Introduction

I first encountered the death penalty up close in 1998 when I was twenty-two. After college, I worked as an investigator at a small nonprofit law office in New Orleans, Louisiana, that represented poor people accused of capital murder. Much of my work involved gathering evidence to help demonstrate to juries that seemingly reprehensible defendants might also deserve compassion. One of the first cases I was assigned involved a man named Albert, who was a few years older than I. Albert was nineteen when he was accused of committing murder, and while I passed my early adulthood at a prestigious East Coast university, he spent his on death row. He and his family were raised in a plantation culture that still exists in parts of the southeastern United States; the family had lived and worked on the same farm continuously since Albert's grandparents were enslaved. According to the court record, the farm owner, Joey Smith, a direct descendent of the owner of the plantation on which Albert's grandfather was condemned to servitude, hired Albert to kill his second wife. Albert considered Smith to be not only his boss but also an archetypal godfather—a *parraine,* as it is called in Cajun country—who was responsible for his family's livelihood. Albert had been following Joey's orders since he was young, and believed that he and his family would be in danger if he disobeyed any request Joey made. There was

little question that Albert had been involved in killing Joey's second wife; he confessed to shooting her at Joey's instruction and helping to make it look like a robbery. But Albert tested as having an intellectual disability, and he had never committed any other violent act. Joey was suspected of involvement with the mysterious disappearance of his first wife and had been convicted of federal drug trafficking. The inequality that our office was trying to reconcile was that Joey, nearly twenty years Albert's senior, was sentenced to live the rest of his years in prison, while Albert was to be executed for an act he committed while still a teenager. Albert deserved, at worst, a sentence equal to his *parraine*'s. This was the first example of an unforgettable lesson I would learn during my years in Louisiana: the murderers who seem to be the most morally despicable are not necessarily those who are sentenced to death row.

It would be sensible to assume that those who face capital punishment have committed the most atrocious murders and that their executions might serve as the strongest deterrent to others. But these are not the criteria that determine who is "death-worthy" in the United States; Albert and his *parraine* are not an anomaly. Zacarias Moussaoui, who conspired to plan the 9/11 attacks, and Gary Ridgway, who was convicted of killing forty-nine women, for example, were both sentenced to life imprisonment. Corinio Pruitt and Corey Wimbley each committed single robbery-murders and were sentenced to death by execution. In the twenty-first century United States, between 14,000 and 17,000 homicides are committed each year, yet fewer than a hundred result in a sentence of death. Those so chosen, according to prosecutors, judges, and legislators, are meant to be the "worst of the worst." During the past two decades, death sentencing has steadily decreased from its peak of 315 cases in 1996 to fewer than 50 in 2018, as shown in figure 1. This is a meaningful trend, but the capital punishment system continues to provide fodder for politicians touting "tough on crime" positions, feeding the myth that the capital punishment system identifies and punishes those most evil in American society. Whether for or against the death penalty, few people are satisfied with the current system. As a court reporter said to me during an especially frustrating day of jury selection when most of the potential jurors were dismissed: "We all hate these here. They take so much time! Nobody gets anything else done. And what's the point? We all know the outcome anyway." (The trial

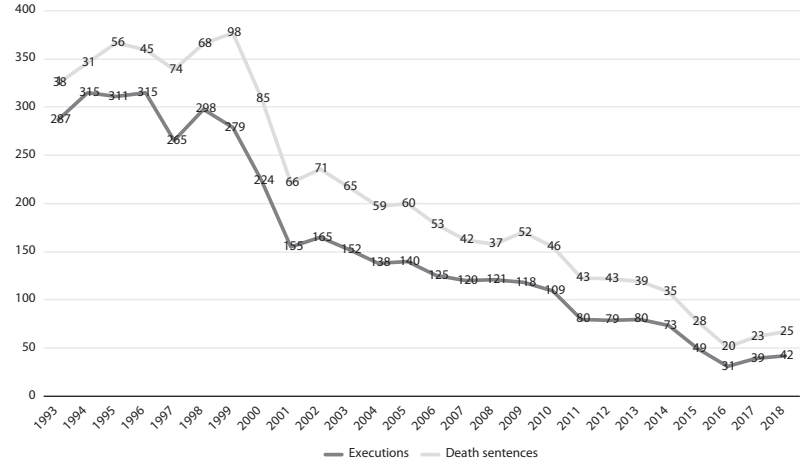

Figure 1. Death Sentences and Executions in the United States, 1993–2018.

