

## **The Discovery of Innocence: Americans and the Death Penalty**

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### **Abstract**

Capital punishment in America peaked in 1935, declined precipitously throughout the post-war period until reaching zero executions in 1968, remaining at that level until 1976. From 1977 to 1996 there was a steady increase in the number of executions. Public policy, public opinion, and public discourse grew increasingly comfortable with a “tough on crime” approach, including the death sentence. Throughout this period, numerous critiques, such as that the system was geographically isolated, subject to arbitrary whims of prosecutors thereby denying equal protection of the law, subject to enormous biases in terms of race and class, and that it was of questionable deterrent value, were widely referenced by knowledgeable observers. And yet support grew. Beginning in the mid-1980s, however, innocence projects began to sprout on college campuses, and by the mid-1990s the debate had been transformed away from the traditional moral and constitutional focus to a new way of looking at the issue: It is a bureaucratic nightmare prone to error. With increasing attention to the problem of mistaken judgments, a thirty year trend toward increasing use of and public support for the death penalty has been reversed. Since 1995, the number of death sentences in America has declined steadily from a peak of 326 in that year to 110 in 2007, according to the Death Penalty Information Center. The Discovery of Innocence explains why.

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## **The Discovery of Innocence**

Capital punishment in America peaked in 1935, declined precipitously throughout the post-war period until reaching zero executions in 1968, remaining at that level until 1976. From 1977 to 1996 there was a steady increase in the number of executions. Public policy, public opinion, and public discourse grew increasingly comfortable with a “tough on crime” approach, including the death sentence. Throughout this period, numerous critiques, such as that the system was geographically isolated, subject to arbitrary whims of prosecutors thereby denying equal protection of the law, subject to enormous biases in terms of race and class, and that it was of questionable deterrent value, were widely referenced by knowledgeable observers. And yet support grew. Beginning in the mid-1980s, however, innocence projects began to sprout on college campuses, and by the mid-1990s the debate had been transformed away from the traditional moral and constitutional focus to a new way of looking at the issue: It is a bureaucratic nightmare prone to error. With increasing attention to the problem of mistaken judgments, a thirty year trend toward increasing use of and public support for the death penalty has been reversed. Since 1995, the number of death sentences in America has declined steadily from a peak of 326 in that year to 110 in 2007, according to the Death Penalty Information Center.

With colleagues Suzanna De Boef and Amber Boydston, I have been working for five years to uncover the explanation of this dramatic policy reversal. This paper gives an overview of one aspect of the findings of our study, which is more fully reported in our book *The Discovery of Innocence and the Decline of the Death Penalty* (Cambridge University Press, 2008), and for which we make available all of our data at this web site:

<http://www.personal.psu.edu/frb1/Innocence/Innocence.htm>.

Some of the most pertinent facts from our study can be presented simply in a series of tables and figures, and that is the goal of this paper. First, some background. The modern era of the death penalty is distinctly different from its historical parallel. In fact, executions peaked in 1935 and declined precipitously until there were none at all during the period of 1968 to 1977. This corresponded to low levels of public opinion in favour of capital punishment as well (with support measured by Gallup reaching a low point in 1965).

(Insert Figures 1 through 3 about here)

Figure 1 shows the number of executions nationally and makes clear several points: 1) the absolute numbers, given the crime rate, have never been high; with fewer than one percent of convicted murderers receiving it, the death penalty has never been a large part of the punishment system for the crime of murder (and even less so when one looks at the numbers of executions compared to the number of murders, never more than 100 in recent decades whereas homicides have often been over 20,000); 2) significant social trends pointed to the abolition of the punishment in the 1940s, 1950s, and 1960s; 3) these trends were reversed with the “war on crime” and the politicization of crime policy, and the death penalty in particular beginning in the 1970s and lasting several decades. The figure does not make clear, but later analysis will show, just how dramatically this trend has been reversed in the past ten years.

Figure 2 shows the aggregate responses to three most common survey questions asked of national samples over the decades: The Gallup question “Are you in favor of the death penalty for persons convicted of murder?”, the slightly more balanced NORC question: “Do you favor or oppose the death penalty for persons convicted of murder?,” and the more recent Gallup question reflecting the fact that almost all states with capital punishment have revised their laws in recent years also to allow for a punishment of life without parole (LWOP): “What do you think should

be the penalty for murder—the death penalty or life imprisonment with absolutely no possibility of parole?” Responses to the third question of course show significantly less support for capital punishment than the more general questions, but the figure makes clear that the series trend in similar manner over time. Making use of this fact, we have made use of all available survey information in order to construct an aggregate model of public opinion over time. This index (also presented in Figure 2) combines information from all national samples where the identical question wording was asked twice or more; we found 292 separate surveys based on 65 different survey questions through a search of IPOLL. Using an algorithm developed by Jim Stimson of the University of California, we combined these into the overall index shown in the figure.

Figure 3 shows the difference between supporters and opponents of capital punishment based on the composite index in Figure 2. Net support (that is, the percentage of respondents expressing support minus the percent expressing opposition to capital punishment) reaches a minimum of almost zero in 1966 (the Gallup murder question actually dipped briefly into negative territory in that year), increases dramatically through the next thirty years until it reaches levels over 30 during the 1990s. It begins declining, however, in 1997 and has declined dramatically since that date. Note that Figure 2 shows that in response to the question including the LWOP option, a majority of Americans today prefers that punishment to death.

In all, while there are many ups and downs in the series, it is clear that American public opinion is highly supportive of capital punishment. Much to the frustration of those who oppose it on moral or religious grounds, many more Americans ascribe to a moral code and/or a religious tradition that supports an “eye-for-an-eye” rather than a “forgiveness and redemption” perspective on punishment. These are the hard facts of public opinion on the issue. As the

debate for most Americans has been rooted in highly religious and moral terms, individuals do not waver easily in their views on such matters.

Given these features of the debate, why has aggregate opinion shifted over time, and why does it seem to be moving against capital punishment at the moment? This is a particularly striking development considering that it has continued unabated throughout the Presidency of George W. Bush, who as a two-term Governor of Texas oversaw the execution of more people than any single Governor in the history of the United States. Other contextual factors that make the decline of the death penalty so striking include the war on terror, the heightened security and reduced civil / private rights ethos of the post-September 11, 2001 era, and the continued rise of evangelical religious denominations in American society in recent decades. In spite of these trends, death sentences, executions, and public support for capital punishment have declined. In 2007, New Jersey became the first state ever to see its elected legislature rescind capital punishment.

