

THE PRICE OF JUSTICE:  
INTEREST-CONVERGENCE, COST, AND THE  
ANTI-DEATH PENALTY MOVEMENT

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**ABSTRACT**—While thirty-two states in the United States still authorize capital punishment, this country finds itself in the midst of an undisputed trend towards states outlawing the death penalty. Over the past six years, legislatures in six states have abolished capital punishment—breaking a three-decade-long death penalty reform stalemate. Although anti-death penalty advocates have fought to abolish capital punishment in the United States for over two centuries, their successes were fairly minimal until recently. What accounts for the anti-death penalty movement’s recent success? This Note argues that “interest-convergence,” a theory developed by Professor Derrick Bell, provides one important explanation. Within the past decade, anti-death penalty advocates have placed less emphasis on the moral arguments against capital punishment, focusing more on the costs and inefficiencies of the practice. In turn, state legislatures have been receptive to the anti-death penalty movement’s cost arguments, especially in light of the recent economic crisis. In other words, by giving state legislatures a self-interested reason to abolish capital punishment—saving their constituents millions of dollars (and increasing their chances of reelection)—anti-death penalty advocates have aligned state lawmakers’ interests with their own. The result has been an apparent turning point for death penalty reform in America.

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INTRODUCTION

While thirty-two states in the United States still authorize capital punishment, this country finds itself in the midst of an undisputed trend towards states outlawing the death penalty.<sup>1</sup> When New Jersey’s legislature repealed the state’s capital punishment statute in 2007, it became the first state legislature to abolish the death penalty since 1976.<sup>2</sup> Over the past six years, five other state legislatures have followed suit.<sup>3</sup> Although anti-death penalty advocates have fought to abolish capital punishment in the United States for over two centuries, their successes were fairly minimal until recently. What accounts for the anti-death penalty movement’s recent

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<sup>1</sup> See Valerie Richardson, *States Slowly Killing Capital Punishment*, WASH. TIMES, Dec. 26, 2012, at A01 (“The death penalty, already on the decline across the United States, could face its own demise at the hands of several state legislatures next year.”); *States With and Without the Death Penalty*, DEATH PENALTY INFO. CENTER (DPIC), <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Mar. 26, 2014); *The Death Penalty: Another Reprieve*, ECONOMIST, Apr. 21, 2012, at 44 (describing Connecticut’s repeal of capital punishment as “part of a growing trend”); *US: Momentum Against the Death Penalty*, HUMAN RTS. WATCH (Apr. 12, 2012), <http://www.hrw.org/news/2012/04/12/us-momentum-against-death-penalty> (stating that “the momentum against the death penalty [in the United States] is gaining force”).

<sup>2</sup> Robert J. Martin, *Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute*, 41 U. TOL. L. REV. 485, 485 (2010).

<sup>3</sup> Since 2007, New Jersey, New York, New Mexico, Illinois, Connecticut, and Maryland have abolished the death penalty. See *States With and Without the Death Penalty*, *supra* note 1.

success? This Note attempts to provide an answer to this question and concludes that one partial explanation is a straightforward one: interest-convergence.

For decades, the anti-death penalty movement suffered from “too few members, too little money, and too little broad appeal in the messages the movement has tried to deliver.”<sup>4</sup> Over the past twenty years, however, the anti-death penalty movement’s strategy has shifted away from fighting the death penalty solely on moral grounds. Although anti-death penalty advocates continue to argue that the death penalty is morally wrong, within the past decade advocacy organizations have increasingly advanced economic rationales for opposing death sentences. Specifically, they argue that because capital punishment is irrationally expensive and ineffective, it wastes money and steals resources from other state needs. In other words, the opportunity costs of the death penalty are too great.

In turn, state legislatures, still coming to grips with the wake of the recent financial crisis, have proved receptive to the anti-death penalty movement’s cost arguments. In statements supporting the abolition of the death penalty, many state lawmakers have pointed to the high costs of capital punishment.<sup>5</sup> In fact, it has been recognized that cost was an important factor behind the legislatures’ decisions to abolish the death penalty in New Jersey and New Mexico.<sup>6</sup>

As this Note illustrates, in addition to New Jersey and New Mexico, cost played a major role in the abolition of capital punishment in Illinois, Connecticut, and Maryland. Cost has also influenced lawmakers in several other states to introduce death penalty repeal bills that eliminate capital punishment as a sentencing possibility. More importantly, however, this Note argues that the success of the cost argument did not occur entirely by happenstance, as others have suggested.<sup>7</sup> Rather, its success resulted from a deliberate effort by anti-death penalty advocates throughout the country to bring economic arguments to the public’s attention.

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<sup>4</sup> HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972–1994*, at 5 (1996).

<sup>5</sup> See, e.g., N.J. SENATE BUDGET APPROPRIATIONS COMM., STATEMENT TO SENATE COMMITTEE SUBSTITUTE FOR SENATE, NOS. 171 AND 2471, at 3 (2007), available at [http://www.njleg.state.nj.us/2006/Bills/S0500/171\\_S2.PDF](http://www.njleg.state.nj.us/2006/Bills/S0500/171_S2.PDF); Carolyn McGinn, *McGinn: Abolishing Death Penalty Way to Go*, THE KANSAN (Feb. 27, 2009), <http://www.thekansan.com/article/20090227/NEWS/302279966#art-tit> (stating that overturning the death penalty would save Kansas “more than \$500,000 per case”); Press Release, Senator Loni Hancock, Hancock to Introduce Legislation to Ban Death Penalty (June 20, 2011), <http://sd09.senate.ca.gov/news/2011-06-21-hancock-introduce-legislation-ban-death-penalty> (stating that “capital punishment is an expensive failure” that “is helping to bankrupt us”).

<sup>6</sup> See Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 161.

<sup>7</sup> See, e.g., *id.*; Rob Warden, *How and Why Illinois Abolished the Death Penalty*, 30 LAW & INEQ. 245, 246, 278–79 (2012) (referring to the cost issue as one of the “many serendipitous milestones on the path to [death penalty] abolition in Illinois”).

Accordingly, the recent trend toward repealing death penalty laws should be viewed through the lens of an “interest-convergence” narrative. The concept of interest-convergence finds its roots in the late Derrick Bell’s work on the civil rights movement.<sup>8</sup> Bell argued that racial desegregation in the United States occurred largely because African Americans’ interest in achieving equality converged with white policymakers’ interests in maintaining the country’s reputation during the Cold War and promoting economic growth in the South.<sup>9</sup> Applying Bell’s interest-convergence theory to the death penalty context, this Note demonstrates that the abolition of the death penalty in several states has partly resulted from a convergence between anti-death penalty advocates’ interests in ending capital punishment and state lawmakers’ interests in balancing the budget and appearing fiscally responsible in a time of financial crisis. By focusing on the costs and inefficiencies of capital punishment, the anti-death penalty movement has given state policymakers a self-interested reason to abolish capital punishment: saving their constituents millions of dollars (and increasing their chances at reelection).

Part I of this Note describes Derrick Bell’s interest-convergence theory, as well as ways in which contemporary scholars have applied and challenged the theory. Next, Part II discusses the history of the anti-death penalty movement and its previous focus on moral arguments against capital punishment. Part III then describes the movement’s recent shift towards creating an interest-convergence story by attacking state death penalty laws on fiscal grounds. This Part specifically focuses on the anti-death penalty movement’s successful campaigns to repeal state death penalty statutes in New Jersey, New Mexico, Illinois, Connecticut, and Maryland. Finally, Part IV examines challenges to the cost argument and suggests reasons why interest-convergence has helped end the death penalty in some states but not in others.

This Note does not claim that interest-convergence is the only factor behind the repeal of death penalty statutes in New Jersey, New Mexico, Illinois, Connecticut, and Maryland. Scholars who have studied death penalty abolition in these states correctly point to certain state-specific conditions that made abolition possible. Rob Warden, for example, argues that exoneration of twelve death row inmates between 1987 and 1999 played a central role in the abolition of the death penalty in Illinois.<sup>10</sup> Writing about death penalty abolition in New Jersey, Robert Martin maintains that the repeal would not have occurred without support from

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<sup>8</sup> See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–26 (1980) (arguing that the interest-convergence between African Americans and white policymakers was one of the reasons behind the success of the civil rights movement).

<sup>9</sup> See *id.* at 524–25.

<sup>10</sup> Warden, *supra* note 7, at 245, 247–62.

key Democrats in the state legislature.<sup>11</sup> Although state-specific factors are an important piece of the death penalty abolition puzzle, they do not explain why states in general are breaking the three-decade-long death penalty reform stalemate.<sup>12</sup> By looking at the recent trend as an interest-convergence story, however, one can see the reason for the state momentum—and why it is gaining speed.

### I. DERRICK BELL'S INTEREST-CONVERGENCE THEORY

Derrick Bell, a law professor and pioneer of critical race theory, first introduced the idea of “interest-convergence” in the context of the civil rights movement.<sup>13</sup> Bell argued that desegregation in the United States, and specifically the U.S. Supreme Court’s decision in *Brown v. Board of Education*,<sup>14</sup> was not solely based on the Court’s interest in remedying injustice against blacks in America.<sup>15</sup> Instead, the Court’s “sudden shift . . . away from the separate but equal doctrine and towards a commitment to desegregation” largely occurred because “it converge[d] with the interests of whites.”<sup>16</sup> According to Bell, white policymakers were interested in ending racial segregation in the United States because of the “economic and political advances at home and abroad that would follow [its] abandonment.”<sup>17</sup> They recognized that desegregation would not only improve the country’s international reputation during the Cold War, but also help further industrialization in the South.<sup>18</sup> Ultimately, Bell believed that “[blacks] could not obtain meaningful relief until policymakers perceived that the relief blacks sought furthered [their own] interests.”<sup>19</sup>

Numerous scholars have since applied Bell’s interest-convergence theory to modern racial justice issues, as well as other areas of law and policy.<sup>20</sup> For example, many scholars, including Bell, have used interest-

<sup>11</sup> See Martin, *supra* note 2, at 524–30.

<sup>12</sup> See Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007, at B3 (stating that in December 2007, “New Jersey [became] the first state to repeal the death penalty since the United States Supreme Court set the framework for the modern capital punishment system in 1976”).

<sup>13</sup> See generally Bell, *supra* note 8 (introducing “the interest-convergence dilemma” for civil rights litigation—the idea that whites would only help African Americans achieve equality in the United States if it was in their own interests); Fred A. Bernstein, *Derrick Bell, Pioneering Law Professor and Civil Rights Advocate, Dies at 80*, N.Y. TIMES, Oct. 7, 2011, at A18.

<sup>14</sup> 347 U.S. 483 (1954).

<sup>15</sup> See Bell, *supra* note 8, at 524.

<sup>16</sup> *Id.* at 523–24.

<sup>17</sup> *Id.* at 524.

<sup>18</sup> *Id.* at 524–25.

<sup>19</sup> Derrick Bell, Jr., *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1624 (2003).

<sup>20</sup> See Stephen M. Feldman, *Do the Right Thing: Understanding the Interest-Convergence Thesis*, 106 NW. U. L. REV. COLLOQUY 248, 248 & n.2 (2012) (listing the various scholars who have “extended [Bell’s theory] to other contexts”); see also, e.g., Justin Stec, *The Deconcentration of Poverty as an Example of Derrick Bell’s Interest-Convergence Dilemma: White Neutrality Interests, Prisons, and*

convergence to explain affirmative action policies.<sup>21</sup> According to Bell, affirmative action in higher education developed because of a convergence between minority students' interests in attending elite universities and businesses' interests in having their future employees exposed to a diverse student body.<sup>22</sup> In other words, universities enacted affirmative action programs because they made their student bodies more appealing to employers, thereby benefiting the universities. They did not enact affirmative action programs—at least not solely—out of an equitable interest in remedying social consequences of past discrimination.<sup>23</sup> Similarly, other scholars argue that minorities can prevent racial discrimination in employment by appealing to employers' interest in a diverse work environment.<sup>24</sup>

Fewer scholars have applied Bell's interest-convergence theory outside of racial contexts. Applying interest-convergence to animal rights, Joseph Lubinski argues that humans usually only act to protect animal rights when doing so serves a human interest.<sup>25</sup> Accordingly, he suggests that activists can achieve animal rights reform by, for example, pointing to studies that link eating meat with an increased risk of cancer.<sup>26</sup> Considering interest-convergence in a religious context, Stephen Feldman argues that religious minorities benefit from greater rights when their interests converge with the interests of Christians because Christians make up the majority of American society.<sup>27</sup> Taking the interest-convergence concept further, Cynthia Lee developed the concept of "cultural convergence," which posits that a criminal defendant's use of cultural evidence to mitigate a charge or sentence—the so-called "cultural defense"—is more likely to

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*Changing Inner Cities*, 2 NW. J.L. & SOC. POL'Y 30, 30 (2007) (applying Bell's theory to modern poverty deconcentration programs).

<sup>21</sup> See, e.g., Richard Delgado, *Rodrigo's Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23, 54–55 (2006); Amy Christian McCormick & Robert A. McCormick, *Race and Interest Convergence in NCAA Sports*, 2 WAKE FOREST J.L. & POL'Y 17, 18–19 (2012).

<sup>22</sup> Bell, *supra* note 19, at 1624–26.

<sup>23</sup> See Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1767 (2004) (“[A]ffirmative action in college admissions is a partial remedy for the social consequences of past and present discrimination in public education.”).

<sup>24</sup> See, e.g., Joseph C. Feldman, *Standing and Delivering on Title VII's Promises: White Employees' Ability to Sue Employers for Discrimination Against Nonwhites*, 25 N.Y.U. REV. L. & SOC. CHANGE 569, 600–01 (1999); Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence*, 48 HOW. L.J. 937, 959 (2005).