was in a jurisdiction known to have anti–death penalty jurors.) Pro–death penalty groups think justice takes too long, and anti–death penalty groups argue that justice is not served using capital punishment.

By the time I left Louisiana, five years after first meeting Albert, I was of the same mind as the hard-charging civil rights attorneys I worked for: I believed that race and class discrimination, not morality or justice, drove the death penalty. I went to graduate school in part to escape the overwhelming injustices I witnessed. I thought I had little to add to the study of the US death penalty because its story seemed so simple: defendants who received sentences of execution were disproportionately poor young men who had grown up under conditions of exceptional violence and deprivation, and received particularly weak legal representation. Indeed, scholarship confirms that race and class continue to influence capital punishment.[1] But the professors in the sociology department where I completed my PhD pushed me to look again, beyond both the existing death penalty scholarship and the perspective of the dedicated advocates I admired. What could I learn about the persistence of such a seemingly discriminatory system by contextualizing my experiences using the sociology of knowledge, culture, and punishment?

In this book, I take readers with me as I reexamined the world of death penalty trials. Capital sentencing ostensibly sorts murderers into

death-worthy and non-death-worthy categories. But neither the relative heinousness of the crime nor simply the race and class of the defendant determines who will face the harshest of the criminal punishments in the United States. Instead, I argue, capital sentencing reflects a legal system at the limit of its powers, locked into practices defined by adversary and performance rather than justice or compassion.

RESEARCHING CAPITAL TRIALS: A SURPRISING AGNOTOLOGY

To begin my sociological inquiry into the world of capital trials in which I had been embedded, I looked, as any young graduate student does, to the academic literature. Much has been written about the contemporary death penalty, and a lot of data gathered. The Bureau of Justice Statistics at the US Department of Justice produces extensive figures on homicides, arrests, and prison sentences for convicted murderers, and organizations such as the Death Penalty Information Center and Human Rights Watch have detailed information on death row and executions. Scholars know a lot about people who are murdered, and those who are eventually executed for those murders, but I was surprised by the lack of data about the legal processes between the homicide and the execution. There is no central list of when or where capital trials occur across the nation. This was a major problem for me. I wanted to conduct an ethnography of a representative group of death penalty trials but could find no one to tell me even the most basic information. My goal was to closely examine the ways prosecutors and defense attorneys argue for death by execution or for lifetime imprisonment, crafting, as I saw it, dueling narratives of a person's life. Death penalty trials take place in courtrooms across the country like other criminal trials, but with a major distinction. When prosecutors seek a death penalty, juries rather than judges hear evidence to determine the defendant's sentence. Capital juries not only determine whether a defendant *committed* the murder; they also decide whether that defendant then deserves a sentence of life in prison or death by execution, the only two options for a defendant convicted of capital murder in all death penalty states today. The central role of these non-experts in capital sentencing

makes it an exceptional site in the US criminal justice system, and not only because the death penalty is on the table. In most every other setting, experts of one sort or another, be they legislators, judges, parole officers, or psychiatric caseworkers, determine criminal sentences. I wanted to understand how evidence pertaining to criminal punishment was presented to everyday Americans. But I found that no organization tracks death penalty trials around the country, nor their results.