The answer has to do with the “discovery” of a fact of criminal justice that has always been with us: The system is far from perfect. Mistakes are made. In the particular case of capital punishment, of course, mistakes are irretrievable, and Americans are extremely uncomfortable with the idea of executing the wrong person. As attention has focused on the new innocence argument, a number of other arguments have gained greater ground as well. Some of these are previously familiar arguments, in particular that the system has a strong racial bias. As a number of previously familiar (but apparently unconvincing) arguments have coalesced, a coherent critique has emerged, and this new “innocence frame” has moved attention and public discussion away from the one dimension of debate where people are the least prone to persuasion: Morality and religion. No matter what one’s views on the issue from a theoretical or

moral perspective, the new set of arguments brings people's attention to the idea that it is a bureaucratic process, that is extremely costly and inefficient, that the solutions to the problem of innocence (namely vastly increased resources to public defenders offices) are unpopular, and that over 125 individuals have been exonerated (that is, found to have been innocent of the crime for which they were sentenced to die), and to the possibility that some innocent people may have actually been executed in the past. No one, even those with strong moral support for the death penalty in theory, is comfortable with a system that does not work very well. And people are finding out that the system is quite prone to error. Consider, for example, that over 60 percent of all death sentences are overturned when reviewed by a federal judge. This surprising finding came from a Columbia Law School review of the outcomes of hundreds of thousands of murder trials, and garnered significant media attention when it was released in 2000.

One interesting point of comparison would be to consider what the collective public response would be if the US Postal Service failed to deliver even one percent of the billions of pieces of mail that it handles each year, or if the Social Security Administration erred with a similar percentage of its monthly checks. It would be politically intolerable, as most Americans, after just a few months, would have some experience with the errors. What level of error is acceptable in the justice system, particularly in the case of capital punishment where any error is irretrievable? Most Americans simply had never thought of this question, as they have no direct experience with the process. Many events have pushed some of these questions into popular culture in recent years, ranging from exonerations to popular television shows and movies focusing on crime labs and police actions, so people have become attuned or primed to the idea that the system may not be perfect. As the question has been raised, people have been shocked to see evidence that the system may have more in common with FEMA than with any unthinking

assumptions that they may have had about an error-free justice system. Considering that the discussion is about life and death, where one would expect the scrutiny and care to be the greatest, the rate of error has been surprising.

No one argues that the American justice system is perfect; we argue that it gives equal opportunity for defense and prosecution to make their respective cases. Our entire system of government is based on the idea that man is fallible, imperfect, and that different actors in the political system must act as checks and balances on the others. And yet, attention to the possibility of error has been virtually absent in the debate, until recently. Figure 4 shows the results of an intensive study of the content of the *New York Times Index*, covering every story on capital punishment or the death penalty from 1960 to 2006, almost 4,000 stories in all. Attention fluctuated dramatically in time, with significant peaks of attention during the period of the constitutional moratorium (1972–76) but especially in the late-1990s and in the year 2000. In fact, the recent surge of attention is dramatically different from the earlier coverage because of the rise of the “innocence” frame. Figure 5 shows the number of stories mentioning any of the following: Arguments about innocence, mentions of problems associated with the use of evidence in the trial, arguments that there are too many errors in the system (the system-is-broken argument), or, strikingly, any mention of the characteristics of the defendant.

(Insert Figures 4 and 5 about here)

Overall, the tone of media attention to the death penalty has shifted dramatically over the years. One simple way of measuring this is simply to code each article as “pro” or “anti” based on whether the actions or opinions reported in the article tend toward the application or the expansion of the use of the death penalty or against it. This proved amenable to highly reliable coding by two different coders, and corresponded as well with shifting topics of attention. (That

is, when attention has focused on morality, the stories have been highly split, some reporting on support for a moral position in favor and others reporting on moral arguments against the death penalty; when attention has focused on other topics, such as the mode of execution, international comparisons, or issues of innocence, positive stories are extremely rare, so the topic of attention is related to its tone. Further, stories that mention victims of crime are highly likely to show a pro-death penalty tone, whereas those mentioning the defendant in the trial are highly likely to show an anti-death penalty tone. Strikingly, attention has shifted dramatically over the decades from a preponderance of attention to the victim to much more attention to the defendant.) Figure 6 shows the “net tone” of coverage, which is simply the number of pro-death penalty stories published in a year minus the number of stories in that same year with an anti-death penalty focus. It shows how dramatically the overall tone of discussion, as reflected in media coverage, has shifted in recent years.

(Insert Figure 6 about here)

The distribution of death sentences is of course highly skewed by geography. Figure 7 shows the number of executions across 53 jurisdictions (the fifty states plus the federal government, the US military, and the District of Columbia). Texas, of course, leads the nation, and five states constitute the vast bulk of executions: Texas, Virginia, Oklahoma, Missouri, and Florida. The typical state has executed just three individuals over the past 30 years, and many states have executed none. While the modern death penalty is more geographically distinct than its historical use from colonial through the first half of the 20<sup>th</sup> century, annual trends are surprisingly similar in the “top five” states and in the other jurisdictions listed in Figure 6. Figure 7 shows this correspondence.

(Insert Figure 7 about here)

The top line in Figure 7 is an important indicator of the state of public policy in America. Unlike public opinion surveys, which reflect a relatively theoretical perspective on the issue, death sentences come after two lengthy trials (the guilt phase, followed by the penalty phase), and they reflect a decision of a jury (sometimes a judge) to sentence a particular individual to death; there is nothing theoretical about it. This may explain why popular support as measured in surveys typically shows very high levels of support for a very broadly worded question (“persons convicted of murder” – not just the most heinous murders), but the total annual number of death sentences has never been above 320 in recent decades. There were between 15,000 and 25,000 homicides in each year between 1970 and 2004 according to FBI crime statistics. Of course we know that all those sentenced to death will not be executed (most, in fact, will have their sentence overturned by a federal judge who will require a new trial, which may or may not lead to the same outcome). Still, the number of death sentences annually reflects an important public policy statement, so we use this as a dependent variable: What explains its movement?

Several features may explain the increase in use of capital punishment during the 1970s, 80s, and for part of the 1990s, as well as its recent decline. The model is presented in Table 1 and Figure 9 shows the predicted and actual values of the model.

