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Transcriber's Office

Floor Debate  
March 19, 2007

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[LB12 LB12A LB170 LB192 LB286 LB292 LB292A LB304 LB368 LB389 LB476 LB568  
LB575 LB585 LB604 LB636 LB677 LB687 LB688 LR39]

PRESIDENT SHEEHY PRESIDING []

PRESIDENT SHEEHY: Good morning and welcome to the George W. Norris Legislative Chamber for the forty-eighth day of the One Hundredth Legislature, First Session. Our chaplain for today is Senator Pirsch. Would you all please rise. []

SENATOR PIRSCH: (Prayer offered.) []

PRESIDENT SHEEHY: Thank you, Senator Pirsch. I call to order the forty-eighth day of the One Hundredth Legislature, First Session. Senators, please record your presence. Please record, Mr. Clerk. []

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

PRESIDENT SHEEHY: Thank you, Mr. Clerk. Any corrections for the Journal? []

CLERK: I have no corrections, Mr. President. []

PRESIDENT SHEEHY: Messages, reports, or announcements? []

CLERK: Your Committee on Enrollment and Review reports having examined and engrossed LB12 and find the same correctly engrossed; LB12A, LB192, LB286, and LB568, all of those reported correctly engrossed. Health and Human Services Committee, chaired by Senator Johnson, reports LR39 back to the Legislature for further consideration. Banking, Commerce and Insurance, chaired by Senator Pahls, reports LB368 to General File with committee amendments attached. And the Revenue Committee, chaired by Senator Janssen, reports LB575 to General File with amendments and the following bills indefinitely postponed: LB170, LB604, LB687, and LB688. That's all that I have, Mr. President. (Legislative Journal pages 889-892.) [LB12 LB12A LB192 LB286 LB568 LR39 LB368 LB575 LB170 LB604 LB687 LB688]

PRESIDENT SHEEHY: Thank you, Mr. Clerk. We'll move to the first legislative confirmation report. []

CLERK: Mr. President, the Education Committee, chaired by Senator Raikes, reports on two appointments to the Board of Trustees of the Nebraska State Colleges. (Legislative Journal page 862.) []

PRESIDENT SHEEHY: Senator Raikes, you're recognized to open on the Education Committee report. []

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SENATOR RAIKES: Thank you, Mr. President, members of the Legislature. The Education Committee encourages your support for the confirmation of Mr. Gary Bieganski to the Board of Trustees of the Nebraska State Colleges. Mr. Bieganski is a new appointment to the board. If confirmed, he would serve on the board through January 1 of 2011. Mr. Bieganski recently retired as president and CEO of McCook Community Hospital, a position he held for the past 29 years. Prior to that, he worked for five years as an administrator for West Holt Memorial Hospital in Atkinson. If confirmed, Mr. Bieganski would help govern the system that includes his alma mater, Chadron State College, where he earned a bachelor of arts degree in business administration and economics. He's also taken courses in a variety of fields, including healthcare administration and adult education. Mr. Bieganski is also active in a number of organizations, including the Mid-America Hospital Alliance, the Voluntary Hospitals of America, the Heartland Health Alliance, and the McCook Economic Development Corporation, to name just a few. He is a past member of the State Board of Health and the Board of Counselors of the University of Nebraska Medical Center. To remind you, the Nebraska State College System is governed by a seven-member board of trustees, six of whom are appointed by the Governor for terms of six years. The Commissioner of Education is the seventh member of the board and serves in an ex officio capacity. The board is charged with a general responsibility of governing three state colleges--Chadron State College, Peru State College, and Wayne State College--which together educate approximately 8,000 students. With that, I'll close and encourage your support of the confirmation of Mr. Gary Bieganski. Thank you. []

PRESIDENT SHEEHY: Thank you, Senator Raikes. You've heard the opening to the Education Committee confirmation report. The floor is now open for discussion. Senator Raikes, no one wishes to speak on this first nominee. You may talk about your second appointment. []

SENATOR RAIKES: Okay, I will do so. Thank you, Mr. President, members of the Legislature. The Education Committee also encourages your support for the confirmation of Floyd Vrtiska to the Board of Trustees of the Nebraska State Colleges. Former Senator Vrtiska is a new appointment to the board. If confirmed, he would serve on the board through January 1, 2013. As many of you know, Senator Vrtiska served in the Legislature for 12 years, 1992 to 2004. He lives in Table Rock where he manages a farm and cattle operation. In addition to his service in the Legislature, Senator Vrtiska has also served as a member of the State Fair Board, the Pawnee County Board of Commissioners, as well as mayor and clerk-treasurer for the village of Table Rock. He is the president of the Southeast Nebraska Development District, the Table Rock Historical Society, and the Table Rock Development Corporation. He is also a member of the Peru State College Foundation. In 2005, the addition of the Peru State College science building was named in honor of Senator Vrtiska and his wife, Doris. With that, I'll close and encourage your support of this confirmation. Thank you. []

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PRESIDENT SHEEHY: Thank you, Senator Raikes. The floor is now open for discussion on the Education Committee confirmation report. Anyone wishing to speak? Seeing none, Senator Raikes, you're recognized to close. Senator Raikes waives closing. The question before the body is, shall the legislative confirmation report from the Education Committee be adopted? All those in favor vote yea; opposed, nay. Have all voted who wish? Please record, Mr. Clerk. []

CLERK: (Record vote, Legislative Journal pages 892-893.) 39 ayes, 0 nays on adoption of the confirmation report, Mr. President. []

PRESIDENT SHEEHY: Confirmation report is adopted. (Visitors introduced.) First item under General File, Mr. Clerk. []

CLERK: Mr. President, LB292A is a bill by Senator Hansen. (Read title of LB292A.) [LB292A]

PRESIDENT SHEEHY: Senator Hansen, you're recognized to open on LB292A. [LB292A]

SENATOR HANSEN: Thank you, Mr. President, members of the body. LB292A is an appropriations bill that actually funds the disproportionate share hospital bill, LB292. It asks that appropriations of \$3 million in the HHS cash fund be matched with \$4.1 million of federal funds for the next two years. These funds go to disproportionate share hospitals across the state. There's ten hospitals that would benefit from this if the counties would allow their contribution to the hospitals to go directly to HHS, mix with these funds, and then re-sent back to the hospitals. So it's a cash funds transaction. Thank you, Mr. President. [LB292A LB292]

PRESIDENT SHEEHY: Thank you, Senator Hansen. You've heard the opening to LB292A. The floor is now open for discussion. Anyone wishing to speak on this item? Senator Hansen, you are recognized to close. Senator Hansen waives closing. The question before the body is, shall LB292A advance to E&R Initial? All those in favor vote yea; opposed, nay. Have all voted who wish? Please record, Mr. Clerk. [LB292A]

CLERK: 40 ayes, 0 nays, Mr. President, on the advancement of LB292A. [LB292A]

PRESIDENT SHEEHY: LB292A does advance. Mr. Clerk, you have reports and announcements? [LB292A]

CLERK: Mr. President, Enrollment and Review reports LB292, LB389, LB304, LB677, LB636 to Select File, some of those having Enrollment and Review amendments attached. That's all that I had, Mr. President. [LB292 LB389 LB304 LB677 LB636]

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PRESIDENT SHEEHY: Thank you, Mr. Clerk. We'll now move to first item under General File. []

CLERK: Mr. President, LB476, a bill introduced by Senator Chambers. (Read title of LB476.) The bill was introduced, Mr. President, on January 17 of this year, at that time referred to the Judiciary Committee for public hearing. The bill was advanced to General File, Mr. President. I do have amendments other than committee amendments pending. [LB476]

PRESIDENT SHEEHY: Thank you, Mr. Clerk. Senator Chambers, you're recognized to open on LB476. [LB476]

SENATOR CHAMBERS: Thank you. Mr. President, members of the Legislature, this is a somber, solemn occasion. The bill deals literally and explicitly with death and life. The question is whether or not the Legislature will continue to hold to the idea that state-inflicted killing is compatible with the evolving standards of a society which we hope is growing more civilized and orderly in the way it conducts its affairs. Because there are many new senators and some who are not new who may have not participated in a debate on this matter, I, and I believe the Speaker, intend to explain what is entailed in the state inflicting death. It's known in legal circles as judicial execution. Because of the fact that much misinformation is out there, I intend to take my time and as much time as is necessary to lay the case before the Legislature, before the public, whichever segments of it will pay attention to what it is that we say here today. The only person in Nebraska eligible to receive the death penalty is one convicted of first-degree murder with attendant aggravating circumstances which are not outweighed by mitigating circumstances. Although the U.S. Supreme Court, in effect, outlawed capital punishment by abolishing all of the existing death penalty laws at that time, there was not a majority of the judges who ruled that the death penalty itself violates the Eighth Amendment to the constitution, which prohibits cruel and unusual punishments. There were nine separate opinions written. Five of the judges, despite having written their own opinions, some of which were joined in by other judges, concluded that the manner in which the death penalty was being inflicted was violative of the Eighth Amendment. It was cruel and it was unusual because it was not uniformly imposed. A majority of those eligible for the penalty did not receive it. And there was nothing to distinguish those who received the death penalty from those who did not. This condition was aggravated by the fact that juries in my states were allowed to set the punishment. They had no direction, no guidance whatsoever. So when the Supreme Court struck down all of these death penalty laws, most of the states that had death penalties went back to work to try to reinstate the penalty. Since the death penalty itself had not been ruled unconstitutional, an attempt was made to address the complaints, the criticisms expressed by the various judges. So the notion--and this might be an oversimplification--that seemed to be the salvation of death penalty laws was to have

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guidance and direction given to whoever the sentencer would be. In most cases, it would be the jury. So this notion of saying that since an ordinary murder was not meritorious--I shouldn't even use that word--did not warrant the death penalty, there should be something that distinguished an ordinary murder from the kind that would merit the maximum penalty. So the aggravating circumstances, there are seven in Nebraska, were established. At least one of those factors had to be present before a death penalty could be pronounced. And even the presence of one or more aggravating circumstances did not necessarily mean that the person would be sentenced to death. It does not mean that even though the person were charged with first-degree murder, that he would be tried for first-degree murder. And even if tried and sentenced to die, that did not mean the execution would be carried out. Over the years, far more people have left Nebraska's death row by means other than execution than those who have been executed. There would be a discussion of the time involved in capital cases, the expense, the inordinate drain on the entire criminal justice system, the skewing of the criminal justice system. But with this opening, I'm just trying to give kind of an overview. It is, I'll admit, an oversimplification, but just to give you an idea that this matter is not as simple as it may appear. When a person is sentenced to die and an execution is going to be carried out, there is what the institution calls a protocol. I have spent the last hours of two of the men who were most recently executed, John Joubert and Robert Williams. The whole process is grotesque. It is cruel, not just for the condemned person, but for the employees at the correctional facility who participate. None is required to participate. But none also realize what it is they're getting into. I have had conversations with some of them afterward. And had they known, they would not have done it, they would not have participated. When I required employees of the institution to walk with me from the hospital room where the condemned man is kept, the path that he will follow to the execution chamber, into that chamber, in examination of the chair, of the electrical equipment, and these two men kept telling me, we're not responsible for this, the law says we have to do this. I said, look, I'm just asking you to show me what steps are going to be taken. They never seemed comfortable, especially when they were trying to explain how the apparatus operated, which would be used to send the current into the man who was to be executed. Why do I keep saying "the man," using the masculine pronoun? Because no woman has ever been sentenced to die in Nebraska. For that, I am grateful. As this discussion progresses, I will present summaries of cases which will demonstrate that the worst murderers in terms of the way the crime was committed, the brutality, the apparent relishing of the crime, they did not get the death penalty. One man bludgeoned his wife to death, blood everywhere. Wrapped her in some barbed wire, placed her under a vehicle, and set it afire. The autopsy determined that she was alive at the time the fire was set. This happened in a rural area. There was no death penalty sought, no death penalty inflicted. And there are other even more gruesome cases than that. The only reason I will go into those things is not for the purpose of sensationalizing, but to demonstrate that the argument which people give in support of the death penalty is flawed. They will say the penalty is reserved for the worst... [LB476]

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PRESIDENT SHEEHY: One minute. [LB476]

SENATOR CHAMBERS: ...killers who commit the worst of crimes. The record demonstrates that is not true. Former Nebraska Chief Justice Norman Krivosha in an earlier case compared cases where no death penalty was inflicted with those where it was to show that, indeed and in fact, the worst murderers did not get the death penalty, often a plea-bargain. Then there are reversals of the penalty, resentencings to life imprisonment. Even the Nebraska Supreme Court not too long ago acknowledged that itself, it itself had acted unconstitutionally in converting itself into a sentencing court when the matter should have been sent back for further consideration. Thank you, Mr. President. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Chambers. You've heard the opening to LB476. Mr. Clerk, you have amendments on your desk. [LB476]

CLERK: Mr. President, I do have amendments. However, I have a priority motion. Senator Flood would move to bracket LB476 until May 31 of 2007. [LB476]

PRESIDENT SHEEHY: Senator Flood, you are recognized to open on your amendment. [LB476]

