

Localism and Capital Judicial Override in Jefferson County, Alabama

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Abstract

This article is an analysis of capital judicial override in Alabama through localist theories of capital punishment, with special focus on Liebman and Clarke's arguments about parochialism and libertarianism. We suggest that localism is related to high rates of death sentencing in one county even when the sentencing agent is a judge, not a jury. We begin with a review of Liebman and Clarke's analysis, then proceed with a description of the law on override in Alabama, and conclude with a qualitative content analysis of sentencing opinions from Jefferson County, Alabama (which has the highest number of overrides to death). After finding evidence of parochialism and libertarianism in all of the sentencing opinions, we suggest that localism may be related to high death sentencing in Jefferson County and urge scholars to study this phenomenon in other high death penalty active counties.

Keywords

race and sentencing, race and courts, supreme court decisions, race and death penalty, guided discretion statutes, race-of-the-victim effects

Introduction

The latest academic discussions of capital punishment in the United States downplay traditionally understood "uses" of the institution, such as deterrence or retribution,

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and focus on its relationship with America's especially localized and hyperdemocratic political system (Garland, 2010; Liebman & Clarke, 2011). Encapsulated, these analyses argue that "almost all there is to know about [the USA's] death penalty is local, not national" (Liebman & Clarke, 2011, p. 258), and that it is this localism that explains the various features of the American death penalty that intrigue scholars, activists, and policy makers (e.g., its presence at all, its Southerness, its racism, its deference to victims' families, its "brokenness," etc.; Garland, 2010; Liebman & Clarke, 2011). These foci together build a theoretical typology of ideologies that we will for now lump together under the umbrella term "localism."

For example, in *Peculiar Institution*, Garland (2010) identifies a set of cultural scripts in America—populism, localism, liberalism, individualism, religiosity, and ruggedness—that, while not exactly responsible for American retention of the death penalty, are connected to its rigidly local form of democracy that makes national abolition difficult.¹ Earlier, Zimring (2003) focused on vigilantism and "privatization" of the death penalty by imagining it as a service for the families of murder victims. Recently, Kaplan (2012) focused on an American Creed, involving "liberty, egalitarianism, individualism, populism, and laissez faire," in relation to retention. And also recently—occasioning this article—Liebman and Clarke (2011) argue that libertarianism and parochialism "characterize the communities most disposed to impose death sentences" (p. 1). While these treatments of America's death penalty differ considerably in specific focus, argument, and implication, they all share a belief that there is a relationship between the death penalty in America and some version of ideologies we are calling localism. "Localism," of course, is an ideal type. As we use it in this article, it refers to a constellation of the ideologies we have just identified in recent academic literature on capital punishment; if a person has a "localist" perspective, she will be individualistic, religious, receptive to populist arguments, have libertarian attitudes about government, and be opposed to cosmopolitan ideas or foreign cultural values. A central element of these ideologies is a rejection of or resistance to federal—and potentially all—government power.² Having a political system that defers to local decision making on criminal justice (Garland, 2010), conceiving of the death penalty as a service for victims' families (Zimring, 2003), or emphasizing libertarian values in capital trials (Kaplan, 2012) or counties (Liebman & Clarke, 2011)—all of these modes of the death penalty reflect a dislike of state power and are characteristic of areas with high death sentencing rates.

Of course, in an obvious sense, capital punishment is the zenith of a sovereign government's power—recall Weber's (1946) classic definition of a state as the legitimate authority to dominate (p. 78). But, outside the relatively arcane scene of academia, most talk in America of capital punishment—at least until very recently³—has been about either the titillating aspects of murder and execution or the somber necessities of justice (Garland, 2010). Put simply, most Americans just do not see the death penalty as an expression of state power,⁴ despite the fact that it certainly is.

Part of the reason for this is probably because of the prominent role of the jury in contemporary capital jurisprudence. Beginning with *Gregg v. Georgia* (1976), and continuing with cases such as *Ring v. Arizona* (2002), death penalty law has made the

life or death decision primarily that of jurors. When the decision to sentence someone to death is made by laypersons, the state's power can seem dissolved into a "popular sovereignty" of "regular folks," not state agents. The fact that capital charging, postconviction review, clemency review, and execution are conducted by the state is obscured when a jury chooses death for capital defendants. As Liebman and Clarke (2011) argue, death sentences given by jurors reflect localist concerns that the state is unwilling to enact the harshest of punishments (p. 278).

There is an important counterfactual (of sorts) to this situation: the phenomenon of capital judicial override. Of the 32 states that employ capital punishment,⁵ three—Alabama, Delaware, and Florida—are unusual in that the final decision on the death sentence is made by the trial judge after a sentence recommendation from the jury (rather than ultimately by the jury, as in all other death penalty states).⁶ While these states' capital statutes have passed constitutional muster, they remain controversial because, as of this writing, in approximately 220 cases,⁷ trial judges have overridden jury recommendations for life and sentenced defendants to death. In Alabama, the number is 98 overrides to death and 9 overrides to life; currently override accounts for about one fifth of Alabama's death row (Equal Justice Initiative [EJI], 2011, p. 4).⁸

This article is an analysis of judicial override in Alabama through the lens of this recent crop of localist theories of capital punishment, with special focus on Liebman and Clarke's arguments about parochialism and libertarianism.⁹ In the pages that follow, we suggest that parochialism and libertarianism are related to high rates of death sentencing even when the sentencing agent is a judge, not a jury. We begin with a brief review of Liebman and Clarke's analysis, then proceed with a description of the law on override in Alabama, and continue with an analysis of sentencing orders from Jefferson County, Alabama, which has the highest number of overrides to death in the state. We found potential traces of localism in all of the orders—*potential*, because from the orders alone it is difficult to identify the beliefs and intentions of the judges. Interpreting this partial record of the decision-making process requires a level of inference that cannot lead to conclusive claims. Moreover, we do not know much about what mitigating and aggravating evidence was presented at trial nor what judges might have left out of the sentencing order. Our goal is thus only to argue that localism *may* explain the behavior of sentencing judges. We see this study as generative and hope that it will inspire additional research into this question.

