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ARTICLES

WITNESS TO A PERSECUTION: THE DEATH PENALTY AND THE DAWSON FIVE*

Hugo Adam Bedau**

The discretionary power . . . in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause.¹ *A Fortiori*, the decision as to what charge to bring is likewise discretionary.²

I

When the definitive history of capital punishment in the United States is written, the full story about capital trials, death sentences, and executions in the State of Georgia deserves to play a prominent role. Preliminary tallies of all executions in this country since the seventeenth century place Georgia near the head of the list.³ Since 1930, Georgia has legally put to death 366 persons;⁴ no other jurisdiction has executed so many in this period.⁵ Nowhere else in this nation have so many blacks been executed—298⁶—nor in any other state have blacks been so large a percentage of the total.⁷ Twenty years ago, Georgia led all other jurisdictions in the nation in the variety of statutory offenses for which the death penalty could be imposed.⁸ Among classic miscarriages of justice, Georgia also has made its contribution with the death in 1915 of Leo Frank, lynched near Marietta

* The prosecution subsequently dropped all charges against the five defendants; therefore, there is no published report of the case.

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1. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

2. C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 38 (1974), commenting on *United States v. Cox*, *id.*

3. Georgia has executed 851 persons, ranking third in the nation behind New York (1081) and Pennsylvania (1052). Memorandum of W. Espy, August 23, 1982, p. 1.

4. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *CAPITAL PUNISHMENT 1980, NATIONAL PRISONER STATISTICS*, No. NCJ-78600 (1981). 16 (Table 3).

5. *Id.* Georgia is followed by New York (329), Texas (297), and California (292).

6. *Id.* Georgia is followed by North Carolina (199), Texas (182), and South Carolina (127) in terms of the number of blacks executed.

7. *Id.* Only the District of Columbia, with 40 total executions of which 37 were blacks (92.5%), exceeds Georgia (81.4%). Several other states—Maryland (80.8%), Virginia (80.6%), and Mississippi (80.5%)—closely approach Georgia in the high percentage of blacks executed.

8. According to the inventory of capital statutes published by the library of Congress in 1962, Georgia's capital statutes included twelve non-homicidal offenses and seven kinds of homicide. 108 CONG. REC. 3301 (Senate, March 1, 1962). According to the same source (at 3300), Alabama was in second place with eight non-homicidal and four homicidal capital offenses. An earlier inventory placed Alabama first with thirteen capital offenses, followed by Georgia with nine. Savitz,

after a commutation of his death sentence for a murder it is now generally conceded he did not commit.⁹ Perhaps it is hardly surprising, therefore, that another Georgia death penalty case during 1977, involving the so-called "Dawson Five," threatened to add one more chapter to the annals of injustice. This essay, largely in the form of a personal reminiscence, narrates one of the central series of events in that complex and disturbing case.

The case of the Dawson Five had all the ingredients of a classic southern death penalty scandal: the robbery-murder of a white victim in a remote rural setting; only one eye-witness, another white; the prompt arrest of an illiterate black teen-ager by an all-white police force; a confession implicating four other black youths; no circumstantial evidence against the accused; denial of bail; a charge of coerced confessions; and looming over it all, the threat of the death penalty and execution in Georgia's electric chair.

The case burst on the national scene within days of the inauguration of President Jimmy Carter in January of 1977.¹⁰ The Southern Poverty Law Center (SPLC) undertook to supply legal counsel for the defendants, and in order to raise funds, sent a letter over the signature of Julian Bond (then President of SPLC) in a nationwide appeal. A copy of this letter arrived in my mail on January 23, 1977.¹¹ Since Dawson, where the crime occurred, is only twenty miles south of Plains, Jimmy Carter's hometown, the national media quickly seized on the case to point up the paradoxes of the "new South." Here was the first President from the Deep South since before the Civil War, a peanut farmer himself, perhaps, but supported by southern black leadership from the Civil Rights movement and eager to show the nation that Georgia was ready to share the national consensus on racial equality. Here was also a President who was going to make the government's protection of human rights, abroad and presumably at home as well, something more than a rhetorical flag flapping in the political breeze. Yet in Dawson, on his very doorstep, a wretched story was unfolding that harkened back to the very worst days of Georgia's ugly past, a land bloody with five hundred blacks lynched since Reconstruction.¹² To make matters even worse, the death penalty statute under which the Dawson Five were to be tried had been signed into law on March 28, 1973 by none other than then Governor Jimmy Carter.¹³

Capital Crimes as Defined in American Statutory Law, 46 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 355, 361 (Table II) (1955).

9. L. DINNERSTEIN, *THE LEO FRANK CASE* (1966). In 1982, 69 years after the event, a witness to the murder for which Frank was lynched reported in a sworn statement that, as a boy of 14, he had observed another man (who became the chief witness at trial against Frank) carrying "the wilted body" of the victim, and that he had been threatened with death by this man if he ever told what he had seen. N.Y. Times, Mar. 8, 1982, at A12, cols. 1-6.

10. President Carter was inaugurated on January 21, 1977.

11. The letter itself is undated. On the same day, the case also apparently received its earliest national publicity; see Chicago Tribune, Jan. 23, 1977, at 8, col. 1.

12. The exact number is unknown. According to one source, 491 blacks were lynched in Georgia between 1882 and 1951; Guzman, *Lynching*, in *RACIAL VIOLENCE IN THE UNITED STATES* 57 (ed. A. D. Grimshaw, 1969). Another source gives the total as 510 between 1882 and 1927; W.F. WHITE, *ROPE AND FAGGOTT* 255 (1969).

13. N.Y. Times, Aug. 2, 1977, at 12, col. 3. For discussion, see Comment, *Furman v. Georgia and Georgia's Statutory Response*, 24 MERCER L. REV. 891, 930 (1973).

The case began exactly a year before Carter's inauguration.¹⁴ On January 22, 1976, in mid-morning, a male customer in a small roadside general store on the outskirts of Dawson was shot and killed (so the store owner later testified) during an armed robbery. The next day (or two days later; reports differ) the store owner told Dawson police that he recognized one of the youths that allegedly committed the hold-up murder. He was Roosevelt Watson, 18, who lived at home nearby with his parents. Young Watson was promptly taken into custody by the sheriff's department and an agent of the Georgia Bureau of Investigation (GBI). Under interrogation thirty miles away at police headquarters in Americus, Watson allegedly confessed to the shooting and implicated four others—his older brother, Henderson, 21, a cousin, J. D. Davenport, 18, and two friends, James ("Junior") Jackson, 17, and his brother, Johnny, 18.

The death penalty entered the case right from the start. Once Roosevelt Watson was out on \$100,000 bail, after serving nine months in jail, he told reporters that the police "told me they gonna put me in the electric chair They had these two things hooked up to my fingers. Had a thing on my arm, real tight. Said they gonna electrocute me if I didn't tell 'em."¹⁵ It was only later, apparently, that Watson learned he was merely undergoing the usual polygraph testing. But it was conceded to reporters by the GBI investigator that during Watson's interrogation "there was talk of electrocution."¹⁶ According to a New York Times report, all five defendants were "indicted on charges of armed robbery and first degree murder, with the recommendation that they be given the death penalty if convicted."¹⁷ In its fund-raising appeals, SPLC stressed the threat of electrocution, and the media understandably emphasized the grim prospect of execution as well.

The talk about the death sentence from the accused and from the police was all the more alarming because of serious doubts about the guilt of the five defendants. Claims that they were innocent were heard virtually from the moment Roosevelt Watson was taken off the polygraph in Americus and returned to Dawson. At the preliminary hearing, he repudiated his confession, claiming that it was coerced. Neither he nor any of his co-defendants was willing to sign a confession. All the police had were alleged statements from Watson implicating the others, and similar statements by the others implicating each other. No physical evidence, such as the murder weapon (a "Saturday night special," according to the eye-witness), fingerprints, or stolen money (\$100) linked any of the defendants to the crime. None of the defendants had any prior criminal record. Alibi witnesses (all black) alleged that the five young men were two miles away from the scene of the crime that morning. According to these informants, the defendants were drawing water from a neighbor's well to haul to the Watsons' home, an unpainted wooden farm house, not quite a shanty, by the side of a country road northeast of Dawson.

