# The Prosecution of Nathaniel Abraham—A Minor

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A dysfunctional family in a dysfunctional environment is likely to produce dysfunctional children. Children from dysfunctional families usually have some hope of a positive development when they are exposed to functional adults outside of their immediate families—teachers, religious leaders, and role models in sports or the media—who may provide a positive counter-balance, but when these role models are absent, the situation is bleak.

So it was in the case of Nathaniel Abraham, an African-American youth, who in the 20th century became the youngest person charged and tried as an adult in Michigan, and possibly the country, for first-degree murder.[1] His name "Nathaniel" translates loosely as "gift from God" but, as it turned out, he was surely no gift. At age 11, in 1997, following a series of offenses, he shot and killed a perfect stranger—18-year-old Ronnie Greene, Jr.—when Greene left a party store. In 1999, two years later, he went on trial for the offense.

In 1996, the Michigan legislature passed a juvenile reform bill, effective January 1997, giving prosecutors the discretion to charge a child of any age as an adult for certain serious crimes. For those under age 14, the trial is held not in an adult court (as widely reported), but in family court; this is significant because the family court has experience with juvenile offenders and the rehabilitation services available for them. The most significant aspect of this law is that the sentencing judge has broad sentencing discretion. Upon conviction, the judge may impose a prison sentence not exceeding a similar sentence for an adult. At the other end of the sentencing spectrum, the judge may simply say to the offender, "You are free to go." Most importantly, the law provides for a "blended sentence" under which the judge can sentence the defendant to juvenile rehabilitation programs with a review every year until age 21. At or before age 21, the judge makes a decision after hearing from professionals such as psychiatrists and other treatment specialists who have been dealing with the defendant. If the professionals advise the judge that the defendant has not been rehabilitated and poses a significant danger to the public if released, the judge may continue the sentence into the adult prison system.

The law thus gives prosecutors the ability to protect the public from dangerous offenders, while giving judges the flexibility to fashion sentences that fit the nature of the crime and the rehabilitative attitude of the juvenile in question. It allows the court to maintain control over the individual at the end of the age of minority, which was not possible under the prior juvenile laws. That is the rationale of the new law—to protect society from an individual who remains dangerous despite the happenstance of reaching age 21. No longer would an individual "age out of the system."

Responding to the sharp rise in juvenile crime, since 1992 at least 44 states have adopted new juvenile justice laws that allow more youngsters to be tried as adults. The slogan is "adult crime, adult time." The statistics that have prompted these laws are alarming; 13 people under the age of 18 are murdered every day in the United States, and one-third of the killers are teenagers. Michigan and other states a number of years ago mandated that juveniles 17 or older be tried automatically as an adult (many other states, and the federal government, require that a

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defendant be at least 18 to be considered automatically as an adult).

In 1923, the Michigan legislature had provided that a probate court judge, who had jurisdiction at the time over juveniles, could waive jurisdiction of those who had attained the age of 15, and had been charged with a felony, to a court of general criminal jurisdiction,[2] and by an amendment in 1996, the age was lowered to 14.[3] For the 14- to 17-year-old age group, waiver is discretionary. In the law adopted in 1996, Michigan also allowed prosecutors to try any youth, no matter how young, as an adult, but those under age 14 would be tried in family court. State Senator William Van Regenmorter, the key force behind the tougher juvenile offender law in Michigan, said, "I don't think these youngsters are beyond redemption, but whether they are rehabilitable or not is secondary in those rare cases to the incredible danger they pose for all the rest."

The prosecution of Nathaniel Abraham attracted global attention. It was featured on the CBS broadcast "60 Minutes."[4] The photos of the youngster on the front pages of newspapers (his wide-eyed naivete and his apparent obliviousness to the magnitude of the harm he had done) made it seem nothing short of medieval to entertain the notion of imprisoning him for life. Television viewers around the world saw a child brought into the courthouse in shackles. His picture appeared on the cover of a report of Amnesty International critical of the many states in the United States that try juveniles as adults, stating that it goes against the standards set at the United Nations convention on the rights of the child, the so-called Beijing Rules. The United States was called the "Land of Legalized Child Abuse." In the U.S., for almost 100 years, the juvenile justice system had operated under the ideal that children will be treated, not prosecuted as a criminal.

The prosecution fueled debate about how to deal with violent youth. The media gave the statistics about the number of African-American youngsters who either drop out of school or get in trouble with the law. Television specials dealt with the problems facing mothers raising children alone. Time and again, blame was placed on social services or the lack thereof. "It takes a village to raise a child," as the popular expression puts it, yet Nathaniel's village was not a help but a hindrance. "What we are doing," it was said time and again, "is punishing Nathaniel Abraham for the failure of our society."

