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Is It a Crime to Live in Public Housing - A Proposal to the Illinois General Assembly to Amend the Automatic Transfer Statute, 27 J. Marshall L. Rev. 855 (1994)

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IS IT A CRIME TO LIVE IN PUBLIC HOUSING? A PROPOSAL TO THE ILLINOIS GENERAL ASSEMBLY TO AMEND THE AUTOMATIC TRANSFER STATUTE

INTRODUCTION

Prior to 1989, the juvenile court would automatically transfer juveniles charged with selling drugs on or near any school property from the jurisdiction of the juvenile courts to that of the adult criminal court system.[1] In 1989, the Illinois legislature expanded the safe school zone protection area to include public housing.[2] The legislature took this action in an effort to reduce criminal gang activity in and around public housing projects.[3] As a result of the 1989 amendment, the juvenile court will automatically transfer juveniles to the criminal court system whether they sell drugs near a school or near public housing property.[4] Consequently, the criminal court system no longer treats a juvenile as a delinquent minor under Section 5-3 of the Juvenile Court Act.[5] Instead, the criminal court system will treat the juvenile as an adult. As a result, the juvenile will lose the protection normally afforded a juvenile in the court system.[6]

In *People v. Lawrence*,[7] two black teenagers caught selling

1. 705 ILCS 405/5-4 (7)(a) (1992).

2. 705 ILCS 405/5-4 (7)(a) (1992). The statute states in pertinent part:

> The definition of delinquent minor under Section 5-3 of this act shall not apply to any minor who at the time of an offense was at least 15 years of age and who is charged with an offense under Section 401 of the Illinois Controlled Substance Act while in a school . . . or residential property owned, operated and managed by a public housing agency . . . or on a public way within 1,000 feet of the real property comprising any school . . . or residential property owned, operated and managed by a public housing agency . . . . These charges and all other charges arising out of the same incident shall be prosecuted under the Illinois Controlled Substances Act.

Id.

3. H.R. Rep. No. 155, 86th Ill. Leg. (daily ed. June 15, 1989) (statement of Representative DeLeo).

4. 705 ILCS 405/5-4 (7)(a) (1992).

5. 705 ILCS 405/5-3 (1) (1992). This section defines delinquent minor in the following manner: "[A]ny minor who prior to his 17th birthday has violated or attempted to violate, regardless of where the act occurred, any federal or state law or municipal ordinance." *Id.*

6. See *infra* notes 31-35 and 73 and accompanying text discussing the protections that the juvenile court provides a juvenile.

7. People v. Lawrence, No. 92-CR-4907 (Cook County Crim. Div. Jan. 20, 1993), *rev'd* People v. R.L., No. 75081, 75083, slip op. at 1-8 (Ill. March 29, 1994).

drugs near a public housing project challenged the constitutionality of the 1989 amendment. On January 20, 1993, Judge Brennan Getty, of the Circuit Court of Cook County, held that the Illinois Automatic Transfer Statute (ATS) was unconstitutional.[8] Judge Getty found the statute violated the equal protection clauses of the Fourteenth Amendment to the United States Constitution[9] as well as the equal protection provision of the Illinois Constitution.[10]

This Note discusses the Illinois Automatic Transfer Statute and the constitutional implications raised by the statute. Section I sets forth the historical treatment of juveniles in the criminal justice system since the turn of the century. Specifically, this section focuses on the revolutionary changes that have occurred over the last thirty years.[11] Section II explores the methods courts and legislatures use to transfer a juvenile to the criminal court system.[12] This section includes a discussion of the theory behind legislative waiver statutes similar to the Automatic Transfer Statute.[13] Section III addresses the standards courts use to determine whether or not a statute violates the equal protection clauses of the 14th Amendment and the Illinois Constitution.[14] Section IV analyzes the equal protection implications of the Automatic Transfer Statute in light of these standards. This Note concludes Judge Getty properly ruled the Illinois Automatic Transfer Statute is unconstitutional as a violation of the equal protection clauses of both the United States and Illinois Constitutions. In addition, this Note proposes that the Illinois legislature repeal the 1989 Amendment and

