

WHEN JUVENILE DELINQUENTS ARE TREATED AS ADULTS:
THE CONSTITUTIONALITY OF ALABAMA'S AUTOMATIC
TRANSFER STATUTE

In the past year, incidents of juvenile violence have shocked the nation time and time again. Incidents drawing the most attention have been those which have taken place on school grounds and have involved multiple victims. In March of 1998, a thirteen-year-old and an eleven-year-old opened fire on their schoolmates and teachers, killing four little girls and one teacher.¹ In December of 1997, a fourteen-year-old in West Paducah, Kentucky, killed three students.² In Pearl, Mississippi, a sixteen-year-old stabbed his mother to death before going to his school and killing two others.³ These violent acts by juveniles undoubtedly will focus national attention on the laws concerning juvenile offenders. Juveniles are handled differently from state to state;⁴ however, had all three of these acts of violence occurred in Alabama, what would become most obvious about Alabama's system of dealing with juvenile offenders is the disparity in how juveniles of different ages are treated.⁵

Had each of these acts of juvenile violence occurred in Alabama, the results would have been as follows: the eleven-year-old and thirteen-year-old would not be eligible to be tried as adults;⁶ upon petition by the prosecutor, the fourteen-year-old might be transferred from juvenile court to circuit court after a full hearing on the matter by the juvenile court referee;⁷ the sixteen-year-old would be transferred automatically to the

1. Marlon Manuel, *Arkansas School Ambushed; Boy Accused of Killing 4, Wounding 11 Said to Be Upset Over Breakup*, THE ATLANTA CONST., Mar. 25, 1998, at A1.

2. Victoria Rainert, *Toward the Root of the Evil*, TIME, Apr. 6, 1998, at 38.

3. *Id.*

4. JUSTINE WISE POLIER, JUVENILE JUSTICE IN DOUBLE JEOPARDY: THE DISTANCED COMMUNITY AND VENGEFUL RETRIBUTION 29 (1989).

5. See ALA. CODE §§ 12-15-34, -34.1 (Supp. 1998).

6. See *id.* § 12-15-34.

7. See *id.* § 12-15-34(a).

criminal court without the benefit of a hearing on the matter.⁸ These results may leave some wondering whether Alabama is tough enough on juveniles who commit heinous crimes. However, when viewed from the perspective of the juveniles themselves, these results raise an issue of greater concern: whether all juveniles are being granted the rights which they are constitutionally guaranteed.

I. INTRODUCTION

There was no such thing as juvenile court at common law, and juvenile courts did not come into being in this country until the end of the nineteenth century.⁹ Juvenile courts were created for the purposes of separating juvenile delinquents from adult criminals and putting them on the path to rehabilitation.¹⁰ Indeed, one of the stated goals of Alabama's Juvenile Justice Act is "to provide a program of supervision, care, and rehabilitation" to juvenile delinquents.¹¹

In the 1970s, however, as the juvenile crime rate began to increase dramatically, legislatures across the country responded by enacting statutes which enabled juveniles to be transferred to adult criminal courts.¹² Then in *Kent v. United States*,¹³ the Supreme Court held that before a judge makes the decision to transfer a juvenile to criminal court, that juvenile must be afforded procedural due process in the form of a hearing and representation by counsel.¹⁴ In an appendix to the opinion, the Supreme Court suggested eight factors that juvenile court judges should take into consideration before making the decision to transfer a juvenile to criminal court.¹⁵ Across the country state

8. See *id.* § 12-15-34.1.

9. POLIER, *supra* note 4, at 29.

10. *Id.*

11. ALA. CODE § 12-15-1.1(7) (Supp. 1998).

12. POLIER, *supra* note 4, at 29; see also Laureen D'Ambra, *A Legal Response to Juvenile Crime: Why Waiver of Juvenile Offenders Is Not a Panacea*, 2 ROGER WILLIAMS U. L. REV. 277, 280-81 (1997) (explaining that rising juvenile crime rates in the 1970s led to an outcry for harsher punishments).

13. 383 U.S. 541 (1966).

14. *Kent*, 383 U.S. at 561.

15. *Id.* at 565-67. The "Kent" factors are:

1. The seriousness of the alleged offense to the community and whether

legislatures adopted these factors, and the result is that most states have substantially similar "judicial waiver" statutes.¹⁶ Typically, these statutes provide that upon a motion by the prosecutor to transfer a juvenile to criminal court, the juvenile court judge will conduct a hearing in which the "Kent" factors are considered.¹⁷

Apparently dissatisfied with the *Kent* decision, a large number of states took additional steps to attempt to curb juvenile crime by enacting what are known as "automatic transfer" or "legislative waiver" statutes.¹⁸ Under these new laws, juveniles of certain ages who commit certain types of crimes do not ever appear before the juvenile court judge but are instead trans-

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 alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Id.

16. Royce Scott Buckingham, *The Erosion of Juvenile Court Judge Discretion in the Transfer Decision Nationwide and in Oregon*, 29 WILLAMETTE L. REV. 689, 693 (1993). Many of the factors to be considered by the court in determining whether to grant a prosecutor's motion for transfer to circuit court which are set out in *Kent* were adopted by the Alabama legislature and appear in section 12-15-34 of the Alabama Code. See *infra* note 25.