In the decision to try Nathaniel Abraham as an adult, Oakland County Prosecutor David Gorcyca cited the boy's numerous run-ins with the police. By age 11 he was a veteran of contacts with police–22 times, including arson, thefts, and attacks on two older boys with a metal pipe. He hit a bus driver over the head. On a number of occasions he pulled a gun on classmates, threatening to shoot them. The school sent him to counseling for six months, but those sessions did not dissuade him from getting into more trouble. Neighbors planned to move away. His mother, Gloria Abraham, pleaded that he needed a firmer hand. He finally got it when he was escorted to court in chains. Prosecutor Gorcyca said on "60 Minutes" that the system owes an apology to Nathaniel's mother for failing to help her son.[5]

Any one of the contacts with the police should have landed him in a county program known as Youth Assistance. The author Kay S. Hymowitz[6] wrote: "All Nathaniel Abraham knew was that when he was a suspect for larceny, burglary and home invasion, and was caught with stolen goods, adults stood around and did nothing. Why shouldn't he assume they would do the same thing when he shot a rifle in the direction of a convenience store or, for that matter, killed someone?"

## Historical Development of Laws on Minors

Under ancient biblical codes, the minor and the mentally defective were not punished, because "their acts are without purpose." In Roman law, a minor under the age of seven was not responsible (an age that coincides with the psychological development of the ego). In the early stages of the common law, infancy apparently was not a defense, but children were usually pardoned for their offenses. By the 14th century, it was established that a child under age seven was not criminally responsible, and it was presumed that a child over age seven lacked the capacity to commit a crime. By the 17th century, 14 had become the age of full responsibility.[7] Many states enacted statutes specifically directed at youthful behavior, which prohibited, for example, playing ball on public ways or sledding on the Sabbath. Other laws covering children specifically were similar to a Massachusetts statute of 1646.[8]

> If any child[ren] above sixteen years old and of sufficient understanding shall curse or smite their natural father or mother, they shall be put to death, unless it can be sufficiently testified that

> the parents have been very unchristianly negligent in the education of such children, or so provoked them by extreme and cruel correction that they have been forced thereunto to preserve themselves from death or maiming. . . .
>
> If a man have a stubborn or rebellious son of sufficient years of understanding, viz. sixteen, which will not obey the voice of his father or the voice his mother, and that when they have chastened him will not harken unto them, then shall his father and mother, being his natural parents, lay hold on him and bring him to the magistrates assembled in Court, and testify to them by sufficient evidence that this their son is stubborn and rebellious and will not obey their voice and chastisement, but lives in sundry notorious crimes. Such a son shall be put to death.

A common crime during the 19th century by children was flight from the service of a master to whom they were apprentices. These offenses were dealt with severely.

Prior to the 1900s, juveniles in violation of the laws were brought to the adult criminal courts. Not only were they tried as adults, but they were sent to adult prisons as well. In 1851, Michigan prison inspectors complained the courts had committed five or six boys to the state prison, "one of whom is only 11 years of age." In the late 19th century, according to a history of reform schools in the state, Michigan Governor Andrew Parsons insisted that juveniles be treated "not as men of understanding and hardened in iniquity."

Starting in the early 19th century, juries began to inject compassion into the law by refusing to convict children, even though the evidence clearly indicated their guilt. Reformers seized on this wave of "jury nullification" and created reform schools, which became homes for children convicted of crimes or found to be "vagrants" or "ungovernable." These schools flourished for several decades until some were revealed to be little more than sweatshops for children.

In 1871, the reform school in Chicago burned in the city's great fire, and many of its charges ended up in the city jails. A year later, Chicago social leaders Lucy Flower, Adelaide Groves, and Julia Lathrop toured those jails and were appalled to find "quite small boys confined in the same quarters with murderers, anarchists and hardened criminals." These women, who believed that children were innately good and that the state had a moral duty to correct and save wayward youth, began lobbying for a separate "'children's court" to handle their cases. Their efforts resulted in the Illinois Legislature enacting a law to establish such a court.[9] On July 3, 1899, Cook County Juvenile Judge Richard Tuthill heard the nation's first juvenile court case, involving an 11-year-old boy who was accused of larceny. The new court system was unique in four ways: (1) it was "rehabilitative" rather than punitive; (2) its records were confidential; (3) it did not place juveniles in adult facilities; and (4) it allowed informal procedures in court, preferring to act "as a wise parent" with a "wayward child," as Judge Julian Mack, one of the original juvenile court jurists put it.

By 1935, nearly all states enacted legislation establishing juvenile courts. Subsequently, the various legislatures, like Michigan, recognized certain extreme conduct necessitates different handling, allowing transfer of juveniles to the regular criminal courts. To "transfer" or "waive" juvenile court jurisdiction, certain criteria such as age, the nature of the crime, and prior record have to be met. The waiver was usually for acts that would constitute a felony if committed by an adult.[10] In *Kent v. United States*,[11] the U.S. Supreme Court in 1966 dealt with waiver of juvenile court jurisdiction to a court of general criminal jurisdiction. It did not strike down waiver of juveniles to criminal court, as was urged. In the course of its opinion, Justice Fortas, who wrote the opinion for the Court, commented, "There is much evidence that some juvenile courts lack the personnel, facilities, and techniques to perform adequately as representatives of the state in a *parens patriae* capacity, at least with respect to children charged with law violations." The court was emphatic that the waiver of jurisdiction was a "critically important" action to the juvenile because there are special rights and immunities that accrue from juvenile court handling: the youth is shielded from publicity, and he may be confined, but with rare exceptions, he may not be jailed along with adults. He may be detained, but only until he is 21 years of age. The child is protected against the consequences of adult conviction, such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment.