8. *Id.* Just prior to publication, the Illinois Supreme Court reversed the trial court's decision finding the Automatic Transfer Statute unconsitutional. The Supreme Court ruled that the Statute does not implicate a suspect classification and thus only needs to withstand rational relation scrutiny. There is currently pending before the Illinois Supreme Court a motion asking for a stay of mandamus until the U.S. Supreme Court has an opportunity to consider certiorari.

9. U.S. CONST. amend. XIV, § 1. The United States Constitution provides in pertinent part as follows: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

10. ILL. CONST. art. I, § 2. The Illinois Constitution provides as follows: "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." *Id.*

11. See *infra* notes 36-54 and accompanying text for a discussion of the changes in the juvenile court system since the 1960s.

12. See *infra* notes 55-79 and accompanying text for a discussion of waiver statutes.

13. 705 ILCS 405/5-4 (7)(a) (1992). This section provides for an enhanced penalty for any juvenile charged with manufacturing or delivering a controlled substance under section 401 of the Illinois Controlled Substance Act. *Id.* The criminal court system will automatically transfer the juvenile from the jurisdiction of the juvenile court to the jurisdiction of the criminal court. *Id.* See *infra* note 73 and accompanying text for a discussion of the difference between juvenile court jurisdiction and criminal court jurisdiction.

14. See *infra* notes 80-120 and accompanying text for a discussion of the applicable constitutional standards of review.

return the statute to its prior limited purpose of controlling gang activity around school grounds.

I. JUVENILE ADJUDICATION

The current juvenile court systems in the United States[15] are very different from the system originally implemented in Illinois prior to the turn of the century.[16] In 1899, Illinois implemented the first Juvenile Court Act in the United States.[17] Other states used the Illinois Act as a model for creating their own juvenile systems.[18] These acts emerged as the Progressive Movement[19] became disenchanted with a criminal justice system that treated juvenile and adult offenders equally.[20] The result was a separate system that treated juveniles differently. However, since the 1960s, the Supreme Court has altered the juvenile court system to the point where it only slightly resembles the system the Progressives initially established.[21] This section first describes the manner in which the juvenile court came into existence. This section also describes the juvenile court system as it existed until the Supreme Court implemented its changes in the 1960s. Lastly, this section discusses the current juvenile court system.

A. Pre-1960s

Prior to the Illinois Juvenile Court Act of 1899 and its counterparts, the criminal justice system made no distinction between adults and juveniles.[22] The only exception the common law made was that a child under the age of seven could not have the requisite mental intent necessary to commit a crime.[23] Therefore, anyone

15. *See* Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructuring the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 n.1 (1991) (stating all 50 states and the District of Columbia have juvenile courts and providing a listing of the Statute for each).

16. Illinois Juvenile Court Act, 1899 Ill. Laws 132.

17. *Id.*

18. Ainsworth, *supra* note 15, at 1096 (indicating that within 20 years of the Illinois Juvenile Court Act, all but three states had a similar system in place).

19. The Progressive Movement began as a response to a changing America at the turn of the century. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 693 (1991). The urban middle-class created state agencies that would alleviate social ills. *Id.* The agencies corrected these social ills by imposing middle-class values upon the poor and upon immigrants. *Id.*

20. *Id. See also* Ainsworth, *supra* note 15, at 1095-96 (discussing other effects of the Progressive Movement, such as the enforcement of compulsory school attendance laws and the enactment of child labor laws).

21. See *infra* notes 41-54 and accompanying text for a discussion of the effect of Supreme Court decisions on juvenile court proceedings.

22. *In re* Gault, 387 U.S. 1, 16 (1967) (stating that at common law, a child that reached the age of seven years was subject to the same treatment as adult offenders).