The lack of systematic information on capital trials is itself salient. Sociologists believe that an agnotology—or absence of knowledge—is not an accident. Missing knowledge should be treated as an *active* rather than incidental aspect of sociopolitical power. Rather than think of a lack of capital trial data as an oversight, I began to consider why a systematic review of capital sentencing trials might jeopardize or destabilize an established source of power. My desired research methodology, it turned out, was itself a potential critique of the status quo. In 2007, I was lucky to find a self-described "crazy law professor" who had begun to create an ad hoc database of capital trials. By scouring newspaper accounts with the help of law students, David McCord found about three hundred capital trials in each of the years 2004 and 2005. Starting with this information, I adapted McCord's method to eventually create a database of all capital trials in 2005, 2012, and 2016. As I gathered this data, I also crafted a research plan that enabled me to pilot the first and only systematic ethnography of capital trials in the United States, observing nearly one thousand hours of capital trials in seven states across the country between 2007 and 2009, and in 2014. I observed thirteen state and three federal trials, lasting from a few days to several weeks, in Pennsylvania (two), New York (two federal), Virginia (one federal), Louisiana (three), Texas (seven), and Illinois (one). I also conducted documentary research; interviewed lawyers, testifying experts, victims' family members, and others; read and analyzed newspaper articles describing capital homicide trials; and became intimately familiar with death penalty jurisprudence, homicide statistics, and legislation. I spent years learning about the world of US capital punishment, the details of which readers can find in appendix A on methodology. Given the lack of systematic data on capital sentencing, my guiding questions became these: What *are* capital sentencing trials? What happens in practice when a group of Americans are asked to decide

whether a person deserves to live or die? And what power could be destabilized by answering these questions?

In addition to methodological challenges, I faced ethical issues when beginning this study. Capital punishment is an emotional as well as intellectual problem. Even without the bias of having worked for a capital defense organization, pretending to be completely "detached" from such a topic would be disingenuous. To deal with this head-on, I follow in the tradition of postcolonial ethnographers and feminist researchers who recognize the impact of their own subjectivity on academic inquiry.

Much sociolegal scholarship on criminal court proceedings relies on legal transcripts as sources of data. Of utmost importance to this project was deciding not to study what Diana Taylor calls an "archive," but instead focusing on "repertoire," the real-time practices of humans in their environment. I rejected the typical method of legal and even sociolegal analysis of capital sentencing, which is limited by its use of the most accessible archive, the legal transcript. I knew from my experiences in capital trials in Louisiana that much courtroom activity never makes it into the legal transcript. Among the central findings of this book is that legal transcription in fact systematically erases whole aspects of capital trials that would seem to impact juries but are never made available for higher courts to review.[2] Ethnographers gather data by immersing themselves in a social scene or community. The goal is to experience the scene from the perspective of a participant, in order to understand what social forces shape it. We are taught how to let go of the scholarly role enough to really *feel* what is happening. Later we interpret how the relationships, institutional demands, and knowledge claims shape those experiences. Readers will notice that I include, throughout the book, some of the notes, photographs, and sketches I made during my ethnographic immersion. It is these *field notes*—a catch-all category for the documentary evidence we create as ethnographers—that I use to discern the social forces impacting capital sentencing.

These notes represent a particular way of viewing a complex social scene. Like most ethnographers, I analyze them as situated in the actualities of my own history, to paraphrase Dorothy Smith. I take for granted that role conflicts are present in any attempt at objectivity and that these

conflicts can be managed more or less badly. I am therefore reflexive in the task of analysis.[3] I do not aim for transcendent objectivity in this study, but instead "start where I am."[4] We cannot understand a social scene without recognizing our own biases, especially vis-à-vis global capital, racial, and gender positionality, so I take pains to call attention to my particular way of seeing as a matter of not only ethics, but also empiricism.[5]

My dual experiences as a capital defense employee and ethnographer provided both handicaps and advantages. On the one hand, my work experience gave me a head start in courtroom observation; even before graduate school, I was cognizant of the *staged* quality of death penalty trials. I knew that attorneys and witnesses were not simply sharing facts with the judge and jury but instead choosing which facts to reveal and how to reveal them. My own archive provides a record of exactly when I became aware of this. I wrote a letter to friends a few months after I began work in Louisiana, in which I told them about my first experience in court, which was different than I had expected:

> It was a hot summer morning, and I put on a flowered dress that I thought appropriate for a rural Southern courtroom. About a dozen of us from the office had driven several hours to live in a four-bedroom cottage in a small town that our office had rented in order to be close to the courthouse where one of our clients was being tried. At the house, the lead lawyers were deep in trial mode—intense writing, sudden requests, and food eaten over focused conversations. Most of us younger investigators and interns were working day and night, and on the morning of the first day of trial I was going to the courthouse with information relevant to the proceedings that had just begun. What I was carrying was urgent, and I ran up the courthouse steps noticing quickly that it was grander than its location warranted—marble pillars, domed ceilings, and embellished hallways in a town with only one main street. Before I could enter the courtroom though, one of our office's lawyers grabbed me in the hallway. She shook her head impatiently and said, "No, no." I knew I had done something wrong, but was startled as she reached for the pair of cat-eye glasses I was wearing. She took them off of my face and motioned that I take out the small silver nose ring—leftover from college—as well. I was stunned but obedient. The trial was in progress, and I could see that the courtroom was packed, but I was only passing a note to one of the attorneys at counsel table. What difference did it make what I looked like? I could see almost nothing without my glasses, but did my task and exited the courtroom without incident.

This memory, and my initial shock at being abruptly instructed to remove my glasses and nose ring, illustrate what I realize now is the importance of *theatricality* in the courtroom. I saw myself simply as a messenger delivering a piece of paper, but my experienced colleague saw me as a prop in an all-important performance. As a young person, I felt conflicted at this seemingly duplicitous act. I was working for the good guys, right? Why would I have to pretend to be anything but myself? Wasn't it dishonest?

But in graduate school I learned that all social acts can be understood as theatrical in some sense. One of sociology's most influential theorists, Erving Goffman, conceptualized human interactions as sets of dramaturgical performances. People string together basic blocks of activities, physical and verbal gestures that make us recognizable to those we encounter. "Social norms"—or those behaviors that signal belonging to a particular culture—are performed in everyday life. These performances are not entertainment, nor are they necessarily duplicitous, but are instead the reflexive processes through which humans assert themselves and recognize others. A young man might perform "respectability" by putting on a suit and tie when going to meet his potential in-laws for the first time. This is not necessarily disingenuous but rather a way of showing that he shares social niceties with the people he hopes will like him. When he dresses another way to go to a college class, he shows that he understands a different set of social norms. Capital trials, I learned that day, are no different. But in my experience, no one exactly enunciated what constituted the intricate costuming, choreography, and scripts we were working to construct. The lawyers knew what did not fit when they saw it, but I wanted to understand the full scaffolding. How did they decide which parts of a client's life to detail in open court? How did they know what would matter to a jury in deciding between one very harsh criminal punishment and another? And what were the impacts of their decisions?

Having experienced the staging and performative qualities of capital trials, I was at an advantage as an ethnographer. Ethnographers are meant to try to understand a situation from the point of view of its participants, and I already *had been* a participant. In this sense I knew about many of the behind-the-scenes details of capital trials in advance. But in another way, my past experience worked to my disadvantage: neutral observation was impossible at first. Though ethnographers do not deny the ways past

experiences inform their observations, they are supposed to attempt a more holistic view. I wanted to discern capital trials in their entirety, and learned quickly that this was going to be a challenge. I was most familiar with, and empathetic toward, the defense. At one of the first trials I observed, I wrote this in my notepad:

> I have to hold myself back from slipping a note to the defense table suggesting a question for them to ask the witness. Would it really be such a violation? I know I'm not supposed to be producing the phenomena I am observing, but surely it is just a little thing? And someone's life is at stake!

