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I. Introduction

The exercise of discretion by key actors in the criminal justice system is commonplace and may even be necessary for the functioning of the process.[1] Even within this framework, the discretion exercised by the prosecuting attorney is enormous. In almost every situation, the prosecutor's decisions concerning whether to charge and what to charge determine the defendant's ultimate criminal liability and sentence. This prosecutorial discretion is essentially unreviewed,[2] making such decisions critical within the criminal justice process.

This article examines prosecutorial discretion in the context of a category of criminal cases giving rise to some of the most troubling societal issues, cases involving homicides committed by juveniles.[3] The

* Professor of Law; Ohio Northern University College of Law. In the spirit of full disclosure of sources of possible bias, readers should be aware that the author served either as defense co-counsel or defense consultant in the three cases used as examples herein. The author is pleased to acknowledge the excellent research and writing contributions to this article by Matthew Alan Skeens, currently a law student in the class of 2006 at the Ohio Northern University College of Law. This article is based substantially upon the author's paper written for the Criminal Procedure Discussion Forum at the Brandeis School of Law, University of Louisville, held on November 13, 2004.

1. WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE 678-680 (2004) [hereinafter LAFAVE, CRIMINAL PROCEDURE]; *see also* Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1308, 1311 (2002).

2. LAFAVE, CRIMINAL PROCEDURE, *supra* note 1 at 685; Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 396 (2001).

3. Throughout this article, the term "juvenile" refers to a person who is under the age of eighteen at the time the crime in question was committed. This "under 18" definition is now common in the United States and internationally, even though many states may use different ages to determine how the term "juvenile" is defined and to determine which offenders are processed in juvenile court rather than in adult criminal court.

phrase "kids who kill" tends to send shock waves through even the most hardened criminal justice professionals. The younger the defendant, the more we may focus on the fact that the defendant is just a child. The more revolting the details of the homicide, the more we may focus on the fact that the victim suffered a horrible, senseless death. The latter concern may be most significant for this article, given that prosecutors commonly identify with the family of the victim for obvious political reasons.

The more important issue, however, is that the defendant is just a child. As a child, that defendant cannot be lumped together with adult offenders. The United States Supreme Court, in its recent juvenile death penalty ruling, *Roper v. Simmons*,[4] has once again highlighted the key factors:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.
>
> First, . . . [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young . . . The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . The third broad difference is that the character of a juvenile is not as well formed as that of an adult.[5]

For these and many other reasons, we simply should not treat homicide by juveniles in the same manner as we do homicide by adults. Prosecutors are on the front line in the decision-making process as to how to handle juvenile homicide cases, so the appropriate exercise of prosecutorial discretion in such cases is critical.

The article begins in Part II with the facts of three actual juvenile homicide cases that vary greatly with respect to both the age of each offender, and the sentence imposed. Part III explores the traditional limitations on the role of prosecutors in juvenile homicide cases. Part IV outlines ethical limitations and exhortations, on the assumption that the highest standards of ethical and professional behavior should be expected of prosecutors in these cases. Examples are provided in Part V of the different approaches in various jurisdictions to the power given prosecutors to determine the court in which these cases are to be heard. Finally, in Part VI specific suggestions are provided for consideration by prosecutors exercising their discretion and as a means for assessing their

4. 125 S. Ct. 1183 (2005).
5. *Id.* at *33-34.

decisions.

II. Three Examples of Juvenile Homicide Prosecutions

The age of juvenile defendants seems to be a major factor in prosecutorial decisions regarding juvenile homicide cases. Building upon that assumption, three specific examples will serve as primary vehicles for this discussion. The first example is that of Cameron Kocher, a nine-year-old boy who received probation and long-term treatment for the 1989 murder of a seven-year-old girl in Pennsylvania.[6] The second example is Nathaniel Brazill, a thirteen-year-old boy sentenced to twenty-eight years in prison for the 2000 murder of his middle school teacher in Florida.[7] The final (and ultimate) example is that of Christopher Simmons, a seventeen-year-old boy sentenced to death for the 1993 murder of a woman in his neighborhood in Missouri.[8]