Liebman and Clarke's Theory of Parochialism and Libertarianism

The essence of Liebman and Clarke's argument is that communities committed to *parochialism* (manifest as a fear of outsiders) combined with *libertarianism* (manifest as a reluctance to spend resources on law enforcement) are more likely to produce death sentences. This is because communities with high levels of these populist ideologies are extravigilant about intruders (parochial) but have poor law enforcement capabilities (libertarian)—an ironic brew that adds up to real and imagined

susceptibility to intrusive crime and then subsequently extraoutraged and retributive responses when intrusive violence occurs:

When parochialism and libertarianism coincide, a temptation—or even a felt necessity—arises to invoke the death penalty to compensate for the crime-solving shortcomings of localities disposed towards meager spending on law enforcement. The death penalty, that is, substitutes as a locally reassuring and externally intimidating demonstration of the community’s disposition to defend itself against criminal invasions where pervasive and effective law enforcement is considered unaffordable or unpalatable. (p. 280).

Unlike other literature on the death penalty and populism (e.g., Garland, 2010; Zimring, 2003), Liebman and Clarke focus on *counties* rather than *states* or *regions*; this allows them to show how capital punishment is, in fact, a starkly minority practice in the United States. By both measures of death sentences and executions, it turns out, a small percentage of counties account for most capital outcomes. Between 1976 and 1995, for example, “16% of the nation’s counties (510 out of 3,143) accounted for 90% of its death verdicts” (p. 265). These disparities generally hold up when only considering capital states and also when including the years since 1995 (see pp. 264–266). What this means is that it is not so much “the South” or “Texas” that account for America’s death penalty but that *a few counties* mostly in the South (including Texas) do.¹⁰ There are lots of parts of the South, including Texas, that are not involved in capital punishment. The point for the authors is that the vast majority—even in actively capital states like Texas—pay for a tiny minority’s use of the death penalty.

Liebman and Clark further argue that parochialism and libertarianism explain the resilience of an anachronistic legal vehicle for securing death: felony murder. While most capital murder requires intention, felony murder “transform[s] an accidental killing in the course of a felony—which normally would merit at most a manslaughter charge based on the inference that the felon must have recognized the risk of death—into the equivalent of purposeful murder” (Liebman & Clark, 2011, p. 281). They argue that the most common underlying felonies—rape, kidnapping, robbery, and burglary—

effectively ... serve as proxies for stranger or invasion crimes ... [that] ... cross boundaries, come frighteningly ‘out of the blue and are the handiwork of frightening outsiders ... [felony murder] provide[s] law enforcement officials with a powerful device for assuaging fears and communicating how seriously they take and how harshly they are prepared to punish outsider crime(pp. 286–287).

We find their analysis of felony murder convincing and propose to extend the analysis to another controversial legal mechanism resulting in increased death sentences in some U.S. counties: capital judicial override. Toward that goal, we first explain how Liebman and Clarke define parochialism and libertarianism.

Parochialism

For Liebman and Clarke parochialism means two things:

the attribution of innate importance and validity to the values and experiences with the members—and thus to the security, stability and continuity of—one’s closely proximate community (p. 268), and

fears that prized local values and experiences are embattled, slipping into the minority and at risk from modernity, cosmopolitanism, immigration-driven demographic change, and a coterie of “progressive” and secular influences, including permissiveness and crime . . . [and that] the boundaries of the immediate community represent a bulwark against outside influences that threaten to dilute or entirely dissolve the community’s cohesion, and parochialism compels a spirited defense of those frontiers (p. 269).

Parochialism as such is operationalized by reference to studies showing that areas with high death sentencing rates “have traditional rather than modern political values, a resonance with masculine honor codes and revenge, Old Testament and evangelical Christian religious beliefs, and Republican Party affiliation” (p. 269), and by inference from the authors’ prior research that communities with high rates of capital sentencing and execution—as measured by high rates of capital error—are ones where influential citizens feel they are under particular threat from crime” (p. 270). Parochialism also includes racism because “other things being equal, the smaller the disparity is between white and Black homicide victimization, the higher the death sentencing is,” meaning that “heavy use of the death penalty thus seems to occur when the worst effects of crime have spilled over from poor and minority neighborhoods” (p. 270). So, Liebman and Clarke’s tripartite definition of parochialism might be summed as fear (especially among whites) of change caused by dangerous (especially nonwhite) outsiders. The nexus of “outsider” and race in this theory is complex because it is about elite White *perception* of outsider status that includes *some* Black persons, or persons thought to be immigrants, or Black and/or immigrant persons with certain characteristics (e.g., nonreligious, non-Republican, and nontraditionalist). Liebman and Clarke define outsider in the following way:

By “outsider,” we certainly mean transient individuals who do not reside in the community and are just passing through. The association of capital crimes with gas-station and convenience-store hold-ups and home invasion crimes along major interstate arteries is a manifestation of this effect. But “outsider” also includes individuals who cross racial and economic boundaries *within* communities in order to commit crimes (pp. 19–20).