This was not a neutral observation. I was invested in the outcome of the case, a very human but not very helpful strategy if I wanted to understand capital sentencing as a whole. I had to refocus. (And I did hold myself back from passing that note.)

When an ethnographer is especially concerned with their ability to reach toward objectivity, one technique is to increase the distance between themselves and the people they want to study. Getting too close might leave the researcher vulnerable to "going native"—interpreting the scene as a member of the group might, with no critical distance.[6] For this reason I did not conduct a traditional ethnography, integrating myself into the lives of a small group of participants. Instead, I made clear that my role was set apart from anyone in the court. In the language of ethnography, I acted as an *observer* rather than a *participant-observer*. When in the courtroom, I literally and figuratively positioned myself with different groups of people in the space. At the second trial, I sat with the law clerks for the prosecution; at another, with journalists covering the trial; and at yet another, with victims' supporters. It was this physical repositioning of myself in space that began to allow me to see the trial from different perspectives. But this took some work. At the beginning of the trial at which I sat with victims' supporters, I noted to myself:

> I just went to the bathroom and looked at myself in the mirror, saying: "I'm a student. I am a sociologist." I used to be an employee, an advocate. Now I am scientist, a learner of facts. Is it possible that I feel okay about this?

I had to learn to separate my ethnographer self from my defense advocate self so that I might pay attention to all of the positions involved. Once

I was able to make this shift, the reward was palpable. By the fourth trial I was listening as openly to prosecutors as I was to defense attorneys and victims' family members. My notes reveal that I sympathized with bailiffs, experts, and jurors. Near the end of my time in the field, I recorded a formal interview with a prosecutor. Listening to it later, I heard myself say, and mean, "I really understand where you are coming from." I had moved toward a more universal set of observations and inquiries that were not only rewarding as a personal journey but have also resulted in this book.[7]

From my years as a member of a capital defense team, I learned that it is possible to look beyond people's worst acts and find sympathy for the most hated people in society. I also saw up close the unspeakable agony of losing loved ones to homicide. From the research documented in this book, I deepened my understanding of the stakes of capital punishment. The performances that I witnessed have consequences beyond even the excruciating decision of whether a homicide defendant lives or dies. Two decades ago an influential death penalty scholar, Austin Sarat, said that state killing should provoke the question, not what it does *for* American society but what it does *to* American society. Among other things, he argued, the US capital punishment system legitimates vengeance, intensifies racial divisions, and distracts Americans from the hard work of solving complex problems by offering seemingly simple solutions.[8] In this book, I document the ways in which capital sentencing today is etched through with these dynamics, imprinting more deeply the most shameful tendencies in US society under the guise of what scholars call "super" due process. Supreme Court jurisprudence affords capital defendants a set of legal protections not guaranteed noncapital criminal defendants, but these do not negate a fundamentally partisan system. Today capital sentencing is lionized as individuated criminal sentencing par excellence. But if one observes capital sentencing across multiple cases, its systematic failure to identify the "worst from the worst" should give pause to those who would hold it as a model democratic process.

THE ARGUMENT

As I describe to readers, I came to think of the trials I witnessed as games of Russian roulette, unnecessary sport where someone would inevitably

die, and that I had no power to stop. Criminal defendants arrive at capital trials through a series of structuring logics ordained by racial classification and state power. In part I, I take readers through the first major structuring logic: the construction of capital homicide. From a vast backdrop of millions of human deaths a year, courts, legislatures, police forces, and prosecutors define some deaths as homicide—the result of malicious human intent—before settling on those worthy of being considered capital. What I refer to as the "narrowing structure" of the capital punishment field is not unproblematic. The cultural and legal norms that determine who eventually is tried by a capital jury follow confusing and often contradictory logics. The stages of this narrowing structure can be visualized in figure 2, where I use 2016—the latest year's data available as of this writing—as a touchstone. Importantly, the stages of capital narrowing are unknown to most of the parties involved. Though I worked in capital sentencing for years, I had little idea about the mechanisms determining who was tried capitally. Capital jurors, I will argue, are likewise and *necessarily* uninformed. When they agree to participate in the capital sentencing process, they are assured that they are the last in a series of people who systematically ensure that those tried for capital murder are the worst society has to offer.