17. D'Ambra, *supra* note 12, at 284. Alabama's juvenile transfer statute is typical. See ALA. CODE § 12-15-34 (Supp. 1998).

18. D'Ambra, *supra* note 12, at 284-85.

ferred automatically to criminal court.¹⁹ These statutes circumvent the judicial hearing required by *Kent* by taking the transfer decision out of the juvenile court judge's hands altogether.²⁰ The result is that juveniles are being transferred to criminal courts without being afforded the protections of due process. However, courts are upholding automatic transfer statutes because they are facially distinguishable from judicial waiver statutes, the only type of statutes specifically addressed by *Kent*.²¹

II. ALABAMA'S STATUTORY SCHEME

Alabama's statutory scheme for juvenile proceedings grants the juvenile court "exclusive original jurisdiction of proceedings in which a child is alleged to be delinquent"²² A child is defined as anyone who is under eighteen or under nineteen and appearing in court "for a matter arising before that individual's 18th birthday."²³ There are two ways in which a child accused of a criminal act may be transferred from juvenile court to circuit court. First, the prosecutor may petition to have a child who is fourteen or older at the time of the conduct charged transferred to circuit court.²⁴ In this situation the juvenile court conducts a hearing and considers a variety of statutorily mandated factors in determining whether the child should be transferred out of the juvenile court's jurisdiction.²⁵

19. *Id.* ("Recently, many state legislatures have revised their respective juvenile codes in order to increase penalties for juvenile criminals, including transfer into the adult correctional system to serve longer sentences under more punitive conditions. . . . Twenty states automatically transfer juveniles to adult court if they commit certain offenses."); see also Buckingham, *supra* note 16, at 694-95 (discussing post-*Kent* changes in transfer statutes).

20. Buckingham, *supra* note 16, at 690, 695.

21. See discussion *infra* Part III.

22. ALA. CODE § 12-15-30(a) (1995).

23. *Id.* § 12-15-1(3) (Supp. 1998).

24. *Id.* § 12-15-34(a).

25. *Id.* § 12-15-34(b). The statute provides in pertinent part:

(d) Evidence of the following and other relevant factors shall be considered in determining whether the motion shall be granted:

- (1) The nature of the present alleged offense.
- (2) The extent and nature of the prior delinquency record of the child.
- (3) The nature of past treatment efforts and the nature of the response of the child to the efforts.
- (4) Demeanor.

The second and more controversial way in which a child may be transferred from juvenile court to circuit court was established in 1994 with the creation of Alabama's automatic transfer statute.²⁶ Section 12-15-34.1 of the Code of Alabama provides that anyone who has reached the age of sixteen and is charged with a certain enumerated felony will not come under the jurisdiction of the juvenile court but will be "charged, arrested, and tried as an adult."²⁷

Hypothetical examples effectively demonstrate the practical inequities of the automatic transfer statute. Suppose child A, aged sixteen, and child B, aged fifteen, are both charged with first degree robbery. Child B will fall under the jurisdiction of the juvenile court unless and until the juvenile court referee decides that the child should be transferred to the jurisdiction of

(5) The extent and nature of the physical and mental maturity of the child.

(6) The interests of the community and of the child requiring that the child be placed under legal restraint or discipline.

Id. § 12-15-34(d).

26. Act of Apr. 14, 1994, No. 94-481, 1994 Ala. Acts 798 (codified as amended at ALA. CODE § 12-15-34.1 (Supp. 1998)).

27. ALA. CODE § 12-15-34.1(a) (Supp. 1998). The enumerated felonies are as follows:

(1) A capital offense.

(2) A Class A felony.

(3) A felony which has as an element thereof the use of a deadly weapon.

(4) A felony which has as an element thereof the causing of death or serious physical injury.

(5) A felony which has as an element thereof the use of a dangerous instrument against any person who is:

a. A law enforcement officer or official.

b. A correctional officer or official.

c. A parole or probation officer or official.

d. A juvenile court probation officer or official.

e. A district attorney or other prosecuting officer or official.

f. A judge or judicial official.

g. A court officer or official.

h. A person who is a grand juror, juror, or witness in any legal proceeding of whatever nature when the offense stems from, is caused by, or is related to the role of such person as a juror, grand juror, or witness.

i. A teacher, principal, or employee of the public education system of Alabama.

(6) Trafficking in drugs in violation of Section 13A-12-231, or as the same may be amended.