SPEAKER FLOOD: Thank you, Mr. President, members. As you might imagine, I rise in opposition to LB476 on several different levels. But before we begin this debate and before we start talking about the case law, the due process involved, an examination of those that sit on death row for heinous crimes and those that do not. In a moment, I will tell you what I intend to make part of this discussion. But I want to first and foremost acknowledge the fact that our senior member has spent a career, a lifetime in this Chamber fighting for this bill. And his work, although we disagree on this issue, should be acknowledged. He is capable of educating all of us on the case law and understands the process. I want, as Speaker, something different than I want as a senator. As Speaker, I want a high-level, thoughtful debate on this issue. I don't think we will see another issue rise to this level of seriousness and gravity for the rest of our careers, although they are limited under term limits, in this Chamber. As a senator representing the 19th Legislative District, I oppose LB476. I want to make one procedural comment before I state my case, and that is that I intend to withdraw this bracket motion after a sufficient amount of discussion on this very important issue. I do not intend to take this to a vote. And I want to be very clear on the record that I do not intend to short-circuit this bill's progress on the floor. I simply want to make my case and join others that have the same feeling in conveying information. Moving to what I believe the facts are and what the position of Nebraskans in my district and my position is, I first and foremost want to recognize the seriousness of the death penalty as a sanction. If you think about it, there is no greater action that the state can take than to take the life of an offender on death row. A premeditated decision ordered by the court, unstopped by a pardons

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board, to electrocute someone in Nebraska's electric chair, our only method of execution. That is a very serious step of state action and I see it for what it is. But I plan to, during this discussion, make the case that, number one, the death penalty is appropriate for certain crimes in this state. Some crimes are so heinous, so awful, pitiless, emotional abuse, to the point that you don't even want to hear the facts, that they do warrant the death penalty and we will be talking about the aggravators and aggravating and mitigating circumstances found in Section 29-2523. And I think the Legislature put it well in sub (1)(d) of that discussion that we had and passed this bill, "the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." And we'll talk more about what that means here soon. I plan to make the case with my colleagues that the electric chair does not violate the Eighth Amendment of the United States Constitution or the Nebraska State Constitution. I plan to make the case that, while other states' botched executions may come into this discussion, there is no evidence nor has there ever been evidence of a botched execution in the state of Nebraska. Fourth, certain crimes rise to a level that warrants spending. The executive branch of state government, the county attorneys, and the Attorney General's Office are charged with the duty of enforcing our laws. And when crimes are especially heinous, exceptional depravity, when they reach the level that they qualify for the aggravating circumstances outlined in 29-2523, we should spend the money to prosecute the offender. You're going to hear a lot of information about how much it costs to keep someone on death row. A lot of that has to do with court decisions requiring extra due process. And we'll have that discussion in a subsequent amendment. But certain crimes warrant the spending that we're talking about. It is necessary to prosecute first-degree murder cases and we'll talk about what those costs actually are. If the Legislature decides to repeal the death penalty, and I want to take us to the next step of the discussion and it's really my next amendment, then we need to look at the super due process protections that have been built into our statutes since the Furman case, since LB1 in 2002, following Ring v. Arizona, and let's make sure that if it is the public policy of this state not to have a death penalty, why do we have the extra due process protections built into our statutes? And finally, I intend to discuss on this floor with my colleagues a history of what has happened, not only in my district--where we saw the most horrific bank murder, robbery that you can imagine--to all the other members of Nebraska's death row, those offenders. We'll talk about what got them there and the types of crimes that were committed to warrant the ultimate sanction from our court system; the death penalty. I guess we can go a couple of ways in this debate and I have the feeling that everybody here has an opinion on the death penalty. This isn't a bill that you cut deals on in the hallway. This is a decision you make from inside you. The discussion may sway you, it may not sway you. I don't fault anybody for supporting this bill. I understand that's an emotional inside decision that you have to make. But at the same time, you need to know who's on death row and what they've done. You need to know why I think it's important to have the death penalty. And you need to know about all the folks that were charged with first-degree murder that pled to second-degree murder because they wanted to avoid the death penalty. And

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that's the death penalty as a deterrent, in one way, the way that we don't often talk about. The murders that are charged one way and resolved another. Some murders don't qualify for any type of a plea-bargain. I would argue that most murders don't qualify for that. However, it is done in Nebraska and that in itself is a deterrent. So I'm looking forward to the discussion. I plan to discuss the Furman case soon, talk about the evolution of Nebraska's death penalty, talk about what happened September 26, 2002, when four men, three of whom walked into a U.S. Bank branch at 13th and Pasewalk in Norfolk and in 50 seconds, five people were dead. And they were shooting at people running outside of the bank at their backs, bullets flying across the street hitting the drive-through of a Burger King, shooting not once but twice, shooting them in the leg and then in the neck. It was awful and that type of behavior warrants the death penalty. Thank you, Mr. President. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Flood. You've heard the opening to motion 22 to bracket until May 31 of '07. The floor is now open for discussion. Senator Flood, you're in the queue. Do you wish to continue? [LB476]

SPEAKER FLOOD: Mr. President, I'll turn my light off, give Senator Chambers an opportunity to discuss this and turn it back on. [LB476]

PRESIDENT SHEEHY: Thank you. Senator Pedersen, followed by Senator Ashford and Schimek and others. Senator Pedersen. [LB476]

SENATOR PEDERSEN: Thank you, Mr. Lieutenant Governor and members of the Legislature. This is a debate I did not want to miss. When I first came into the Legislature 15 years ago, I was pro-death penalty. I believe there are crimes that are serious enough that people should die for them. But I've come to believe and learn that that is not another man's job unless we are worried about safety. If I were in that bank the day that them people died and I could have done anything to save their lives, by even shooting and killing those who were committing that crime, I would have done so. But them people today we have locked up in maximum security facilities and they will never get out, except for those who we have and may kill in the future with capital punishment. For those of you who are worried about the comfort of a prisoner on death row, please ask me anytime and I will set you up a tour and take you down to Tecumseh and show you death row. Yes, them cells have television in them if the family has furnished it for them. But there's a reason for television. Television isn't for a prisoner's comfort. Believe it or not, it's for the staff comfort. For many, many years, this country was plagued with riots in our prison and many people died in them. For those of you who are not aware of it, those riots stopped when we put air conditioning and television and TV sets into the prisons. So it's not there just for a comfort but it's there for a, lack of better word, babysitter, keep things mellow. It is not a pleasant place to live. It is not a cruel place. Our Federal Constitution does not allow us to be cruel. It is a place that I believe they should be. And as long as we know that they aren't going to get

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back out and recommit them crimes, then we are safe today and that's what it's all about. Killing someone else does not take care of the feelings that those people have who have lost a loved one in such a crime. In some cases, even after the one has been killed, put to death in our death chambers, the loved ones carry on that hate and anger long after that. And that is a cancer that festers on the human being. And a lot of them people have come back and said it did not work. A lot of those people who were pro-death penalty across the country... [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR PEDERSEN: ...obviously have changed their minds as many states, most of our states do not allow capital punishment at all. Capital punishment is already dying a death of a million cuts through the U.S. Supreme Court. My intention of this three minutes is to let you know public safety is served by life imprisonment. We don't need to be part of that hate and anger and get even that most Christians do not believe in. Thank you. [LB476]

PRESIDENT SHEEHY: Thank you, Senator. Senator Ashford. [LB476]

SENATOR ASHFORD: Yeah, thank you, Mr. President, members. I would just like to lay the groundwork a little bit on what the committee did at the hearing and after the hearing. There was a rather extensive hearing on this issue. There were a number of proponents for LB476. There were no opponents. And the discussion was wide-ranging and the discussion within the committee was also wide-ranging. The bill was voted out to the floor 7-0-1, seven votes in favor and one abstention. And I thought it was a very important committee hearing for me because I had the opportunity years ago in 1988 to be on the Judiciary Committee when we discussed this issue, not as a repeal statute but as in another vein. The actual last time when this matter came before the floor as a repeal was 1981. And this debate, I'm sure, will focus on the many, many changes that have occurred since 1981 in the application of the death penalty and the many court cases that have occurred since that time. But I'd like to talk just briefly about--and it was a serious discussion in the committee. It was one of the most serious discussions that I can recall having. When I was in the Legislature before, I was on the bubble on this issue. I didn't know which way to go. As a result of that, I tried, with other senators, to amend the death penalty to make the application narrower. Because it was clear at that time, as it is today, that many, many, many heinous crimes are not punished with the death penalty in Nebraska and are not penalized that way. So I think our effort at that time was to try to narrow the scope to the most heinous crimes we could think of and apply the death penalty to those cases. Now we sit here almost 20 years later, for me, and the debate is on the floor again. I'd like to respond to Senator Flood just briefly. And I appreciate his comments and I appreciate the groundwork that he has laid for the tenor of this debate. But here's my problem, here is my problem with the whole thing. Clearly the case in Norfolk, there cannot be a more heinous series of events. There

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cannot be. There is no more heinous series of events I bet anyone could ever imagine than the crimes in Norfolk. But here are the facts. Between 1973 and 1999--this is according to the Baldus study, the study that was commissioned by this Legislature four years ago, five years ago to study the death penalty--there were 691 homicides in Nebraska. Of those 691, 175 were classified as death-eligible cases. Of those 175, 24 individuals received the death penalty. Of those, nine cases were reversed and there have been three executions. In my lifetime, which is getting to be longer than I like to think about, was there have been four executions since 1949. Today, 11 people sit on death row. If one looks...and Senator Flood made a point. He said that it was deterrence, there was deterrence in the fact that these death penalty cases are important to be brought because even though there was a plea-bargain down to second-degree murder, that in and of itself is deterrence. I'm bothered by that. Because if one looks at those 175 cases, it is very difficult, very difficult to take case by case by case and determine or decide which is more heinous than the others. And clearly there are some that are particularly heinous. But they are all heinous, they're all heinous. [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR ASHFORD: They're all heinous. And to me, there lies the problem. Those 175 or 170 or 150 people, who are not on death row who may have pled to second-degree murder and may be out on the streets, create a risk to this society. I would much rather see, at this point, a strictly enforced life imprisonment without parole. I agree with Senator Flood, that the cost is not a major issue and there may be some discussion about cost. But I think we do owe it our citizens to spend the kind of money that needs to be spent to keep our citizens safe. But the problem is, bad guys are getting back on the street. They're getting back on the street because, in fact, there are plea-bargains to avoid the death penalty. So there will be discussion about a lot of other issues today. But that's the one that I keep getting hung up on. I keep getting hung up on that particular issue, is there are so many crimes that are heinous that are not punished with the death penalty... [LB476]

PRESIDENT SHEEHY: Time, Senator. [LB476]

SENATOR ASHFORD: Thank you. [LB476]

PRESIDENT SHEEHY: Senator Schimek, followed by Senator Kruse, Senator Erdman, Senator Chambers, and others. Senator Schimek. [LB476]

SENATOR SCHIMEK: Yes, thank you, Mr. President and members. First of all, I'd like to begin by acknowledging the work that Senator Chambers has put into this issue over the years. And he, probably more than any other issue, has championed this. I'd also like to acknowledge Senator Flood's remarks and the way he is helping to set the tone

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for this debate. I think it's very, very important. And lastly, I'd like to acknowledge Senator Ashford because I think his comments in committee were particularly good. He indicated the reasons that he was going to support moving the bill to the floor. And he indicated that so much had happened in the United States on the death penalty issue over the last 10 or 20 years and that we needed to have that discussion on the floor. It was time that we had that discussion on the floor once again. So I appreciate the way that all of them have contributed to this debate this morning. I rise, first of all, in opposition to the bracket motion as a formality because I knew that Senator Flood was going to introduce this in order to allow a debate. I would like to say that I have become even more convinced over the years that the death penalty does not accomplish for us what we want it to accomplish. And you are going to hear about the studies that have been done. You're going to hear about the fact that DNA has now been introduced into the equation, which has allowed us to find out that there really have been people who have been sentenced to death row wrongly because of other, maybe because of zeal of the prosecution, maybe because of the inability of the prisoner to get good counsel, depending on a lot of different things. You're going to hear about the cost to the state. You're going to hear about the time consumed and the fact that families often don't get closure on these issues because these court cases drag on and on and on. And every time there's a new appeal or a new occurrence, these wounds are reopened. You're going to hear about unequal application of the death penalty and the studies indicate that. You're going to hear that most other countries in the world, particularly European countries but even others as well, do not have the death penalty and look somewhat abhorrently at the United States for retaining the death penalty. But I think the one little thing that I want to talk about in my remaining time is the information that I had distributed a little bit early about the crime rate in states. And this is just a snapshot, I acknowledge that it's just a snapshot. But if we think that the death penalty really does deter people from violent crime, then you have to study this chart. And I have circled Nebraska on the chart and it shows that in Nebraska in 2004, there were 308.7 violent crimes per 100,000 inhabitants. And violent... [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR SCHIMEK: ...crimes do include murder, forcible rape, robbery, and aggravated assault. So it's not clearly murder cases. But if you look at that chart and look at the once that I've starred, those are the Midwestern states that do not have the death penalty. And only one of them has a higher rate than Nebraska. You would think that they would have a higher violent crime rate than Nebraska because they don't have the death penalty. Then if you look at the remaining Midwestern states--Illinois, Indiana, Kansas, Ohio, and South Dakota--only one of those states has a lower rate than Nebraska. So I guess what I'm trying to say is, I don't think you can make broad assumptions about... [LB476]