Cameron Kocher's case made national news both because of his age and because of the decision to prosecute him in adult criminal court.[9] Kocher was only nine years old (a fourth grade cub scout) at the time he committed his crime, but that crime certainly was horrible:

> On the morning of March 6, 1989, a snow holiday from school, Jessica Ann Carr was fatally shot while riding as a passenger on a snowmobile owned by Mr. and Mrs. Richard Ratti, neighbors of the petitioner [Cameron Kocher]. On that morning, petitioner had been playing Nintendo at the Rattis' home but stopped playing when Mr. Ratti forbade the children to play because the children had made a mess in the kitchen. Some children, the victim included, started riding snowmobiles but the petitioner returned home. At some point after returning home, the petitioner procured the key to his father's locked gun cabinet and removed a hunting rifle equipped with a scope. He loaded the weapon with ammunition, opened a window, removed the screen, and pointed the gun outside. The gun discharged, striking Jessica Ann Carr in the back and fatally wounding her. The scope of the rifle struck the petitioner's forehead and left a visible wound. He returned the rifle to the gun cabinet and hid the empty shell casing.
>
> On March 8, 1989, the petitioner was arrested and charged with criminal homicide in the Court of Common Pleas of Monroe County. After being arraigned, he was released on bail to the custody of his

6. *See* Commonwealth v. Kocher, 602 A.2d 1309 (Pa. 1992).
7. *See* Brazill v. State, 845 So. 2d 282 (Fla. Dist. Ct. App. 2003).
8. *See Simmons*, 125 S. Ct. 1183.
9. *See, e.g.*, Anthony DePalma, *10-Year-Old Boy is Charged as Adult in Fatal Shooting of 7-Year-Old Girl*, N.Y. TIMES, Aug. 26, 1989, at A6.

parents.

> The Court of Common Pleas found Cameron Kocher to be a normal fourth grader of above-average intelligence with an above-average school record. He was a good student who exhibited occasional inattentiveness. He related well to others in his school, community, and church, and he possessed an average level of maturity and physical development. His home life was stable, close-knit, and supportive. The child exhibited no physical, mental, emotional, or behavioral disorders and had no previous criminal or delinquent history. The trial court considered these factors favorable to his application for transfer [to juvenile court].
>
> Conversely, the trial court's analysis of the nature of the crime and the level of criminal sophistication weighed against the petitioner's petition for transfer. When he fired the rifle, he endangered the driver of the snowmobile and the other children playing in the area. His manipulation of the gun and the window, and his dishonesty about the cut on his forehead to his parents and police reflected an adult level of criminal sophistication and knowledge. He appeared to show no remorse for the crime. The petitioner was quoted as saying, "[i]f you don't think about it, you won't be sad," to one of the neighbors' children as the victim lay dying in the Rattis' home. These factors weighed heavily against the petitioner's petition for transfer.[10]

Nathaniel Brazill was a rambunctious thirteen-year-old on his last day of school before summer vacation. Unfortunately, Brazill's excitement over the end of school turned terribly tragic:

> In the early afternoon of May 26, 2000, Brazill and Michelle Cordovaz were suspended for the remainder of the day as the result of a water balloon fight. School counselor Kevin Hinds escorted the two students off campus. Brazill asked Hinds what time he was going home. Hinds indicated that he was leaving around 4:15 to 4:30 p.m. and asked why Brazill wanted to know. Brazill shrugged and did not respond. As he was walking away with Cordovaz, Brazill told her that he had a gun and was going to return to shoot Hinds. Cordovaz asked: "You wouldn't do that, Nate, would you?" Brazill answered: "Watch. I'm going to be all over the news."
>
> On the way home, Brazill made several stops. Near his grandmother's house, Brazill spoke to Brandon Spann. He asked if Spann was part of a gang or had a gun. Spann asked him why he

10. *See Kocher*, 602 A.2d at 1309-1310, 1313.

needed a gun. Brazill replied that he was "going to fuck up the school" because of the suspension.