23. *Id.*

under seven years old was not accountable for their criminal behavior. However, the common law assumed that anyone over seven years of age was capable to form the intent necessary to commit a crime.[24] As a result, the common law treated every offender over the age of seven identically.

At the turn of the century, Progressive reformers rejected the rigidity courts used to deal with the conduct of children.[25] The reformers envisioned a juvenile court system that focused on the offender rather than the offense committed.[26] In addition, the reformers desired a system that focused on the best interests of the offender.[27] The reformers believed an informal court system that de-emphasized the procedural aspects of the criminal justice system could best accomplish this task.[28] Accordingly, this new juvenile court system ignored many of the procedural aspects often considered to be constitutionally mandated.[29] The courts rationalized the elimination of the procedural obstacles by claiming it was in the best interest of all juveniles.[30]

The new juvenile court system produced an unprecedented relationship between the offender and the court. In order to shield the juvenile, the court system labeled the offender a delinquent[31] when he committed an offense rather than labeling him a criminal. Additionally, the state acted as Parens Patri[32] rather than an ad-

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24. *Id.*

25. *See* Lee E. Teitelbaum, *Youth Crime and the Choice Between Rules and Standards*, 1991 B.Y.U. L. REV. 351, 352 (indicating that juvenile court systems were a rejection of the rigidity of the manner in which criminal courts dealt with children).

26. *Id.* at 360-61. Teitelbaum discusses the idea of the juvenile court founders that the system could be individualized whereby a juvenile judge would look to the best interest of the child and not his actions. *Id.*

27. See Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 324-27 (1991), for a discussion of the original goals of the juvenile court system.

28. *Id.* at 327-31. Forst and Blomquist address the lack of due process rights afforded juveniles as compared to adults and changes made by the Supreme Court to extend those rights to juveniles. *Id.*

29. *See* Teitelbaum, *supra* note 25, at 363. Specifically, notice of charges were often oral. *Id.* For the most part, counsel was not present in most proceedings. *Id.* Most strikingly, the privilege against self-incrimination was not followed since the proceedings were non-criminal and an important aspect of the system was the interplay between the judge and the juvenile. *Id.*

30. *In re Gault*, 387 U.S. at 15-16.

31. Illinois Juvenile Court Act § 1, 1899 Ill. Laws 132. Under this Act, a delinquent minor included "any child under the age of 16 years who violates any law of this State or any city or village ordinance." *Id. See also* Juvenile Court Act of 1987, 705 ILCS 405/5-3 (1) (1992). *See also* Teitelbaum, *supra* note 25, at 362 (stating that under many juvenile codes, a court could not find that a juvenile was delinquent unless the juvenile committed an act which would be a crime in the jurisdiction and he was in need of care or supervision).

32. Parens Patri is defined in the following manner: "'Parent of the country,' refers traditionally to [the] role of [the] state as sovereign and guardian of

versary. Moreover, the adjudication proceedings were more civil in nature than criminal.[33] In effect, the state focused on the best interests of the child.[34] Thus, the system sought to rehabilitate the juvenile, not punish him.[35]

B. Post-1960s

In the early 1960s, criticism of the informal juvenile proceedings began to mount.[36] Modern reformers argued the juvenile system was replete with punitive aspects similar to those of the criminal system.[37] For example, the system empowered juvenile court judges with wide discretion,[38] including the power to incarcerate the juvenile.[39] Accordingly, critics realized there was no real difference between incarcerating a juvenile delinquent and a criminal adult.[40]

In 1967, the Supreme Court addressed the issue of incarcerating a juvenile in *In re Gault*.[41] In that case, a fifteen-year-old juvenile allegedly made lewd phone calls to a neighbor.[42] As a result, a Gila County Arizona sheriff took the juvenile into custody.[43] At the

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persons under legal disability . . . ." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). Courts used this doctrine to justify their intervention into the life of the child. *See* Feld, *supra* note 19, at 695.