(Insert Table 1 and Figure 9 about here)

Going back to 1963, when we have enough data for all variables to conduct reliable tests, Figure 9 shows that there were roughly one-hundred death sentences per year until just before the 1972 decision invalidating state capital laws. A momentary but significant drop in 1973 followed by a surge in 1975 reflect state efforts to re-write their laws before trying a backlog of inmates not tried under laws known to be unconstitutional. We model these in the analysis with simple dummy variables for 1973 and 1975. Sentencing increases regularly from the late-1970s

to the mid-1990s, then declines later. We saw above that public opinion has followed a roughly equal trend; similarly the tone of newspaper coverage and the number of homicides (the most appropriate single measure of the crime rate for this purpose) have followed similar trends, generally speaking. The regression analysis presented in Table 1 includes each of these variables. The model is quite simple: Death sentences are a function of:

- Death sentences in the previous year
- Public opinion (the “net support” variable from Figure 3)
- The tone of media coverage (e.g., “net tone” from Figure 6)
- Homicides (measured in thousands in order to make the coefficient of a similar magnitude to the others; these data range from about 8,500 in the early years, increasing to over 24,000 in 1991 and 1993, then declining sharply to end the series in 2004 at just below 16,000)
- Dummy variables for the temporary decline in 1973, and the surge in 1975

Of particular concern is the relative importance of the shifting nature of public discussion, reflected in the “net tone of media coverage” variable, and the others. The results show that a shift in the nature of public discussion leading to a 50-point shift in the net-tone variable would be associated with 33 fewer death sentences. Shifts in public opinion similarly have a strong impact. Homicides, on the other hand, are not related to outcomes. (Note, we did find that homicides are a significant predictor of public opinion in another model reported in the book; as we have already included a variable for public opinion here, and this reflects an impact of homicides, there is an indirect effect of homicides on death sentences. The tone of media discussion, by contrast, exerts *both* a direct effect on death sentences as well as an indirect effect through its impact on public opinion.)

A glance back at Figure 6 shows that the net tone of media coverage of the death penalty moved from a value of over +30 in the mid-1990s to one of below –100 more recently, reflecting an overwhelming movement in public discussion from relative contentment with the system to a preoccupation with errors, exonerations, and problems of lethal injection. Today, of course,

there is a moratorium on executions as the Supreme Court heard arguments about the constitutionality of the lethal injection method and will not render its decision until later in its current term; in the meantime there can be no use of lethal injection, the only method of execution currently in use. According to our model, a movement of 130 points in the net tone of media coverage, reflecting such a sea-change in the nature of public discussion, should itself be associated with a movement of 86 death sentences, each year. Figure 9 showed that the actual number has indeed declined by more than half, from over 300 to fewer than 150; we believe that the bulk this decline can be associated with the “discovery of innocence” through its direct effect just described as well as through its indirect effect on public opinion.

## **Conclusions**

One of the most surprising reversals in public policy in recent decades is the decline of the death penalty. This paper has given an overview of some of the reasons why this occurred. For reasons of space, it has not focused on the driving forces of the “discovery of innocence,” those student-led “innocence projects” that began to spout up in journalism and law schools beginning in the 1980s and which now number in the dozens with active groups in most states having the death penalty, and I have not presented our detailed model of public opinion, which we found to be sensitive both to the level of homicides as well as to the nature of public discussion as measured by the net tone of media coverage. These innocence projects and allied organizations have put a new face on an old debate. Upending decades of increased public support for a policy seen by many as fundamental to a “tough on crime” approach (but by others as unfairly focused on minority populations, morally wrong, or simply ineffective), they have succeeded in a surprising endeavour: To take the most reviled segment of the population and make them the beneficiary of one of the most striking policy reversals in recent years. To do this, they have had

to shift the national debate away from an entrenched way of thinking about a morally charged debate with heavy religious overtones toward a new issue-definition: that the system is a bureaucratic nightmare with tremendous waste and inefficiency and a unique possibility in American public policy to create an irreparable and tragic harm.

Racial politics are of course central to issues relating to criminal justice in general and the death penalty in particular. Almost half of all those sentenced to death in the United States have been African-Americans. The racial elements of the debate have long been known and have defined many Americans' responses to capital punishment. However, in the new "innocence" argument that has recently become predominant, the racial element of the debate fits in with many other flaws in the system to paint a new portrait of the policy: That it is flawed in its application not just by race, but by poor police practices, inadequate support for the public defenders offices, and that it has demonstrably failed to ensure justice in over 100 cases where innocent individuals have been sentenced to die. The "discovery" of these facts (very few of which can be argued to be new) by the broad public has given new life to many old complaints about the criminal justice system. It has already accomplished something that could not have been predicted 10 years ago – during the Bush presidency and the war on terror, it has led to decreasing, not increasing public support, and to a decline over 60 percent in the number of death sentences in America.

Table 1. Explaining the Number of Annual Death Sentences, 1963–2005.

	Annual Death Sentences
Sentences <sub>t-1</sub>	0.316 <sup>+</sup> (.097)
Net Tone <sub>t-1</sub>	0.453 <sup>+</sup> (.137)
Opinion <sub>t-1</sub>	5.059 <sup>*</sup> (1.069)
Homicides <sub>t-1</sub> (thousands)	0.817 (1.437)
1973	-67.80 <sup>+</sup> (25.80)
1975	129.49 <sup>*</sup> (25.34)
Constant	22.92 <sup>#</sup> (19.20)
R-Squared	.930
RMSE	23.97
StDev	83.70

Entries are regression coefficients; standard errors are in parentheses.

Note: \* denotes  $p < .001$ , + denotes  $p < .05$ , and # denotes  $p < .10$ , one tailed.

Figure 1. Executions in the US, 1800-2002.