It is likely that elite Whites in Jefferson County consider *some* Black persons as insiders: those who share their version of “the good.” And, of course, some Whites are viewed as outsiders by elite Whites. The essence of Liebman and Clarke’s notion of parochialism is a fear of change caused by others.

Of course, a long line of rigorous empirical scholarship led by David Baldus in the mid-1980s and replicated in most regions of the United States shows that Black persons who kill White persons are more likely to be charged capitally (e.g., Epstein, 2009), sentenced to death (e.g., Pierce & Radelet, 2010; Radelet & Pierce, 2010), and executed (e.g., Jacobs, Qian, Carmichael, & Kent, 2007; Petrie & Coverdill, 2010). This research demonstrates that all links in the chain of the death penalty institution are still infected with racism and have not been cured by the doctrinal requirements of *Gregg v. Georgia* (1976) nor any subsequent U.S. Supreme Court cases.

Libertarianism

For Liebman and Clarke, libertarianism means preferences for:

- 1) more rather than less protection of acts of individual autonomy,
- 2) less over more frequent exercises of state power,
- 3) low taxes over high services, and
- 4) a vigilante streak—the willingness to take the law into one’s own hands and out of the untrustworthy hands of the government (p. 273).

Putting these aspects of the ideology into one sentence:

the uneasy combination of a desire for seriously retributive responses to non-consensual acts interfering with another’s autonomy, yet little or no spending on police, prosecutors, investigators, courts, corrections, rehabilitative services and other methods of combating crime may dispose libertarians towards self-help, even in the realm of criminal justice and law enforcement (pp. 273–274).

The authors operationalize libertarianism by referencing previous research, which found that high death sentencing states also had “low clearance rates for serious crimes and low levels of expenditure on criminal courts” (p. 274).

If one were to imagine an equation produced by Liebman and Clarke’s theory, it would look like this:

Counties with:
 Fear of dangerous outsiders
 +
 Preference for individual autonomy, low taxes, few services, and vigilantism; and dislike of state power

 = high levels of death sentencing

With these elements of localist ideology in mind, we explore the usefulness of Liebman and Clarke’s theory for explaining high levels of death sentencing in Jefferson County, Alabama.

Judicial Override in Alabama

In all states except Alabama, Florida, and Delaware, the organ responsible for deciding death is constituted of laypersons from the local community—the jury.¹¹ While the judge plays an important role by being more or less lenient with what kinds of arguments they allow defense counsel to make and by which jury instructions they give (for example), the sentencing decision ultimately lies with the jury, not the judge. In Alabama, though, a major source of higher capital sentencing is a judge, a representative of the state.¹² Nevertheless, some Alabama judges—despite their official power—are able to position themselves as representatives of the community, not the state. We argue that jurors and judges alike are capable of doubting the ability of the state to protect traditional values and the people who hold them, from corrupting elements. Alabama sentencing opinions provide an opportunity to explore whether and how judges in high death sentencing counties are influenced by localist ideology.

Alabama law, as in the other override states, requires the judge to write a sentencing opinion explaining his or her own findings on aggravation and mitigation (Alabama Code 13A-5-47[d]). The judge chooses life or death according to the following instruction:

In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to Section 13A-5-46(a) or Section 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court (Code of Ala. § 13A-5-47, 2011).

As Russell (1994) observes, this law creates no statutory standard nor refers to any case law standard for guiding judges when deciding life or death (p. 8).¹³ In Alabama, death sentences are almost entirely in the judge's hands.¹⁴

Perhaps the most important fact about Alabama in relation to override is that, unlike in Florida and Delaware, the judges tasked with deciding death are elected in *partisan* elections (EJI, 2011, p. 14). The potential for arbitrariness under these conditions is obvious enough,¹⁵ and the Alabama-based nonprofit EJI (2011) has documented plenty of anecdotal evidence of political influence, including the fact that 92% of overrides in Alabama are life-to-death (p. 14), some evidence of higher rates of life-to-death overrides in election years (p. 16), and lots of heated tough-on-crime rhetoric in judicial ad campaigns, such as this:

Kenneth Ingram [a candidate], ran a TV ad that opened with grainy videotape footage from inside a convenience store where, 20 years earlier, a teenager had murdered the owner. Here, said the ad's narrator, "a 68-year-old-woman, working alone, was robbed, raped, stabbed 17 times, and murdered. Without blinking an eye, Judge Kenneth Ingram sentenced the killer to die." The victim's daughter appears on screen to give her personal endorsement: "It was my mother who was killed, and Judge Ingram gave us justice.

Thank heaven Judge Ingram is on the supreme court” (EJI, 2011, quoting from Silverstein, 2001).

Moreover, Radelet (2011) concludes that life-to-death override in the United States has become strictly Alabaman:

In Delaware and Florida the override has become a one-way ratchet in favor of life . . . But Alabama is a different beast. It is an outlier. In contrast to every other death penalty state, it not only regularly allows life-to-death overrides, but does so without standards, without appellate courts that regularly reduce such death sentences to life imprisonment, without governors extending executive clemency, and with a continuing practice of sending those with life recommendations to its death chamber. The way that Alabama treats capital cases with life recommendations is utterly unique; it is different in both form and practice from all other death penalty states (pp. 28–29).

The question we investigate here is whether this uniqueness can be understood in terms of localism.