33. The idea of treating juvenile proceedings as civil matters emerged because of the many types of children the juvenile court systems handled. Feld, *supra* note 19, at 695. The court handled children who were abused, neglected or dependent. *Id.* It also handled those who were charged with criminal offenses. *Id.*

34. See *supra* note 25-33 and accompanying text for a discussion of the goals of the juvenile court system.

35. *See generally* Franklin E. Zimring, *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 267 (1991) (indicating that the underlying purpose of the juvenile court system is to help the juvenile that comes before the court rather than to punish him).

36. *See* Forst & Blomquist, *supra* note 27, at 327-30 (discussing the criticism that arose in the 1960s and 1970s regarding the juvenile court system).

37. *Id.*

38. *See* Ainsworth, *supra* note 15, at 1099 (stating the legislature gave judges almost limitless discretion when it allowed them to create dispositions which were tailored toward a particular individual).

39. *See* Illinois Juvenile Court Act, 1899 Ill. Laws 132. The act states in pertinent part: "If the child is found guilty of any criminal offense, and the judge is of the opinion that the best interest requires it, the court may commit the child to any institution . . . ." *Id.*

40. *In re Gault*, 387 U.S. at 27. In discussing the incarceration of a juvenile, Justice Abe Fortas noted: "[T]he boy is committed to an institution where he may be restrained of liberty for years . . . . [H]owever euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time." *Id.*

41. *Id.*

42. *Id.* The Court does not state exactly what the juvenile said to the neighbor. *Id.* at 4. However, the Court does note that the comments were of the adolescent, sex variety. *Id.*

43. *Id.*

subsequent juvenile court hearing, the judge ignored many due process rights of the juvenile.[44] The judge ruled the juvenile was a delinquent and committed him to the State Industrial School until the delinquent reached the age of twenty-one.[45] The Supreme Court reversed the decision of the juvenile court judge and stressed that courts must adhere to due process requirements when the possibility of incarcerating the juvenile exists.[46]

In part, the *Gault* Court based its decision on the earlier Supreme Court case of *Kent v. United States*.[47] The Court in *Kent* specifically dealt with a situation in which a juvenile court judge used his discretionary powers[48] to waive jurisdiction and transfer a fourteen-year-old juvenile to the criminal court.[49] As in *Gault*, the juvenile argued that waiver of jurisdiction violated the due process rights of the juvenile.[50] The Court acknowledged that "waiver of jurisdiction is a critically important action determining vitally important statutory rights of the juvenile".[51] Thus, the Court deter-

44. *In re Gault*, 387 U.S. at 1. At the time authorities arrested the juvenile for making lewd phone calls, they did not inform his parents that he had been taken into custody. *Id.* at 5. Neither the juvenile defendant nor his parents received formal notice of a hearing. *Id.* at 6. Instead, they received a short note on plain paper telling them of the time of the hearing. *Id.* The juvenile judge held the hearing in his chambers without the presence of an attorney for the juvenile. *Id.* at 5. At this hearing the juvenile revealed self-incriminating evidence since he had never been advised of his privilege to not reveal the information. *In re Gault*, 387 U.S. at 10. Since the complaining witness was not present, the court did not allow the juvenile to confront and cross-examine her. *Id.* at 7. The court used the unsworn hearsay testimony of a probation officer who had spoken to the complaining witness. *Id.* Lastly, the court did not record the hearing and, therefore, during the habeas corpus appeal, all testimony came from the memories of the trial participants. *Id.* at 10.

45. *In re Gault*, 387 U.S. at 10. The irony of the *Gault* decision is that if the juvenile defendant had been an adult when he committed the same offense, the maximum punishment would have been a fine of $5.00 to $50.00 or imprisonment in jail for not more than two months. *Id.* at 29.