PRESIDENT SHEEHY: Time, Senator. [LB476]

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SENATOR SCHIMEK: ...how the death penalty deters crime. Thank you. [LB476]

PRESIDENT SHEEHY: Senator Kruse. [LB476]

SENATOR KRUSE: Mr. President and colleagues, thank you. I stand in favor of the bill and opposed to the bracket. As has been indicated, this subject has been around for a while. And as you would guess, in my career, I have spent hours in discussions on this. I do want to underline that I do not judge anybody who supports the death penalty because of these far-ranging discussions that I've had. But in looking at them, it's interesting--and pondering it now--that the arguments in favor of the death penalty are mostly emotional and the arguments opposing it are mostly factual, rational. And that is quite interesting. We support the death penalty because of a factor of revenge. You could use other words, another one that's often used is closure. (Laugh) Rationally, closure happens when...well, it doesn't really ever happen. But we think it happens when there's some definite action. Life imprisonment would bring more closure to a family because it would be immediate and responsive rather than the death penalty, which is going to wait for 20 years. It's been said, also emotionally, the person doesn't deserve to live; Norfolk and others. I agree absolutely that it's not a proposition which we support those who did these things. But why copy them? What's the point to it? There's only fact that I can find in support of the death penalty and that is the person won't be back. In one Nebraska case, he should have been back because the person he's supposed to have killed came back to town after he was executed. So it's a disturbing fact. But looking at the reasons against the death penalty, we have a lot of factual. Not a deterrent, we know that. It'd be a deterrent for most any one of us on this floor but it's not a deterrent for a violent young adult. In fact, it's an attraction, it's a way to get on the front page, time and time again. It's not a deterrent because countries without the death penalty have lower violent crime rate than we do. It is a fact that it costs much more money for us to follow the death penalty. If we really want to act like we're conservatives--and we are conservatives, we don't have to act that way--then we should be thinking about the budget. It is also a fact that it sets a bad example for violence-minded youth. I could talk a lot about that because I've experienced that. It is a fact that some of them are innocent of the crime. I've already indicated one case where Nebraska executed a man who was innocent. It is a fact that minorities are more likely to be killed than somebody else and that's already been referred to. In the prosecution, if you are poor, you are far more likely to have the charge made against you that could result in the death penalty. We talk about something uniform. That's the most offensive thing about the death penalty. There's nothing about it that's uniform. It is not uniform. The lower social class is going to get hit. The odds of one of us on this floor of going to be executed, no matter what we do, is almost zero. We have a picture of... [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

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SENATOR KRUSE: ...judgment, holding the scales of justice, and blindfolded. In Nebraska with the death penalty, the picture of Justice has no blindfold. Justice looks out to see what the person looks like and then we decide whether or not to have a death penalty. Thank you. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Kruse. Senator Erdman. [LB476]

SENATOR ERDMAN: Mr. President, I would yield my time to Senator Flood. [LB476]

PRESIDENT SHEEHY: Senator Flood. [LB476]

SPEAKER FLOOD: Thank you, Mr. President, members. As we continue to discuss the death penalty, I thought one of the key components to this discussion should be the proportionality issue. Essentially, does the punishment fit the crime? And rather than make some arguments that directly address some of the issues just raised by our prior speakers here on the floor, I think we should with the Furman decision from 1972, where the U.S. Supreme Court issued really a mandate to a number of different states and put an end to the death penalty as they knew it, pending some affirmative action by their legislatures. Although the court looked specifically at the death sentencing systems of Georgia and Texas, the opinion--and I say opinions because we had five concurring opinions--effectively invalidated not only those two systems but 37 other states across the country, including the District of Columbia and the entire federal system. In that decision from 1972, we had five separate concurring opinions. But a majority of the justices in Furman did not conclude that the death penalty, on its face, violated the Eighth Amendment's prohibition against cruel and unusual punishment. The issue for the plurality in the splinter decision was with the way the states were implementing the death penalty. And when I say implementing, I'm talking about that phase at sentencing where the court or the jury, as it may be in any given state, makes the decision to order a death sentence. Georgia and Texas had discretionary death penalty system in which jurors had almost complete freedom to decide between death and prison sentences for individuals convicted of certain offenses. And on its face, that may be how you see the death penalty applied in court systems across our nation. But after 1972, that changed. Furman mandated that where discretion is afforded a sentencing body a matter so grave as the determination as to whether someone shall live in our prison system or die, that discretion must be suitably directed and limited so as to minimize--and this is important--the risk of wholly arbitrary and capricious action. And that actually, some of that language is also incorporated in Gregg v. Georgia, a 1976 case. What was Nebraska doing in 1972? Well, if you pled guilty to the court or if you were subject to a bench trial, you waived your right to a jury trial, the judge, in his or her discretion, made the decision as to whether your criminal conduct warranted the state's death penalty sanction. But if it was a jury trial, then the jury fixed punishment. The year after Furman, and this is interesting, the Legislature passed LB268 which created a framework for our current aggravator-mitigator system, which we'll get into a little bit more. In that same

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year, to Senator Chambers' credit, the Legislature also passed LB146 which is very similar to what you see today as Senator Chambers' repeal bill. Senator Chambers' bill passed first, LB268 passed second with the E clause attached, and the Attorney General at that time said that the bill that passed later in time prevails. That was 1972. Gregg happens in 1976. And then in 2002, Ring v. Arizona. And in this 2002 case, the United States Supreme Court decides that juries should make the findings regarding aggravators in capital cases. [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SPEAKER FLOOD: At the time in Nebraska, a three-judge panel made the decision as to whether the aggravators existed. And that put into motion LB1 during the 2002 Special Session in November-December and changed the law with regard to how we find aggravators and how the court receives mitigators. What are aggravators? And I think we need to spend some time on this. We need to spend some time on what an aggravator means to the defendant charged with first-degree murder. In my opinion, to put it in simple terms, it's the over and above acknowledgement that something, that the behavior exhibited by the defendant was enough to warrant the death penalty. It's that extra step behind life in prison to say, yes, what you did in this case merits the death penalty. And that's a pretty low-level definition of an aggravator but I wanted to spend time on that. [LB476]

PRESIDENT SHEEHY: Time, Senator. [LB476]

SPEAKER FLOOD: Thank you, Mr. President. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Flood. We have Senator Chambers, followed by Senator Kopplin, Senator Lathrop, Senator Preister, and others. Senator Chambers. [LB476]

SENATOR CHAMBERS: Mr. President, members of the Legislature, since Senator Flood mentioned an incident that took place in his district and it therefore has a bearing on his opinion, I'm going to mention something which I don't talk about. I come from a district where many people are victims of homicide. Everybody in my district knows that I'm opposed to the death penalty under all circumstances no matter who the victim is, no matter who the perpetrator is, no matter the nature of the crime. When a young black female student was murdered who had attended North High School, the family sought my assistance to work with the prosecutor, look through some of the evidence, the circumstances under which one of the alleged perpetrators hanged himself, knowing...they came to me asking for my help. They knew that I opposed the death penalty. I reminded them of that. And I said, if through this process the perpetrator's identity is determined, I would be opposed to that person being sentenced to die. Every member of the family said, we knew that already. I said, but I want it fresh in your mind.

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But I have an example closer than that. I've said before, at the time my youngest sister died, that a baby sister has a special status with most of us. And there was a considerable number of years between my birth and that of my youngest sister. Some people thought she was my child. I was very close to her. When I attended law school at Creighton, sometimes I'd let her go with me because I didn't attend class but it gave her a chance to go for a bus ride. And people would ask, how can such a pretty little girl have a father who looks like you? (Laughter) I said, well, first of all, I'm not her father, she's my sister. She had a son, my nephew. A few years ago he was brutally murdered. He was shot in the head several times. The destruction was such that the coffin could not be opened. Some people couldn't wait to come to me and ask me, how do you feel about the death penalty now? I said, I still feel the same way. The state should not kill anybody. If the state were to do it, it wouldn't bring my nephew back, it wouldn't make my sister feel any different, it wouldn't make me feel any different except that I would regret that a member of my family was used as a justification for something that I oppose with every fiber of my being. Senator Flood said that the cost should not be a consideration. In Richardson County, they didn't consider the cost when they wanted to put Michael Ryan on death row and he's there now, but it bankrupted their county. Former Senator Vrtiska had to come to the Legislature to ask us to bail out his county because of the financial straits they were in in prosecuting that capital case. Senator Flood talked about wanting to discuss who's on death row. Others of us will discuss who's not on death row. Before Senator Warner died, he made it clear that he thought it was inappropriate that a new prison should also contain a death chamber. He was opposed to the death penalty. The death chamber is there. It is clear that I have not been... [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR CHAMBERS: ...successful. Senator Schmit, who is not a sentimentalist, came here as a strong advocate of the death penalty. After being here a number of years and observing the skewed way in which the system operates, he became a strong opponent of the death penalty. I will mention some of the things that happened in Senator Flood's county while they were trying to prosecute those capital cases in terms of not having enough money for the public defender, for the prosecutor, and how court clerks had to prepare lunches for jurors because they didn't have the money to purchase. Those are matters of record. Thank you, Mr. President. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Chambers. Senator Kopplin. [LB476]

SENATOR KOPPLIN: Thank you, Mr. Lieutenant Governor, colleagues. I wish to express my appreciation to Senator Chambers and to the Judiciary Committee for bringing this discussion to the floor. I oppose the bracket motion and support the underlying bill. It's been suggested that this discussion should be of facts and logic. Facts are good. I have many to share with you. Logic is good, common sense always

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works out. But emotions in this discussion will never be left out for, in the end when the vote comes, each one of us will have to reach deep inside ourselves for the answer as to which button we press. I came to grips with my feelings and understandings of taking human lives years ago so I stand here today in support of the issue before us. My feelings developed over the years. Seven men have been executed in my lifetime; four white, two black, one Native American. I don't remember the first three, I was too young to understand the issues. I do remember the execution of Charles Starkweather in 1959. But I don't recall any emotions surrounding that act. It happened in my locality. He committed murder and he had to die, that was that. Then we went into a 35-year period of time with no executions. I raised a family of my own, my thoughts begin to change. I remember the relief and the good feelings I had when the Supreme Court questioned the implementation of the death penalty. I remember the anger and the apprehension when the courts reinstated the penalty in 1976. After 17 years in prison for murder, Harold Otey was executed in 1994. I remember the taunting from the crowd shown on TV that night. I was sickened at the disregard for the lack of dignity surrounding the death of a man. I can recall the excited eagerness, almost breathless anticipation, of the newscasters covering the event. And I remember my anger the next day when I saw children gathered in classrooms to watch the recap of that circus. Some of them intently drawn to the TV screen, others looking bored, and still others seeking not to make eye contact or let their uncomfortableness of their emotions be seen. And I thought, what has this act done to society? We are all diminished by an execution. Next was the execution of John Joubert. He had committed the most heinous, horrible acts of murder I could imagine. [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR KOPPLIN: And yet he had been no threat to society for the 12 years he was imprisoned. That's why we build prisons, to protect ourselves from those too violent to live among us. So if the threat is no longer there then our actions are simply built upon vengeance, an eye for an eye. The last execution was Robert Williams who committed murder while in a state of drug and alcohol influence. What I remember in this daytime execution are the images of the quiet dignity of those protesting the death penalty, standing in quiet prayerful attitude. And I remember thinking, why am I not there? And I knew that I could never remain quietly on the sidelines again. Had Robert Williams had sufficient legal counsel early in the case, it probably wouldn't have happened. So I stand in full support of LB476. Thank you. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Kopplin. Senator Lathrop. [LB476]

SENATOR LATHROP: Thank you, Mr. President, colleagues. I will join the others in supporting Senator Chambers' LB476 today. I also oppose the attempt to bracket this bill. I have, as a lawyer, researched the issue of the death penalty. I've watched it take place in the courthouse in Douglas County, the trials. And I've come to conclude that the