Jefferson County

Jefferson County is Alabama’s leader in life-to-death overrides (with 17) and one of the three counties in Alabama that account for almost half of all overrides in the state (the other two are Mobile and Montgomery; EJI, 2011, p 17); it is also Alabama’s leading capital county by current death row inmates (29, almost twice the next county on the list, Houston, with 17) and second in executions in the modern era (with seven; Mobile County accounts for 10; Alabama Department of Corrections, 2013).¹⁶

As of this writing, we do not know enough about tax policy and the politics of service provision to say whether these elements of Liebman and Clark’s theory could be involved in how override drives high death sentencing in Jefferson County. However, Jefferson County filed for bankruptcy in 2011, which was then the largest municipal bankruptcy filing in U.S. history (Church, Selfway, & McCarthy, 2011).¹⁷ This fact suggests that tax income was low, and it implies that service provision was probably lacking.¹⁸

Method

Our question here is not whether these defendants deserved a death sentence but whether localism is a particular form of capital punishment’s idiosyncratic application. In order to evaluate Liebman and Clarke’s theory, we undertook a content analysis of 14 of the total of 17 override-to-death sentencing memos from Jefferson County.¹⁹ This content analysis entailed primarily qualitative techniques, although quantitative data were also gathered for descriptive purposes. Although interesting patterns were revealed in the quantitative data, they cannot be used reliably for analysis, given the small number of cases in our study. As much as possible, the descriptive data were gathered from the orders themselves. Race of defendant data

Table 1. Characteristics of Override Cases.

D	Vote for LWOP	Race of D	Race of V	# of V/s	ID of V/s	Race of judge	Outsider	Reject mit/science	Ind aut	Hdwkd jurors
AA	8	W	W	5	Strangers, bar patrons	W	X	X		
AB	8	B	B	3	Girlfriend and daughters	NA	X	X	X	
KB	7	B	B	1	Fellow drug dealer	W	X	X	X	
PC	12	B	W	1	Correctional officer	NA	X	X		
CC	NA	W	W	1	Cop	W	Unk	X		
DE	9	B	W	2	Drug customers	W/L		X		
JG	7	W	W	1	Pregnant mistress	W		X		
EH	NA	B	B	1	Cop	NA	X	X		
DJ	10	B	B	1	Cop	W/L	X	X	X	
BM	10	B	B&W	3	Employees at robbery site	W	X	X		X
MN	8	W	W	3	Bar patrons	W	X	X		
KS	11	W	W	1	Stranger, contract murder	NA	X	X	X	
KSp	9	B	W	3	Cops	W	X	X		
MS	10	B	W	1	Stranger, robbed	W	X	X		X

Note. Outsider = not from Jefferson county, transients, crossed race/class lines; LWOP = life without parole. First column is initials of defendants.

was gathered from the Alabama Department of Corrections web pages related to capital punishment. Race of victim data was gathered from media accounts of the crimes.

Following Liebman and Clarke's definition of "outsider," we coded defendants as outsiders if they were not residents of Jefferson County or their crime crossed racial or economic lines. Our determination of the remaining categories (rejection of mitigation/social science, belief in individual autonomy, and hoodwinked jurors) was interpretive. Again, our primary purpose for gathering the quantitative data was to provide a descriptive picture of the memos in our study.

The results illustrated in Table 1 present the following picture of these cases: All of the defendants in these cases were men convicted of capital murder. Victims in these cases were girlfriends (two cases), fellow drug dealers (one case), strangers (six cases), and police or correctional officers (five cases). Several of the cases involved multiple victims, and one case had five victims. Some of the victims were robbed or kidnapped before being shot. Crack was involved in at least four cases.

In nine (64%) of the 14 cases, defendants were Black, five of the cases involved Black defendants and White victims, and in none of the cases was the defendant White and the victim Black. The life-to-death override cases in Jefferson County thus at least suggest that racism infects Alabama's death penalty. The fact that none of the overrides from Alabama's leading capital county involved a White defendant and Black

victim is redolent of the race effect we cited earlier that is so well known in other death penalty contexts in the United States.

Localist language in the form of rejecting mitigation/social science was used in all 14 cases and in the form of emphasis on individual autonomy in four cases. In 11 of the cases, defendants fit Liebman and Clarke's definition of "outsider." Language explicitly doubting the jurors was present in only 2 of the 14 cases.

This project originated out of a qualitative analysis of override memos from the three states with override statutes. For that study, we conducted open coding of the memos to understand the ways that judges justified their override decision. It was during that analysis that we became curious about the particularly high rates of overrides in particular counties, like Jefferson, and we decided to reanalyze this subset of cases. Once the theme of localism began to emerge, we shifted our analysis to code for "evidence of localism" by carefully rereading the orders to look for any language or narratives that invoke the elements of localism identified by Liebman and Clarke. These elements of localism will become clearer when we discuss representative examples from the sentencing orders given subsequently.

Indications of Localism in Several Forms

Alabama's statute authorizing override is vague about the extent to which the judge is required to explain his or her reasoning. On the one hand, the statute requires that the judge:

enter specific written findings concerning the existence or nonexistence of each aggravating circumstance . . . each mitigating circumstance . . . and any additional mitigating circumstances offered . . . The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it (Code of Ala. § 13A-5-47, 2011).

On the other hand, the law does not explicitly require the judge to write down his or her reason or reasons *why* he or she thinks the aggravation is more important and/or that the jury's recommendation should be discarded. Rather, the statute simply instructs the court to "determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict . . ." (Code of Ala. § 13A-5-47, 2011). So, while the judge has to say whether he or she believes that aggravators or mitigators exist and whether one or the other outweighs its counterpart, he or she does not have to explain *how* or *why* they think so. This frustrates anyone's attempt to understand judicial reasoning. Indeed, the statute creates that particular form of legal opacity where the obstruction to substantive understanding is draped in legalistic discourses that, pardon the double meaning, hide the opacity—a classic example of "repressive formalism." Still, even with the limitations on meaning caused by this law, we can try to learn something about localist ideologies by closely reading these unusual documents.