At his home, Brazill retrieved a gun from his bedroom. The previous weekend, Brazill was at his grandfather's house and found the gun in a cookie jar in his grandfather's bureau. At that time, he loaded the gun, pulled the slide back, engaged the safety, and placed it in his overnight bag. When Brazill left his grandfather's house, he took the gun home with him; upon returning home, he hid the gun in his room.

Taking the gun from his bedroom, Brazill rode his bike back to school. On the way, he stopped by his aunt's house and left a note. Brazill entered the school grounds near the rear parking lot, a designated teachers' area. School security officer Matt Baxter saw him. Baxter followed him, but found only an abandoned bike. After leaving his bike, Brazill ran to the school building. On the way, he advised a student sitting outside to go home.

When Brazill knocked on Grunow's door, the students in the class were already standing, because they were about to go outside. Brazill sternly asked to speak to Rosales and Ware, who were standing on either side of Grunow. The teacher did not allow the girls to leave the classroom, but said that Brazill could come inside. Brazill refused to enter the classroom. Three more times he asked to see the girls. Each time Grunow calmly declined and told him to go back to class.

Brazill then pulled out the gun and aimed it at Grunow's head. He was in the hallway, approximately an arm's length from Grunow. He backed up slightly and assumed a shooter's stance with his legs apart. Grunow told Brazill to stop pointing the gun, but he continued to point the gun at the teacher's head. Brazill appeared to be angry but calm; he was not crying or shaking. Brazill pulled the slide back on the gun. As Grunow attempted to close the classroom door, Brazill pulled the trigger and Grunow fell to the floor, with a gunshot wound between the eyes. A school surveillance videotape of the hallway revealed that Brazill had pointed the gun at Grunow for nine seconds before shooting. Brazill exclaimed: "Oh shit," and fled.[11]

The final example of a juvenile homicide is the one committed in Missouri by seventeen-year-old Christopher Simmons, who ultimately became a poster child for the effort to abolish the juvenile death penalty:

In early September 1993, Simmons, then age seventeen (now 28),

11. *Brazill*, 845 So.2d at 285-286.

discussed with his friends, Charlie Benjamin, fifteen, and John Tessmer, sixteen, the possibility of committing a burglary and murdering someone. On several occasions, Simmons described his planned crime: find someone to burglarize, tie the victim up, and ultimately push the victim off a bridge. Simmons assured his friends that their status as juveniles would allow them to "get away with it." On September 8, 1993, Simmons arranged to meet Benjamin and Tessmer at around 2:00 a.m. to carry out Simmons's plan. The trio met at the home of Brian Moomey. When Simmons and Benjamin left to commit the burglary, Tessmer returned home.

Simmons and Benjamin found a window cracked open at the rear of Shirley Crook's home. They opened the window, reached through, unlocked the back door, and entered the house. Simmons turned on a hallway light; the light awakened Mrs. Crook, who was home alone. She sat up in bed and asked, "Who's there?" Simmons entered her bedroom and recognized Mrs. Crook as a woman with whom he had previously had an automobile accident. Mrs. Crook apparently recognized Simmons as well.

Simmons ordered Mrs. Crook out of bed and, when she did not comply, Simmons forced her to the floor with Benjamin's help. While Benjamin guarded Mrs. Crook in the bedroom, Simmons found a roll of duct tape, returned to the bedroom, and bound her hands behind her back. The two also taped shut Mrs. Crook's eyes and mouth. They placed Mrs. Crook in the back of her minivan. Simmons drove the van from Mrs. Crook's home in Jefferson County to Castlewood State Park in St. Louis County.

Simmons parked the van near a railroad trestle that spanned the Meramec River. When he and Benjamin began to unload Mrs. Crook, they discovered that she had freed her hands and had removed some of the duct tape from her face. Using Mrs. Crook's purse strap, the belt from her bathrobe, a towel from the back of the minivan, and some electrical wire found on the trestle, Simmons and Benjamin bound Mrs. Crook again, restraining her hands and feet and covering her head with a towel. Simmons and Benjamin walked Mrs. Crook to the railroad trestle. There, Simmons bound her hands and feet together, hog-tied fashion, with the electrical cable, and covered her face completely with duct tape. Simmons then pushed her off the railroad trestle into the river below. At the time she fell, Mrs. Crook was alive and conscious. Simmons and Benjamin threw Mrs. Crook's purse into the woods and drove the van back to the mobile home park across from the subdivision in which Mrs. Crook lived.

