Introduction

On April 15, 2013, Dzhokhar and Tamerlan Tsarnaev became instantly infamous when their homemade bombs exploded at the finish line of the Boston Marathon, killing three and wounding more than 260. \(^1\) Four days later, Tamerlan was dead and Dzhokhar was in custody, the latter’s arrest eventually leading to a lengthy and well-publicized trial. It would be difficult to have lived through this period and not recognize the Tsarnaev brothers. But what of Judy Clarke? Hardly a household name, Clarke was Dzhokhar Tsarnaev’s lead attorney in the federal trial that ended in his death sentence. That verdict was rare for Clarke, who has succeeded in sparing many other notorious defendants execution. Her roster of former clients includes Unabomber Theodore Kaczynski, the Atlanta Olympics bomber Eric Rudolph, Arizona assassin Jared Lee Loughner, and Susan Smith, the South Carolina mother who strapped her two young children into car seats and rolled the vehicle into a lake, killing them both. In each of those cases, Clarke’s clients remain alive, albeit sentenced to life in prison.

Those who know her call Ms. Clarke one of the nation’s best capital defense lawyers, the proverbial “ace in the hole,” and yet she assiduously avoids press attention. The few profiles of Clarke describe her as “modest, unassuming,” and “reticent” to draw attention to herself. \(^2\) She refuses to grant reporters interviews, and a profile of her in The Guardian even described a scene from the Tsarnaev trial in which Clarke walked into a bar one evening only to find a pack of journalists gathering for a drink. Seeing the crowd, she turned around and left for a different location. \(^3\)

It might be tempting to see Clarke as an exception among capital defense lawyers. To be sure, she has handled a remarkable number of notorious cases, and her record at sentencing is outstanding. But the
depiction of Clarke as a kind of hermit savant misunderstands the nature of capital defense. By and large, the best lawyers in Clarke’s field avoid press coverage, choosing instead to go about their professional lives with a low profile. It’s not simply because the work they do is unpopular. Certainly, many people consider their clients to be the “worst of the worst,” criminals whose ghastly deeds may justify execution. Yet, to hear the lawyers describe their lives, few have faced serious harassment for the work they do. There is the occasional letter or comment in passing—perhaps even an amateurish crank phone call at home—but these seem to be the exceptions, even for advocates who stand before the public and argue on behalf of defendants who are alleged to have killed many.

So, if it’s not the threats or concerns for their own safety or reputation that silence capital defense lawyers, what keeps them quiet? Their reticence is rooted in a greater, almost Hippocratic notion of professionalism—to do no further harm to the client. “There is no good to be gained by talking to the media,” says one such lawyer, “nothing I can say that will get a reporter to cover my client like we need.” “Besides,” explains another attorney, “I’m not the story. This case isn’t about me. If I ever forget that, if I ever step out front and accept the spotlight, I’d be letting ego get the better of me. That’s not what I do. We’re here to serve those who need us, not advance ourselves.”

The result is that capital defense attorneys end up hiding in plain sight. Handling the most notorious cases, seen on television walking to and from court, rendered in a courtroom artist’s sketch while arguing at a trial, we can identify their faces and may recognize their names, yet we know next to nothing about them. Why, for example, do they perform this work? What are the challenges of the position, and how do lawyers handle the incredible stresses of a job where failure is quite literally a matter of life and death? Some lawyers must even be witnesses to that failure—their client’s execution. How can someone work on another’s behalf for months, sometimes years, watch him die, and then go back to the office to take on another case?
It is unfathomable. Or at least it seemed unfathomable to us until we started talking to capital defense lawyers. Over the course of two years, we interviewed more than sixty capital defense lawyers and some of their staff. From Virginia to California, from Texas to New York, our research took us across the country, talking to attorneys in state and federal courts, at the start and near the end of distinguished careers, in firms big and small and in public defender’s offices, too. The one commonality was that the lawyers had handled death penalty cases at the trial stage, where verdicts either “take death off the table” or put clients on “the conveyer belt toward” execution.

We are far from naïve about the criminal justice system, and in fact, one of us has more than a decade of experience studying capital cases. We number several capital defense lawyers among our friends. Still, it was remarkable how anxious defenders were in speaking to us. Some joked that the practice is like a cult at times, its members fearful of letting anyone in who might even inadvertently share their thinking, allowing it to reach the hands of a prosecutor who would use the “inside” information to convict and sentence one of their clients to death. Caution is understandable when the stakes are so high, but there is a lot to be gained by opening up the world of capital defense for examination. Not only can we explore the attorneys’ motives and professional challenges, but even more, it gives us a window into the gravest corner of the U.S. criminal justice system: the workings of the death penalty. The United States is among a minority of countries in the world, and arguably one of only two developed, democratic nations, that has executed a defendant in recent times. 4 Regardless of one’s stand on capital punishment, it ought not operate in a secret, almost antiseptic world in which the public is treated to the most horrific details of the underlying crimes but is left out of the grueling, often tragic process that leads to a verdict. Defense lawyers are central players in that drama—along with prosecutors, judges, jurors, and, of course, the families of the victims and defendants. But unlike many of the others involved, capital attorneys chose this work, assuming a responsibility that few other Americans, or even
American lawyers, would voluntarily accept. As one capital defender explained, “To many people, we’re seen as the garbage collectors of the law. Who would want to do this dirty job?”