Id.

the circuit court.²⁸ The referee cannot make such a decision until a full hearing on the matter takes place,²⁹ a hearing in which child *B* is represented by counsel.³⁰ On the other hand, child *A*, regardless of his circumstances, will be treated as an adult.³¹ What's more, even if child *A* pleads guilty to a lesser offense or is convicted of a lesser included offense, he will still be sentenced as an adult because of his age, whereas, had he originally been charged with a lesser offense, he would have been afforded the protections of juvenile court.³²

Clearly then, Alabama's automatic transfer statute raises both equal protection and due process concerns, as well as concerns over the role of the prosecutor. If, in the wake of the recent explosion of multiple killings committed by juveniles, the Alabama Legislature should turn its attention to Alabama's statutory scheme for juvenile court jurisdiction, it should consider carefully the impact that the current scheme has on the rights of juvenile defendants. Furthermore, while neither the Eleventh Circuit nor the Alabama Supreme Court has addressed Alabama's automatic transfer statute, it seems inevitable that both courts will be presented with the issue of the statute's constitutionality in the near future. Across the country, these statutes are routinely being met with constitutional challenges,³³ and as one commentator notes: "Practically all of these challenges have been unsuccessful, but the efforts persist because of the profound impact that adult treatment may have on juveniles."³⁴ While it is likely that the Eleventh Circuit and the Alabama Supreme Court may follow the trend set by courts which have upheld the constitutionality of automatic transfer statutes,³⁵ there is ample reason to question the decisions in those cases, and with regard to Alabama's automatic transfer

28. See *id.* § 12-15-34.

29. *Id.* § 12-15-34(b).

30. *Id.* § 12-15-63 (1995). In addition to granting juveniles the right to counsel, section 12-15-63 gives the court the power to appoint counsel if the child faces possible incarceration and if justice seems to demand it. ALA. CODE § 12-15-63 (1995).

31. See *id.* § 12-15-34.1 (Supp. 1998).

32. See *id.* § 12-15-34.1(a)(7), (b).

33. Robert E. Shepard, Jr., *Challenging Change: Legal Attacks on Juvenile Transfer Reform*, CRIM. JUST., Fall 1997, at 55.

34. *Id.*

35. See discussion *infra* Part III.

statute in particular, there is ample reason to distinguish Alabama's statute from those which have been upheld.

III. THE FEDERAL PRECEDENT

In analyzing the constitutionality of Alabama's automatic transfer statute, it is necessary to consider the development of the case law in the federal circuit courts. There are five federal cases concerning the constitutionality of statutes that allow for criminal court jurisdiction over a juvenile despite the absence of a judicial hearing and waiver, and in each, the circuit court upheld the statute.³⁶ Before examining these cases, however, it is important to understand the Supreme Court's decision in *Kent v. United States*³⁷ that a juvenile should not be transferred out of juvenile court to face prosecution as an adult until the court has afforded the juvenile a hearing that comports with constitutional due process requirements.³⁸

In *Kent*, a juvenile aged sixteen, was transferred from the jurisdiction of the juvenile court to the criminal court for the District of Columbia pursuant to a statute which, in the case of felonies or offenses punishable by death or life imprisonment, allowed the juvenile court judge, "after full investigation," to waive jurisdiction and order that the child be tried as an adult.³⁹ The statute did not require a hearing on the waiver issue, nor did it set out standards for the judge to follow in making the waiver decision.⁴⁰ Without reciting the factors considered or the reasons for his decision, the juvenile court judge in *Kent* merely issued an order which transferred Kent from the jurisdiction of the juvenile court to the jurisdiction of the district court.⁴¹

The Supreme Court found Kent's transfer invalid because "there is no place in our system of law for reaching a result of

36. See *infra* note 93 and accompanying text.

37. 383 U.S. 541 (1966).

38. *Kent*, 383 U.S. at 541.

39. *Id.* at 547-48 (quoting D.C. CODE § 11-914 (1961)).

40. *Id.* The statute provided that waiver was a matter of judicial discretion, subject only to "a full investigation" by the court. *Id.*

41. *Id.* at 546 ("[The juvenile court judge] made no findings. He did not recite any reason for the waiver.").

such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.”⁴² The Court determined that Kent’s right to come under the jurisdiction of the juvenile court system was a special right, statutorily created, which entitled Kent to “certain procedures and benefits,” among them the right to a hearing prior to the waiver decision.⁴³

Congress responded to the decision in *Kent* by changing the District of Columbia’s statutory definition of “child” so that it explicitly excluded individuals between the ages of sixteen and eighteen charged with certain enumerated offenses.⁴⁴ When the defendant challenged the statutory definition of “child” in *United States v. Bland*,⁴⁵ the United States District Court for the District of Columbia held that the statute was unconstitutional in that it allowed the determination that a child be tried as an adult to be made without the protection of procedural due process.⁴⁶ On appeal, however, the United States Court of Appeals for the District of Columbia reversed the district court and upheld the constitutionality of the statute.⁴⁷

In upholding the constitutionality of the statute, the *Bland* court ignored the *Kent* decision, finding that the case at bar did not involve “waiver” since, under the statutory definition of “child,” an individual between sixteen and eighteen who is charged with one of the enumerated offenses is not a “child” and therefore never comes under the jurisdiction of the juvenile court.⁴⁸ The dissenting opinion characterized this reasoning as “plainly fallacious” and noted that the principles expounded in *Kent* do not rest on mechanical distinctions between taking away existing rights and withholding rights not yet in existence, but rest instead on “the crucially important distinction between the treatment afforded children in an adult court and that granted them in Family Court.”⁴⁹

42. *Kent*, 383 U.S. at 554.

