

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

Floor Debate  
January 27, 2012

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[LB50 LB216A LB276 LB473 LB612 LB633 LB790 LB807 LB862 LR19CA LR385]

SENATOR GLOOR PRESIDING

SENATOR GLOOR: Good morning, ladies and gentlemen. Welcome to the George W. Norris Legislative Chamber for the sixteenth day of the One Hundred Second Legislature, Second Session. Our chaplain for today is Stephen Floyd, Church of the Nazarene in Falls City, Nebraska, Senator Heidemann's district. Please rise.

CHAPLAIN FLOYD: (Prayer offered.)

SENATOR GLOOR: Thank you, Chaplain Floyd. I call to order the sixteenth day of the One Hundred Second Legislature, Second Session. Senators, please record your presence. Roll call. Mr. Clerk, please record.

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

SENATOR GLOOR: Thank you, Mr. Clerk. Are there any corrections for the Journal?

CLERK: I have no corrections.

SENATOR GLOOR: Thank you. Are there any messages, reports, or announcements?

CLERK: Enrollment and Review reports LB473, LB633, and LR19CA to Select File, some having Enrollment and Review amendments attached. A conflict of interest declaration by Senator Nordquist to be acknowledged. A series of reports received on file in the Clerk's Office, reports from: the Department of Aeronautics; Banking; Education; Energy Office; the Fire Marshal; Health and Human Services; the Real Estate Commission; the Department of Roads; State Patrol; the University of Nebraska. Those will be available for member review. And finally, Mr. President, the weekly required filing of new registration for lobbyists. That's all that I have, Mr. President. (Legislative Journal pages 359-361.) [LB473 LB633 LR19CA]

SENATOR GLOOR: Thank you, Mr. Clerk. (Doctor of the day introduced.) We will now proceed to the first item on the agenda, General File. Mr. Clerk.

CLERK: Mr. President, LB276 introduced by Senator Council. (Read title.) The bill was introduced in January of last year, Mr. President, referred to the Judiciary Committee. Senator Council presented her bill yesterday on the floor. At this time I have no amendments pending to the bill, Mr. President. [LB276]

SENATOR GLOOR: Thank you, Mr. Clerk. Senator Council, would you please take two minutes to update and to review LB276 for the body? [LB276]

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SENATOR COUNCIL: Thank you, Mr. President. Again, LB276 is a bill designed to abolish the death penalty in the state of Nebraska. I will begin again by reciting the quote from a retired New Hampshire Supreme Court justice: No legal system is perfect. Human beings make mistakes. That is one reason we accept the notion that occasionally the guilty will go free and the innocent will be convicted. But I do not believe, I do not believe that anyone accepts the notion that it is all right for a person to be wrongfully executed. So with the most respected judicial system in the world, how can we willingly embrace a system which cannot be reversed after it is imposed, and how can we continue to believe that it is morally acceptable for the state to take a human life? Yesterday we heard horror stories and I agree they're horror stories. Unless someone believes that I am not mindful of the gravity of some of the offenses committed by those who have received the death penalty, I have personal experience that I will discuss on my own time. But that does not affect my belief that it is morally wrong for the state to take a human life, that it is morally wrong for us to embrace a system that is not perfect, a system that has been arbitrarily, capriciously, and discriminatorily applied across this nation. But of greater concern to us within this state, I will share with you equally horrible stories involving the taking of lives of individuals in this state for which no death sentence was sought. And I will submit to you that one of the reasons the death penalty wasn't sought was the cost to that county of prosecuting a case. Does that establish capriciousness? I suspect that it does, because whether or not you receive a sentence of death in Nebraska depends in large measure on what county you're in when the crime is committed. It also depends in large measure on the quality of your legal counsel, whether or not he or she is able to extract a plea that prevents a prosecution that would result in the death sentence. And, yes, ladies and gentlemen, it does depend in many instances on your race and the race of your victim. We cannot be complicit in allowing such a system to continue in the state of Nebraska and particularly under current circumstances with regard to our lethal injection protocol, which again I will discuss on my time on the mike on this issue. But, again, when there is any risk of executing an individual who is innocent, we should not be willing, not only we shouldn't be willing but excited about the prospect of taking a human life. Senator Karpisek made a statement yesterday that if someone took a life of a member of his family, he'd want to take that person's life. I understand that feeling. But Senator Karpisek is not the state and I'm not the state. And in those instances, the state should not be resorting to such emotional levels and the desire to seek revenge.... [LB276]

SENATOR GLOOR: One minute, Senator. [LB276]

SENATOR COUNCIL: ...in order to justify the continuation of this system. I, too, believe that life is precious. Any life is precious. And for us to suggest that we can determine whose life is more important than someone else's life, I think we do a disservice to the citizens of this state. I think we compromise our system of justice because it is not just when whether or not you face the ultimate punishment depends on who you are and

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where you are and who represents you. And that is the system that exists in this state. And I would urge your favorable consideration of the advancement of LB276. Thank you. [LB276]

SENATOR GLOOR: Thank you, Senator Council. Members, we return to debate on LB276. Senators in the speaking queue: Fulton, Cook, Wallman, and Council. Senator Fulton, you are recognized. [LB276]

SENATOR FULTON: Thank you, Mr. President, members of the body. Good morning. I hope that this debate can continue at the high level and with the level of decorum that we saw yesterday because this is one of the most weighty issues if not the most grave issue we will deal with. I had not planned on speaking, partly because I've been engaged in this debate over the course of the years of my service here. And I think that I've made my position clear. However, during debate, there are times when an argument is made with weight and persuasion. And Senator Lathrop, Senator Nordquist, some others have brought forward I think good arguments. And frankly, if I may, Senator Lathrop, when he spoke yesterday, really articulated a lot of my approach to the point where I was almost able to get up and say, well, amen, brother, I'm with you. But the argument that was put forward that I want to address is this argument of pro-life, the idea that if one calls himself or herself pro-life, one has to repeal the death penalty. I don't believe that that is true, nor do I believe that argument to be entirely logical. And I'm going to use two ways to display that. The argument if you're pro-life for the unborn then you have to be pro-life for those who are on death row buys into a theory called the seamless garment theory. And it holds that just that, if you're going to be consistent in your life ethic, then you have to say...then you have to protect this unborn life as you do this life who's on death row. It takes an absolute approach to life. Then I'll propose this scenario. If we adopt this "consistent seamless garment" argument, and for the sake of the record I'm putting quotes around the "consistent seamless garment," then what are we to do when faced with an unjust aggressor? Would we as a policy say we cannot go to war because we will be taking another person's life as a state or as a nation, in this case, but as an organized entity? Well, you can't. You can't say that. One can't take a position of absolute pacifism for one will quickly cease to exist, at least in this world. And so this argument, this absolutism to life premised on the argument that one has to take that position if one calls himself pro-life is not logical, otherwise we'd have to admit a 100 percent absolute pacifism such that we could not engage with the use of deadly force to defend ourselves. This actually is a rationale that I put forward as to why I would personally change how the death penalty is applied, but I will not repeal it. It's a premise of the natural law that one has the ability to defend oneself and that which is true for one is true for the many. If there is an individual who poses a risk, a danger to the public or to the innocent, as Speaker Flood pointed out, individuals who work within the corrections system, then it is our obligation as a mechanism of self-defense, if necessary, to use the ultimate sanction. And that is why the death penalty cannot be repealed outright. Now there's another part to this

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argument that I want to address because I've heard it said numerous times. I've never heard it refuted. I hope to refute it now. [LB276]

SENATOR GLOOR: One minute. [LB276]

SENATOR FULTON: If you are pro-life then you are pro-life across the board. The meaning of pro-life comes from the Declaration of Independence. To be pro-life doesn't mean that I like all life. It could mean that, certainly. But in the context that it was invented, it was taken from the Declaration of Independence: We hold these truths to be self-evident, that all men are created equal, endowed by their Creator with certain unalienable Rights, among these the right to life, liberty, and the pursuit of happiness. It's called the National Right to Life movement, right to life as in the Declaration of Independence. If we are to maintain that one cannot invoke the death penalty because one is in favor of the right to life, then does it not logically follow that one cannot invoke the elimination of liberty for that, too, is declared in our Declaration of Independence? Life, liberty, and the pursuit of happiness clearly... [LB276]

SENATOR GLOOR: Time, Senator. [LB276]

SENATOR FULTON: Thank you, Mr. President. [LB276]

SENATOR GLOOR: Thank you, Senator Fulton. Senator Cook, you're recognized. [LB276]

SENATOR COOK: Thank you, Mr. President. And good morning, colleagues. I would yield my time to Senator Council. [LB276]

SENATOR GLOOR: Senator Council, 5 minutes 25 seconds...4 minutes. [LB276]

SENATOR COUNCIL: Thank you, Mr. President, and thank you, Senator Cook. Senator Fulton, part of me says don't waste your valuable four minutes responding to your Declaration of Independence argument because I know for nearly 200 years nothing in that document applied to me or anybody who looked like me. So I will move past that. I will move to the issue of that...the arguments that have been made that there are certain crimes that are so heinous and the people, they exert such depravity and it evidences such depravity that we have to have a death penalty to rectify these wrongs. And the suggestion that because I am unalterably opposed to the death penalty, that I don't appreciate that there are people who engage in such depraved conduct that results in pain and suffering to families. Well, allow me to let you know, if you don't know, that one of the individuals sitting on death row committed a heinous act--I'd be the first to agree with that--in the death of a young woman who lived around the corner from me whose family I knew and know, whose family I witnessed personally experiencing the pain of not knowing what had happened to their child until their child was found. The person

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charged with that offense is 1 of the 11 sitting on death row. So you could ask me, well, Senator Council, in light of that, how could you possibly be opposed to the death penalty? Well, because I can tell you for every one Roy Ellis who has senselessly taken the life of someone, including children, there are tens of people who have received life sentences without possibility of parole in this state for committing equally, if not more, heinous acts. And the reason that they are not sitting on death row is the very reason I oppose the death penalty, and that is because its application is arbitrary, capricious, and discriminatory. By way of example, just recently, last year, a young woman in Mitchell, Nebraska, was raped, killed, and her body was attempted...there was an attempt to hide her body from authorities by her stepfather, an offense that, under everyone's description of when we should impose the death penalty, should have been a death penalty case. Allow me to read to you: A 32-year-old man eluded the death penalty in a plea deal for killing his stepdaughter. Salvador Carlos Lopez of Mitchell confessed to killing eight-year-old...I'm not going to reveal her name. Although he won't face the death penalty...listen to this, colleagues, although he won't face the death penalty, investigators still feel comfortable with him likely spending the rest of his life in prison without parole. And the Nebraska State Patrol was quoted as saying, we were able to get a conviction today. He pleaded guilty to first-degree murder, and the only sentence he can receive is life in prison without parole. [LB276]

SENATOR GLOOR: One minute. [LB276]

SENATOR COUNCIL: Why is it okay in some cases for a person to receive life in prison without possibility of parole for committing as heinous an offense as those who are sitting on death row? Again, it's because this system is arbitrary. I doubt whether Sioux County could have afforded to prosecute a death penalty case. They are happy that they're not prosecuting a death penalty case. In fact it is said, although the 32-year-old Mitchell man will not be facing the death penalty, law enforcement covering this case still considers this to be a win-win for all involved--a win-win for all involved. But it's not considered a win-win for all involved if that sentence is a sentence that would be applied in every case. [LB276]

SENATOR GLOOR: Time, Senator. [LB276]

SENATOR COUNCIL: Did you say time, Mr. President? [LB276]

SENATOR GLOOR: Time, Senator. [LB276]

SENATOR COUNCIL: Thank you. [LB276]

SENATOR GLOOR: Thank you, Senator Council. Senators waiting to be heard: Wallman, Council, Harms, Carlson, Mello, Nordquist, and others. Senator Wallman, you are recognized. [LB276]