How Can You Represent These People?

Yet they do it, thus raising one of the most central questions for this book—what motivates someone to make a career out of defending some of the worst killers in the country? It’s a question that gets asked of criminal defense attorneys in general—phrased often as “How can you represent those people?”—but the stakes are undoubtedly higher when the lawyer is handling a death penalty case. Some attorneys have sought to answer this question in print, but their accounts are typically specialized and limited. By contrast, we find multiple motivations. Perhaps the easiest to understand is zealous opposition to the death penalty. With few exceptions, each of the capital defense lawyers we interviewed opposes the death penalty in all cases. For some, though, the mission is even greater. As one attorney explained, “One of my jobs is to get the human rights world to see my clients as victims of systemic human rights violations.” Many of these lawyers are driven by a religious zeal, seeing the task of preventing state-sponsored killing as akin to a moral crusade. “I just felt called,” said an earnest young attorney. “I’m somewhat of a religious person, and I felt very much called by this work.”

For others, the attraction was the chance to work with smart, talented mentors handling the kind of litigation seen as the most difficult—and, thus, most prestigious—in the criminal defense community. “You’ve got to understand . . . and I’m not proud of it,” explained one lawyer, “people like me are naturally ambitious. [We take on capital cases] because it’s the most serious work.” Repeatedly, lawyers mentioned mentors like Stephen Bright, president and former director of the Southern Center for Human Rights; Bryan Stevenson, founder and executive director of Equal Justice Initiative; and senior counselors like John Blume and Mark Olive as the reason they entered the field. In their telling, these lumi-
naries offered attractive examples of what top-quality advocacy could involve and provided direct entry into a world of committed and well-educated lawyers.

Still other attorneys “just fell into the work,” confused to this day as to how they ended up representing notorious criminals, although as many interviewees noted, there may be multiple psychological, perhaps unconscious reasons that attract attorneys to the work. “A lot of us . . . have had some trauma in [our] past and keep replaying it,” described one lawyer. If they’re not careful, the lawyer told us, “we’re taking on these cases . . . trying to remaster [our] own trauma again and again and again.” Added a more jaded attorney, “Some [defenders] are crazy, they’re so emotionally involved with their clients. It’s like a freshman-year psych student. They’re drawn to this work because of their personal craziness. . . . It’s the cause that attracts them, even though they’ll say it’s the client. You often hear them say, ‘You’re killing my client.’” They get “too emotionally wrapped up” in the cases.

If some attorneys can’t explain what brought them to the work, most are clear on why they stay. “It’s all out there to see,” explained one senior litigator. “Some want to ‘stick it to the man.’ Some do it for ‘race reasons.’ Some do it for the money. Some fight for constitutional and civil liberties. Some want to ‘do everything I can for [this] particular human being.’ Some people like or respect their clients.”

The rewards, too, are multifarious and often extend beyond the lawyers’ initial expectations when they first entered the field. It’s “the feeling that you are living life, that you’re seeing life for what it is,” radiated one seasoned advocate. He continued:

The best thing about this job is you learn so much about life and yourself because of the opportunities it gives you. Being exposed to the clients and the crimes, I know so much more about the world than I ever did. . . . The parallel is, I think it makes you appreciate the good things too, because, there’s this whole world of awfulness out there. I feel like I am more engaged in things. I’m more alive. And I really appreciate that. I think it’s
made me such a better person—more knowledgeable, more accepting, more tolerant, humble.

Other lawyers spoke of the “privilege [of] observing humanity” even in the depths of a murder trial. Many of their clients suffer from low IQ or struggle with mental illness, past abuse, or drug or alcohol addictions. In those circumstances, “what’s eye-opening—[what becomes] the real privilege of this job—is you recognize how beautiful it is that life and affirmative values [still shine] through [a client’s] impairment.” And sometimes the judge, jurors, and witnesses come to recognize this, too—“that no matter how horrible the defendant’s act, there is still a person in there.”