14. The basic facts of the case are not in dispute, and the following account is based on sources cited *supra* note 11, and *infra* as noted.

15. N.Y. Times, April 21, 1977, at A18, col. 5.

16. *Id.*

17. N.Y. Times, *supra* note 15, at col. 1. Accord, Chicago Tribune, Jan. 23, 1977, at 8, col. 1. Newsweek, May 23, 1977, at 26, wrote that the defendants "could be sentenced to death if convicted." THE PROGRESSIVE, May 1977, at 40, reported that they "face the death penalty"

Guilty or innocent, the Dawson Five desperately needed legal counsel. After the preliminary hearing, during which they were represented by a local attorney, efforts were made to interest SPLC in taking over the defense of these five dirt-poor prisoners. SPLC, with its headquarters some distance away in Montgomery, Alabama, agreed to accept the case and turned over the task to its (then) affiliate, Team Defense, based in Atlanta. Organized during 1976, and already active in providing defense counsel in capital cases, Team Defense consisted of a "group of lawyers and social scientists who plan to use relatively new trial techniques in an effort to avoid executions, even in support of hopeless cases."¹⁸ These techniques were reported to include: "Appealing to logic rather than compassion in arguments against the death penalty; prolonging trials to allow jurors to become well acquainted with defendants; using a proliferation of motions to 'capture the atmosphere of the trial' for appeal, if necessary; using social scientists to assist in challenging the composition of jury pools and evaluating the character of prospective jurors."¹⁹

Heading Team Defense was Millard Farmer, 42, white, an attorney whose Atlanta-based practice had been largely confined to typical small-office civil and criminal matters. Not any more. By 1977, Farmer was best described by New York Times editor, Tom Wicker, who saw in Farmer "a passionate south Georgian possessed of a voice like a bullfrog with laryngitis."²⁰ In one of the local Georgia newspapers, he was described succinctly as "the most controversial lawyer in Georgia"²¹ as a result of the novel trial tactics he pioneered in capital cases. Farmer's collaborator in working out trial strategy was not another lawyer but a social psychologist, Courtney Mullin, 37, white, from Raleigh, North Carolina, "a hippy-looking girl without the hippy mind,"²² as one unfriendly but respectful observer had put it. She had turned her talents to forensic psychology and was well-known for her work on jury selection during the notorious case in 1975 of Joan Little.²³ Completing the Team Defense staff in the Dawson Five case were several students on leave or on vacation from their studies in college or law school, plus a couple of other social activists.

By the summer of 1977, a year and a half after the crime and the arrest of the defendants, Team Defense had been working on the case for many months, trying first to get the defendants out on bail (which entailed helping to raise the bail money), challenging the racial composition of the jury lists (which delayed inception of the trial), and helping to get publicity for the case far and wide (which included cooperating with a film crew from Boston's WGBH that was making a documentary for television on the case).²⁴

Throughout its involvement in the Dawson Five case, Team Defense

18. N. Y. Times, Dec. 5, 1976, at 60, col. 1.

19. *Id.* For a slightly different account of Team Defense's strategy, see Pinsky, *The Not-So-New South: Legal Aid in the "Death Belt,"* THE NATION, Mar. 26, 1977, at 367-68.

20. N. Y. Times, Aug. 14, 1977, at E17.

21. Albany (Ga.) Sunday Herald, July 31, 1977, at A6, col. 1.

22. Quoted from an unidentified source in J. RESTON, *THE INNOCENCE OF JOAN LITTLE: A SOUTHERN MYSTERY* 177 (1977).

23. *Id.* at ch. 9 ("Courtney Mullin and Judge Henry McKinnon"). See also Mullin, *The Jury System in Death Penalty Cases: A Symbolic Gesture*, 43 LAW & CONTEMP. PROB. 137 (1980).

24. "Life and Death: Dawson, Georgia," was broadcast in Boston on WGBH the evening of Aug. 2, 1977; see Boston Globe, Aug. 2, 1977, at 41.

made its headquarters in Albany, 23 miles southeast of Dawson. Those with a memory of the struggles of the Civil Rights movement in the early 1960's would recall the Dawson-Albany region. It made national headlines for months with its protracted boycotts, sit-ins, night-riding white racists, KKK rallies, and sporadic shootings and bombings that killed and wounded civil rights workers and their sympathizers.²⁵ Just as Scottsboro, Alabama—another obscure southern town—had forty years earlier become a household word because of a death penalty case tried there,²⁶ Dawson was on the threshold of notoriety because of the arrest and impending capital trial of the Dawson Five.

A sleepy country town of about six thousand people, situated deep in the heart of southwest Georgia's peanut and cotton farmland, Dawson is also the county seat of Terrell County. Known as "Terrible Terrell" during the Civil Rights movement, it had been more recently described by Millard Farmer as "the buckle on the Death Belt."²⁷ It was from Terrell County and other rural districts like it in the Deep South that small-town juries (usually all white) tried and convicted men (usually black) of first degree murder and (especially if the victim was white) sentenced them to death.²⁸ Such results were virtually guaranteed by the exclusion of blacks from the jury pool. In Terrell in 1976, where the population was about 60% black, the jury pool was 74% white.²⁹ This racial imbalance was the target for the first of the many pre-trial motions on behalf of the Dawson Five, and in April 1977 it succeeded in obtaining a new jury pool with equal black and white members.³⁰

On July 26, 1977, Farmer filed seven further pre-trial motions, covering a wide variety of issues.³¹ One motion sought to dismiss the indictment on grounds of state misconduct. Another attacked the scrupled juror qualifications in the Georgia death penalty statute. The boldest sought to strike down the entire death penalty statute as unconstitutional. It was this motion that served as the basis for my involvement in the case.

II

The hearing on these pre-trial motions was scheduled to begin at 9:30 on Monday morning, August 1st, in the Terrell County Courthouse in Dawson. Along with over a dozen other witnesses scheduled to testify on these

25. See C. CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING IN THE 1960's 56-65, 84, 92-93 (1981); C.S. KING, MY LIFE WITH MARTIN LUTHER KING, JR. 202-207 (1969).

26. See generally D. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969).

27. Quoted in Pinsky, *supra* note 19, at 367.

28. There seems to be no research, and certainly none in the 1970's, published specifically on the sentencing practices in capital cases of rural southern juries. On the racism of southern criminal courts in recent capital cases, see generally Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 A. SOC. REV. 918 (1981); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981); Bowers & Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQUENCY 563 (1980). Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals* (1982, forthcoming); Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J.C.L. & C. 379 (1982).

29. Chicago Tribune, Jan. 23, 1977, at 8. sec. 1, col. 3.

30. N. Y. Times, April 21, 1977, at A18, col. 2.

31. Their contents were summarized in Albany (Ga.) Herald, July 27, 1977.

motions, I arrived in Albany on the Friday before the hearing. I spent the weekend getting to know the other witnesses, the Team Defense staff, the two defendants then out on bail, their families, and the countryside. Three days later, my contribution was over and I was on the plane back to Boston. Within those seventy-two hours was sandwiched one of the more remarkable episodes provoked by the death penalty, and for those of us who witnessed it, an unforgettable drama and sobering lesson.

On the face of it, a pre-trial motion in 1977 to throw out Georgia's death penalty statute as unconstitutional would have struck most informed observers as implausible and far-fetched, even frivolous and dilatory. Exactly one year earlier, in *Gregg v. Georgia*,³² the United States Supreme Court had sustained the Georgia Supreme Court³³ in turning back a challenge to the constitutionality of this very statute. No doubt, as subsequent litigation and commentary were to prove,³⁴ the statute was vulnerable to attack. But the likelihood that any Georgia court, trial or appellate, in the summer of 1977 would look favorably on a frontal challenge to the constitutionality of the death penalty seemed not merely slight, but zero.