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SENATOR WALLMAN: Thank you, Mr. President, members of the body. This is definitely an emotional issue and it says nothing about the victims. We're always about, is this justice, folks? Is this justice? O.J. Simpson, was he convicted? Huh? He had money. Folks, it's about the money, justice and money. Where can you find justice? So I heard a fellow attorney said about deals, we love the death penalty so we can make deals so we can convict somebody. Well, it sounds good but is that person going to be convicted of murder if they make a deal and lie about somebody else? This is messy stuff. And it's hard to find out justice for all. We can't do it. In the Good Book it says vengeance is mine, so it's not ours. So could I press the button? I think if we're going to have a true death penalty and it happens to my family, then I guess I should be able to give the shot. I shouldn't expect the state to do it. Because it's proven that people that do these things have a little trouble living out the rest of their days. And eventually you won't be able to find a judge or jury that will prescribe the death penalty. So do we have the death penalty now? When is the last time it was used in this state? We had it for a long, long time, folks. When was it used? When? We have appeals, appeals, appeals, appeals, and nothing about the victim. And I'd yield the rest of my time to Senator Mello. [LB276]

SENATOR GLOOR: Senator Mello, 3 minutes 15 seconds. [LB276]

SENATOR MELLO: Thank you, Mr. President, members of the Legislature. I rise to some extent to discuss or continue discussing the issue Senator Fulton raised. As some of you remember from our floor debate on LB36 three years ago, I, like many of my fellow Catholic lawmakers, consulted with my priest, consulted with the Catholic Conference, and consulted my own faith to realize that for me to truly follow the culture of life and the consistent ethic of life that I needed to not only try to protect life from the unborn but also extend that to the natural death and everywhere in between, issues that involve racism, euthanasia, economic injustice, and the issue that Senator Fulton was trying to allude to, unjust war. Colleagues, the reality is, is we make these decisions based on our own faith, our own morals, and our own personal views. And I will, for one, not spend an exorbitant amount of time trying to convince you to accept what I view is my moral compass in my faith in regards to guiding why I support LB276. However, Senator Fulton alluded to that there is other issues out there or his perception of what it means to be pro-life. That is a conversation that him and I and other fellow Catholic lawmakers can have off the mike with our priests, our deacons, the Catholic Conference, and others because the Catholic faith teaches to protect all human life in dignity from conception to natural death. That is not debatable. That is not negotiable. That is our faith as what it teaches us. So we can have that dialogue and debate internally amongst us off the mike. And I'm not going to chastise Senator Fulton for his interpretation over mine or anyone else's. But I rise in support of this bill because I try to remain consistent. By adopting that view that life is precious, all human life of dignity is precious, we don't just talk about the unborn but we talk about issues till natural death.

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The Catholic faith teaches us that healthcare is a right. [LB276]

SENATOR GLOOR: One minute. [LB276]

SENATOR MELLO: It teaches us that seniors deserve to end their days in dignity, that racism is fraught with problems that we as Catholics should be advocating against it. Colleagues, our world view is bigger sometimes than one or two issues. I urge you to take sometimes that bigger world view. Your own moral compass will guide you on this issue and I firmly believe that. My moral compass is guided by my faith, which I try to remain consistent in following that consistent ethic of life. From protecting the unborn to supporting someone's natural death, I rise in support of LB276 as I rose three years ago in opposition of LB36. Thank you, Mr. President. [LB276]

SENATOR GLOOR: Thank you, Senator Mello and Senator Wallman. Senator Council, you're recognized. [LB276]

SENATOR COUNCIL: Thank you, Mr. President. And before I continue along the line that I was going down when I was previously on the mike, I just received a note. And I was asked to advise the members in the body and the members who may be watching from their offices that Miriam "Mimi" Thimm Kelle, the sister of the victim of Mike Ryan, who is on death row, is out in the Rotunda. And she's out in the Rotunda because she supports LB276. And she's out there and has offered for anyone who wants to get firsthand the feelings that victim's families have about the continuation of the death penalty, she has extended an offer to you to come out and meet with her and discuss with her. And I want to publicly thank "Mimi" for taking the time out of her life, her day to come and share with you from a victim's family perspective. A lot of us want to talk about what victim's families feel and what would be acceptable and suitable to them. Here's someone who can provide that firsthand. Again, one of the statements made by one of my colleagues yesterday in opposition to LB276, Senator Smith made a statement that the death penalty should be continued because the people who have been sentenced to death, and I quote, are proven murderers, closed quote. Well, Senator Smith, according to our own Nebraska Department of Corrections, as of August 31 there were 228 such people who were serving life without parole--228 compared to 11 who are serving death sentences. Sound a little arbitrary? Sound a little capricious? Sounds a little discriminatory. Take that into context. Again, when I was talking about the capriciousness that's evidenced from county to county in terms of whether a death penalty is sought, and if you don't believe that cost plays a major role in that decision, you need to go out and talk to some of those county attorneys. Again, just look at the statement from the Nebraska state trooper, the investigators involved in this Lopez case. It's a win-win because Mr. Lopez is going to be sentenced to life without parole. Well, let me give you another example, recent, of a senseless homicide. And again, I'm hesitant to mention the names because these families are still dealing with this tragedy, but Milton Jackson, an African-American businessman, who befriended a young white

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man ten years ago, took him into his home, fed him, treated him the same as he treated a number of other individuals in the community. He was known as a loving, caring man. So no one could understand why someone would come into Milton Jackson's shop and shoot him down dead in cold blood. But it was this young man who he had befriended. And his act was so senseless that his own attorney described it as, I quote,... [LB276]

SENATOR GLOOR: One minute. [LB276]

SENATOR COUNCIL: ...this was inexplicable. And the defendant in that case tried to raise an insanity defense. And after an evaluation, the psychiatrist said not only is he not insane, this guy was faking insanity, did everything he could to avoid the consequences of his senseless act. And what happened? He had good legal counsel who was able to negotiate a deal. And this individual is going to be charged with second-degree murder and he'll get a life sentence. Ladies and gentlemen, colleagues, look at this issue objectively. Look at this issue as dispassionately... [LB276]

SENATOR GLOOR: Time, Senator. [LB276]

SENATOR COUNCIL: Thank you. [LB276]

SENATOR GLOOR: Thank you, Senator Council. The Chair recognizes Senator Harms. [LB276]

SENATOR HARMS: Thank you, Mr. President and colleagues. I still rise in opposition to LB276. There was a Gallup study that was done. This was a recent one that I was able to find. And I'd like to share it with you if I can, just some of the comments that...and somewhat some of the data really tells us. This is about America in general, about their view about the death penalty. Sixty-nine percent of the Americans responded yes when they were asked, are you in favor of the death penalty--sixty-nine percent. What I found kind of interesting, in the mid-seventies this thing kind of jumped around a little bit. It went from 60 percent to 70 percent. The highest point in American history of people supporting the death penalty was in 1994 and it was 80 percent of the people in this great nation said they supported the death penalty. The question about morality of the death penalty of the Gallup poll showed that 66 percent of the Americans indicated that they supported the death penalty and they define the death penalty morally acceptable to them over this issue. The question about, is the death penalty used too frequently, one out of five said they felt that it was used too frequently. But what I found kind of interesting in this study itself, and this in regard to subgroupings, the question was asked, are you in favor of the death penalty for persons convicted? And this is what it says: conservatives, 81 percent said yes; Republicans, 81 percent said yes; 50-plus males said...which was 78 percent, said yes; male in general said 76 said yes; male from 18 to 49, 74 percent, they agreed with the death penalty; in the West, 73 percent. If you remember yesterday, I talked with you about my area or about Nebraska in general,

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73 percent said yes. But in the study it said those that had some college, 73 percent said they supported the death penalty. White, 73; Midwest, 72; high school or less, was 72; Independent, 67; in the East, 66; in the South, 66; 50-plus female was 66; moderate was 64; female from 18 to 94 was 60; Democrats, 60 percent said they supported the death penalty. The reason I want to bring this out is that I don't think this has changed much across America, folks. And I believe that people really feel very strongly that when a life is taken that the penalty should be death. I've looked at the research and I assume this research is accurate. It's very clear that it does deter people from killing individuals. There's been studies done internationally. In Europe, I think England did a study that found a great impact on the difference between having it and not having it, and having it did cut back. So there's a lot of debate and everybody has their views and I support...and I respect their views. But I believe that when you lose a loved one and some of the crimes that are so heinous, I don't know what other answer we would have. I don't think life imprisonment is the right thing to do when a crime is so heinous. And I went over just a couple of those. I'm not going to go over any more of those. That was enough for me just to give that information to you. But I object to this. I think it's the wrong thing for us to do. The death penalty is important and I would ask you to support...I would ask you not to support LB276. Thank you. [LB276]

SENATOR GLOOR: One minute. [LB276]

SENATOR HARMS: Thank you, Mr. President. [LB276]

SENATOR GLOOR: Thank you, Senator Harms. Senators wishing to be heard: Carlson, Nordquist, Ken Haar, Schumacher, Bloomfield, and others. Senator Carlson, you're recognized. [LB276]

SENATOR CARLSON: Thank you, Mr. President and members of the Legislature. We started the debate yesterday on elimination of the death penalty in Nebraska. And in my six years in the Legislature I think this is the fifth time that we had this debate. Now some would say we've decided the question in other previous sessions and that ought to be enough. But I think the appropriate answer to that is no. We are a democracy. We have freedom of speech. And it is appropriate to debate issues over and over again regardless of our different positions on these issues. You know, we debate again and again tax policy. I hope we're going to debate term limits, senator pay, state versus local control, and many other issues. This discussion is appropriate. It's been interesting to listen to senators who haven't been through this debate before about the death penalty and weigh in on their thoughts. And I encourage those who haven't spoken to do so. Yesterday I was moved by Senator Lathrop's testimony. In six sessions, he and others are consistent in their pro-life positions. Senator Lathrop talked about his moral compass and how he has been led to be against killing the unborn and against the death penalty. I think we both get our values that we live by from the same book. I believe Senator Council gets her value system from the book. We just have three

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different conclusions from the same word. The book tells me that those in government leadership positions are put there by our Creator. The book says do good. Follow the rules and you have no need to fear. But if you intentionally break the law, the government doesn't bear the sword for nothing. Murder is wrong. But in my view, killing may not be wrong. What about war? And what about the heinous crimes like those in Norfolk and other places that have been committed? I'm really bothered by our different standards in the United States. We have many in this body who want to do away with the death penalty for the worst of the worst in our society, for some who, in my opinion, really don't deserve to live. But what I really struggle with is eliminating the death penalty on the worst in our society but allow the death penalty to continue on the innocent, defenseless unborn. Continuing that practice is just not acceptable in our Creator's plan. There's a time to resist the government, to go against the government, to fight the government when the policy is against God's law. If we eliminated the death penalty for the unborn in all cases, it would be more plausible, in my opinion, to seriously further consider the elimination of the death penalty for the worst of the worst. But at this time I do not support LB276. Thank you. [LB276]

SENATOR GLOOR: Thank you, Senator Carlson. Senator Nordquist, you're recognized. [LB276]

SENATOR NORDQUIST: Thank you, Mr. President and members. As I stated yesterday and certainly again echoing what Senator Lathrop has said and Senator Mello, the importance of creating a culture of life, and much along the lines of how Senator Carlson started his remarks respecting all life, that certainly is a part of my moral compass as well. And I just want to address some of the thoughts and kind of explain my thinking in response to the point Senator Fulton brought up. The idea of self-defense and how society has the right to defend itself. And certainly my thoughts go back to, you know, what Pope John Paul said in 1999. He said, quote, the new evangelic...sorry, let me see here, well, essentially he talk...talking about the idea of pro-life and people who celebrate and proclaim and serve the gospel of life in every situation. He said, a sign of hope is the increasing recognition that the dignity of human life must never be taken away, even in the case of someone who has done great evil. Modern society has the means of protecting itself. And kind of to the points that I was making yesterday about the public safety concerns here, if we really have public safety concerns about these individuals, then we should have those about our entire correction system. These individuals, again, are going to be on average sitting in our corrections system for 16 years before they are put to death. And we know, as Senator Council has pointed out time and time again, as our own study made...alluded to, that we don't always sentence the worst of the worst to the death penalty. So we have people who are just as dangerous right now sitting in prison with a sentence of life without parole. So if the reason we're going to reject the argument of all life...protecting all life is because of public safety, the logic just doesn't hold up. Because if that was the case, then we should have 20 bills debating right now of how we reform our corrections

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system to protect and make sure that we're all safe from the people who are equally as dangerous or more dangerous. So that argument doesn't hold up to logic. So for me, we can protect society and protect life, all life. Again, those who have done great evils, but we have to rise above that as policymakers. We shouldn't be looking necessarily to poll numbers. We should be looking to what's right. And for me what's right is respecting all human life given to us by God, even those who have done great evil. Thank you.