Yet, for all the “privileges” of the job, capital defense can take a heavy toll on defense practitioners. A client will “live or die,” defenders explained. “That’s what makes [the work] unlike everything else. It makes it terrifying and so real. You’re dealing with such deep, human realities.” Working on capital cases “informs everything you do.” The “pressure is enormous, and the work is enormous and never ending. There is always more you can do. You don’t sleep at night.” Some lawyers thrive on the pressure, but that kind of constant stress “has damaged people.” It’s almost like being a survivor of abuse, but “the [defense] community never talks about secondary trauma” and its effects on lawyers. “We as a community spend vast amounts of time as individuals listening to people talk about being raped and burned and starved as children,” described a luminary in the field. “We examine the detailed facts of multiple homicides; that’s tragic enough. And having clients executed. This is all traumatic. When you’re watching a man being murdered before your eyes that you were charged with saving, that’s pretty traumatic. Even just working on part of a case and having the client executed is traumatic.” And yet for all that focus on trauma, the capital defense bar is strangely silent about the effects on its members: “As a community, we internalize some of it but don’t pay mindful attention to how it’s affecting us. [Why?] I don’t know. We seem to have PTSD and don’t examine this.”
Were the plight of capital defense lawyers merely a human-interest story, it would still be a good read. There are few other jobs in which the stakes are truly life-and-death: a surgeon during a tough operation, a police officer when confronting an armed intruder, a fighter pilot. The list is small. For capital defense lawyers, the failure to investigate a fact, litigate a motion, or properly advise a client can lead to the defendant’s death, and the prospect exists in every single case. What’s more, defense counsel must perform those functions in a culture that is understandably revolted at the underlying crimes and with little sympathy for the advocates who will stand with the suspect accused of such horrific acts. We could tell these stories several times over and they would still be relevant and gripping.

A Bigger Picture

But this book is more than a human-interest story. It is a study of the capital litigation process and the effects it has on the people who participate in it. It is also, centrally, an examination of the workings—and weaknesses—of the American criminal justice system. According to many defenders, “the courts are so unfair, so loaded against poor people. You come to recognize that the death penalty is about demonizing people for poverty, mental illness, [and] race.” This is a systemic indictment of capital prosecutions in the United States, and for many defenders the entire process is infected. Leveling charges like a fighter lands punches in the ring, one attorney described a system that fails to deliver justice: “Arrayed against you is a lethal force, [managed by a] bumbling, prejudiced [system]. Race prejudice is so intense and infects everything in the courts. Resources are so limited. Jurors aren’t a representative group of the community. Prosecutors have too much power, and there are no repercussions when they violate law or ethics. Judges [can be] stupid and mean.”

Are these charges true? Certainly, many of the criticisms have been established elsewhere. Public defenders have extraordinary caseloads
in many jurisdictions and cannot take on the additional, often overwhelming responsibilities of a capital matter. In turn, some of the nation’s most experienced trial lawyers are excluded from capital representation. Resources, too, are limited in many jurisdictions, meaning that the defense’s investigation and trial preparation pales in comparison to the prosecution’s case. Even in the federal system—where resources are more plentiful than in most any state—we already know that capital defendants whose resources fall at the low end of the continuum have twice the risk of a death sentence at trial. Race infects the entire criminal justice process, no more so than in capital sentencing, where multiple studies over the years have shown that nonwhite defendants are at a greater risk of a death sentence if their crime involved white victims. The composition of juries matters, too, the most troublesome research finding that the risk of a death sentence at trial rises with the number of white men on the jury.

We do not accept the defenders’ claims merely on face value, nor do we suggest the reader reach a conclusion about the legitimacy of the American system of capital punishment only on reports of the defense bar. Despite its topic and sources, this is not a book intended to bring down the death penalty in the United States. Rather, we offer critical commentary about the system based on credible sources whose perspectives are rarely heard and whose insights speak to the reality of capital litigation. Are there other perspectives? Absolutely. But it would be a disservice—indeed, it would be the height of malpractice—to ignore the systemic challenges and critiques lodged by capital defenders.

Finally, this is a book about the sociology of law and the sociology of the legal profession. The former goes back at least a century to social theorists Max Weber and Émile Durkheim with more modern roots in legal realism. Its central tenet rejects law as immutable “black letter” rules that sit bound on a shelf, instead envisioning law as a process of interpretation, understanding, and implementation that is influenced by the backgrounds, preferences, and even biases of the people who use or seek to change it. We see this approach often in scholarship on the crim-
nal justice system, where the authors of such books as *Felony Justice*, *Courtroom 302*, and *The Craft of Justice* describe criminal court outcomes as dependent on the personalities and negotiations of “courtroom workgroup” members like prosecutors, judges, and defense lawyers. Even where a state statute might set a sentencing range at two to five years, prior research tells us that there will likely be a common “going rate” in each jurisdiction based on the preferences of prosecutors and defense lawyers, hammered out over repeated cases and brokered by the local judiciary.10

There is no reason to believe that this phenomenon is any different among capital cases. Even as the stakes are heightened, the process is administered by individuals—at least some of them elected in some jurisdictions—who have their own personal and professional motives in reaching a particular outcome. If the indictment rate for capital cases can vary based on the location of the crime, if the resources that judges authorize show tremendous geographic disparities,11 why wouldn’t we expect that the style and quality of defense advocacy in capital cases might vary based on nonlegal factors? As defense lawyers talk about their cases and describe their strategic decisions in the pages that follow, pay attention to how much of the practice is governed by social, cultural, and even political influences that never appear in statutes or case law.