The standard form for the life-to-death override orders is for the judge to briefly introduce the case, list its procedural history, summarize the facts about the crime, list each statutory aggravating factor²⁰ and declare whether he or she believes that it exists in this case and whether he or she considered it, list each statutory mitigating factor²¹ and declare whether he or she believes that it exists in this case and whether he or she considered it, list any nonstatutory mitigating factors²² and declare whether he or she believes that it exists in this case and whether he or she considered it, mention the jury's recommendation, declare that the aggravators outweigh the mitigators, and finally the sentence of death.²³ Unfortunately, the orders tend to lack much substantive content. Instead, they consist primarily of legal boilerplate, descriptions of jury instructions, and simple lists of factors in aggravation and mitigation. Nevertheless, by carefully reading them, we can see several forms of localism that might be involved in these judge's decisions to reject jury recommendations for life.

We found evidence of localism in the opinions in several forms, including rejection of the concept of mitigation, rejection of scientific knowledge of social influences on human behavior, belief in individual autonomy, characterization of jurors as tricked by outsider defense attorneys, and fear of dangerous outsiders. We discuss each of these in turn.

Rejection of Mitigation and Scientific Knowledge About Social Influences on Human Behavior

Aggravation and mitigation evidence is presented during the penalty phase of a capital trial, which takes place after the defendant has been found guilty of capital murder. Most capital states, including Alabama, have statutory lists of aggravating factors (e.g., multiple victims, victim was a law enforcement officer, etc.) and also have lists of mitigation factors (e.g., no prior record, the defendant was under duress, etc.). In capital cases, individualized consideration of mitigating factors is mandatory, and it is one of the "super due process" requirements developed by the U.S. Supreme Court in a series of post-*Gregg* rulings (Raden, 1980). In one of these cases, *Lockett v. Ohio* (1978), the Court held that capital decision-makers must consider all mitigating factors and are not limited to the statutory list of mitigating factors. Mitigation evidence can range quite widely to include anything from evidence of a defendant's mental illness as a young child to post offense evidence of redemption (e.g., good adjustment while in custody).²⁴ Mitigation is usually organized under the concept of the defendant's social history, and in actual practice, the defense team gathers facts about the defendant's background—such as family history records (e.g., birth, death, and marriage certificates), medical records, educational records, employment records, veteran's records, incarceration records, and so on—and also interviews persons who know or knew the defendant. Marshalling this evidence, the defense team builds a narrative of the defendant's social history, usually telling a tale of "diminished autonomy" (Stetler, n.d., retrieved 2014), often caused by neglect and/or abuse resulting in some form of mental illness. Mitigation thus relies on social scientific

knowledge about the relationship between early trauma and later behavior in human beings (Haney, 1995; Khantizian & Albanese, 2008).

One clear form of localism was the flat dismissal of mitigation, which can be understood as a parochial fear of progress and a libertarian rejection of big federal government. We make this inference because the consideration of mitigation is constitutionally required and to simply reject the concept—to deny its existence—reveals that the decider does not believe in social scientific knowledge about human behavior and also dismisses U.S. Supreme Court rulings. Put another way, by rejecting mitigation, the judge rejects an “outsider” concept—a concept developed by “cosmopolitan social scientist types” and validated by the federal government. Of course, death penalty jurisprudence, and particularly legal doctrine on the concept of mitigation, is notoriously complex. Part of the story may be that judges are plain confused about what mitigation is because they have not received clear instructions from above. Requiring judges to consider mitigation complicates their task exponentially—to honestly grapple with a person’s history and the forces shaping that history is a tall order for anyone, including judges. So, while we posit that localism is playing a role here, we concede that other factors, including the confusing nature of the concept of mitigation, may also be at work. What we focus on in our analysis is the flat rejection of the concept of mitigation and social science that supports it.

For example, one judge decided that testimony by the defendant’s family simply did not constitute mitigation: “There was no mitigation presented on behalf of the defendant as the family members testified that he was no particular problem in his formative years . . .” (*Alabama v. Apicella*, 2000, p. 6). This judge also comes close to arguing that no mitigation could outweigh the actions of the defendant: “The actions of the defendant in this case are so heavily weighted in favor of the death penalty that the aggravating circumstances far outweigh any mitigation circumstances either statutory or nonstatutory, of only of which [sic] one statutory mitigating circumstance was found and no nonstatutory mitigating circumstances were found . . .” (pp. 6–7).

A different judge thinks that intentionally killing a person during a robbery is “so vile, and morally and legally reprehensible” (*Alabama v. Spradley*, 2008, p. 17) that she “finds it very hard to imagine a combination of mitigating circumstances that could fairly outweigh this aggravating circumstance as proven” (p. 17). This statement suggests that this judge was, a priori, strongly disinclined to consider *any* mitigation. And while including the phrase “very hard to imagine” preserves the legality of this sentence, the judge’s position refutes the U.S. Supreme Court’s requirement for super due process and “difference” in capital cases, especially relating to mitigation.

Other judges flatly disregarded mitigation evidence:

The Court does find that the jury’s recommendation is a mitigating factor and the Court has considered said mitigating factor at this sentence [sic] hearing. However, the jury was allowed to hear testimony regarding the defendant being raised in a dysfunctional family, that he was physically abused by his uncles, that they were unkind to him and that he was borderline mentally retarded as well as suffering from a mood disorder. Further the jury

heard evidence that defendant tried to commit suicide shortly after the killings. As stated above, the Court finds that defendant's dysfunctional family life, his mood disorder, his uncles' abuse and his attempted suicide are not mitigating factors (*Alabama v. Burgess*, 1994, p. 11; see also *Alabama v. Crowe*, 1984).