46. *Id.* The Fourteenth Amendment and the Bill of Rights protect children as well as adults. *Id.* at 13. As a result, the Court specifically held a juvenile cannot be found delinquent and ordered to state institution based on unsworn testimony not subjected to cross-examination. *Id.* at 57.

47. 383 U.S. 541 (1966).

48. See *infra* notes 62-68 and accompanying text for a discussion of judicial waiver.

49. *Kent*, 383 U.S. at 542.

50. *Id.* at 562. The police arrested the juvenile defendant for housebreaking, robbery, and rape. *Id.* at 542. The attorney for the defendant knew the prosecution would ask to have the juvenile court waive jurisdiction. *Id.* at 544. In order to prepare for the waiver motion, the attorney filed a separate motion to allow him access to the Social Service file of the defendant. *Id.* at 546. The agency had created the file when the court previously placed the defendant on probation. *Kent*, 383 U.S. at 546. The attorney also motioned the court to order psychiatric care for the juvenile under the jurisdiction of the juvenile court. *Id.* at 545. The juvenile court judge did not make any specific rulings on the motions, nor did he conduct a hearing or state a reason for his decision to waive jurisdiction. *Id.* at 546.

51. *Id.* at 556.

mined that when such an important issue is at stake,[52] a juvenile is entitled to constitutional due process protection.[53] However, the Court did not discard the use of waiver statutes since it believed waiver statutes are designed to subject a juvenile to the procedures of the criminal court.[54] The next section describes the types of waiver available and how the courts implement them.

II. WAIVER STATUTES

Statutory provisions excluding some offenders from the protection of juvenile courts have always existed.[55] The legislators of various states enacted waiver statutes since they did not consider the punitive powers of juvenile courts to be strong enough in some cases.[56] To address these situations, legislatures gave judges discretion to waive jurisdiction in cases where they thought the criminal system was more suitable to handling the juvenile offender.[57] Furthermore, legislatures explicitly denied jurisdiction to the juvenile court when a juvenile had been charged with certain offenses.[58] These provisions reflected the realization that, at times, the goals of the juvenile system[59] were subordinate to the protection of society as a whole. This section will explain the different types of waiver. First, this section will discuss judicial waiver. Judicial waiver allows judges the discretion to make the waiver decision on a case-by-case basis. Second, this section will describe legislative waiver. Legislative waiver occurs when the legislature itself makes a waiver decision and denies this power to judges.

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52. There is a great difference between juvenile court jurisdiction and criminal court jurisdiction in *Kent*. *Kent*, 383 U.S. at 557. If the juvenile court determined the defendant was delinquent, the maximum punishment would have been five years in a state institution. *Id.* Under the criminal law, a court could have sentenced the defendant to death. *Id.*

53. *Kent*, 383 U.S. at 561-62.

54. *Id.* at 565.

55. *See* Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281 (1991) (noting that even the adamant proponents of the juvenile court system realized certain individuals could not be rehabilitated and that society must be protected from these individuals).

56. *See* Zimring, *supra* note 35, at 276 (stating the justification behind all waiver decisions is that the maximum punishment under juvenile court laws is not harsh enough for certain situations).

57. See *infra* notes 62-68 and accompanying text discussing judicial waiver.

58. See *infra* notes 69-79 and accompanying text discussing legislative waiver.

59. See *supra* notes 25-35 and accompanying text for a discussion of the goals of the juvenile court system.

A. Judicial Waiver

There are two methods[60] in which a juvenile court may transfer an offender to the jurisdiction of an adult criminal court.[61] The first method involves the use of judicial waiver.[62] Judicial waiver occurs when a juvenile court judge determines the individual before him should have his case heard in the criminal court.[63] Although at one time a juvenile court judge practically had unlimited discretion,[64] the Supreme Court has recently imposed standards to act as a guide for juvenile court judges.[65] Thus, while juvenile court judges still have the power to waive jurisdiction, statutes now incorporate criteria for judges to consider when making their decisions.