<sup>25</sup> See Joseph Lubinski, Note, *Screw the Whales, Save Me! The Endangered Species Act, Animal Protection, and Civil Rights*, 4 J.L. SOC'Y 377, 407 (2003) (“[I]n the case of animals, society is likely to only act to substantially protect animal life when a human interest is implicated.”).

<sup>26</sup> *Id.* at 411.

<sup>27</sup> STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE 273–75 (1997).

succeed in a U.S. court when the cultural norms underlying the defense converge with American cultural norms.<sup>28</sup> Scholars have also used Bell's interest-convergence theory in the context of poverty deconcentration policies,<sup>29</sup> immigration reform,<sup>30</sup> and same-sex marriage laws.<sup>31</sup>

Not all scholars, on the other hand, have embraced Bell's interest-convergence theory. Namely, Justin Driver argues that by relying on moments of "fortuity," Bell's theory affords a "near total absence of agency to both black citizens and white citizens."<sup>32</sup> Driver's critique is an important one. As Driver concedes, Bell did recognize the important role that civil rights activists played in achieving racial equality.<sup>33</sup> Yet, Bell also referred to blacks as "fortuitous beneficiaries" of the interest-convergence phenomenon.<sup>34</sup> Accordingly, Bell seemingly undermined the role of black activists by treating their work as secondary to the fortuitous events—the Cold War and economic growth in the South—that made policymakers view desegregation as beneficial to their own interests.<sup>35</sup> Stephen Feldman, however, argues that Driver's critique suffers from a "misunderstanding of the interest-convergence thesis as future-oriented."<sup>36</sup> Instead of using interest-convergence as "a strategy for the future," Feldman argues that scholars should use interest-convergence only as "a tool . . . to help explain historical developments related to social justice."<sup>37</sup> Driver and Feldman are equally right and wrong. Feldman correctly notes that Bell used interest-convergence to prove a historical pattern,<sup>38</sup> with hindsight's full benefit. At the same time, reducing interest-convergence to a retrospective theory with no value as an affirmative strategy for advocates would be ill-advised.

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<sup>28</sup> See Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 939 (2007).

<sup>29</sup> See Stec, *supra* note 20.

<sup>30</sup> See George A. Martínez, *Arizona, Immigration, and Latinos: The Epistemology of Whiteness, the Geography of Race, Interest Convergence, and the View from the Perspective of Critical Theory*, 44 ARIZ. ST. L.J. 175, 195–200 (2012).

<sup>31</sup> See Keeva Terry, *Same-Sex Relationships, DOMA, and the Tax Code: Rethinking the Relevance of DOMA to Straight Couples*, 20 COLUM. J. GENDER & L. 384, 384 (2011) (arguing that "the interests of same-sex couples are only accommodated when they coincide with the interests of heterosexual couples").

<sup>32</sup> Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 165 (2011).

<sup>33</sup> *Id.* at 176 n.143 (noting that "Bell's early formulation of the interest-convergence thesis demonstrated considerably greater awareness of . . . black agency" (citing Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME LAW. 5, 28 (1976))).

<sup>34</sup> DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPE FOR RACIAL REFORM* 159 (2004).

<sup>35</sup> See Driver, *supra* note 32, at 176 (arguing that Bell's interest-convergence theory underestimates the power of litigation strategies and mobilization).

<sup>36</sup> Feldman, *supra* note 20, at 256.

<sup>37</sup> *Id.* at 259.

<sup>38</sup> *Id.*

This Note supports Bell's interest-convergence theory and refutes Driver's view that interest-convergence and agency are incompatible.<sup>39</sup> It also refutes Feldman's argument that interest-convergence cannot be forward-looking.<sup>40</sup> After discovering the substantial cost implications of state death penalty laws, anti-death penalty advocates started to emphasize the economic benefits that would result from abolition of the death penalty.<sup>41</sup> They created an interest-convergence story that aligned the interests of death penalty advocates with nonmoral interests of state policymakers and succeeded in influencing policymakers' decisions to end capital punishment. This contradicts Feldman's suggestion that advocates cannot use interest-convergence as a strategy for achieving *future* social change. And although certain coincidental events, such as the 2008 financial crisis, were likely necessary for the cost argument to succeed, the interest-convergence was made possible by the anti-death penalty movement's cost-focused campaign. Thus, contrary to Driver's argument,<sup>42</sup> the anti-death penalty movement did not wait passively for interest-convergence to occur.

## II. BACKGROUND: THE ANTI-DEATH PENALTY MOVEMENT, 1790S–1990S

Although a powerful anti-death penalty movement itself cannot bring an end to capital punishment in the United States, “it is a necessary precondition.”<sup>43</sup> Between the 1790s and 1990s, anti-death penalty advocates led numerous campaigns to abolish capital punishment throughout the country. Specifically, they argued for an end to the death penalty on grounds that it was morally wrong, and even unconstitutional. Yet, the movement's moral arguments failed to convince state legislatures or the U.S. Supreme Court to put an end to capital punishment. In fact, by the end of the twentieth century, the death penalty in America was thriving.

### A. *The Early Years*

Americans first started to voice their opposition to the death penalty when the United States gained independence from England in the eighteenth century.<sup>44</sup> Although capital punishment was less prevalent in the

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<sup>39</sup> See Driver, *supra* note 32, at 175–76 (“[A]ccord[ing] [them] an almost complete absence of agency[.] . . . interest-convergence . . . views black people as mere ‘fortuitous beneficiaries’ and instructs them to expect . . . advances toward racial equality . . .”).

<sup>40</sup> Feldman, *supra* note 20, at 257 (arguing that “interest-convergence [is not] a forward-looking thesis that . . . predict[s] future behavior”).

<sup>41</sup> See *infra* Part III.

<sup>42</sup> See generally Driver, *supra* note 32, at 190 (stating that “[a] leading consequence of subscribing to the interest-convergence theory as the only (or even the predominant) method of achieving reform is its inculcation of passivity in its adherents”).

<sup>43</sup> HAINES, *supra* note 4.

<sup>44</sup> *Furman v. Georgia*, 408 U.S. 238, 336 (1972) (Marshall, J., concurring).

American colonies, by the eighteenth century, each colony recognized an average of twelve capital crimes.<sup>45</sup> During the anti-death penalty movement's early years, advocates based their opposition to the death penalty solely on moral arguments. They generally argued that it is morally wrong to kill another human being, whether that killing is done by an individual or the state.<sup>46</sup>

In contrast to later years, anti-death penalty advocates in the late 1700s focused their efforts on narrowing death-eligible offenses to particularly heinous crimes, rather than abolishing the death penalty altogether.<sup>47</sup> For example, Benjamin Rush, one of the signers of the Declaration of Independence, worked with the then-Pennsylvania Attorney General to repeal the death penalty in Pennsylvania for all offenses except for first-degree murder.<sup>48</sup> Thomas Jefferson, John Jay, and James Madison also all supported limiting the use of the death penalty.<sup>49</sup>

The anti-death penalty movement shifted towards a fight for abolition in the 1800s.<sup>50</sup> Many Americans, who, like those who opposed slavery, called themselves "abolitionists," lobbied for death penalty abolition bills in state legislatures throughout the mid-1800s.<sup>51</sup> Anti-death penalty lobbyists helped abolish capital punishment in Michigan in 1847,<sup>52</sup> Rhode Island in 1852, and Wisconsin in 1853,<sup>53</sup> as well as several other states at the turn of the century.<sup>54</sup> Their success, however, was temporary: all but three of the states reversed the legislation by the end of World War I.<sup>55</sup>

In the 1920s, the newly created American League to Abolish Capital Punishment (ALACP) helped to reenergize the anti-death penalty movement. The ALACP's primary goals included coordinating campaigns

<sup>45</sup> *Id.* at 335.

<sup>46</sup> See LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865, at 3–5 (1989); *Furman*, 408 U.S. at 296–97 (Brennan, J., concurring).

<sup>47</sup> See HAINES, *supra* note 4, at 8 (“[W]hereas relatively few [abolitionists] called for complete abolition of the death penalty during the eighteenth century, many more did so by the early 1830s.”).

<sup>48</sup> Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 3, 6–7 (2002).

<sup>49</sup> *Id.* at 6 n.26.

<sup>50</sup> See *id.* at 7 (describing the anti-death penalty's abolition efforts in the 1800s).

<sup>51</sup> HAINES, *supra* note 4, at 5, 8.

<sup>52</sup> Michigan only retained capital punishment for individuals who committed treason against the state. Phillip English Mackey, *Introduction* to VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, 1787–1975, at xxvi (Phillip English Mackey ed., 1976).

<sup>53</sup> *Id.* at xxvi–xxviii.

<sup>54</sup> *Furman v. Georgia*, 408 U.S. 238, 372 app. I (1972) (Marshall, J., concurring) (listing seven other states that abolished capital punishment between 1872 and 1914).

<sup>55</sup> *Id.* at 339–40 (stating that four states reinstated capital punishment “under the nervous tension of World War I”). Michigan, Minnesota, and Wisconsin were the only states that did not restore capital punishment at this time. *Id.* at 372 app. I (listing states that abolished and restored the death penalty between 1846 and 1968).

to introduce state abolition bills and educating the public about capital punishment, including the moral and practical problems involved with the practice.<sup>56</sup> The ALACP also helped undermine the deterrence rationale for the death penalty by conducting some of the first empirical investigations on the deterrent effect of capital punishment.<sup>57</sup> The ALACP argued that, contrary to the arguments of death penalty supporters, the death penalty does not deter dangerous criminals from committing crimes.<sup>58</sup> The organization's founders, including Clarence Darrow and Lewis Lawes,<sup>59</sup> were also some of the first activists to present information on racial discrimination in capital sentencing.<sup>60</sup> Despite the influential role that the ALACP played in the anti-death penalty movement, the organization failed to achieve any changes in state death penalty policies.<sup>61</sup>

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<sup>56</sup> HAINES, *supra* note 4, at 10–11.

<sup>57</sup> *Id.*; see Jay Holmes, *Retention of Death Penalty Favored by Judges, Lawyers*, AMSTERDAM RECORDER, Sept. 12, 1957, at 11 (stating that the ALACP and other organizations disagreed with claim that capital punishment deterred crime). Supporters of the death penalty argue that the threat of capital punishment deters people from committing capital offenses more than the threat of long-term imprisonment because death is unarguably the most severe sanction. Michael L. Radelet & Marian J. Borg, *The Changing Nature of Death Penalty Debates*, 26 ANN. REV. SOC. 43, 44–45 (2000).

<sup>58</sup> See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 218 (2002) (“The American League to Abolish Capital Punishment collected homicide data from the Census Bureau to demonstrate that the states with capital punishment had an average homicide rate more than twice as high as those without.”). The problem with the deterrence argument, for both sides of the debate, is that the deterrent effect of the death penalty is difficult to prove. See *Gregg v. Georgia*, 428 U.S. 153, 184–85 (1976) (opinion of Stewart, Powell & Stevens, JJ.) (plurality opinion) (stating that the results of statistical attempts to evaluate the deterrent effect of the death penalty have been inconclusive); David P. Phillips, *The Deterrent Effect of Capital Punishment: New Evidence on an Old Controversy*, 86 AM. J. SOC. 139, 146 (1980) (arguing that capital punishment has a short-term, but not long-term deterrent effect). Compare Isaac Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 J. POL. ECON. 741, 741 (1977) (arguing that “[f]indings indicate a substantial deterrent effect of [capital] punishment on murder and related violent crimes”), with William J. Bowers & Glenn L. Pierce, *The Illusion of Deterrence in Isaac Ehrlich’s Research on Capital Punishment*, 85 YALE L.J. 187, 187 (1975) (arguing that Ehrlich’s research on capital punishment “failed to provide any reliable evidence that the death penalty deters murder”).

<sup>59</sup> See MICHAEL KRONENWETTER, *CAPITAL PUNISHMENT: A REFERENCE HANDBOOK* 119, 170 (2d ed. 2001) (listing Clarence Darrow and Lewis Lawes as two founders of the ALACP).

<sup>60</sup> See, e.g., CLARENCE DARROW, *FARMINGTON* 212–13 (1904); KRONENWETTER, *supra* note 59, at 119; Lewis E. Lawes, *The Death Penalty at Sing Sing*, 59 SURV. MIDMONTHLY 69, 70 (1927).

<sup>61</sup> In fact, during the 1930s, there were more executions than in any other decade. *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 10 (Hugo Adam Bedau ed., 1997). From 1930 to 1939, 1667 prisoners were executed in the United States. LARRY J. SIEGAL & CLEMENS BARTOLLAS, *CORRECTIONS TODAY* 304 (2011). At the same time, Gallup conducted its first poll on the death penalty in 1936 and found that 59% of Americans supported imposing capital punishment for murder convictions. *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Mar. 26, 2014) [hereinafter *Death Penalty*, GALLUP].