Without any explanation why, this judge rejects all of the mitigating evidence offered by the defense.

In the case of Coy Crowe, the judge inaccurately ties the purpose of mitigation to the question of guilt:

The Court, in accordance with the requirements of Title 13A-5-52, has considered all aspects of the defendant's character and record and all aspects of the environment in which he was raised and the evidence offered with reference to the claim by his counsel of his deprived childhood and his lack of community and family stability in his growing up, and after consideration of all these facts, the Court finds that there are no mitigating circumstances contained as such in any of these offers of proof and the Court *declines to declare and find that this is a mitigating circumstance in the defendant's conduct made the basis of this charge and subsequent conviction* (p. 372, emphasis added).

Here we can see how a libertarian rejection of the influence of social forces *causes* the judge to reject the mitigation—of which there was plenty in Crowe's case.

Sometimes these judges "found" mitigation but gave it no weight. The reason for "underweighting" mitigation is arguably based in a parochial rejection of science. For example, in the 2008 case of Demetrious Jackson, the judge "found" as a nonstatutory mitigator that the defendant experienced "lack of a relationship with his father and violence in the home" (p. 8), but that "the mitigating circumstance of an unpleasant home life was totally outweighed by the aggravating circumstances..." (p. 8). Without reviewing the trial transcript, we cannot know the extent of evidence presented about the domestic violence that Demetrious Jackson experienced, but the judge's use of the term "unpleasant home life" rather than "violence in the home" suggests skepticism about the effect of domestic violence on a person's future behavior, which we argue reflects parochialism.

In a different case—*Alabama v. Mitchell* (2007)—the judge also "finds" mitigation but gives it no weight. Indeed, in this case, the mitigation was substantial; the judge "found" that Mitchell was removed from his mother's care between the ages of one and three due to her problems (p. 6), that Mitchell was "whipped all the time" while under the care of his grandmother (p. 6), and that he was "hit with extension cords and/or pans, tied to chairs, and beat for hours" (p. 6). The judge refers to this social history as "a sad and abused childhood" (p. 6) but says nothing more about his understanding of this evidence, except that: "The court has weighed the aggravating and mitigating circumstances and finds that the aggravating circumstances outweigh the mitigating circumstances" (p. 7). Like other judges in Alabama,²⁵ this Court follows the state law by listing the evidence but fails to live up to the federal individualized sentencing requirement, discussed earlier. We argue that this 'deweighting'

of mitigation represents parochialism because it rejects scientific knowledge about the effect of childhood trauma on future behavior and also rejects federal legal norms.²⁶

Belief in Total Individual Autonomy

Recall that a key component of Liebman and Clark's conceptualization of localism is a libertarian deep belief in individual autonomy and a concomitant rejection of the effect of social forces on a person's behavior. As we have discussed in detail elsewhere (Dunn & Kaplan, 2009), this belief reflects the hegemony of individualism in American society. Individualism equates to a conceptualization of personhood and social life through the lens of a monad, a singular self-directed subjectivity. A person under the hegemony of individualism understands everything about personhood and society ultimately in terms of the individual, even if "groups count" in some senses. Individualism anchors U.S. society, as it lies at the heart of liberal political ideology and capitalist economics (see Dunn & Kaplan, 2009, pp. 341–345 for a theoretical discussion of the hegemony of individualism).

In a number of cases, the judge made a point of noting that the mitigating evidence—whether it was evidence of good character, family ties, child abuse, mental illness, drug addiction—did not have an impact on the defendant during the crime itself. We interpret this as indicative of a belief in individual autonomy and a rejection of the idea that human behavior is the result of forces other than pure will. In a few cases, the judge made specific reference to defendant's choice or will. In *Alabama v. Eatmon* (2006), the judge perceived the defendant's drug use not as evidence of suffering or self-medication, but as a bad choice: "... the mitigating circumstance of self destructive behavior by illegal drug use was absolutely outweighed by the aggravating circumstances presented in this case" (*Alabama v. Eatmon*, 2006, p. 10). Two years later, another judge used exactly the same phraseology to make the same point (*Alabama v. Jackson*, 2008, p. 9). These judges "convert" the mitigation by flipping it into a negative—the defendant was not suffering from a disease or using drugs to escape from misery caused by past trauma, but making bad choices, all on his own.

Hoodwinked Jurors

This article analyzes override cases, so inherently we know that all of these judges thought that their juries got it wrong on penalty. Most of the orders say almost nothing about why the judge thought the jury was incorrect. In several cases, though, the judge claimed to give great weight to the jury's vote for life, suggesting a respect for local power. Yet, these judges ultimately rejected these juries' decisions, making a contradiction.

For example, in the 2007 case of Brandon Mitchell, the defendant and another man were convicted of robbing three persons during the robbery of a hotel. The jury voted 10-2 for life without parole (LWOP). The judge found four of the possible ten statutory aggravating circumstances in the penalty phase, including that the offense was especially heinous (p. 5). The judge found none of the statutory mitigators, but did find some

nonstatutory mitigation related to the defendant's troubled social history. In this case, the judge claimed to give great weight to the jury's 10-2 recommendation for LWOP:

In determining Brandon Mitchell's sentence the Court weighed **very heavily** the jury's 10 to 2 recommendation for the sentence of Life Without the Possibility of Parole. The Court even reviewed the occupation of all of the jurors, and determined that based upon their occupations the jury was fairly representative of the citizenry of Jefferson County, Alabama (p. 7, emphasis in original).