However, critics argue judicial waiver is still too arbitrary.[66] Current statutes list a number of criteria that a judge should take

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60. A third type of waiver provision, the prosecutorial waiver, exists in thirteen states. Bishop & Frazier, *supra* note 55, at 284-85. The legislature allows for concurrent jurisdiction in juvenile and criminal courts. *Id.* at 285. The prosecutor decides in which forum the case will be heard. *Id.* The prosecutor is often given great discretion in making this decision since he must only adhere to certain vague guidelines. *Id.*

One of the main problems people find with this type of waiver is that prosecutors historically have been more interested in retribution than rehabilitation. *Id.* at 283. Thus, quite often, the goals of the juvenile system are not taken into consideration. *Id.* Furthermore, in some jurisdictions, this process is carried out without a hearing, counsel for the juvenile, or any statement for the reason behind the decision. Bishop & Frazier, *supra* note 55, at 287-88. In Florida, when the legislature amended its prosecutorial waiver statute to allow for more prosecutorial discretion, the percentage of cases transferred to criminal court jumped from 2.83% to 8.85% in a single year. *Id* at 288. However, for purposes of this Note, prosecutorial waiver is not discussed since it does not exist in Illinois.

61. *See* Feld, *supra* note 19, at 701-08 (discussing judicial and legislative waiver).

62. *Id.*

63. *See, e.g.*, 705 ILCS 405/5-4 (1992).

64. *See Kent*, 383 U.S. at 552-53; Feld, *supra* note 19, at 704-05 (discussing the great amount of discretion accorded juvenile court judges in making decisions as to whether jurisdiction should be waived).

65. *Kent*, 383 U.S. at 566-67. The Court listed eight factors a judge should consider in deciding whether jurisdiction should be waived. *Id.* First, a judge should consider the seriousness of the alleged offense, including whether the juvenile used violence. *Id.* Second, the judge should determine if the juvenile committed the alleged offense "in an aggressive, violent, premeditated or willful manner" against a person. *Id.* Third, the judge should consider whether the offense was against a person or against property. Fourth, the judge should consider the strength of the evidence against the juvenile. *Id.* at 567. Fifth, the court should also determine whether there are co-defendants who are adults and will be tried in the criminal court. *Id.* Sixth, the judge should take into consideration the maturity of the juvenile as well as the previous history of the juvenile. *Id.* The judge should also consider the record and previous history of the juvenile. Lastly, the judge should consider the protection of society and the likelihood of rehabilitating the juvenile. *Id.*

66. *See* Feld, *supra* note 19, at 704 (arguing that the Court's decision in *Kent* did not curb judicial discretion).

into account when making a waiver decision.[67] The critics assert the list merely reinforces the discretion of juvenile court judges since they may place more emphasis on one factor over another to justify a waiver decision.[68] In order to curb the perceived abuse of discretion and arbitrariness, legislatures have passed laws that automatically remove youthful offenders from the jurisdiction of the juvenile court.[69]

B. Legislative Waiver

The second method in which a juvenile court may transfer an offender to the jurisdiction of an adult criminal court is legislative waiver.[70] Legislative waiver occurs when a legislature enacts a law that automatically transfers any juvenile who commits a certain offense to the criminal court.[71] The legislature completely removes the discretion a juvenile court judge normally possesses. As a result, the courts will subject the child offender to the same trial an adult would receive.[72] Consequently, the juvenile court system automatically transfers the juvenile to the criminal court system where the juvenile will lose the benefits customarily afforded a juvenile offender.[73]

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67. *See, e.g.*, 705 ILCS 405/5-4 (3)(b) (1992). The act provides that a judge should consider the following factors when determining the question of jurisdictional waiver:

> (i) whether there is sufficient evidence upon which a grand jury may be expected to return an indictment; (ii) whether there is evidence that the alleged offense was committed in an aggressive and premeditated manner; (iii) the age of the minor; (iv) the previous history of the minor; (v) whether there are facilities particularly available to the Juvenile Court for the treatment and rehabilitation of the minor; (vi) whether the best interest of the minor and the security of the public may require that the minor continue in custody or under supervision for a period extending beyond his minority; (vii) whether the minor possessed a deadly weapon when committing the alleged offense.