[LB276]

SENATOR GLOOR: Thank you, Senator Nordquist. (Visitors introduced.) Continuing with debate, Senator Ken Haar, you're recognized. [LB276]

SENATOR HAAR: Mr. President, members of the body, I had an interesting conversation on walking to lunch yesterday. We were talking about the death penalty. And the person I was walking with actually had some distant relative or acquaintance who had been murdered. And the statement came out that with modern technology, we know who committed murder, who didn't, who the murderer was. And I would suggest that one of the reasons that the polling numbers are going up is we're all watching CSI and programs like that and we're being told that technology can tell us exactly who the murderer is all the time and years in the past and so on. So that was an interesting perspective that I got yesterday. But really much more important to me is the whole argument of what are the worst of the worst. And we hear examples of where's...you know, where's the bright line? Who is the worst of the worst? And how come in one case where murder is...results in the death penalty and in another very similar case it results in life in prison? I think as a government this is...as government, we can't make mistakes in this issue. There can't even be...you know, it's got to be...it can't even be 99.9999 percent sure. We can't be 100 percent sure in this case. And we can't be 100 percent consistent in how this penalty is applied. And so I rise in support of LB276 and would give the rest of my time to Senator Council. [LB276]

SENATOR GLOOR: Senator Council, 2 minutes 57 seconds. The Chair recognizes Senator Schumacher. [LB276]

SENATOR SCHUMACHER: Thank you, Mr. Chairman. I was going to ask Senator Council a question and maybe I can when she gets back with regard to some of this. As I listen to the various orations on this matter, I have to compliment Senator Council, Senator Lathrop, Senator Flood. Those are very accurate descriptions of the debate that we have. From every deep-thinking line of analysis, I think Senator Council makes a good argument; Senator Lathrop, Mello make good arguments. Most of our modern western civilizations have done away with the death penalty. It doesn't seem to do any good when it comes to results in the...whether or not we protect society. Iowa's rate of murder is 1.3 per 100,000. Ours is 3.0. Ours is increasing dramatically from 2.3 in '09 to 3.0 in '10 while Iowa's remained flat, and we're probably fairly comparable states. When Senator...Senator Council, will you yield to a question? Notably we know that

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identification by witnesses and confessions are more suspect than we ever imagine them to be before scientific study of their validity. Are there any people on death row in Nebraska today who we are unsure of the identity and that we've got the right person? [LB276]

SENATOR GLOOR: Senator Council, would you yield? [LB276]

SENATOR COUNCIL: I can't state definitively, Senator Schumacher, because I have not studied every one of the cases of the individuals on death row. But it is my understanding that for the most part we're not hearing claims of innocence unlike the recent situation involving Troy Davis in Georgia. [LB276]

SENATOR SCHUMACHER: Thank you, Senator Council. At least that's good to hear because, as we push those red or green buttons, at least our probability here in Nebraska is not there that we'll be killing someone who is innocent. Now having said all that, it would be pretty easy to push the green button on this were it not for the truth of what Senator Flood said. That was a terrible thing that occurred in Norfolk. It was unwarranted, unprovoked, cold-blooded, and it's the kind of thing that makes the brain say maybe that's a case for the death penalty. And I think where I'm at right now, and I am certainly very fluid in this area, I've got to listen to what my district says. And I know that if this measure does not die today that it...if it goes on to Select File, there will be some input from the various churches, some preaching done, some homilies delivered, and I would await on Select File the input from my district as to whether or not they feel that what was done in Norfolk and like kind of things justify the continuation of what amounts to a rather barbaric practice on our part in the name of justice. Thank you. [LB276]

SENATOR GLOOR: Thank you, Senator Schumacher. Senator Bloomfield, you are recognized. [LB276]

SENATOR BLOOMFIELD: Thank you, Mr. President, colleagues. I rise in opposition to LB276. I don't do this easily, as none of us do. Probably most of my colleagues are not aware that my father passed away when I was eight years old. I was raised by my mother. My mother told me consistently we should not take a human life until we have the ability to give it back. However, some few years later when Charlie Starkweather was put to death, I asked my mother about this again. I was at that time, 13, 14, in that neighborhood. And she said that was a just act and a just end to a man that got what he deserved. I, like Speaker Flood, am too close to Norfolk not to oppose this bill. Thank you. [LB276]

SENATOR GLOOR: Thank you, Senator Bloomfield. Senators wishing to be heard: Wallman, Cook, Council, Nelson, and Dubas. Senator Wallman, you are recognized. [LB276]

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SENATOR WALLMAN: Thank you, Mr. President. Again, I want to emphasize the victims. And our church secretary was murdered, cold-blooded, shot through the window of the car, cold-blooded murder, execution style. Did that man get the death penalty? No. Why? Who knows. It just didn't happen. So is there justice for all folks? There's not. Look at all the people that are in prison that committed murders. They're not...you know, they're not going to get the death penalty. Some of them may plead insanity, and some of them are mentally ill, I know. But the victims, folks, we keep bringing this up, and the victims and I...Senator Council knows I hate it when this bill comes up and I've told her so. But I appreciate all the testimony. I know how everything is. It's a tough vote to call no matter which way you vote. But my conscience tells me to vote this way. You know, a great leader in the Bible killed somebody with a bone and they had a tribal system back there. Nothing. So it's tough. And, Senator Council, I'd yield the rest of my time to you. [LB276]

SENATOR GLOOR: Three minutes forty-two seconds, Senator Council. [LB276]

SENATOR COUNCIL: Thank you, Senator Wallman, and thank you, Mr. President. Quickly I want to address a couple of issues that were raised about polls. Senator Harms, in his statements on the mike reciting poll information, also related that a poll had been conducted in England. And correct me if I'm wrong, Senator Harms, that a poll had been conducted in England in support of the position that the death penalty is a deterrence. Was I correct in my understanding of what he stated? I find that interesting and ironic because Great Britain doesn't have a death penalty. Great Britain is one of the many industrialized, civilized nations in this world that does not have a death penalty. The data with regard to whether Americans support the death penalty, I will have printed and provided to you a poll that was conducted. And the question was not asked simply: Do you support the death penalty? The questions that were asked were: Do you support alternatives to the death penalty? And in response to that question, the numbers flipped, Senator Harms. Greater than 60 percent of Americans favor something like life without possibility of parole. And, in fact, it was just such data that led the New Mexico Legislature in 2010 to abolish the death penalty in that state and to substitute for the death penalty life in prison without possibility of parole. Senator Bloomfield related the basis for his position in favor of the death penalty. Allow me to share my basis for opposing it as long as I can remember. Because as a child, Senator Bloomfield, I've watched on TV and I saw in the newspaper instance after instance after instance where African-Americans were subjected to death sentences for acts as simple as whistling at a white woman. And I vividly recall and can never get the picture out of my head... [LB276]

SENATOR GLOOR: One minute. [LB276]

SENATOR COUNCIL: ...of Emmett Till, 14 years old. He didn't even get the benefit of

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having his offense tried because he was accused of whistling at a white woman. And the people in that city who were offended by that took his life in the most brutal, in the most horrific way that anyone could imagine, and that picture of him stays in my mind today. And the people who did that, with all the evidence that he had walked in their house, kidnapped him, and he was never seen again, they laughed as they left the courthouse with no indictment. That, for me, was one of the first reasons provided for me to oppose the death penalty because it's not applied... [LB276]

SENATOR GLOOR: Time, Senator. [LB276]

SENATOR COUNCIL: Thank you. [LB276]

SENATOR GLOOR: Thank you, Senator Council. The Chair recognizes Senator Cook. [LB276]

SENATOR COOK: Thank you, Mr. President. Good morning again, colleagues. I think this is a good opportunity for us to share our points of view on the death penalty and its application. I, like Senator Council, have had the images of the disparities among sentencing and carrying out of that sentencing, and I bring that perspective absolutely to the Legislature. And as people have said before in this body, a citizen Legislature brings their personal experience to the debate and to the policy debate. I'm certainly not immune to or blind or deaf to the pleadings of my colleagues. But I think it is just as important for people to recognize that there are differences among opinions. And, as Senator Carlson said a little bit earlier--and forgive me if I'm misinterpreting it--that the differences are just as reasonable and rational and valid among each point of view. In other words, it's not that one point of view has a more valid basis. It's all just as real as something that might come from the edict of a particular faith, the leadership of that faith, the political policy arm of that faith from...in the case of my faith, from an in-dwelt holy spirit that informs your moral and emotional and decisions. So I am appreciating the tenor of the debate in the sense that we are talking about why we feel this way. And maybe perhaps for the first time, I've been here for four years and this and other very difficult emotional issues seem to come up every single year, that we are finally recognizing that we bring ourselves to the Legislature. With that, I would like to offer the balance of my time to Senator Council. Thank you. [LB276]

SENATOR GLOOR: Thank you, Senator Cook. Senator Council, 2 minutes 37 seconds. [LB276]

SENATOR COUNCIL: Okay. Two quick points I want to make on Senator Cook's time that she graciously provided to me. Thank you. Getting back to the basis for my unalterable opposition to the death penalty. While the racial disparities in the application of the death penalty may not be as stark now as they were in the sixties, they still exist. Senator Schumacher, if I could further elaborate on my response to your question.

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Again, I can't definitively say that there is an innocent person on death row in Nebraska today. But I can definitively say that people in Nebraska have been coerced into confessing to crimes they did not commit because they were threatened with the death penalty: the Beatrice Six; a young forester here in Lincoln 55 years ago was coerced into confessing to killing his wife. When he recanted, after getting out of that interrogation setting, he still wasn't believed and he was prosecuted and sentenced. And always maintained his innocence, and was not released until the person who actually committed the crime confessed. So while there may not be innocent people currently sitting on death row, the fact remains that the possibility exists, the risk is there. [LB276]

SENATOR GLOOR: One minute. [LB276]

SENATOR COUNCIL: We already have evidence of the potential for it occurring in the state of Nebraska. But one thing for sure that we have is evidence of the fact that the death penalty in the state of Nebraska is arbitrarily, capriciously, and discriminatorily applied. That evidence is stark. It can be made no clearer--228 people who have taken lives and we're comfortable that they've been sentenced to life without possibility of parole. Recent eight-year-old subjected to a heinous...she was killed by her stepfather because she told him, I'm going to tell mom that you inappropriately touched me, and he killed her to prevent her from telling her mom. How depraved... [LB276]

SENATOR GLOOR: Time, Senator. [LB276]

SENATOR COUNCIL: Thank you. [LB276]

SENATOR GLOOR: Senator Council, you are up next in the queue. [LB276]

SENATOR COUNCIL: Thank you. And while I still have time to talk and while my colleagues hopefully will yield some time to me if I run out, Senator Coash made a statement yesterday about the likelihood that anyone in Nebraska would be executed. I submit to you that I concur in his opinion for a couple of reasons. The first is that of the 11 individuals currently sitting on death row, I believe that there is a strong constitutional argument to be made that they cannot be executed by lethal injection. At the time certain of those individuals were sentenced to death, the law of the great state of Nebraska was if you receive a death sentence, you will be executed by having electricity pass through your body. And we made it clear, we went on to say, and by no other means. That was it. If you received a death sentence and that death sentence became a final judgment, that was the manner in which this state said you would be executed--by no other means. And that statute, ladies and gentlemen, contained no savings clause which would allow some subsequent method of execution to be employed. Now reasonable minds will differ with me on that. But again, in my opinion, constitutionally, since we cannot by constitution go back and change someone's