A felony conviction, on the other hand, whether or not there is imprisonment, is a lifelong handicap, but there is the possibility of expunging at least one conviction from a record. As a consequence, trial as an adult has a number of protections, not available in a juvenile proceeding, in particular, the applicability of the full panoply of the rules of evidence, the de-

fense of "not guilty by reason of insanity," and the unanimity of a jury of twelve. In 1967, in the case of *In re Gault*,[12] the U.S. Supreme Court "legalized" the juvenile court in considerable measure by establishing that juveniles were owed at least those elements of the due process essential to fundamental fairness (e.g., the right to counsel, written and timely notice of the charges, and the privilege against self-incrimination). In *Gault*,[13] Justice Fortas described juvenile courts as "kangaroo courts" characterized by arbitrariness, ineffectiveness, and the appearance of injustice.

In its opinion in *Kent*,[11] the U.S. Supreme Court appended eight criteria for waiver, but none specifically called for expert testimony on the prospects for rehabilitation: (1) the seriousness of the alleged offense to the community and whether the protection of the community requires waiver; (2) whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; (3) whether the offense was committed against persons or against property; (4) the prosecutive merit of the complaint (that is, whether there is evidence upon which a grand jury may be expected to return an indictment); (5) the desirability of trial and disposition of the entire events in one court with the juvenile associates in the alleged offense who will be charged with the crime; (6) the sophistication of the juvenile; (7) the record and previous history of the juvenile in context to the previous findings of the court; and (8) the prospects for adequate protection of the public and the likelihood of rehabilitation of the juvenile by use of procedures, services, and facilities currently available to the juvenile court. Additionally, of course, representation by counsel at a hearing after full investigation requirements were met.

The various states have established specific rules of practice and procedure for waiver in accordance with *Kent*.[11] In a second Kent case,[14] the juvenile again appealed the juvenile court's waiver of jurisdiction to criminal court, arguing that he was incompetent to be sent over to the criminal court because he was schizophrenic. Writing the opinion of the District of Columbia Court of Appeals, Judge David Bazelon stated that it is implicit in the juvenile court scheme that no criminal treatment is to be the rule, and the adult criminal treatment the exception, which must be governed by the particular factors of individual cases. On the facts of the Kent case, waiver was deemed inappropriate; the theory of allowing insanity as a bar to waiver, it was said, is not in accord with the prevailing philosophy of the juvenile court. Judge Bazelon wrote: "Since waiver was not necessary for the protection of society and not conducive to [appellant's] rehabilitation, its exercise in this case violated the social welfare philosophy of the Juvenile Court Act. Of course, this philosophy does not forbid all waivers. We only decide here that it does forbid waivers of a seriously ill juvenile."[15] Judge Warren Burger, later Chief Justice of the Supreme Court, vigorously dissented, saying that Kent if waived would have in the criminal court all the rights in relation to his alleged psychiatric problems that he would have in the juvenile court.

"Waiver hearings" (also known as amenability or transfer hearings) are designed to address the issue of: the juvenile offender's "fit" in juvenile court, a determination that rests on the minor's amenability to rehabilitation via those programs, services, and facilities accessible through juvenile court.[16] In 1992, in *Mikulovsky v. State of Wisconsin*,[17] the Wisconsin Supreme Court held that it is not mandatory for a juvenile court to hear expert testimony on a minor's rehabilitative prospects before transferring jurisdiction to adult court. The court apparently followed all of the *Kent* criteria on waiver, the objection being that the court failed to hear certain testimony concerning one aspect, to wit, the psychological and social worker's opinions as to rehabilitation.

Responding to the sharp rise in juvenile crimes, at least 44 states since 1992 have adopted new juvenile justice laws that allow more youngsters to be tried as adults. According to the Office of Juvenile Justice, juveniles in 1980 were the offenders in eight percent of all homicides in the United States. By 1994, that number had doubled to 16 percent. Between 1988 and 1994, the arrest rate for males age 10 to 17 for violent crimes rose 60 percent. In 1998, the U.S. Supreme Court ruled that the states may not execute anyone who was younger than 16 at the time of the crime.[18] The five-to-three decision was followed a year later by a ruling allowing execution of those who were between age 16 and 18 at the time of the crime.[19] A 10-year-old black child was hanged in Louisiana in 1855, and a Cherokee Indian child of the same age was hanged in Arkansas in 1885.[20] Florida today prosecutes more juveniles as adults than any other state. The suicide rate of juveniles in prison is appalling, but it is rarely mentioned in the news.

## The "Ghetto Defense"

What about the "ghetto defense"? Abraham's world was one of neglect, unheeded pleas, and a neighborhood where he could roam the streets alone at night with no one intervening; where adult eyes turned the other way; and where the scene was one of addicts and hookers. A victim of society, he became a menace to society.

A 1972 decision from the District of Columbia, *United States v. Alexander and Murdock*,[21] is best known for a discussion of a "subculture of poverty" or the "ghetto defense." In this case, two black males in a restaurant exchanged glares with a group of five white male Marine lieutenants and a woman. One of the black males verbally challenged the Marines, one of whom responded with a racial epithet. The two black males then drew guns and began shooting, killing two Marines and wounding another Marine and a woman. At trial, the instructions to the jury included the statement: "We are not concerned with a question of whether or not a man had a rotten social background." On appeal, the appellate court found no error in the instruction, but it provoked a lengthy dissent by Judge David Bazelon that has been the subject of extensive commentary. Judge Bazelon suggested that a "rotten social background" excuse would spur society to provide effective assistance to the poor.