The defense motion in question, styled "Motion to Strike and Quash As Unconstitutional the Georgia Statutes Providing for the Imposition of the Death Penalty and Their Application to This Case," consisted of eight legal pages in which eleven points were argued. The point given the most extensive development was devoted to the contention that the racist practices imposed by the white minority on the black majority made Terrell County "simply a modern version of the plantation system,"³⁵ with a criminal justice system that employed the threat of capital punishment as its ultimate tool of repression. The motion argued that this racist factor was crucial to the State's declared intention to seek the death penalty for the defendants:

Differential treatment of minorities in the application of criminal sanctions is an inherent product of such an environment. This is particularly so with regard to the death penalty, with its historic over-imposition on minorities. The quality of justice which the defendants will receive is a product of such a system and thus cannot be untainted by this pervasive and blatant discrimination. The above acts have perpetuated a system where a black person's life has never been as highly esteemed as that of a white person, a system in which the State's most racist tool—the death penalty and its threat—has historically been racist as applied and is now racist as applied in this county. In this case, death as punishment is only being used as the white man's 'boogie man' to instill fear in these young black kids and the entire black community. It is an ever-present threat to the poor, the black and the oppressed. Therefore, the State should be prevented from seeking the ultimate punishment against these defendants.³⁶

Whether the Georgia death penalty was functionally racist and whether this was a sufficient ground for a court to rule on the unconstitutionality of

32. 428 U.S. 153 (1976), decided July 2, 1976.

33. *State v. Gregg*, 233 Ga. 117, 210 S.E. 2d 659 (1974).

34. See *Davis v. Georgia*, 429 U.S. 122 (1976); *Coker v. Georgia*, 433 U.S. 584 (1977); *Presnell v. Georgia*, 439 U.S. 14 (1978); *Green v. Georgia*, 442 U.S. 95 (1979); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Zant v. Stephens*, 102 S. Ct. 1855 (1982). See also, for general criticism, Donohue, *Godfrey v. Georgia: Creative Federalism, The Eighth Amendment, and the Evolving Law of Death*, 30 CATH. U. L. REV. 13 (1980), and sources cited therein.

35. Motion, p. 1.

36. *Id.* at 6-7.

the statute as the motion implied, and as I was ready to believe, did not especially concern me. I did not think of myself as someone qualified by his own empirical research to be an expert on the racial aspects of the death penalty, although over the years I had examined some data in northern jurisdictions relevant to this issue,³⁷ and I was familiar with the important research on the subject published by other investigators.³⁸ Besides, it was not primarily in this connection that Team Defense sought my testimony; others in the group of expert witnesses assembled to testify in this case (notably William Bowers³⁹ and Marc Riedel⁴⁰) could speak on this theme with the authority I lacked.

In a briefing session conducted jointly by Farmer and Mullin with me the day before the pre-trial motions were to be argued, they explained that my testimony was needed on the general history and trends of the death penalty nationally and worldwide, in order to provide the setting into which the more detailed testimony from the other witnesses could be fitted. A memorandum prepared by Team Defense and distributed to all the witnesses outlined the general themes that the expert testimony was expected to cover: (a) the demography of capital punishment, including the arbitrariness and discrimination to be found in its administration; (b) the unreliability of the process of selecting capital offenders, which defeats any rational legislative purpose underlying the adoption and enforcement of capital statutes; (c) the cruelty of executions and of death row confinement; (d) the cruelty of the death penalty as judged by contemporary social science and moral theory; (e) problems with selecting jurors in capital trials; (f) the evidence against the deterrent efficacy of the death penalty; and (g) the economic costs of capital punishment.

Team Defense, in effect, wanted to put capital punishment on trial right from the start in this case because that was what the case was all about. The court, the prosecution, and the media needed to be made to understand this as unambiguously and persuasively as possible. In order to do this most effectively, Farmer decided that I should be his opening witness at the hearing.

In thinking over how matters would go in court the next day, I was not anxious about my ability to answer direct questions from Farmer nor to respond to cross-examination, insofar as my responses would turn on knowledge of the relevant facts. By the summer of 1977, I had already spent a good fraction of twenty years reading, writing, and talking about the death penalty, and I was confident that I could summon ad lib an appropriate range of things to say that would inform the court. But one thing about my forthcoming testimony did give me pause. This was not the first time I had

37. See Bedau, *Death Sentences in New Jersey, 1907-1960*, 19 RUTGERS L. REV. 1, 18-21 (1964); Bedau, *Capital Punishment in Oregon, 1903-64*, 45 OR. L. REV. 1, 10-13 (1965); Bedau, *Felony Murder Rape and the Mandatory Death Penalty: A Study in Discretionary Justice*, 10 SUFFOLK U. L. REV. 493, 516-517 (1976).

38. See generally Wolfgang & Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 THE ANNALS 119 (1973), and sources cited therein at note 2.

39. See W. BOWERS, *EXECUTIONS IN AMERICA* (1974); and BOWERS & PIERCE *supra*, note 28.

40. See Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman*, 49 TEMPLE L. Q. 261 (1976); Wolfgang & Riedel, *Rape, Race, and the Death Penalty in Georgia*, 45 A. J. OF ORTHOPSYCHIATRY 658 (1975); and Wolfgang & Riedel, *supra*, note 38.

been invited by the defense in a murder trial to appear as an expert witness on capital punishment.

The previous occasion had been in a case in 1965 in Seattle, Washington, that also involved black defendants and a white victim. Defense counsel in that case believed there was little room for maneuver on the question of guilt; it was solely on the issue of sentence that they thought I might be helpful. They had heard about my book, *The Death Penalty in America*, then recently published.⁴¹ As I was at that time a resident of Portland, Oregon, it was not difficult for me to arrange to comply with their request, and take a day off for the trial. In fact, I was eager to testify. I arrived as planned and was placed on the stand, the judge having temporarily excused the jury prior to ruling on the admissibility of my testimony. As defense counsel began to qualify me as an expert, the prosecution moved to strike my testimony as irrelevant and inappropriate. Without any hesitation, the trial judge sustained the objection. Subdued and frustrated, even feeling a bit of a fool, I was soon on the train back to Portland, convinced that my days as an expert witness in capital trials were over before they had even begun. True, that 1965 case was very different from the situation in the Dawson Five, because in Seattle my testimony had not been sought in support of a pre-trial motion on the constitutionality of the statute itself, but directly before the jury on the issue of sentence. And over a decade had passed, during which the death penalty controversy had undergone enormous transformations. Still, my experience in futility in that Seattle courtroom was an unwelcome precedent not far from my mind.

To my surprise, Farmer and Mullin did not share my worry. They explained they were counting on the trial judge's willingness to allow my testimony because they thought he would go some distance, perhaps even bend over backward, to show that the accusations of racism in Terrell County's system of criminal justice that were then being broadcast nationwide by the media were false, or at least much exaggerated and, in any case, would not corrupt his handling of the trial of the Dawson Five. They also believed that if the judge were to rule out my testimony as irrelevant, or deem me to be unqualified as an expert on the motion, such rulings could be exploited in the courtroom of the streets, where television cameramen and newspaper reporters ruled. Excluding my testimony would be viewed in that forum as simply further evidence of the refusal of the State of Georgia to hear the truth in open court about the death penalty system that was propelling five innocent black teen-agers toward the electric chair. Either way, Farmer and Mullin were convinced, the defendants could not lose.

Farmer also explained that when I took the stand, he would try to construct questions for me to answer in such a way that in the course of establishing my qualifications as an expert, I would already be offering the general substance of my testimony. Thus, there would never be a precise point when his questions and my answers shifted from the technical issue of my credentials as an expert to the substantive issues of my views on the

41. The first edition of the book was published as a paperback in 1964, in hardback later the same year. For reviews, see 50 A.B.A.J. 670 (July 1964); 43 SOCIAL FORCES 137 (1964); 357 THE ANNALS 153 (1965); 78 HARV. L. REV. 1100 (1965); J. CRIM. L., CRIMINOLOGY & POLICE 354 (1965); 76 ETHICS 63 (1965).

death penalty as a deterrent, etc. Farmer hoped that the prosecution would defer interruptions to challenge my status as an expert or the relevance of my testimony, or that the court would defer ruling in favor of any such prosecution challenges until a great deal of what he wanted from me was already on the record. I agreed that if anything might help to get around the problem that had me expelled summarily from that Seattle courtroom years earlier, Farmer's tactic would. I also agreed that even if I were not allowed to testify, I might be able to serve the defense's purpose by helping to turn the case around from one in which five innocent black teen-agers were on trial for their lives in a backwater Georgia courtroom, into a case in which the town of Dawson and Terrell County (with their long history of manifest racism), and Georgia's newly-minted death penalty statutes were on trial in every household of the nation that could be reached by newspaper and television.