### B. *The Mid-Twentieth Century*

The anti-death penalty movement became more powerful in the 1950s and helped accomplish important legislative reforms, some of which were permanent. Between 1957 and 1965, anti-death penalty advocates helped pass abolition bills in Delaware, Oregon, West Virginia, Hawaii, and Alaska.<sup>62</sup> Meanwhile, Vermont, New York, and New Mexico passed legislation that limited the death penalty to extraordinary offenses.<sup>63</sup> At the same time, the yearly rate of executions started to decline, especially in the northern and western regions of the country.<sup>64</sup> For example, while 199 executions took place in 1935, there were 117 executions in 1945 and only 76 executions by 1955.<sup>65</sup>

Along with the declining rate of executions, the establishment of several anti-death penalty organizations in the 1950s and 1960s strengthened the movement's efforts. Some of these organizations, including Citizens Against Legalized Murder (CALM), the New Jersey Council to Abolish Capital Punishment, and the Ohio Committee to Abolish Capital Punishment were affiliated with the ALACP.<sup>66</sup> These organizations inspired the American Civil Liberties Union (ACLU) to come out against the death penalty in 1965 and establish its "Capital Punishment Project" in the 1970s to help coordinate the activities of anti-death penalty organizations throughout the country.<sup>67</sup>

Despite growth in the anti-death penalty movement in the 1950s and 1960s, the movement faced a fairly major setback in 1962 when the American Law Institute (ALI) decided not to recommend the abolition of the death penalty when it created the Model Penal Code (MPC)—a largely successful attempt to codify criminal law in the United States.<sup>68</sup> Before creating the MPC, the ALI commissioned Thorsten Sellin—a renowned criminologist at the University of Pennsylvania,<sup>69</sup> as well as a board member of the ALACP<sup>70</sup>—to produce a major research report addressing capital punishment.<sup>71</sup> Sellin's research focused on main issues within the death penalty debate at the time, including deterrence, proportionality, and

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<sup>62</sup> See Kirchmeier, *supra* note 48, at 11–12.

<sup>63</sup> WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982*, at 9 (1984).

<sup>64</sup> HAINES, *supra* note 4, at 11–12.

<sup>65</sup> *Id.* at 12.

<sup>66</sup> *Id.*

<sup>67</sup> See *id.* at 25, 49.

<sup>68</sup> See Russell Dean Covey, *Exorcizing Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 *HASTINGS CONST. L.Q.* 189, 190, 202–06 (2004).

<sup>69</sup> Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 *COLUM. L. REV.* 1396, 1400 (2005).

<sup>70</sup> HAINES, *supra* note 4, at 11.

<sup>71</sup> *Id.*; see THORSTEN SELLIN, *THE DEATH PENALTY* (1959).

racial discrimination.<sup>72</sup> Despite Sellin's findings that capital punishment had no deterrent effect on homicide rates,<sup>73</sup> however, the ALI decided not to recommend abolition.<sup>74</sup>

### C. *The Civil Rights Era*

While the anti-death penalty movement had previously focused on abolishing capital punishment through state legislation, in the late 1960s, the movement's focus shifted to the courts. Several organizations, such as the ACLU and the NAACP Legal Defense and Education Fund (LDF), focused on challenging the constitutionality of the death penalty by appealing capital cases.<sup>75</sup> For a short period in the 1960s, public support for capital punishment reached its lowest levels in recorded history, with almost half of Americans opposing the death penalty.<sup>76</sup>

The LDF developed a death penalty "moratorium strategy" in 1966.<sup>77</sup> Under its strategy, the LDF aimed to block all executions in the United States by representing every death row inmate who sought the organization's assistance.<sup>78</sup> At the same time, the organization challenged the constitutionality of the death penalty on grounds that complete jury discretion in capital cases violated the Eighth and Fourteenth Amendments to the Constitution.<sup>79</sup> To carry out the moratorium strategy, LDF reached out to a number of national and state anti-death penalty organizations and intervened in hundreds of capital cases throughout the country.<sup>80</sup> In 1968, the LDF organized a National Conference on Capital Punishment in New York for over one hundred lawyers and advocates with the goal of developing a more cohesive litigation strategy for ending the death penalty.<sup>81</sup>

<sup>72</sup> Zimring, *supra* note 69, at 1407.

<sup>73</sup> SELLIN, *supra* note 71, at 63 ("Any one who carefully examines the above data is bound to arrive at the conclusion that the death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes. It has failed as a deterrent.").

<sup>74</sup> See Covey, *supra* note 68, at 200–06; Zimring, *supra* note 69, at 1400–01.

<sup>75</sup> See MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 49 (2011).

<sup>76</sup> Andrew Kohut, *The Declining Support for Executions*, N.Y. TIMES, May 10, 2001, at A33 (stating that "by the mid 1960's . . . most people were opposed" to the death penalty, and "[p]ublic support dropped to 42 percent, a 50-year low, in a 1966 Gallup poll"); Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 50 (2007) ("[1966] marked the lowest level of death penalty support in recorded history . . .").

<sup>77</sup> FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 33 (1986); Michael Meltsner, *Litigating Against the Death Penalty: The Strategy Behind Furman*, 82 YALE L.J. 1111, 1112 (1973).

<sup>78</sup> See Meltsner, *supra* note 77.

<sup>79</sup> Kirchmeier, *supra* note 48, at 13–14.

<sup>80</sup> MELTSNER, *supra* note 75, at 80, 84.

<sup>81</sup> Meltsner, *supra* note 77, at 1117 ("The purpose of the 1968 conference, however, was not technical; its aim was to bring the participants together for a face-to-face encounter, and at this it

In 1972, the United States Supreme Court's decision in *Furman v. Georgia*<sup>82</sup> was a key victory for the LDF, as well as the anti-death penalty movement in general.<sup>83</sup> The decision struck down state death penalty statutes across the United States. The Court held that by giving juries unguided discretion to impose the death penalty, states were administering capital punishment in an arbitrary and discriminatory manner in violation of the Eighth and Fourteenth Amendments.<sup>84</sup> Justice Marshall, in his concurring opinion, emphasized the "partial successes" of anti-death penalty activists in tempering capital punishment in the United States.<sup>85</sup> In December 1971, six months before the Supreme Court decided *Furman*, Congress held its first hearing on the death penalty in twelve years.<sup>86</sup> In consideration of the Court's upcoming decision, members of the House Judiciary Committee proposed a bill to suspend the death penalty throughout the United States in order to give state authorities and Congress more time to reexamine the constitutional issues surrounding capital punishment.<sup>87</sup> However, Congress never passed a bill to suspend the death penalty, and the effects of the *Furman* decision were short-lived.

#### D. The 1980s and 1990s

Many people thought that *Furman* signaled the end of the death penalty in the United States.<sup>88</sup> In reality, however, *Furman* had the opposite effect and worked to reverse the previously increasing momentum in many states towards death penalty abolition. In response to *Furman*, twenty-eight states passed new death penalty statutes that complied with the Supreme Court's mandate by making the capital sentencing process less arbitrary.<sup>89</sup> In a series of decisions in 1976, the Supreme Court upheld the constitutionality of a majority of these state death penalty statutes.<sup>90</sup> At the

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succeeded handsomely. This first confrontation of numerous professionals who had previously worked alone gave the movement a cohesion that it had lacked.")

<sup>82</sup> 408 U.S. 238, 239 (1972) (per curiam).

<sup>83</sup> See HAINES, *supra* note 4, at 14; Meltzer, *supra* note 77, at 1111.

<sup>84</sup> See *Furman*, 408 U.S. at 239–40; see also *id.* at 249 (Douglas, J., concurring).

<sup>85</sup> *Id.* at 341–42 (Marshall, J., concurring).

<sup>86</sup> See *Capital Punishment: Hearings Before the H. Subcomm. No. 3 on the Judiciary*, 92d Cong. 18 (1972) (statement of Senator Kastenmeier) [hereinafter *1972 Hearings*].

<sup>87</sup> *Id.*

<sup>88</sup> See *The Supreme Court, 1971 Term—Cruel and Unusual Punishments*, 86 HARV. L. REV. 76, 85 (1972) ("Whatever the possibilities for narrower death penalty statutes after *Furman*, the Court has prohibited capital punishment in the overwhelming majority of cases . . . [and] *Furman* may contain the seeds . . . of a complete proscription of the death penalty in the future."); *Furman*, 408 U.S. at 239 (per curiam).

<sup>89</sup> HAINES, *supra* note 4, at 14.

<sup>90</sup> See *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion); see also Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the*

same time, public support for capital punishment increased from a low of 42% in 1966 to 66% by 1976.<sup>91</sup>

In 1987, the anti-death penalty movement suffered another significant blow when the Supreme Court held in *McCleskey v. Kemp* that evidence of racial discrimination in capital sentencing did not violate the Eighth or Fourteenth Amendment.<sup>92</sup> As a result of the judicial disappointments they suffered post-*Furman*, anti-death penalty advocates realized that they must try—once again—to turn state legislatures and the public against capital punishment. Their public education campaigns throughout the 1980s and 1990s, however, did little to turn public opinion against the death penalty. By the 1990s, capital punishment was “flourishing” in the United States.<sup>93</sup> In 1993, thirty-eight people were executed throughout the country, which was more than any other year since the 1960s.<sup>94</sup> Also, more than 70% of Americans supported capital punishment during the 1980s and 1990s.<sup>95</sup>

Similarly, the anti-death penalty’s lobbying efforts were fruitless in light of the robust public support for capital punishment in the country. At the time, any elected officials who publicly opposed the death penalty essentially risked sacrificing their political careers.<sup>96</sup> For instance, in the 1988 presidential race between Michael Dukakis and George H.W. Bush, Dukakis lost significant support from voters because he said that he opposed the death penalty in a televised debate.<sup>97</sup> By the 1990s, it was clear that the anti-death penalty movement needed a new strategy.

### III. THE MODERN ANTI-DEATH PENALTY MOVEMENT’S FOCUS ON COST

As early as the 1980s, people on both sides of the death penalty debate started to become aware of the costs involved in capital punishment compared to life imprisonment.<sup>98</sup> In fact, in *Furman*, Justice Marshall recognized that “[w]hen all is said and done, there can be no doubt that it

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*Capital-Sentencing Trial*, 146 U. PA. L. REV. 795, 800–01 (1998) (“In the 1976 cases, the Supreme Court upheld statutes from Florida, Georgia, and Texas . . . [and] struck down statutes from Louisiana and North Carolina . . .”).

<sup>91</sup> *Death Penalty*, GALLUP, *supra* note 61.

<sup>92</sup> 481 U.S. 279, 298–99, 308 (1987).

<sup>93</sup> HAINES, *supra* note 4, at 3.

<sup>94</sup> *Id.*

<sup>95</sup> Support for capital punishment was above 70% in every Gallup poll conducted between 1985 and 1999. One poll from 1981 showed that 66% of respondents supported the death penalty, while data from 1982–1984 is not available. *Death Penalty*, GALLUP, *supra* note 61.

<sup>96</sup> Stuart Banner, *The Death Penalty’s Strange Career*, 26 WILSON Q., Spring 2002, at 70, 74.

<sup>97</sup> *See id.*

<sup>98</sup> *See, e.g.*, Robert L. Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45, 47 (1989) (concluding that the death penalty costs more than life in prison); Margot Garey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1270 (1985) (arguing that the “death penalty process results in astronomical costs—both morally and financially”).

costs more to execute a man than to keep him in prison for life.”<sup>99</sup> Nevertheless, largely because of the scant data available on the costs of state death penalty systems, anti-death penalty advocates did not begin to use cost as an argument against capital punishment until the end of the 1990s.<sup>100</sup> Before then, cost, if mentioned at all, was generally used as an argument in support of the death penalty. For instance, in 1983, Ernest van den Haag, a prominent death penalty supporter, asserted that it was cheaper to execute a criminal than keep him in prison for most of his life.<sup>101</sup>

Around the turn of the twenty-first century, research conducted by newspaper reporters and academics in various states began to reveal the high costs of the modern death penalty system.<sup>102</sup> For example, in 1988, *The Miami Herald* reported that the cost of the death penalty in Florida was \$3.2 million per execution compared to \$600,000 for life imprisonment.<sup>103</sup> Similarly, *The Dallas Morning News* reported in 1992 that the trials and appeals of a capital case alone cost Texas \$2.3 million per case on average, which was approximately three times the cost of imprisoning someone for forty years.<sup>104</sup> In 1993, a report by professors at Duke University found that the death penalty cost North Carolina \$2.16 million more per execution than murder cases with the sentence of life imprisonment.<sup>105</sup> Columbia University published a report on capital punishment in 2000, which found

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<sup>99</sup> *Furman v. Georgia*, 408 U.S. 238, 358 (1972) (Marshall, J., concurring).

<sup>100</sup> Although scholars started to argue that the death penalty was costly as early as the 1990s, *see, e.g.*, Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 719 (1990–1991), anti-death penalty advocates did not make this argument in their campaigns at the time. Ben Johnson from the Connecticut Network to Abolish the Death Penalty (CNADP) stated that the Connecticut anti-death penalty movement, for instance, did not start using the cost argument until it had figures on the costs of capital punishment in the state. Telephone Interview with Ben Johnson, former Exec. Dir., CNADP (Jan. 29, 2013).

<sup>101</sup> Michael L. Radelet & Marian J. Borg, *The Changing Nature of Death Penalty Debates*, 26 ANN. REV. SOC. 43, 50 (2000). According to Jeremy Schroeder, the former Executive Director of the Illinois Coalition to Abolish the Death Penalty (ICADP), before the anti-death penalty movement focused on the cost argument, people assumed that the death penalty was more expensive than life in prison because it is counterintuitive that the death penalty would cost more. Telephone Interview with Jeremy Schroeder, former Exec. Dir., ICADP (Jan. 30, 2013). As a result, many Americans who supported the death penalty in the 1980s and 1990s cited the high costs of imprisonment as a reason for their position. Mark Costanzo & Lawrence T. White, *An Overview of the Death Penalty and Capital Trials: History, Current Status, Legal Procedures, and Cost*, 50 J. SOC. ISSUES 1, 1, 9 (1994); *see* Radelet & Borg, *supra* note 101 (citing a 1985 *Gallup* poll finding that one reason provided by 11% of Americans who supported the death penalty was that it would save costs).

<sup>102</sup> *See* Radelet & Borg, *supra* note 101.

<sup>103</sup> D. Von Drehle, *Bottom Line: Life in Prison One-Sixth as Expensive*, MIAMI HERALD, July 10, 1988, at 12A; Editorial, *Judicial Wisdom*, ST. PETERSBURG TIMES, Jan. 3, 1998, at 12A (referring to 1988 Miami Herald study finding that Florida spent approximately \$3.2 million per execution compared to \$600,000 to imprison someone for life).