43. *Id.* at 556-57.

44. See *United States v. Bland*, 472 F.2d 1329, 1339-40 (D.C. Cir. 1972).

45. 330 F. Supp. 34 (D.D.C. 1971).

46. *Bland*, 330 F. Supp. at 38.

47. *Bland*, 472 F.2d at 1329.

48. *Id.* at 1335.

49. *Id.* at 1343 (Wright, J., dissenting).

The majority opinion in *Bland* focused on the juvenile defendant's assertion that because the District of Columbia's statutory scheme gave the prosecutor the authority to decide whether to charge a juvenile with an offense which automatically removes him from the juvenile court's jurisdiction, the effect of the statutory scheme was to vest overly broad discretionary powers in the prosecutor to determine through his charging decision who will be treated as an adult and who as a juvenile.⁵⁰ The court rejected the defendant's argument by noting that in a wide variety of circumstances, prosecutors are allowed to "exercise [their] age-old function of deciding what charge to bring against whom," even when the consequences of such a decision are significant.⁵¹ As additional support for its prosecutorial discretion position, the court noted that the provisions of the Federal Juvenile Delinquency Act, allowing the Attorney General the discretion to direct that juveniles charged with certain crimes be tried as adults, had been upheld.⁵²

Shortly after the D.C. Circuit issued its opinion in *Bland*, the Fourth Circuit handed down its opinion in *Cox v. United States*,⁵³ and because Cox was seventeen years old and allegedly committed bank robbery, a federal crime, Cox dealt directly with the Federal Juvenile Delinquency Act.⁵⁴ The court began its analysis of the Act by noting that because there are no independent juvenile courts in the federal system, this case did not involve "the problem of judicial waiver of the primary jurisdiction of a juvenile court to the jurisdiction of a general trial court."⁵⁵ Were that the case, said the court, then certainly a *Kent* hearing would be required prior to the waiver of jurisdiction.⁵⁶ Just as the *Bland* court did, this court delineated a num-

50. *Id.* at 1335-37.

51. *Id.* at 1336-37. Other significant prosecutorial decisions include: "whether to charge one person but not another possible codefendant; whether to charge an individual with a misdemeanor or a felony; etc." *Bland*, 472 F.2d at 1336-37.

52. *Id.* at 1337 (citing *United States v. Verra*, 203 F. Supp. 87 (S.D.N.Y. 1962)). The Federal Juvenile Delinquency Act applies to juveniles who are charged with federal crimes and grants the Attorney General the discretion to determine whether and when a juvenile should be tried in a federal court as opposed to a state juvenile court. 18 U.S.C. § 5032 (1994).

53. 473 F.2d 334 (4th Cir. 1973).

54. *Cox*, 473 F.2d at 335.

55. *Id.* at 335.

56. *Id.* (explaining that when a juvenile court judge must decide the issue of

ber of circumstances in which the prosecutor is granted broad discretion in prosecutorial decision-making.⁵⁷ The court admitted that from the juvenile's perspective, the "effect and consequences" of the prosecutorial decision to proceed against him as an adult as compared to a judicial waiver decision are the same.⁵⁸ However, the court distinguished our country's long history of requiring due process in judicial proceedings from our history of granting prosecutors broad discretion, stating that "[j]udicial proceedings must be clothed in the raiment of due process, while the processes of prosecutorial decision-making wear very different garb."⁵⁹ Thus, the court concluded that although judicial waiver decisions implicate due process, prosecutorial charging decisions do not.⁶⁰

A significant aspect of *Cox* is that one of the reasons the circuit court upheld a statute granting the Attorney General such broad discretion in deciding whether to proceed against a juvenile as an adult was that the effect of the decision was not absolute.⁶¹ Instead, the Youth Corrections Act, which was in effect at the time of this decision and provided guidelines for sentencing juveniles convicted of federal crimes, required judges to make a post-conviction determination of whether to sentence the juvenile as an adult or a youthful offender.⁶² The court argued:

In substantial measure, therefore, the judge, after conviction, when he has the benefit of information disclosed in the trial and in presentence reports, may extend to the youth an opportunity to gain many of the advantages he would have derived from initial treatment as a juvenile delinquent. To that extent, a decision of the Attorney General to proceed against a youth as an adult is

whether to waive juvenile jurisdiction, "it is clear that the juvenile is entitled to a hearing on the question of waiver and the assistance of counsel in that hearing").

57. *Id.* at 335-36.

58. *Id.* at 336.

59. *Cox*, 473 F.2d at 336.

60. *Id.* Interestingly, when this case came before the Fourth Circuit initially, a majority of a divided panel held that a juvenile was entitled to a hearing prior to the Attorney General's decision to prosecute him as an adult. *Id.* at 334-35. Thus, this opinion was handed down by the majority of the en banc panel, which sided with the dissent in the original hearing. *Id.*

61. *Id.* at 336.

