there really is a way to apply fairness, not just the best we can do but fairness, and if we can come up with a flawless system, then I will support LB36. If not, I will be one of those voting against it. Thank you very much. [LB36]

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SENATOR ROBERT: Thank you, Senator Haar. Senator Flood, you are recognized and this is your third time. [LB36]

SPEAKER FLOOD: Thank you, Mr. President. Good evening, members. I passed out...well, first of all, I knew that from the paper that Senator Nantkes and Nordquist respectively had sent a letter to the Attorney General. And then when a copy was delivered or a letter was delivered to Senator Nantkes, Senator Nordquist from the Attorney General I requested and received a copy of that dated May 13, 2009. I think Senator Nantkes is going to put out a copy of her and Senator Nordquist's letter to the Attorney General. But I thought if we're going to continue to talk about the Attorney General's response, let's put it in front of us and go through it. I think it's straightforward. The fact is we don't keep costs on a per-case basis for the state of Nebraska. I would venture to bet no lawyer in the Department of Justice keeps their time like a private practice lawyer does. So I guess my concern was we're asking for things that can't really be provided. I'm not going to deny that it costs money. I would suggest to you that most of the money is paid for by the county that prosecutes the defendant as would make sense. What I just want to keep coming back to here is that this bill, this LB36 was drafted after the U.S. Supreme Court acted. Had the U.S. Supreme Court not ruled in 2008 I don't think I'd be here today with this bill because I wouldn't have felt comfortable taking the Legislatures time on something that I didn't know was constitutional because it was under advisement by the U.S. Supreme Court. That's why this bill came when it did. The justices of the United States Supreme Court ruled 7 to 2. We read the decision. We drafted a bill. We did the best job we could. And we crafted a bill that looks just like the Kentucky statute. And you may say, why are there so many unknowns? That's because that's the way it was in Kentucky. Don't you think though when the Department of Corrections sits down to formulate these rules and regulations they know they're going to be vetted by the Nebraska Supreme Court, the Legislature, the U.S. Supreme Court quite possibly, the Eight Circuit Court of Appeals, I mean, whoever? They're going to do the best job they can to stand the parameters of what the U.S. Supreme Court has most recently said was constitutional. We have to believe that. We have to buy into that. Nobody in this state that I've ever ran into have I ever had a public policy discussion with them about speeding this up and executing more people. That's not what this is about. This is about doing the right thing when it comes to meting out the state's most significant sanction--the death penalty. It is serious. It's emotional. It's difficult. It's difficult for even those of us that support it because it is such a very big decision. But it's something that's done because the defendant's behavior necessitates the gravity of the sanction, necessitates the severity of the sanction. So I guess I would just ask you to adopt this committee amendment. This committee amendment that is under consideration right now is very important. It does two things: it makes this a transparent process that many of Nebraska have signed off on that so that when we have the death penalty protocol laid out the day of the execution, the citizens of this state know exactly how it is going to be used and what's going to happen. It also requires the Department

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of Corrections to use the Administrative Procedures Act guidelines and rules and regulations to...and the statute to develop these rules and regulations. And I think that's important. So we need to adopt AM828 even if you oppose the death penalty. [LB36]

SENATOR ROBERT: One minute. [LB36]

SPEAKER FLOOD: Even if you oppose the lethal injection you should want AM828 because it does provide some additional protections. I thank you, Mr. President. [LB36]

SENATOR ROBERT: Thank you, Senator Flood. Senator Nantkes, you're next and recognized. [LB36]

SENATOR NANTKES: Thank you, Mr. President. And, Speaker Flood, I'm hoping that you're available for just a brief question. But number one on the record to be clear, we've heard statistics from a variety of different sources in regard to public opinion in regards to this issue. And, colleagues, while that may be interesting in terms of the debate or the record, it is in no way important or significant or a factor to utilize when considering fundamental constitutional rights. Public opinion should not be utilized in that regard. We can take it to heart. We can think about it. But our job is to ensure that constitutional rights are not violated and that we have policies and practices in place to ensure such. I want to get that out there. The Speaker just concluded on this point, and I want to make clear it's been said that Nebraska has rejected abolition in the past, so we must have a method in place and that LB36 offers that. Well, we've also had lethal injection bills introduced in the past and they've been rejected. So the actions of previous legislatures really are irrelevant for purposes of this debate. But I do want to talk about what would happen in the absence. Senator Flood, if you'd yield to a question? [LB36]

SENATOR ROBERT: Senator Flood, will you yield to a question? [LB36]

SPEAKER FLOOD: Yes, I will. [LB36]

SENATOR NANTKES: Senator Flood, I want to thank you again for how you've structured this debate and been very respectful and open to minority viewpoints. And so I really, truly, sincerely want to thank you for that. And I made it clear to you previously throughout the session and through the course of this debate that I'm not particularly interested in getting involved in a debate, but rather was more concerned with making a record. So I promise I will keep this to one question. [LB36]

SPEAKER FLOOD: Thank you. And those are all true statements, Senator Nantkes. [LB36]

SENATOR NANTKES: Thank you, Speaker Flood. Speaker Flood, if LB36 as amended

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or otherwise is not adopted this session how many people will be subject to capital punishment in Nebraska this year or in the near future? [LB36]

SPEAKER FLOOD: Zero. [LB36]

SENATOR NANTKES: Thank you, Mr. Speaker. Thank you very much for your time. And thank you for your honesty. Colleagues, that is the heart of the matter. This is not simply an implementation issue. This is reinstatement of the death penalty. But for LB36 Nebraska may have a death penalty on the books but no means to carry it out, and that effectively, colleagues, for the past 14 months is how we have been as a state. We haven't seen a large rash of murders occur because we fail to have a method of execution available. So that brings into question additional deterrence issues and whether or not those are even...I mean, they are relevant so I don't want to say that, but it does bring those issues into question. This body has rejected lethal injection in the past. The Baze case does not change the fact that there's still issues surrounding lethal injection. In fact, legal scholars including Professor Berger as put out in the Nebraska Law Review Bulletin and in a recent law review in the Yale Journal of Law and Policy talks about the limited...and his specialty, colleagues, is lethal injection issues and changing the method of execution from electrocution to lethal injection or otherwise. We have a legal scholar right here in our backyard who can help us with these issues, whose worked on cases in Missouri, whose worked on cases in other states, about the legal challenges surrounding these issues. And he tells us the Supreme Court case and the decision in Baze from Kentucky, from the United States Supreme Court was relatively simple. It did not take into account malfeasance, maladministration, or a variety of other issues that may or may not exist in regards to the arena surrounding lethal injection and capital punishment. [LB36]