The fact that the judge took the extra step of making sure the jurors were representative of the county indicates a respect for the jury system and the role of the jury as voice of the community. Nevertheless, this did not stop him from overriding these representatives of Jefferson County and assigning death. The judge explains that the state did not present evidence in the penalty phase, causing the jury to under emphasize the aggravating evidence and be swayed by the mitigating evidence.

There are only a few other cases in which the judge provides any explanation for overriding the jury. In *Alabama v. Burgess* (1994), the jury was influenced by mitigating evidence that the judge found not to, in fact, be mitigating factors. And in *Alabama v. Spradley* (2008), the judge says that the jury was tricked into showing mercy by a slick defense attorney:

... this Court is of the opinion that it was defense counsel's penalty phase closing argument that led ten (10) of the twelve (12) jurors to recommend the defendant be sentenced to life in prison without the possibility of parole ... defense counsel concentrated his entire closing argument on mercy, redemption, one's ability to change, sparing the defendant's life and how much defendant's family and small children needed him. This Court finds that it was this brilliant but coercive argument by defense counsel that persuaded ten (10) jurors to recommend life without parole ... While defense counsel's tactics may have worked on the jury, this Court was not swayed by defense counsel's argument (*Alabama v. Spradley*, 2008, p. 27).

Perceiving defense counsel as "brilliant but coercive" arguably reflects a parochial rejection of mitigation. In all three of these cases, the jury got mitigation wrong; they should have stood up against this foreign concept imposed by progressives. Because the jury failed to protect local values, the judge had to do it for them.

Fear of Outsiders

As defined earlier, "outsider" according to Liebman and Clarke, refers to people "not from here" as well as those who commit crimes across racialized or classed boundaries. In a few cases, judges expressed being "shocked" by "needless execution" (*Alabama v. Apicella*, 1997) and described "innocent victims of unprovoked conduct" (*Alabama v. Mitchell*, 2007) killed while minding their own business (*Alabama v. Norris*, 1995). While only Mitchell involved the crossing of race lines (Black defendant, both White and Black victims), the victims in all three of these cases were

strangers and language used suggests the judge perceived a lack of relationship between perpetrator and victim of violence.

In one case, *Alabama v. Spradley* (2008), Judge Bahakel goes into particular detail about defendant's outsider status. Montez Spradley (a Black man) was capitally convicted in 2008 for robbing and killing a 58-year-old (White) grandmother named Marlene Jason. In this case of racialized boundary crossing, the judge's florid and angry description of the crime, victim, and defendant suggest also a crossing of class boundaries as well as a female White judge's fear of Black crime. The judge describes how defendant followed the victim, a female white stranger, home from the shopping mall, and then brutally beat, robbed, and murdered her in cold blood in front of her home. "The defendant told [another inmate], he and a friend saw the victim, an old white woman shopping and followed her home. He said 'he' started choking her, but she didn't have shit, so 'he' shot her" (p. 6). The victim "fought for her life" and was left in a gutter. "In the view of this Court, the beating and choking of Mrs. Jason, which occurred prior to her being killed, was shocking evil, outrageously violent and extraordinarily cruel" (p. 18).

Moreover, Judge Bahakel's description of the victim reveals an acute focus on the individual's right to safety at home:

The evidence at trial reflected that Mrs. Jason was brutally murdered in cold blood in the front yard of her home, and that a majority of her wounds were defensive wounds, indicating that she was conscious of the attack and was trying to ward off her attacker. Everyone has a reasonable expectation that their home is a safe haven, a place where one never expects to be confronted with the type of unspeakable violence visited on Mrs. Jason. Yet, the defendant invaded that safe haven, and brutally murdered her, in cold blood, in the yard of the home where she lived and felt most secure (p. 17).

Again, while it is not clear from the order whether Spradley was born in Jefferson County and whether he and his victim belonged to different socioeconomic classes, he is clearly painted as someone outside of society who has violated an insider.

In addition to the detailed description of the victim and crime, this order is striking in its provocative invocation of "Black gangster" culture. Throughout the order, Judge Bahakel refers to key persons by apparent street monikers (e.g., a person named Cedric Atkins aka "See Boo"). She also uses the terms "bitch," "ho," "homeboys," "chillin," "dope dealer," refers to Spradley's girlfriend as "his baby's mama" (p. 4), and describes Spradley as "a 'bad boy to the bone,' and is proud of it, as evidenced by his tattoos, which are permanent reminders of his wicked and evil deeds" (p. 23).²⁷ The impression one gets is that this White judge is repelled by a dangerous and morally corrupt "Black street culture."

Conclusion

Because of the lack of substantive material in these orders, we must be careful not to infer too much. We propose, however, that the characteristics of the cases and content

of the opinions in Jefferson County override cases, at minimum, support continued exploration of Liebman and Clark's usefulness for understanding factors driving high death sentencing rates in particular counties. The evidence in the orders of the rejection of mitigation and scientific knowledge on human behavior, belief in the total autonomy of the individual, belief that jurors were tricked by coercive defense lawyers, and fear of "dangerous outsiders," coupled with the race demographics, is at least suggestive of localism as an explanatory factor. Additional research is needed to more fully understand the role of localism in judicial override.