62. *Cox*, 473 F.2d at 336.

not final, for special treatment as a youthful offender who may earn a clearance of his criminal record remains an available and preferred sentencing alternative.⁶³

In *United States v. Quinones*,⁶⁴ another case in which the prosecution proceeded against a juvenile as an adult in the federal court system, the court gave only fleeting consideration to the juvenile's due process and equal protection arguments.⁶⁵ The *Quinones* court elected to follow the holdings of *Cox* and *Bland* that the exercise of the Attorney General's discretion to determine when to prosecute a juvenile as an adult does not require a due process hearing.⁶⁶

The decision in *Russell v. Parratt*⁶⁷ differs only in that the challenged statute was a Nebraska state statute which allowed the County Attorney "unbridled" discretion in determining whether the accused should be tried as an adult or a juvenile.⁶⁸ Without much analysis, the court in *Russell* simply cited and agreed with the holdings of *Bland*, *Cox*, and *Quinones* and established that it is equally as reasonable to grant broad powers of discretion to a County Attorney as to an Attorney General.⁶⁹

The statute most resembling Alabama's automatic transfer statute which a federal court has examined and approved is the Florida automatic transfer statute⁷⁰ challenged in *Woodard v. Wainright*.⁷¹ The challenged statute "automatically divests Florida Juvenile Courts from their normal jurisdiction over juveniles upon the latter's indictment by a grand jury for offenses punishable by death or life imprisonment."⁷²

63. *Id.*

64. 516 F.2d 1309 (1st Cir. 1975).

65. *Quinones*, 516 F.2d at 1312.

66. *Id.* at 1311 (citations omitted) ("We agree . . . that Congress could legitimately vest in the Attorney General discretion to decide whether to proceed against a juvenile as an adult and that the exercise of such discretion does not require a due process hearing.").

67. 543 F.2d 1214 (8th Cir. 1976).

68. *Russell*, 543 F.2d at 1215.

69. *Id.* at 1216.

70. Compare ALA. CODE § 12-15-34.1 (Supp. 1998), with FLA. STAT. ch. 39.02(5)(c) (repealed 1990).

71. 556 F.2d 781 (5th Cir. 1977).

72. *Woodard*, 556 F.2d at 782 (citing FLA. STAT. ch. 39.02(5)(c)).

The *Woodard* court addressed *Kent*⁷³ in greater detail than did any of the previous cases.⁷⁴ However, because the statute considered in *Kent* required a "full investigation" by the court prior to juvenile transfer, the *Woodard* court began by questioning whether a *Kent* hearing is constitutionally required or whether the Supreme Court required it because of the "full investigation" language of the challenged statute.⁷⁵ The court went on to say that even if a *Kent* hearing is constitutionally required in cases of judicial waiver, it is not necessary in the case of automatic transfer.⁷⁶

At the outset, the *Woodard* court agreed with the respondent's argument that "treatment as a juvenile is not an inherent right but one granted by the state legislature; therefore, the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or discriminatory classification is involved."⁷⁷ However, this argument ignores the fact that in *Kent* the United States Supreme Court identified the right to treatment as a juvenile as a "vitally important" right.⁷⁸ The *Kent* Court clearly realized that it was conferring constitutional protections upon a statutorily created right:

It is clear beyond dispute that the waiver of jurisdiction is a "critically important" action determining vitally important *statutory* rights of the juvenile. . . . The Juvenile Court is vested with "original and exclusive jurisdiction" of the child. *This jurisdiction confers special rights and immunities.*

The net, therefore, is that petitioner—then a boy of 16—was by *statute* entitled to certain procedures and benefits as a consequence of his *statutory* right to the exclusive jurisdiction of the Juvenile Court.⁷⁹

Thus, the Supreme Court did not seem to think that statutorily created rights are any less deserving of constitutional protection than other rights.

The *Woodard* court went on to say that it did not think that

73. *Kent v. United States*, 383 U.S. 541 (1966).

74. *Woodard*, 556 F.2d at 783-84.

75. *Id.* at 784.

76. *Id.*

77. *Id.* at 785.

78. 383 U.S. at 556.

79. *Id.* at 556-57 (emphasis added).

juveniles affected by the statute were ever actually given the right to juvenile court jurisdiction.⁸⁰ In essence, the court tried to classify the statute in such a way as to make it similar to the *Bland* statute which expressly excluded individuals charged with certain crimes from the definition of "child," and thereby, from the original jurisdiction of the juvenile court.⁸¹ The court portrayed the statutory scheme in the following way: "Chapter 39, Florida Statutes, grants to certain persons age eighteen or younger the right to be charged and tried as juveniles. The section does not grant that right to persons indicted by the grand jury for crimes punishable by life imprisonment or death."⁸² Additionally, the court argued that even though one provision of the statute grants the juvenile court exclusive and original jurisdiction, the whole statute must be read together, with the result being that the juvenile court's jurisdiction is limited "from the start."⁸³

The argument that the protections of *Kent* are irrelevant when a statute excludes juveniles charged with certain crimes from ever coming under the jurisdiction of the juvenile court was raised in *Bland*⁸⁴ and followed in *Woodard*.⁸⁵ The dissenting opinion in *Bland* aptly recognized that the distinction between transferring a juvenile from juvenile court to criminal court and initially placing a juvenile in the jurisdiction of the criminal court is wholly superficial.⁸⁶ The dissent noted that "[i]n either case, the consequences to the child are precisely the same and, hence, the procedural protections should be identical."⁸⁷ The *Woodard* court, therefore, was as guilty as the *Bland* court of making a transparent attempt to evade the mandates of *Kent*.