SENATOR ROBERT: One minute. [LB36]

SENATOR NANTKES: It did not resolve challenges to lethal injection procedures in place in Arizona, Ohio, Oklahoma, and the federal government which are still pending. Be clear, colleagues. We've passed bills this session, in previous sessions that we hope will protect our citizenry, whether it's through increased criminal penalties, whether it's through preventative services in programs. But to be clear, each of those votes was only in the hope of prevention. When we push our button today we will know very clearly that somebody will die or somebody will live. This is the only vote you have before you that rises to that level, not in your hope but actuality. And that's why this is not a simple closing of a loophole. This is reinstatement of the death penalty in Nebraska which has gone without for over 14 months, and more so in practice. [LB36]

SENATOR ROBERT: Time. [LB36]

SENATOR NANTKES: Thank you, Mr. President. [LB36]

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SENATOR ROBERT: Thank you, Senator Nantkes. Senator Council. Senator Council is not available. Senator Pirsch, you're recognized. [LB36]

SENATOR PIRSCH: Thank you, Mr. President, members of the body. I think that when we reach this issue is a very somber issue and an issue that should be taken with all its due seriousness and gravitas that when it comes to the issue cost should not be the directing factor that we look at here on either side. I don't think that when it comes to argument, those who would say it's the cost, the high cost of carrying out the penalty that should lead you to the decision to get rid of the penalty because by that logic then if we could...if a way was discovered then to reduce the cost of executions in the state, then there would be, by their argument, no reason not to. And so I think...I don't think that that's the true objection here. I think that it's...the objection is pinned more on other issues. And I think rightfully so. So I don't think cost should be the driver of this discussion. Having said that, I would yield the balance of my time to Speaker Flood should he desire to use it. Thank you. [LB36]

SENATOR ROBERT: Senator Flood, 3:30. [LB36]

SPEAKER FLOOD: Thank you, Mr. President. Thank you, Senator Pirsch. When Senator Nantkes asked me a question, she asked me a question as it related to...you know, the way I interpreted it was how many people are going to die in Nebraska, be executed that are on death row. The answer to that is zero on the execution side. But how many people are going to be death eligible? Ask Roy Ellis following what he did in Douglas County. He was sentenced to die in Douglas County after what happened with Amber Harris. That's not too long ago that that occurred. The death penalty is still on the books in Nebraska. The death penalty is still available for defendants that are found guilty beyond a reasonable doubt and an aggravator is found. It's still there. It hasn't gone away. We just happen to have death penalty with no method to carry it out. And the idea that by pushing green or red on your keypad that you're deciding whether somebody else lives, we're in the wrong branch of government for that. We set the laws and the policy. The court system decides, juries decide, the Nebraska Supreme Court and district judges decide whether or not somebody lives or dies. And you know what? They decided based upon the evidence. Ultimately the behavior of the defendant, the criminal conduct of the defendant, the crime committed, the aggravators, we are setting the policy here today. We are making our statutes work in unison. You can't have a death penalty without a method. Even if you're against the death penalty I think you have to think a few times about keeping something on the books without a method. I recognize how difficult it is, but we have a responsibility too. I urge you to adopt AM828. Thank you, Senator Pirsch, for the time. Thank you, Mr. President. [LB36]

SENATOR ROBERT: Thank you, Senator Flood and Senator Pirsch. Senator Council, you're next and recognized. [LB36]

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SENATOR COUNCIL: Thank you very much, Mr. President. I agree with you, Senator Flood. We shouldn't have the death penalty on the books, and that's why I introduced LB306, and that's why I've offered it as an amendment to LB36. And I know the context in which you said it that if we're going to have it on the books, we should have a method of carrying it out. It's my opinion and I've made it clear from the outset from the initial hearing before the Judiciary Committee when both LB36 and LB306 were heard at the same time that we should not be involved in the business of killing people in this state. There was discussion earlier in this debate, and it kind of waned, about what we were actually doing. And I share the thoughts and the statements of one of the former judges that says...and we were talking about state-sanctioned revenge. And I know there's been a debate about whether cost should be an issue in this debate. Well, I respectfully fall on the side that says cost most definitely should be an issue in this debate. I had notice when LB36 was introduced there was really no cost projected to be involved in the switch from electrocution to lethal injection. Well, looking at what has occurred in other states the cost of just retrofitting a gas chamber in one state was \$850,000. And if you looked at the Baze decision again, part of the protocol that the U.S. Supreme Court looked at were the facilities that were being used, how those facilities were set up. And if you look at the Baze decision and their protocol, the intravenous application of those drugs is from a room that is removed from where the inmate is and there's clearly a cost associated with developing that system where the person who is administering the drug can be in one room and the inmate...the condemned person be in another. So those are real costs, and I'm surprised that the body doesn't ask about those costs. Irregardless of whether you think the death penalty is an appropriate punishment of the state, there's not been many other bills that have passed this body where we haven't looked at what the cost to the taxpayers would be. We also have to take into account what we're looking at in terms of alternatives and the punishment, and actually just how the death penalty has been administered in this state. Again, if you look at the period from 1975 to about 2001 there were close to 29 death penalty sentences imposed. Half of those people had their sentences reversed. There were three people as I recall who died during the period that their appeals were pending,... [LB36 LB306]

SENATOR ROBERT: One minute. [LB36]

SENATOR COUNCIL: ...one committed suicide and several of those are still pending. Earlier someone talked about, you know, Carey Dean Moore. We're talking about over 20 years. We've already had figures that say \$31,000 a year on average to incarcerate someone. And the cost that we continue to incur when the more appropriate punishment would be life without possibility of parole because it addresses all of those societal issues that have been raised, and that is providing for adequate punishment and safety to the public. And for those reasons I would urge the body to oppose AM828 and underlying LB36. And if AM828 should pass, we will soon be debating my amendment, which is for the repeal of the death penalty. [LB36]

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SENATOR ROBERT: Thank you, Senator Council. Senator Nantkes, you're recognized. [LB36]