III

August 1, 1977, the opening day of the hearing, dawned bright and hazy, with the promise of damp, sweltering heat a few hours later. In a car filled with other witnesses, I was driven from Albany across the flat drought-ridden farmland that stretched west and north to Dawson. The streets of Dawson were nearly empty when we arrived shortly after 9:00 a.m. at the courthouse parking lot. The century-old Terrell County Courthouse was in its own way an imposing edifice of brick and stone. On the sidewalk in front, a few bystanders watched as television crews were setting up their equipment. On the portico and front steps of the courthouse, uniformed state troopers flanked the entrance. One by one we entered and climbed the three flights of stairs to the courtroom on the second floor.

The courtroom was larger than I expected, roughly square, high ceilinged, with a bar railing that stretched across the entire front of the room. The courtroom had been modernized recently, so that it was comfortably air-conditioned and brightly lit by the indirect fluorescent lighting typical of lecture halls. The spectators were provided with rows of comfortable seats arranged, not as in most courtrooms, but in the semi-circular fashion of an amphitheatre. Sitting in the top row in the back, one would be just below eye level with the judge. The witness stand, where I would soon be sitting, was immediately to the left of the bench and directly in front of the table reserved for the prosecution. As we filed down the aisle to our seats near the defense table, other spectators, reporters, and court officers also entered and the room slowly began to fill. In the corner to the judge's right, eight or nine men lounged in the jury box. Most of the men were heavy-set and casually dressed. We were told they were detectives, town police, and GBI officers in mufti here to keep the peace. The sidearms of several were in plain view.

Murder trials were not an everyday occurrence in the Terrell County Courthouse, and local observers assured us that nothing remotely like the Dawson Five case had ever transpired in this courtroom before. Presiding over the case was Judge Walter I. Geer, white, and said to be "highly respected on the seven-county Pautula Circuit."⁴² He was not in the best of

42. N.Y. Times, Aug. 16, 1977, at 35, col. 5.

health, as was soon to be evident; he suffered from emphysema as well as other inconveniences of advancing age. Within a few weeks he would retire from the case (only temporarily, as it turned out) on the grounds that he was simply "not physically able" to continue.⁴³ Representing the prosecution was another elderly white man, District Attorney John R. Irwin. He looked ashen and frail; he was ill from cancer and the side effects of radiation therapy.⁴⁴ He did not look strong enough to direct an effective prosecution in a case such as this. At his side was a much younger man, Michael Stoddard,⁴⁵ an Assistant Attorney General sent down from Atlanta as a special prosecutor to assist the District Attorney. Unlike Geer and Irwin, whose age, dress, and manner seemed more suitable to an earlier era far from the limelight of national attention, Stoddard looked alert, business-like, and dapper in a well-cut dark suit. Before the morning was over, he was to become a central actor.

As soon as Judge Geer was seated at the bench, he recognized the attorney for the defendants.⁴⁶ Farmer immediately sought to establish the mood he wanted in the courtroom that morning by a series of sparring maneuvers. He insisted, firmly but politely, that the prosecution leave ample room at the table for the defense to spread out its papers and its persons. Judge Geer assured him there would be no territorial encroachments by the prosecution. In answer to the judge's query about a small box-like apparatus on the defense table, Farmer explained that it was a tape recorder, that it was running, and that the defense intended to use it to record all the proceedings in order to assist it in reviewing each day's testimony and rulings. That way, Farmer said, the defense would not have to depend on the efficiency of the court reporter in preparing the daily transcript. No objection. Farmer could see that Judge Geer's attention was distracted by a young man who was distributing a folder containing papers to each of several persons throughout the courtroom. Farmer explained that this was one of his assistants, who was providing members of the press with a packet of materials on the motions and on the experts who were soon to begin their testimony on them. No objection. He then turned to his companions around the defense table, and introduced them one by one, starting with Courtney Mullin. As he introduced the five defendants, he made a particularly emphatic point of saying that although when he spoke to them he would use their first names, he expected the court and the prosecution always to address the defendants as "Mister"—Mr. Watson, Mr. Jackson, etc.⁴⁷ Finally, he presented to the

43. N.Y. Times, Aug. 27, 1977, at 12, col. 40.

44. Boston Globe, Aug. 10, 1977, at 15.

45. For some reason, Mr. Stoddard's name nowhere appears in the several news reports of the hearing that I have seen. I am indebted to Mr. Roy Herron and to his account of the hearing for noting Mr. Stoddard's name; see *infra* note 46.

46. The account that follows in the text *infra* of the events in the courtroom are derived in part from personal recollection, but mostly from an unpublished transcript of the hearing and an accompanying commentary (also unpublished) prepared by Mr. Roy Herron. Mr. Herron has kindly provided me with a draft of this material and given me his permission to extract and paraphrase from it in this essay, and I have done so extensively. He is, of course, in no way to be held responsible for any use or misuse of his material in my account. All quotations in the text *infra* not otherwise attributed are taken from Mr. Herron's transcript of the hearing and the subsequent interviews included in his typescript.

47. In another Georgia court less than two years later, this same tactic was to cause Farmer no small inconvenience. In April, 1979, in Blackshear, Georgia, Farmer was held in contempt of court

court his young assistants, four men and eight women; seven of these twelve were blacks.

With these preliminaries behind him, Farmer announced to the court that he was withdrawing several defense motions as no longer germane, including the motion for a speedy trial and the motion to recompose the jury (grand and trial) pools. That brought him to the centerpiece of his morning's work, the motion to throw out the Georgia death penalty statute and the expert testimony he had arranged to present. Farmer addressed the court:

Your Honor, I think maybe if I just made one short statement to the court before I started, the court might understand where we are going with these motions. As the court knows, in July of 1976 the U. S. Supreme Court in the decision of *Gregg versus the State of Georgia* said that on its face the Georgia statute asking for death, to allow death as punishment, was constitutional. We are now in the era of what in the slang of the profession we would say is the 'constitutionality-as-applied-to-the-statute' attacks. Is the death penalty constitutional as applied? And we are ready to proceed on that with our first witness, Dr. Hugo Bedau.

IV

I walked across the courtroom to the witness stand next to the bench, sat down, and found myself perched on an armchair looking down on everyone in the room except for the judge. Staring back at me were perhaps a hundred and fifty people: the press, the guards and court officers, the two prosecutors and the defense team, the five defendants, and the spectators. Most of the spectators were local residents, black men and women along with their children, whole families dressed plainly but neatly in their best Sunday clothes. Conspicuous by contrast with everyone else in the room, were the other expert witnesses waiting their turn and seated here and there in groups of three or four. At a glance they were obviously outsiders; each had a briefcase, several of the men had beards, and their attire was more suitable to a less humid and more urban environment. All were white.

Farmer began by asking me to tell the court some of my qualifications and publications, and I did. I mentioned in particular the book I had edited in the 1960's, *The Death Penalty in America*. I described it as the first book to gather the resources from every viewpoint, religious, legal, historical and sociological. It was, I said, "designed to be a kind of encyclopedia" on all aspects of the death penalty. At that point I handed the copy of the book I had been holding over to Judge Geer for his inspection. He reached over to take it from me, put on his glasses, and looked down at the cover for a few seconds. Then he put the book down on the desk before him and leaned back, implying I should go on. I did:

Most of the book is devoted to trying to look at whether the death penalty does provide a special protection to society, whether it prevents and deters crime; and also whether the death penalty has, in its history, been applied fairly and equitably so that it doesn't violate the canons of justice but conforms to them. These are the two most controversial issues in the discussion of the death penalty throughout its history. Is the death penalty really

and briefly jailed for making precisely the same request in another case before a different judge (personal communication from Mr. Farmer).

a protection for society or isn't it? Is it a better protection than imprisonment or isn't it? And, secondly, is it really fair in its applications? I think the evidence of thirteen years ago, as included in that book, confirmed by subsequent publications by myself and others, is that the death penalty has not proved an effective social defense; has not proved to be a better deterrent and preventer of crimes of murder, rape and other crimes against a person or property; and also, it has not proved to be a punishment that society wants to use fairly The death penalty has not been fairly applied and the death penalty has not been effective, uniquely effective, particularly effective, as a social deterrent to crime.