Likewise, the *Woodard* court's reliance on federal precedent with regard to analyzing the constitutionality of broad prosecutorial discretion was misplaced. Just as the other federal circuits did, the *Woodard* court upheld the constitutionality of allowing a

80. *Woodard*, 556 F.2d at 785.

81. *See id.*

82. *Id.*

83. *Id.*

84. *United States v. Bland*, 472 F.2d 1329, 1343 (D.C. Cir. 1972) (dissenting opinion).

85. *Woodward*, 556 F.2d at 785.

86. *Bland*, 472 F.2d at 1343 (Wright, J., dissenting).

87. *Id.*

prosecutor broad discretion in deciding whom and how to charge.⁸⁸ The court cited Florida law recognizing the prosecutorial discretion which is "inherent in our system of criminal justice,"⁸⁹ as well as citing the federal court decisions in *Bland*, *Cox*, and *Russell*.⁹⁰ Significantly, however, the court failed to distinguish this case from those federal cases wherein great weight was given to the fact that the Attorney General's decision was not final because of the protections afforded at the sentencing phase by the Youth Corrections Act.⁹¹

Additionally, the *Woodard* court rationalized that some amount of protection against an overzealous prosecutor comes by way of the grand jury indictment:

[I]f the evidence presented does not support an indictment of an offense punishable by death or life imprisonment, presumably no indictment will be issued by the grand jury, and the juvenile will remain under juvenile jurisdiction. This evidentiary requirement constrains the vehement prosecutor who might otherwise attempt to defeat juvenile jurisdiction through a single unsupportable charge of a life-imprisonment offense embedded within a group of supportable charges of lesser offenses.⁹²

However, this protection may be questionable in light of the fact that grand jury proceedings are another area in which prosecutors have historically been granted broad powers which go practically unchecked by the judiciary.⁹³

IV. ALABAMA'S AUTOMATIC TRANSFER STATUTE CONSIDERED IN LIGHT OF FEDERAL PRECEDENT

Ultimately, several of the federal court decisions which have approved statutes giving a prosecutor the power to decide, with-

88. *Woodard*, 556 F.2d at 786.

89. *Id.* (citation omitted).

90. *Id.* (citations omitted).

91. See *Cox v. United States*, 473 F.2d 334, 336 (4th Cir. 1973); *United States v. Bland*, 472 F.2d 1329, 1337 (D.C. Cir. 1972).

92. *Woodward*, 556 F.2d at 786.

93. See Christopher M. Arfaa, *Mechanikal Applications of the Harmless Error Rule in Cases of Prosecutorial Grand Jury Misconduct*, 1988 DUKE L.J. 1242, 1243 ("This institutional restraint, coupled with the prosecutors' dominant role in grand jury proceedings, creates an environment susceptible to prosecutorial overreaching.").

out any hearing on the matter, how a youth will be tried are distinguishable from Alabama's automatic transfer statute. Furthermore, although the Fifth Circuit has upheld an automatic transfer statute which is substantially similar to Alabama's, the opinion in *Woodard v. Wainright* is not without flaw.

In light of *Bland* and *Woodard*,⁹⁴ a threshold question when analyzing the constitutionality of Alabama's automatic transfer statute might be whether a juvenile charged with one of the felonies enumerated in the statute ever actually comes under the jurisdiction of the juvenile court, and whether the effect of Alabama's juvenile court statutes when read all together is that individuals charged with certain felonies fall outside the jurisdiction of the juvenile court from the beginning. Alabama's automatic transfer statute itself does not contain language which speaks to divesting the juvenile court of jurisdiction as the Florida automatic transfer statute did, but rather states simply that individuals of a specific age, charged with specific crimes "shall not be subject to the jurisdiction of juvenile court but shall be charged, arrested, and tried as an adult . . ."⁹⁵ Thus, a plain reading of this statute would suggest that these individuals do indeed fall outside the jurisdiction of the juvenile court from the start. This language, however, is in conflict with the language of section 12-15-30 of the Alabama Code, a preceding statute which grants to the juvenile court "exclusive original jurisdiction" over all delinquent children.⁹⁶

If an Alabama court determines that the effect of section 12-15-34.1 is to transfer a juvenile from the original jurisdiction of the juvenile court to the jurisdiction of the circuit court, there should be something more than a superficial distinction between the judicial transfer of juveniles to circuit court and prosecutorial transfer of juveniles to circuit court before the court holds that the requirements of *Kent* are only applicable to judicial waiver. The essential principle of *Kent* is that due process requires that any determination of whether a juvenile should be tried in juvenile court or criminal court be made only after a full

94. See *supra* notes 44-52, 71-93 and accompanying text.

95. ALA. CODE § 12-15-34.1 (Supp. 1998).

96. *Id.* § 12-15-30 (1995).

hearing on the matter.⁹⁷ This should be so no matter from whence the transfer decision comes.