SENATOR NANTKES: Thank you, Mr. President. Thank you, colleagues, for your kind consideration and attention during this debate. I rise just simply to clarify for the record some comments I made earlier in regards to prior actions of the Nebraska Legislature in regards to lethal injection. It's been verified through people involved on both sides of this issue including the Governor's Officer that at least from 1999 through 2007...I believe 1999 LB52; 2001 LB356; 2002 LB815 regular session; 2003 LB526; 2005 LB506; 2002 LB1281; 2001 LB62; 2002 LB20 special session. Those are all instances, specific instances where a lethal injection bill was introduced to this body and rejected by this body. In relation to arbitrariness I think the bill itself begs a question: Why lethal injection? That seems like a pretty arbitrary message to choose, to utilize. Why not the gas chamber? Why not the firing squad? Why not other methods? The choice of bringing forth one method under LB36 itself is arbitrary and cannot be corrected through amendment or subsequent amendment. Colleagues, with that, again, I'd sincerely thank you for your kind consideration and to the Speaker for his professional courtesy in structuring the course of this debate. I think that we all know now, I think that we all knew going in where our votes were. And I believe sincerely that each member looks to their own hearts and their own minds to make this decision and none of them...none of us make it lightly. And I do believe that people of good will can have very different practical and philosophical beliefs about this issue. But what I'd hope that we wouldn't do is inject political beliefs into this issue because that, colleagues, doesn't have a place at the table on something as important as this and something as important as life and death. And I hope that people will think clearly about legitimate penological objectives, a comprehensive look at deterrence and whether or not that's worthwhile and proven at cost at other issues, and think about those and decide maybe they just need more study. And then they can make a more forthright decision in regards to this issue. That's a legitimate point of view to hold. Or maybe they feel that LB36 does the best that it can and at this point in time it's all that we can do and they will choose to support it and the committee amendment and to reinstate capital punishment in Nebraska. But, colleagues, as we saw through the safe haven debacle, people will say, what's going on in Nebraska? What's going on in Nebraska? This will be one of those instances. Other states this year, this very year are moving to abolish the death penalty, to end capital punishment in their state. And Nebraska is going in the wrong direction, back in time rather than forward. That's not conducive to evolving standards of decency. Thank you, Mr. President. [LB36]

SENATOR ROBERT: Thank you, Senator Nantkes. That was your third opportunity. Seeing no other lights on, Senator Ashford, you're recognized to close on AM828. [LB36]

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SENATOR ASHFORD: Thank you, Mr. President and members. Each state of the United States that has the death penalty utilizes lethal injection. The U.S. Military utilizes lethal injection as does the U.S. Government. That is the predominant form of execution in our country. When we were given this bill in the Judiciary Committee, we were given a relatively narrow charge. The charge was to evaluate whether or not the bill, LB36, met the standards that we had before us, and quite frankly those standards are found in the Baze case. There are no other dispositive cases at that level, the Supreme Court level other than the Baze case. We did that evaluation, and we carefully did that evaluation. We read the Baze case and we looked at the facts and circumstances surrounding the initial appeals of that case. We compare...and the legislation that was passed in Kentucky, and we compared it to the legislation that is LB36 and found them to be substantially the same. Under any analysis of constitutional law I can see no other logical conclusion than the terms and conditions placed in LB36 meet the standards of the Baze case. We went, however, further than that in the Judiciary Committee. We talked about transparency and we went to Speaker Flood, and Speaker Flood offered right away as he has suggested he did that the Administrative Procedures Act would apply to the methodologies utilized in Nebraska of what protocol, if you will, would be utilized in carrying out executions under lethal injection protocols. And we did that in order to ensure transparency, but in order to ensure that there was, as Speaker Flood has suggested, adequate review of the protocols. The Judiciary Committee went further still and went in and spent several weeks on the issue of proportionality. Proportionality was not necessarily a preeminent or predominant issue raised in LB36, but it has been discussed all afternoon. Proportionality is in our minds. It is something we think about when we think about whether or not we should have the death penalty in Nebraska. And I can tell you, members, we looked at every option that I know exists other than repeal, and we certainly did look at repeal because we advanced Senator Council's bill to the floor for consideration next year. We looked at every possible scenario that we could find that dealt with proportionality. Can we make this statute in Nebraska respond to the concerns and criticisms, much of which have been voiced here today, that the process is not proportional. And we concluded after thorough discussion with experts and reading the cases and discussing this matter at length that the system of proportionality and the system that is in place now with a three-judge panel determining that the aggravators clearly outweigh the mitigators is a system that does not exist in I'm not sure any other jurisdiction in the country--it may, but not very many--after a jury has determined by clear and convincing evidence that the aggravators are present. It is then appealed to the Supreme Court, as we all know as we have discussed. Those procedures are important. And we felt in the committee and the six members advanced the bill... [LB36]

SENATOR ROBERT: One minute. [LB36]

SENATOR ASHFORD: ...having gone through those various checks. And the reason that those are important safeguards is that in Nebraska we do not use the death penalty

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very often. I believe 26 times since 1903 since the Department of Corrections took over...26, I believe is correct, since the Department of Corrections took over the administration of the death penalty. More sentences have been commuted than they have been carried out. Evaluating all of these facts and circumstances, members, the committee voted this bill, this amendment to the floor 6 to 1. And I would urge the adoption of AM828 and the eventual advancement of LB36. Thank you. [LB36]

SENATOR ROBERT: Thank you, Senator Ashford. Members, you have heard the closing to AM828, the Judiciary Committee amendments. The question before the body is, shall the amendment be adopted? All those in favor vote yea; opposed, nay. Have all those voted who wish? Mr. Clerk, please record. [LB36]

CLERK: 34 ayes, 4 nays on adoption of committee amendments. [LB36]

SENATOR ROBERT: AM828 is adopted. Items for the record, Mr. Clerk. [LB36]

CLERK: Mr. President, four study resolutions: LR237 to LR240 all will be referred to the Executive Board. (Legislative Journal pages 1592-1594.) [LR237 LR238 LR239 LR240]

Mr. President, next amendment to the bill, Senator Avery, AM1410. [LB36]

SENATOR ROBERT: Senator Avery, you're recognized to open on AM1410. [LB36]

SENATOR AVERY: Thank you, Mr. President. It has never been my intent to prolong a resolution of this issue. Since that amendment has been adequately and thoroughly debated, I wish to withdraw it. Thank you. [LB36]