Some environmental hardship defenses have prevailed, while others have not. They include battered women syndrome, black rage, cultural evidence, urban psychosis, and television intoxication.[22] By and large, expert testimony on environmental hardship is deemed irrelevant (although it may be considered in sentencing). One commentator summarized the reasoning on the irrelevancy claims as follows: "The court's role is limited and it cannot be concerned with broad issues of justice."[23] Professor James Q. Wilson of UCLA has challenged environmental hardship defenses as based on a divisive notion of group identity, undermining individual responsibility, and embodying "junk science."[24]

## Parental Responsibility

What about the responsibility of parents? It is not unheard of in the inner cities of America to encounter men who have fathered 15 to 20 children, from different women, of course, and they rarely, if ever, see any of them; usually some of the offspring are in prison. The promiscuity is not deemed a sex offense. The women, by and large, are on welfare. Worldwide, including America, the low income and poorly educated people abound in offspring. The sad truth of the matter is that there are hundreds of youngsters like Nathaniel Abraham in the cities of the United States. They have little parental or adult supervision, attend schools that can be best characterized as chaotic, and roam the streets in search of reckless excitement.

To be sure, Nathaniel's mother is not a welfare mother. She works at night, from 7 p.m. until 3 a.m., as a lab technician. She could not find a day job. Nathaniel's father was gone by the time he was born. The mother has three other children, two teenagers and a four year-old, plus she takes care of a child of a friend who is incarcerated. She has a brother in prison.

What was apparent throughout the case was the readiness of Nathaniel's mother to embrace the role of victim. The system had failed her, she said. She did not seem to recognize that she, perhaps, had failed her son. After all, she brought this child into the world. Who was watching him or putting some restriction on him? His relatives were able to find the time and make the effort to be publicly visible throughout the judicial proceedings, but they were nowhere to be seen when he was creating havoc in the neighborhood. In a letter in the *New York Times*, a physician from West Bloomfield, a suburb of Detroit and one of the wealthiest in the country, blamed Michigan's governor, John Engler, for pushing welfare mothers into the workforce.[25]

## The Miranda Warning

With police wanting to question Nathaniel, his mother signed a form waiving his Miranda rights—the right to remain silent and to have an attorney present during questioning. Nathaniel signed too, and confessed, although defense attorneys later argued that he could not have understood the Miranda warning. If his mother had not been present, he conceivably could have claimed a "Mama Miranda" warning, a right to see his mother.

In Michigan, the opinion in *People v. Givans*[26] sets forth the factors a court should consider in deciding whether or not a statement from a juvenile was properly taken, including a requirement that the offender's parent or guardian be present. Nathaniel's

mother was at his side the entire time he was being advised of his rights. During the police interview, Nathaniel said he was "just shooting at trees" and "I guess I just hit somebody." He said he saw people walking outside the store. He was charged with first-degree murder, attempted murder, and two felony-firearm counts. Days before the fatal shooting, he told friends he was going to kill someone.

## Feiger to the Rescue

Just as the trial was to begin, and with Court-TV appearing on the scene, attorney Geoffrey Feiger swooped in, like Superman to the rescue, and took over the defense *pro bono*. The *Detroit News* carried a page 1 headline: "Feiger bursts in to teen's defense."[27] "If ever a trial was made to order for Geoffrey Feiger, this is it," wrote Pete Waldmeir, veteran columnist of the *Detroit News*. "All the elements are there: an accused child, national TV exposure, racial overtones."[28] Feiger immediately brokered the "60 Minutes" interview (Daniel Bagdale, who had been representing Abraham for two years, had denied all requests for interviews). "Whatever you think of his motives," said Jack Lessenberry of the Wayne State University School of Journalism, "Feiger was the only powerful person to take a stand for this powerless kid."[29] Well known for his "Trump-size" ego, Feiger said to the prospective jurors, "You know who I am. I do not need to introduce myself." To be sure, if one of them had indicated that they did not know him, he would have been devastated.

Feiger came into the national spotlight representing Jack Kevorkian, the assisted suicide crusader. He made another splash when he offered tongue-in-cheek to defend President Clinton in the Lewinsky affair and again when he made a bid in 1998 for the governorship of the state of Michigan. In April 1999, he won a 25-million dollar judgment against Warner Brothers in the Jenny Jones case. He represents the family of 1 of 12 students slain in the massacre in Littleton, Colorado, and has filed a wrongful death lawsuit against the gunmen's parents. He has obtained several multimillion dollar awards against hospitals in malpractice cases. He studied theater in undergraduate college, and he effectively uses his talents in playing to a jury. He sets his own rules in the courtroom, and he usually gets away with it.