Id.

68. *See* Feld, *supra* note 19, at 704 (arguing the criteria placed in statutes following the decision of the Unites States Supreme Court in *Kent* actually reinforces the discretion granted to judges); *see also* Teitelbaum, *supra* note 25, at 399 (stating judicial waiver statutes have been compared to death penalty statutes due to the lack of objective standards).

69. See *infra* notes 70-79 and accompanying text for a discussion of legislative waiver.

70. *See generally* Feld, *supra* note 19, at 703-09 (discussing judicial and legislative waiver).

71. *See, e.g.*, 705 ILCS 405/5-4 (6)(a) (1992). The statute provides that any minor who is at least fifteen years of age and is charged with first degree murder, aggravated criminal sexual assault, or armed robbery involving the use of a firearm will automatically be prosecuted under the Criminal Code. *Id.*

72. *See* Ainsworth, *supra* note 15, at 1112. The removal of discretion on the part of the juvenile court distinguishes legislative waiver from judicial waiver. *Id.*

73. Kent v. United States, 383 U.S. 541 (1966). The Court listed a number of rights given to juveniles under the juvenile system which are not present under the criminal system. *Id.* at 556-57. Although the rights vary by jurisdic-

The principal attribute distinguishing legislative waiver from judicial waiver is the lack of discretion the legislature provides judges in the juvenile court system.[74] Thus, some critics argue legislative waiver is the best alternative.[75] However, others insist the lack of discretion is the main drawback.[76] The focus invariably changes from the offender to the offense and from rehabilitation to retribution.[77] The rehabilitative function of the juvenile court system erodes, and the distinction between the juvenile court system and the criminal court system disappears. Some commentators even advocate abolishing the juvenile court system entirely.[78] This position would bring the criminal justice system full circle to where it was prior to the Illinois Juvenile Court Act of 1899.[79]

This section and the preceding one addressed the movement of the juvenile court system from the turn of the century to the present. The sections also discussed the means a judge or legislature may use to transfer the juvenile to the criminal court system. In addition, these sections focused on the severe impact a transfer can have on an individual. The next section shifts the emphasis from the distinction between juvenile and adult court systems to the standards a court will use to determine whether a statute violates the equal protection clauses of the United States Constitution and the Illinois Constitution.

III. Standards of Review

Illinois Courts assess equal protection claims brought under either the United States or Illinois Constitutions according to the same analytical standards.[80] Therefore, Illinois courts follow the

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tion, statutes generally shield the juvenile from publicity. *Id.* at 556. Although the court may confine the juvenile, under most circumstances, the court will not confine the juvenile with adults. *Id.* Upon adjudication, the court may detain the juvenile, but only until he is twenty-one years of age. *Id.* As opposed to an adult conviction, the juvenile will not lose his civil rights. *Id.* In addition, the adjudication will not be used against him at a later date. *Id.* As an added benefit, he will also not be disqualified from obtaining public employment. *Id.* at 557.

74. Ainsworth, *supra* note 15, at 1112.

75. *See* Zimring, *supra* note 35, at 269.

76. *See generally* Ainsworth, *supra* note 15, at 1112 (stating that automatic transfer statutes represent a complete rejection of the underlying juvenile court philosophy).

77. The whole concept underlying legislative waiver statutes is that for certain offenses, the jurisdiction of a juvenile court jurisdiction is waived regardless of the age of the offender. *Id.*

78. *See id.* at 1112 (arguing that the child-adult dichotomy which served as the basis for the juvenile court movement at the turn of the century is no longer valid and, therefore, no reason exists to continue using the separate systems).