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death penalty makes certain promises to the people of the state of Nebraska that we want to have true. We want to believe in the death penalty. We want to believe that we can avenge the murders, the heinous murders of people in our society. We want to believe that in the worst way. And as state senators, we want to be able to deliver some relief to the families of those victims and the death penalty makes us certain promises. And I would submit to you that the promises that the death penalty makes to us are an illusion. They are an illusion built on a myth. And the myths of the death penalty are an illusion. The myth that the death penalty is a deterrent is an illusion. We have had study after study and every study, every credible study has indicated the death penalty is not a deterrent to these types of murders. We want to believe in the myth that everyone who commits one of these terrible murders is going to find himself one day in the electric chair and responding to and accountable with his life. In fact, we've had 175 death-eligible murders in Nebraska since the death penalty was reinstated. We have put only 31 of those people on death row. And of the 31 we've put on death row, only three of them have been killed by the state. That is, just among the 31 who have been there, that is a batting average of 7.5 percent. We are not, we are not making those who kill accountable with the death penalty. We are making those who don't escape the process responsible and that's 7 percent. We want to believe in the myth that we're saving money by putting these people in the electric chair. The fact is that we're not. It costs...and we have seen studies, there are studies--and I'll talk about them later--in Kansas and in North Carolina that show that it costs, in 1992 dollars, \$2 million more to execute somebody. It is a myth to believe that the electric chair is going to save us money. We want to believe, and it is a myth, that we are not going to kill innocent people. Since 1973, 123 people in this country have been exonerated and freed from death row. We want to believe that if we vote down LB476, that the death penalty will be with us. I can tell you, if you read the cases, you can see the erosion of the death penalty in the United States Supreme Court. [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR LATHROP: It is only a matter of time before this institution is taken from us by U.S. Supreme Court decision. And more than anything, more than anything we want to believe that we are doing something for the victims of these terrible murders and we're not. We do them no favor when we tell them after someone has been sentenced to death that we have avenged the murder of their loved one, when in fact that only means they will have to endure 20 years of appeals, 20 years where we trot out the person that did this crime, 20 years where we have to pick at the wounds while they watch somebody that should be doing life in prison have another hearing. Twenty years of appeals, only to have 7 percent of those actually materialize into death in the electric chair. So for 90 percent... [LB476]

PRESIDENT SHEEHY: Time, Senator. [LB476]

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SENATOR LATHROP: ...of these families...thank you. [LB476]

PRESIDENT SHEEHY: Time. Senator Preister, followed by Senator Flood, Senator Pedersen, Senator Schimek, and Senator Aguilar, and others. Senator Preister. [LB476]

SENATOR PREISTER: Thank you, Honorable President, friends all. I rise in opposition to the bracket motion, respecting that the Speaker has put it there for discussion purposes. I think we would have the discussion purposes either way with Senator Chambers' bill. And this is the first time in the 15 years that I've been here that this measure has been before us on the floor. It is one of the most important issues that we, as state policymakers, will make a decision on. And therefore, I support the discussion. I'm looking forward to the discussion. And for those people that are only viewing us and not here present, I would submit to you that this is extremely serious to all of us. There is virtually no senator that's missing. Everyone has been here, has been attentive, and is paying close attention. And I think the citizens of this state deserve that and I want them to know that they're getting that kind of attentiveness and taking of this issue extremely seriously, deadly seriously. Over the weekend, I received calls. Some people may be surprised that we don't just work 90 days or 60 days. When we're at home, people call us and they want to express their opinions. When we go to church, they want to express their opinions. When we go to grocery stores and everywhere else we go, we are on duty and people are giving us their opinions. This weekend was no exception for me and I would venture to say many of you were also answering questions and dealing with constituents who had opinions on this and other subjects. One of the calls I got was from a law enforcement officer. And he thought that we should keep the death penalty, that his concern was for the children. The children, particularly those who were killed like those killed by John Joubert. And he wanted justice for those children. He was also concerned about a young lady who was killed in Omaha and he wanted justice for that young lady. I understand his concern. I understand his and other people's thirst and interest for justice and to prevent that from happening. Another call that I received was from a Catholic nun. She reminded me that 123 people, as Senator Lathrop, have been exonerated. They were on death row and 123 of those people who were found, who were charged, found guilty, and 123 of them sentenced to die were later found innocent because new evidence through DNA proved that they were not the perpetrators. They were not, in effect, guilty. And fortunately, those folks, I believe most of them were found innocent prior to their execution. That makes this a very, very serious issue and we certainly are in the position of being in charge of life and death. I take that, personally, very serious. Two concerns that I have: one, I think we need to do everything we can to prevent these tragedies from happening in the first place. Same thing I say, whether it's pollution, whether it's healthcare or any other issue. If we prevent it in the first place, it's the best thing to do. We need to invest in education. We need to invest in our youth agencies. We need to reach young people so that the streets and poverty and all of the factors that lead a lot of young people down the road to crime, we have invested in and we have done our very level best to

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prevent in the first place these young people from going down the wrong path. Prevention is important. [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR PREISTER: Another thing is protection. We do need to protect society. Is society best protected by a death penalty? Or, as Senator Ashford says, are we allowing a lot of people to not be charged with the death penalty and to end up back on the streets because of it? Perhaps Senator Chambers' proposal of life imprisonment without an opportunity for parole is better protection for the public. And I have questions. Are there inconsistencies in sentencing or is the process truly fair and fair in all instances? What are the costs? And the Speaker says costs are irrelevant. Well, I hear from constituents all the time saying that taxes are too high and we need to cut cost. They're saying maybe costs are a factor. What are the true costs? Is the death penalty truly a deterrent? I wonder if somebody who is about to commit murder sits down and logically determines what their sentence is going to be before... [LB476]

PRESIDENT SHEEHY: Time, Senator. [LB476]

SENATOR PREISTER: ...ever making that decision. Thank you. [LB476]

PRESIDENT SHEEHY: Senator Flood. [LB476]

SPEAKER FLOOD: Thank you, Mr. President, members. I'm going to use the first part of my opportunity to speak to discuss some of the issues that have already been raised; first by Senator Kruse and next by Senator Preister. But I think it's important to get it out on the table, to talk about what the purpose of our criminal law is in this country. And I want to call your attention to the opinion in 1976, Gregg v. the state of Georgia, and specifically the concurring opinion with Justices Stewart, Powell, and Stevens. And they write, the death penalty is said to serve two principle social purposes; retribution and deterrence of capital crimes by prospective offenders. The word "retribution" has been used on the floor. I can understand where an opponent of the death penalty, or I should say a proponent of LB476, will hear that word and say, see what you're doing, you're doing this to get back at them because you're mad at them. Well, we are mad at them. That's on the table. But retribution is a recognized purpose of punishment. By definition, retribution includes an emotional component. I will not deny that. But does that automatically make it irrational, as claimed by Senator Kruse? I'm not willing to connect the dots between retribution and irrational. That's why we had Furman, that's why we have Gregg v. Georgia, that's why we had LB1 in 2002 and Ring v. Arizona. I think our court system has done a good job of making this a rational decision by the court system. But please don't connect irrationalism with the retribution side of our criminal law and its purpose, especially with regard to the death penalty. Is the death penalty a deterrent? Well, I think common sense says that it is. And again, I read from Gregg v.

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Georgia, specifically the concurring opinion of Justices Stewart, Powell, and Stevens. And they write, quote, although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We, and they're talking as the court, may nevertheless assume safely that there are murderers such as those who act in passion for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as a murder for hire, where the possible death penalty or penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate, end quote. I think we're addressing the issues head-on and those are the issues I think involving use of the death penalty as a deterrent and use of the death penalty, in part, as retribution. Switching gears, let's look at what Nebraska does and what is currently in our law in Chapter 29. In capital cases, the prosecutor has to give notice of aggravators in the information or the pleading. The state can, of course, amend its notice of aggravation at any time up to and including the 30th day prior to trial. And I'm going to talk later this morning or tomorrow about how that has limited the ability of prosecutors to introduce evidence that I think is relevant in cases that we've seen in Madison County. But the prosecutor must endorse witnesses 30 days prior to trial. Trial is held, let's say the defendant is found guilty or pleads guilty to... [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SPEAKER FLOOD: ...first-degree murder. The next step is an aggravation hearing and it will be conducted by the jury that found the defendant guilty or a specially convened jury if the defendant pled or there was a bench trial. Or if the defendant waives jury determination of aggravators, the three-judge panel convened for sentencing will hold a hearing on the existence of aggravators. Again, three more steps to make a rational decision based on implementing the death penalty. At those hearings, the state has to approve the alleged aggravators beyond a reasonable doubt. The burden is on the state to prove that this murder was so heinous that it rises to a level different than other capital murder cases. And if the jury decides guilt, it also decides the aggravators. It can consider any evidence received at the trial in determining whether aggravators have been proved. For an aggravator to be considered in sentencing, the jury has to find--and I might add unanimously--that the aggravator... [LB476]

PRESIDENT SHEEHY: Time, Senator. [LB476]

SPEAKER FLOOD: ...was proved beyond a reasonable doubt. Thank you, Mr. President. [LB476]

PRESIDENT SHEEHY: (Doctor of the day introduced.) Senator Pedersen. [LB476]

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SENATOR PEDERSEN: Thank you, Mr. Lieutenant Governor, members of the Legislature. My last time speaking, I mentioned that most of the states have done away with the death penalty. I meant most of the states have been working on doing away with the death penalty and there's more and more all the time, along with the U.S. Supreme Court who's been doing away with the death penalty just about every time it rules on it. Something for you to think about. Do you realize that we have people walking the streets and in our prisons today not on death row who have committed far more heinous crimes than some of those we have on death row? With that, I'll give the rest of my time to Senator Chambers. [LB476]

PRESIDENT SHEEHY: Senator Chambers, you have about 4 minutes. [LB476]

SENATOR CHAMBERS: Thank you, Mr. President. Thank you, Senator Pedersen. And since I'm working on Senator Pedersen's time, I'm going to depart from the path that I had set for myself and deal with some of the issues that have come up. I'm glad that Senator Kopplin described what happened at the execution of "Wili" Otey. There were not just racial slurs screamed literally and shouted, they were carried on signs and they were broadcast all over the country and probably all over the world to show what a barbaric, vicious, brutal, vindictive state Nebraska is and that is exactly how those mobs were portrayed. When "Wili" Otey was in the electric chair--and at some point, I'm going to describe that procedure--they put a wide leather strap across the face and there is a triangle cut in the middle so that the nose will be through that so the person can breathe. The witnesses said that it was put on him in such a way as to impede his breathing. So if you can't breathe, and then I will describe that process of directing the current through a person. That is a form of torture. That was one of the reasons that I agreed to be a special observer for John Joubert and Robert Williams. And it's fortunate in both cases that I was. What Senator Flood and others who support electrocution don't realize, because Senator Flood said he doesn't think that it's cruel and unusual punishment, when that electricity is applied all of the muscles seize up instantaneously at the same time. Those that cause the arm to straighten out and those that cause it to bend. So they're working in opposition to each other and they produce not only excruciating pain but they cause dislocation and broken bones. John Joubert had a broken rib in addition to the burns on his head, the burns on his leg, the blistering that does accompany these brutal...you know what electrocution is like? It's like a high-tech burning at the stake. But you'll be surprised when you hear what the experts and those medical practitioners have said about the course that the electricity follows from that electrode in the head to the electrode on the leg. When Robert Williams was being strapped into the chair, I was there. And although these guards were trying, I suppose, to do what they were required to do without being cruel, in their nervousness they didn't do exactly what they were trying to do in the way they tried. [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

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SENATOR CHAMBERS: Moving from Robert Williams, when they were strapping Joubert's hands down, his wrists down, he was very small, he told them that I can still move my hand. So they pulled the straps tighter and that's when his hands began to turn blue. All of this is required. They had put Williams' elbow against that upright in the back of the chair so what we call the crazy bone was pressing against that upright and he was in pain. And I called it to the guard's attention and it's like they didn't even hear what I said. So the director was in another room, I went and got him, Harold Clarke, and he came in and instructed them to reposition his arm and put the straps on correctly. There's no need to put these people through unnecessary pain because you don't like them. Senator Flood said, yeah, we don't like them and that retribution is all right. Well, when you can see in that death chamber actions inflicted against these people who are going to die anyway, it shows a certain type of depravity... [LB476]

PRESIDENT SHEEHY: Time, Senator. [LB476]

SENATOR CHAMBERS: ...that is called forth in those who carry it out. Thank you, Mr. President. [LB476]

PRESIDENT SHEEHY: Thank you. Senator Schimek. [LB476]

SENATOR SCHIMEK: Yes, thank you, Mr. President and members. I would like to continue discussing the deterrence factor because I think it's a...I think it's a huge factor and I think it's been overplayed in many of the discussions of the death penalty. And I apologize for reading to you a little bit here, but this is from an article that was from The New York Times in the year 2000 and it...I think it's relevant today. It says that the dozen states that have chosen not to enact the death penalty since the Supreme Court ruled in 1976 that it was constitutionally permissible have not had higher homicide rates than states with the death penalty, government statistics and a new survey by The New York Times show. Indeed, 10 of the 12 states without capital punishment have homicide rates below the national average, Federal Bureau of Investigation data shows, while half the states with the death penalty have homicide rates above the national average. In a state-by-state analysis, the Times found that during the last 20 years the homicide rates in states with the death penalty has been 48 percent to 101 percent higher than in states without the death penalty. The homicide rate in North Dakota, which does not have the death penalty, was lower than the homicide rate in South Dakota, which does have it. Massachusetts, which abolished capital punishment in 1984, has a lower rate than Connecticut, which has six people on death row. The homicide rate in West Virginia is 30 percent below that of Virginia, which has one of the highest execution rates in the country. Other factors affect homicide rates, of course, including unemployment and demographics, as well as the amount of money spent on police prosecutors and prison. Then from another little place in the article it says, the prosecutors and officials in states that have the death penalty are as passionate about