Furthermore, any argument that under Alabama's scheme juveniles between the ages of sixteen and eighteen who are charged with certain crimes never fall under the jurisdiction of the juvenile court should be recognized for what it is, a transparent attempt to circumvent the essential holding of *Kent* by making it seem that there is no "transfer" at all. Instead of being followed, *Bland* and *Woodard* should be criticized for their attempts to evade *Kent* in this way.

Another issue for consideration is the reasonableness of the prosecutorial power that results from Alabama's statute; in other words, is it reasonable for the district attorney to have the power to determine whether an individual will be granted the privileges of juvenile court jurisdiction or be subjected to the harshness of the adult system? It is important that *Cox* gave considerable weight to the fact that when a juvenile faced prosecution in federal court, the Attorney General's discretion was checked through the operation of the Youth Corrections Act requiring judges to make sentencing determinations pursuant to that act.⁹⁸ Under Alabama's statutory scheme, the procedural protection closest to the Youth Corrections Act provides that an individual who is transferred to the jurisdiction of the circuit court may then petition the court for adjudication as a youthful offender.⁹⁹ Once a defendant has applied for youthful offender status, the circuit court judge must conduct an investigation and examination before determining whether to arraign the defendant as a youthful offender or an adult.¹⁰⁰ However, there are no statutory provisions, such as those found in the judicial waiv-

97. *Kent*, 383 U.S. at 553-54.

98. *Cox*, 473 F.2d at 336.

99. ALA. CODE § 15-19-1(a) (1995). The statute states:

A person charged with a crime which was committed in his minority but was not disposed of in juvenile court and which involves moral turpitude or is subject to a sentence of commitment for one year or more shall, and, if charged with a lesser crime may be investigated and examined by the court to determine whether he should be tried as a youthful offender, provided he consents to such examination and to trial without a jury where trial by jury would otherwise be available to him.

Id.

100. *Id.*

er statute,¹⁰¹ to guide the judge in making that determination, and there is no requirement of a formal hearing on the matter.¹⁰² Thus, it is not clear whether the protections afforded by the right to seek youthful offender status are analogous to the protection afforded by the Youth Corrections Act. Furthermore, the *Cox* court found that pursuant to the Youth Corrections Act, a juvenile has "an opportunity to gain many of the advantages he would have derived from initial treatment as a juvenile delinquent."¹⁰³ Thus, an Alabama court would have to determine whether status as a youthful offender provides a significant number of the advantages that come with treatment in the juvenile court system.

In assessing the constitutionality of putting the fate of juveniles into the hands of prosecutors who have unfettered discretion in their charging decisions, *Woodard* and *Russell* fail to provide guidance. The *Woodard* and *Russell* courts professed to be following *Cox*, but ignored *Cox's* reliance on the Youth Corrections Act as an important safeguard of juvenile rights.¹⁰⁴ Additionally, the check against prosecutorial overreaching suggested in *Woodard*, the grand jury check, is tenuous at best.¹⁰⁵

Even assuming there is a rational basis for allowing prosecutors, through their charging decisions, to affect whether a juvenile is treated as an adult, it is not clear from Alabama's automatic transfer statute that prosecutors will be the only law enforcement officers with the power to affect a juvenile. Because Alabama's statute states that anyone who has reached the age of sixteen and is charged with certain crimes will not come under the jurisdiction of the juvenile court but will be "charged, arrested, and tried as an adult,"¹⁰⁶ the result is that sometimes it is police officers and warrant clerks who make the decision to treat a juvenile as an adult.¹⁰⁷ So, a juvenile who is suspected of committing one of the felonies enumerated in the statute will be handled like an adult even before formal charges are brought by

101. See *id.* § 12-15-34(d) (Supp. 1998).

102. See *id.* §§ 15-19-1 to -7 (1995).

103. *Cox*, 473 F.2d at 336.

104. See *Woodard*, 556 F.2d at 784; *Russell*, 543 F.2d at 1216.

105. See *Woodard*, 556 F.2d at 787.

106. ALA. CODE § 12-15-34.1 (Supp. 1998).

107. See *Price v. State*, 683 So. 2d 44, 45 (Ala. Crim. App. 1996).

way of a grand jury indictment.

V. AN ALTERNATIVE APPROACH

While the overwhelming majority of state courts followed the example set by the federal courts in upholding as constitutional statutes which, under certain circumstances, allow juveniles to be transferred to criminal court without a *Kent*-type hearing,¹⁰⁸ at least one state court took a different stance. In *Hughes v. State*,¹⁰⁹ the Delaware Supreme Court annulled a statutory amendment which provided that "if a child reaches his eighteenth birthday prior to an adjudication on a charge of delinquency arising from acts which would constitute a felony,' the Family Court must automatically transfer the matter to Superior Court."¹¹⁰ The same amendment also effectively prevented a juvenile so transferred from petitioning for a "reverse amenability" hearing, one which is conducted by the Superior Court to determine whether the juvenile should be transferred to the Family Court.¹¹¹ The court found the amendment to be unconstitutional for two reasons. First, the court found that the age distinction in the statute was "patently arbitrary."¹¹² However, the court was much more concerned that the amendment allowed the transfer of a child to criminal court to take place upon a prosecutor's decision with no judicial check on that decision.¹¹³ The court seemed very troubled that "the fate of a child is entirely entrusted—without impartial judicial review—to the charging authority, which unilaterally decides whether to charge a child with a felony or a misdemeanor, without a mechanism to challenge its charging decision or transfer the case to the appropriate forum."¹¹⁴