Later that day, Simmons returned to Moomey's home and bragged

that he had killed a woman "because the bitch seen my face."[12]

These three cases, involving: (1) nine-year-old Cameron Kocher; (2) thirteen-year-old Nathaniel Brazill; and (3) seventeen-year-old Christopher Simmons, provide examples of the range of juvenile homicide cases that prosecutors might receive in their in-basket. Despite the broad range of ages and circumstances, the prosecutor handled each case the same way. The arrested child was charged with murder in adult criminal court and faced a minimum sentence of life in prison. In the *Simmons* case, the prosecutor sought the maximum sentence, the death penalty.[13] Did law and ethics mandate, or at least encourage, this prosecutorial decision? Moreover, did prosecutorial discretion play a significant role in any or all of these cases?

III. Traditional Limitations on the Role of Prosecutors

The principle that prosecutors have broad discretion in when to prosecute and what charge to file "is firmly entrenched in American law."[14] However, the bulk of this discretion appears to be exercised: (1) in less serious criminal cases; and (2) in cases in which prosecutions of the apparent perpetrators would not best serve the public interest,[15] both of which would rarely apply to juvenile homicide cases, except perhaps in cases of very young offenders. A third prominent explanation for the existence of prosecutorial discretion is the individualized treatment of offenders at the charging stage as well as at the sentencing stage.[16] The younger the juvenile offender is, the more persuasive the call for individualized justice may be.

In homicide cases, the prosecutor's power to charge in criminal court may be limited marginally by several institutional checks. The most important is the requirement of approval of the charge by a grand jury in the federal criminal justice system and in about a third of state criminal justice systems.[17] In states without the requirement of grand jury approval, most jurisdictions require that a judge at a preliminary hearing approve the charge.[18] However, it appears that neither form of approval is difficult for the prosecutor to obtain, and thus, neither is a

12. Brief for Petitioner at 3-5, Roper v. Simmons, 540 U.S. 1160 (2004) (No. 03-633).

13. Roper v. Simmons, 125 S. Ct. 1183 (2005).

14. *See* LAFAVE, CRIMINAL PROCEDURE, *supra* note 1, at 680; Ramsey, *supra* note 1, at 1311.

15. *See* LAFAVE, CRIMINAL PROCEDURE, *supra* note 1, at 680-681.

16. *Id.* at 681.

17. *Id.* at 679, 688.

18. *Id.* at 679.

significant check on prosecutorial discretion.[19]

The sufficiency of the admissible evidence is another, more obvious, limitation on prosecutorial charging powers.[20] Presuming that the charge is lodged after an arrest has been made, the beginning premise from the arrest is that probable cause exists to believe that a criminal homicide has been committed and that this specific person committed that criminal homicide.[21] At trial, the evidence will have to show guilt beyond a reasonable doubt,[22] so one presumes that prosecutors would prefer that the admissible evidence rise to that level before actually charging the arrestee.

Prosecutorial discretion includes the power not to charge even when the evidence is overwhelming.[23] Most knowledgeable commentators would agree that, for the criminal justice system to function optimally, "something less than full enforcement of the law by the prosecutor is an absolute necessity."[24] A decision not to prosecute any charge in a provable case of criminal homicide would be extremely unusual; however, such a decision may be made in the case of a very young juvenile offender under the age of seven.[25] The lesser alternative to a decision not to take any action is a decision to divert the matter into a non-criminal program of counseling and treatment. If the participant is responsive to the program, the criminal prosecution is never brought, but that prosecution would proceed if the participant does not meet the obligations of the diversion program.[26] Such a pretrial diversion program might be the best option for the juvenile offender under the age of thirteen or fourteen.