## Rulings on Competency

In Oakland County Family Court, the case was assigned to Eugene Arthur Moore, an experienced and highly regarded juvenile court judge. At the outset, in legal circles, he confided that even in the face of a jury verdict of first-degree murder he would not sentence Abraham to prison, but he would not inform the jury of the consequences of its verdict. It is a general principle that judges do not inform juries of the consequences of their verdict. In many jurisdictions, and at one time in Michigan, an exception was made in cases involving the insanity defense. Because of popular belief that insanity aquittees go completely free, juries would be reluctant to return a verdict of not guilty by reason of insanity (NGRI), so at the option of the defendant, they could be informed that commitment would follow an NGRI verdict.[30]

There was a lengthy legal battle to exclude Nathaniel's confession on the ground that he did not understand *Miranda*. Judge Moore threw out the confession but was reversed on appeal. The Michigan Court of Appeals ruled the confession admissible.[31] The Michigan Supreme Court denied an appeal, and U.S. Supreme Court Justice John Paul Stevens denied an emergency request to hear the matter. Judge Moore said he had considered the evaluations of two psychologists who pegged Nathaniel's learning and emotional ability at age six to eight. "I'm satisfied he did not know the meaning of the statements," Judge Moore had declared, "or understand the consequence of what he said."

In ruling the confession admissible, the Michigan Court of Appeals said, "We find it a matter of great significance that defendant's mother was present and participated in the entire *Miranda*-waiver process. Parents normally have the duty and authority to act in furtherance of both the physical and legal needs of their minor children. This responsibility includes deciding whether the minor will undergo medical treatment, deciding what school the minor will attend, signing contracts for or on behalf of the minor, and assisting the minor in deciding whether to waive *Miranda* rights."[32]

What of competency to stand trial? In a footnote, the Michigan Court of Appeals commented, "[N]ot at issue before this court is whether defendant should be tried as an adult or a juvenile. Although the prospect of trying a person of defendant's age for first-

degree murder as an adult invites great controversy, we express no opinion regarding this aspect of the case."[33]

During the two years awaiting trial, while the appeals were taking place, Abraham was held at Children's Village, a secure juvenile detention facility. Bagdale, who initially alone defended Abraham, filed an unsuccessful motion that sought to dismiss the case "based on the fact that the young person in front of the court today is not the same person as two years ago, and the jury will not be able to see what he was like then." When Abraham committed the crime in 1997, he was small, but two years later, at age 13, he had grown considerably. He was a less sympathetic figure. The trial had been delayed because of the appeals regarding competency to confess and competency to stand trial. The argument was reminiscent of that made in cases of accused persons who plead insanity and are on medication at the time of trial. There it is claimed that their demeanor is not like that at the time of the offense and would mislead the jury.[34]

What of the criteria for triability set out by the U.S. Supreme Court in *Dusky v. United States*?[35] In numerous studies, psychiatrists and psychologists have done empirical studies on "competency" in various contexts, but the practical utility of these studies in the legal setting is questionable. Competency is not independent of the facts of the particular case, and the concept is often used at law as a ploy to reach a desired result. For whatever it may be worth, among the most extensively researched issues in recent decades has been that of competency to stand trial. Psychometric measures of triability have attempted to translate the criteria in *Dusky* that the accused must have a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and have a "rational as well as factual understanding of the proceedings against him," into psychological and behavioral "functions" or competency abilities.[36] Not surprisingly, as in other cases, the studies were of no moment in deciding Abraham's triability.

Judge Moore rejected the argument that Abraham was too young to be triable as an adult. Two independent psychological examinations concluded that he had the mental capacity to aid in his defense, but during the trial he looked quizzically at his attorneys. Every day he asked them, "When can I go home?" During the course of the trial, he read *Action* comic books and drew pictures of Superman on a yellow legal pad. A trial judge is supposedly obliged to raise the issue of triability *sua sponte* at any time during the proceedings when a "bona fide doubt" appears as to the defendant's competency.[37] Nationwide, more often than not, when a minor age 14 to 16 is bound over to the criminal court, the minor will be returned to the juvenile court on the ground of incompetency to stand trial.

In the "60 Minutes" interview, under questioning by correspondent Ed Bradley, Abraham appeared to understand little of the legal process swirling around him. When asked if he understood that the prosecution has to prove its case beyond a reasonable doubt, his answer was "not really." When Bradley asked what he thinks the term means, he said, "She has to prove me guilty with a big explanation," referring to assistant prosecutor Lisa Halushka. The judge's job, he added, is "just to sit there."

Under the 1996 law, although tried as an adult as we have noted, Abraham was tried in family court; he was not transferred to criminal court, as is done in the case of minors over age 14. Abraham could not have found a judge more sympathetic to him than Judge Moore. Even with a conviction, the judge could have done anything he wanted, including returning him home. Hence, the triability issue had less significance than it would in a trial held in a criminal court.

## Expert Testimony at Trial

At the trial, six mental health professionals gave expert testimony on Abraham's criminal responsibility, with only two of them having interviewed him. The five defense experts all concluded that he did not have the mental ability to concoct a murder plot. "He's not very smart. He is operating on the level of a six-year-old. He has no ability to control his impulses," said child psychiatrist Thomas Gaultiere, who reviewed Abraham's medical record; "his level of understanding is at a very, very primitive level." "Nate does not have the capacity to carry out a plan," said Dr. Margaret Stack, a psychologist with the Michigan State Forensic Center, who examined Abraham. Michael Abramsky, a psychologist who frequently serves as an expert, testified that children at age 11 are still developing a moral code and that Abraham could not have understood the consequences of his actions. Abraham, he said, was a frightened child raising himself on the streets who began acting aggressively as a means of survival. Psy-

chiatrist Gerald Shiener told the jurors that 11-year-old children lack the mental capacity to form the intent necessary to plan and carry out first-degree murder. "A child that age, " he said, "cannot understand the full effects of what a weapon might do, and the consequences." He said that his review of the test and assessments of Abraham show the boy was functioning on the intellectual and emotional level of a six- to eight-year-old when he was 11.