<sup>104</sup> Christy Hoppe, *Executions Cost Texas Millions*, DALLAS MORNING NEWS, Mar. 8, 1992, at 1A.

<sup>105</sup> PHILIP J. COOK & DONNA B. SLAWSON, WITH THE ASSISTANCE OF LORI A. GRIES, *THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA* 98 (1993).

that 68% of capital judgments were “seriously flawed” and that capital cases cost significantly more than noncapital ones.<sup>106</sup> Consequently, the report concluded that “large amounts of resources are being wasted on cases that should never have been capital in the first place.”<sup>107</sup>

These early reports on the fiscal realities of the death penalty came from different states and therefore varied in their estimates on the costs of capital punishment.<sup>108</sup> Nonetheless, they all confirmed one thing: states would save millions of dollars if they replaced the death penalty with sentences of life imprisonment without parole. The high cost of the death penalty does not mean that the executions themselves are more expensive than keeping a criminal in prison for life. Rather, the high costs of the death penalty reflect the fact that capital prosecutions often involve lengthy trials and multiple appeals.<sup>109</sup> Complex pretrial motions, jury selections, investigations, and expensive expert witnesses all add to the costs of death penalty cases.<sup>110</sup> Meanwhile, the post-conviction phase of capital cases involves a technical appeals process that creates additional costs for both the prosecution and defense, with taxpayers typically footing the bill.<sup>111</sup> Taxpayers pay not only for the costs of the trials and appeals, but also for the extra costs of incarcerating capital prisoners in facilities separate from general prison populations.<sup>112</sup>

In addition to research on the high costs of capital punishment, the anti-death penalty movement’s focus on the problem of wrongful convictions was a necessary predicate for the cost argument to succeed in

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<sup>106</sup> James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973–1995*, at 15–16 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 15, 2000).

<sup>107</sup> *Id.* at 16.

<sup>108</sup> Part of the reason for the difference in death penalty costs among states results from different capital sentencing procedures, as well as the frequency of capital prosecution, which is largely determined by the district attorneys in a particular area. Telephone Interview with Robert Owen, Clinical Professor, Univ. of Tex. Sch. of Law (Jan. 25, 2013).

<sup>109</sup> See Leigh B. Bienen, *Capital Punishment in Illinois in the Aftermath of the Ryan Commutations: Reforms, Economic Realities, and a New Saliency for Issues of Cost*, 100 J. CRIM. L. & CRIMINOLOGY 1301, 1363 (2010) (“Along the way, the [capital] appeals become more technical, more controversial, and more costly[,] . . . and the taxpayers pay for the costs . . .”).

<sup>110</sup> Telephone Interview with Robert Owen, *supra* note 108 (capital defense attorneys must find detailed information about defendants’ lives for capital cases, which requires substantial time and work).

<sup>111</sup> See Costanzo & White, *supra* note 101, at 10–12 (explaining the costs of the capital punishment process); see also Frederic Block, Op-Ed., *A Slow Death*, N.Y. TIMES, Mar. 15, 2007, at A27 (stating that taxpayers typically pay for both the prosecution and defense of capital cases). Although some states, such as Florida, have attempted to reduce costs by placing time restrictions on post-conviction appeals, these laws may violate the due process rights of death row inmates. See Jonathan Mattise, *Negron Death Penalty Law Challenged*, STUART NEWS, June 28, 2013, at 1A. Moreover, the majority of costs stem from the pretrial and trial phases. Editorial, *High Cost of Death Row*, N.Y. TIMES, Sept. 28, 2009, at A22. Thus, laws limiting the appeals process are unlikely to result in much cost savings.

<sup>112</sup> See Bienen, *supra* note 109, at 1363, 1386.

convincing state legislatures to abolish the death penalty. Beginning in the 1990s, the availability of DNA testing helped exonerate many death row inmates.<sup>113</sup> In 1998, hundreds of anti-death penalty advocates, scholars, and journalists came to Chicago for the National Conference on Wrongful Convictions and the Death Penalty.<sup>114</sup> Prior to the conference, advocates had not focused on wrongful convictions in capital cases as an area of serious concern.<sup>115</sup> After the conference, however, the frequency of wrongful convictions became one of the main talking points for the anti-death penalty movement.<sup>116</sup> Evidence that people were being executed for crimes they did not commit undermined a main justification for the death penalty: retribution.<sup>117</sup> When more than 100 people sentenced to death were innocent and thus did not “deserve” to die, it became much more difficult for death penalty supporters to rely on retribution as a justification for capital punishment.<sup>118</sup>

The problem of wrongful convictions “trigger[ed a] reexamination of the costs and benefits of capital punishment” in a way that other challenges to the death penalty had failed to do.<sup>119</sup> It encouraged several states to examine their death penalty policies in order to fix the errors in their capital sentencing process. In 2000, an extensive wrongful convictions campaign in Illinois helped lead to a temporary moratorium on capital punishment in the state until the government could review the system.<sup>120</sup> Governor George Ryan stated that he “favor[ed] a moratorium, because [he had] grave concerns about [Illinois’s] shameful record of convicting innocent people and putting them on death row.”<sup>121</sup> Around the same time, a coalition of

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<sup>113</sup> The very first DNA exoneration occurred in 1989. Jay D. Aronson & Simon A. Cole, *Science and the Death Penalty: DNA, Innocence, and the Debate over Capital Punishment in the United States*, 34 LAW & SOC. INQUIRY 603, 610–11 (2009) (“By 1996, sixty-five people had been exonerated on the basis of DNA evidence.”).

<sup>114</sup> Warden, *supra* note 7, at 252–53.

<sup>115</sup> *Id.*

<sup>116</sup> Telephone Interview with Lawrence Marshall, Professor of Law, Stanford Law Sch. (Feb. 4, 2013). Professor Marshall used to be a professor at Northwestern University School of Law and organized the National Conference.

<sup>117</sup> Although retribution has not been considered a primary objective of criminal law in the United States for over half a century, it remains one of the primary reasons that the American public supports the death penalty. Banner, *supra* note 96, at 77. In the 1980s and 1990s, polls showed that the majority of Americans who were pro-capital punishment would still support the death penalty even if it did not result in fewer murders. *Id.*

<sup>118</sup> See Editorial, *110 Wrongful Convictions, and Counting*, N.Y. TIMES, Aug. 27, 2002, at A16.

<sup>119</sup> Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 579 (2004).

<sup>120</sup> See generally *id.* at 578 (arguing that “[t]he engine driving [the 2000 moratorium] was a series of thirteen death row exonerations”).

<sup>121</sup> Press Release, Ill. Governor’s Office, Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System (Jan. 31, 2000), available at <http://www3.illinois.gov/PressReleases/showpressrelease.cfm?subjectid=3&recnum=359>.

Republicans and Democrats in Congress proposed a bill to combat wrongful convictions in death penalty cases.<sup>122</sup> And in *Kansas v. Marsh*, four dissenting Supreme Court justices went so far as to state that the “repeated exonerations of convicts under death sentences” made the death penalty system unconstitutional.<sup>123</sup>

Once the anti-death penalty movement exposed the serious flaws in the death penalty system, it became more difficult for state legislators to claim that capital punishment was worth the millions of dollars in extra costs. Consequently, activists started to focus on the cost arguments against capital punishment by underscoring how states waste millions of dollars each year on inefficient death penalty systems. Some organizations, such as the ACLU, have produced their own studies on the high costs of capital punishment.<sup>124</sup> Other organizations have tried to raise public awareness about the costs of capital punishment through online action reports, newspaper editorials, and lobbying efforts.<sup>125</sup> In particular, organizations have emphasized the effect of capital punishment costs on already troubled state budgets.<sup>126</sup> For example, in a 2009 report, the Death Penalty Information Center argued that there is “little support for continuing to spend enormous sums on an ineffective program when so many other areas of need are being short changed.”<sup>127</sup>

Anti-death penalty advocates contend that the cost argument focuses not only on reducing state budget deficits, but also on opportunity costs.<sup>128</sup> Anti-death penalty campaigns in various states have argued that instead of spending millions of dollars on the death penalty, states would be better off using the money for other important state and local uses. For example, in New Jersey, Connecticut, and New Mexico, anti-death penalty advocates proposed that the money saved as a result of abolishing the death penalty should be used to provide additional law enforcement officers or victim assistance.<sup>129</sup> In California, Proposition 34—a recently defeated ballot

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<sup>122</sup> H.R. 3214, 108th Cong. (2003); Editorial, *Toward Death Penalty Reform*, N.Y. TIMES, Oct. 13, 2003, at A16.

<sup>123</sup> 548 U.S. 163, 208, 211 (2006) (Souter, J., dissenting) (finding that because of the prevalence of wrongful convictions, the death penalty violated the Eighth Amendment).

<sup>124</sup> See, e.g., NATASHA MINSKER, AM. CIVIL LIBERTIES UNION OF N. CAL., *THE HIDDEN DEATH TAX: THE SECRET COSTS OF SEEKING EXECUTION IN CALIFORNIA* (2008).

<sup>125</sup> See *supra* Part IV.A–F, which discusses the various strategies carried out by anti-death penalty organizations throughout the country.

<sup>126</sup> See MINSKER, *supra* note 124, at 3–4.

<sup>127</sup> RICHARD C. DIETER, DPIC, *SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS* 6 (2009).

<sup>128</sup> See *New Jersey Death Penalty Study Commission Hearing* 72–73 (Sept. 13, 2006) (statement of Patrick Murray, Director, Monmouth University Polling Institute) [hereinafter *Murray Testimony*].

<sup>129</sup> See *New Jersey Death Penalty Study Commission* 87–88 (Oct. 25, 2006) (statement of Celeste Fitzgerald, Director, New Jerseyans for Alternatives to the Death Penalty) [hereinafter *Fitzgerald Testimony*]; Cost, N.M. REPEAL, <http://www.nmrepeal.org/issues/cost> (last visited Mar. 26, 2014);

initiative to abolish capital punishment<sup>130</sup>—included a proposal to direct the over \$100 million annual savings to law enforcement agencies for investigations of homicide and rape cases.<sup>131</sup> When budget shortfalls force state governments to make cuts, anti-death penalty advocates argue that lawmakers should choose to get rid of the death penalty over other necessary programs.

#### A. Cost and Abolition in New Jersey

The New Jersey legislature's decision to abolish the death penalty in 2007<sup>132</sup> illustrates the effectiveness of the cost argument for the anti-death penalty movement. In 1999, anti-death penalty activists Lorry Post and Celeste Fitzgerald established New Jerseyans for Alternatives to the Death Penalty (NJADP).<sup>133</sup> Rather than focusing their lobbying efforts on moral and religious arguments, Fitzgerald and NJADP emphasized the costs of the death penalty, wrongful executions, and the fact that New Jersey had not executed anyone in forty years.<sup>134</sup> Specifically, NJADP commissioned a fiscal study of the state's death penalty system, which found that abolishing the death penalty would save New Jersey more than \$11 million each year.<sup>135</sup> According to Fitzgerald, by focusing on the costs of capital cases, NJADP was able to “attract [support from] people who thought the death penalty was simply another waste of time and money.”<sup>136</sup>

Partly as a result of the lobbying efforts of the NJADP, in 2006 the New Jersey legislature selected a state-sponsored Death Penalty Study Commission to examine the effectiveness of the state's death penalty

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*Victims' Families*, CNADP, <http://www.cnadp.org/resources/issues/victims-families/> (last visited Apr. 5, 2014).

<sup>130</sup> California voters defeated Proposition 34 on November 6, 2012. *State Voters Back Death Penalty*, DAILY POST (PALO ALTO), Nov. 8, 2012, at 10.

<sup>131</sup> TEXT OF PROPOSED LAWS, CAL. SEC'Y OF STATE 95, available at <http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf#nameddest=prop34>.

<sup>132</sup> Peters, *supra* note 12.

<sup>133</sup> R. Erik Lillquist et al., *Panel III—Legislative Moratorium and the New Jersey Death Penalty Study Commission*, 33 SETON HALL LEGIS. J. 137 (2008) [hereinafter *Panel III—Legislative Moratorium*].

<sup>134</sup> *Making History: The Repeal of the Death Penalty in New Jersey*, METROPOLITAN CORP. COUNS., Mar. 2008, at 50. Although more than sixty people were sentenced to death between 1963 and 2007, the majority of sentences were overturned on appeal. *Panel III—Legislative Moratorium*, *supra* note 133, at 139 n.7. At the time New Jersey repealed its death penalty statute, the state had eight men on death row. Editorial, *A Long Time Coming*, N.Y. TIMES, Dec. 15, 2007, at A22.

<sup>135</sup> Robert Schwaneberg, *N.J. Panel Counts Cost of Death Penalty*, STAR-LEDGER, Sept. 13, 2006, at 29; Press Release, NJADP, New Report Finds Death Penalty Cost New Jersey Tax Payers \$250 Million Since 1982 (Nov. 21, 2005), available at <http://www.njadp.org/forms/cost/cost%20study%20release.html> (stating that NJADP commissioned the New Jersey Policy Perspective report).