Despite the attractiveness of pretrial diversion programs and other prosecutorial charging decisions resulting in less harsh treatment of juvenile offenders, each of the three example cases described earlier[27] received the most aggressive prosecutorial action. The nine-year-old Cameron Kocher was charged in criminal court with criminal homicide and other related charges.[28] Once charged with murder, Pennsylvania law required that Kocher's case go to adult criminal court.[29] The

19. *Id.* at 685-686.
20. *See id.* at 679.
21. *Id.*
22. *See* In re Winship, 397 U.S. 358, 359 (1970).
23. *See* LAFAVE, CRIMINAL PROCEDURE, *supra* note 1, at 683, 686-689.
24. *Id.* at 679.
25. *See* DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW, 1067-1072 (2d ed. 2003) (stating that the common law infancy defense draws the minimum age line for criminal liability at age seven).
26. *See* LAFAVE, CRIMINAL PROCEDURE, *supra* note 1, at 680.
27. *See* Part II, *supra*.
28. *See* Commonwealth v. Kocher, 602 A.2d 1309, 1310 (Pa. 1992).
29. *Id.* at 1310-1311.

prosecutor, however, obviously had the option of not charging Kocher under that murder statute and thereby not forcing the case into adult criminal court.

The same could be said in the case of the thirteen-year-old Nathaniel Brazill, in which the prosecutor's decision to pursue a grand jury indictment automatically placed the case in adult criminal court.[30] Such decisions by prosecutors treat a juvenile homicide as an adult murder, regardless of the characteristics of the offender, but such decisions also treat nine-year-olds and thirteen-year-olds as if they have the criminal nature of adult offenders. In the Christopher Simmons case, the offender was age seventeen when he committed the murder, and pretrial diversion in lieu of prosecution would not seem to have been appropriate.

IV. Ethical and Professional Limitations and Exhortations

Prosecutors are subject to the same ethical and professional requirements as are all other members of the bar,[31] and they also carry additional responsibilities unique to their office as "ministers of justice."[32] For example, the American Bar Association's (ABA) current set of recommended model ethics rules continues to include a targeted provision entitled "Special Responsibilities of a Prosecutor."[33] Particularly significant in juvenile homicide cases could be the ethical obligation to disclose mitigating information:

> The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. . . .[34]

Cases in which the offender is particularly young and innocent of previous misdeeds may commonly raise mitigating evidence or information raising questions as to "the guilt of the accused" through reduced *mens rea* due to youthfulness. Such evidence or information would almost always be significant "in connection with sentencing" of a

30. Brazill v. State, 845 So.2d 282, 288-289 (Fla. Dist. Ct. App. 2003).

31. An example of such ethics rules are the American Bar Association's MODEL RULES OF PROF'L CONDUCT (2004) [hereinafter ABA MODEL RULES].

32. ABA MODEL RULES, *supra* note 31, at R. 3.8 cmt.; *see also* Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309 (2001).

33. ABA MODEL RULES, *supra* note 31, at R. 3.8.

34. *Id.* at R. 3.8(d).

juvenile offender. One example of such mitigating evidence might be the juvenile defendant's relatively minor role in the homicide, as compared to the role played by the juvenile's older co-defendants. If the prosecutor is charging and prosecuting the other co-defendants as well, the prosecutor may be uniquely situated to have evidence or information about this factor.

The most obvious mitigating factor in juvenile homicide cases is the youth of the offender. However, as happened in the Christopher Simmons case, the prosecutor may use youth to argue to the jury that the offender is even more evil and menacing: "Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."[35] Justice O'Connor noted that "the prosecutor's apparent attempt to use respondent's youth as an aggravating circumstance is troubling. . . ."[36] If extension of this argument is permitted, might not a homicidal offender age nine (Kocher) or thirteen (Brazill) be even scarier?