In cross-examination, the prosecutor pointed out that Abraham appeared to be able to plan, he talked about the shooting beforehand, he obtained bullets, he loaded the gun, and he shot it. For the prosecution, psychologist Lynne Schwartz, who had examined Abraham in 1998, testified, "He knew what bullets were for. He did load a gun. He did shoot. The best way to gauge whether someone has the capacity to do something is look at what they do."

The defense contended that the killing was a freak accident, that Abraham was shooting at a clump of trees and the bullet ricocheted and killed Greene. The ricochet theory was supported by Macomb County Medical Examiner Werner Spitz. Oakland County Medical Examiner, L. J. Dragovic, called the idea "absolute nonsense." The day of the fatal shooting, with a rifle stolen in a burglary, Abraham shot at street lights and missed one bystander before hitting Greene.

## Jury Nullification

In view of the controversy swirling over the issue of prosecuting minors as adults, and not being instructed on the consequences of a guilty verdict, would the jury nullify the law? Would they blame the system that failed Nathaniel Abraham? The jury could not render a verdict against the system, but it could send a message by returning a verdict of not guilty or guilty of a lesser crime. As we know, juries can return a verdict contrary to the law; they do not have to give a reason for their decision. Returning a verdict contrary to the law is known as jury nullification, sometimes called "jury justice," and it often happens (notably in the District of Columbia in drug-related cases).

Jury nullification was the aim of Geoffrey Feiger, who, it may be remembered asked jurors to disregard the law in the trial of Jack Kevorkian. In the Kevorkian trial, the Wayne County prosecutor in a pretrial motion prevailed upon the trial judge to enter an order barring Feiger from talking about nullification during the trial. However, Feiger's pretrial statements reported in the press and television made prospective jurors aware of it and put it at the forefront of their consciousness, as did Feiger's closing arguments in the Kevorkian case and in the Jenny Jones case.

Before the 19th century, juries were unfettered in nullifying the law, because judges would not set aside a jury verdict. Jurors were expected to nullify a law if their consciences demanded it. They were deemed to be performing a vital function, standing firm for the individual against tyrannical government. The Founding Fathers argued passionately for unrestrained power of the jury. It is to be remembered, however, that at that time only "gentlemen" served as jurors. The poor, blacks, and women were excluded. The constitutional fathers did not trust ordinary people.[38]

Following the Civil War, as juries began to be selected from "the rabble and riffraff," a new view of jury power took hold. In 1895 in *Sparf and Hansen v. United States*,[39] the majority of the United States Supreme Court, in a 56-page opinion written by Justice Harlan, held that the jury is bound, in criminal as in civil cases, to follow the judge's instructions on all matters of law, and they were not to be told of their power of nullification. But in a dissenting opinion of some 73 pages, Justice Gray said it would be preferable, historically and politically, to inform the jury that it had a right as well as the power to disregard the court's instruction. The meaning of the rule "the facts are for the jury and the law is for the judge," according to Justice Gray, is that it is "the bounden duty of the judge to lay down the law as it strikes him, and that of the jury to accede to it, unless they have superior knowledge on the subject."

The majority opinion in *Sparf and Hansen* is the Supreme Court's authoritative denial of the jury's right, but not of its power, to disregard the judge's instructions. Consequently, because the jury does not have the right of nullification, the judge is not to instruct on its power, and likewise it would be improper for an attorney to argue it. Today, in every courtroom, the judge admonishes the jury: "Ladies and gentlemen of the jury, it becomes my duty as the judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you." Failure of the jury to follow the law as set out by the courts is, of course,

grounds for a judge to reverse the jury's verdict, but an acquittal in a criminal case is final.

Although not informed by the judge, jurors know about nullification either from general knowledge or by argument of defense counsel, but perhaps not in these exact words. In criminal cases, defense counsel in opening and especially closing argument, as well as throughout the trial, carry on in ways not possible for the prosecutor. As a matter of practice, the defense is allowed to introduce evidence otherwise inadmissible. Judges are reluctant to call a mistrial, and an acquittal is not appealable.