Chapter 1 begins by delineating how liberal democracies enact criminal punishment. It problematizes the mechanisms that distinguish the vast majority of the 2.7 million "nonnegligent" human deaths in 2016 from those 17,250 that the law defines as criminal. I adapt the term "necropolitics" to describe how some deaths happen with little notice or care, while others garner a great deal of legal concern. This process—dependent especially on a racial-capital nexus of power—is the first step in constructing the group of people who prosecutors call the "worst of the worst," charged with capital murder.

Chapter 2 moves from the social forces that make capital punishment possible in the United States, to the way it is governed. I introduce the US Supreme Court's shaping of "modern" capital punishment, beginning with *Furman v. Georgia* and *Gregg v. Georgia*. This jurisprudence refashioned the capital punishment system during the 1970s but failed, I argue, to rid the system of its fundamental inequity. In the post-*Furman* era, mechanisms developed at the state and local level differentiating between the

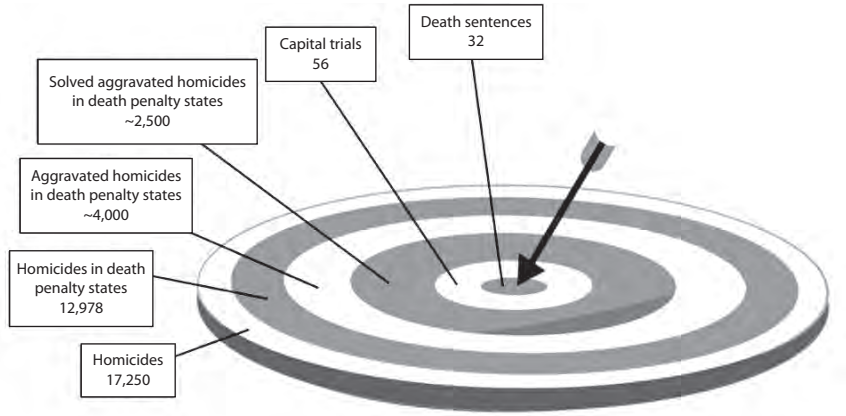

Figure 2. Narrowing Capital Eligibility: Thirty-Two Death Sentences for 17,250 Homicides (2016).

thousands of homicides committed annually and the hundred or so that eventually result in a capital trial. Chief among these processes are state legislators' decisions whether to retain or abolish the death penalty, and how to narrow the class of homicide offenders who would be eligible. As of January 2020, only twenty-nine states have the death penalty on the books, and four of those have enacted a moratorium. This means capital punishment is effectively absent from fully half of American states. Within retentionist states there is also great variation in the use of the death penalty. As I will explain, prosecutors, state legislators, and policing practices align with the Supreme Court's rulings but use a separate set of social logics that nonetheless reinforce racial and economic cleavages.

Chapter 3 moves from this broader context into an examination of those who shaped the capital sentencing field. Using the concept of "field" proposed by French thinker Pierre Bourdieu, I show that the Supreme Court decisions in the 1970s catalyzed new professional communities that created templates for staging capital sentencing trials. I show how juries' required participation necessitated the development of communicative performances by prosecution and defense teams that are not socially neutral but embedded in the same biases that "super due process" was sup-

posed to have corrected. Many aspects of these performances furthermore are written out of the appellate record because they are not captured by legal transcription. These performative aspects of the courtroom, I argue, act as a link between the social and juridical worlds in capital sentencing, which is detailed in the second part of the book.