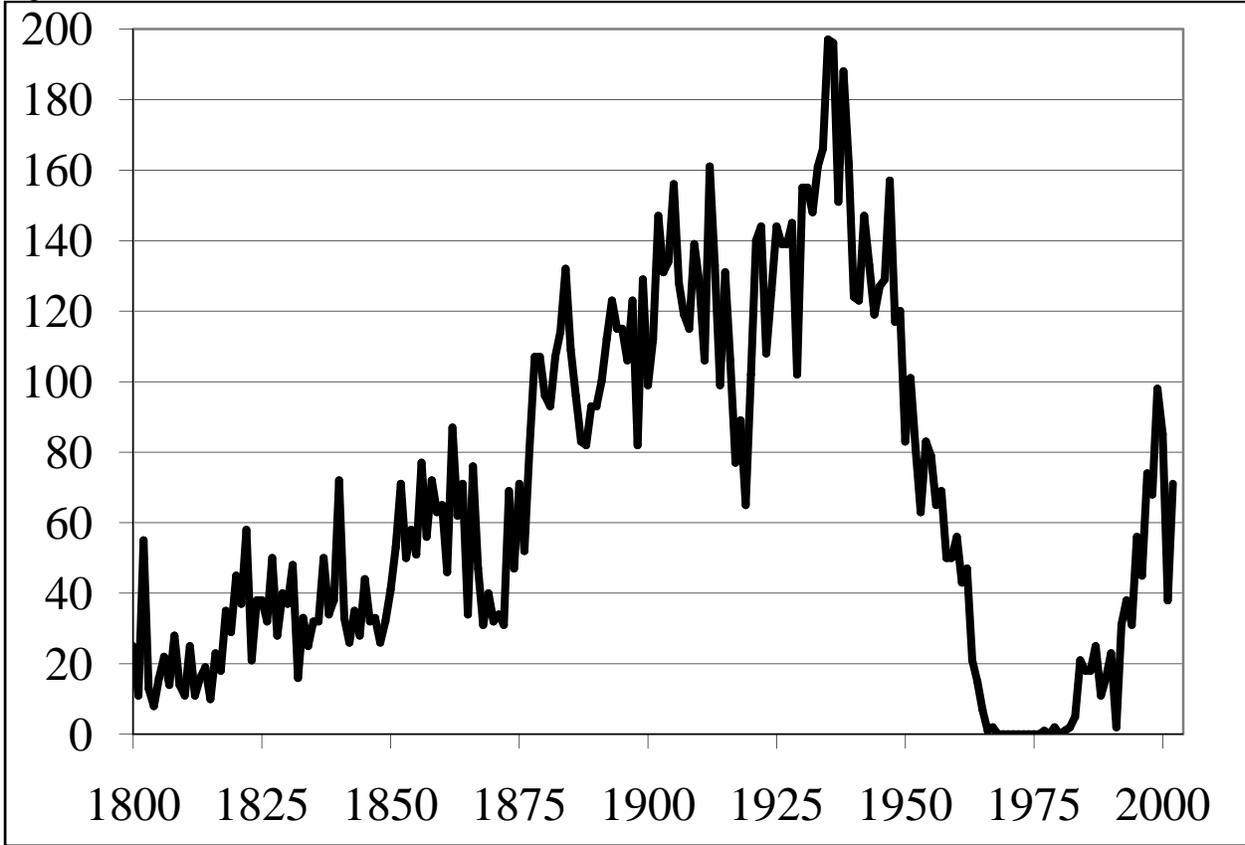


Figure 2. Public Opinion on the Death Penalty, 1953–2005.