Farmer then asked me about the status of the death penalty in other countries. I explained that Great Britain, whose laws were historically most akin to our own, had abolished capital punishment, and that Canada had also done so just a year ago. I added:

And on Friday of this past week, the French government received a 700-page report recommending that the guillotine in France be abolished.⁴⁸ Now Canada, Great Britain, and France are not inconsequential nations to compare ourselves with. They are indeed the source of considerable cultural influence on us so that the retention of the death penalty in the United States today is in marked contrast to what we find in the practice of other nations most like us.

So far, so good; there were no interruptions from the prosecution or the judge. I continued with my testimony to comment on the death penalty in Georgia, pointing out that until very recently Georgia statutes had retained the death penalty for some very remarkable crimes, the most peculiar being desecration of a grave with the intent to commit robbery.⁴⁹ The repeal of that statute, I argued, was an example of what had been happening across the nation throughout this century in reducing the variety of capital crimes. The overall pattern and direction, I insisted, was quite clear: "It's toward the reduction and abolition of all capital statutes."

As I was speaking, four black women got up from their seats in the courtroom, squeezed past other spectators toward the aisle, and headed for the exit. Judge Geer watched them until the courtroom doors closed behind them. I continued:

It's a hundred and thirty years since the first United States jurisdiction abolished the death penalty: Michigan, 1847. Now in that hundred and thirty years, every single state in the country has moved in that direction, some more rapidly than others. Georgia, eleven years ago,⁵⁰ eliminated half its death penalty statutes, a very striking move in this direction, and typical of what's happening in the United States.

48. In saying this, I was relying on an item that had been published a few days earlier in the *Boston Globe*, July 29, 1977, p. 38. Apparently, however, this item was in error, as no such "report" existed. I later learned there had been published a two-volume document, *RÉPONSES À LA VIOLENCE: RAPPORT DU COMITÉ D'ÉTUDES SUR LA VIOLENCE, LA CRIMINALITÉ ET LA DÉLINQUENCE*, presented by A. Peyrefitte, in which recommendation no. 103 did favor abolition of the death penalty (personal communication from Dr. Jan Stepan, chief librarian, Swiss Institute of Comparative Law). Four years later, on Sept. 30, 1981, the French Senate voted to abolish the death penalty effective "probably next week." *N. Y. Times*, Oct. 1, 1981, at A4.

49. GA. CODE ANN. §26-8117, repealed in 1963.

50. "Eleven years" was in error; in a general revision of the criminal code in 1968, Georgia abolished many of its erstwhile capital statutes, 108 CONG. REC. 3301, *supra* note 8. See Georgia Laws 1968 Session (adopting Criminal Code of Georgia, effective July 1, 1969), at 1249-1351, especially 1337-1351 (Sec. 2, Specific Repealer).

All the while, Farmer was standing diagonally across from me on the other side of the bench, smiling and encouraging me to go on. As no one seemed to object—a deputy yawned, a bailiff looked down at his hands in his lap, John Irwin leaned forward onto the table, Michael Stoddard leaned back with his hands behind his head—I went on:

Historically, capital punishment, as we know it from the Bible, is part and parcel of a system of punishment that involves maiming people, castration, cutting off the hands of thieves, branding people, flogging people. Killing people is historically among methods of punishment that involve other corporal punishments: flogging, maiming, branding. I think the most striking historical fact about capital punishment is that it survives and the others have been banished. The moral attitudes of our society throughout the country prohibit the use of these other punishments. It would not be possible for a legislature to undertake to introduce maiming or branding or flogging as a punishment, even if people felt that retribution required it, and many people do, and even if somebody thought that it would be a good deterrent, and maybe it would be. But our moral attitudes and our interpretation of the Constitution have developed to the point that unquestionably prohibits the use of those other methods.

A hundred years ago, nobody could have said what I just said. Two hundred years ago, anybody who said this would have been laughed out of the court. Today, if we think about it, we realize that we all know this, and that we accept it without any hesitation. So, the surprising thing is that capital punishment survives the condemnation that has been visited on all the similar punishments that once were widespread in our society.

Why does it survive? When we sit in a courtroom such as this with a capital case about to unfold, we might tend to take for granted that capital punishment is, of course, a part of contemporary penology and jurisprudence. The truth of the matter is that it's an anachronism. It is part of a past that hardly survives into the present, and which certainly will not survive into the future. That's what the full historical record discloses. And to answer the question, 'Why capital punishment survives?' we have to look again at some of its peculiarities.

There is a deep-seated belief that it does protect; there is a deep-seated belief that it does provide retributive justice; there is a deep-seated belief that people can be put to death in a humane and painless way. And the old maxim, 'out of sight, out of mind,' still applies as far as the death penalty is concerned. . . . People who are put to death are forgotten. Whereas if we saw people walking around in society with their hands lopped off, or 'T' for 'thief' branded in their forehead, we would be vividly reminded of the barbarities that we practiced, and we wouldn't stomach it.

So, capital punishment is an anachronistic survivor from a primitive past, all of its common modes or related punishments long since abolished, and it survives, I believe the record shows, for the reasons that I've indicated.

Perhaps as much as twenty minutes had gone by since I had taken the stand. Almost everyone in the room by now appeared to be paying attention to the mini-lecture they were hearing from the witness stand. I fleetingly wondered whether anyone had ever said in a rural Georgia courtroom the things I was saying that morning. When I had completed my answer to Farmer's most recent question, and was in need of another query from him to get me started off in a new direction, he instead indicated to the court that my testimony was at an end. I could tell by the way he looked at the judge that he was enormously pleased with the way things had gone. He had man-

aged to get all of my testimony before Judge Geer without a single pause or interruption. The tactic of having me provide the court with a seamless self-qualification-cum-substantive-testimony apparently had worked. Whether or not the judge would eventually rule against my testimony, he had at least allowed me to have my say, and that was more than half the battle.

V

As soon as Farmer ended direct examination, I expected Judge Geer to turn the prosecution loose on me. Instead, audibly struggling for breath, Judge Geer wheezed, "We're gonna take a twenty minute break," and then speaking to a black spectator near the front row, a young girl whose even younger companions had apparently fallen asleep, he said kindly, "Little lady, wake your colleagues up." I wondered whether the judge's preoccupation with children dozing in his courtroom had interfered with his attention to what I had been saying for the past few minutes.

During the recess, I spoke with several of the defense staff and my colleagues, the other visiting expert witnesses, and we shared our amazement that it had all been so uneventful so far. We speculated over how the prosecution might react. Would they perhaps choose not to cross-examine me at all, thereby quickly getting rid at last of a witness who seemed articulate, self-confident, and competent? Farmer thought that might happen even though he was quite content (and so was I) to have me parry thrusts with Irwin and Stoddard as long as they wanted to joust.

As the recess neared its end, I resumed my seat on the stand. Judge Geer called the court to order, and immediately asked the prosecution whether they were ready to cross-examine me. Irwin remained seated. Stoddard stood up and addressed the court. Because he was standing directly in front of me, no more than a couple of steps away, I could hear him quite easily. But Farmer, standing fifteen or twenty feet from him on the other side of the bench, had to strain to catch every word. The spectators, who could see only Stoddard's well-tailored back, could hear almost nothing of what he said. What he said, not loudly but in a normal speaking voice, was this: "Your Honor, at this point we would like to have this witness' testimony struck as the defense does not have any standing, we contend, to contest the constitutionality of the death penalty." So, I thought, it's going to be like Seattle after all. Farmer immediately started to interrupt, but changed his mind. The young prosecutor continued, audibly enough to me and to Judge Geer, but barely so to others in the room:

The State has never given the defense any notice of aggravating circumstances that is required by Code Section Twenty-seven-twenty-five-oh-three.⁵¹ We don't think that the death penalty has been invoked in this case; we do not concede that it is unconstitutional; we contend that the defense has no standing to challenge it in this case since we have not given notice in this case—

51. The reference was to GA. CODE ANN. §27-2503 (1975 Supp.), which provides that "only such evidence in aggravation as the State has made known to the defendant *prior to his trial* shall be admissible [at the post-conviction hearing prior to sentencing in a capital case]." (emphasis added).