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sentence that was the result of a final order, I don't believe that we can go back and change someone's method of execution that was entered by a final order. Secondly, I believe that under our current lethal injection protocol, we have serious, serious problems. Many of you know that a March 6 execution date has been set for Michael Ryan. You may also know that there were execution dates previously set for Carey Dean Moore. And some of you may have been following the newspaper stories and the video media reports of the absolute mishandling of this state's acquisition of one of the drugs to be used in the three-drug protocol. I'll tell you in the Carey Dean Moore instance, in my opinion, the conduct of the Attorney General's Office was not only unethical but shameless in its failure to advise the Supreme Court at the time they were pressing for an execution date for Carey Dean Moore, not to advise the Supreme Court that the quantity of that drug, sodium thiopental, that we have, we obtained illegally and won't be able to use. But, you know, we also don't have a way of obtaining that drug before the date set for the execution. Now there will be disagreements on that. But there have been documents that have been produced in those cases that establish that at the time that the Attorney General was seeking the execution date for Carey Dean Moore, they had no idea... [LB276]

SENATOR COASH PRESIDING

SENATOR COASH: One minute. [LB276]

SENATOR COUNCIL: ...where they were going to get that drug. Because the supplier that they were utilizing advised them that the soonest they could get it would be a date subsequent to the execution date. I think it should also be noted that with regard to that particular company where the state thought they were going to be able to obtain the sodium thiopental, if you look at their import/export declaration, there's a place where they have to mark what is the above-named substance being imported for. The box checked: legitimate medical need. An execution is a legitimate medical need, ladies and gentlemen? And we are going to be complicit in this conduct if we allow an execution to go forward in this state under these circumstances? [LB276]

SENATOR COASH: Time, Senator. Thank you, Senator Council. Senator Nelson, you're recognized. [LB276]

SENATOR NELSON: Thank you, Mr. President, members of the body. I perhaps will comment on what Senator Council just said about the appropriateness of trying to find a drug to carry out what our Supreme Court would say is a legal matter, but that's another subject. This time I want to...and let me say I rise in opposition to LB276. We've heard a lot of talk this morning about the penalty of death being applied arbitrarily and capriciously, inconsistently, and indiscriminately. I think at this time we need to review how the death penalty is applied under current Nebraska law. If a person, hereinafter referred to as the defendant, murders another and is arrested, then the county attorney

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must first determine the appropriate charge to file. If it's a first-degree murder, then the county attorney must then determine if aggravating circumstances exist as defined by statute. Only if the evidence supports a charge of first-degree murder and the evidence supports the existence of one or more aggravating circumstances will the case be charged as a potential death penalty case. Then we move into two phases of trial: the guilt phase and the penalty phase. In the guilt phase of the trial, the question is whether the defendant is guilty of the crime of first-degree murder or some lesser degree of homicide. If he or she is found guilty of first-degree murder by a jury by the evidence, then the court moves on to the penalty phase of the trial. And, of course, if it's not guilty, why, then we never get into this issue. The penalty phase has two distinct parts: the aggravation hearing and the sentence hearing. In the aggravation hearing, a jury or the court hears the county attorney's evidence that one or more aggravating circumstances are present. If the county attorney proves the evidence of one or more aggravating circumstances beyond a reasonable doubt, then the possibility of the death penalty remains. If the county attorney cannot prove that, why, then again we go, there's no death penalty possible and the defendant will be sentenced to imprisonment from which the defendant cannot be paroled. If one or more aggravation circumstances are proven, then we have a three-judge panel appointed to conduct a sentence hearing at which the defendant is allowed to offer any mitigating circumstances or evidence that the defendant believes might persuade the sentencing panel not to impose a sentence of death. And after all the evidence is presented, the panel of judges must weigh all of the aggravating evidence found to exist against all the mitigating evidence offered. This is not mathematical but accomplished by the panel of judges assigning a subjective weight to all of the evidence presented by both sides. If the mitigation evidence is found to outweigh the aggravating evidence, then the sentence must be life imprisonment. If the mitigation evidence is found to equal the weight of the aggravating evidence, the sentence must be life imprisonment. If the aggravating evidence outweighs the mitigation evidence but not by very much, the sentence must be life imprisonment. Only when the panel of judges unanimously, that's all three of them, conclude that the aggravating evidence significantly outweighs the defendant's mitigation evidence, then is a sentence of death appropriate. Any sentence of death is automatically appealed to Nebraska Supreme Court and cannot be enforced until the Nebraska Supreme Court has affirmed both the finding of the defendant's guilt and the determination that death is the appropriate sentence for the defendant under Nebraska law. I want to submit to you, colleagues, that it's almost impossible... [LB276]

SENATOR COASH: One minute. [LB276]

SENATOR NELSON: Time? [LB276]

SENATOR COASH: One minute. [LB276]

SENATOR NELSON: ...to convict an innocent person in Nebraska and impose the

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death penalty. We need to retain the death penalty for those murders and those cases which are so heinous, so callous, so indifferent to the right to life of that person that was murdered and the depravation of the victim's families. So I urge you to vote against LB276. Let's retain the death penalty as the ultimate penalty when it becomes necessary and obvious that this is the way that we should go in the state of Nebraska. Thank you very much. [LB276]

SENATOR COASH: Thank you, Senator Nelson. Senator Dubas, you are recognized. [LB276]

SENATOR DUBAS: Thank you, Mr. President. Good morning, colleagues. I do not stand in an attempt to change anyone's mind on this issue. We are all...on this issue in particular, we are all guided by our own moral compass. And when we leave this Legislature, we must be able to live with the decisions that we have made. I honestly thought early in my legislative career that I could vote to retain the death penalty. But for...the first time we took a vote on this, when it was time to press my vote button, I literally froze because I realized that my decision could ultimately lead to someone else's death. And even though these are the most despicable people imaginable, my conscious would not allow me to cast that vote. Do I judge those who believe otherwise as wrong? No, I do not. But for me, this became a personal conviction that I could not go against and live with myself. I have compassion for the victims whose lives have been forever changed by someone else's heinous actions. I also know that these people, these families come down on both sides of this issue. So in no way would I presume to tell any of those family members what they should or should not feel. But on this issue, it came down to what decision can I make personally that I can live with for the rest of my life. And I think there's very few decisions that we make in this Legislature that come down to that, that have that degree of magnitude. But for me personally, I realized I could not vote to continue supporting the death penalty. And I would yield the remainder of my time to Senator Council if she's in the Chamber. [LB276]

SENATOR COASH: Senator Council, you've been yielded just under 3 minutes. [LB276]

SENATOR COUNCIL: Thank you, Mr. President, and thank you, Senator Dubas. I wish that I could be as definitive as my colleague Senator Nelson and say that it is impossible for someone in Nebraska to be sentenced to death under our current provisions on the death penalty. There are some that believe that it's impossible for an innocent person...for a guilty person to go free, and I can give you example after example of our system of justice allowing guilty people to go free in some of the most heinous murders that have been committed in this state. Again, without putting the family again through that tragedy, a young North High School student went missing, ultimately found her body mutilated. The person charged the evidence pointed to, who had committed that, is now walking free for a variety of reasons associated with the way our justice system works. Now the only flaw in Senator Nelson's commentary was

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ignoring the fact that before you get to trying the case on the merits of guilt, and before you get to the trial stage of aggravating and mitigating, the county attorney has the discretion, the sole discretion to determine whether or not to pursue... [LB276]

SENATOR COASH: One minute. [LB276]

SENATOR COUNCIL: ...a death penalty case. How many people in this Chamber don't see at least three of the aggravating circumstances existing in the case of young Kerra Wilson? She was killed by her stepfather after she was sexually molested by him. She was strangled and hit over the head with a shovel and left in a ditch--all aggravating circumstances. Yet the county attorney and all of the law enforcement in Sioux County said we're going to get a conviction. It's going to be a win-win. This man is going to serve a life sentence without possibility of parole--not death. In fact, it's stated he eluded death. And I submit to you, Senator Nelson, he eluded death because the cost associated with the process you just outlined weighed against the fact that they were... [LB276]

SENATOR COASH: Time, Senator. [LB276]

SENATOR COUNCIL: ...going to get a first-degree conviction is what led him away from the death penalty. [LB276]

SENATOR COASH: Time, Senator. Senator Lautenbaugh, you are recognized. [LB276]

SENATOR LAUTENBAUGH: Thank you, Mr. President, members of the body. I do rise in opposition to this bill, and that's no surprise, I assume, to those of you who have been here with me through my time here. And I will never fault anyone for persistence because I've been guilty of bringing issues back a time or two myself, as some of you may recall. But I believe we should have capital punishment in this state. I don't believe it's arbitrary and capricious. That's a legal standard and I think the courts have not adjudicated it or found it to be such. And I have a problem when we stand here comparing cases because I do try cases for a living, not criminal cases but civil cases. I tried one back in November that made the papers because I had to miss a few days of a special session to be there. And the jury found for my client, the defendant. The judge told me after the fact he would have found for the plaintiff if I'd have tried it to the bench. Does that make the process arbitrary or capricious? No. That means there was a different result depending on how it was tried--on who tried it, on what the evidence was, on who was on the jury, etcetera, etcetera, etcetera. To stand here comparing one case to another, one criminal act to another and say, well, this must be arbitrary and capricious because this person didn't get the same sentence, we don't know what went on in all these other cases. We don't know if there were problems with evidence. We don't know if the confession was the only way to guarantee a conviction in some of these cases. We can't compare them and be confident we're comparing apples to

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apples. So that doesn't make this process arbitrary and capricious. If you want to tell me that there's some people who probably deserved capital punishment and haven't gotten it, absolutely. That doesn't mean the ones who have received that sentence didn't merit it, don't merit it, and it should be carried out. The people who are opposed to capital punishment frequently are, one, self-described unalterably opposed to capital punishment. We were told a year or two ago that we should pay to have a study to find out the costs of capital punishment versus life imprisonment, and I resisted that because the study was only designed to change my mind. But the people who were opposed to capital punishment, if they found out that capital punishment was cheaper than life without possibility of parole, it wouldn't matter. They would still be opposed to capital punishment. It's a one-way street. I'm the one whose mind has to be changed apparently, and that's not happening. I can remember being at a seminar in 1991. I was a brand new lawyer. It was a panel discussion on capital punishment. Two of John Joubert's attorneys were on one side, someone from the AG's Office on the...Douglas County prosecutors on the other. And one of the gentlemen was up speaking about the people on death row, one of the defense attorneys, and he said, I want to know...I want you to know, I've been there, and these people on death row, they're not animals; they're just people, people who made a mistake. And frankly, I was outraged because if I screw up drafting a bill, that's a mistake, or if I miss a hearing because it's not on my calendar, that could be a mistake. But when you rape and murder someone as "Walkin Wili" did--I think I misspoke; they were the attorneys for "Walkin Wili" Otey--that's not a mistake. That's not something that just happens and, you know, could have happened to anyone. No. It's horrible, it's horrific, and it's heinous. And "Walkin Wili" Otey deserved the penalty he received. And now we're talking about supposedly shameful conduct on the part of the... [LB276]

SENATOR GLOOR PRESIDING

SENATOR GLOOR: One minute. [LB276]

SENATOR LAUTENBAUGH: Thank you, Mr. President...the Attorney General's Office in trying to obtain the drugs medically necessary, it's a sedative, medically necessary to carry out the death penalty. What I see as kind of shameful is that we're having litigation surrounding that process with motions being filed in the wrong court by attorneys who know better, should know better. This is beyond zealous representation. This is just meant to vex the process and then we have people stand up and say, well, see how long it takes? And the Attorney General was in such a hurry to get an execution date for Carey Dean Moore, well, Carey Dean Moore committed his crimes in 1979. I don't think we can say that there's been some sort of hurry on the part of the Attorney General's Office unduly to carry out this sentence for crimes that took place in 1979. [LB276]

SENATOR GLOOR: Time, Senator. [LB276]

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SENATOR LAUTENBAUGH: Thank you, Mr. President. [LB276]

SENATOR GLOOR: Thank you, Senator Lautenbaugh. Senators remaining in the queue: Cook, Wightman, Council, Brasch, Wallman, Ken Haar, and Lautenbaugh. Senator Cook, you're recognized, and this is your third time, Senator. [LB276]

SENATOR COOK: Thank you, Mr. President, and good morning again, colleagues. I would yield my time to Senator Council if she would like it. [LB276]

SENATOR GLOOR: Senator Council, 4 minutes 53. [LB276]