SENATOR ROBERT: AM1410 is withdrawn. [LB36]

CLERK: Senator Avery, AM1412. (Legislative Journal page 1505.) [LB36]

SENATOR ROBERT: Senator Avery, you're recognized to open on AM1412. [LB36]

SENATOR AVERY: Thank you, Mr. President. AM1412 is different from AM1410 and AM1455. But, again, it is not my intent to prolong debate. I believe that these amendments would improve the bill. It is obvious that I don't have a majority that agrees with me, so I request that one also be withdrawn. Thank you. [LB36]

SENATOR ROBERT: AM1412 is withdrawn. [LB36]

CLERK: Mr. President, Senator Nantkes would move to amend AM1439. (Legislative Journal page 1594.) [LB36]

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SENATOR ROBERT: Senator Nantkes, you're recognized to open on AM1439. [LB36]

SENATOR NANTKES: Thank you, Mr. President. Thank you, pages. Colleagues, to be clear it is my intent and this has been communicated to Senator Flood and others that it's not to engage in unnecessary delay or dilatory tactics or filibuster in regards to this legislation, but it's rather to create a record. I'm going to go ahead and withdraw the amendment at this time, and would encourage other members who filed amendments. Of course it's their province to do however they wish. But to have an opportunity to maybe recircle the wagons, make appropriate final comments on Select File for the record, and then consider amendments at that time. But with that, Mr. President, please withdraw the amendment. [LB36]

SENATOR ROBERT: The amendment is withdrawn. [LB36]

CLERK: Mr. President, the next amendment, Senator Dierks, AM62. (Legislative Journal page 1595.) [LB36]

SENATOR ROBERT: Senator Dierks, you're recognized to open on AM62. [LB36]

SENATOR DIERKS: Thank you, Mr. President, members of the Legislature. AM62 is one that I had prepared to take to the committee on the date of the hearing. And this exact...this is that particular amendment. And what it does, the new language that it puts in there says that, "If the criminal proceedings involved a capital offense, the public defender or appointed counsel shall have been licensed to practice law in the state of Nebraska for at least five years prior to the date of appointment, and shall be experienced in the practice of criminal defense, including the defense of capital offenses." I think that language provides some degree of protection to every side in the issue. And I would just request your support of AM62. Thank you. [LB36]

SENATOR ROBERT: Thank you, Senator Dierks. Members, you have heard the opening to AM62 to LB36. Those wishing to speak: Senators Lathrop and Flood. Senator Lathrop, you're recognized. [LB36]

SENATOR LATHROP: Thank you, Mr. President and colleagues. I can see this thing is winding down or it looks like it is. I don't know if we're going to get to Senator Council's amendment or not. But I thought before it did that I'd like to talk to you a little bit about what happened in Judiciary Committee in case you're confused. We started this year out having three times brought this repeal to the floor and LB36 came in. And our chairman undertook an exhaustive attempt to look at whether or not it's appropriate to have two aggravators present. The concern being, as I understood it, that the death penalty is imposed and ultimately not sustained half the time on appeal. That was a concern. And the committee had an intern who studied the issue exhaustively, made presentation about the defects in the death penalty, the problems with the death penalty

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in its application, in its proportionality, and then we voted on it. The vote was to leave it in committee. And I'll take the blame for that, I guess, because I believed what we talked about early on in our committee work that there are problems with the application of the death penalty. And so I set out to talk to people who actually worked with the death penalty. Joe Smith in Madison County, Don Kleine in Omaha, Tom Riley, people from the advocacy group that works with the death penalty cases and we looked for a solution. And I want to be clear about something because maybe it gets confused in some of the debate you've heard today or some of the representations. I was the one that went and spoke to Don Kleine and to Tom Riley. And they didn't tell me that this isn't arbitrary. And they didn't tell me that it doesn't have problems. And they didn't tell me that there aren't problems with the death penalty in its application. What they said was they are inherent in this type of a penalty. We have prosecutors in this state that don't believe in the death penalty. Okay. So when they have a capital crime, they don't ask for it. We have counties that can't afford it. The representation was made. Well, of course, sometimes it's an evidence thing. We're not comparing apples to apples. Sure, there are cases that are thin and people don't ask for the death penalty because they get some guy to plea to first-degree murder and go spend the rest of his life in jail. I understand that. But understand there are problems with the application of the death penalty, and that's what we tried to resolve. And the fact that we put this amendment out, the fact that this bill is before you doesn't mean that we didn't find those problems. They're there. They were recognized by our chairman when he engaged the intern and we studied it for months. And they're recognized by lawyers that work in this area. They will tell you that there are some county attorneys that won't prosecute these things. There are some counties that can't afford them. And it does lead to an arbitrary application and we do have people sitting in the population who have committed as bad or worse first-degree homicides than these people. So we can vote on LB36 and we can cause the lethal injection to be part of our law. I understand where we're going. [LB36]

SENATOR ROBERT: One minute. [LB36]

SENATOR LATHROP: But don't, after the discussion today and the confusion by what people have said, understand that somehow I had a conversation with the county attorney and a public defender and they think it's fine because they don't. They think it's inherent in the application. You're not going to get consistency. We could. We could. Senator Chambers had it in there. It said no one can be prosecuted or put to death if there's somebody who's done something worse than him or her. Think about that because that was wrongly rejected by prosecutors, it was wrongly rejected by the Attorney General. I understand why. They couldn't put anybody to death in this state after that. There's a way to make this consistent and there's a way to make it proportional, but they would not accept that as an amendment. But don't for a minute think after you've listened to the debate today or the conversation on the floor or some of the representations... [LB36]

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SENATOR ROBERT: Time. [LB36]

SENATOR LATHROP: ...that the problem was resolved with a conversation I had with a county attorney and a public defender. Thank you. [LB36]

SENATOR ROBERT: Thank you, Senator Lathrop. Senator Flood, you're recognized. [LB36]