Judge Geer interrupted, somewhat incredulously, it appeared. The following colloquy ensued:

COURT:—Let me stop you right there, Mr. Stoddard. We are trying to come to some conclusion on a pre-trial motion.

STODDARD: Yessir.

COURT: Now, I don't know if the State anticipated asking for the death penalty or not.⁵² But if you're not, I think Mr. Farmer is entitled to know at this stage of the proceedings whether you are or are not since you made your objection. If you're not, then we'll stop this motion right where we are now.

STODDARD: Your Honor, we do not intend to ask for the death penalty.

I was thunderstruck. Not ask for the death penalty! I couldn't believe my ears. My mind raced. The death penalty is what this case is all about. How could the prosecution *not* ask for the death penalty, just like that, after a year and a half of allowing the police, the defendants, and the reporters to think the contrary? While these thoughts tumbled through my mind, I could see that Farmer was not quite sure he had heard Stoddard correctly. Others seated at the defense table could tell that something important had just happened, but what exactly, they were not so sure. The courtroom buzzed as the spectators filled each other in, as best they could, on what Stoddard had been saying. After a moment's hesitation, Judge Geer spoke to the special prosecutor, saying, "All right, sir, let's let this witness go down." By now, most of those in the courtroom had been able to piece together what had transpired, and the spectators burst out with applause and some cheers. Judge Geer immediately gavelled the room back to order, turned to me and said, "All right, you may go down."

I thanked him, and as I walked toward the defense table, Farmer was on his feet and approached the bench. Even now, he seemed not fully to believe what he understood he had heard from the prosecution and the judge. He knew he had won a major victory at a phase in the proceedings where he least expected it, and his delight momentarily took the wind out of his sails. He spoke to Judge Geer:

FARMER: Your Honor, may we have, uh, that's, that's, uh, that's very much a surprise to us. The district attorney told us last week he *was*, definitely would seek the death penalty. We need just a *short* recess to get our other witnesses together and we'll be ready to go on, just a five-minute recess.

COURT: I would assume that the district attorney, like all other lawyers, reserves the right to change his mind, Mr. Farmer.

Smiling broadly, Farmer answered, "I certainly don't mind his changing his mind about that, Your Honor." As Farmer addressed the court, the black spectators and Team Defense staff again audibly showed their pleasure at the way things had gone. The police, court officers, and few local whites in the courtroom sat still and silent. Judge Geer raised his voice above the chatter and said, "All right, just one minute."

After this short recess, the courtroom was quiet again, and the judge recognized Michael Stoddard:

STODDARD: We'd like to, uh, Your Honor, we, uh, did not tell Mr.

52. See the text and references *supra* notes 15-17.

Farmer last week that we were going to ask for the death penalty. He asked us if we would waive it, and we inquired, uh, in terms of negotiations, why we should waive it.

We had never given him notice under these indictments; uh, the only notice given was to a different attorney under different indictments.⁵³ So, Mr. Farmer never asked us about the aggravating circumstances or anything else, so—

Judge Geer shut him off, and sounded slightly sarcastic and more than a little impatient when he said, "Well, thank you Mr. Stoddard, let's leave that and move on to something else."

Judge Geer turned to Farmer and asked how much time he would need. Farmer again asked for four or five minutes. The judge then inquired what this development did to the other motions. Farmer fumbled for words, then admitted: "To be honest with you, it's a surprise to us and we just need a little time to regroup and see—

COURT:—Get your sense back?

FARMER: Sir?

COURT: To get your senses back?

Judge Geer grinned slightly and the crowd chuckled, giggled and murmured happily. Farmer responded, "That's right. To get our feet on the ground. And to see what exactly we want to hear, because we had approximately three days and probably fifteen witnesses on this motion." Geer questioned Farmer further, Farmer finally responding: "What I'm telling the court is that it leaves me where I need to think about it a little bit. . . . We had three days planned out and it just went down and we'll be ready in just a little bit." Judge Geer agreed: "Anything that saves this court three days, disposing of anything, take your five minutes."

By now, the mood in the courtroom had completely changed, and outright laughter seconded Judge Geer's agreement to recess. Nevertheless, Farmer went on, no doubt exhilarated by the events of the past few minutes: "Yessir. Now I'll tell you the next motion is to dismiss the indictment and if they're willing to waive that one, we can save the court a whole lot more time!"

The courtroom erupted again and Judge Geer gavelled for order before repeating to Farmer that he could have his five minutes. But Stoddard then rose, and said, "The court doesn't want to hear me on that one?" Judge Geer, surprised, looked at him and said, "What?" Was it possible that Stoddard would equally abruptly propose to withdraw the indictments and drop the case altogether? It was not to be. Stoddard said, bluntly, "We aren't prepared to dismiss the indictment." Judge Geer, apparently somewhat bewildered, even annoyed, merely responded, "All right, thank you." With that, the court recessed.⁵⁴

There is much more to the story of the Dawson Five, and someone

53. Neither the news sources available to me, *supra* notes 11, 13, 15, 17-21, 24, 29-31, 42-44, and *infra* notes 54-55, 58, nor the Herron transcript mention the name of this attorney.

54. The published news reports I have seen of the morning's hearing devote at most a few sentences, not all of them accurate, to describing the events. The Boston Globe, Aug. 2, 1977, at 10, wrongly credits District Attorney Irwin with moving to waive the death penalty. N.Y. Times, Aug. 2, 1977, at 12, credits the waiver to "the prosecution."

should tell it before it is forgotten; but it is anti-climactic for the present purpose. Suffice it to state here that nearly six months later, on December 19, 1977, District Attorney John Irwin announced that he was dropping all charges against the five defendants. He had no other choice, he said, after a ruling by Judge Geer a week earlier that ordered suppression of the statement to the police given by Roosevelt Watson.⁵⁵ After two years less a month, the ordeal of the Dawson Five was over.

VI

When special prosecutor Stoddard announced to Judge Geer that the State had no intention of seeking the death penalty for the Dawson Five, the seemingly spontaneous character of his announcement, coming immediately on the heels of my testimony as it did, naturally tempted me, and not only me, to think that something in my manner or in my testimony, or in the way that Judge Geer had allowed Farmer to lead me by the hand, caused the prosecution during the short recess to reevaluate its professed sentencing goal in this case. But I was instinctively cautioned against yielding to any such temptation lest I commit the fallacy of reasoning noted in every elementary logic textbook, *post hoc ergo propter hoc* ("after this, therefore because of this"). Elated by the stunning success of the morning, which obviated the need for any further expert testimony on general aspects of the death penalty (though not on the question of jury selection or on other particular issues in the case),⁵⁶ one of my fellow experts (Brian Forst,⁵⁷ as I recall) quipped:

Well, it's obvious how Team Defense should defend capital cases from now on. All they have to do is to bring Bedau in to testify on this kind of pre-trial motion, and instead of bothering with any of the rest of us experts, they should hire some local actors to sit together in a row in the courtroom, dressed in three-piece suits and with briefcases on their laps. That'll help create the proper, intimidating atmosphere, but they'll never be needed.