SENATOR COUNCIL: Thank you, Mr. President, and thank you again, Senator Council...Senator Cook. Hey, I make the mistake that everybody else makes (laughter). I stand accused. Yeah, I want to take a few minutes and I guess it was fortuitous that Senator Cook yielded the time to address a couple of the comments raised by my colleague, Senator Lautenbaugh. Yes, I'm unalterably opposed and I will continue to be unalterably opposed. And, yes, I introduced a bill for us to look at the cost. And if the cost had...the study had come back and showed that the cost of the death penalty was less than life without possibility of parole, it wouldn't have changed my position on the death penalty, but it would have changed whether I continue to pursue repeal of the death penalty in this body. And it would have impacted upon some of the decisions. Again, the cost associated with the death penalty, I guess I must confess, I had no doubt that it would come back showing that it costs more to prosecute a death penalty case than it does a case where the sentence is life without possibility of parole. And it costs more for precisely the reasons set forth by Senator Nelson. It's not one trial, it's two trials. And in most cases the state, as someone said yesterday, pays to prosecute and pays to defend at both of those trials. So, yeah, there's cost associated with it. And Senator Lautenbaugh definitively states that "Walkin Wili" Otey deserved to be executed. And then he says that we don't know when we talk about other cases, we don't know what went on in those cases and we don't know if they're comparable. Well, I submit to Senator Lautenbaugh, he just did the same thing he accused others of doing. He apparently does not know all of the facts surrounding "Walkin Wili" Otey because if he did he would have known that someone else confessed to that crime first. Someone else confessed and then recanted, retracted, and was allowed to do so. But interestingly enough, in a case and, no, again, I concede, not in Nebraska, but in Georgia and I think it's important that it's in Georgia because it was the Georgia case that led to the 1972 abolishment of the death penalty and it was a Georgia case that led the Supreme Court in 1976 to realow the death penalty. But just last year in Georgia they executed a man after several of the witnesses against him in his trial recanted, said they lied. Wasn't enough. Interestingly enough, though, had those same people did that on the witness stand, more than likely he wouldn't have been convicted because our standard for conviction is beyond a reasonable doubt. If you have five of the seven eye witnesses against you recant, doesn't that provide reasonable doubt? And doesn't it provide

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enough doubt to refrain from executing someone until you can find the truth? Apparently not because those who are determined to utilize the death penalty apparently subscribe... [LB276]

SENATOR GLOOR: One minute. [LB276]

SENATOR COUNCIL: ...to the vengeance is theirs instead of vengeance is mine, saith the Lord. Because in Georgia, they made up their mind somebody was going to die for the death of the victim in that case, who happened to be a police officer. They didn't care who died, but someone was going to die because that officer lost his life. And unfortunately, yes, that does, Senator Lautenbaugh, provide evidence of the arbitrariness and the capriciousness and the discrimination. Indiscriminately? Perhaps. Look at the number of death penalty cases that are filed in the United States annually and how many executions occur annually. And you look at how many murders occur annually. [LB276]

SENATOR GLOOR: Time, Senator Council. [LB276]

SENATOR COUNCIL: Thank you. [LB276]

SENATOR GLOOR: Thank you, Senator Cook and Council. Senator Wightman, you're recognized. [LB276]

SENATOR WIGHTMAN: Thank you, Mr. President and members of the body. I really didn't intend to participate in the debate today. I think I've joined in the debate on every other occasion when this has...the death penalty has been considered, but I do rise in opposition to LB276. And one thought that occurs to me as I listen to the debate today and yesterday is that maybe we all ought to examine our position as far as the death penalty is concerned on the bin Laden, Osama bin Laden case or the Gaddafi situation in Libya. I think probably many of the opponents of the death penalty, those that would abolish the death penalty, probably cheered when they heard that Osama bin Laden had been killed without a trial, without any thought probably to the death penalty and because I think that it fit the crime so I think in both instances. We have a lot of instances of cries that states in the United States are depriving criminal victims of their rights to life, liberty, and pursuit of happiness in various arguments that are made. When we try criminals internationally in human rights courts that allow executions for war crimes, I think we all thought that it would be justified in probably taking Gaddafi's life for mass violation of human rights for killing his own people. I think there's little difference here between that, only a matter of numbers and degrees, for somebody that walks into a bank in Norfolk, for example, and takes the number of lives that were taken in that instance. So to say that you can't justify the death penalty under any circumstance is just completely foreign to my thoughts. One of the arguments we frequently hear, and I think the one that concerns me the most with regard to the death penalty, is that there

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are wrongful convictions. Frequently these are learned as a result of DNA evidence. In other instances, we find out that maybe the wrong person has been convicted by a confession by a cellmate or by somebody who is serving time for some other crime, and that truly bothers me. And I suppose if a bill were brought or an amendment to current law were to be considered which would limit the death penalty to cases involving support of the charges by either eye witnesses or DNA evidence, I might very well support that because it bothers me a lot to think that somewhere someone may be wrongfully convicted for the crime and not maybe quite as concerned in that it isn't applied uniformly throughout the state or throughout the country because there's a difference in personalities of county attorneys across the state, a difference in...as so many have argued, we all bring our own moral compasses. And I think that death penalty frequently depends upon the moral compass of a judge and, of course, they usually...they do sit in panels on these cases so that one person's... [LB276]

SENATOR GLOOR: One minute. [LB276]

SENATOR WIGHTMAN: ...thoughts probably don't control. But I might consider something of that nature as far as limiting the death penalty in its being carried out. I also have always believed, and there are many, many studies that show that it is a deterrence, there are just as many studies, I believe, that show that the death penalty is a deterrence to murder and crime as there are those that show that it is not. So I think you can justify any study and find what you want from those statistics. With that, thank you, Mr. President. [LB276]

SENATOR GLOOR: Thank you, Senator Wightman. (Visitors introduced.) Senators in the queue: Council, Brasch, Wallman, Ken Haar, and Lautenbaugh. Senator Council. And this is your third time, Senator Council. [LB276]

SENATOR COUNCIL: Yes, thank you, Mr. President. I certainly appreciate my colleague, Senator Wightman's, commentary. Yeah, reasonable minds are going to differ. And if you want to make a case, you'll find someone somewhere out there who will provide you with data or research to support it. But I would urge my colleagues to look at the people that we generally defer to--law enforcement. Law enforcement has routinely stated that they don't view the death penalty as a deterrent. They have routinely in their research indicated that the greatest deterrent to crime is the fear of getting caught. There are law enforcement officials who have gone on record supporting repeal of the death penalty where in lieu of the death penalty and the savings associated with it there is life without possibility of parole, and the savings are directed to enable them to clear cold cases. So we can find data to support everything. But I do want to get back to another point that Senator Lautenbaugh made and that was with regard to the current situation involving the press to carry out execution of Carey Dean Moore and Michael Ryan and the controversy surrounding the state's acquisition of one of the drugs in the three-drug protocol. Colleagues, I'm telling you, you ought to be very

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concerned about the status of that issue. You should be very concerned that the manufacturer of the drug that we have currently in our inventory and are apparently prepared to utilize, that the manufacturer of that drug says that those drugs were obtained under false pretenses. Now you can take sides on this. You can say, well, I don't believe it or I do believe it. That's why the attorneys for those defendants have presented their cases to our Supreme Court and other courts. But I submit to you that if you look at the documentation on the method by which these drugs were obtained, I think it should be disturbing to you that when the second attempt was made to obtain the sodium thiopental the broker, and I use that term loosely, involved in that transaction advised our Department of Corrections that they would have to obtain a larger quantity than that earlier order, and he needed to obtain that larger quantity in order to get the drug through Customs. I'm going to read to you from an e-mail from that person to a representative of the Nebraska Department of Corrections: What I meant by that, and that being why you had to order more and why you have to pay more, what I mean by that is because the quantity is small, "they," Customs agents, know it's for the Department of Corrections in the USA. And that is why they don't want to do it. If quantities were larger, they would not have had a problem, thinking it was for distribution to hospitals. So we're obtaining this drug knowing it's being obtained in a deceitful manner with the intent to deceive. Not only that, we are seeking to utilize this drug in the face of the manufacturer, for whatever reason they have, asking it to be returned, that they never intended it to be sold... [LB276]

SENATOR GLOOR: One minute. [LB276]

SENATOR COUNCIL: ...and they never intended it to be used in executions. And because of what reason? Because that manufacturer as well as other manufacturers around the world are declining to manufacture and distribute that particular drug if they know it's going to be used in executions. We should be asking ourselves why can't we get the drug in the U.S.? Because no manufacturer in the U.S. will produce it because they know it's going to be used for executions and that's not how they see pharmaceuticals being intended to be used. I submit to you that if the drug that we have now is used in an execution we, this body, could be viewed as accessories after the fact if it is, and I believe it will be, established that those drugs were obtained... [LB276]

SENATOR GLOOR: Time, Senator. [LB276]

SENATOR COUNCIL: ...under false pretenses. Thank you. [LB276]

SENATOR GLOOR: Thank you, Senator Council. Members in the queue: Brasch, Wallman, Ken Haar, Lautenbaugh, and Schumacher. Senator Brasch, you're recognized. [LB276]

SENATOR BRASCH: Thank you, Mr. President. I rise in opposition to LB276. I rise

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because I do oppose, both as a pro-life senator, which was, you know, we've discussed and also as a senator who is a person of faith. These have been challenged, in my opinion. We have had others speak on them. Every...and I will just speak very briefly because every Wednesday morning starting as a new senator I received an invitation to attend a very early 7:00 a.m. nondenominational prayer meeting. Last year with great interest, great concern, and gravity we did discuss scriptures on the ability, the institution of the state to moralize. I have the sheet here. And because Senator Council had mentioned vengeance is mine, says the Lord, there are also scriptures which I will not read in entirety at all, but Romans 13:4 and Peter 2:14 specifically talk about the right for authority to take a life. And I believe that was what Senator Carlson had also mentioned. In murder, a crime. It is a crime. It is a law. Murder is the worst crime that can be committed. And it is not vengeance, but it is justice here. And what we want to do is to protect the innocent. In pro-life, we try to protect the most innocent of the innocent. As colleagues and senators here, we also try to protect the innocent. And I ask serious consideration as we are all seriously considering this, we cannot give back the life. We cannot allow citizens to take other lives, whether they're in an institution or not. What we need to work for is to prevent this from happening. We don't need to build more jails. We need to stop crime. That's what we need to do, and we need to work to get to that point in our churches, in our families, in our society and our culture. But if we're telling our culture, our society that if you murder you get to keep your life, there seems to be something wrong with that. I will yield the remaining of my time to Senator Lautenbaugh, if he is here. [LB276]

SENATOR GLOOR: Senator Lautenbaugh, 2 minutes. [LB276]

SENATOR LAUTENBAUGH: Thank you, Mr. President, and thank you, Senator Brasch. I've been trying to pay attention to Senator Council's comments. And I do not agree with a lot of what's been said regarding the AG's Office and their efforts to obtain the sodium thiopental. And again, it is instructive that that is where the legal challenge now lies for someone on death row. There's no claim that these two individuals that are possibly up soon for execution are actually innocent or wrongfully convicted, far from it. There's no claim of that at all. And there's just...we have to have an appellate process and we have to make sure that we aren't making mistakes. But... [LB276]

SENATOR GLOOR: One minute. [LB276]

SENATOR LAUTENBAUGH: ...the time that has lapsed between when these horrible crimes were committed and we are still struggling to carry out the sentences that were justly handed down, at a certain level it breeds, I think, disrespect for all law that we cannot follow through on these things when there are no legal issues regarding actual innocence or wrongful conviction. I do think at some point the challenges now have gone beyond zealous representation of a client and gone on to something more and something that isn't authorized and something that might not be wholly ethical. And

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people will say, well, it's capital punishment so we have to do what we're doing. That's not true. That's a justification, that's a rationalization for some things that probably shouldn't be going on, some attacks that shouldn't be being made. And frankly, again, I think it breeds disrespect for the law, for our institutions... [LB276]

SENATOR GLOOR: Time, Senator. [LB276]

SENATOR LAUTENBAUGH: Thank you, Mr. President. [LB276]