SPEAKER FLOOD: Thank you, Mr. President. First, I want to comment on Senator Dierks's amendment AM62. You know, I do admire Senator Dierks. He came here in '86. That's where he was. That's where he is today. You can't argue with somebody that's got that type of moral belief on an issue like this. And I respect him for it. And it's a hard position to have in our area of the state given what has occurred in parts of his district and mine. I have a different opinion from him, but I can respect where he's coming from. And with that respect, I looked at his amendment and I think on its face that, you know, it does good things because you want competent attorneys representing defendants. Speaking favorably of our bar for a second, in rural and urban Nebraska we have a very good bar. We can be proud of it. I don't think there have been any problems demonstrated. The death penalty is sought so rarely in Nebraska I think the district courts have a record of appointing competent attorneys. Yes, is this a problem in Illinois? Is this a problem in Maryland or California? Maybe. I don't know. I just picked those states randomly, geographically spread across the country. But in Nebraska there's no showing of a problem. And if you look at the cases that have gone up as it relates to ineffectiveness of counsel, I don't think you'll find one. And if they do, they send it back for a new trial. In a state the size of Nebraska...and here's my real concern, when you start narrowing the scope of people that can represent a capital murder defendant, the pool is very small. You've got Jerry Soucie and the Nebraska Public Commission on...Public Advocacy Commission. You've got a couple of Norfolk attorneys now. You've got excellent defense attorneys like Tom Riley in Douglas County, and I'm sure a few others in Douglas County. You've got people that...I would say Clarence Mock arguably one of the best criminal defense attorneys in the state of Nebraska. I don't know that he's had a lot of capital murder cases, but if I was the district judge I wouldn't hesitate for a second to appoint a class act like him to represent somebody facing a first-degree murder charge. I don't think we can arbitrarily in this state draw a circle around who can and who cannot defend somebody. I think district judges know. And district judges want that defendant to have a good lawyer because the practice of law demands excellence. And a good lawyer representing a defendant means that justice will be served, that every possible fact or piece of evidence will come in to mitigate whatever the state has on the other side. And for that reason I'm not going to support Senator Dierks's amendment. I think maybe this would be more appropriate in a state that's much larger. But I use Clarence Mock as an example. I think he's from Blair, if I'm right, has an office in Blair...Oakland. He is a gem of a guy. In fact, the Legislature hired him on Regent Hergert matter. I don't know that he'd qualify for this.

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Maybe he would. I don't know all of his cases. But he'd be appointed in a heartbeat and I wouldn't want somebody like him excluded because we have an obligation to make sure that the defendant has good legal representation. And district court judges know that when they appoint. Secondly, Senator Lathrop talked about, you know, the process they went through on the Judiciary Committee. And trust me, I've said it before, it was painstakingly detailed. There were nights I went to bed tossing and turning, hoping that I could come up with the one amendment that we could all agree on because we've done that before on difficult issues. [LB36]

SENATOR ROBERT: One minute. [LB36]

SPEAKER FLOOD: We tried everything. I think he came to me with two or three ideas. I came to him with at least two ideas. We couldn't meet in the middle, but we tried. Senator Ashford was there. We tried on several occasions. We couldn't get it done. You talk about a county attorney that doesn't believe in the death penalty, well, you know what? County attorneys win elections or they're appointed by the county board if nobody runs. If your county attorney doesn't believe in the death penalty, the citizens of the county elected him. Not only that but the Attorney General has concurrent jurisdiction. And the other thing I want to say before my time is done here, if your county can't afford it, I don't buy that because the Attorney General's Office is ready and willing to step in with their criminal division. They have concurrent jurisdiction. If Keith County can't afford to prosecute somebody for first-degree murder, the Attorney General's Office is ready to step in and take that case. So there are backups to the backups. I think that just has to be said. [LB36]

SENATOR ROBERT: Time. [LB36]

SPEAKER FLOOD: Thank you, Mr. President. [LB36]

SENATOR ROBERT: Thank you, Senator Flood. Senator Ashford, you're next and recognized. [LB36]

SENATOR ASHFORD: Thank you, Mr. President. And I don't want to prolong this debate unnecessarily, but I do want to discuss a couple of quick points. First, on Senator Dierks's amendment, I'm not going to support it on General File. It is a worthy issue and I think we should have some more discussions about it even this year between now and Select File. But I do want to comment a little bit about Senator Lathrop said. And he's absolutely right. We were stuck. We were stuck because we felt...and this discussion started last summer after the Baze case came out in April. I believe April 18, 2008, the Baze case came out and it was clear to me that lethal injection in all probability was a constitutionally acceptable method of carrying out the death penalty in the United States. We started the discussion about the two aggravators over the summer with the Attorney General's Office, with Speaker Flood and in the

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committee, that and many other issue. And we did come to a 4 to 4 impasse on trying to find some option to deal with proportionality. And Senator Lathrop, as he has done on so many occasions in the Judiciary Committee, took the issue as his own. And he went to many people. And I know it was not only Tom Riley and Don Kleine, but many other experts and on all sides of the issue and read a lot about it. And certainly discussed it with me throughout the last weeks before this bill was advanced out of committee. And my sense is that what at least in talking to Tom Riley and to Don Kleine of what they were saying is exactly as Senator Lathrop represented. And that is that there is no guarantees against arbitrariness. It is inherently arbitrary in many respects when the death penalty is being discussed in a court of law or the sentence of death is being debated by judges. It has significant issues. What they said was that the system that we had constructed and all of the options that we thought about to make it a better system so that we could have presented this body with some other options that might have made more of us feel more comfortable with the death penalty, this particular process that we had in place was the best process because it allowed the defense to put in whatever evidence the defense wished in the mitigation phase to the three judges that must decide unanimously that the aggravators outweigh the mitigators. And Tom Riley suggested to me that is the best system. So I think that's what certainly motivated me to vote the bill out. We kept Senator Council's bill alive and moved it out to the floor because there may be problems that come up over the next 12 months on the death penalty. And we felt it was imperative that this body have an opportunity to digest what will have happened in the months prior to next year when we convene again and that they will have an opportunity to have this review one more time. It doesn't hurt to have three, four, and five debates on the death penalty, members, in my view. So that's my recollection of what happened. I thank Senator Lathrop for his...well, his just incredible desire to take all these issues on his shoulders and all the other members of the committee, Senator Council, Senator Lautenbaugh, and everybody else, Senator Coash, Senator Rogert, all of us. [LB36]

SENATOR ROGERT: One minute. [LB36]

SENATOR ASHFORD: Thank you, Mr. President. [LB36]

SENATOR ROGERT: Thank you, Senator Ashford. Senator Council, you are next and recognized. [LB36]