Those decisions also speak to the attorneys’ professional identity, a topic that has been closely examined in other subfields of law. Examining divorce lawyers, for example, Mather, McEwen, and Maiman posited three leading theories for attorney behavior: that “formal codes of responsibility and law school socialization . . . create shared norms and obligations”; that lawyers are influenced by “economic incentives and [the] conditions of work facing” them; and that their “social backgrounds, personal values, and identities . . . affect professional conduct.”12 The same is true for capital defense lawyers, for, as political scientists remind us, “we are accustomed to learning and re-learning that institutions matter, economics, matter, cultures (mass and local) matter, and individual human beings matter.”13
Just as Mather and colleagues identified “communities of practice” among divorce lawyers, we see the same with the capital defenders we interviewed, both in comparison to general criminal defense lawyers and in geographic niches. For all the past publications on criminal defense, few consider the field through a sociological or anthropological lens, accepting that criminal law, and most particularly the lawyers who defend capital cases, have a distinct culture. Certainly, prior work has described the professional lives of criminal defense lawyers, but most of the socio-legal research on legal professions has concentrated on attorneys in civil matters, whether it’s how law school affects their career choices, the differential impact of gender on lawyers’ career paths, or how they structure their practice in large commercial law firms or when handling small, individual matters. Even when authors have addressed capital litigation—like Susannah Sheffer’s book *Fighting for Their Lives: Inside the Experience of Capital Defense Attorneys* and Austin Sarat’s essay “Lawyering against Capital Punishment”—the focus has been on post-conviction habeas corpus litigation, and the approach has been at times to lionize the “courageous” lawyers who challenge death sentences. In this book, by contrast, we approach the subject neutrally, employing the tools of socio-legal research to describe, theorize, and explain the structure and culture of trial-level capital defense in the United States.

Outline of the Book

The book itself is laid out in six chapters and a conclusion. The first chapter describes the nature of capital defense, seeing the field as a geographically diverse community of practice. We explain how capital defenders differ from “garden variety” criminal defenders in the tasks they undertake, the goals of their representation, and the status of their work. We distinguish between “insiders” and “outsiders” in the field and discuss, as well, the interplay of place in the experience and expected outcomes of litigation. Our central argument is that capital defense is both a specialized community and distinct culture within law, even
among criminal defense as a whole. We also address the fundamental challenge in capital representation—the defenders’ belief that their clients are often guilty of the crime charged and the ensuing struggle to convince the client to plead guilty to avoid a death sentence.

Chapter 2 explains why capital defenders enter the field and what keeps them engaged despite the many challenges and multiple setbacks. Here, the reasons are varied but tend to fall among six categories: not surprisingly, many capital defenders strongly oppose the death penalty, but lawyers were just as likely to be attracted by the intellectual challenge and prestige of the work, their admiration for luminaries in the field, their own experiences with trauma, their desire to serve the less fortunate, or their longing for an “adrenalin rush.” Of these motives, two—prestige and service—stand out for special attention. Even though criminal defense is typically considered public-interest work, the backgrounds and “pedigrees” of many of the capital defenders look similar to the top attorneys in America’s largest and most prestigious corporate law firms. In fact, the lawyers in both settings were sometimes law school classmates years back. For all the talk of selflessness in criminal defense, there is a fair amount of ego in the desire of young lawyers to move into the field—a desire not only to do the most interesting intellectual work and be surrounded by smart, capable litigators, but also to be recognized by others as working in a prestigious area of law. Capital defense pays much less than does corporate law, but for an attorney interested in criminal litigation there is little work more prominent than capital matters.

Of course, what draws one to criminal defense in the first place is often a desire to serve the less fortunate, as so many criminal defendants—including those prosecuted for capital crimes—are indigent. Despite reports that many capital defenders are agnostic or atheists, a large number described being raised in families that emphasized social service, much of it religiously mandated. Even where lawyers broke away from a conservative upbringing, they took with them the importance of serving others. That commitment, however, does not necessarily make them
cause lawyers— the kind of advocate who might see a case as a means to accomplish a larger social end—nor is the attorneys’ interest primarily ideological or even politically driven. Although a few respondents described themselves as “human rights activists” or otherwise engaged in the elimination of the death penalty, the clear majority of capital defense lawyers we interviewed were, first and foremost, legal advocates, there to serve the needs of the client in the instant case. “The client is the thing” could be the mantra for many capital defenders.