SENATOR GLOOR: Thank you, Senator Lautenbaugh. Senator Wallman, you are recognized. This is your third time, Senator. [LB276]

SENATOR WALLMAN: Thank you, Mr. President. I heard some comments about execution, Osama bin Laden and that. That's military, act of war--different rules, different laws. So anybody that's in here, been in the military, it's different. You're guilty until you prove yourself innocent if you're involved in some kind of a thing in the military. So it's a lot different law. And in regards to what Senator said about county attorneys and making these decisions about the heinous crimes and all that, that's what I don't like, folks. It's a political football, whether it be the Attorney General or whether it be county attorneys. We have that in our county, you know the five supposed or six supposed innocent. It was a political football. I still think they were probably...I better not say, but it's a question mark. So it was used as a political football. Folks, that's not right. It's just not right. It's not...it's actually letting people out that are dangerous. Decided by who? They'll get a parole. You can get an execution, Senator Bloomfield, and the person may only serve in prison 17 years now on account of a county attorney. And so I'd much, much rather have life without parole, much. And thank you, Senator Council, for bringing this forth. I know you know I hate this bill and I'll give you the rest of my time. [LB276]

SENATOR GLOOR: Thank you, Senator Wallman. Senator Council, 3 minutes 18 seconds. [LB276]

SENATOR COUNCIL: Thank you again, Mr. President, and thank you, Senator Wallman. Senator Lautenbaugh makes a point about the length of time that has elapsed here. And I'm not suggesting that that isn't a meritorious claim. But in my opinion, it calls for support of repeal of the death penalty. And I'll again read from the editorial written by Miriam Thimm Kelle, the sister of the victim of Michael Ryan, who in her editorial said, "If Jim's murderer had received life in prison without the possibility of parole over 25 years ago, we likely would never have heard Michael Ryan's name again or seen his face. We would have been able to mourn Jim's loss as a family and recount our positive memories of him together." Her concluding comments were, "Enough is enough. The death penalty is not worth it. Lock them up, throw away the key, and leave my family and me in peace." That's what LB276 accomplishes, ladies and gentlemen. It locks

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them up, throws away the key, leaves these families in peace. We talk about the appeals and the length of the appeals, and the fact that execution isn't swift and just, and the fact that the people on death row may not be innocent or may not claim innocence. But the fact of the matter is if you carry out an execution and you are wrong, you can't correct that mistake. It is irreversible. And I think Senator Lautenbaugh knows as well as any of us who are lawyers that in most instances where capital punishment is involved we accord greater rights. We accord greater appeal opportunities. And we do it for that very reason--that you can't reverse it after it's done if you made a mistake. [LB276]

SENATOR GLOOR: One minute. [LB276]

SENATOR COUNCIL: A life sentence without possibility of parole cuts down those appeals, as Ms. Thimm Kelle stated, relieves those families of having to relive the pain and suffering every time there is an appeal. And finally, in terms of the current controversy over the drug that has been acquired, Senator Lautenbaugh certainly can have his opinion as to whether or not what the attorneys in that case are doing is zealous representation. I don't know what else he is suggesting that it could be, but I'm going to tell you if my life is at stake I would want my attorneys to do everything... [LB276]

SENATOR GLOOR: One minute (sic). [LB276]

SENATOR COUNCIL: ...humanly possible to... [LB276]

SENATOR GLOOR: Time, Senator. [LB276]

SENATOR COUNCIL: ...avoid that ultimate punishment. Thank you. [LB276]

SENATOR GLOOR: Thank you, Senator Council. The Chair recognizes Senator Ken Haar. [LB276]

SENATOR HAAR: Mr. President and members of the body, I give my time to Senator Council if she wishes. [LB276]

SENATOR GLOOR: Senator Council, 4 minutes 53 seconds. [LB276]

SENATOR COUNCIL: Thank you, Mr. President, and thank you, Senator Haar. This is the kind of discussion that needs to occur with regard to this issue. I think many in this body who support the death penalty believe that we will have a means now and in the future to carry out executions. I respectfully disagree with that opinion. Even in the states that have used three-drug protocols, similar to the one that the Nebraska Department of Corrections adopted, have experienced far too many instances of

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botched executions, giving grounds for future constitutional challenges to the use of lethal injection. If you will recall when we were debating LB36, one of the justifications for advancing the lethal injection protocol as the means of carrying out executions in the state of Nebraska was that the U.S. Supreme Court had found constitutional the Kentucky protocol which involved the exact three...same three drugs that the Nebraska Department of Corrections adopted. Now again, questions I believe are legitimately raised when the drug that is obtained by the Department of Corrections is not sodium thiopental, which is what the protocol says, but is thiosol sodium, which I understand to be some type of generic but also some type of generic that hasn't been approved by the FDA. So while it may have been legal to import it, the question is whether it's legal to use it. I don't know. I'm not...I can't answer that question. That's why we have courts and that's why we have lawyers who take cases to court. But I submit to you that in that environment, in that climate, and knowing the standard by which the U.S. Supreme Court judges whether or not actions of the state amount to cruel and unusual punishment, whether you like it or not, whether you agree with it or not, if there's evidence and there continues to be evidence presented of inmates or convicted people suffering, experiencing pain and suffering through the lethal injection process, that will be an issue that will be soon presented to the U.S. Supreme Court for determination as to whether it, like our Nebraska Supreme Court found with electrocution, is cruel and unusual punishment. As these botched executions build up, ladies and gentlemen, we will be revisiting this issue again. And I submit to you that in the case of the current controversy here in the state we may be revisiting it sooner than we all think. And I thank you, Mr. President. I thank you, Senator Haar, for yielding time. [LB276]

SENATOR GLOOR: Thank you, Senator Council. The Chair recognizes Senator Schumacher. [LB276]

SENATOR SCHUMACHER: Thank you, Mr. President, members of the body. Would Senator Council yield to a couple of quick questions? [LB276]

SENATOR GLOOR: Senator Council, will you yield? [LB276]

SENATOR COUNCIL: Yes. [LB276]

SENATOR SCHUMACHER: Senator Council, is there any litigation currently underway regarding the ex post facto nature of the change in the method of execution? [LB276]

SENATOR COUNCIL: That issue has been alleged in one of the pieces of litigation that is currently pending, yes. [LB276]

SENATOR SCHUMACHER: Is that in the federal courts now? [LB276]

SENATOR COUNCIL: No, it's in the state courts. [LB276]

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SENATOR SCHUMACHER: State courts yet. Thank you. And in the event we would abolish the death penalty in Nebraska under Nebraska law, is it still available in cases of terrorism under the federal law? [LB276]

SENATOR COUNCIL: If there's a federal prosecution. [LB276]

SENATOR SCHUMACHER: So basically that's an availability in defense of state. [LB276]

SENATOR COUNCIL: To the federal...to federal prosecutors, yes. [LB276]

SENATOR SCHUMACHER: Thank you, Senator Council. I rise a second time because it kind of occurred to me that I might be the only person in this room who's been in a position of having to lift a murder victim into a body bag, take it down to a morgue, an autopsy and watch the clothes be cut off, as have many county attorneys in this state who do their job, which also includes the job of being the coroner. And to a certain extent, the implication that after having gone through those experience, a county attorney would play politics is just not fair to those county attorneys and prosecutors out there who take this in a most heavy, heavy way when they perform that function and sign those indictments and prosecute those cases and balance all the interests that have got to be balanced. So to that extent, the comments which may call into question the integrity of a prosecuting authority at the county level, I think need to be maybe reassessed. The only reason for a death penalty is the protection of state and society. And I am somewhat taken aback and I don't know the facts, but I think we should know the facts before we put this issue to bed one way or the other. When we deem that the offense was such that we must invoke this ultimate penalty in the protection of state and society, then we, in doing it, better be without reproach and lily white. And to the extent there has been any indication that anything has been done improper in the acquisition of drugs, in the way we're going to carry out this process, we better back up and do it over. If it's lasted 17 years or however many so far, a few more, six or eight months, however it takes to get a new batch of drugs and do it right should be done. And if this body does not make darned sure that when we do this we are right, then we have breached our obligation to a very sacred role in the justice system. Thank you, Mr. President and members of the body. [LB276]

SENATOR GLOOR: Thank you, Senator Schumacher. Mr. Clerk. [LB276]

CLERK: Mr. President, I have a motion. Senator Council would move to indefinitely postpone LB276. Senator Council, as the principal introducer, you have the option to lay the bill over at this time. [LB276]

SENATOR GLOOR: Senator Council, do you wish to lay the bill over? [LB276]

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SENATOR COUNCIL: I wish to lay the bill over. [LB276]

SENATOR GLOOR: Thank you, Senator Council. So ordered. Items for the record, Mr. Clerk. [LB276]

CLERK: Thank you, Mr. President. Your Committee on Judiciary, chaired by Senator Ashford, reports LB790 to General File; LB807, General File with amendments; LB862, General File with amendments. A new resolution: Senator Price offers LR385; that will be laid over, Mr. President. And that's all that I have. (Legislative Journal pages 362-363.) [LB790 LB807 LB862 LR385]

SENATOR GLOOR: Thank you, Mr. Clerk. We continue with General File, LB612. [LB612]

CLERK: LB612, a bill by Senator Pirsch. (Read title.) Introduced on January 9 of last year, referred to the Judiciary Committee. The bill was advanced to General File. There are Judiciary Committee amendments, Mr. President. (AM789, Legislative Journal page 1020, First Session, 2011.) [LB612]

SENATOR GLOOR: Thank you, Mr. Clerk. Senator Pirsch, you're recognized to open on LB612. [LB612]

SENATOR PIRSCH: Members of the body, I am the sponsor of LB612, and just some information. At committee there were...the bill passed as amended out of committee on an 8 to 0 vote with a clarifying amendment that is to follow. And I'm in support of that clarifying amendment that artfully expresses the intent behind the bill. There were no opponents at committee and no neutral testifiers and, as I mentioned, unanimous passage out of committee. And so I want to thank Chairman Ashford and all members of the Judiciary Committee for their thoughtful consideration of the concept here. LB612 seeks to lengthen modestly a statute of limitations to allow victims of child sexual assault a greater opportunity to file suit for injuries suffered. Child sexual assault is a deeply damaging problem in the United States. The U.S. Department of Health and Human Services reported 83,600 substantiated reports of sexually abused children in one year alone, 2005. So that doesn't include unreported incidents or incidents where the substantiation was not able to be achieved. And as a former prosecutor and attorney who's worked with children in these contexts, I can tell you that the numbers of children are far greater than this 83,600 per year. And sadly, the problem does exist in Nebraska as well as every state. The legal mechanics of the current civil statute of limitations for sexual assaults involves two statutes, 25-207(3) essentially adding four years for noncontractual injuries, and that works in concert with 25-213, which tolls the statute of limitations in such cases until the individual's 21st birthday. So the bottom line is for sexual assaults of children, the age by which you can currently file is capped at