<sup>136</sup> Bob Braun, *Chief Repeal Advocate Says It's Time to 'Close Up Shop'*, STAR-LEDGER, Dec. 13, 2007, at 17 (statement of Celeste Fitzgerald).

policy.<sup>137</sup> The Commission held hearings and heard from New Jersey residents on both sides of the debate. Testimonies provided evidence about the significant costs of the death penalty, as well as polls showing that only 36% of New Jersey residents preferred the death penalty to life imprisonment without the possibility of parole.<sup>138</sup> In addition to relying on savings estimates from various New Jersey state agencies, the Commission considered cost studies conducted by other states.<sup>139</sup> In its 2007 report, the Commission recommended that the New Jersey legislature abolish the death penalty in the state.<sup>140</sup> It found that capital punishment in New Jersey did not “rationally serve[] a legitimate penological intent,” and that “[t]he costs of the death penalty are greater than the costs of life in prison without parole.”<sup>141</sup>

Around the same time of the Death Penalty Study Commission’s report, New Jersey’s financial landscape had taken a turn for the worse. In 1999, when the NJADP started making its cost arguments, the state had few fiscal problems. The Newark-based *Star-Ledger*, for instance, reported that the 1999–2000 budget was “heavy on generosity and short on pain.”<sup>142</sup> By 2007, however, it was widely recognized that “New Jersey ha[d] been living beyond its means for more than a decade.”<sup>143</sup> Although the national financial crisis had not yet hit, in 2007 New Jersey was one of only a handful of states facing a structural deficit.<sup>144</sup> Indeed, New Jersey’s per capita debt burden at the time was the third highest in the nation.<sup>145</sup> Accordingly, in February 2007 Governor Corzine warned that the state legislature would have to make some “tough choices” in order to mitigate “the avalanche of growing fixed costs that hang over the state.”<sup>146</sup>

When Fitzgerald testified before the New Jersey Senate, she encouraged lawmakers “to seriously consider the money-saving suggestion of replacing the death penalty with life without parole . . . and the many other ways that money could be spent.”<sup>147</sup> And in December 2007, New

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<sup>137</sup> See Panel III—Legislative Moratorium, *supra* note 133, at 141.

<sup>138</sup> Murray Testimony, *supra* note 128, at 68–69, 71–72.

<sup>139</sup> N.J. DEATH PENALTY STUDY COMM’N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 31–33 (2007), available at [http://www.njleg.state.nj.us/committees/dpsc\\_final.pdf](http://www.njleg.state.nj.us/committees/dpsc_final.pdf).

<sup>140</sup> *Id.* at 2.

<sup>141</sup> *Id.* at 1.

<sup>142</sup> Robert Schwaneberg & Joe Donohue, *Whitman Will Submit \$19.2 Billion Budget Plan*, STAR-LEDGER, Jan. 24, 1999, at 1.

<sup>143</sup> Jon Shure, *The Balancing Act*, RECORD, Feb. 25, 2007, at O-1 (referencing Gov. Corzine’s statement during budget address).

<sup>144</sup> OFFICE OF MGMT. & BUDGET, OFFICE OF THE GOVERNOR, STATE OF N.J. BUDGET: FISCAL YEAR 2007–2008, at iii (2007) [hereinafter NJ FISCAL YEAR 2008 BUDGET].

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *New Jersey Legislature, Senate Budget and Appropriations Committee Public Hearing on Fiscal Year 2007 State Budget*, Apr. 3, 2006 (statement of Celeste Fitzgerald, Director, New Jerseyans

Jersey became the first state to abolish the death penalty legislatively since 1976.<sup>148</sup> Achieving the twenty-one to sixteen vote in the New Jersey legislature was not easy.<sup>149</sup> However, NJADP brought cost to the forefront of the debate at the exact time legislators were particularly interested in finding ways to save money for the state.

### *B. Cost and Abolition in New Mexico*

Cost also played a significant role in New Mexico's decision to abolish the death penalty in 2009. In New Mexico, the anti-death penalty movement argued that money spent on capital punishment should be used to help victims' families.<sup>150</sup> This was particularly successful because it undermined one of the main arguments in support of the death penalty: restitution for victims' families.<sup>151</sup> In February 2009, the New Mexico House voted forty to twenty-eight to repeal the state's death penalty statute, and on March 13, 2009, the Senate voted twenty-four to eighteen in favor of repeal.<sup>152</sup> Before signing the bill to abolish the death penalty, Governor Bill Richardson, a longstanding death penalty supporter, cited his concerns about wrongful convictions. He also added that cost was "a valid reason [to support the abolition of the death penalty] in this era of austerity and tight budgets."<sup>153</sup> Indeed, in the months leading up to the repeal, New Mexico's government was facing a \$454 million budget shortfall.<sup>154</sup> Although New Mexico's economy grew rapidly in the early 2000s,<sup>155</sup> the 2008 financial crisis forced the state government to make drastic cuts for the first time in a decade.<sup>156</sup>

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for Alternatives to the Death Penalty (NJADP)), available at [http://www.njleg.state.nj.us/legislative/pub/budget2007/testimony/04032006/Fitzgerald\\_C.pdf](http://www.njleg.state.nj.us/legislative/pub/budget2007/testimony/04032006/Fitzgerald_C.pdf).

<sup>148</sup> Martin, *supra* note 2.

<sup>149</sup> See *id.* at 487 & n.18; Jeremy W. Peters, *With Senate Vote, New Jersey Nears Historic Repeal of the Death Penalty*, N.Y. TIMES, Dec. 11, 2007, at B1 (stating that New Jersey's repeal bill passed in the Senate 21 to 16).

<sup>150</sup> Cost, *supra* note 129.

<sup>151</sup> See THE ROAD TO ABOLITION?: THE FUTURE OF CAPITAL PUNISHMENT IN THE UNITED STATES 32 (CHARLES J. OGLETREE, JR. & AUSTIN SARAT eds., 2009) (discussing the argument by supporters of the death penalty that capital punishment is needed to help victims' families).

<sup>152</sup> LARRY W. KOCH, COLIN WARK & JOHN F. GALLIHER, *THE DEATH OF THE AMERICAN DEATH PENALTY: STATES STILL LEADING THE WAY* 50 (2012).

<sup>153</sup> Ian Urbina, *In Push to End Death Penalty, Some States Cite Cost-Cutting*, N.Y. TIMES, Feb. 25, 2009, at A1 (statement of Governor Bill Richardson).

<sup>154</sup> Dan Boyd, *State Faces Big Budget Squeeze: Broad Funding Cuts Likely Next Fiscal Year*, ALBUQUERQUE J., Dec. 9, 2008, at A1.

<sup>155</sup> See Aaron Baca, *Looking Up*, ALBUQUERQUE J., Sept. 15, 2003, at 1 (reporting that New Mexico had the second-fastest-growing economy in the U.S. at the time in terms of job growth); Editorial, *Be Careful with Revenue Windfall*, ALBUQUERQUE J., July 17, 2005, at B2 (reporting an anticipated \$237 million state budget surplus from oil and gas revenues).

<sup>156</sup> Boyd, *supra* note 154.

When the effort to abolish New Mexico's death penalty began in 1997, advocates attempted to introduce the cost argument into the death penalty debate.<sup>157</sup> At the time, however, there was very little information available about the costs of New Mexico's death penalty system.<sup>158</sup> Thus, anti-death penalty advocates did not focus on costs as a central part of their campaign until several years later.<sup>159</sup>

Between 2004 and 2008, as more information on costs of the death penalty system emerged—and the state's budget deficit grew—New Mexico's anti-death penalty campaign shifted towards a greater emphasis on cost. Although the New Mexico government never commissioned a statewide study on the costs of capital punishment,<sup>160</sup> the State Bar's Task Force on the Administration of the Death Penalty in New Mexico published a report in 2004 outlining the reasons for the high costs of capital cases.<sup>161</sup> Around the same time, then New Mexico Supreme Court Justice Bosson estimated that the cost of a capital case in New Mexico was six times higher than noncapital murder cases.<sup>162</sup> The cost argument in New Mexico was also strengthened by cost studies from other states, such as North Carolina, which found that capital punishment cost more than life imprisonment.<sup>163</sup>

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<sup>157</sup> For example, when Representative Gail Chasey (formerly Gail Beam) sponsored a bill to repeal the death penalty in 1999, she argued that the death penalty did not deter crime, cost more than life in prison without parole, and risked sentencing innocent people to death. Bruce Daniels, *Proposal May End Death Penalty*, ALBUQUERQUE J., Jan. 29, 1999, at A10; Kate Nash, *House Gets Bill to Abolish Executions*, ALBUQUERQUE TRIB., Feb. 25, 1999, at A1, available at 1999 WLNR 2353025; see also Carmen E. Garza, Op-Ed, *Death Penalty Legal Work Requires Twice the Effort*, ALBUQUERQUE J., Jan. 29, 1998, at A11 (explaining why “the death-penalty is just a big-tag merchandise in tight-budget times”).

<sup>158</sup> In 1998, Representative David Pederson said that the House Judiciary Committee had difficulty getting statistics on death penalty cases. See *Death-Penalty Died, but Study Will Go On*, ALBUQUERQUE TRIB., Mar. 14, 1998, at A2. In 1999, the only available information on the costs of the death penalty in New Mexico concerned one specific death penalty case in which the defense spent a reported \$4.3 million. See Colleen Heild, *Sureño Tab Costs Public \$4.3 Million*, ALBUQUERQUE J., Dec. 3, 1999, at A1.

<sup>159</sup> For example, the Fiscal Impact Report for the 2005 House Bill to abolish the death penalty suggested that the bill's fiscal implications would be negligible. N.M. LEGISLATIVE FIN. COMM., FISCAL IMPACT REPORT, HB 576, at 2 (2005), available at <http://www.nmlegis.gov/Sessions/05%20regular/firs/HB0576.pdf>. But cf. Deborah Baker, *Senate Kills Attempt to Repeal Death Penalty*, ALBUQUERQUE TRIB., Mar. 10, 1999, at A4, available at 1999 WLNR 2348036 (stating that State Senator Manny Aragon argued that repealing the death penalty “is both fiscally responsible and a bit more civilized”).

<sup>160</sup> See N.M. LEGISLATIVE FIN. COMM., FISCAL IMPACT REPORT, HB 285, at 2 (2009), available at <http://www.nmlegis.gov/Sessions/09%20Regular/firs/HB0285.pdf>.

<sup>161</sup> TASK FORCE TO STUDY THE ADMIN. OF THE DEATH PENALTY IN N.M., STATE BAR OF N.M., FISCAL REPORT (2004), available at <http://www.nmbar.org/attorneys/lawpubs/tskfredthpnlyrprt.pdf>.

<sup>162</sup> *Cost*, supra note 129.

<sup>163</sup> See N.M. LEGISLATIVE FIN. COMM., FISCAL IMPACT REPORT, HB 285, at 2 (2009), available at <http://www.nmlegis.gov/Sessions/09%20Regular/firs/HB0285.pdf> (referencing a North Carolina study to support the argument that the death penalty in New Mexico is more costly than life imprisonment).

The growing strength of the cost argument in New Mexico's death penalty debate is illustrated by a comparison of Fiscal Impact Reports for Representative Gail Chasey's abolition bills in 2001 (HB 239) and 2005 (HB 576) with the Fiscal Report for the abolition bill in 2009 (HB 285). The Fiscal Impact Report for the 2001 bill suggested that costs "may ultimately decrease with the repeal of the death penalty," though it also recognized the possibility that costs could be higher.<sup>164</sup> While not explicitly stating that repealing the death penalty would save money, the 2005 Fiscal Impact Report indicated that jury and witness costs for a death penalty case amounted to \$20,000–\$25,000 compared to \$7000–\$8000 for a non-death penalty case.<sup>165</sup> In contrast, the 2009 Fiscal Report stated that abolition of the death penalty would save New Mexico *several million dollars* each year.<sup>166</sup>

By 2008, NM Repeal (New Mexico's largest anti-death penalty advocacy group) and others used cost as one of their main "talking points" when lobbying state legislators to support abolition.<sup>167</sup> Although few legislators mentioned cost when they publicly spoke in support of repeal, state legislators were well aware of the cost implications of the bill by the time they cast their votes in 2009.<sup>168</sup> For instance, David Keys, a professor of criminology at New Mexico State University, testified before the Senate Judiciary Committee and told the panel that a single execution in New Mexico cost the state between \$2.75 and \$5 million.<sup>169</sup> Viki Harrison, the former Executive Director of NM Repeal, believes that state policymakers considered cost as a factor in casting their votes, even if they did not say so explicitly.<sup>170</sup>

According to Harrison, the cost-effectiveness argument was particularly successful in New Mexico because the state had only executed one person since 1960.<sup>171</sup> As a result, in light of the high costs of the death penalty, state lawmakers were more inclined to vote for abolition because

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<sup>164</sup> See N.M. LEGISLATIVE FIN. COMM., FISCAL IMPACT REPORT, HB 239, at 2 (2001), available at <http://www.nmlegis.gov/Sessions/01%20Regular/firs/house/hb0239.pdf> (emphasis added).

<sup>165</sup> N.M. LEGISLATIVE FIN. COMM., FISCAL IMPACT REPORT, HB 576, at 2 (2005), available at <http://www.nmlegis.gov/Sessions/09%20Regular/firs/HB0576.pdf>.

<sup>166</sup> This figure was according to the Public Defender Department. N.M. LEGISLATIVE FIN. COMM., FISCAL IMPACT REPORT, HB 285, at 2 (2009), available at <http://www.nmlegis.gov/Sessions/09%20Regular/firs/HB0285.pdf>.

<sup>167</sup> Telephone Interview with Viki Harrison, former Exec. Dir., N.M. Repeal (Feb. 1, 2013).

<sup>168</sup> See Viki Elkey, *Abolishing the Death Penalty in New Mexico: Lessons Learned in a Long Campaign*, PEACEWORK, May 2009, at 12, 13; Telephone Interview with Viki Harrison, *supra* note 167.

<sup>169</sup> Statement by David Keys, In re: HB 285—Abolition of the Death Penalty, New Mexico House of Representatives (Feb. 4, 2009) (on file with author).

<sup>170</sup> Elkey, *supra* note 168, at 13.