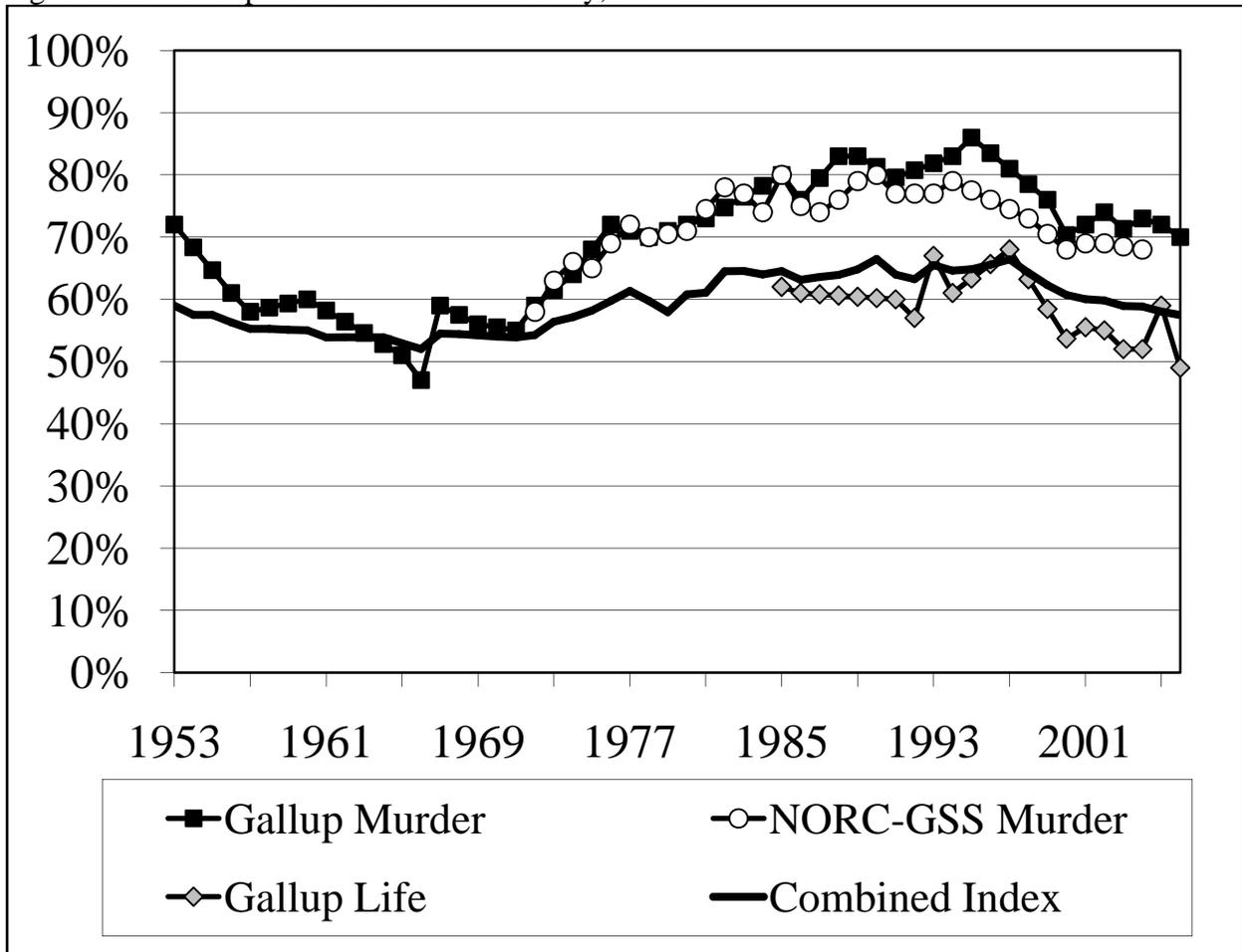
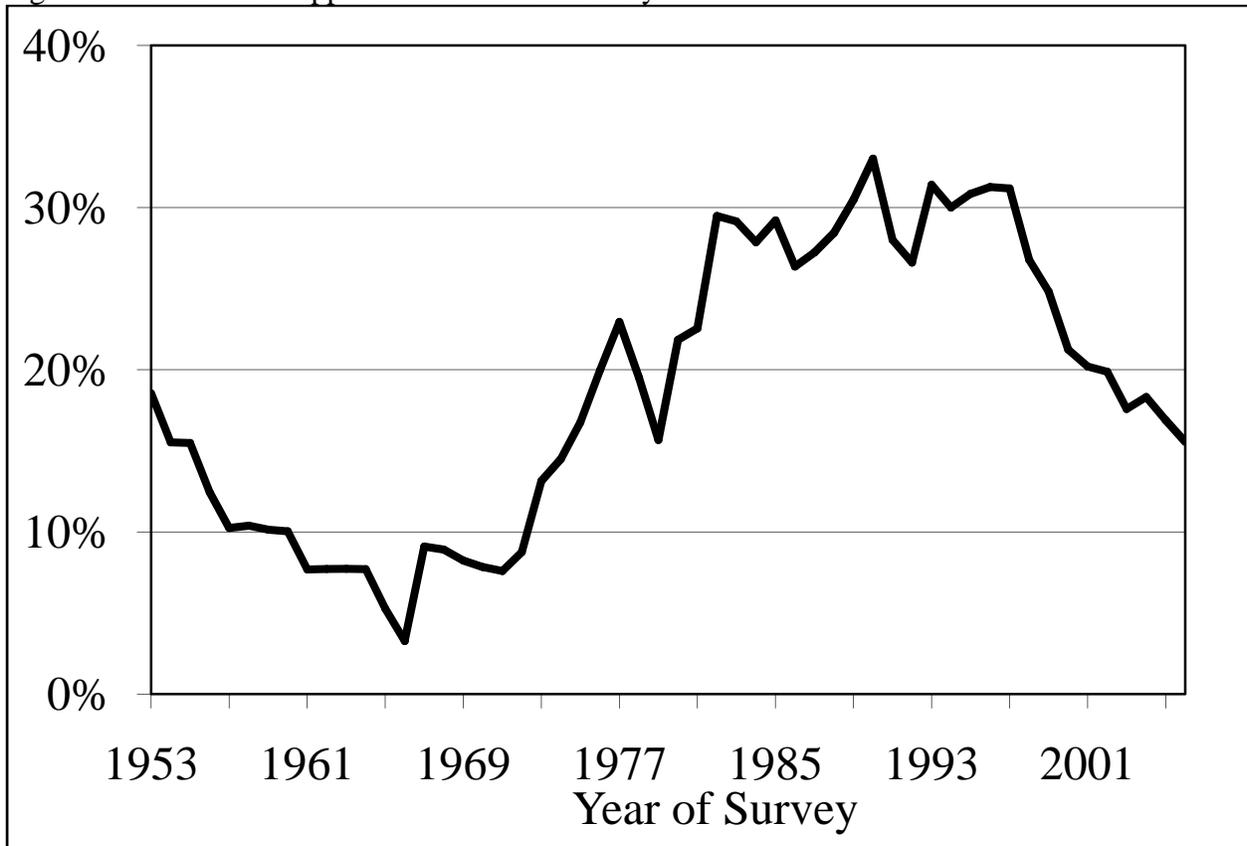
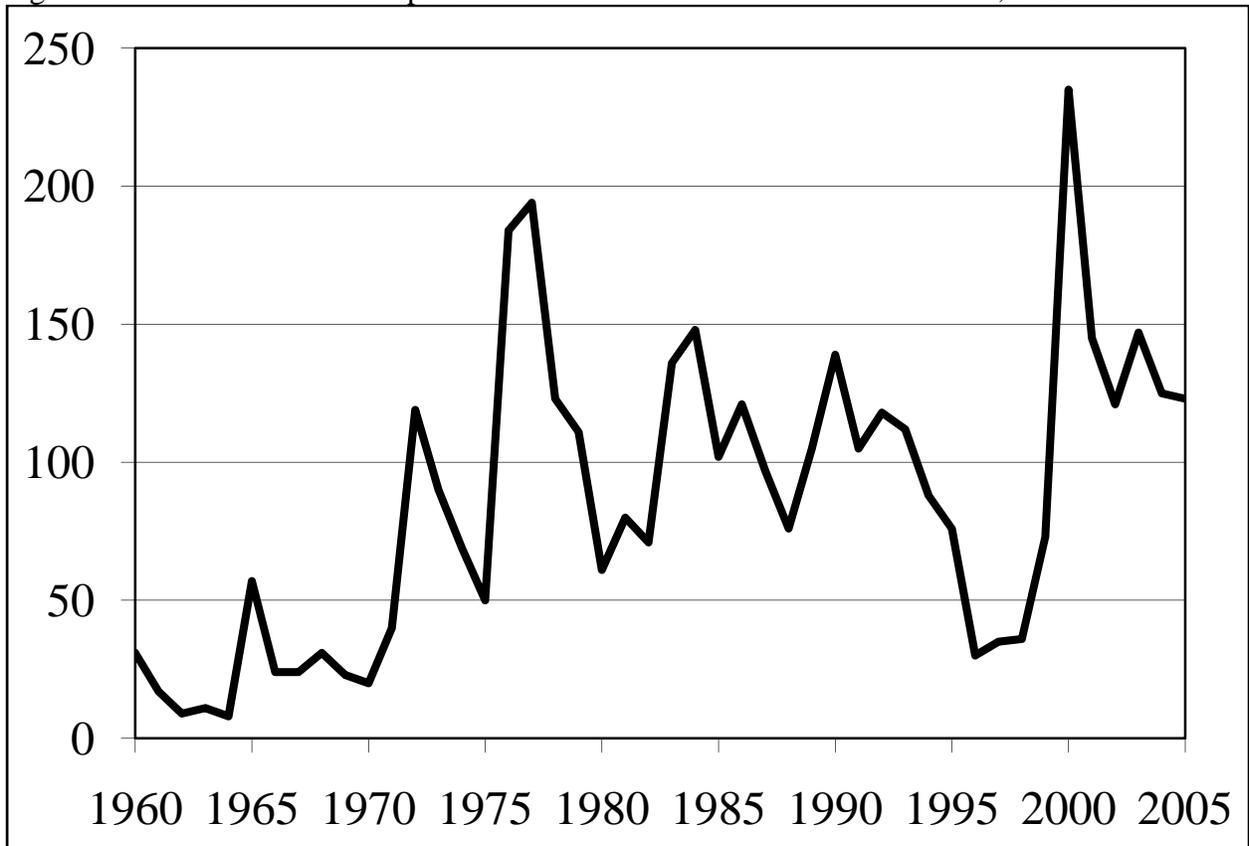