SENATOR COUNCIL: Thank you, Mr. President. I rise rather, I don't know, ambivalent. Senator Dierks, I think you for attempting to address one of the problems with the administration of capital punishment, not only in the state of Nebraska but nationwide. Just as recently as last year, the American Bar Association presented testimony to Congress on the issue of the effectiveness of the defense counsel in capital cases. And they conducted a study in eight states who had at some point in time been engaged in the various moratoriums on the death penalty. And there were serious issues with

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regard to effectiveness of counsel. And I tried to quickly pull up...the American Bar Association in 2003 issued specific guidelines for the appointment of legal counsel to represent individuals in capital cases. And clearly not all of the counties in the state of Nebraska have individuals who satisfy those requirements. And it's interesting that we do have some fine criminal defense attorneys in the state of Nebraska, but the issue is one of appointment of counsel for indigent defendants. And in those counties that aren't fortunate to have a public defender like the public defender that's in Douglas County who's had the opportunity to handle probably far too many capital cases, I mean, we don't have a system of assigning public defenders to other counties, not that the Douglas County public defender would want to go out into other places, but in those places where you don't have that level of expertise, I think, Senator Dierks, you've raised a very serious issue that needs to be addressed as part of any legislation that is going to maintain a system of punishment that is irreversible. Individuals who are sentenced to death if errors are committed in their defense that but for those errors they would not have been convicted, we run the serious risk of individuals being sentenced to death who are innocent. And when we talked about earlier in the day Senator Avery's amendment, and there were a lot of questions. And I don't know whether Senator Avery was aware of one of the key issues about the DNA, and I think that one of my colleagues mentioned it, is that...I think it was Senator Lathrop, you can find DNA on about anything. And when you have so many allegations surrounding how evidence was recovered, how evidence was accounted for, that becomes problematic. So, Senator Dierks, but for the fact that it's my hope that we simply repeal the death penalty, I think your amendment is certainly focused in the proper direction. I just don't know whether we might want to rely on what the American Bar Association has set forth as the requisite guidelines because your bill goes to the training, but it also doesn't go to the funding of the experts that a court-appointed defense counsel would need in order to... [LB36]

SENATOR ROBERT: One minute. [LB36]

SENATOR COUNCIL: ...prepare an adequate defense. So I think your amendment needs to go maybe a little farther with regard to setting out guidelines for the complete defense of an individual who is charged with a capital crime. [LB36]

SENATOR ROBERT: Thank you, Senator Council. Senator Nantkes, you're recognized. [LB36]

SENATOR NANTKES: Thank you, Mr. President. And thank you, Senator Dierks, for bringing forward this amendment. Colleagues, I think what's represented through Senator Dierks's amendment and earlier through the Avery amendment that was proposed was a acknowledgement that a system based on humans is prone to human error. And they've attempted to provide procedural safeguards for when we are dealing with the ultimate sanction, whether it's through educated and appropriate and skilled

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defense attorneys as evidenced in the Dierks's amendment or whether it's through DNA testing and other procedural safeguards as envisioned under at least the concept as I understand it in Senator Avery's earlier amendment. These are procedural safeguards that we should think about, that we should talk about when we're doling out the state's ultimate and only irrevocable sanction. That being said, when we see thoughtful amendments brought forth like the Avery amendment, like the Dierks amendment in terms of making the process and the procedure better, proponents of lethal injection, proponents of the death penalty say: No, we don't want to have anymore discussion about process and procedure. We don't want to ensure that we have a level playing field in terms of counsel. We don't want to make sure that we have additional procedural safeguards in place. We want to proceed forward regardless of those legitimate questions. We want to proceed forward regardless of the cost. We want to proceed forward. That's been the response from proponents of this legislation. And I pledge to you, colleagues, and I charge you to consider even the most strongly felt feelings in support of LB36 should be cautioned, should be challenged by legitimate questions surrounding process and procedure and cost. Or at the very least we should wait until we can have an evaluation of those. Senator Flood is absolutely right. We are blessed to have a competent and engaged bar and bar association within the state of Nebraska. And I'll provide you a quote from James Hewitt, the past president of the Nebraska Bar Association published in the Omaha World-Herald on January 29, 2009, elected by this peers to be the president of the body regulating lawyers, representing lawyers from all across the political and legal spectrum. And he says: Nebraskans and Nebraska legislators should proceed slowing and cautiously in determining whether lethal injection should be the method the state employs to execute convicted murders. Nebraska need not rush to judgment. Examine the matter fully, particularly in light of term limits. Let new senators have a chance to think about the issue. I believe that a study about costs of executing a prisoner versus confining him/her for life as well as the effectiveness of lethal injection compared to other methods would allow both the Legislature and citizens to feel comfortable with whatever decision they ultimately reach. Nebraska need not rush to judgment. They should examine the matter fully. Thank you, Mr. President. [LB36]

SENATOR ROBERT: Thank you, Senator Nantkes. Senator Dierks, you're recognized. [LB36]

SENATOR DIERKS: Thank you, Mr. President. I'd just like to ask Senator Flood a question if I may. [LB36]

SENATOR ROBERT: Senator Flood, will you yield to a question? [LB36]

SPEAKER FLOOD: Yes. [LB36]

SENATOR DIERKS: Senator Flood, AM62 if it were attached to LB36, what kind of

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damage would that do to the bill? [LB36]

SPEAKER FLOOD: Well, I think you set up a system that eventually dries itself out. Everybody has got to have a first case, everybody has got to get a chance to represent somebody in a capital murder case. You basically have a class of people can be the only ones hired to represent a defendant under your amendment, and some day these people are going to die or retire and there's going to be nobody available. I think the bigger issue here, Senator Dierks, is that you rely on the district court to appoint the best person possible to represent the defendant and make sure they are a competent attorney. And I have faith that the court will do that. So I do think your amendment could cause a lot of strain and harm to the system in the event this happens. [LB36]

SENATOR DIERKS: So in other words you think that the negatives are greater than the positives. Is that right? [LB36]

SPEAKER FLOOD: Yeah. Well, saying very clearly, I respect what...you are focused on an issue that's important, and that is competent legal counsel for the defendant. I acknowledge that. I don't think this is the way to do it. I don't know that there's been a problem documented that we have to solve if you look at the cases and capital cases in Nebraska. [LB36]

SENATOR DIERKS: Thank you. Thank you, Mr. President. [LB36]