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the issue as their counterparts in states that do not have capital punishment. While they recognize that it is difficult to make the case for deterrence, they contend that there are powerful reasons to carry out executions. Rehabilitation is ineffective, they argue, and capital punishment is often the only penalty that matches the horrific nature of some crimes. Furthermore, they say society has a right to retribution and the finality of an execution can bring closure for victims' families. And admittedly, polls show that these views are shared by a large number of Americans, and certainly most states have death penalty statutes. Twelve states have chosen otherwise, but their experiences have been overlooked largely in recent discussions about capital punishment. I think Michigan made a wise decision 150 years ago, said the state's Governor, John Engler, at that time, a Republican. Michigan abolished the death penalty in 1846 and has resisted attempts to reinstate it. We're pretty proud of the fact that we don't have the death penalty, Governor Engler said, adding that he has opposed the death penalty on moral and pragmatic grounds. Governor Engler, and I think this is real interesting, said he was not swayed by polls that showed 60 percent of Michigan residents favored the death penalty. He said, 100 percent would not like paying taxes, which I think is a good point to make. I guess the one thing that I wanted to say to you is... [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR SCHIMEK: ...is I think that this is a matter of conscience, consciousness. I think that you have to be able to articulate the way you feel about this issue to your constituents. I recall a number of years ago being out, going door to door in one of my neighborhoods, and finding a fellow out raking his yard and he and I had a long, involved conversation on the death penalty, and I finally said to him, well, you know, I probably better move on because I think, you know, we're never going to agree on this issue, and I'm just sorry you can't vote for me. And he said to me, I didn't say I wasn't going to vote for you. And I think that we have to keep those kinds of things in mind. Our constituents expect us to do our best down here and if we can explain to them why we vote a certain way on any issue, it's not just the death penalty,... [LB476]

PRESIDENT SHEEHY: Time, Senator. [LB476]

SENATOR SCHIMEK: ...it's on any issue, then I think they're often very reasonable about those votes. Thank you. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Schimek. (Visitors introduced.) Senator Aguilar, followed by Senator Wightman, Senator Erdman, Senator Ashford, and others. Senator Aguilar. [LB476]

SENATOR AGUILAR: Thank you, Mr. President, members. I especially want to thank Senator Chambers and the Judiciary Committee for bringing this debate to the floor. I'm in my eighth year in the Legislature and I've never heard a full and fair debate on this,

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the most important issue of my tenure. I certainly appreciate Senator Chambers' views, as well as Speaker Flood's passion for what happened in his district, and most of all I appreciate the body's attention on this most important issue before us today. With that, I would yield the rest of my time to Senator Chambers. [LB476]

PRESIDENT SHEEHY: Senator Chambers, you have about 4 minutes and 25 seconds. [LB476]

SENATOR CHAMBERS: Thank you, Mr. President. Thank you, Senator Aguilar. Members of the Legislature, when Senator Flood was talking about the heinous crimes and the aggravators, he perhaps was going to get to this further along in the discussion, but those so-called aggravators have had to be defined and redefined by the Nebraska Supreme Court because those terms were vague and devoid of meaning. And had not the U.S. Supreme Court allowed state courts to restrict the reach of various statutes, Nebraska's death law would have had to be struck down because of vagueness and ambiguity. So if you look at those aggravators yourself, and I hope you will at some point, you see whether or not, in reading those words, they convey any meaning whatsoever to your mind, especially in the context of some of the crimes we will mention where no death penalty was inflicted. When the term "death eligible" was used by some of the speakers, what needs to be emphasized and made clear, and I think they did when they mentioned it but I just want to underscore it, these were homicides. These were murders where one or more aggravating circumstances were found. These people could have been charged with first-degree murder and the prosecutor could have sought the death penalty. All of the factors were there, but in the vast majority of those cases no death penalty was sought. So what kind of penalty is it when the vast majority of people eligible for it don't face it? It shows that there's arbitrariness, there is prejudice, and in some cases, believe it or not, there are county attorneys with scruples against the death penalty so they will never seek the death penalty. That's in this state. How are you going to have a penalty which is the most severe that can be inflicted by the state, but it's not imposed uniformly across the state? You all know that taxation has to be uniform across the state, but the taking of life does not have to be. Although when jurors are being seated in cases where the death penalty may be sought, those jurors can be examined to determine whether or not they have any hesitancy about imposing the death penalty, and if they do, they're off the jury. That's why these death-favoring jurors are considered to be hanging juries. It skews that jury in the beginning by letting them know you are expected to come to a conclusion that will result in the death penalty, and in most cases they oblige, and in a very large percentage of those cases a higher court will overturn the death sentence, sometimes even the conviction. There is a man named Erwin Charles Simants who lives to this day. [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR CHAMBERS: He killed an entire family in Sutherland. There were a couple

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of times when the Supreme Court reversed the decision. People were outraged, but the final reversal came that took him off death row was inappropriate misconduct by the sheriff. So Erwin Charles Simants was put in a mental institution and he lives today, and he hasn't harmed a soul, which indicates that no matter the nature of the murder or the victims, it is possible for this society to avoid killing somebody itself while making sure that the perpetrator is not in a position to kill anybody else. Thank you, Mr. President. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Chambers. Senator Wightman. [LB476]

SENATOR WIGHTMAN: Thank you, Mr. President. Members of the body, I rise to support the retention of the death penalty and opposed to LB476. My reason for supporting it, the death penalty, is not because we're going to save any money. I don't know whether we'll save any money or not. We want to weigh or it seems that we want to weigh the cost of keeping somebody with the cost of endless appeals, and certainly we have had endless appeals with regard to the death penalty. Even though I oppose the abolition of the death penalty, I want to compliment Senator Chambers, Pedersen, Lathrop, Senator Kruse, Senator Schimek, and Kopplin, who have all spoken so passionately opposed to the death penalty and certainly they have substantial reasons for this. At the same time, I know that one of the issues that we've discussed has been whether or not this is a deterrent, whether the death penalty is a deterrent from people being killed, and certainly the aggravating circumstances that are currently set out as one of the reasons to support the death penalty considers this issue. And I'm looking at Section 29-2523, subsection (b), guess it would be subsection (1) subsection (b), and that says, in one of the aggravating circumstances that can be considered, is that 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. Statistics, I suppose, can be made to prove any point, and frequently are. In this instance, we can look at as many statistics as we want to, and I don't think that it totally reveals whether or not the death penalty is ever a deterrent to murder. Common sense tells us that in some rare instances, and nobody knows how rare, that a person who is committing a crime murders somebody to conceal either his identity or...certainly can't conceal the identity of the crime, but so that the only witness is no longer available to testify against him. Now I don't think that's capable of proof by any statistics that we have, but common sense tells us that happens and I think that was recognized by the court in...and by the United States Supreme Court as one of the reasons that we condone or have the death penalty. If it saves one life of one victim in 10,000 crimes, then I consider it is still a valid reason for the death penalty. There's been a lot of discussion with regard to costs. I don't know that you could make any real assumption with regard to the cost. Senator Lathrop makes a compelling argument with regard to the fact that it costs \$2 million, I think was his figure, to carry out one execution. I think that assumes that there will be no appeals or endless appeals if somebody is given, in place of the death penalty, incarceration without the possibility of parole. I don't think that's a fair assumption. I think that there will be tens of thousands,

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hundreds of thousands of dollars... [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR WIGHTMAN: ...that will be expended to avoid that penalty as well. I'd like to mention one thing with regard to DNA. I think it cuts both ways. I think it is much less likely that we will have somebody sitting on death row because of DNA today. So DNA can prove the person's...either his innocence or his guilt. Thank you. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Wightman. Senator Erdman. [LB476]

SENATOR ERDMAN: Mr. President, I would yield my time again to Senator Flood. [LB476]

PRESIDENT SHEEHY: Senator Flood. [LB476]

SPEAKER FLOOD: Thank you, Mr. President. Thank you, Senator Erdman, for the time. I want to talk about cruel and unusual punishment, the Eighth Amendment of the United States Constitution and the same amendment in the Nebraska State Constitution. I think it's important to note that our Nebraska Supreme Court has ruled that with respect to the prohibition against cruel and unusual punishment, the Nebraska Constitution does not require more than the U.S. Constitution in the Eighth Amendment. All the precedent is that electrocution as a means of execution is not cruel and unusual punishment. Point your attention to a case out of the Eighth Circuit, Williams v. Hopkins. Electrocution has never been found to be cruel and unusual punishment by any American court. That was a 1997 case. I want to reference a 2001 Georgia case where the argument was made, and this case in Georgia did find electrocution to be cruel and unusual, but it based the decision on the state constitution and not the federal constitution. And as I said a moment ago, our Supreme Court has said that our Eighth Amendment in the Nebraska Constitution does not require more than the federal Eighth Amendment. In no less than 13 cases, the Nebraska Supreme Court has found that electrocution does not violate the Eighth Amendment of the United States Constitution. What does cruel and unusual mean? And I think this is important. I think this is the duty of every member of the Legislature to get into the middle of this discussion about cruel and unusual and apply those words to the best of your ability to the method of execution currently in our statutes in Nebraska. With respect to the death penalty itself, the punishment of death by electrocution or the punishment of death itself is not cruel and unusual, or more specifically cruel. It is only the unnecessary torture or infliction of pain that would make a particular method cruel in the context of the Eighth Amendment. And I'm citing several cases there: in re Kemmler, an 1890s U.S. Supreme Court case, and Wilkerson v. Utah, an 1878 U.S. Supreme Court case, and Francis v. Resweber, a 1947 U.S. Supreme Court case. Let's talk about death by electrocution, specifically Nebraska's method. I'm going to paraphrase for you three different expert witnesses

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that testified at some of the trials in Madison County with regard to the question of, is the death penalty of Nebraska...does it constitute cruel and unusual punishment? And this is all in the record, in the transcript, of the Madison County District Court. First, a neurologist, Dr. Wilder, who has participated in numerous cases involving electroconvulsive therapy, testified that judicial execution will cause unconsciousness instantly and the prisoner will feel no pain. Dr. Wright, a forensic pathologist, participated in electroconvulsive therapy and autopsies of judicial electrocutions, reviewed numerous judicial electrocution autopsies and confirmed that judicial execution would result in almost instantaneous unconsciousness. Nebraska's protocol would result in irreversible cessation of brain function within a second, and prisoner will not feel any pain. Finally, Dr. Morse, electrical engineer with specialization in bioengineering, created a finite element analysis, which is a mathematical model to predict how substance or structure will respond to a given amount of force or energy, concluded that under Nebraska's protocol 70 percent of applied current will enter the skull and brain of a person being executed and the person would not feel pain or dread. It's hard to hear that,... [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SPEAKER FLOOD: ...but I think we knew...need to discuss the legal hurdle that has to be addressed, and that is, is this cruel and unusual punishment? Supreme Court of Nebraska says it's not, and with deference to the proponents of LB476, I understand there's dicta in the Mata case from out west regarding the constitutionality of the electric chair. I'll let the proponents of LB476 share that information with you, but there has been no evidence of any botched executions in Nebraska. And a botched execution says nothing about the constitutionality of the method. By definition, it is the result of human or mechanical error, not constitutional infirmity. This is not an easy subject to discuss. No one, I'm sure, woke up this morning and looked forward to this discussion. But it is the serious policy debate that I think Nebraskans expect and I intend to come back with a discussion of... [LB476]

PRESIDENT SHEEHY: Time, Senator. [LB476]

SPEAKER FLOOD: ...aggravating mitigating circumstances. Thank you, Mr. President. [LB476]

PRESIDENT SHEEHY: (Visitors introduced.) Senator Ashford, followed by Senator Kruse, Senator Avery, Senator Stuthman, and others. Senator Ashford. [LB476]

SENATOR ASHFORD: Thank you, Mr. President, members. I have been listening to this debate and it's been an excellent debate, and I would like to respond a little bit to the discussion about cruel and unusual, very briefly, because I don't think that's what we're talking about here particularly. The debate about whether or not...when I was here

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in 1988, we discussed lethal injection. The debate was primarily engaged on that topic--is electrocution cruel and unusual punishment? The issue I think today is the issue that is simply put. Senator Lathrop talked about it, and I agree with Senator Kopplin. Every one of us at some point in this debate, when it comes time to vote, is going to have to reach down inside themselves and make a decision, and I respect very much what Senator Kopplin has said, because I think all of us have had our thinking evolving over a period of years as we've watched this issue. To me, the issue is very, very simple--are we safer with a death penalty or not? It is clear to me that we are no safer with a death penalty than if we did not have the death penalty. The committee hearing this time was opening a book for me to get into this issue. I would invite all of you, and it's a tedious job, but to look at the Palmer case, a Supreme Court case in the 1970s where Judge Krivosha listed the 150 cases where the death penalty was not imposed. And I'm not going to go over those, but I would...there are dismemberment cases and robbery cases where people were shot in the back of the head. They're the most heinous crimes. You can't find any more heinous crimes. But in point of fact, for whatever reason, those cases did not result in the death penalty. When the Supreme Court looks at the aggravating and mitigating circumstances to make its final review, it doesn't look at those 150 cases. It doesn't look at cases where the death penalty was not imposed. It looks at cases where the death penalty was imposed. In order to be not arbitrary, in order to be appropriate in evaluating these cases, one cannot avoid the fact that in Nebraska we have had and continue to have homicides which are extremely heinous and cause tremendous grievous harm to families. I can't find any evidence certainly in the hearing, and the hearing was an extremely important hearing to me, that would suggest that the death penalty is going to make us any safer. One last point, and I don't want...and, Senator Kopplin, I apologize for getting into studies and that really, to some extent, is not the point, but this body did vote to have a study done on the death penalty, as I said, four years ago, and one of the conclusions that it came to was the death penalty is much less likely in cases where the victim is of a lesser socioeconomic class. And I have my personal experiences, and we all do, but as executive director of the housing authority on more than one occasion going down to a murder scene where a young child or children were killed and going to talk to the families of those children, and there is...those victims will always be victims. Those families will never have closure. And having the death penalty in Nebraska did not prevent that homicide. My point here is that we must decide as public officials, are we serving the state by imposing a penalty that is rarely imposed,... [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR ASHFORD: ...that is exceedingly costly and that clearly does not make us safer? It does not make us safer. Let's put our resources behind efforts to improve our criminal justice system, to improve apprehension, and to solve the real problems that we have to solve. It's not a constitutional argument, particularly. It's an argument about public safety and the safety of our citizens. Thank you, Mr. President and members.