Figure 3. Net Public Support for the Death Penalty



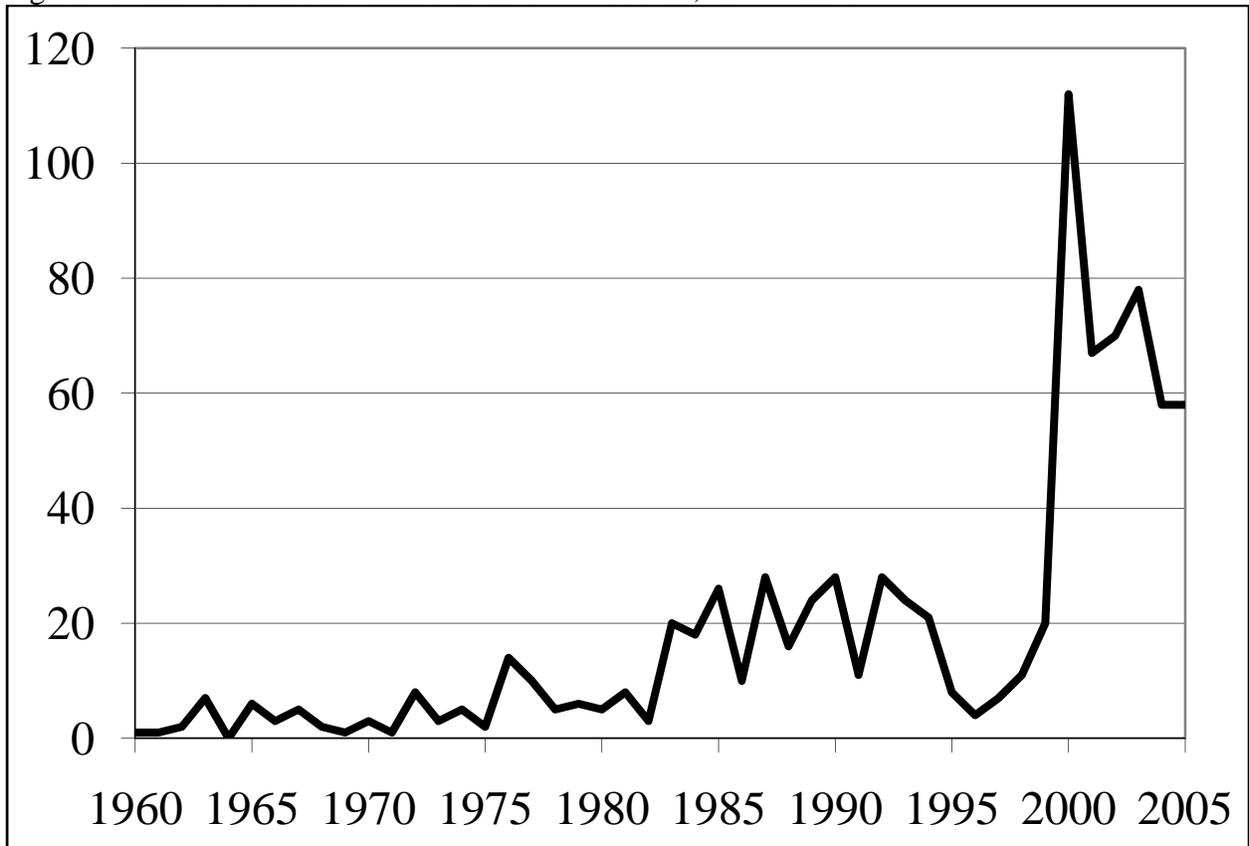
Note: The series shows the number supporting minus the number opposing the death penalty, based on a weighted combination of over 250 polls from 1953 to 2006.

Figure 4. Annual Stories on Capital Punishment in the *New York Times Index*, 1960–2005



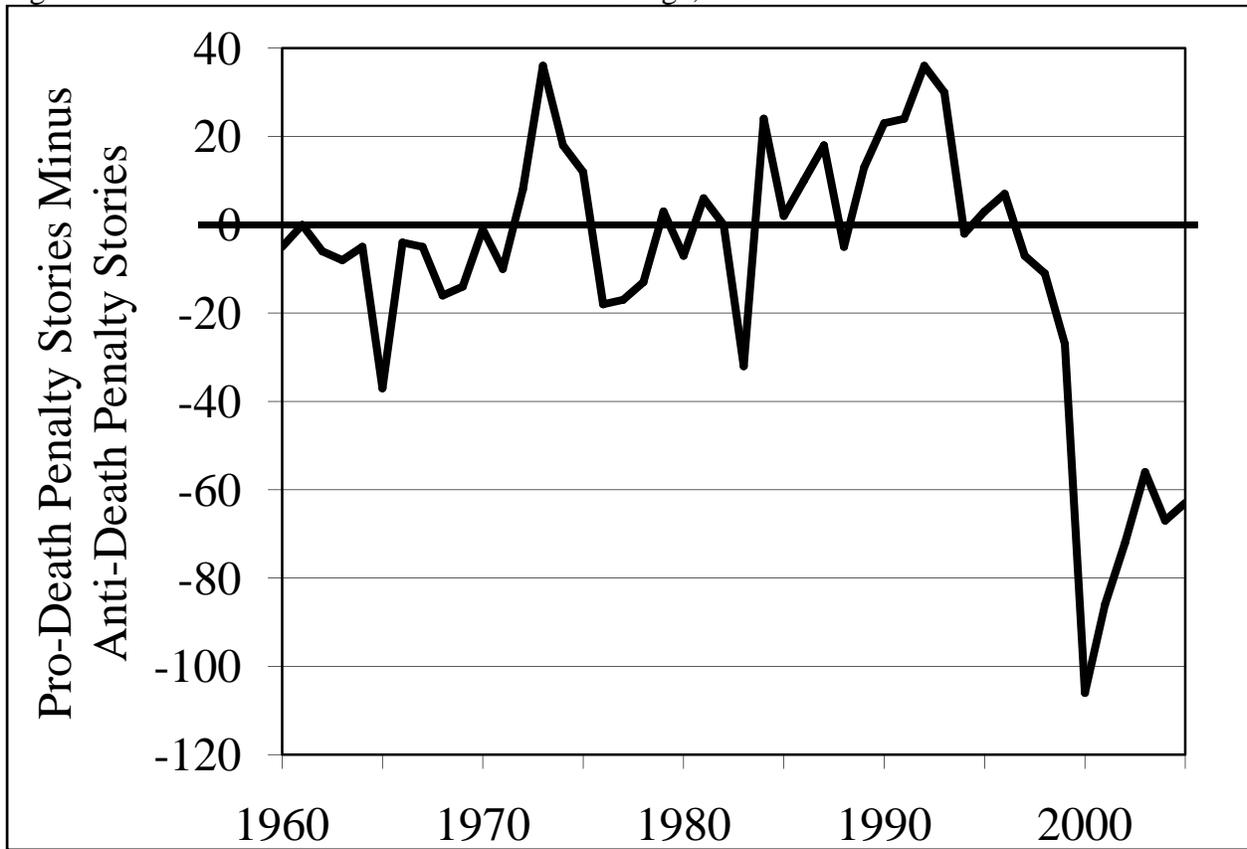
Note: Levels of coverage in the *New York Times* are highly correlated with levels of attention in the *Readers' Guide* over this time period, though the *Guide* does not show the peak of attention associated with the 1976 reinstatement.