## Closing Arguments

The tactic of defense lawyers in criminal cases is, more often than not, to put the jury in a fog, as was done in the O.J. Simpson case, where the jury was utterly bewildered by the DNA evidence. The defense attorneys and experts "blew a lot of smoke." After all, the state has to prove its case "beyond a reasonable doubt," and the fog would create a doubt. Invariably, closing arguments by the defense in criminal cases are like those in a dog bite case in which defense counsel argued: (1) the defendant's dog didn't bite the plaintiff, (2) the plaintiff provoked the dog into biting him, and (3) the defendant didn't own the dog. In the Abraham case, Feiger contended in closing argument that Abraham did not intend or was not capable of intending to kill; and, for the first time, in closing argument he slipped in the contention that the bullet did not come from Abraham's gun (ballistic experts at trial without challenge established that it did come from his gun). He would thus give a rationale to the jury to acquit or bring in a lesser verdict than first-degree murder. His 2.5-hour closing argument was mainly an exhortation for nullification. The state, on the other hand, is precluded from making a "civic duty argument."[40]

Repeatedly during closing argument, sometimes dropping his voice to a whisper, other times raising it to a roar, Feiger beseeched the jury to send a message about prosecuting minors as adults. He said to the jury:

> Why are we going back to a time that never existed before? Why are we brutalizing children? In our history we have never done this before to children. You are the conscience of the community. Stop this! Where have we gone as a people? Children used to be put in mines and worked 18–20 hour days. They were sent to Australia. They were hung. Their necks were broken. Out of that we decided not to brutalize children, because they are children. We seek vengeance now because we feel events are out of control. As we feel less in control, it produces hatred and anger and that results in this type of prosecution. We can collectively stand up and be counted. Be a barrier against government. Strike a blow for freedom. Your verdict will say where we as a people are going. Are we going to act as a civilized people? You have to make the decision. The world is watching what we are doing in Oakland County, Michigan.

The judge instructed the jury, "If prosecutors failed to prove intent, or you feel he suffers from diminished capacity, then you must find him not guilty of first-degree murder." The charge against Abraham was in the first degree, with intent to kill. The jury was advised that they could consider the lesser crime of second-degree murder, which carries up to life in prison, or negligent use of a firearm causing death, which carries up to two years in prison. As Feiger would have it, the judge did not instruct on lesser crimes of manslaughter or negligent homicide. Feiger went all-or-nothing, that is to say, the jury was either to convict Abraham of an intentional crime or return a not guilty verdict, thinking that the jury would not find him guilty of an intentional crime.[41]

During the course of deliberation, the jury asked to see exhibits and they asked for a ruler and paper, apparently to measure or perhaps map out the trajectory of the bullet. The judge denied that request, as jurors are prohibited from conducting their own inquiries and must rely on the evidence presented. Then the jury questioned the judge about elements needed to convict or acquit Abraham of second-degree murder. A conviction for second-degree murder requires that a defendant must have intended a high risk of death or great bodily harm. In a note sent to the judge, they asked, "Does 'intended to cause high risk of death/harm' infer that the defendant knew the consequences of his actions?" The judge told them to rely on his instructions to them regarding the law. Empirical studies have found that instructed jurors have no better grasp of the law than uninstructed jurors.[42] Judges adhere to their boilerplate instructions because they may be reversed by what is said in an untested or informal instruction.

The jury returned a verdict of second-degree murder but found Abraham not guilty of firearm possession. Feiger called the verdicts inconsistent and would appeal, but compromise verdicts are a common and accepted practice. Quite often, juries will find a defendant guilty on some counts of an indictment but not on others, although the findings may

not be consistent. Bargaining or negotiating is a fact of life. Juries are allowed to compromise and settle on a lesser penalty. Lenity is a prerogative of the jury.[43]

## Posttrial Discussion

Feiger claimed that race played a role in the prosecution and conviction of Nathaniel. He claimed Nathaniel would have never been charged with murder in neighboring Wayne County, which encompasses Detroit and is heavily black.[44] Oakland County is only eight percent black, and was settled in the 1960s and 1970s mainly by whites fleeing Detroit. There was only one black person, an elderly man, on the jury, which was made up of seven women and five men. The verdict, as it had to be, was unanimous.

Representing the North Oakland National Association for the Advancement of Colored People (NAACP), the American Civil Liberties Union (ACLU), and the Black Law Student Alliance at the University of Michigan Law School, a group of about three dozen people rallied at the courthouse to protest the verdict. One of the protesters wrote a poem for the rally called "The Boy Without a Smile," which stated that the system failed Nathaniel, but prison was not the solution. "We are at a critical juncture in this country," said the executive director of the Michigan ACLU. "We are at a place where we either turn back to the land of Charles Dickens or we move forward with compassion and wisdom as we deal with the real and difficult problems of youth violence." Feiger said, "We've locked up an entire generation of young African-American men. Now they're trying to lock up an entire generation of African-American youth."

The Abraham case began as a *cause célèbre* about the prosecution of minors as adults, but with the conviction it became a racist *cause célèbre*. Many commentators said that the law had been used to single out blacks. Trevor Coleman, a *Detroit Free Press* African-American editorial writer, said: "Nate Abraham is a living, breathing reminder of the arbitrary nature of black folks' existence in this country. . . . Despite Abraham's victim being a young black man and his lawyers being white males, the dirty little secret—the unspoken truth about this case—is that it is dripping with racial implications. The battle over Nate Abraham's future, ironically, is yet another battle over our own tortured racial history."[45]

The Reverend Al Sharpton, Martin Luther King III, and others from around the country joined the protest.[46] "Let's not close out this century by locking up our babies," shouted Sharpton of the National Action Network, "it's Nathaniel Abraham today. It could be your baby or my baby tomorrow." "I believe if my father were here, he would be in the forefront of this issue," said King, president of the Southern Leadership Conference.