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[LB476]

PRESIDENT SHEEHY: Thank you, Senator Ashford. Senator Kruse. [LB476]

SENATOR KRUSE: Mr. President and colleagues, thank you. I would proceed with the question of the method of execution, but I will do that at a later time because I have an amendment to substitute the guillotine, which is much more efficient, much less costly, and much less threatening to the person that's being executed. I find it bothers us because we say that's too messy, but, hey, hello, we're trying to kill somebody. I would rather speak this time to the thing that's a problem for me, especially as a pastor, when people say, well, you're a bleeding heart. Well, that's silly. That's just absolutely silliness. I'm not having any feel for these persons. As someone has said, they merit the death penalty. I don't question that. I don't question that at all, except for those that are mentally retarded. Forty-four of the people we have executed in the United States were under 70 IQ. And again, that's something we could talk about at another point. Some assume, because I value religion, that I am impressed by a jailhouse conversion. Well, that's great, but it's completely beside the point. Does not change the fact that this person has committed a heinous crime and should pay for it; my preference--lifetime imprisonment. The person does not get a get-out-of-jail-free card by being suddenly religious, and I do want you to understand I've had people suddenly religious lying on a hospital bed. They thought they were going to die and, you know, you respect that conversion, but I'm not impressed by it. I've not had one single case of a person who then lived who changed his ways. It was all fellows. So a deathbed conversion doesn't really convince me of anything. It is not about him. It is about me. I want not to kill anyone. That's where it comes down for me. I want not to set a killing example for the kids on my street because, as a member of the Legislature, I am participating in any execution and so are you. We can't get out of that. I want not to encourage violent persons to use this method of getting rid of their agitator. I want not to feed the anger of the person who is down and out, which is what we are doing. As a member of a Legislature, I am involved in state murder any time it occurs. I can't get out of that. I can't avoid it. My vote isn't going to clear me. I am a part of it. You are a part of it. We are a part of it, and that's why the conversation is so serious. Shall we kill someone who has hurt us, offended us, done a dastardly thing against us? That's the question, and I do not want to kill somebody for that reason. I do not want to set that example. I think it is terrible behavior on our part to set that example and I would hope that we will take another course. Thank you. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Kruse. Senator Avery. [LB476]

SENATOR AVERY: Thank you, Mr. President. I enter this body as a longtime supporter of the death penalty. I made this clear in my campaign, much to the consternation of many of my friends. I've always felt that the most extreme crimes require the most extreme punishment. However, I did not and do not believe that all capital crimes

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require capital punishment. I believe that capital punishment may be the most appropriate in only the most extreme cases, the most conspicuously offensive crimes. I agree with Judge Jackson of the Nuremberg Trials when he stated some crimes are so calculated and so despicable that society cries out for justice. I spent a great deal of time this past weekend reading literature on both sides of this issue. I found some impressive studies, both academic and nonacademic, that made strong cases for the death penalty, some against. Some studies showed strong statistical evidence that the death penalty is a deterrent to capital crimes; others seemingly just as valid would show statistical evidence to the opposite. But one thing stood out in this literature, and it stood out clearly, and that is the presence of bias in the application of capital punishment. The death penalty appears to be heavily biased against racial minorities and the very poor regardless of their race. I find this most disturbing. A person's probability of receiving a death sentence should not be affected by the color of his skin, nor the color of the skin of his victim. A person's economic circumstances also should not matter. My weekend reading has created a great deal of anguish in my own heart, and some doubt in my mind about this issue. I had talked with many opponents of the death penalty, including one of my oldest and best friends who has served for many years as the paid consultant to the national organization that opposes the death penalty. Still, I struggle with this issue. So I plan to listen very carefully to the debate. I'm taking notes because I want to know what you think. I want to hear the evidence. I want to hear the arguments for and against. And I will keep an open mind. This is an important debate on a very solemn subject and, given its gravity, it should not be otherwise. Thank you. [LB476]

SENATOR LANGEMEIER PRESIDING [LB476]

SENATOR LANGEMEIER: Thank you, Senator Avery. Senator Stuthman, followed by Kopplin, Lathrop, Preister, and others. Senator Stuthman, you're recognized. [LB476]

SENATOR STUTHMAN: Thank you, Mr. President, members of the body. First of all I want to thank everyone here in the legislative body for paying so much attention to this issue. I have never experienced this before, as long as I've been down here, and this is just my fifth year. But there are probably more senators on the floor, in their chair, this morning than there ever has been. One of the concerns that I have as that...as Senator Flood has brought up the issue of the bank shooting in Norfolk, I did lose a constituent in that happening. And I'm a firm believer that a person should not take another man's or person's life. I truly believe that. But I think one of the issues that we have before us is, because this happened, what were the circumstances that led up to this? Were these people of sound mind? No, they were not. Were they involved in drugs? The majority of the time when something like this happens they were. I think that's where we can have an impact of allowing drugs or the utilization of drugs. I think those are the components that get people to that situation. Many times you hear that they refer to that, the use of drugs, so they can accomplish what their mind has set out to do. And also, the use of the weapon, I am totally opposed to the concealed carry, to the use of weapons. I do

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not like them at all. I just think that we've got such a serious matter here this morning that we need to really concentrate on what we're trying to accomplish and how we're going to try to accomplish that. But I think the overlying fact is, you know, what are the things that people are referring to or leaning back to so that they can accomplish that tragic incident, just like what happened up there in Norfolk. And I feel that those people, whether we take their life or not, you know, they're not going to be killing another person. They're in the institution. They'll be in there for life. So with that, I'll give the balance of my time to Senator Flood. [LB476]

PRESIDENT SHEEHY PRESIDING [LB476]

PRESIDENT SHEEHY: Senator Flood, you have about 2, 10. [LB476]

SPEAKER FLOOD: Thank you, Senator Stuthman, members. Appreciate the extra time. I think it's important to note, as we continue to talk about the rational decisions made by our court system for a first-degree murder case, let's talk about the aggravating circumstances that the state is required to prove and, might I add, under the rules of evidence and beyond a reasonable doubt--both very big burdens--whereas mitigators, to the best of my understanding, don't...can be introduced to the court without the rules of evidence in application. What are aggravators? Let's talk about the standards for which must be present, at least one must be present, before a defendant is sentenced to death by a district court in the state: (a), and this is under Section 29-2523, the offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial prior history of serious assaultive or terrorizing criminal activity; (b) 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--Senator Wightman raised that issue in his remarks this morning; (c) the murder was committed... [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SPEAKER FLOOD: ...for hire or for pecuniary gain, or the defendant hired another to commit the murder for the defendant. (1)(b)(sic) of Section 29-2523 is a necessary--the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence. Think about that. That's a high burden. We're saying that what you've done is so bad and so despised and so cruel that you deserve the state's ultimate sanction. (1)(d)(sic) of Section 2523: at the time the murder was committed the offender also committed another murder; (1)(f) the offender knowingly created a great risk of death to at least several persons; (1)(g) the victim was a public servant having lawful custody of the offender or another in the lawful performance of his or her official duties and the offender knew or should have known that the victim was a public servant performing his or her official duties; (1)(h) the murder was committed knowingly to disrupt or hinder the unlawful exercise of any

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government... [LB476]

PRESIDENT SHEEHY: Time, Senator. [LB476]

SPEAKER FLOOD: ...function or the enforcement of laws. Thank you, Mr. President. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Flood. (Visitors introduced.) Senator Kopplin. [LB476]

SENATOR KOPPLIN: Thank you, Mr. Lieutenant Governor, colleagues. I, too, spent hours this weekend reading the data, reading the research, and I'd like to share just a few numbers that I found that add to our discussion: 69, that's the number of men sentenced to death row in Nebraska since 1903; 67, that's the percent nationally of capital convictions that are overturned, mainly on procedural grounds of incompetent legal counsel, police or prosecutors who suppressed evidence, and judges who gave jurors the wrong instructions; 30 is the number of death sentences commuted in Nebraska--21 white, 6 black, 1 Hispanic, 2 Native American; 15 is the number of executions by electrocution since 1913; 8 is the number of executions by hanging since 1903--5 white men, 3 black men. One is the most interesting number to me. It comes up twice. One man, Robert Shumway, executed by hanging in 1909. There was an asterisk beside his name. The asterisk mark had this notion: Later claims were made that Shumway was innocent. Three years after execution, there was an alleged confession on the deathbed of a man who said that it was he who crushed the skull of the Gage County farm woman. That's referenced in an article in the Journal of American Institute of Criminal Law and Criminology. One comes up again because that's the number of...I can never say the word, posthumous pardons that were given in Nebraska and that man was William Marion, who was executed in 1887. His victim was seen in town in 1891. You can make the point that, yeah, these are old occurrences, they're long ago and those things don't happen now, but they do. Innocent people are found guilty, and we can't let that happen. I was interested in the comments by Senator Avery because I also found some information regarding the predictors of whether a death sentence will be given or not, and studies indicated that the single greatest predictor of whether that death sentence is given is not the race of the defendant but the race of the victim. According to a 2003 Amnesty International report, blacks and whites were the victims of murder in almost equal numbers, yet 80 percent of the people executed since 1977 were convicted of murders involving white victims. I have a lot of respect for the court systems, the tremendous load they carry,... [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR KOPPLIN: ...the work they do, but mistakes are made. When we're talking about the life of a human being, we can't afford mistakes. Thank you. [LB476]

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PRESIDENT SHEEHY: Thank you, Senator Kopplin. Senator Lathrop. [LB476]

SENATOR LATHROP: Thank you, Mr. President and members. Again, I am...this...on this occasion, I want to visit about retribution. I believe retribution is another one of those myths of the death penalty. It is an illusion that brings support to the death penalty. Retribution is often indicated as the justification for the death penalty, and the idea is that families that have suffered such a loss ought to have their pound of flesh. They ought to take a life from the person who took that family member away from them in such a hideous manner. It is feeding an emotional need. It's feeding an emotional need. And when you look at retribution, I don't think you can look at retribution. So far we've delivered retribution to three families. We have had 175 death penalty eligible defendants in this state, and we've delivered retribution to 3 families. And I don't think we can look at retribution without looking at the 172 families that didn't get it. You see, as long as we have the death penalty in Nebraska, people whose family members have been lost in a hideous manner in some senseless act like that, that occurred in Norfolk, the families are going to come to this institution for retribution. They'll want the death penalty for the person that killed their loved one. Our of 175 death penalty eligible homicides in the state of Nebraska, we have turned 140 of those families away. So when we talk about retribution, we should consider those families that we say this institution is not available to you. Senator Ashford has discussed the opinion of Chief Justice Krivosha, where he outlined some of the murders that haven't put people on death row. They are some of the worst murders in the state of Nebraska, some of the worst murders. The circumstances are as bad as anybody that's sitting on death row has done. But to those families we've said this institution is not available to you. Maybe we did it as a prosecutor because we can't afford to prosecute one of these things; we'll bankrupt our county. A hundred and forty families had to be told, no, we're not going to bring the death penalty to your family and to this circumstance. And it is even more concerning to me that we had death penalties in 31 cases, but we've only delivered on 3. Now if you want to talk about retribution as some sense of satisfaction for the family, and there's nothing we can do to make their pain go away, but if we could deliver something to those families, think about what we're delivering to the families who spend 20 years watching somebody go through the appeals only to be exonerated or only to be...to have their death sentence reversed. We say to those families,... [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR LATHROP: ...you have hoped for the death penalty, you have hoped for retribution; we only deliver it in 7 percent of the cases. Seven percent of the people we put on death row ultimately are killed there. To 93 percent of the families we say, I'm sorry, this institution failed 93 families, it failed, pardon me, it failed all of the death penalty eligible families, but it failed in 93 percent of the cases where people they thought they were going to get the retribution they wanted. I think the death penalty