Another "special responsibility" of prosecuting attorneys is to assure that the case is not tried in the news media either by the prosecutor or by the law enforcement agencies:

> The prosecutor in a criminal case shall . . ., except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.[37]

The exceptions to the prohibition of public disclosures described above allow disclosure in a criminal case of the identity, residence, occupation and family status of the accused and, if the accused has not yet been apprehended, the information necessary to facilitate public aid in making that apprehension.[38] If the case is to end up in juvenile court rather than adult criminal court, then much of this personal information about the juvenile offender should not be made public.[39] The confidentiality typically required in juvenile court cases, however, does

35. State ex. rel. Simmons v. Roper, 112 S.W.3d 397, 413 (Mo. 2003), *aff'd*, 125 S. Ct. 1183 (2005).

36. Roper v. Simmons, 125 S. Ct. 1183 (2005) (O'Connor, J., dissenting).

37. ABA MODEL RULES, *supra* note 31, at R. 3.8(f).

38. *Id.* at R. 3.6(b)(7)(i, ii).

39. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

not carry over to juvenile offenders charged in adult criminal court.[40]

In high profile juvenile homicide cases, one particularly fears that prosecutors will be seduced by the many political advantages of playing to the media. All three of our example cases became national as well as local media events, featuring the prosecutors quite prominently.[41] Indeed, given the "man bites dog" freakishness of juvenile homicides, such cases can be expected to attract considerable media attention in nearly every case. This leaves the prosecutor torn between keeping the details quiet in order to protect the juvenile and his or her family, and exploiting the details of the case in order to ride a wave of publicity into the next election.

Another major set of rules governing the exercise of prosecutorial discretion is the ABA's criminal justice standards.[42] These standards conclusively presume that prosecutors will exercise discretion and therefore address this factor expressly: "the prosecutor must exercise *sound discretion* in the performance of his or her functions."[43] A key part of the performance of those functions is the "[d]uty of the prosecutor is to seek justice, not merely to convict."[44] This standard might suggest the rationale for a prosecutor's decision not to file charges in a case in which the arrestee's guilt is fairly obvious. Seeking justice might lead to a different goal in a homicide committed by a juvenile in comparison to a similar homicide committed by an adult. The ABA criminal justice standards also provide that the prosecutor should continue to have the power to lodge criminal charges, albeit perhaps not total power.[45] However, they do not suggest any form of outside review of the prosecutor's decision to charge or not to charge. Prosecutors are expressly urged not to consider personal gain:

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40. *See* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

41. *See, e.g.*, Linda Greenhouse, *Supreme Court, 5-4, Forbids Execution in Juvenile Crime*, N.Y. TIMES, Mar. 2, 2005, at A6 (Christopher Simmons case); *The Oprah Winfrey Show: Notorious Trials; Behind the Scenes; Guests Discuss Sensational Trials They Have Been Involved In*; *Interview with Nathaniel Brazil* (ABC television broadcast, June 11, 2004); DePalma, *supra*, note 9 (Cameron Kocher case). Mark Pazuhanich, the prosecutor in the Cameron case, went on to be elected a county court judge, but ultimately was convicted of child molestation, resigned from office, and was banned from the bench for life. The Associated Press, *Pazuhanich Banned from Bench for Life*, PENN L. WEEKLY, Oct. 11, 2004, at 9; Joe McDonald, *Pazuhanich to Face Court from New Perspective; Jury Selection to Start in Molestation Case Against Monroe Judge*, THE MORNING CALL, Jul. 11, 2004, at B1.

42. AMERICAN BAR ASSOCIATION STANDARDS OF CRIMINAL JUSTICE RELATING TO THE PROSECUTION FUNCTION (1993) [hereinafter ABA PROSECUTION STANDARDS].

43. *Id.* at Standard 3-1.2(b) (emphasis added).

44. *Id.* at Standard 3-1.2(c).

45. *Id.* at Standard 3-3.4(a) ("The decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor.").

> In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions.[46]

These standards also urge prosecutors to consider non-criminal dispositions as a part of the prosecutorial discretion whether to file criminal charges:

> The prosecutor should consider in appropriate cases the availability of non-criminal disposition, formal or informal, in deciding whether to press criminal charges which would otherwise be supported by probable cause; especially in the case of a first offender, the nature of the offense may warrant non-criminal disposition.[47]

Interestingly, in considering cases for this dispositional alternative, the standards urge prosecutors to "be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process."[48] It appears that seeking assistance from other knowledgeable professionals in making the charging decision is raised only here and not in cases of determining which criminal charge to bring. If the prosecutor declines to present the maximum number of charges in a given case, one reason may be "the disproportion of the authorized punishment in relation to the particular offense or the offender."[49] This standard might be particularly applicable in juvenile homicide cases, given the youthfulness of the offender and the probability that the harshest of criminal punishments would be inappropriate for a juvenile.