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24. So at age 25 you are unable to do so. So the intent of my bill, simply put, is to allow civil filings up through age 32. In a number of our statutes, Nebraska has long recognized that child victims of sexual assault are unique and deserve special protection under the law. Child victims of sexual assault suffer in extraordinary and unique ways. Unlike fully developed adults, child victims are profoundly psychologically affected while they are in the midst of developing their capacity for trust, intimacy, agency and sexuality. Victimization of a child can change that individual's brain functioning and developmental potential. Effects of child sexual assault can include physical injury to the child, but psychological injuries can cause harm that lasts even longer, including suicidal tendencies, posttraumatic stress disorder, sexualized behavior, and I should point out 95 percent of teenage prostitutes were sexually abused, according to a 1992 study. I think that's really important to point out, virtually every teenage prostitute had been sexually abused. Other problems include depression, eating disorders, dissociative and anxiety disorders, anger control, relationship problems, criminal propensities, alcoholism and other substance abuse, poor self-esteem, learning problems, and a propensity to further victimization themselves in adulthood. Children are often singled out as victims because they are among the most vulnerable and helpless members of our society. The perpetrator chooses his victim. Many times grooming takes place, you witnessed that in the Penn State incidents that have been brought to light recently. Children tend not to disclose their victimization for a number of reasons--offenders often threaten to hurt or kill the victim or a loved one, victims feel too much shame during these developing years, embarrassment, fear, getting...fear of even getting the offender in trouble, fear of being held responsible or punished, and fear of being disbelieved as a child. They can't psychologically process the act in many cases or they may deny the fact that a trusted individual would do this to them. They may believe the myth that somehow they caused the assault to happen or fear others' reactions or blame themselves for not saying no or even fighting back, especially with young children. They may not even realize that society is structured such that they have a right to feel that they...to not be victimized. So even after becoming a young adult, victims often think that the best way to go about it is just to ignore the trauma and try to put it behind them. And many try that for a great number of years. Ultimately, their thought is the psychological fallout will fade away over time, but many find out that that just, after a great number of years have passed, that that just does not happen and will never happen without a great deal of professional assistance. For many without means, the current statute of limitations, which in my estimation is very narrow, prevents the perpetrator from having to contribute to the victim's healing. LB612 recognizes that with this unique and heinous crime of child sexual assault, child victims will need reasonable accommodation to mature to the point where they become conscious of the damage they have suffered and be able to reasonably seek redress. In this way, I think it is a reasonable balancing of interests. And, you know, I can tell you based upon my experience as a prosecutor dealing with child victims and representing kids nowadays as an attorney it seems quite clearly in all of society's best interest. So I would ask for your support in this measure as amended. And Senator Ashford will be

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discussing the brief clarifying amendment that the Judiciary Committee has, and I do support that. Thank you. [LB612]

SENATOR GLOOR: Thank you, Senator Pirsch. As the Clerk and Senator Pirsch mentioned, there are amendments from the Judiciary Committee. Senator Ashford, as Chair of that committee, you're recognized to open on the amendment. [LB612]

SENATOR ASHFORD: Thank you, Mr. President. I stand here to briefly describe the brief amendments to this bill. As Senator Pirsch has suggested, it's very brief. And he's actually handled it. I'm sorry to be flip. But the 12-year statute of limitations which this bill prescribes would begin at age 21. So 32 would be the age when the cause of action would cease. And the purpose of it is to not prejudice, obviously, a youngster who is 5, 6 or 7 years old, who under the original bill would have his or her cause of action cease under age 21, which would be a lesser age than current law. So Senator Pirsch has most adequately described the bill. And I urge the adoption of AM789. Thank you. [LB612]

SENATOR GLOOR: Thank you, Senator Ashford. You have heard the opening on LB612 and the committee amendment. There are senators in the queue. Senator Wightman, you're recognized. [LB612]

SENATOR WIGHTMAN: Thank you, Mr. President. If Senator Pirsch would yield, I would have some questions to ask him. [LB612]

SENATOR GLOOR: Senator Pirsch, would you yield? [LB612]

SENATOR PIRSCH: Yes, I'd be glad to. [LB612]

SENATOR WIGHTMAN: Senator Pirsch, as you know, you and I have talked off the mike on this. And my concern is the length of time, lengthening it from 4 to 12 years. As you well know, as an attorney, the statute of limitations is put in place to take care of stale claims, claims that maybe witnesses would die or become incapacitated or not be able to testify. And that applies to witnesses on both sides. And I know you told me off the mike, but I'd like to have you explain again how you arrived at the 12 years. [LB612]

SENATOR PIRSCH: I thank you, Senator Wightman, for that question. And this will not put us at the forefront by any means of the elongated statute of limitations for civil. And I'm not talking about criminal. There are some states, I think Florida is one of them, I believe Connecticut is one of them as well, there may be more that already within the civil context, tort context allow for...there is no statute of limitation. So there is...I...and...so in that context, I do feel that this is a much more appropriate...we're not on the cutting-edge with respect to pushing the limit here. I think it's an effective balancing. Now let's look at if there is some concern about the statute of limitations, I

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would address your attention to the fact that we already have...let's turn our attention to the criminal cases. This is...what I'm proposing in this bill is strictly civil, deals with money, that sort of thing. But in the criminal context far greater repercussions can occur, including imprisonment, greater effects upon people's liberties. In this state, as in many, at least half the states I would say or approximately half the states, you can already, within a criminal sense there is no statute of limitations for child sexual assault. So if your concern is based upon too long of a statute of limitation, I think you need to look at what has actually occurred in the long period of time during which we have had no statute of limitations at all within the criminal context. You don't see any problematic occurrences within that, and there is no limits at all, not even...there's just none. And again, that's half the states. So I think, you know, that's pretty predictive in telling that even if we were to go with an unlimited, no statute of limitations, that it would be not problematic. But I'm not...because, you know, and I guess that as lawyers we are always trained to look at that very discriminatingly. And that's what has led me to believe that that balancing of interests...and part of it was, you said what motivated the 12 years in particular, it was taking a current survey of other states' laws, the 50 states. While this probably brings us to around the midpoint or slightly over midpoint, it certainly doesn't bring us to the cutting-edge of protecting the statute of limitations of child sexual assault victims. And so I think in that sense when I mention the word that it is modest, I truly believe that. In the future... [LB612]

SENATOR WIGHTMAN: Senator Pirsch, before my time runs out, if I maybe... [LB612]

SENATOR PIRSCH: Sure. [LB612]

SENATOR GLOOR: One minute. [LB612]

SENATOR WIGHTMAN: ...discuss one other...time or one minute? [LB612]

SENATOR PIRSCH: And I will yield you my time, too, then if you run out of time. But go ahead. [LB612]

SENATOR WIGHTMAN: Okay. I guess one of the areas that concerns me, we all have read and heard about the repressed memory cases and that some of these, there's been a real feeling that people have been wrongfully convicted under criminal statutes through the repressed memory cases. And that sometimes a psychiatrist may have planted that in the mind of the alleged victim, I will use in those cases, when there's a real question as to what really occurred. The person has no memory of it at all, and yet all of a sudden, with the assistance of a psychiatrist, they all of a sudden have memory. [LB612]

SENATOR GLOOR: Time, Senator. [LB612]

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SENATOR WIGHTMAN: Thank you. [LB612]

SENATOR GLOOR: Thank you, Senator Wightman. Thank you, Senator Pirsch. Senator Campbell, you are recognized. [LB612]

SENATOR CAMPBELL: Thank you, Mr. President and members of the body. I stand in support of the underlying bill and certainly of the amendment. And want to say that this is an important issue that I appreciate Senator Pirsch bringing to our attention. And I think that we only need to look at the headlines certainly in the fall of last year to understand that oftentimes there are many powerful influences that come to bear why people do not come forward and do not speak of these crimes to children and certainly youth extended beyond what we might think the age of a child. I would like to ask Senator Pirsch a question if he would yield. [LB612]

SENATOR GLOOR: Senator Pirsch, would you yield? [LB612]

SENATOR PIRSCH: I would be happy to. [LB612]

SENATOR CAMPBELL: Senator Pirsch, in light of what we had seen happening in Penn State, I certainly support the 12 years. Do you think that is sufficient as we have looked at the situation and how long it took for that to evolve? [LB612]

SENATOR PIRSCH: Well, I appreciate that question. And actually I have to tell you this bill had been written and dropped at a point in time before any of the Penn State incidents have evolved. But I think it has caused people to go back and reevaluate and pay attention to the, you know, the issue of development, mental development in children. I think it is a clear illustration of...and nobody now doubts that those incidents have occurred. And yet, it did take that long, I mean, for...and look at, if it had been nipped in the bud right away, the difference that may have occurred. So the question is, does it go far enough? I, you know, my own personal viewpoint is probably not. I would like to see longer. But this is the concept that was put forward and went through the process of the committee hearing in which people were invited to either become proponents of or opponents, of which only proponents spoke and no opponents spoke. So out of respect for the process and fairness, I can only guarantee that with respect to this specific proposal there are absolutely no opponents who came and testified. So I do appreciate the question. I think that kind of tells you that there is, you know, obviously some, you know, the concept of statute of limitation that weighs on some people at some point. But this is a very unique type of crime and one that deserves unique treatment. So I appreciate that question. [LB612]

SENATOR CAMPBELL: And again, colleagues, I certainly support the underlying bill and the amendment. And I am more than supportive of putting in 12 years and monitoring that situation and continuing to monitor what we see across this country.

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This is oftentimes a crime against children and youth that takes a long time to become evident. And we need to be cognizant of that. So I appreciate Senator Pirsch bringing it forward. And thank you, Mr. President. [LB612]

SENATOR GLOOR: Thank you, Senator Campbell. Senators wishing to speak: Howard, Wallman, Lautenbaugh, Pirsch, and Wightman. Senator Howard, you're recognized. [LB612]

SENATOR HOWARD: Thank you, Mr. President. It was certainly gratifying to me to see that this bill was passed out of the Judiciary Committee with unanimous support. And as Senator Pirsch pointed out, there were proponents to this bill, one, two, three, four individuals came in and spoke in support of this bill, and there were no opponents. I certainly stand in support of this bill and thank Senator Pirsch for bringing this issue to the Legislature this session. And I can tell you that children, by their very nature of being children, are not good witnesses. And county attorneys are often reluctant to bring a child in, knowing full well how easy it is for the defense attorney to shake the testimony of a child and, additionally, how cruel it is to put a child on a witness stand to be cross-examined. Often these children suffer the sexual abuse at the hands of a relative or someone living in their home, so they have little opportunity to be safe in their own environment or with their own families. Twelve years is not too long a period of time to give someone, as an adult, the opportunity to reconcile this issue with themselves, either through counseling or whatever other means of supportive services they're able to obtain and benefit from, but for them to come forth and to address it through our judicial system. So thank you, Senator Pirsch, again for bringing this to us. And I fully support this measure. [LB612]

SENATOR GLOOR: Thank you, Senator Howard. The Chair recognizes Senator Wallman. [LB612]

SENATOR WALLMAN: Thank you, Mr. President. And thank you, Senator Pirsch, for bringing this legislation forward. And I'd recommend you support this. Thank you, Mr. President. [LB612]

SENATOR GLOOR: Thank you, Senator Wallman. Senator Pirsch, you're recognized. [LB612]

SENATOR PIRSCH: As promised, I would yield as much time to Senator Wightman as he would care for so that we could continue our conversation. So I'd ask if Senator Wightman might yield. [LB612]

SENATOR GLOOR: Senator Wightman, would you yield? [LB612]

SENATOR WIGHTMAN: Yes, I will. [LB612]

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SENATOR PIRSCH: Senator Wightman, if we could continue our conversation, I believe that, because of my lengthy answer to your initial question, that you may not have had enough time to continue on your line of questioning. [LB612]

SENATOR WIGHTMAN: Yes. I do have a few other questions. And certainly it's not that I'm opposed to this bill or to the amendment. But anytime we lengthen the statute of limitations, I think we need to give due consideration to the reasons for that lengthening and try to determine whether that is the appropriate amount. For example, on civil cases I suspect you would have had 8-0 votes even had it said that you were going to have no statute of limitations. And you have indicated to me that some of the states have done that. And yet I probably would be opposed to that for sure, because I think that it gets around the very reason for statutes of limitation. So it may be that 12 years is the right length of time and the right statute of limitations. I have one other question before we continue on that dialogue. And that would be, is it your understanding that this will be retroactive? [LB612]

SENATOR PIRSCH: Thank you very much. And I was planning to address that, so thank you for bringing that question. And, yes, with the issue of retroactivity, in other words for that which has gone on in the past, sexual abuse, child sexual assaults, under the current existing regime those civil statutes of limitations applies and have terminated cases when the victim reaches age 25. And I cannot...any legislator lacks the constitutional authority to go back and, so to speak, unextinguish already extinguished statute of limitations. So the case law has been quite clear on that. So this is...there is no attempt at retroactivity to the extent that statute of limitations under the currently existing paradigm have already run. And there's nothing, you know, we as legislators encounter that in all that we do. That which has been finished through statute of limitations, we as legislators do not even have the power to go back and recreate. The courts have been quite clear of that. [LB612]

SENATOR WIGHTMAN: And that statute of limitations, I assume, dates from the time of the inappropriate act or unlawful act. Is that correct? [LB612]