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brings more misery to the victims' families than such an institution should warrant and for that reason we should pass LB476. Thank you. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Lathrop. Senator Preister, followed by Senator Chambers, Senator Wallman, Senator Flood, and others. Senator Preister. [LB476]

SENATOR PREISTER: Thank you, Honorable President, friends all. The last time that I spoke I didn't quite finish, but because my time was up I shut up, as we all do. The last question that I was going to raise was, in the list of questions that come up in my mind anyway, was is the death penalty used to advance political careers, and I think that's an important component and I would certainly welcome hearing any instances where people think that is or isn't the case. It's part of my struggle in making a decision, but this morning I did make a decision and, coming in, I wasn't sure how I was going to vote on Select File. I did say I opposed the bracket motion because we need the discussion. But this is a good discussion. It is raising good issues and it is addressing those issues. So I appreciate the level of that discussion. For that reason, and I think the public has a right to hear and see and be a part of this process through the media and through their direct involvement through NETV, they're getting some education on this issue. I think as serious an issue as this is, it deserves merit on at least Select File, so I've made the decision, as I'm listening and going back and forth, that I want to at least continue the debate and if that means voting in favor of LB476, to continue that debate, to continually engage the public, then that's what I intend to do and I wanted to be on the record of supporting that. With that, Mr. President, I would yield the remainder of my time to Senator Chambers. [LB476]

PRESIDENT SHEEHY: Senator Chambers, you have about 3, 10. [LB476]

SENATOR CHAMBERS: Thank you, Mr. President, and thank you, Senator Preister. I'm going to scamper through some of the things that other senators have said, because today we're kind of giving an overview and laying of the groundwork for more detailed discussion later. Senator Flood has talked in kind of dry terms about the dry aspects of the legalese associated with the death penalty. He had mentioned that the Eighth Amendment to the Nebraska Constitution does not require any more in the way of protection than the U.S. Constitution. Well, some people say that since death was accepted as a punishment when the U.S. Constitution was brought into being, it could not be considered unconstitutional if it was recognized by the constitution. And it's explicitly mentioned in the Fifth Amendment. A person shall not be put twice in jeopardy of life or limb. But what does it mean when it refers to "limb"? Mutilation. They mutilated people during those days. But the U.S. Supreme Court has ruled that mutilation is unconstitutional, even though it's mentioned in the constitution. It is unconstitutional. A society is expected to grow, to mature, to become more civilized. It's kind of ironic that in the balcony we had Australians and in their country they have no death penalty, we

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had visitors from North Carolina and their enlightened court system has put all executions on hold because of the problems with lethal injection. So in both cases they're sitting here looking, especially the Australians, saying we're in America in the year 2007, in the country of the moral arbiter of the world, and they're arguing, some people passionately, for the right of the state to continue killing. And because America as a county approves of killing, there are other countries which will not extradite a criminal wanted by America, no matter how heinous that person's crime may have been, if he or she faces the death penalty in America. So if America wants that person extradited there must be an assurance... [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR CHAMBERS: ...given that no death penalty will be inflicted. To be a member of the European Union, a country must have no death penalty. Turkey is talking about doing away with its death penalty because apparently economic considerations are leading countries to do that which no amount of moral suasion can achieve. The idea of being with the in crowd when it comes to politics and economics is leading countries to do away with the death penalty and for my part, since I'm against it under all circumstances, whatever it takes is what I'd like to see come into play. Thank you, Mr. President. [LB476]

PRESIDENT SHEEHY: Senator Chambers, you're in the queue to speak next. [LB476]

SENATOR CHAMBERS: Thank you. I will continue. Senator Flood and Senator Wightman talked about a specific aggravator, which shows the irrationality and illogic of the death penalty. They both mentioned subsection (b) which makes it an aggravator to commit a murder to conceal a crime. Now, brothers and sisters, friends, enemies and neutrals, if the underlying crime does not carry the possibility of death why will I commit a murder and run the risk of being executed to cover up my identity for a crime that carried no possibility of dying? In other words, I'm willing to risk the death penalty to avoid going to jail for a theft, so that means I fear the death penalty? That I'm a calculator? No, it shows the irrationality of all of this. Senator Flood mentioned that the death penalty should be used for murderers for hire. The two who were on Nebraska's death row, allegedly for murder as murderers for hire, were taken off death row because the sentencing panel was not unanimous. So the murderers for hire are not on death row. At the federal level, anybody who has followed these things knows that the murder for hire is a practice, a modus operandi, of organized crime, but you have not and you cannot show me an example of a murderer for hire being executed by this government. They become snitches. In exchange for snitching, they don't face the death penalty and they are given an identity in the witness protection program. And those that don't have to become snitches have such high-powered lawyers and have connections that avoid the death penalty for them. No rich person has ever suffered death in this country, in the history of this country. Senator Avery mentioned two things that are constant in this

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discussion--economic status and race--and as long as you have people motivated and influenced by those factors you're going to have a hippety-hop kind of penalty. Where the rich are concerned, never a death penalty. The poor cannot hire good lawyers. Kenneth Starr, who used to be the special prosecutor, talked about the problems with the death penalty and he said adequate counsel is a problem. The large firms which could provide such counsel are not going to do it because it requires giving up too many tens of thousands of dollars. So he's acknowledging that there are people deprived of an adequate defense because they don't have the money, and when lawyers are appointed to offend (sic) people on trial for their life, a woefully small amount of money is given; no money for experts, no money for investigators. And yet this society which says it has a philosophy of life is going to make it almost a cinch that the person on trial for his or her life, and who is a member of a despised class anyway and is facing prejudice, is not going to have adequate representation. How can a society which prides itself on principles of justice being the guiding lights going to be aware that people's lives are taken while they're being defended by lawyers who come to court certifiably drunk, who sleep during the trial? [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR CHAMBERS: And these things have been established on the record and appellate courts have said that is not enough basis to establish inadequate counsel for the purpose of overturning a death sentence. So I've got a lawyer sleeping off a drunk and it's clear in the courtroom and I can be sentenced to die. But I might be one of those lucky people where DNA will show that I could not have been the killer. Then what do people say? That proves the system works. No, it proves that the system was robbed of its prey. If the system worked we wouldn't have innocent people being convicted and sentenced to die. We wouldn't have people being represented by attorneys appointed by the court when the court knows that attorney might be fresh out of law school, has never defended a capital case in his or her life. So in that area of the law, where the U.S. Supreme Court, the appellate courts have said that more time... [LB476]

PRESIDENT SHEEHY: Time, Senator. [LB476]

SENATOR CHAMBERS: ...and care should be given...thank you, Mr. President. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Chambers. Senator Wallman. [LB476]

SENATOR WALLMAN: Thank you, Mr. President, members of the body. I find it very interesting who gets executed. It's usually by never a hired attorney. If you hire an attorney how many people get executed? Not too many. Public attorneys, or where you hire public attorneys or they're furnished for you, you're probably not going to have a good chance. And we talk about retribution. You know, vengeance is mine, says the

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Lord. If we're going to look...when a constituent called me up, it says in the Bible, eye for an eye, tooth for a tooth, but it also says vengeance is mine. And so what are we? And if we're going to make a decision here about the death penalty, I'm against this bracket motion. I think we better make a decision and the year of our Lord 2007 might be a good year to do it. And we're talking about people's lives and there's...I know of two people that have had murders in their families. Did they seek the death penalty? No. That spoke volumes to me. I guess if you're going to...if, Tom, you're going to murder my wife, I might murder you, but I could not push a button for somebody else. I couldn't do it, you know? And...but I probably could for my own family. And so I'm...you know, we're taught to strike back. That's a farmer's way. That's the military way--strike when the iron is hot, do it right away, take care of the problem. But the Legislature is supposed to take care of this problem here, the death penalty. I didn't want to talk on this. It's very emotional for me. But when you know families that it happened to and they don't seek the death penalty, what does that tell us? I guess if you want to press the button, anyone of us in here want to press the button, that's okay. I'm not going to say which way you should go. But I return the rest of my time to Senator Chambers. [LB476]

PRESIDENT SHEEHY: Senator Chambers, about three minutes. [LB476]

SENATOR CHAMBERS: Thank you, Mr. President. Thank you, Senator Wallman. And since the subject of retribution has been raised, I think I'll touch on it also. That notion of an eye for an eye and a tooth for a tooth comes from the "Bibble," the Old Testament. It's not something God said, but it's interesting that the Hebrews, the Jews, who are supposed to be the ones who brought us that law, never enforced eye for eye, tooth for tooth. And do you know what their Rabbi said? If Mr. A takes the eye of Mr. B, how do we know that if Mr. B takes Mr. A's eye that Mr. A's eye does not have greater acuity? There is no way to determine that the eye being taken was precisely the same as the eye that was lost in the first instance; therefore, no person can take the eye of another simply because his or her eye was taken. Instead, that became a measure of damages--how much value is that eye to the person, how much harm is endured as a result of losing that eye? They never said, if I broke Senator Carlson's tooth that he would hold my mouth open and allow him to break my tooth. It was a measure of damages and never to be taken literally. And it's interesting to me how the literalists, when it comes to the "Bibble," are literal when it comes to cruelty, harm, and hurting others. But when it comes to the kindness, the compassion, the mercy, and Jesus was known as the one who brought mercy, that is laid aside. And they say, but there's something above that--eye for eye, tooth for tooth. And that never was imposed. And when it came to the death penalty itself they had a multimember court,... [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR CHAMBERS: ...the Jews did, and if a unanimous decision came down there was no death penalty inflicted. And do you know why? The reasoning was this. No man,

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when he is facing death, should come to a situation where everybody feels that he has no argument in his favor; somebody ought to see where there was a mitigating factor for that man. And since there was no person on this court, the death penalty cannot be carried out. If you want to study history, study it. You mention these things but you don't know their history and how they were applied. When they were taking a person actually to the stoning, a herald or a person who spoke had to precede the entourage and cry out, is there anybody who can say a word for this condemned, anybody? Is there anybody? And if somebody said, I can, that stopped the proceedings right there. Every means of preventing the carrying out of a death sentence... [LB476]

PRESIDENT SHEEHY: Time, Senator. [LB476]

SENATOR CHAMBERS: ...was resorted to. Thank you, Mr. President. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Chambers. Senator Flood, followed by Senator Pedersen, Senator Schimek, Senator Aguilar, and others. Senator Flood, and this is your third time. [LB476]

SPEAKER FLOOD: Thank you, Mr. President, members. I want to talk about, in the broad sense, why...or what we intend to accomplish with our criminal law code in this state and really the intent of criminal sanctions in this country. And for me it boils down to four main objectives: public safety, retribution, rehabilitation, and deterrence; public safety, retribution, rehabilitation, and deterrence. And I want to confront the issue of retribution head on. I know that some of you hear that and say, well, wait a second, that's exactly what drives me to support LB476, and for that I cannot pull you back if that's your position. But how is retribution at this level for these crimes different than the retribution that is advertised for drunk drivers? Do this and you go to jail. Think about what you see on TV. You drive drunk, you go to jail. We're going to get you. We're going to make you pay for the crime. You sell drugs in this state, it's a Class II felony, you could spend up to 50 years in prison. Twenty years is a common sentence. How is that not retribution? So as we connect the dots today there should be no visceral reaction to retribution as one of the components or considerations of the criminal law when it reaches the first-degree murder offense. The second thing I want to talk about, and Senator Chambers raised this point, was that in Section 29-2523 sub (1)(b) 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. As an officer of the court, Senator Wightman is as well, if I had to justify that without reading any Law Review articles or reading the testimony, I would say that aggravator exists to protect the administration of justice. You cannot go and kill somebody to prevent them from testifying against you or to conceal your crime. It's crime, on top of crime, on top of crime, and I think it's justified. Next thing I want to talk about, and as long as we are talking about aggravators, the aggravator that I continue to raise in section (1)(d), the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and

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intelligence. It sickens me to even have to talk about this, but sometimes you have to connect the facts to the crime to show you what a district court in the Panhandle identified as meeting the standard that I just acknowledge in section (1)(d) of Section 29-2523, and that's in the case of Raymond Mata. The basic facts of Mr. Mata's case, he abducted and murdered a three-year-old child of a woman with whom he had had an on-again, off-again relationship. A search warrant is executed at his sister Monica's house where he had been residing, and from the case expert I give you the following, quote: Police searching Monica's residence found human remains in the basement room occupied by Mata. Hidden in the ceiling was a package wrapped in plastic and duct tape which contained a crushed human skull. In the kitchen refrigerator of the residence, police found a foil-wrapped package of human flesh. Human remains were also found on a toilet plunger and were found to be clogging the sewer line from the residence; human flesh, both cooked and raw, found in the dog food bowl/bag of dog food; human bone fragments were received from the dog's digestive tract. By every account I can understand... [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SPEAKER FLOOD: ...why the court found that this murder, in Mr. Mata's case, met the standard of the aggravator found in Section 29-2523 (1)(d) that the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence. The three-judge panel found one statutory aggravator, and the one I just read to you is it. The three-judge panel found no statutory mitigators, but considered four nonstatutory mitigators, and Mr. Mata was sentenced to die. The Supreme Court remanded this case for resentencing, and again he was sentenced to death. This Supreme Court ruling is now pending on appeal. It makes a difference I think when you look at the conduct we're talking about here. I cannot speak for the over 150 cases that Senator Lathrop raised, but the parting comment I want to make is in regard to Senator Wallman's assertion that for some reason a court-appointed lawyer is different than a private pay lawyer. [LB476]