Understanding the death penalty as not a national but rather a phenomenon concentrated in particular locations under specific conditions asks us to focus our attention on those specific conditions. This is useful because it can in a general sense deepen understanding of law as a social product and in a specific sense expand knowledge about how death sentences in America are the consequence of highly subjective, idiosyncratic, often irrational decisions made by a small handful of people. This stands in contradiction to the claims of deterrence and retribution that continue to undergird the death penalty in some parts of the United States. In contrast to anything having to do with any utilitarian benefit to society, death sentences are often made on the basis of subjective and sometimes biased interpretations of evidence and defendants' character, in these cases by judges. Future research on localism and judicial override can produce meaningful knowledge about how local circumstances influence America's death penalty institution, especially if it includes interviews with jurors and judges.

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Notes

1. To be clear, Garland does *not* argue that these cultural scripts represent a sort of deterministic "American exceptionalism" responsible for retention. Indeed, Garland forcefully argues that it is specifically America's radically local version of democracy that explains its contemporary capital institution. Nevertheless, these cultural scripts are inevitably bound up with America's political system.
2. We recognize that "the state" manifests itself in many ways through many apparatuses at macro, meso, and micro levels. Following Zimring (2003), we use the term to refer to governmental power in the abstract.
3. Innocence, and even more recently, cost, have come to the fore. See, for example, the SAFE campaign to abolish the death penalty in California's 2012 election cycle.
4. For an elaboration on this argument, see Zimring, 2003, p. 98.

5. Of these 32 states, only about half of them execute persons with any regularity or at all. California, with by far the largest death row in the USA, has executed only 13 persons since 1976.
6. The state of Indiana abandoned its similar override statute in 2002 (Radelet, 2011, p. 5).
7. It is difficult to know exactly how many capital cases have transpired in Alabama, Florida, and Delaware since 1976. However, by counting persons on death row (630) and executions (145; Death Penalty Information Center [DPIC]), we arrive at a tentative total of 775 condemnations in the modern era (not accounting for death row deaths not caused by execution). For the simple purpose of comparing to 220 overrides, we can double the number of known condemnations to account for capital trials that went to a penalty phase that resulted in something less than a death sentence: 1550. This is an admittedly crude approximation of the number of capital trials in the override states, but it nevertheless allows us to reasonably speculate that the number of overrides accounts for a significant portion of death sentences.
8. Interestingly, around 45% of Alabama death sentences are overturned in Federal circuit court. Perhaps this is a sign that federal judges are less influenced by localist sentiments. We do not focus on the appellate process here because we are most interested in what drives high death sentencing rates in some counties and in particular, the forces behind trial judges' decisions to override jurors' life verdicts.
9. This article draws on data from the Capital Judicial Sentencing Project, which analyzes override in all three states to study judicial understanding of mitigation evidence.
10. Of the top 15 executing counties since 1976, three come from outside the south: St. Louis County (MO) at #6, Pima County (AZ) at #12, and Hamilton County (OH) at #13 (DPIC, 2014).
11. *Ring v. Arizona* (2002) requires that jurors, not judges, must find the special circumstance or aggravating factor that elevates first-degree murder to capital murder, in other words jurors must determine whether defendants are culpable for capital murder. As of this writing, this doctrine has not yet extended to the penalty phase.
12. There are currently 194 persons on Alabama's death row (Alabama Department of Corrections, 2013); since 1976 there have been 55 executions in Alabama. The current total of death sentences and executions is thus 249. 98 (39%) of those 249 were the result of judicial override. Of course, some death sentences, including some override cases, have been overturned on appeal. We do not know the exact number of overrides-to-death that have been overturned, but we do know that some have been upheld by Alabama courts and that 10 (18%) of Alabama's 55 modern-era executions were the result of override (Alabama Department of Corrections, 2013; Equal Justice Initiative, 2011).
13. This law has not changed since Russell analyzed it in 1994.
14. In *Harris v. Alabama* (1995), the U.S. Supreme Court upheld Alabama's override statute, ruling that standards such as the one established in the Florida's *Tedder v. State* (1975) or a specific method for weighing aggravation and mitigation are not constitutional requirements (see Maullem, 1996 for a discussion)
15. Justice Sotomayor points this out in *Woodward v. Alabama* (2013).
16. Jefferson County is the largest by population in Alabama, and also contains the state's largest city (Birmingham), so it is not surprising that it leads Alabama in death penalty activity.

17. Detroit replaced Jefferson County at the top of the list in 2013 (Schaeffer, Eagan, & Baldas, 2013)
18. Bankruptcy itself does not signify ideological opposition to spending public moneys on service provision—Detroit’s bankruptcy probably occurred in a more liberal, spending-friendly climate than Jefferson County, Alabama. Nevertheless, it is strikingly suggestive of Liebman and Clarke’s theory that Alabama’s most death penalty active county is also bankrupt.
19. We attempted to collect all 17 but were unable to obtain three.
20. For example, murder committed during commission of crime, murder for pecuniary gain, multiple victims, murder was especially heinous, etc.
21. For example, no priors, defendant experienced extreme mental disturbance, age, etc.
22. For example, defendant had good family ties, defendant was a good worker, etc.
23. This is a general model; some orders differ slightly in of presentation.
24. See Stetler, n.d. (retrieved 2014)
25. In addition to the judge in *Alabama v. Jackson* (2008), similar “finding” of mitigation followed by subsequent denial of its influence can be seen in *Alabama v. Spradley* (2008).
26. A more famous and blatant example of parochialism was southern resistance to school desegregation. In *Cooper v. Aaron* (1958), the Court established the rule that states must abide by federal rulings even if they do not agree with them and denied the claim of southern states that they did not need to submit to school desegregation.
27. A jailhouse informant claimed that Spradley told him he got a tattoo for each crime he committed.

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