Chapter 3 expands on these reports by addressing the lawyers’ identities and their efforts to manage that identity. Several attorneys described “feeling like outsiders” growing up, whether as the progressive oddity within their families or as simply different from the prevailing culture in which they were raised. For others, their families’ experience with discrimination or worse was a motivation. In particular, we found a sizeable number of Jews (or those raised Jewish) among the capital defense bar, for whom the Holocaust was not a distant memory and who described a cultural aversion to “the state kill[ing] systematically.”

Racial identity is a hot button issue in capital defense considering that many of the defendants are nonwhite and most of the defense bar is white. Some lawyers were defensive about the subject, either briefly noting the phenomenon or acknowledging that “there is nothing [they] can do about it” other than “trying to be the client’s best representative regardless of race.” Where lawyers were expansive, they spoke eloquently about the dilemma of trying to understand and convey the nature of a client’s background when their own experience was so different. Indeed, some attorneys warned against assumptions that race—or any other aspect of identity for that matter—is a key determinant when connecting with clients and others. Instead, these attorneys stress the intersectional nature of identity, saying they strive to create space for each team member to connect with the client in his or her own way despite assumed gendered, racial, or socioeconomic differences, among others.

Chapter 4 investigates the attorney–client relationship, starting with the fundamental challenge facing advocates: how do you form a rela-
tionship with a stranger so that he trusts your advice to plead guilty and spend the rest of his life in prison? This tension draws on prior literature in legal ethics but is made all the more complex considering that many capital defendants suffer from mental illness, addiction, past abuse, and low intelligence and have multiple reasons to doubt an outsider who purports to help them. Still, for all these difficulties, many lawyers talk of liking their clients, whom they see alternately as victims themselves and “more than the worst thing they’ve ever done.”

Chapter 5 takes up the issue of gender in capital defense. At first glance, the field might appear to be hypermasculine, with brashness rewarded and little tolerance for emotions of doubt and loss in representations that, at best, will usually see a client spending the rest of his life in prison. Yet the rise of mitigation investigation and the need for attorneys to build trust with their clients has seen the field begin to prize, or at least accept, “emotional work.” But therein lies the contradiction. Although men purport to appreciate the need for mitigation investigation, the vast majority of mitigation specialists are women, and female lawyers are often pigeonholed into being the primary “hand-holder” for the client. Capital defense, then, is a kind of gender-bending subfield that both conforms to and defies traditional gender stereotypes. Even as the community learns to appreciate more female perspectives, it still seems to reproduce traditional notions of gendered work.

Chapter 6 addresses the effects of capital representation on the lawyers themselves. Although the attorneys may seek to normalize the work, analogizing the stress to other difficult jobs, the pressure is intense and the worrying compulsive. Lawyers find themselves repeatedly fretting about whether they are “doing enough” on cases, with the consequences of failure leading to a client’s death sentence. Lawyers whose clients have been executed talk of “specialized survivor guilt” while at the same time seeking to compartmentalize the loss so that they can go back to work on the next case. Even when lawyers achieve a positive result, the effects on their family members, not to mention the lawyers themselves, can be destructive. It is no wonder that some advocates acknowledge having
“PTSD symptoms,” but surprisingly the community seems neither to acknowledge nor provide a mechanism to address the feelings of doubt, shame, defeat, and sorrow. People tend to “process [their] feelings in silence” and “move on.” For all the field’s focus on the inner workings of their clients’ minds, the lawyers themselves seem minimally introspective about their own reaction to the work. “You keep your eyes on the job and you just do it,” they explained. “You don’t spend any time thinking about ‘Is there some way I can avoid doing this?’ You just do it.”

A concluding section ties the effects of capital representation back to the nature of the field. Best understood as a specialized community of practice, capital defenders are a relatively self-limiting group. It’s an ironic field, its members paranoid of accepting newcomers into work that is potentially damaging to the psyche but from which few choose to escape. In the end, capital defense highlights much that is good about the professionalism of lawyers while also exposing the many weaknesses of the American criminal justice system.

Research Methods

The findings and arguments we present here are based on interviews we conducted with more than sixty capital defense lawyers across the country. Interviews lasted at least an hour and sometimes up to three or four hours at a time. In several circumstances we returned to attorneys a second or third time to follow up on a key finding or to continue a professional relationship that was generating helpful information. Recruitment was done by “snowball sampling,” which is to say that we asked attorneys for recommendations of capital defenders they considered to be “high quality.” We intentionally left the term vague to encourage respondents to be expansive in thinking through their recommendations. For that matter, one of our ulterior motives was to help give greater contours to the notion of quality representation. Certainly, the American Bar Association has issued “Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.”