<sup>171</sup> Telephone Interview with Viki Harrison, *supra* note 167. At the time New Mexico repealed its death penalty, two men were on death row. *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 19, 2009, at A16.

most defendants in capital cases ended up with life sentences anyway.<sup>172</sup> During the House debate on the bill in 2009, Representative Gail Chasey argued, “[I]n 48 years we’ve spent several million dollars a year for this one execution. That’s not much of a return.”<sup>173</sup>

In addition to arguing that the death penalty was expensive and rarely used, anti-death penalty advocates pointed out that the money used for New Mexico’s death penalty system diverted resources from other state needs, such as services for victims’ families.<sup>174</sup> Murder Victims’ Families for Reconciliation (MVFR), which played a large role in the effort to defeat the death penalty in New Mexico, maintained that the death penalty did not redress problems faced by victims’ families.<sup>175</sup> MVFR worked with Chasey and NM Repeal to create a list of victims’ services that could be established as a result of the repeal’s cost savings.<sup>176</sup> A 2008 statewide poll confirmed that the majority of New Mexico residents—64%—supported replacing the death penalty with life in prison without parole and allocating the saved resources to services for victims’ families.<sup>177</sup> The poll persuaded state legislators to support the repeal by reassuring them that they would not face public opposition if they voted for the bill.<sup>178</sup>

### C. *Cost and Abolition in Illinois*

Anti-death penalty advocates in Illinois considered cost a crucial part of their strategy to convince legislators to repeal the state’s death penalty law in 2011. The ACLU, an organization with one of the most active anti-death penalty campaigns in the state, argued that Illinois’s death penalty was “expensive and [an] ineffective use of scarce resources.”<sup>179</sup> Between 2002 and 2010, Illinois’s budget deficit climbed from \$1.4 billion to \$13 billion.<sup>180</sup> Like activists in New Jersey and New Mexico, Illinois advocacy

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<sup>172</sup> See Urbina, *supra* note 153.

<sup>173</sup> KOCH ET AL., *supra* note 152, at 53 (citation and internal quotation marks omitted).

<sup>174</sup> *Cost*, *supra* note 129.

<sup>175</sup> *How It Causes Harm*, MURDER VICTIMS’ FAMILIES FOR RECONCILIATION, <http://www.mvfr.org/how-it-causes-harm/> (last visited Mar. 26, 2014). According to MVFR, the death penalty harms victims’ families because the drawn-out nature of capital cases delays the healing process and takes away resources from services for victims’ families, such as counseling. See *id.*; *The Win in New Mexico: Spotlight on Murder Victims’ Families for Reconciliation*, EQUAL JUST. USA (Apr. 1, 2009, 11:40 AM), <http://ejusa.org/newsline/article/2009/04/01/win-new-mexico-spotlight-murder-victims-families-reconciliation>.

<sup>176</sup> *The Win in New Mexico*, *supra* note 175.

<sup>177</sup> RESEARCH & POLLING, INC., DEATH PENALTY SURVEY: SUMMARY OF RESULTS (2009) (on file with author).

<sup>178</sup> Telephone Interview with Viki Harrison, *supra* note 167.

<sup>179</sup> *End Illinois’ Broken Death Penalty*, ACLU ILLINOIS, <http://www.aclu-il.org/wp-content/uploads/2011/01/Death-Penalty-Factsheet-updated-1122.pdf> (last visited Mar. 26, 2014).

<sup>180</sup> See Jodi Wilgoren, *Illinois: Governor Offers Smaller Budget*, N.Y. TIMES, May 29, 2002, at A16; Bob Secter, *Illinois Speeds Toward Financial Chaos*, CHI. TRIB., Feb. 24, 2010, at 4.

organizations also claimed that the state's capital punishment system ultimately harmed victims' families by depriving them of resources that could otherwise be used for therapy and law enforcement programs.<sup>181</sup>

The Illinois State Bar Association (ISBA), which voted to support abolition of Illinois's death penalty in 2008, also emphasized the cost and inefficiencies of capital punishment in its efforts to push for death penalty repeal. In a letter to Governor Pat Quinn, the ISBA stressed that \$100 million had been spent on Illinois's death penalty between 2003 and 2010, and "it *continues* to be a legal crapshoot on who gets executed and who doesn't."<sup>182</sup> The ISBA also argued that the three main justifications for the death penalty—incapacitation, deterrence, and retribution—were no longer valid.<sup>183</sup> Finally, the ISBA noted that Illinois residents supported life without parole over the death penalty by a 2-to-1 margin (64% to 30%) when they considered the millions of dollars spent on death penalty cases every year.<sup>184</sup> In other words, the ISBA showed that Illinois's death penalty involved substantial costs with next to no benefit.

Jeremy Schroeder, the former Executive Director of the Illinois Coalition to Abolish the Death Penalty (ICADP), affirms that the cost-saving aspect of repealing the death penalty helped the organization's anti-death penalty campaign.<sup>185</sup> Namely, he says that the cost argument helped ICADP get its "foot in the door" with legislators who had previously supported capital punishment.<sup>186</sup> ICADP used polling data, moreover, to show legislators that the death penalty was no longer "the third rail"; politicians could speak out against the death penalty without hurting their chances of reelection.<sup>187</sup> Ultimately, Schroeder believes "[i]t was the cost savings plus having such a broken system that [the state hadn't] used for 11 years" that persuaded Illinois lawmakers to vote for repeal.<sup>188</sup>

The impact of the cost argument is illustrated in statements by Illinois legislators leading up to repeal. In 2011, during the Illinois Senate floor debate on the bill (S.B. 3539) to abolish the death penalty, senators cited

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<sup>181</sup> See *End Illinois' Broken Death Penalty*, *supra* note 179 (stating that the death penalty harmed victims' families by taking away resources from programs and services that could help them); Charles N. Wheeler III, *Public Opinion Appears to Have Shifted in the Capital Punishment Debate*, ILL. ISSUES (Univ. of Ill. Springfield), Sept. 2010, at 38 ("Abolitionists argue the money could be better spent on programs and services to help victims' families and on additional resources for law enforcement.").

<sup>182</sup> Letter from Jim Covington, Dir. of Legislative Affairs, Ill. State Bar Ass'n, to Governor Pat Quinn (Jan. 12, 2011).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Jamey Dunn, *Abolition of Death Penalty Creates Cost Savings*, ILL. ISSUES (Univ. of Ill. Springfield), May 2011, at 10.

<sup>186</sup> See *id.* (statement of Jeremy Schroeder, Executive Director of ICADP).

<sup>187</sup> Telephone Interview with Jim Covington, Dir. of Legislative Affairs, Ill. State Bar Ass'n (Jan. 25, 2013).

<sup>188</sup> Dunn, *supra* note 185.

the costs of the death penalty as one of their reasons for supporting the repeal bill. State Senator Jeffrey Schoenberg, who had previously supported the death penalty, mentioned the costs of the state's death penalty system and argued that "whether you actually believe that the death penalty is a deterrent or not, it's an indisputable fact on the basis of economics alone . . . [that] our system of capital punishment clearly does not work in Illinois."<sup>189</sup> State Representative Karen Yarbrough, who sponsored the House bill to abolish the death penalty, also based her support for abolition on evidence that the state's capital punishment system is unfair, highly expensive to taxpayers, and does not serve as a deterrent to crime.<sup>190</sup> Specifically, Yarbrough pointed out that despite the state's \$13 billion budget shortfall, in ten years Illinois had spent more than \$100 million on the death penalty without executing anyone.<sup>191</sup> Under Yarbrough's bill, which was signed into law by Governor Pat Quinn on March 9, 2011, the money saved from the death penalty would go towards investigating unsolved cases and training law enforcement officials.<sup>192</sup>

#### D. Cost and Abolition in Connecticut

The cost of capital punishment was also a major part of the anti-death penalty movement in Connecticut,<sup>193</sup> as well as an important factor in the state legislature's decision to repeal its death penalty law in April 2012. Like New Mexico, Connecticut did not carry out an official cost study on the state's death penalty system.<sup>194</sup> When a bill to abolish the death penalty was introduced in the state legislature in 2009, however, the Connecticut General Assembly's Office of Fiscal Analysis (OFA) estimated that the death penalty cost the state approximately \$4 million each year.<sup>195</sup> In 2012, the OFA estimated that the state would save \$5 million each year by abolishing the death penalty.<sup>196</sup> In the months leading up to the repeal,

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<sup>189</sup> Senate Transcript of Regular Session Debate on S.B. 3539, State of Ill. 96th Gen. Assemb. 75 (Jan. 11, 2011), available at <http://www.ilga.gov/senate/transcripts/strans96/09600144.pdf> (statement of Sen. Schoenberg).

<sup>190</sup> Wendell Hudson, *Yarbrough, Raoul Successfully Pushed for the End to Death Penalty*, CHI. DEFENDER, Jan. 26, 2011, at 4; Maya Srikrishnan, *Could Abolishing the Death Penalty Help States Save Money?*, ABC NEWS (Dec. 7, 2010), <http://abcnews.go.com/Politics/abolishing-death-penalty-states-cut-costs/story?id=12324697&page=4>.

<sup>191</sup> Srikrishnan, *supra* note 190.

<sup>192</sup> *Id.*; Editorial, *The End of Death Row*, CHI. TRIB., Mar. 10, 2011, at 22 (reporting that Gov. Quinn signed a bill to abolish Illinois's death penalty).

<sup>193</sup> See *Death Penalty in Connecticut*, CNADP, <http://www.cnadp.org/resources/death-penalty-in-connecticut/> (last visited Mar. 26, 2014).

<sup>194</sup> Telephone Interview with Ben Johnson, *supra* note 100.

<sup>195</sup> CONN. GEN. ASSEMBLY'S OFFICE OF FISCAL ANALYSIS, FISCAL NOTE, HB-6578 (2009), <http://www.cga.ct.gov/2009/FN/2009HB-06578-R000726-FN.htm>.

<sup>196</sup> CONN. GEN. ASSEMBLY'S OFFICE OF FISCAL ANALYSIS, FISCAL NOTE, SB-280 (2012) <http://www.cga.ct.gov/2012/FN/2012SB-00280-R000111-FN.htm>.

several local newspapers reported on the high costs of the state's death penalty system.<sup>197</sup> One newspaper estimated that Connecticut spent between \$100 million and \$200 million on 240 capital cases since it reimplemented capital punishment in the wake of *Furman*.<sup>198</sup> At the same time, the state only carried out one execution over three decades.<sup>199</sup>

The Connecticut Network to Abolish the Death Penalty (CNADP), the ACLU, and the NAACP worked together to pressure legislators to vote for repeal. They argued that “[t]he death penalty does not work” and costs taxpayers far more than life in prison.<sup>200</sup> The ACLU and others told state legislators that Connecticut's death penalty took money from the state that could be used for other important state programs, such as education.<sup>201</sup> Support from prominent law enforcement officers bolstered the cost argument and convinced lawmakers that the death penalty was not an effective use of law enforcement resources.<sup>202</sup> Moreover, the campaign had support from a large number of murder victims' families who wrote letters and conducted interviews arguing that capital punishment was not only costly and inefficient, but also harmful to victims' family members.<sup>203</sup>

Many state legislators who ultimately voted for repeal were persuaded by the high costs of the death penalty, as well as evidence that there was little support for capital punishment among murder victims' families.<sup>204</sup> Connecticut's budget deficit grew from \$500 million to \$3.5 billion

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<sup>197</sup> See, e.g., Editorial, *Repealed, Sort of*, HARTFORD COURANT, Apr. 8, 2012, at C2 (stating that the costs of capital punishment are “too high”).

<sup>198</sup> Dan Haar, *Death Penalty a Costly Sham*, HARTFORD COURANT, Nov. 29, 2010, at A1.

<sup>199</sup> *Id.*

<sup>200</sup> *Testimony on Behalf of the Connecticut Network to Abolish the Death Penalty in Support of SB-1035 and HB-6425*, CNADP (2011), available at <http://www.cga.ct.gov/2011/JUDdata/Tmy/2011SB-01035-R000307-Ben%20Jones,%20Executive%20Director%20of%20Connecticut%20Network%20to%20Abolish%20the%20Death%20Penalty%20%28CNADP%29-TMY.PDF>; *NAACP President and CEO Benjamin Todd Jealous Decry Connecticut Governor Jodi Rell for Veto of Anti-death Penalty Legislation*, NAACP (June 4, 2009), <http://www.naacp.org/press/entry/naacp-president-and-ceo-benjamin-todd-jealous-decry-connecticut-governor-jodi-rell-for-veto-of-anti-death-penalty-legislation>.

<sup>201</sup> *Testimony on Behalf of the Connecticut Network to Abolish the Death Penalty*, *supra* note 200. Lobbying state legislators has been one of the ACLU's main strategies. See Mark Pazniokas, *State ACLU Names New Director*, HARTFORD COURANT, Mar. 3, 2005, at B9 (“[T]he ACLU will continue to lobby against the death penalty.”).