SENATOR ROBERT: Thank you, Senator Dierks, Senator Flood. Senator Lautenbaugh, you're next and recognized. [LB36]

SENATOR LAUTENBAUGH: Thank you, Mr. President and members of the body. And as the hour is late I will be brief. I do appreciate Senator Dierks's commitment and his position on this issue. We differ on this but as Senator Flood indicated, he has been consistent and clear throughout. I do have to rise in opposition to this amendment for the simple reason that I'm not comfortable with it as it is written regarding requiring a certain amount of experience in Nebraska for a practicing attorney before one of these cases may be handled. And I just don't feel that experience is adequately defined, and then it throws in there experience including capital cases. But how much has to be capital cases versus other criminal defense work? I understand the spirit in which this is brought. I do believe in Nebraska this may be a solution in search of a problem. We may be addressing it well with the Commission on Public Advocacy and very highly trained public defenders in this state. So with all due respect to Senator Dierks, I cannot support this amendment. Thank you, Mr. President. [LB36]

SENATOR ROBERT: Thank you, Senator Lautenbaugh. Senator Flood, you are next and recognized. [LB36]

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SPEAKER FLOOD: Thank you, Mr. President, members. The other point I want to raise on Senator Dierks's amendment, you know, lawyers are officers of the court. They're judicial branch actors. And the court has the jurisdiction to make decisions on the actions of its officers. I don't know that it's the providence of the Legislature to step in and tell the court how to regulate or who can or who cannot represent a client. I think we can tell the court what the qualifications for a county attorney are because that's an executive branch function inside the judicial branch of government. But can the Legislature under the separation of powers in the constitution pierce that judicial branch veil and say, okay, these are the only people that can represent this client? We're going to tell the district court what to do as it relates to an officer of the court. I think that's a legitimate question. I'm not saying I'm right. I think it's a consideration. As I said with Senator Dierks, everybody's got to have first case. And we have good lawyers in the state. With that, I'll leave that alone. AM62, I'm opposing it. I appreciate the reason it was brought forward. I want to address Senator Nantkes and her recent statements that proponents of LB36 don't want a level playing field for counsel. Not true. Proponents of LB36 want justice which requires a level playing field for counsel, which requires a defendants attorney that knows what he/she is doing, which requires competency on both sides of the case, both the state and the defendant. I take exception to the idea that simply because we're proponents of LB36 we don't want this to be a fair trial. Quite frankly that's obnoxious. We want fairness because if the result is the death penalty, you want to know that it was done justly and properly and fairly. Otherwise it's not worth even discussing. Senator Nantkes suggested that proponents of LB36 don't want to talk about costs. I'll talk about costs. Let's talk about the Attorney General's letter. Let's talk about the fiscal note. What is it we want to discuss? The simple answer is the county pays the bill for the most part. And then Senator Nantkes suggested that proponents of LB36 simply say no to thoughtful amendments. I spent five weeks trying to say yes to an amendment with Senator Lathrop and Senator Ashford. I wanted nothing more to find some compromise that would work. It seemed like two months. It seemed like three months. It was every single day. You see who I sit next to? What did we talk about every single day? It was painful. We tried to find common ground, we couldn't but we kept trying. I've been trying to say yes to an amendment I can sink my teeth into and say, yes. But you know, I think the thing we learned in this whole matter is that this is one of those issue where you can't, without compromising where you're coming from on it, agree. So the suggestion that we haven't been doing this in good faith, I completely reject that. And as the lead proponent on LB36 and the one that communicated with others like Senator Lautenbaugh and others in here, we put every ounce of our energy into doing this the right way. I wish there was the magic solution where both sides would say, yes, we can agree. But we're talking about an issue that I don't think you'll ever get that on. And I think that's the sum and substance of what some in here have been talking about in the last half hour. [LB36]

SENATOR ROBERT: One minute. [LB36]

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SPEAKER FLOOD: I do want a level playing field for counsel. I am willing to talk about costs. And I'm not summarily dismissing every amendment just because it's brought by an opponent of LB36. Thank you, Mr. President. [LB36]

SENATOR ROBERT: Thank you, Senator Flood. Senator Wallman, you are next and recognized. [LB36]

SENATOR WALLMAN: Thank you, Mr. President, members of the body. I, too, appreciate all the work Senator Friend has put in...Speaker Flood, "Cap" Dierks, Senator Council, Senator Nantkes. This is an emotional issue. And if we...we do have a death penalty bill and this is to take care of the death penalty, LB36. And if we're going to support this I think Senator Dierks's amendment would help those...I truly do not think we have good representation in every county or the monetary system to put in place to pay for it or the county boards don't wish to pay for it. So I would support Senator Dierks's amendment. And if he'd want anymore time, I'd yield it back to Senator Dierks. [LB36]

SENATOR ROBERT: Senator Dierks, 4 minutes. [LB36]

SENATOR DIERKS: Well, thank you, Mr. President. Thank you, Senator Norman (sic). My intent, of course, is to provide what I think is an extremely fair element of trial effort on the part of the defense of these people that are sentenced to death. I think it's necessary that we do everything we can to make sure they have adequate representation, legal representation. This amendment is not complicated. It's very simple. It just puts it in a few words and I think we need to provide that kind of help for those people. And with that, I'll just return the mike to the President. Thank you. [LB36]

SENATOR ROBERT: Thank you, Senator Dierks, Senator Wallman. Senator Council, you're next and recognized. [LB36]

SENATOR COUNCIL: Yes, thank you, Mr. President. And I will be brief. Again, I think that Senator Dierks's amendment is an attempt to address a very serious issue when we're talking about the imposition of a sentence of capital punishment or seeking capital punishment in a capital case. And I did provide to Senator Dierks for his review...and I apologize I haven't made copies for everyone, but Senator Dierks's amendment does raise some very critical aspects with regard to the trial of capital cases. And what I've provided to Senator Dierks was a copy of testimony presented on behalf of the American Bar Association to the Subcommittee on the Constitution, Committee on the Judiciary of the United States for the hearing on the adequacy of representation in capital cases, April 8, 2008. And what I was saying earlier is that I think that Senator Dierks's amendment goes in the right direction. I don't think that it goes quite far enough. And with regard to Senator Flood's questions as to the extent to which the judiciary can get involved in it, Senator Dierks's amendment amends a section of