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but even experienced practitioners acknowledge that these terms may be vague and far from exclusive qualities. We were hoping that practitioners would help define the concept with the individuals they recommended we interview.

That said, we were not looking for simply “superstar” litigators, the kind of luminaries like Judy Clarke, Mark Olive, and John Blume mentioned above, who truly set the bar for exceptional advocacy. Rather, our goal was to depict capital defense practice, as is it performed, as best as possible given the typical constraints on lawyers’ time and resources. Therefore the collection of sixty-plus lawyers interviewed includes a mix of veteran and relatively new capital defenders, lawyers who practice in a public defender’s office and on their own, lawyers who handle primarily capital cases and those whose work is more varied; there was also a great geographic mix of lawyers, as well as variety in terms of whether they work primarily in state or federal court. In some circumstances we also spoke with mitigation specialists and other members of the defense team to confirm stories. Our “unit of analysis” is the lawyer him- or herself, meaning that a single interview often provided stories from multiple cases.

We also attempted to include a subset of lawyers in the interviews who were rated by their colleagues as being poor or substandard. Of course, we did not tell these lawyers during recruitment that others thought badly of them, nor was it our goal to disparage their practice. Rather, in seeking to understand what high-quality representation looks like we also needed counterexamples, at least as defined by lawyers in the field. In this respect, we had a difficult time recruiting the “worse” lawyers. Perhaps, as in their practice, they were reluctant to return phone calls, were slow to answer emails, and would agree to an interview and then fail to schedule a time. In the end, we were only able to include a handful of the less-respected attorneys in the research, which is a limitation we acknowledge.

It’s important to note that our interviews were conducted under a strict human subjects protection plan, which ensured that respondents could
share freely and that no one we interviewed, their clients or colleagues, would be identifiable or subject to criticism or sanction for having agreed to speak with us. We never asked lawyers about topics that might expose a privileged conversation, and if a response began to venture near this category we warned the lawyer. (It happened just once.) We also promised the lawyers complete anonymity, meaning nothing included in this book is traceable to an identifiable respondent, whether a lawyer, mitigation specialist, staff member, defendant, judge, victim, or observer. We do not list the people we interviewed, and we never told the lawyers whether one of their colleagues or acquaintances had spoken with us. We stand by our reputations as researchers in confirming that the interviews took place as described and in noting that respondents were candid and forthcoming. But, from the reader’s perspective, there is no sense in trying to guess which defender said what in this book, as we present the quotations in a way that no single respondent should be traceable. Even where we use pseudonyms, we disguise the individuals’ identities.

As a result, there may be questions about the generalizability of our findings. Although we cannot identify the specific lawyers we interviewed, we can offer a broad summary of the sample. Approximately 60 percent of attorneys carried a combined criminal and capital practice; 15 percent worked exclusively on capital cases; 20 percent had a general practice that included capital work; and 5 percent were classified as other. The clear majority had worked as a public defender or public-interest attorney at some point, although more than half were in private practice at the time of interview. Lawyers came from all parts of the country, although the sample was naturally weighted most heavily to those parts of the country in which the death penalty is most often sought and litigated. Given that we were seeking to interview attorneys ranked highly by their peers, the sample tilted toward older, more experienced lawyers. The least-experienced attorney among our interviewees had practiced law for ten years, whereas the longest serving had been lawyers for more than forty years. Finally, approximately 70 percent of interviewees were male, and more than 80 percent were white.
We do not claim that our sample is a match for the national capital defense bar, nor should the reader consider it as such, especially since we intentionally sought out the most highly regarded capital defenders. But it is worth comparing the demographics of our sample with data recently obtained by the federal courts when querying private lawyers who handle criminal cases.\(^{18}\) To be sure, the courts surveyed traditional and capital defense practitioners, but because members of the federal defense bar must also apply and be accepted for appointment, its attorneys are often among the better defense advocates. In this respect, it is instructive that 80 percent of the attorneys in the federal courts’ survey were male and 83 percent white, while more than 60 percent of the group was over the age of fifty. Against these data, our sample seems at least reasonably representative, although, again, we are careful not to overclaim. We do not contend that the stories collected here are entirely reflective of capital defense, but the interviewees themselves cover much of the field.