<sup>202</sup> Telephone Interview with Ben Johnson, *supra* note 100. Law enforcement officials also helped persuade state lawmakers that they would not appear “soft on crime” if they voted in favor of abolishing the death penalty in the state. *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> See Russell Blair, *Lawmakers Reflect on Their Death Penalty Votes*, RECORD-J. (Meriden, Conn.), Apr. 13, 2012, at 1; Ken Dixon, *86-62 Vote: House OKs Death Penalty Repeal*, CONN. POST, Apr. 12, 2012, at A1; Mary Ellen Godin, *Connecticut Lawmakers Vote to Repeal Death Penalty*, CHI. TRIB., Apr. 11, 2012, available at [http://articles.chicagotribune.com/2012-04-11/news/sns-rt-us-connecticut-death-penaltybre83b051-20120411\\_1\\_capital-punishment-penalty-in-recent-years-connecticut-s-death-row](http://articles.chicagotribune.com/2012-04-11/news/sns-rt-us-connecticut-death-penaltybre83b051-20120411_1_capital-punishment-penalty-in-recent-years-connecticut-s-death-row).

between 2009 and 2012.<sup>205</sup> Accordingly, state legislators knew that a “no” vote on the death penalty repeal bill would result in cuts to other state programs. When signing the state’s death penalty repeal bill, Governor Dannel P. Malloy cited the costly appeals process in capital cases as one of the reasons for his decision to support the legislation.<sup>206</sup>

### *E. Cost and Abolition in Maryland*

In 2013, Maryland became the most recent state to abolish capital punishment. On March 15, 2013, the Maryland House of Delegates voted eighty-two to fifty-six to repeal the state’s death penalty law.<sup>207</sup> Cost played a major role in Governor Martin O’Malley’s decision to file legislation to repeal Maryland’s death penalty statute in January 2013.<sup>208</sup> Over the past four years, Governor O’Malley spoke out in favor of abolition on grounds that “there are better and cheaper ways to reduce crime.”<sup>209</sup> A 2008 study found that Maryland spent \$186 million more on capital cases over two decades than it would have spent if the state did not have the death penalty.<sup>210</sup> At the same time, the state’s budget deficit grew from \$432 million to \$1.6 billion between 2008 and 2011.<sup>211</sup>

Similarly to other states, anti-death penalty advocates in Maryland focused on the high costs of the state’s death penalty system in a time of economic crisis. In addition, they argued that capital sentencing in Maryland is prone to racial bias and fails to deter crime.<sup>212</sup> With support from anti-death penalty groups, Governor O’Malley called attention to the fact that despite the state’s death penalty system, Baltimore has become one of the most violent cities in the United States.<sup>213</sup> The Governor

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<sup>205</sup> See Susan Haigh, *Malloy to Cut Spending as Revenue Declines*, REC.-J. (Conn.), Jan. 19, 2012, at 13; Editorial, *Dithering While Conn. Sinks in Red*, THE DAY, Dec. 13, 2009, at E2.

<sup>206</sup> Press Release, Office of Governor Dannel P. Malloy, Gov. Malloy on Signing Bill to Repeal Capital Punishment (Apr. 25, 2012), <http://www.governor.ct.gov/malloy/cwp/view.asp?Q=503122&A=4010> (stating that “the people of this state pay for appeal after appeal”).

<sup>207</sup> See Ashley Southall, *Maryland: Repeal of Death Penalty Awaits the Governor’s Signature*, N.Y. TIMES, Mar. 16, 2013, at A14.

<sup>208</sup> Press Release, Office of Governor Martin O’Malley, Repealing Capital Punishment in Maryland (Jan. 15, 2013), <http://www.governor.maryland.gov/blog/?p=7999>.

<sup>209</sup> Urbina, *supra* note 153.

<sup>210</sup> Jennifer McMenamin, *Death Penalty Costs Md. More than Life Term*, BALT. SUN, Mar. 6, 2008, at 2B.

<sup>211</sup> See Laura Smitherman, *Maryland Faces Revenue Shortfall of \$432 Million*, BALT. SUN, Sept. 10, 2008, at 1A; Adam Glazer, *No Tuition Aid for Illegal Immigrants*, WASH. POST, Jan. 1, 2011, at A16 (“Maryland is facing a \$1.6 billion budget deficit.”).

<sup>212</sup> See Maryland’s Death Penalty: The Case for Repeal, MD CASE (on file with author).

<sup>213</sup> Jake Miller, *Gov. Martin O’Malley Seeks to Abolish Md. Death Penalty*, CBS NEWS (Jan. 16, 2013, 10:13 AM), [http://www.cbsnews.com/8301-34222\\_162-57564265-10391739/gov-martin-omalley-seeks-to-abolish-md-death-penalty/](http://www.cbsnews.com/8301-34222_162-57564265-10391739/gov-martin-omalley-seeks-to-abolish-md-death-penalty/).

explained, “The death penalty is expensive and it does not work. And for that reason alone, I believe we should stop doing it.”<sup>214</sup>

#### *F. Cost in Other States*

Although most states still practice capital punishment, evidence shows that lawmakers in death penalty states are becoming more concerned about its costs. The cost and inefficiency argument has persuaded several state governments to conduct detailed examinations into the fiscal impact of their death penalty systems—an important first step towards perhaps inevitable repeal. For example, in Indiana, the Legislative Services Agency recently conducted a study on the costs of capital punishment in the state and found that the average capital case cost more than twice the amount of the average life-without-parole case.<sup>215</sup> In July 2013, the Nevada legislature passed a bill authorizing an audit of the state’s death penalty, to be completed by January 2015.<sup>216</sup> The Legislative Fiscal Analyst’s Office in Utah recently conducted a study on the costs of the state’s death penalty system, finding that the death penalty costs the state an additional \$1.6 million per inmate compared to life without parole.<sup>217</sup>

In other states, lawmakers have specifically pointed to financial costs as a basis for their decisions to cosponsor death penalty repeal bills. In Kansas, for example, Senator Carolyn McGinn introduced a bill to abolish the death penalty in 2009, citing the state’s “dire deficit situation” and the need to look “outside the box to solve . . . budget problems.”<sup>218</sup> In addition to pointing out that Kansas had not executed anyone since 1965, she argued that abolition of the death penalty could save Kansas over \$500,000 per capital case.<sup>219</sup> Former Colorado lawmaker Paul Weissman also introduced a bill to repeal the death penalty in 2009 to save money.<sup>220</sup> The cost argument has also helped change the minds of conservatives<sup>221</sup> and

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<sup>214</sup> Press Release, Office of Governor Martin O’Malley, *supra* note 208.

<sup>215</sup> LEGIS. SERVS. AGENCY, INDIANA OFFICE OF FISCAL AND MGMT. ANALYSIS, FISCAL IMPACT STATEMENT, S.B. 344 (2010).

<sup>216</sup> Sean Whaley, *Death Penalty Foes Attack Cost*, LAS VEGAS REV.-J., July 8, 2013, at 1B.

<sup>217</sup> Emiley Morgan, *National Support for Death Penalty at 40-Year Low*, DESERET NEWS (Jan. 5, 2014, 5:00 PM MST), <http://www.deseretnews.com/article/865593591/National-support-for-death-penalty-at-40-year-low.html?pg=all>.

<sup>218</sup> Urbina, *supra* note 153 (statement of Senator Carolyn McGinn).

<sup>219</sup> *See id.*; Jeannine Koranda, *Will Death Penalty Fall Victim to Recession?*, WICHITA EAGLE, Feb. 7, 2009, at 1A.

<sup>220</sup> *Saving Lives and Money*, ECONOMIST, Mar. 14, 2009, at 32. The bill ultimately failed in the Colorado Senate, and Representatives Claire Levy and Kevin Priola introduced a similar bill in 2013 that would redirect money from the death penalty to crime-prevention programs. Jessica Fender, *Foes Weigh Push to Repeal*, DENVER POST, Dec. 26, 2012, at 1A; Kurtis Lee & Lynn Bartels, *Governor Hints at a Veto*, DENVER POST, Mar. 21, 2013, at 4A.

<sup>221</sup> The cost argument appeals to conservatives’ concerns about government spending. This is important because a poll conducted by Gallup found that conservatives are more likely to support capital punishment than are moderates and liberals. *See* Joseph Carroll, *Who Supports the Death*

lawmakers who had previously supported capital punishment. For instance, Montana Conservatives Concerned About the Death Penalty joined the anti-death penalty movement in Montana because of their belief that “[t]he death penalty is another institution of government that is wasteful and ineffective.”<sup>222</sup> Representative Steve Handy, a Republican lawmaker from Utah, recently called for a fiscal review of state and local government costs of Utah’s death penalty system.<sup>223</sup> Colorado’s President of the Senate, John Morse, stated in 2012 that he would likely support a bill to repeal the state’s death penalty statute, even though he had previously opposed efforts to repeal the state’s death penalty law.<sup>224</sup> Considering Colorado has only executed one person since 1976, Morse recognizes that “[i]t costs a lot of money to keep the death penalty on the books.”<sup>225</sup>

#### IV. COST, INTEREST-CONVERGENCE, AND IMPLICATIONS FOR THE ANTI-DEATH PENALTY MOVEMENT

By focusing on the costs of capital punishment, the anti-death penalty movement has created an “interest-convergence” story. Advocacy organizations now spend fewer resources on convincing state lawmakers that abolishing the death penalty is morally right. Instead, anti-death penalty advocates ask state lawmakers to consider the opportunity costs of the death penalty.<sup>226</sup>

The cost argument has created an interest-convergence story because anti-death penalty advocates are simply asking lawmakers to act in their own best interests, as well as the interests of their constituents. As states face substantial budget deficits, keeping the death penalty takes scarce resources away from other areas of law enforcement and other programs. The state legislatures mentioned in Part III, for example, all knew that

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*Penalty?*, GALLUP (Nov. 16, 2004), <http://www.gallup.com/poll/14050/who-supports-death-penalty.aspx>.

<sup>222</sup> Ashby Jones & Steve Eder, *Costs Test Backing for Death Penalty*, WALL ST. J. (Oct. 5, 2012, 7:58 PM), <http://online.wsj.com/article/SB10000872396390443493304578036792267666794.html> (statement of Steve Dogiakos, director of Montana Conservatives Concerned About the Death Penalty).

<sup>223</sup> *Costs: In Utah, Each Death Penalty Case Costs \$1.6 Million Extra*, DPIC, <http://www.deathpenaltyinfo.org/costs-utah-each-death-penalty-case-costs-16-million-extra> (last visited Mar. 26, 2014).

<sup>224</sup> Sam Levin, *Death Penalty: As Legislators Consider Repeal, John Morse Says He’s Now Supportive*, DENVER WESTWORD (Dec. 27, 2012, 5:46 AM), [http://blogs.westword.com/latestword/2012/12/death\\_penalty\\_as\\_legislators\\_c.php](http://blogs.westword.com/latestword/2012/12/death_penalty_as_legislators_c.php).

<sup>225</sup> *Id.*

<sup>226</sup> This is not necessarily a new concept. According to John Galliher, who has written extensively on the death penalty, during the Progressive Era, states were generally less supportive of capital punishment because they needed convict labor to support their growing economies. John F. Galliher, Gregory Ray & Brent Cook, *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538, 559–60 (1992). During the Great Depression, however, states relied on capital punishment when economic conditions deteriorated and the crime rate increased. *Id.* at 575–76. Thus, while the correlation between economics and capital punishment has existed since the early 1900s, it was not recognized until recently.

failing to repeal the death penalty would force them to cut spending on other programs. At the same time, state legislators are aware that executions are extremely rare and can take decades before they occur—if they occur at all.<sup>227</sup> Although it may be difficult to put a price on justice, the increasingly known problem of wrongful convictions suggests that capital punishment as it exists today is far from just. Rather, advocates claim, it is unjust to require taxpayers to put millions of dollars into an inefficient death penalty system when the money could be better used for more valuable programs.<sup>228</sup> Thus, the question is: considering the millions of dollars spent on an ineffective death penalty system, is the occasional execution worth the millions of dollars in taxpayer money? Many state lawmakers, as well as their residents, answer with a resounding “no.”

The anti-death penalty movement’s recent focus on interest-convergence contrasts sharply with its longstanding emphasis on morality discussed in Part II. In the past, many advocates endorsed the notion that capital punishment “is a human rights violation, not just a matter of criminal justice.”<sup>229</sup> Today, anti-death penalty campaigns still focus on the injustice of the death penalty. In their state abolition campaigns, anti-death penalty coalitions have highlighted the problem of wrongful convictions and racial bias in the capital punishment system.<sup>230</sup> They have also argued that the length of the death penalty process harms victims’ families. At the same time, more and more anti-death penalty organizations now cite cost to taxpayers as the number one reason, or at least a top reason, why the death penalty should be abolished.<sup>231</sup>

The role of interest-convergence has potentially interesting implications for the future of the anti-death penalty movement. Namely, it suggests that advocacy groups should continue to focus more on practical issues, such as cost and inefficiency, in order to end capital punishment in the rest of the country. Several states, including Oregon and Washington,

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<sup>227</sup> Most states have not executed anyone in several years, but Texas accounts for approximately 40% of total executions in the United States since 1982 when the state reinstated its death penalty. *Number of Executions by State and Region Since 1976*, DPIC, <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited Mar. 26, 2014); *Briefly*, DALLAS CHRON. (Dallas, Or.), June 26, 2013, at A3, available at 2013 WLNR 15932569.

<sup>228</sup> See *supra* note 129 and accompanying text.

<sup>229</sup> EUGENE G. WANGER, NCADP, NATIONAL COALITION TO ABOLISH THE DEATH PENALTY: A 30TH ANNIVERSARY HISTORY 5 (2006) (quoting Jack Healey, Exec. Dir. of Amnesty International).

<sup>230</sup> See, e.g., *About the Death Penalty*, NCADP, <http://www.ncadp.org/pages/about> (last visited Mar. 26, 2014); *Capital Punishment*, ACLU, <http://www.aclu.org/capital-punishment> (last visited Mar. 26, 2014).