Yet he, too, of course, realized that other factors were probably at work quite apart from the testimony he heard me give. But what were these factors? When asked later by the local newspaper reporters, District Attorney Irwin was quoted as saying simply that the prosecution decided to drop the death penalty because of "the ages of the boys, they were all young, . . . and

55. Later developments in the case can be followed in the N. Y. Times, Aug. 14, 1977, at E17, col. 6; Aug. 16, 1977, at 35, col. 5; Aug. 17, 1977, at A16, col. 1; Aug. 27, 1977, at 12, col. 4; Aug. 29, 1977, at 18, cols. 1-2; Aug. 30, 1977, at 10, cols. 1-2; Nov. 18, 1977, at A16, cols. 3-4; Dec. 15, 1977, at A26, cols. 1-5; Dec. 20, 1977, at 20, cols. 1-2; Dec. 23, 1977, at A29, col. 1. See also *Afro-American* (Baltimore, Md.), Dec. 31, 1977, at 1.

56. Testifying in the afternoon of Aug. 1, 1977, was Dr. Faye (Goldberg) Girsh, as reported in *The Atlanta Constitution*, Aug. 3, 1977, at A1, col. 5. Her area of expertise is juror attitudes and their effects on conviction-proneness and sentencing-severity. See Goldberg, *Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law*, 5 HARV. C.R.-C.L.L. REV. 53 (1970).

57. Mr. Forst had been expected to testify on general deterrence. See Forst, *The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's*, 61 MINN. L. REV. 743 (1977); and Klein, Forst and Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, in *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES*, 336-360 (eds. Blumstein, Cohen and Nagin, 1978).

because of the lack of any prior records."⁵⁸

Now, five years later, the full story is still not clear. There are two supplementary though somewhat overlapping versions, neither of which fully supports John Irwin's explanation. Both these subsequent stories are supplied by Roy Herron, who was then a member of Team Defense and among the staff present in the Dawson courtroom that morning.⁵⁹ The first version is from Morris Dees, who was the chief trial counsel for SPLC at the time. While in Albany on a visit to his in-laws the day before the pre-trial hearing, Dees explained in an interview with Herron, he succeeded in persuading the prosecutor to drop the death penalty.

I told John [Irwin] that I thought that for the benefit of Georgia and with [President] Carter being from there, they ought to drop going for the death sentence. And I just convinced him that he couldn't get the death penalty, because he was gonna get virtually an all-black jury. . . .⁶⁰ He said he would drop it at the first open-court hearing.

In a subsequent interview with Herron, Michael Stoddard gave a somewhat different explanation:

I think Morris Dees' conversation helped John [Irwin] to see it in a different light. But John did not really decide whether to go for the death penalty or not. I felt it was John's decision. I was to assist the local district attorney. He's the one who takes the heat and gets the credit. But one of the things we knew was it'd be an all-black jury if we got to the jury. A lot of the whites we talked with didn't want to be on juries because of their racial feelings. They didn't want to serve and have to be with blacks. The chances of conviction we thought would be lessened if jurors were worried about having to vote on a death sentence. It would be difficult enough to get a conviction, was what I told John, but easier if they did not have to face the death penalty.

Still, the decision not to go for the death penalty was not made until I stood up and waived it. There'd been a witness on the stand and it was my turn to cross-examine and we had to either fish or cut bait. John had been indecisive. I told John, 'We've gotta decide.' Finally, I told him, 'Well, John, we've got to decide *now*. Unless you tell me not to, I'm going to waive it.' It was time to fish or cut bait. So I stood up and waived it.⁶¹

It does not matter much which of these two versions, or perhaps some combination of them, is more accurate because from each the same point emerges. It is the sole point of this essay, one that has been made before by others,⁶² though not, to my knowledge, ever in the harsh light cast by a case

58. N.Y. Times, Aug. 2, 1977, at 12, col. 5.

59. See *supra* note 46.

60. Herron transcript at 16-11. Four weeks later, Farmer was quoted as saying that "the first 60 to 70 prospective jurors from which the trial jury is to be selected is about 70 percent black, a figure that closely reflects the county proportion." N.Y. Times, Aug. 29, 1977, at 18, col. 1. On challenging the racial composition of capital trial juries generally, see Farmer, *Jury Composition Challenges*, 2 L. & PSYCH. REV. 43 (1976); and Mullin, *supra* note 23.

61. Herron transcript at 16-12/13.

62. See BLACK, *supra* note 2, at 15, 37-44. Professor Black's discussion of prosecutorial discretion concentrates on the use of the death penalty in plea bargaining. However, plea bargaining appears not to have been an issue in the Dawson Five case at any juncture. Nowhere in his discussion does Professor Black address the issues raised by the availability of the death penalty in a case such as this, viz., the propriety of the prosecution's apparent willingness to allow the defendants, their counsel, and the public to believe that the death sentence was the preferred sentencing outcome, when in fact the prosecution either had made no such decision or was willing to reconsider that decision quite apart from plea bargaining initiatives by the defense.

like that of the Dawson Five. Nonetheless, it is a point that deserves to be repeated, and can be succinctly expressed in two propositions.

First, in capital cases, as the law currently stands,⁶³ the prosecution has complete, untrammelled, and unreviewable discretion to decide whether to use its Death Penalty card, to leave it in the deck, or—as in the unusual case of the Dawson Five—to put it partly into play in the early stages of the game and then abruptly revoke it just before trial. Second, whatever might be said for the role of bargaining cards in the game of criminal justice, it is difficult to make out a rational case for the Death Penalty card. Its utter discretionary employment by the prosecution is surely inconsistent with the spirit, if not the letter, of the standards that govern capital cases. These standards are expressed in the epigram that “death is different,” a notion that has increasingly found recognition among appellate courts⁶⁴ and commentators.⁶⁵ So long as the prosecution in a murder case can do what was done to the Dawson Five, the death penalty is treated as being in principle no different from any other criminal sanction. It is viewed as simply one among many possible punitive outcomes in the case, albeit more severe than others. This view, of course, flies in the face of reality. A possible death sentence and a possible life term in prison do not differ in the way that a suspended sentence and probation, or probation and short-term confinement, differ—much less in the way that a ten year and a twenty year prison sentence differ.

The power and the freedom of the prosecution to act as it did in the Dawson Five case is not unique to Georgia law, nor is the danger of the misuse and abuse of this freedom and power confined to the Deep South. It is characteristic of the death penalty system in the United States as it operates in the present legal environment, and it is difficult to imagine any possible remedy for it short of abolishing the death penalty itself. Quite apart from any other aspect of the current death penalty system (which it has not been my purpose to discuss here), the very existence of capital punishment as a statutory option for a crime such as murder will in practice impose unwarranted burdens, provoke needless fears, increase economic costs, and make justice bend to expediency.

63. See *supra* notes 1-2. Discussion of prosecutorial discretion by the Supreme Court in capital cases is rare. The confidence expressed by Justice White in *Gregg v. Georgia*, is perhaps representative of the views of a majority of the current Court: “Petitioner’s argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts.” 428 U.S. 153, 225 (1976) (White, J., concurring). One might well debate whether this judgment is confirmed or contradicted by the behavior of the prosecution in the case of the Dawson Five.

64. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (“the penalty of death is different in kind from any other punishment imposed under our system of criminal justice”) (Stewart, J.); also *Woodson v. North Carolina*, 428 U.S. 280, 303-304 (1976) (“death is a punishment different from all other sanctions in kind rather than degree . . .”) (Stewart, J.). The phrase, “death is different” was singled out for shudder quotes by Justice Rehnquist in his dissenting opinion in *Woodson*, at 322.

65. The origin of the phrase, as well as the reason for its recent rise to prominence as an epigram, is uncertain. No doubt, Professor Black has helped; *supra* note 2, at 21 (“the thesis that death is different . . .”). Cf. A. CAMUS, REFLECTIONS ON THE GUILLOTINE 25 (1959) (“capital punishment is not merely death. It is as different, in its essence, from the suppression of life as a concentration camp from a prison.”) The general idea, of course, is neither new nor controversial. Elucidating the standards implicit in this epigram is beyond the scope of this article.