While we cannot identify our interviewees, we can provide more detailed information on our research methods. We employed a strategy of open-ended interviews, starting from a script of seven thematic areas with multiple follow-up questions embedded in each section. Rather than track a script blindly, we allowed the conversation to flow where each participant took it, although we were careful to circle back to the protocol to ensure that we covered each subject. A copy of the interview instrument is included in an appendix. Interviews were conducted at a location of the subject’s comfort—sometimes in a lawyer’s office, sometimes in a private corner of a hotel lobby or coffee shop, and sometimes over the phone. Our goal was to put lawyers at ease and to encourage them to share freely. Most did not know us ahead of the interview, so it took them time to warm up, and in those circumstances we would schedule multiple sessions to keep pressing away at their experience. Some lawyers understandably held back from sharing their most vulnerable stories, but we were honored to be trusted by so many participants, who routinely took us through some of the most harrowing experiences of their practice—and their lives. Several lawyers told us afterward that
the interviews were cathartic, the conversations having been one of the few times they shared their experience.

As may be evident by now, we approached this project as researchers first, meaning that we don’t have an ulterior motive in how the capital defense lawyers are presented. In reading prior literature on defense lawyers, we recognize a tendency in some work to depict the advocates as righteous or provide an entirely sympathetic account of defense practice. Although we admire many of the people who do this work, we see the capital defenders first as people—with all the strengths, weaknesses, and idiosyncrasies that implies. Our research does not sugarcoat the defense function or hold up the lawyers as superhumans or saints, an approach, we believe, that presents a richer, more holistic account of capital defense. Nor is there any need to “put a thumb” on the scale in describing the practice of capital defenders. Their stories are so compelling, their self-reflection so torturous at times, that our job of reporting is made simpler.

The true challenge is interpretation. Here, we offer our own informed analysis, but we leave the ultimate judgement to the reader. How different is capital defense from other areas of law, and what does its practice say about the people who voluntarily represent capital clients? What can the inquiry tell us about the workings of the U.S. criminal justice process, and do we come away from the examination feeling any differently about the legitimacy of our legal system and its underlying constitutional guarantees? Finally, does the depiction provide additional ammunition or greater reassurance in considering America’s use of the death penalty? These are but some of the questions raised by the research, issues we hope readers will consider as they pore through the narratives. Capital defenders may have labored in relative obscurity up to now, but their work and challenges go right to the heart of what it means to do justice in the United States. Unless others are prepared to take up those difficult duties, we owe it to the defenders to consider their accounts.
An Introduction to the Capital Defense Process

Although capital defense lawyers may be relatively unknown, most Americans understand that capital punishment is practiced in the United States. It is sometimes said that the death penalty is part of the American fabric. In fact, its history in the new world predates the nation’s founding. The first recorded execution in the new colonies was in Jamestown in 1608. Capital punishment was a recognized penalty at the time of the Constitution’s adoption, and the practice rose steadily from there. Numbering fewer than two thousand from 1800 to 1850, executions in the United States jumped to more than seven thousand between 1900 and 1972.

The course was stayed in 1972 with the Supreme Court’s decision in Furman v. Georgia, in which the justices struck down capital sentencing statutes that gave jurors unbridled discretion in choosing which defendants would face the death penalty. The effect was to put executions on hold nationwide for three years while states rewrote their statutes and the high court considered these new attempts. In the 1976 case of Gregg v. Georgia, the justices approved a new sentencing scheme that bifurcated capital trials. To this day, capital prosecutions follow two paths: first, jurors decide whether the defendant is guilty of the capital charge; if so, they reconvene for a separate “penalty phase” to decide on the appropriate punishment. Multiple Supreme Court decisions have subsequently circumscribed the practice of the death penalty in the United States, and in fact, by mid-2015, only thirty-one states and the federal government maintained the death penalty. Even then, just three states—Florida, Missouri, and Texas—actually executed more than three defendants in 2014.

According to recent Supreme Court precedent, capital sentencing is the province of jurors, not judges, who first consider “aggravators” of the crime that might make the death penalty justified and then weigh mitigating factors that would counsel a different punishment. Their sentencing decision must be unanimous. Jurors also must be “death qualified,” meaning that they must be willing to sentence a defendant to death.
if the law and circumstances dictate and not oppose capital punishment on principle. However, the death penalty may not be imposed on defendants who are mentally incompetent, are intellectually disabled, were younger than eighteen at the time of the crime, or are convicted of rape but not murder.26

The decision to seek the death penalty belongs to the prosecution. Prosecutors speak of a crime being “death eligible,” which suggests that “aggravating circumstances [are present in the crime] that the state legislature has determined . . . elevate a killing to a capital crime.”27 These circumstances may include the killing of a police officer or correctional officer, the murder of a young child or multiple victims, or upward of twenty other categories depending on the state. The prosecution must announce its intention to seek the death penalty within a certain period set by statute following indictment and before trial. In the federal system, the U.S. Department of Justice convenes the Attorney General’s Review Committee on Capital Cases to evaluate potential capital crimes submitted by federal prosecutors for “recommendation to the Attorney General concerning the appropriateness of seeking the death penalty.”28 Often the defense is invited to appear before the committee and explain why a capital prosecution is inappropriate in the case. Within most states, individual district attorneys make the decision to file capital charges on their own, with the defense consulted rarely if at all. In fact, as many capital defense lawyers complain, state prosecutors may file capital charges as leverage to convince a defendant to plead guilty and accept a sentence of life without the possibility of parole. We discuss that charge at greater length in chapters 1 and 4.