Prosecutors did not attend the rally but said they were dismayed by the message. "It is unfortunate, because it is our opinion that this is not a race issue," said the chief assistant prosecutor.[47] While this was taking place, Abraham, awaiting sentence at the juvenile detention center, was engaged in "inappropriate and sexually delinquent behavior" with another 13-year-old boy.[48]

At no time did Nathaniel Abraham show any remorse or recognition of the harm that he had done. He did not say anything like, "I want to undo what I've done." His wish was to be released. After two years of depending on lawyers to decide his fate, he wants to be one. "I want to go to law school," he said on "60 Minutes." "Why?" asked Ed Bradley. "Because they make a lot of money," Abraham replied. He earlier had indicated he wanted to be a basketball player. His conviction notwithstanding, he could well be admitted to a law school.

Should Abraham be diagnosed as a sociopath? Sociopathy begins early in life, but the American Psychiatric Association's *Diagnostic and Statistical Manual* states that the diagnosis of "antisocial personality disorder" should be given only to an individual who is at least age 18 years. Some sociopaths, generally milder cases, may remit during the late teens or early mid-twenties. In other instances, sociopathic behavior persists into early middle age and then remits. Some sociopaths never change. Attempts to explain remissions have been based on hypothetical maturing or on "burn-out."

In posttrial interviews, the jurors said that they struggled in separating their emotions and the law. It was, they said, a gut-wrenching experience. They deliberated for 17 hours on four separate days. A few members of the jury spoke briefly about their deliberations. Of the testimony of the five psychologists and psychiatrists who said that Nathaniel Abraham was not smart enough, old enough, or cunning enough to murder somebody, the jurors said that they took the expert testimony into consideration,

but they mostly relied on their experiences dealing with 11-year-olds, the age Abraham was when he killed Ronnie Greene. "We gave Nathaniel every benefit of the doubt," said the jury foreman. "We came to the conclusion that someone that age can form intent, though we had doubts that the actual intent was to kill. We came to the conclusion that the gun doesn't raise up automatically. There was an intentional action." Another juror said, "He had a gun, loaded it and shot. Then there was a confession." The jury dropped the first-degree murder charge, finding insufficient premeditation. Another juror said that they were unaware of Nathaniel's history of run-ins with the police.

Neighbors for the most part were relieved by the verdict. "The whole neighborhood can rest easy now," said a neighbor who had been shot at hours before Nathaniel killed Greene.[49] In not the best of all possible worlds, the Oakland County jury was commended for seeing through the defense attorney's presentation and doing its duty.[50] As was expected, the prosecution requested a blended sentence, ordering Nathaniel into a juvenile facility until he is 21, if not sooner; at that time his progress would be reviewed, and he would then be released or sent to an adult prison. Judge Moore postponed the sentencing for two months, ostensibly to await reports of psychological testing, but apparently to let emotions calm.[51]

## Sentencing

The day of sentencing was marked by hundreds of protesters, including Reverend Al Sharpton and others from New York, who circled the courthouse chanting "Free Nathaniel" and "No justice, no peace" as African drums played in the background. The protesters were relieved upon hearing the sentence. Judge Moore did not sentence Abraham to prison nor did he impose a blended sentence as requested by the prosecution. Instead, he ignored the law adopted in 1996 allowing youngsters under age 14 to be charged as adults. The judge sent Abraham to a juvenile facility where he will remain, as under the prior law, until he reaches the age of 21, at which time he will be freed regardless of whether he has been rehabilitated.

In a 20-minute speech, the judge called Abraham a symbol of society's failures and called for national and local juvenile justice reform. He called the case a wake-up call that our children are in trouble. "The safety net of a delayed sentence removes too much of the urgency," he said. "We can't continue to see incarceration as a long-term solution." The judge exhorted state officials to improve the state's system for handling juvenile offenders. "I urge the Legislature," the judge said, "to lean toward improving the resources and programs within the juvenile system rather than diverting more youth into an already failed adult system."[52]

## Conclusion

Judge Moore struck back at the application of the 1996 law by sentencing Abraham to a youth training facility until his 21st birthday. The judge supported the adoption of the law but did not believe it should be applied to someone as young as Abraham. The challenge of rehabilitation (or, properly speaking, "habilitation") was put to the rehabilitation workers who, if they fail, will be blamed. Rehabilitation, however, is a possibility when a youngster is suffering from emotional conflict, but sociopathy will not likely be changed. At no time did Abraham give any indication of remorse or empathy, and at the facility his sociopathy will be reinforced by other offenders.

Abraham and his family view themselves as victims of society, and to an extent they are right; but when we see ourselves as victims, there is little hope for change because the problem remains "out there." With a guarantee that he will be released at age 21, there is no motivation to change—but is change even possible? When bonding or empathy is not developed in early childhood, it is too late, in most cases, to remedy the situation, and society does not have the resources to bring about such change even if it were possible.

To account for dysfunctional individuals like Nathaniel Abraham, there is plenty of blame to pass around. That is the lesson of the Abraham case.

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2. Mich. Pub. Acts 1923, Nos. 105, 106; amending Act 325 of Laws of 1907 that had a cut-off age of 17

3. Mich. Pub. Act 409 (1996)
4. "60 Minutes" segment, CBS television network, aired Nov 7, 1999
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13. 387 U.S. at 18, 19, 26, 28
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