VII

It is useful to examine such a judgment in the light of more general considerations about discretion in the administration of criminal justice. Since at least the pioneering study by Kenneth Culp Davis on discretionary justice,⁶⁶ discretion in the legal system has been the subject of continuing scrutiny throughout the past decade. The oxymoron in the very idea of "discretionary justice" has not been lost on commentators, for many of whom "discretion," "lawlessness," and "injustice" have become virtual synonyms.⁶⁷ Nowhere has discretion come under harsher criticism during this period than in regard to the sentencing power of courts. The so-called "just desserts" philosophy of mandatory or determinate sentences⁶⁸ is but one of many prominent manifestations of that criticism: During the past decade, beginning with *Furman v. Georgia*,⁶⁹ the Supreme Court has looked with particular disapproval on the discretionary use of the death sentence. *Gregg v. Georgia*⁷⁰ is a central part of this judicial critique and constitutional constraint on the hitherto unbridled use of such discretion. But sentencing, discretionary or otherwise, is a matter for judges and courts. However rigidly controlled it may be, it leaves completely untouched the discretion in the hands of prosecutors.

Prosecutors generally, it has been pointed out, "enjoy . . . an unusual degree of independence—both from administrative superiors and from judges."⁷¹ They operate "in virtual isolation from judicial review"⁷² and with "absolute discretion."⁷³ Their charging decisions—what to charge, whom to charge, how to use the charge prior to and during the trial—are "subject to no storable rule,"⁷⁴ but are based on "an open-ended series of factors"⁷⁵ Discriminatory prosecution, of course, in which decisions to prosecute or to charge only one of a number of co-defendants with a grave crime, if manifestly based on "an unjustifiable standard such as race . . ." has been expressly prohibited by the Supreme Court for a century.⁷⁶ However, apart from the literary and scholarly industry devoted to the plea-bargaining issue, concern for discretion in decisions related to charging, including prosecutorial sentence recommendations, has not caught the atten-

66. K.C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

67. "The basic trouble with discretion is simply that it is lawless" (H.L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, 290 [1968]); "the greatest and most frequent injustice occurs [as a result of] . . . discretion" (DAVIS, *supra* note 66, at v).

68. *See, e.g.*, A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976), and NATIONAL INSTITUTE FOR LAW ENFORCEMENT AND CRIMINAL JUSTICE, *DETERMINATE SENTENCING* (1978). In an unpublished paper, "The Ethics of Classification and Sentencing," prepared in 1980 for the Panel on Sentencing Research of the Commission on Behavioral and Social Sciences and Education, National Research Council, I endeavored to show how much discretion nevertheless remains in typical current determinate sentencing schemes.

69. 408 U.S. 238 (1972).

70. 428 U.S. 153 (1976).

71. A. GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA* 4 (1981).

72. *Id.* at 6.

73. Cox, *Prosecutorial Discretion: An Overview*, 13 AMER. CRIM. L. REV. 383, 418 (1976).

74. BLACK, *supra* note 2, at 47.

75. *Id.*

76. *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *see Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

tion of either commentators⁷⁷ or appellate courts. This is true even where the death penalty is concerned. Empirical research is extensive in some areas of the legal, administrative, political, and criminological questions raised by the death penalty system,⁷⁸ but is virtually non-existent on this issue.⁷⁹

Admittedly, in the case of the Dawson Five, neither the charging decision nor the sentencing recommendation was squarely at issue. Given the facts of the case as alleged,⁸⁰ a charge of first degree murder, rather than any lesser degree of criminal homicide, seems to have been appropriate. (This is, of course, quite apart from the question whether the evidence against the actual suspects taken into custody in the case warranted charging *them* with first degree murder.) Prior to trial and particularly prior to a finding of guilt, the possibility of making a genuine sentencing recommendation to the court does not arise. This is especially true in a system such as Georgia's in which the guilt phase of a capital trial is bifurcated from the pre-sentence hearing.⁸¹ Yet, as we have seen in the case of the Dawson Five,⁸² the possibility of a death sentence for the accused was bruited about from the moment the defendants were arrested.⁸³ So the issues of principle raised in this case cannot be the familiar ones raised by discretion in prosecutorial charging and sentencing recommendations, or in judicial sentencing. Instead, they are the more elusive ones of determining the proper use, if any, of the death penalty threat by prosecutors prior to trial of a felony-murder case.

Consider the options open to the prosecution as they affect its use of a possible death sentence upon conviction of the defendants. At one extreme there is alternative (i), a decision not to let the death penalty play any role in the pre-trial or trial strategy. Such a renunciation by the prosecution might be made public before trial, or it might not. At the other extreme there is alternative (ii), a decision to try to get a capital sentence subsequent to conviction, with that decision playing a prominent role in pre-trial and trial strategy. In alternative (ii), use of the death penalty threat for plea-bargaining purposes is ruled out. A decision to use the threat of a death penalty purely or mainly as a plea-bargaining lever is, of course, a possible and familiar tactic and constitutes alternative (iii). In such cases the prosecution

77. A welcome recent exception is Dean James Vorenberg, who writes that "there are good reasons to see prosecutors' virtually unlimited control over charging as inconsistent with a system of criminal procedure fair to defendants and to the public." Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1525 (1981).

78. See, for collections and summaries of such research, CAPITAL PUNISHMENT IN THE UNITED STATES (H. Bedau and C. Pierce, eds. 1976); THE DEATH PENALTY IN AMERICA, (H. Bedau 3d ed. 1982); and S. DIKE, CAPITAL PUNISHMENT IN THE UNITED STATES: A CONSIDERATION OF THE EVIDENCE (1982).

79. The kind and quality of information available on this subject can be gleaned from such studies as Carner & Fuller, *A Study of Plea Bargaining in Murder Cases in Massachusetts*, 3 SUFFOLK U. L. REV. 292 (1969), and Zimring, Eigen, & O'Malley, *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227 (1976). Both essays stress the plea bargaining uses of the death penalty threat; neither gives any narrative or discursive account of how actual prosecutors in the particular homicide cases under study may have used the threat of the death penalty in other ways.

80. See accompanying text, *supra* note 14.

81. See GA. CODE ANN. § 26-2503 (Supp. 1974).

82. See accompanying text, *supra* notes 15-17.

83. To be sure, this abuse, if that is what it is, cannot be laid exclusively at the door of the prosecution. There is no evidence that District Attorney Irwin's office in Dawson trumpeted its intention to seek the death penalty upon conviction of the Dawson Five.

might even begin with an assumption that if a conviction is obtained after trial, the plea bargain having been refused by the defense, no death penalty recommendation would be made. Another alternative, less precise than these others but not without merit, is alternative (iv), a decision to make no decision on the possible sentencing recommendation until after the conviction is secured.

The evidence at our disposal in the Dawson Five case⁸⁴ seems to indicate that none of these options was the alternative taken by the prosecution prior to the pre-trial hearing, eighteen months after the arrest and indictment of the defendants. Instead, in this case the prosecution acted as if it had chosen to pursue a different course, alternative (v), a decision to let it be understood that the death penalty was not only a possible but the likely sentence to be sought in this case (thus rejecting alternatives (i) and (iv)), perhaps for later plea bargaining purposes (thus not ruling out alternative (iii)) or perhaps for other reasons (and thus appearing to have embraced alternative (ii)). Such a decision, however, could not be final; by its very nature it is temporizing and unstable. In the case of the Dawson Five, the decision in favor of alternative (v) did not survive the pre-trial hearing; as we have seen, it was superceded by a decision in favor of alternative (i), albeit somewhat belatedly. To have acted in this fashion was effectively to have chosen what amounts to yet another alternative, (vi), a decision to revoke the death penalty prior to trial after having permitted the court, the defendants and their counsel, and the public to think that the decision in fact had been in favor of alternative (ii).

Thus we are brought to the fundamental questions: Are there ethical objections to a prosecutorial decision in capital cases in favor of alternative (vi)? If there are, do these objections tend to undermine any system of criminal justice that would include the death penalty as a possible sentencing outcome? At the end of the previous section (VI), I indicated my own views. Yet the issues raised are important ones indeed. To do them justice would take us well beyond the scope of the present essay and would require evidence beyond what can be extracted from any one capital case, even one as remarkable as that of the Dawson Five. Perhaps it is enough here to have raised these issues, and to leave them for another occasion to be pursued with the detail they deserve.

84. *Supra* text accompanying notes 60-61, 82.