108. See, e.g., *People v. Thorpe*, 641 P.2d 935 (Colo. 1982); *State v. Angel C.*, 715 A.2d 652 (Conn. 1998); *Lane v. Jones*, 257 S.E.2d 525 (Ga. 1979); *People v. P.H.*, 582 N.E.2d 700 (Ill. 1991); *State v. Perique*, 437 So. 2d 1060 (La. 1983); *In re Wood*, 768 P.2d 1370 (Mont. 1989); *Jahnke v. State*, 692 P.2d 911 (Wyo. 1984).

109. 653 A.2d 241 (Del. 1994).

110. *Hughes*, 653 A.2d at 243 (citation omitted).

111. *Id.* at 247.

112. *Id.* at 253.

113. *Id.* at 247-53.

114. *Id.* at 249.

The Delaware Supreme Court admitted that it had indeed recognized the broad powers of discretion vested in the prosecutor in making charging decisions, but found that where the interests of a child are at stake, such discretion cannot be justified.¹¹⁵ The court expressed its concern as follows:

The State's decision to charge a child with a felony implicates constitutional rights not present in the average charging decision of an adult. The consequences of over-charging an adult are limited. . . . [A] trial buffers any prejudice suffered by the adult by compelling the State to prove the elements of the alleged offense beyond a reasonable doubt. An adult acquitted of an alleged felony offense but convicted of a lesser included misdemeanor offense will be subject to the same penalties as if originally charged with the lesser offense.

Conversely, judicial review of the charging decision is essential for those children who are prosecuted as adults. While over-charging an adult is of little consequence, a groundless felony charge against a child who reaches age eighteen pending trial in the Family Court results in a criminal prosecution with its grave attendant consequences. . . . In view of these consequences, it is unconstitutional to grant unfettered discretion to the prosecution, whose unilateral charging decision can effectively establish the jurisdiction over a child. Some meaningful judicial review into the nature of the charge is essential to the constitutionality of such a scheme.¹¹⁶

The opinion of the *Hughes* court suggests that perhaps the federal court opinions were too quick to endorse broad prosecutorial discretion in the context of charging decisions against children. Perhaps they are flawed in their failure to distinguish the critical effects that prosecutorial decisions regarding children encompass. More troubling is the possibility that as public outcry against children who kill other children increases in response to the country's recent wave of juvenile violence, it seems likely that a prosecutor may put the public's demands for justice ahead of the rights of the individual accused.¹¹⁷

115. *Hughes*, 653 A.2d at 249.

116. *Id.* at 250 (citations omitted).

117. See Shari Del Carlo, *Oregon Voters Get Tough on Juvenile Crime: One Strike and You Are Out!*, 75 OR. L. REV. 1223, 1240 (1996). Del Carlo relies on a leading commentator on juvenile justice to note that "a prosecutor, responding to political

VI. CONCLUSION

The federal circuit courts have time and again upheld statutes which have the effect of placing children in the perilous position of being treated as adults. Indeed, the Fifth Circuit has upheld an automatic transfer statute which is similar to Alabama's.¹¹⁸ Yet, these decisions are flawed in many ways and still leave many questions unanswered. It can probably be assumed that when the Alabama Legislature drafted section 12-15-34.1 of the Alabama Code it recognized that similar statutes had already been upheld and that in all likelihood Alabama's statute would be upheld as well. However, should the legislature begin to reconsider its juvenile court scheme in response to the recent wave of violent juvenile crime, it would serve it well to take a closer look at the cases which seem to support the constitutionality of automatic transfer.

Additionally, because the automatic transfer statute is consistently being questioned by juvenile defendants, it seems likely that at some time in the near future the Eleventh Circuit and the Alabama Supreme Court may have occasion to analyze section 12-15-34.1. It should not be presumed that the Eleventh Circuit would follow the federal court precedent in analyzing Alabama's statutory scheme. Furthermore, it certainly should not be a foregone conclusion that the Alabama Supreme Court would uphold the constitutionality of the statute. Perhaps the Alabama Supreme Court would decide instead to take a closer look at the principles of *Kent*, to reject the reasoning propounded in the federal court decisions, or to follow the example set by the Delaware Supreme Court.

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pressure, is 'more likely to seek transfer of jurisdiction in response to society's demand for retribution . . . [and] less likely . . . to consider the welfare of the accused.'" *Id.* (quoting Barry C. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515, 564 n.155 (1978)). If a leading commentator was concerned about this type of prosecutorial overreaching in 1978, surely there is a significantly greater concern in 1998, when acts of violence committed by juveniles are at the center of society's attention.

118. *Woodard v. Wainright*, 556 F.2d 781, 787 (5th Cir. 1977).