In the landmark case of *Gideon v. Wainwright*, the U.S. Supreme Court established that the state must provide an attorney for a criminal defendant if he cannot afford one on his own.29 The reality is that most capital defendants are indigent, and if they are not already, the cost of a capital defense would bankrupt most of them. As a result, almost all the defendants charged with a capital crime are defended by attorneys provided by the state. These lawyers may be members of a public defender’s
office or, more likely, private attorneys who agree to take on a capital case and are appointed and compensated by the court from a panel of willing practitioners. Defendants are not consulted in the appointment process and must rely on the acumen of a judge or magistrate in choosing a lawyer. Appointed lawyers may be solo practitioners, work in small firms, or come from large commercial law firms and occasionally take a capital case as a favor to the court. Rarely do defendants retain their own lawyers, and when they do it is not always clear that they choose lawyers with experience in capital defense, all too often picking an attorney they know from another matter who may not have litigated capital cases.

As mentioned above, the American Bar Association has established “Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.” First adopted in 1989 and updated in 2003, the ABA Guidelines “set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing or convicted of death penalty offenses.” Among its standards, the Guidelines advise that the “defense team should consist of no fewer than two [qualified] attorneys . . . an investigator, and a mitigation specialist.” Further, the Guidelines recommend qualification standards for the lawyers, urging, among other credentials, that they have “skill in the use of expert witnesses and familiarity with common areas of forensic investigation,” not to mention experience in “the investigation, preparation, and presentation of mitigation evidence.”

Capital defense lawyers are held to a minimum standard of performance on behalf of their clients. The U.S. Supreme Court in *Strickland v. Washington* established a two-part test for ineffective assistance of counsel in capital cases, ruling that a death sentence cannot stand if the trial attorneys’ performance fell below an objective standard of performance and that the deficiency was a likely cause of the client’s conviction or sentence. The Court has provided some clarification of the *Strickland* standard in *Wiggins v. Smith* and *Rompilla v. Beard*. In *Wiggins*, the justices urged defense lawyers to investigate and present any mitigating evidence during the sentencing phase of a capital trial, and in *Rompilla*
the Court held that defense counsel must review any material they believe the prosecution will use to establish aggravating factors.

Coupled with the ABA Guidelines, which “have been cited with approval by courts around the country,”\textsuperscript{35} the Supreme Court’s decisions in \textit{Strickland}, \textit{Wiggins}, and \textit{Rompilla} might lead observers to believe that the overall quality of capital defense in the United States is high. Certainly, as this book suggests, the practice attracts many highly qualified advocates. But, as other federal courts have noted, “ineffective assistance of counsel in capital cases has been a persistent problem in the United States.”\textsuperscript{36} The late Welsh White, a law professor at the University of Pittsburgh and an expert on capital defense, detailed many of these failings in his book \textit{Litigating in the Shadow of Death}, and the renowned researcher James Liebman and his team have investigated how often ineffective assistance of counsel occurs in capital cases. Analyzing death sentences imposed between 1973 and 1995, the team concluded that “68% of all death verdicts imposed . . . were reversed by courts due to serious errors.”\textsuperscript{37} Whether in state post-conviction proceedings or in a federal habeas corpus action, “ineffective assistance of counsel led to more death sentence reversals than any other error.”\textsuperscript{38}

What should we make of these contradictory portrayals? Is capital defense a calling of the skilled and dedicated or a muddle of the uncommitted and untrained? In truth, it’s a compilation of the two. For that matter, even the best, most devoted attorneys can make mistakes, even the kind of errors that justify a new trial or resentencing. In the pages that follow, we take readers into the heart, nay guts, of capital representation, seeking to provide an open, honest depiction of the practice and a fuller understanding of the challenges of capital litigation. Support for capital punishment is on the decline, dropping in 2013 to 55 percent of Americans from a recent high of 78 percent in 1996.\textsuperscript{39} But so long as the death penalty is sought, there will be a need for defense attorneys who willingly—and zealously—represent capital defendants. Good, bad, and ugly, capital defense illustrates the highest aspirations of legal practice while also exposing the many weaknesses of the American criminal justice system.