V. Which Court Should Hear the Case?

Juvenile homicide cases combine two elements that seem not to go together. The term "juvenile" indicates an adolescent or younger child, and such a person would most naturally go to juvenile court. The term "homicide" indicates the category of the most serious crimes known to law, and such crimes would most naturally go to criminal court. So if a "juvenile" commits a "homicide," does the case go to juvenile court or to criminal court? This question has been the basis for an entire cottage industry for scholars and commentators.[50]

It is generally agreed that three general categories of provisions

46. *Id.* at Standard 3-3.9(d).
47. *Id.* at Standard 3-3.8(a).
48. *Id.* at Standard 3-3.8(b).
49. *Id.* at Standard 3-3.9(b)(iii).
50. *See, e.g*, Fagan & Zimring, *supra* note 40, and the list of books and articles collected at BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION 491-493 (2d ed. 2004).

exist that permit bringing putative juveniles into adult criminal court.[51] One category is for the legislature simply to have excluded from juvenile court certain juveniles accused of committing certain offenses, leaving no discretion in any prosecutor or judge if a juvenile is charged with that offense.[52] Of course, the prosecutor could choose to charge the juvenile offender with a different (lesser) offense, avoiding that legislative exclusion from juvenile court. If this category is the law in a given jurisdiction, though, all homicides may be excluded,[53] leaving the prosecutor with essentially no viable options, at least within homicide law. This is essentially what happened in our three example cases.

Judicial waiver is a second category and would appear also to leave little discretion in the hands of the prosecutor. Here the case must be originated in juvenile court, but that court has the authority to waive juvenile court jurisdiction and to transfer the case to criminal court.[54] The prosecutor's role in judicial waiver jurisdictions often is to file a motion to transfer, without which it would be unlikely that the case would be transferred to criminal court.[55] Presumably the prosecutor retains the discretion not to seek transfer through judicial waiver, but the juvenile court may take up that consideration on its own motion.[56]

The greatest prosecutorial discretion in choosing which court hears a juvenile homicide case exists in the states providing concurrent jurisdiction shared by juvenile and criminal courts in serious cases, commonly juvenile homicide cases.[57] Revealing its true nature, concurrent jurisdiction is also known as prosecutorial waiver or prosecutor discretion.[58] Only about a third of the states provide for this extreme prosecutorial discretion.[59] Prosecutorial discretion in these situations is restricted only by the determination whether evidence exists to prove the case.[60] If so, the prosecutor has nearly a free hand to decide whether to charge the youth in juvenile or criminal court.

Those jurisdictions that permit prosecutors to file juvenile homicide cases either in juvenile court or in criminal court raise the most serious

51. *See* 1999 U.S. DEP'T OF JUSTICE JUVENILE OFFENDERS AND VICTIMS NAT'L REP.

52. United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972); *see* FELD, *supra* note 50, at 573-592.

53. *See* FELD, *supra* note 50, at 573-592.

54. Kent v. United States, 383 U.S. 541, 547 (1966); *see also* FELD, *supra* note 50, at 499-571.

55. *See* FELD, *supra* note 50, at 499-571.

56. *Id.*

57. *Id.* at 593, 613.

58. *See* Francis Barry McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629, 632 (1994).

59. *See* FELD, *supra* note 50, at 593.

60. *Id.* at 595.

concerns about unchecked prosecutorial discretion. The consequences to the juvenile are enormous, ranging from a community-based treatment program to life in prison or, prior to *Roper v. Simmons*,[61] even the death penalty.[62] Even before challenging the appropriateness of permitting such a wide range of sanctions to be imposed by the criminal justice process, it would seem that prosecutorial discretion to launch such prosecutions should not be the unreviewable decision of a solitary criminal justice official.