Part II takes readers into capital courtrooms to detail how the biases of the mid-twentieth century were refashioned for the twenty-first. Chapter 4 lays bare the unique process of choosing "death qualified" jurors to sit on capital trials. Jurors are recruited into a role I call *punitive citizenship,* which demands that they take personal responsibility for particularly harsh state punishments. Lawyers eliminate potential jurors who show emotional vulnerability in the face of the life-and-death decisions. Choosing only those jurors who agree to sublimate the nuances that complicate crime-and-punishment narratives, the state claims capital jury selection to be a democratic endeavor.

Chapters 5 and 6 detail the presentation of evidence for and against the death worthiness of particular defendants based on competing constructions of their lives. Defense teams present evidence to convince jurors that defendants deserve mercy, and prosecutors explain why defendants must be put to death. These chapters analyze how experts' performances attempt to establish order on a messy and contradictory set of experiences. Attorneys, judges, psychologists, and psychiatrists weave in and out of their official areas of expertise to construct oft-conflicting sets of knowledge parcels about childhood, mental illness, and hypothetical future behavior, much of which is inseparable from the psychomedical knowledge on which necropolitical logic depends.

Chapter 7 exposes one of the most heart-wrenching and controversial parts of the capital trial: the participation of victims' families. Here I demonstrate that victim supporter testimony—which the Supreme Court says should provide jurors with a "quick glimpse" of the impact of the victim's death—stretches well beyond its legal limits. Victims' supporters who appear in court and perform their role in a socially hallowed manner receive the confirmation of judges, courtroom staff, lawyers, and audience members. This gives their emotional appeals for the death penalty immeasurable power. Those who do not appear, or do not perform their role in culturally "normal" ways, do not wield that same power.

In the book's conclusion, I reframe the Supreme Court's nominative attempt to ameliorate capital punishment's racist past. Joining with others in the prison abolitionist movement, I argue for the elimination of death sentencing.

A NOTE ON LANGUAGE

Readers will notice that throughout the book I use male pronouns when discussing capital defendants. This is a deliberate choice meant to signal how gender biases intersect with other forms of subjugation in the capital punishment system.[9] The vast majority of capital murder defendants are male. Of the nearly three thousand people on death row, fewer than one hundred, or about 3 percent, are women. This misrepresents the percentage of murders committed by women; approximately 10 percent of all known homicide offenders in the United States are female. Scholars explain the underrepresentation of women on death row as a sort of "chivalry" bias. Actors throughout the criminal justice system—police officers, judges, prosecutors, and jurors—are more sympathetic toward female offenders and less likely to judge them as harshly as men. The gendered assumptions about violence constitute one of the many nonlegal factors that come into play to determine who is sentenced to death in the US's criminal justice system. This book helps readers to understand many others.

A NOTE ON METHOD

Throughout, I also obscure the locations of the trials that I observed. I made this decision not only because I wanted to protect the identities of the people I observed and talked with, as is the case with much "sensitive" social scientific work. For the most part, revealing the locations of the trials would have been ethically defensible because most of my observations were in courthouses open to the public. In fact, I include enough information in the methodology (appendix A) that a persistent reader might, with a little cross-referencing, identify exactly which trials I observed.

My decision not to identify the trials in the main narrative of the book comes instead from an epistemological imperative. I am presenting a particular *way of knowing* about capital sentencing. Alerting readers when one observation comes from Los Angeles and another from Nashville (neither of which I actually visited in the course of this study) would distract from the proposition that there is something common to capital sentencing trials across the country, set into motion by the system's "modernization" in the 1970s. No doubt the place-ness of Los Angeles or Nashville influences capital proceedings. Much important research on local factors—be they court culture, demographic, or political-historical—demonstrates their influence on criminal justice processes, which this book does not dispute. My goal in this study is to emphasize localities' commonalities through their shared social performances. There is something to be said about this moment in the history of capital punishment that can be found even in the most specific of interactions. This is one of the conceits of ethnography and one of the most meaningful lessons I learned by becoming a sociologist: fine-grained analyses of complex settings allow researchers to illuminate powerful social forces usually shrouded by the immediacy of everyday life.[10]