Figure 5. *New York Times Index* entries on Innocence, 1960-2005.



Note: Based on a review of all stories on capital punishment in the *New York Times Index*, the graph indicates the total number of stories per year mentioning any of the following: arguments about innocence, evidence, system-is-broken, or mention of the defendant.

Figure 6. The Net Tone of *New York Times* Coverage, 1960–2005



Note: The tone of coverage is consistently more pro-death penalty in the *Times* than in the *Readers' Guide*, belying charges of liberal bias and probably due to the fact that as a paper of record, the *Times* reports on government actions such as legislative activities and court actions, many of which have expanded the scope of the death penalty. Since the mid-1990s, both the *Times* and the *Guide* have been heavily anti-death penalty in the nature of their coverage, reflecting more attention to themes of innocence, exonerations, and problems in the death penalty system. Similarly, a comparison of Lexis-Nexis searches since 1980 for ten leading newspapers show correlations of over 0.70 for overall levels of coverage between the *Times* and the average of the other papers, and over 0.90 for frequency of the words “innocence” each year. The papers included were the *Washington Post*, *Miami Herald*, *Houston Chronicle*, *Pittsburgh Post-Gazette*, *Seattle Times*, *Boston Globe*, *Chicago Sun-Times*, *Denver Post*, and *San Francisco Chronicle*.