SENATOR PIRSCH: Well, in this case it would...it is told under the current regime, because it is treated specially, until the child reaches 25. So if such child has already, under the currently existing regime, has reached the age of 25 then my understanding is there is nothing I can do to go back and resurrect that claim and make it active and valid. So in my estimation it is prospective. If there exists a statute of limitation that has not yet run, then I am able to extend that to this proposed 12 year. But that which has already extinguished because the child has reached 25 years of age... [LB612]

SENATOR GLOOR: One minute. [LB612]

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SENATOR PIRSCH: ...already, I can't, my understand is, do anything about...I lack the power to do anything about those type of cases. [LB612]

SENATOR WIGHTMAN: Okay, and I started to address that last time. The refreshed memory cases probably come to mind as one of the more doubtful areas in this in that I think that sometimes those are not very accurate. But I'm sure some of them and probably most of them are. But I think sometimes people have been wrongfully accused under those, and I think there are cases that indicate that. But that would be under criminal statutes I understand. [LB612]

SENATOR PIRSCH: Yeah, which cases? I'm sorry, I couldn't quite hear you. [LB612]

SENATOR WIGHTMAN: Repressed memory cases. [LB612]

SENATOR PIRSCH: Oh, repressed memory, and I'm glad you brought that doctrine up. Of course, that's a claim that deals...has to go through either, depending on the state, of Frye or Daubert, as we have Frye in the state now, but that is not uniformly accepted. That's such a tolling type... [LB612]

SENATOR GLOOR: Time, Senators. Thank you, Senators Pirsch and Wightman. Senator Flood, you're recognized for a Speaker's announcement. [LB612]

SPEAKER FLOOD: Thank you, Mr. President. Good morning, members. We've accomplished a lot this week and I know that committee hearings have been running late. After this bill is resolved we are going to quit for the week as far as our floor work, and we'll have hearings today at 1:30. So after LB612 is resolved or noon, whichever comes first, we'll go ahead and adjourn. And we'll be back in on Monday at 10:00 a.m. Thank you, Mr. President.

SENATOR GLOOR: Thank you, Mr. Speaker. Continuing floor debate, Senator Pirsch, you are recognized. [LB612]

SENATOR PIRSCH: Well, I just wanted to finish up in a few ways. And just say with respect to the repressed memory, and that's kind of a...it's not from statute that it has been created but a judge-created doctrine that allows for sometimes...the end effect is that the statute of limitations not to be strictly construed against a child sexual assault victim. And I think that when we, to the extent that we have very narrow laws that seem to cut off clear cases of child sexual assault through a statute of limitations, we run the risk of more...of having the utilization of doctrines, such as repressed memory and other type of doctrines, that have not in all jurisdictions been accorded with a certification that there is some scientific verification behind them. But in Nebraska in years past we have, my understanding is that that doctrine has been successfully alleged as a means of defeating child sexual assault statute of limitations. I think to the extent that we have a

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more reasonable statute of limitations in place, and I would posit this bill helps get us there, those type of doctrines, which some may label as strained, are less likely to be employed. That being said, I did want to speak about, and this was an interesting article in the paper recently, just a couple of days ago, this was the Omaha World-Herald, published January 25. It was within the context of a former Nebraskan who is a rape victim and now in South Dakota. And she talks about her experiences. She was 15 years...I'm sorry, it took more than 15 years, she indicates, to come to terms with the rape she endured as a teenager in Nebraska. Now she waited too long and her claim is extinguished. She now lives in a different state and is helping to pass appropriate laws in South Dakota. But she indicates, and this is I think fairly reflective of children who are at that developmental stage who undergo such a trauma. And she now, looking back, she's in her thirties, I believe, and she says, it was surreal. And she had...she was kind of betrayed by a family friend, one that her parents would have a really hard time believing could have done it. But she said, as a child you're not in a position to process and work through what's happened to you. I was 32 years old before I could finally do what I wish I could have done at 15. And so it's kind of ironic that she is kind of speaking at the point in her life when she's first able to process this, that meshes with what this law would hold as the new statute of limitations. And so I just wanted to mention that. Again, the...in terms of fairness, this does not resurrect any already extinct cases under the prior statute of limitations because we lack the authority of legislators to do so. It would be a... [LB612]

SENATOR GLOOR: One minute. [LB612]

SENATOR PIRSCH: ...constitutionally we're unable to. Given the fact that this specific proposal for this specific bump-out of years was considered in committee and unanimous support, no opposition at all, and I would ask for your vote in support of both the amendment, AM789, and the underlying bill. Thank you. [LB612]

SENATOR GLOOR: Thank you, Senator Pirsch. And, Senator Pirsch, that was your third time. Senators remaining in the queue: Nelson and Wightman. Senator Nelson, you are recognized. [LB612]

SENATOR NELSON: Thank you very much, Mr. President, members of the body. Just a quick question for Senator Pirsch. [LB612]

SENATOR GLOOR: Senator Pirsch, would you yield? [LB612]

SENATOR PIRSCH: Thank you. [LB612]

SENATOR NELSON: I think if I understood you, you said this does not raise any extinct cases. So you're talking about someone who had a cause of action but they didn't bring it before they were age 25. Is that correct? [LB612]

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SENATOR PIRSCH: Correct. [LB612]

SENATOR NELSON: All right. [LB612]

SENATOR PIRSCH: Yeah, we can't go back and undo that which has already been done. [LB612]

SENATOR NELSON: Well, what... [LB612]

SENATOR PIRSCH: And we're just talking about kids in the future. [LB612]

SENATOR NELSON: Yeah. So we have a 27- or 28-year-old who finally, whether refreshed or whatever,... [LB612]

SENATOR PIRSCH: Yes. [LB612]

SENATOR NELSON: ...comes to realize that he may have a cause of action, which I would suggest is often a powerful motive for coming forward. So doesn't this really serve to enlarge the time then that that person would be able to come and bring a cause of action now, if he or she hasn't done anything before, until they're age 32? Is that about what we're talking about here? [LB612]

SENATOR PIRSCH: Well, I appreciate that question. And though I agonize about it, I am constitutionally tied and unable to do anything for such an individual because they've already reached, as in your hypothetical they were 27, so thus they've passed into their 25th year and that... [LB612]

SENATOR NELSON: Okay. All right. So they've let that go by and they're precluded now. [LB612]

SENATOR PIRSCH: Yeah. And I wish that the reality for them in years past, under the law, that the law was not that which it was, but it...once done, the courts have been quite clear. We as legislators, our hands are shackled and tied. We cannot do anything for them. [LB612]

SENATOR NELSON: So where are we now when the law becomes effective then? Who is it applicable to? [LB612]

SENATOR PIRSCH: Yeah, and I appreciate that. Again, going...this is prospectively. And this bill is not aimed at any group or anything that...any one group in the past because this is...we're talking about looking forward and helping kids here in the future and protecting kids in the future, hopefully, making sure that they get help in the future.

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So going forward, for all cases now it would not be...it used to be that at 25 they were extinguished, now they can through 32. So it's, as I estimate, gives a little bit more time for kids to pass into adulthood, internalize the fact that this trauma, and I got to tell you, I've seen so many kids just never have that ability to get over it. And it's a lot of kids. But it gives a little bit more time for them to try to internalize what has happened and understand that they can do something to help pay for their therapy and that kind of thing. [LB612]

SENATOR NELSON: All right. All right. Thank you, Senator Pirsch. I do stand in support then of LB612 and AM789. Thank you, Mr. President. [LB612]

SENATOR GLOOR: Thank you, Senator Nelson. Senator Wightman, you are recognized. [LB612]

SENATOR WIGHTMAN: Thank you, Mr. President. I'll try to do this in 30 seconds or less. I do plan to support both LB612 and AM789. I do also think that anytime we're looking at a statute of limitations we need to discuss that, because there is a reason for statute of limitations. And a lot of that has to do with the fact that witnesses may die, memories may become fainter. And so it's a major area when you start talking about raising statute of limitations. With that, as I say, I will support the bill and the amendment. Thank you, Mr. President. [LB612]

SENATOR GLOOR: Thank you, Senator Wightman. The Chair recognizes Senator Schumacher. [LB612]

SENATOR SCHUMACHER: Thank you, Mr. Chairman, members of the body. This is an interesting phenomenon, one that we probably never really wanted to admit exists. But I'm wondering if this approach is necessarily the right approach to it or whether or not there may be other approaches and maybe this is just part of the approach to dealing with it. I saw a survey the other day which was very surprising. They did a survey which was confidentially done by a health agency of ninth graders. And the number in this particular survey of girls who claimed that they had been subjected forcibly against their will to sexual activity, sexual intercourse, 14 percent. And 5.7 percent of boys in the ninth grade claimed they had been subjected to what I take would have been sodomy. If this kind of conduct is occurring and if these kids claim they are recognizing it in the ninth grade, then perhaps, as good as or maybe better than waiting until they're 30 years old in order to bring a lawsuit against somebody, we should try to address the problem and bring the lawsuit while everything is fresh in everyone's mind and the evidence is there to prosecute it if it's true and to defend it if it's not true. I think there's pretty good scientific evidence to show that as time goes on there may be a core of an experience that is then unconsciously embellished in dreams and beliefs and repeats and nightmares that may or not in the end resemble reality. And somehow those...the interest of justice needs to be balanced there too. I would think that maybe while we're

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on this topic, and Senator Pirsch is addressing it, we might want to think of a mechanism for triggering these lawsuits sooner and so that the evidence is still there in the cases where they are true, and there's a viable defense and ability to clear one's name in the event it is not true. Thank you, Mr. Chairman. [LB612]

SENATOR GLOOR: Thank you, Senator Schumacher. There are no senators remaining in the queue. Senator Ashford, you're recognized to close on the Judiciary Committee amendment. Senator Ashford waives. The question before the body is, shall the committee amendments to LB612 be adopted? All those in favor vote aye; all those opposed vote nay. Record, Mr. Clerk. [LB612]

CLERK: 35 ayes, 0 nays on adoption of committee amendments. [LB612]

SENATOR GLOOR: The amendment is adopted. Discussion continues on the advancement of LB612 to E&R Initial. There are no senators wishing to be recognized. Senator Pirsch, you're recognized to close on the advancement of LB612. [LB612]

SENATOR PIRSCH: Thank you, members of the body. In closing, I'd just like to point out I really do appreciate, and, Senator Wightman, thank you for that conversation. I'd be concerned if we weren't having a conversation about a statute of limitations during this discussion. I think that there is...it's a very...had to happen. So I appreciate that. With respect to this type of crime and tort, boy, I think this isn't designed to be a one cure-all to the situation. And I think Senator Schumacher brings up a great point that we can't just let the concept or the idea pass and think that we're addressing it squarely just with this bill. And he brings up a lot of points. Whatever we can do to help eliminate this...I can't tell, as a lawyer again, a prosecutor dealing with a number of cases involving child victims of sexual assault and as an attorney practicing in the juvenile courts, I can tell you it's affecting a lot of young kids, their lives, their families' lives. And it is affecting as well the taxpayers of the state of Nebraska and all Nebraskans. The productivity of these kids, of their families is just lost. There's an enormous amount of costs that are going into the...helping to try to deal with the ruins of a lot of...and the effects of a lot of this victimization. So I look forward with Senator Schumacher to look at other things that we can do to address this crime and tort. And again, I thank you for the conversation that we've had here today, and urge you to pass LB612. Thank you. [LB612]

SENATOR GLOOR: Thank you, Senator Pirsch. The question is the advancement of LB612 to E&R Initial. Those in favor vote aye; those opposed vote nay. Record, Mr. Clerk. [LB612]

CLERK: 35 ayes, 0 nays, Mr. President, on the advancement of the bill. [LB612]

SENATOR GLOOR: The bill advances. Mr. Clerk, items for the record. [LB612]

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CLERK: An amendment to LB216A by Senator Coash to be printed. Senator Mello would like to add his name to LB50. (Legislative Journal page 363.) [LB216A LB50]

And an adjourn motion: Senator Dubas would move to adjourn the body until Monday morning, January 30, at 10:00 a.m.

SENATOR GLOOR: Members, you have heard the motion to adjourn until January 30 at 10:00 a.m. All those in favor say aye. All those opposed say nay. We stand adjourned.