PRESIDENT SHEEHY: Time, Senator. [LB476]

SPEAKER FLOOD: Thank you, Mr. President. [LB476]

PRESIDENT SHEEHY: Senator Pedersen, and this is your third time. [LB476]

SENATOR PEDERSEN: Thank you, Mr. President. Members of the Legislature, it's been mentioned several times that the death penalty does not deter crime, and in my 15 years on the Judiciary Committee I've read enough information and heard enough information that I believe it does not deter crime. If it does not deter crime, then I see it that we are not necessarily saving lives in the future by having laws like this, but instead we are taking lives under the auspices of the law. And Senator Flood mentions the

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courts have done a good job. Yes, they have. Yes, they have. But the court's law is to...a court's job is to follow the law, and we here in this room make that law. We're here today to look at the...changing that law so we do not condone capital punishment in the great state of Nebraska. Fourteen years ago when this death penalty came to the Judiciary Committee, my first year on that committee, we stayed here late in the evening hearing testimony against it, in favor of the death penalty. We had e-mails and mail in my office that overshadowed everything else in that session. Here we are, people, 15 years later and there was nobody showed up to testify against this bill. People have changed their minds. Compassion for life, I think, has taken over. We've got a few e-mails and some letters in my office, about half and half, for/against, LB476. I remember those years, when the death penalty was carried out, of the people carrying the banners, hollering "fry 'em." And some of them same people who I knew were in church the next morning holding hands saying, forgive us our trespasses as we forgive those who trespass against us. And that doesn't say for stealing a dime or a nickel. That are His words about forgiveness. And it says nothing about condoning the sin. I don't condone murder. I don't condone pedophilia, or any of them things that people do time for. But I, as a sinner, realize that there must be compassion and we can give that today and still have a safe society without putting these people to death. Again, we in this room make the law. [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR PEDERSEN: The judges' job is to follow the law and they've done a good job of that. Some of us are at the end of our political careers. I'll be done here next year, and I hope that I can go to bed those nights after I'm through with the Legislature saying that I did not make political decisions about life and death. Thank you. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Pedersen. Senator Schimek, and this is your third time. [LB476]

SENATOR SCHIMEK: Yes, thank you, Mr. President. I'd like to give my time to Senator Chambers, please. [LB476]

PRESIDENT SHEEHY: Senator Chambers. [LB476]

SENATOR CHAMBERS: Thank you, Mr. President. Thank you, Senator Schimek. And for Senator Avery and others who have expressed some misgivings about the inequality that is found when the death penalty is involved, look in the Bible again. And Senator Carlson, I pronounced it that way in deference to you, and if I remember, that's what I will do, but habits are hard to break. Take the example of Jesus and Barabbas. Barabbas was a man convicted of riot, insurrection, and murder. Jesus, by all accounts, even Pilate's, was innocent. Which one did the mob, who was inflamed against Jesus, which one did they say should go free? The innocent man, or the murderer? The bad

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one. He's the one who got away. Go out and look in the yard in the penitentiary and you will see men who committed far more heinous crimes than even those described by Senator Flood, and they did not face the death penalty. They either were not charged with first-degree murder, or charged and allowed a plea bargain. What happened to the innocent man? Had I been a Roman senator, perhaps there would not have been a death penalty and Jesus would not have died, and we wouldn't be here talking about the death penalty because there would not be Christians trying to hold on to it. But be that as it may, let me continue on a different track. Senator Wightman had said that even if we had a life sentence then we'd have all these appeals. All you need to do is look at the circumstance, not only in Nebraska but around the country. There are not that many appeals. Courts have put in place a special system for handling death cases and that system applies to no other cases. It is not happening now in life cases; it is not going to happen. And Senator Wightman I think was sincere when he said it, but he was simply mistaken. On the retribution, again Senator Flood kind of veered off the track. He mentioned the retribution, you can call it that, for somebody who drives drunk. That is not final. The retribution does not extend to taking a person's life. And Senator Flood knows that there are lawyers and others who will have a third offense or fourth offense or fifth offense drunk driving charge reduced to a second offense. Check the case of a lawyer in Omaha named Willow Head and see how the courts have dealt with her if you want to see, even in a situation that doesn't involve death, where for some reason courts favor some people and skew the law. But in this particular case something similar to what Senator Flood talked about was something like a sex triangle, Senator Flood, and the last name of the family was Nokes or Nokes, N-o-k-e-s. The wife and husband murdered this person, dismembered the body, wrapped the parts in butcher's paper, and threw them in the reservoir. They did not even face the possibility of a death sentence, and they're probably out now. So when these emotional appeals are made we can all respond to them emotionally, and nothing is wrong with that. And Senator Wallman spoke for a lot of us, if not all. If something was done to somebody very dear to me and under the heat of the emotional upsetness I would feel, maybe I would do a terrible thing to that person if I could get my hands on him. But I have a direct connection to the victim. My emotions are inflamed. I would acknowledge that I am not thinking... [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR CHAMBERS: ...at that time as I am now, and I'm carried away and I do something which I may regret. But people would understand that, and when you act under those kind of emotions you may not even be held criminally culpable. You may get off. But we're talking about the settled, deliberate policy of a state, not acting, supposedly, under inflamed emotions, not even knowing or having any direct connection to a victim, 20 or 30 years after the event, coldly, calculatingly require some of its employees to kill a person they don't even know, and from having served on a death watch, may have bonded and feel that this is horrible and wrong, but it's my job,

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as said the Nazis. And the Nazis, by the way, are the ones who created lethal injection. Thank you, Mr. President. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Chambers. Senator Aguilar, followed by Senator Erdman, Senator Synowiecki, and others, Senator Aguilar. [LB476]

SENATOR AGUILAR: Thank you, Mr. President and members. I do have to say this debate is all and even more than I could have ever anticipated. The more I listen, as all of you do, the more questions come to my mind. Some of those questions came to light because of something Senator Lathrop said, something Senator Flood said. Those questions, when Senator Lathrop talked about retribution, Senator Flood talked about aggravating circumstances, I would submit to you if a family member is violently taken from you before their time, are you any less hurt, any less pain if there were no aggravators present during that death? I suggest not. And as far as retribution, are you going to expect any less retribution if those aggravators aren't present? I suspect not. For those reasons, I'm questioning myself where is the consistency in our punishment system. I'm having a hard time right now trying to figure that out, and I'm struggling with that decision. With that, I'd give the balance of my time to Senator Chambers. [LB476]

PRESIDENT SHEEHY: Senator Chambers, about 3, 35. [LB476]

SENATOR CHAMBERS: Thank you, Mr. President. Thank you, Senator Aguilar, and to Senator Avery, who raised the very important issue of the impact of race. And somebody else then mentioned, if it was not Senator Avery, that the race of the victim is what really tips the scale, and if the victim is white then there's a greater likelihood of a death sentence regardless of the race of the perpetrator. So if it is my life, society does not place the same value on it, if that's what we're talking about. It shows once again that I'm put in a subhuman category. And maybe I can identify, Senator Carlson, with a comment about Jesus when they were mentioning the 30 pieces of silver--this is how they valued him. So that's how they value my life. But I had mentioned something that Kenneth Starr had said. I want to read the quote. It's from the San Francisco Chronicle of February 17, 2006. Kenneth Starr, former U.S. special prosecutor and current dean of Pepperdine Law School, quote: Society is not equipped to handle death penalty cases because of resources. Large law firms are not willing at this stage to take these cases on at a cost of many thousands of dollars in order to make sure that if the public wants the death penalty it is not administered with arbitrariness and caprice. Here's a comment from a former Texas prosecutor. The county was B-e-x-a-r, Bexar County, Texas: I've come to the conclusion--his name is Samuel Milsap, M-i-l-s-a-p--I've come to the conclusion that the system as it relates to capital murder is simply broken. It's my view, in fact, that because it's driven by human beings and decisions that are made by human beings it cannot be fixed and that as a result what has to happen is that the option to put people to death has to end. And that he said July 21, 2006, and he was a prosecutor who had sought death sentences. This system never was right; it's wrong

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now; it always will be wrong no matter how they try to prettify it or give the taking of the life the appearance of a medical procedure in a well-lighted, sterile hospital room. The fact is you cannot make dung honey by dressing it up any kind of way. We need to focus on the wrongfulness of the state killing. [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SENATOR CHAMBERS: And at some point I will point out how it started really gaining momentum with Pope John II, the Catholic Church's reassessment of its teaching on the death penalty, and how in these days, in these developed countries, there is no justification for the death penalty because the person who committed the crime can be put in a place where no harm can be done to others. You have a right to defend yourself, but when the one who is going to do harm can no longer do harm, the infliction of death is never justified under those circumstances. And I will read the direct language to that effect. But again today we're just kind of doing an overview. Thank you, Mr. President. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Chambers. Senator Erdman. [LB476]

SENATOR ERDMAN: Mr. President and members of the Legislature, in keeping with the overview tone, I will yield my time to Senator Flood, as I'm sure we'll have more discussion tomorrow. Senator Flood. [LB476]

PRESIDENT SHEEHY: Senator Flood. [LB476]

SPEAKER FLOOD: Thank you, Senator Erdman, for yielding me your time. I guess I want to get back on track here with regard to some of the due process and constitutional discussions that we've already had, but I want to readdress a point that Senator Wallman made some time ago. Senator, you stated that court-appointed counsel was somehow less effective than paid-for lawyers by the defendant. Now I think that is an overgeneralization. That may, in some instances, be true based on what counties pay, but I can tell you, from my own experience in Madison County, I think defense counsel, especially local counsel, has done a good job of defending defendants in this type of a case, in this situation. So I don't really have a violent reaction to your statement, but I do have an objection to making a generalized statement that for whatever reason a court-appointed lawyer is somehow less capable than a lawyer paid for by defendant's funds or friends of the defendant's funds. And with regard to Senator Chambers' comment about my discussion regarding drunk driving or drug offenses, I don't want to minimize the death penalty discussion by drawing lines back and forth between Class W misdemeanors or Class II felonies. And that was not my intention. My intention was to show that retribution exists throughout our criminal code in the penalty phase for defendants. But I recognize the stark difference between a first-degree murder case where the penalty is the discontinuation of an offender's life, killing an

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offender, compared to the 90-day revocation that may be found in a Class W misdemeanor first offense, and in no way do I think the two are remotely similar. Tomorrow we're going to have a discussion on my next amendment that basically removes the super due process provisions that LB1 in 2002 and work the Legislature did in 1999 and prior have in our statutes for the commission of a...of first-degree murder. If the policy of the state is going to be not to execute individuals, then I do not see why we need the extra hurdle of due process in our system, and that's what my amendment is about. It doesn't mean I'm going to vote for the bill if it's adopted. You may say it would make, from my vantage point, a bad bill better, but not follow with my vote in support of the same. So that's what's coming tomorrow and I think that talking about the super due process protections will also give us a chance to painstakingly review the aggravators, the mitigators, the extra hurdles for the prosecutor, the protections already built into the system. And as Senator Chambers shared a story where the accused was walking through the community or the city in the Roman times and everybody had the chance to wave their hand and say any reason why that offender should not be put to death or their situation mitigated, I think if you look at the law we have significant protections built into the same. And I'm also, hopefully, going to address tomorrow this idea that to make the death penalty more effective we should be killing more people on death row. And at the same time, there's this argument that it takes too long and it costs too much money. You can't have it both ways. You can't, as a proponent of LB476,... [LB476]

PRESIDENT SHEEHY: One minute. [LB476]

SPEAKER FLOOD: ...talk about not doing it enough, and at the same time talk about the costs. I believe that our system is set up to do everything possible under the law to examine whether or not the defendant or the accused or the offender, you shall say, warrants receiving the death penalty and did the offender receive a fair trial. Those are the considerations that I think face us tomorrow. I want to thank the body this morning for what I think has been a very thoughtful, high-level debate on issues surrounding LB476. And with that, Mr. President, in advance of tomorrow, I hereby withdraw my bracket motion currently under consideration. [LB476]

PRESIDENT SHEEHY: Thank you, Senator Flood. Senator Flood withdraws his motion to bracket. Mr. Clerk, do you have items for the record? [LB476]

CLERK: I do, Mr. President. Senator Preister, an amendment to LB585 to be printed. I have a communication from the university regarding a proposed bond issue requiring Legislature approval; that will be referred to Reference. A hearing notice from Education Committee. And an announcement, Mr. President: The Education Committee will meet at 1:30 today in Executive Session in Room 1525. (Legislative Journal pages 896-898.) [LB585]

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I have a priority motion, Mr. President. Senator Hudkins would move to adjourn until Tuesday morning, March 20, at 9:00 a.m. []

PRESIDENT SHEEHY: The question before the body is, shall the Legislature adjourn until Tuesday, March 20, 2007, at 9:00 a.m.? All those in favor say aye. Opposed, nay. We are adjourned. []