Figure 7. The Distribution of Executions by State, 1977–2005

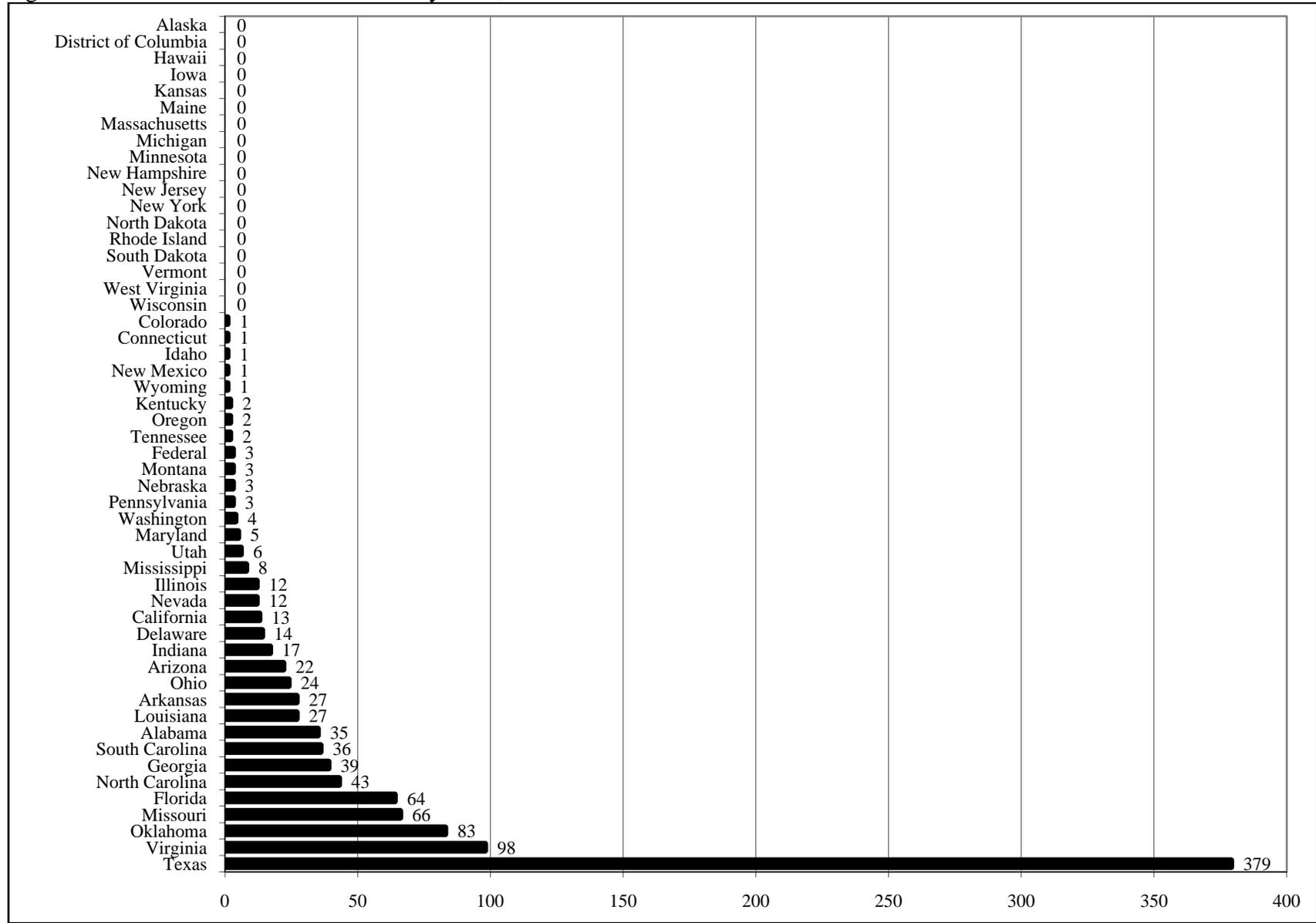
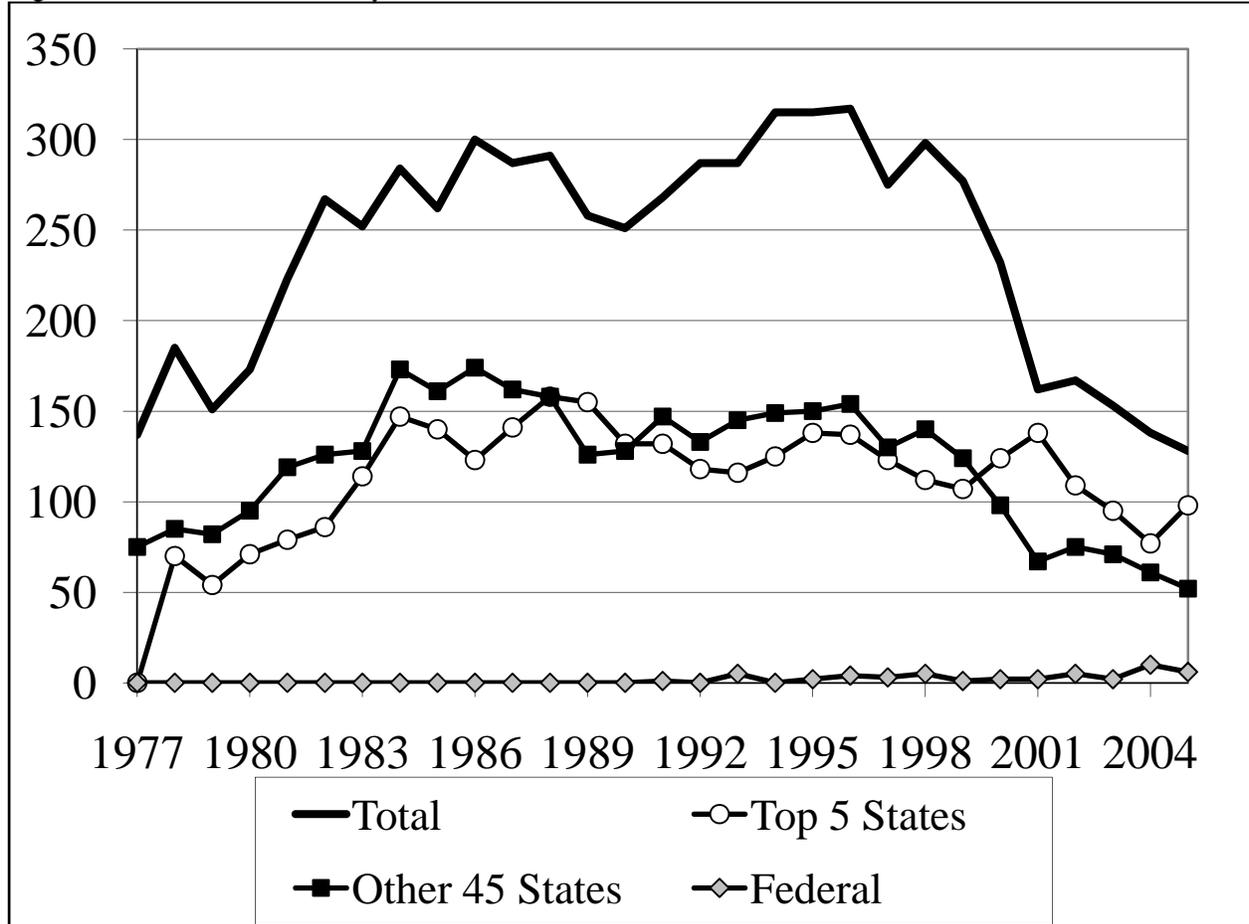
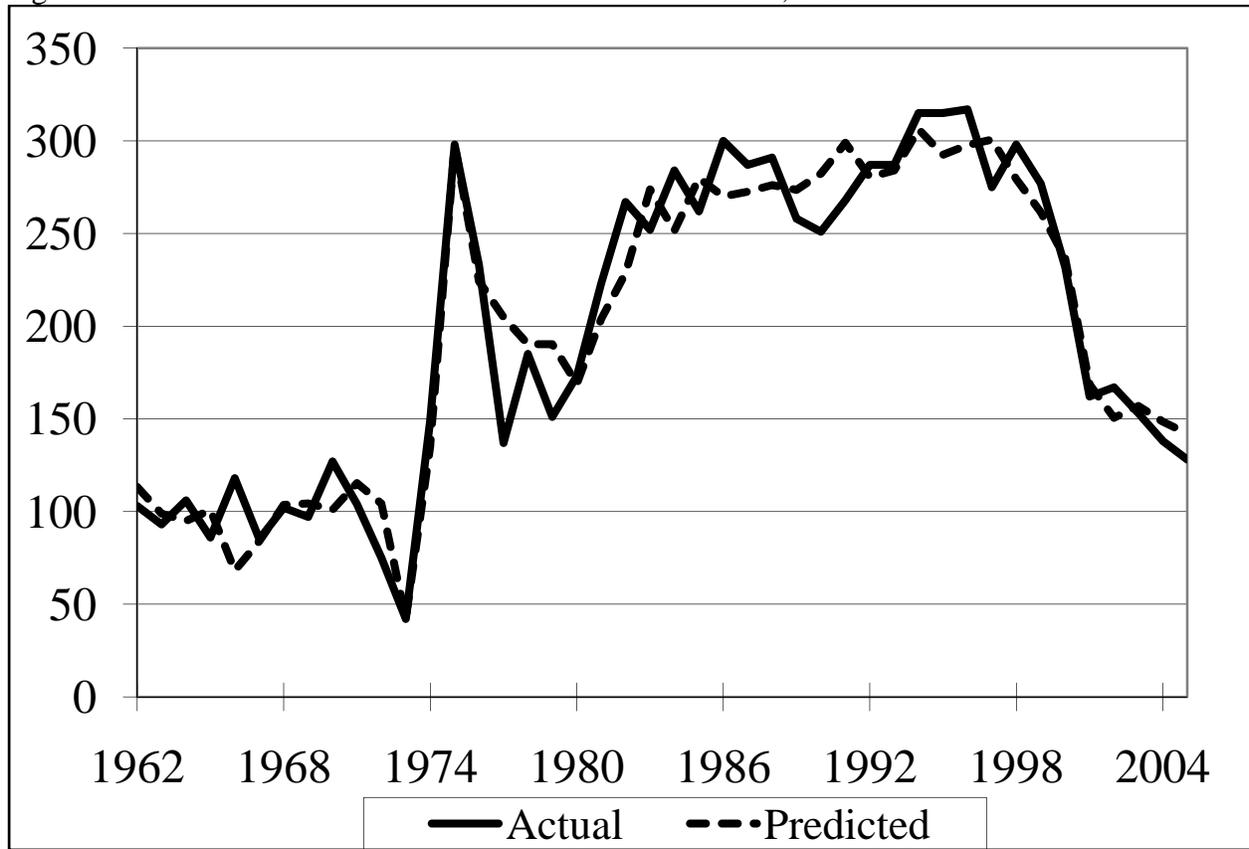


Figure 8. Death Sentences by Jurisdiction, 1977–2005



Note: The figure shows total annual death sentences across the United States as well as the part of that total comprised of: the “top five” states of Texas, Virginia, Oklahoma, Missouri, and Florida; the other states and jurisdictions; and the federal government itself.

Figure 9. Predicted and Actual Numbers of Death Sentences, 1963–2005



Note: See Table 1 for the predictive model used.