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current statute that where we, the Legislature, has granted the courts the authority to appoint counsel. And I think it's important that we make the distinction there are some counties that have county public defenders and there are some counties that even the county public defender may not be able to represent a defendant because of a conflict of interest and the court has to appoint someone outside of the public defender's office to represent that defendant. And in those cases, we have to be very cognizant of the amount that attorneys are being authorized payment for if they're court appointed in certain of these counties. In some counties the compensation rate is as low as \$50 an hour. And I don't know that you'd get a Clarence Mock and tell you you won't get a Clarence Mock at \$50 an hour in a capital case. So I would be supportive of Senator Dierks's amendment if it even went further than it does now. And that is to set out a compensation rate that is commiserate with the skill level of the individuals who are being appointed. Because the fact of the matter is that one of the leading grounds for appeal in a capital punishment case is ineffective legal counsel. And I think Senator Dierks has touched upon a very serious issue relative to the defense of capital cases. And, again, I'm just so adverse to capital punishment I would be voting against the bill. But in the event that we're not successful in repealing capital punishment, I'd be more than happy to work with Senator Dierks in the interim to develop a system to ensure that defendants in capital cases get the best legal counsel that they can if they are indigent. [LB36]

SENATOR ROBERT: Thank you, Senator Council. Senator Nelson, you are recognized. [LB36]

SENATOR NELSON: Thank you, Mr. President, members of the body. I, too, want to commend Senator Dierks on bringing this amendment, and a lot of good things have been said. Let me ask Senator Council a question if she's available. [LB36]

SENATOR ROBERT: Senator Council, will you yield to a question from Senator Nelson? Senator Council, will you yield to a question? [LB36]

SENATOR COUNCIL: Yes, Senator Nelson. [LB36]

SENATOR NELSON: Senator Council, in the state of Nebraska in the counties that don't have a public defender that serve one or more counties and no one is available, where do they go to seek defense counsel? [LB36]

SENATOR COUNCIL: You know, Senator Nelson, your guess is as good as mine. (Laughter) I have no idea. I would assume that they contact the State Bar Association and try to get the names of some people who would be willing to accept such an appointment. [LB36]

SENATOR NELSON: Don't we as a state have a defense ground here in Nebraska that

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will make people available? Am I wrong about that? [LB36]

SENATOR COUNCIL: Well, I'm not a member of the Criminal Defense Attorneys Association. I don't know that they do or they don't. I know that...I mean, if you're talking about the lawyer referral service, that has no application in the case of criminal appointments. And I suspect that the criminal defense attorneys would make a list of available people published on some regular basis. But I can't speak for the criminal defense attorneys. [LB36]

SENATOR NELSON: We have a dearth of knowledge on our part about what's available. But I do want to say this, I am familiar with what we have in Douglas County. Senator Dierks, we have a very capable public defenders office. They are so capable in most capital cases and so inventive and so tenacious that it's often frustrating to members of the public. They do an excellent job and I don't think there's anyone in my estimation or from my knowledge in a capital case, in Douglas County anyway, that doesn't get a very capable legal defense. And I would imagine the same is true here in Lancaster County. And I have not heard of anyone in outstate Nebraska that did not have a good defense attorney one way or another. It simply is very important to the district judges that the defense be good and capable because that would a big factor in overturning a conviction. And there isn't any district judge that wants that. I think we're well-protected with the system that we have. We have a good defense bar. We have a good prosecutorial bar. My feeling is that your amendment might hamstring the courts a little bit. I'm not sure that it would even stretch or go into the ability of the federal court if necessary if we passed a law to this extent of the certain restricts that had to be made as far as whether defense counsel could represent. So I do feel...I am going to oppose the amendment. I know your intentions are good, but I don't think it would be that helpful. Thank you, Mr. President. [LB36]

SENATOR ROBERT: Thank you, Senator Nelson. Senator White, you're next and recognized. [LB36]

SENATOR WHITE: Thank you, Mr. President. I really appreciate Senator Dierks's amendment and I think it is a huge problem. Senator Dierks, in many states where people have been actually convicted, they are restricted to being...pay their attorneys no more than \$100 to defend a capital murder case. And I can assure you you do not get a just result, you do not have a process that's reliable or a process even remotely fair when you're doing that. On the other hand, I can honestly tell you that some of the most accomplished criminal defense lawyers in this state are public defenders. The Lancaster County public defenders and Douglas County public defenders regularly lend their talent to other counties to ensure that they are. For my money, maybe the best criminal defense lawyer in the state is Tom Riley who is a public defender. I tell him he's the best lawyer money can't hire. And that's legitimately, I think, real credit. I would support this amendment. I have one reservation. In Nebraska we have a statute that says that

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anyone who graduates from an accredited law school in the state of Nebraska can practice law without taking the bar. The Nebraska Supreme Court has repeatedly stated they are the only judge because of, as Senator Flood had earlier raised of separation of powers, they are the only judge of qualifications of attorneys. And while I would hope that they would have the common sense to ensure that only experienced, qualified attorneys are appointed in these cases, I'm not sure that we can do that job for them because of that separation and because actually Senator Chambers for years took the position he could practice law without passing the bar because of a statute, and for years the Supreme Court rejected that. So given that situation I certainly don't have a problem voting for the amendment, though I have a concern over whether or not in fact it will enforceable. Thank you, Mr. President. [LB36]

SENATOR ROBERT: Thank you, Senator White. Senator Dierks, you are next and recognized. [LB36]

SENATOR DIERKS: Thank you, Mr. President. I've had some assurance that we will be able to work on this during the interim or between now and Select File and try to find some answer to it. With that, I will withdraw the amendment. Thank you. [LB36]

SENATOR ROBERT: AM62 is withdrawn. Mr. Clerk, items for the record. [LB36]

CLERK: I do, Mr. President. I have one study resolution, Senator Pirsch, LR241 be referred to Exec Board. Senator Council, an amendment to be printed to LB36. A series of name adds to LR161. (Legislative Journal page 1596.) [LB36 LR241 LR161]

And a priority motion. Senator Lathrop would move to adjourn the body until Tuesday morning, May 19 at 9:00 a.m. []

SENATOR ROBERT: Members, you have heard the motion to adjourn until Tuesday morning at 9:00 a.m. All those in favor signify by saying aye. Opposed nay. We are adjourned. []