<sup>231</sup> See, e.g., *Capital Punishment*, ACLU, <http://www.aclu.org/capital-punishment> (last visited Mar. 26, 2014); *Death Penalty Overview: Ten Reasons Why Capital Punishment Is Flawed Public Policy*, NCADP (2007), <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=31512&libID=31481>; *Facts*, DEATH PENALTY FOCUS (May 31, 2013), <http://www.deathpenalty.org/section.php?id=13>.

appear to be on the verge of repealing their state death penalty statutes.<sup>232</sup> Moreover, most states' economies have not yet recovered from the 2008 financial crisis.<sup>233</sup> Once state legislators and taxpayers no longer feel the pressure to balance state budgets in a time of financial crisis, the anti-death penalty movement's cost argument may lose some of its persuasiveness. Thus, the window to push for nationwide death penalty reform may be closing quickly.<sup>234</sup>

On the other hand, if the economic argument against the death penalty is so effective, why have some states repealed their death penalty statutes while others have not? On November 6, 2012, Californian voters rejected Proposition 34—a ballot initiative to abolish capital punishment in the state.<sup>235</sup> Proposition 34 failed despite the presence of an anti-death penalty campaign that specifically focused on the high costs and inefficiency of the state's death penalty system.<sup>236</sup> Between 2008 and 2011, the ACLU published several reports that revealed the substantial costs of California's death penalty.<sup>237</sup> The state has only sentenced thirteen convicts to death since 1978, yet it has spent \$4 billion on the death penalty since that time.<sup>238</sup> The failure of Proposition 34 was particularly surprising because of California's serious budget crisis,<sup>239</sup> which one would think would have made the anti-death penalty movement's cost argument particularly persuasive to voters in the state.

At first blush, California's failure to pass Proposition 34 appears to contradict this Note's argument that interest-convergence can explain the

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<sup>232</sup> See Ashby Jones, *Washington State Halts Use of Death Penalty*, WALL ST. J., Feb. 12, 2014, at A6 (reporting that Washington Governor Jay Inslee instituted a moratorium on capital punishment in the state); Helen Jung, *Bill to Repeal Oregon's Death Penalty Scheduled for Work Session*, OREGONIAN (Apr. 8, 2013, 1:42 PM), [http://www.oregonlive.com/politics/index.ssf/2013/04/bill\\_to\\_repeal\\_oregons\\_death\\_p.html](http://www.oregonlive.com/politics/index.ssf/2013/04/bill_to_repeal_oregons_death_p.html); see also *House Panel Votes in Support of Repeal to Death Penalty*, N.H. UNION LEADER, Feb. 12, 2014, at A4 (stating that the House was likely to vote for the death penalty repeal bill, which would then go to the Senate).

<sup>233</sup> See, e.g., Michael Cooper & Mary Williams Walsh, *Surpluses Help, but Fiscal Woes for States Go On*, N.Y. TIMES, June 1, 2013, at A1 (reporting that "mounting Medicaid costs and underfunded retirement promises are continuing to cloud [states'] long-term outlooks"); Norimitsu Onishi, *California Governor Issues Cautious Budget, Disappointing Democrats*, N.Y. TIMES, May 15, 2013, at A16 (stating that California Governor Jerry Brown proposed a budget that fell below what was projected and has continued to warn against new spending).

<sup>234</sup> See Robert J. Shiller, *Yes, We're Confident, but Who Knows Why*, N.Y. TIMES, Mar. 10, 2013, at BU4 ("[T]he overall economy has finally gained sustainable momentum—or so it is said").

<sup>235</sup> *Supra* note 130.

<sup>236</sup> See Lisa Green, *The Death Penalty and the Cost of Justice*, DAILY INDEP., Oct. 13, 2012, at 4A, available at 2012 WLNR 21941132.

<sup>237</sup> See MINSKER, *supra* note 124; NATASHA MINSKER ET AL., AM. CIVIL LIBERTIES UNION OF N. CAL., DEATH IN DECLINE '09, at 4–7 (2010); NATASHA MINSKER ET AL., AM. CIVIL LIBERTIES UNION OF N. CAL., CALIFORNIA'S DEATH PENALTY IS DEAD: ANATOMY OF A FAILURE 2 (2011).

<sup>238</sup> See *A Just and Sure Punishment*, Op-Ed., S.F. CHRON., Sept. 19, 2012, at A13.

<sup>239</sup> See Adam Nagourney, *New Spending Cuts as California Shortfall Swells by Almost \$7 Billion*, N.Y. TIMES, May 13, 2012, at 19.

recent state trend towards abolition of the death penalty. There are several possible explanations, however, for the result in California. First and foremost, California's attempt to abolish the death penalty through a ballot initiative (as opposed to a statute passed by the state legislature) may be a key factor in explaining its failure. With the exception of New York, every state that has abolished the death penalty over the past four decades has done so through the state legislature.<sup>240</sup> California, however, is unique because its constitution requires a voter referendum to amend the state's death penalty statutes.<sup>241</sup> Although state legislators are supposed to represent the interests of their constituents, in reality it takes substantially fewer resources to educate legislators than to educate the millions of voters who must vote to change the law. It is particularly time-consuming to educate individuals about the costs of the death penalty because the idea that capital punishment costs more than life imprisonment does not intuitively resonate with most people.<sup>242</sup>

Evidence suggests that Proposition 34 was unsuccessful because the anti-death penalty campaign failed to educate enough California voters about the high costs of the state's capital punishment system. According to SAFE California, the organization that led the Proposition 34 campaign, a lack of funding prevented the campaign from getting the cost message out to voters.<sup>243</sup> The campaign only raised \$7.5 million, which it largely spent on 30-second TV advertisements about wrongful convictions. Although SAFE California highlighted the cost argument in its radio and Internet campaigns, TV advertisements are crucial to the success of California political campaigns.<sup>244</sup>

Polls conducted in California within the past two years confirm SAFE California's belief that many California voters were unaware of the high costs of the state's death penalty system when they voted against Proposition 34. A poll conducted by University of California, Berkeley, and the Field Poll shortly before Election Day showed that 42% of California voters were in favor of Proposition 34, while 45% opposed the

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<sup>240</sup> See *supra* Part III. New York abolished the death penalty in 2004 after the New York Court of Appeals held that the state's death penalty statute violated the state constitution. See *People v. LaValle*, 817 N.E.2d 341, 367 (N.Y. 2004).

<sup>241</sup> See Scott W. Howe, *Can California Save Its Death Sentences? Will Californians Save the Expense?* 33 *CARDOZO L. REV.* 1451, 1454 & n.22 (2012) (stating that "the state constitution requires voter approval to amend the death-penalty statutes"); see also *CAL. CONST.* art. II, § 10(c) (2012) (setting forth the requirements for the legislature to be able to repeal or amend referendum statutes).

<sup>242</sup> Telephone Interview with Ben Johnson, *supra* note 100.

<sup>243</sup> Telephone Interview with Ana Zamora, Assistant Campaign Manager, SAFE Cal. Campaign (Feb. 4, 2013).

<sup>244</sup> *Id.*; see also Meg James, *For Ads, Campaigns Play It Old-Media Safe*, *L.A. TIMES*, Oct. 29, 2010, at A1 ("TV commercials sway voters. . . . And these days it is impossible to escape the barrage of ads on television.").

measure.<sup>245</sup> However, the poll did not inform respondents about the cost savings that would result from the initiative.<sup>246</sup> In fact, in a 2011 California Field Poll, the majority of respondents stated that they believed the death penalty was cheaper than life in prison without parole (43% to 41%).<sup>247</sup> In contrast, a poll conducted by David Binder Research in 2011 shows that when California voters were informed about the costs, the number of California voters in support of the death penalty dropped dramatically.<sup>248</sup> Specifically, the poll found that 63% of California voters favored life in prison without parole over the death penalty when they were told that it would save the state \$1 billion in five years and the money saved would go towards law enforcement and public education.<sup>249</sup>

Regardless, the failure of Proposition 34 should not be viewed as signaling a failure of the cost argument or the anti-death penalty movement in general. The number of Californians who voted *for* Proposition 34—48%—was a milestone for California’s anti-death penalty movement.<sup>250</sup> Over the past several decades, polls indicated that an overwhelming number of California voters supported capital punishment, and California lawmakers generally believed that voicing disapproval of the death penalty was a “high risk-venture” for their political careers.<sup>251</sup> Now, after Proposition 34 confirmed that public support for capital punishment is declining, elected officials in California may be more willing to support repealing the death penalty.

It is also important to note that the unique history of the death penalty in each state may influence whether the cost argument is effective in achieving repeal legislation. For instance, while New Jersey, Connecticut, and New Mexico had not executed anyone in the decades preceding the abolition of the death penalty in their respective states, other states, namely Texas and Alabama, continue to execute people every year.<sup>252</sup> Residents of Texas and Alabama may therefore see more value in the death penalty than

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<sup>245</sup> Bob Egelko, *Death Penalty Repeal Close in Poll*, S.F. CHRON., Sept. 25, 2012, at A9.

<sup>246</sup> *See id.*

<sup>247</sup> MARK DICAMILLO & MERVIN FIELD, UNIV. OF CAL. BERKELEY, *THE FIELD POLL: VOTERS CLOSELY DIVIDED ON PROPOSITION 34 TO REPEAL DEATH PENALTY 3* (2012).

<sup>248</sup> Memorandum from Shanan Alper, David Binder Research, Re: Voters from Across Political Spectrum Support Converting All Current Death Row Sentences to Save California \$1 Billion Over Five Years, Apr. 26, 2011, available at [https://www.aclunc.org/docs/criminal\\_justice/death\\_penalty/april2011dppoll.pdf](https://www.aclunc.org/docs/criminal_justice/death_penalty/april2011dppoll.pdf).

<sup>249</sup> *Id.*

<sup>250</sup> Franklin E. Zimring, *Endgame for the Death Penalty in California*, S.F. CHRON. (Dec. 8, 2012), <http://www.sfgate.com/opinion/article/Endgame-for-death-penalty-in-California-4101011.php>.

<sup>251</sup> *See id.*; Marisa Lagos, *Field Poll: Voter Support of Death Penalty*, S.F. CHRON., Sept. 29, 2011, at C2.

<sup>252</sup> *See* Jennifer Emily, *Lancaster Woman’s Execution Today to Mark Texas Milestone*, DALLAS MORNING NEWS, June 26, 2013, at 1A (stating that there were 40 executions in Texas in 2000, 15 in 2012, and 8 so far in 2013); Editorial, *Alabama-Style Executions*, BIRMINGHAM NEWS, Dec. 31, 2008, at 8A (noting that it was an unusual occurrence when Alabama did not carry out an execution in 2008).

residents of other states, and it may be more difficult to convince them that capital punishment is a waste of taxpayer dollars. In addition, the fact that some states are more cash-strapped than others also may account for the varying success of the cost argument. For instance, New Jersey, New Mexico, Illinois, and Connecticut all faced extremely high budget deficits when their legislatures voted to abolish the death penalty.<sup>253</sup>

It is also possible that some state lawmakers are opposed to considering cost as part of the death penalty debate. Some lawmakers have argued that the decision of whether to administer the death penalty is strictly a moral—and not economic—issue.<sup>254</sup> On an abstract level, this argument has merit: the cost argument would be inappropriate in the context of a flawless death penalty system where states have abundant resources. The country's capital sentencing process, however, is fraught with errors. In addition, there is no penological reason why capital punishment is more effective than life without parole.<sup>255</sup> Lastly, the death penalty deprives states of other important crime-control programs because it demands so much money. For these reasons, policymakers *must* consider the costs of the death penalty to fulfill their duties to the people of their state.<sup>256</sup>

Evidence shows that the cost argument is working in many states, in spite of a few roadblocks. Accordingly, anti-death penalty advocates should continue to create an interest-convergence story by focusing on the high costs of capital punishment. Combined with evidence of wrongful convictions, the cost argument shows that the abolition of the death penalty is in the states' best fiscal interests. At the same time, anti-death penalty advocates should not completely ignore the moral quandaries involved in the death penalty. Instead, they should continue to argue that the money spent on the death penalty should go towards victim assistance and other critical law enforcement needs. Lastly, the anti-death penalty movement should continue to educate the public about the inefficiencies and costs of capital punishment. Considering state lawmakers' strong interest in winning reelection, they will only vote to repeal the death penalty if they think their constituents support such legislation.

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<sup>253</sup> Bienen, *supra* note 109, at 1307; *supra* note 144; Boyd, *supra* note 154; Haigh, *supra* note 205.

<sup>254</sup> See, e.g., N.J. DEATH PENALTY STUDY COMM'N, *supra* note 139, at 81 (presenting his minority view, the Honorable John F. Russo asserted that “[t]he taking of a human life is something far too important to be influenced either way by costs”).

<sup>255</sup> See *supra* note 58.

<sup>256</sup> See Bienen, *supra* note 109, at 1308 (“[A]t a time when state governments are not meeting their most basic obligations, how can the state’s policy of maintaining capital punishment alone be immune to considerations of cost and relative value?”).

## CONCLUSION

In his concurring opinion in *Baze v. Rees*, Justice Stevens opined, “The time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely arrived.”<sup>257</sup> Fortunately for Justice Stevens, a focus on the costs of the death penalty has arrived because the anti-death penalty movement helped bring the issue to the public’s attention. By creating an interest-convergence story, anti-death penalty advocates have finally turned the tide in the movement towards ending the death penalty in the United States. By emphasizing the costs and inefficiencies of capital punishment, advocates have helped convince state lawmakers that ending the death penalty is in the states’ best interests, especially considering the recent economic crisis. Although the cost argument has not been a “magic bullet” for ending the death penalty in America, it has proven more successful than any of the moral arguments that the anti-death penalty movement has used in the past. This interest-convergence story has implications for the future of the anti-death penalty movement because it suggests that anti-death penalty advocates should continue to focus their strategy on an economic-based approach, at least while states’ budget woes persist. It also has implications for social movements in general. Activists generally attempt to create social change by concentrating on the moral and humanitarian need for reform. The anti-death penalty movement’s recent success, however, suggests that appealing to policymakers’ own interests may prove a more fruitful strategy in the end.

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<sup>257</sup> 553 U.S. 35, 81 (2008) (Stevens, J., concurring).