VI. Recommendations for Prosecutors

The overriding issue in prosecutorial discretion for juvenile homicide cases, as in perhaps almost all criminal cases, "is not discretion versus no discretion, but rather how discretion should be confined, structured, and checked."[63] This discretion resides almost exclusively in the office of each local prosecutor: "The prosecution function has traditionally been decentralized, so that state attorneys-general exercise no effective control over local prosecutors."[64] If prosecutorial discretion is wide-ranging and essentially unreviewed by any other agency, it seems we would benefit from discussions of broadly accepted guidelines and checklists for such far-reaching decisions.

Confining the prosecutor's discretion in juvenile homicide cases could begin with establishing a reasonable minimum age for a criminal charge to be made in an adult criminal court. This needed improvement in juvenile homicide law must come from the legislature if we are to put an end to the criminal prosecution of nine-year-old, fourth-grade cub scouts such as Cameron Kocher. In fact, a minimum age of fourteen to sixteen seems most appropriate, forever banishing the spectacle of cases like *Kocher*.

The ABA criminal justice standards provide a basic framework for prosecutorial standards and procedures: "The prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted."[65] This ABA standard goes to the sufficiency of the evidence to prove the case in court, but this theme might also lend itself to the evaluation of the unique considerations in juvenile homicide cases regardless of the sufficiency of the evidence.

Structuring prosecutorial discretion in juvenile homicide cases

61. 125 S. Ct. 1183 (2005).
62. Stanford v. Kentucky, 492 U.S. 361 (1989).
63. *See* LAFAVE, CRIMINAL PROCEDURE, *supra* note 1, at 683.
64. *Id.* at 685.
65. ABA PROSECUTION STANDARDS, *supra* note 42, at Standard 3-3.4(c).

could be enhanced by ensuring that prosecutors receive maximum information about both the crime and the juvenile offender.[66] Prosecutors' information about the crime is typically ample, but information about the juvenile is often limited to his or her juvenile or criminal record. If the horror of the crime is overwhelming, as is often the case in juvenile homicides, then the prosecutor may be pushed toward the logic of treating the case as an "adult crime" deserving of an "adult punishment." The end result of this logic is an argument to a criminal court jury that the young child sitting at the defense table is really an adult in a child's body. The structuring of prosecutorial discretion could also be improved by requiring a pre-charge conference at which the prosecutor and defense counsel could discuss the pros and cons of various possible juvenile or criminal charges that could be filed, as well as the appropriateness of a noncriminal disposition.[67]

Finally, the exercise of prosecutorial discretion in juvenile homicide cases might be subjected to a special review due to the unique nature of these cases. The youth of the offender in such cases calls for such a special review to prevent prosecutors from handling them as they would any homicide cases. The most obvious entity to provide this special review would be the juvenile court judge, who is probably the government official within the jurisdiction who has the most experience and education about the special nature of childhood. One way to force this review would be to require that all juvenile homicide cases be filed first in juvenile court, and, then, if the prosecutor desires, a motion to transfer the case to criminal court can be filed. This motion and the transfer hearing it precipitates would be held before the juvenile court judge, providing the special review with unique expertise that is recommended.

In sum, it appears impossible, as well as inadvisable, to reduce prosecutorial discretion in juvenile homicide cases to zero. However, the intense political and media pressures on prosecutors in such cases, combined with less than sophisticated knowledge about the personal characteristics of juveniles, too often result in prosecutorial discretion being exercised in a knee-jerk, tough-on-crime manner. Juveniles are not just short adults, and the negative impact on them of this prosecutorial choice can be much greater than for an adult offender in the same situation. Conversely, the mere fact of their youthfulness should give us much more hope that they will turn their lives toward positive alternatives than we might hold out for hardened adults. In juvenile homicide cases, the exercise of prosecutorial discretion should not be just

66. *See* LAFAVE, CRIMINAL PROCEDURE, *supra* note 1, at 684.
67. *Id.*

business as usual.