79. See *supra* notes 22-24 and accompanying text for a discussion of the criminal justice system prior to the creation of juvenile court systems.

80. People v. Clark, 565 N.E.2d 1373, 1376 (Ill. App. Ct. 1991) (stating that both the Unites States and Illinois Constitutions employ the same analysis in

standards established by the United States Supreme Court in equal protection cases brought under both the Illinois Constitution as well as the United States Constitution.[81] Any discussion of judicial review under the Fourteenth Amendment of the United States Constitution will apply equally to the equal protection provision of the Illinois Constitution.[82] This section discusses the standards courts employ when addressing equal protection claims.

A court will apply one of two tests to assess potential equal protection violations.[83] The first test is the rational basis test. A court will apply the rational basis test when deciding a case that does not involve a fundamental right or a suspect classification.[84] However, a court will apply a more stringent standard, the strict scrutiny test,[85] whenever an issue involves a fundamental right[86] or the

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deciding whether the equal protection rights of a defendant were violated in the context of first and second degree murder charges).

81. *Id.*

82. *Id.*

83. San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 17 (1973); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976). However, some have suggested that courts actually use a three-tier approach. Collins v. Schwitzer, 774 F. Supp. 1253, 1261 (D. Idaho 1991). Supreme Court Justice Thurgood Marshall believed that the Court did have an intermediate scrutiny standard. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting) (citing numerous cases where the Court noticed legislative goals and means even though the interest involved would not have given rise to the application of strict scrutiny). Courts analyze classifications based on gender or illegitimacy under the intermediate scrutiny standard. High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 570 (9th Cir. 1990) (holding that classifications based on homosexuality are not protected under the heightened standard, but under the rational basis standard).

Justice Marshall thought the Supreme Court should come right out and say there are three standards, not two. *Murgia*, 427 U.S. at 318 (Marshall, J., dissenting) (arguing lower courts would be able to rule on equal protection questions more effectively if the standards were clearer). The intermediate group has been labelled quasi-suspect and defined as a group that has some of the qualities of a suspect class but does not quite meet all of the requirements. *See* Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 948 (1991) (arguing that homosexuals should at least be protected by the intermediate standard, if not the strict scrutiny standard).

Justice Stevens believed that there were no clear set of standards used by the Court. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 451 (1985) (Stevens, J., concurring). Instead, Justice Stevens believed the Court uses a continuum to decide cases based on different classifications. *Id.* If anything, the Court should apply one standard, the rational basis standard. *Id.* However, if a law classifies a group based on race, the law will not be upheld since it is not rational to classify on the basis of race. *Id.* at 453. Similarly, when a law classifies based on gender, the state will have a difficult time showing that gender is relevant to a relevant state purpose. *Id.* at 454.

84. See *infra* notes 91-100 and accompanying text for discussion of the rational basis test.

85. See *infra* notes 101-20 and accompanying text for discussion of the strict scrutiny standard.

86. See *infra* note 104 for a discussion of fundamental rights.

presence of a suspect classification.[87] However, the classification does not have to be overt.[88] If a court believes that a legislature enacted a neutral statute with an underlying discriminatory motive, the court must apply the strict scrutiny test.[89] The test a court applies will almost always determine whether or not the statute is constitutional.[90]

A. The Rational Basis Standard

As a general rule, courts presume statutes are constitutional.[91] Additionally, courts will not find a statute unconstitutional simply because it classifies people or draws lines.[92] In fact, almost all statutes involve some degree of classifying.[93] Courts provide legislatures with this deference even if a court believes the legislature erred in passing the law.[94] Courts take the position that the democratic process will correct certain legislative mistakes.[95] Thus, judicial intervention is not needed.[96] Consequently, legislative action need not be perfect so long as there is a rational basis for the action.[97]

Once a court determines that a fundamental right or a suspect classification is not at issue, the court will then decide whether the legislature had a rational basis for enacting the statute.[98] A court will give wide discretion to legislatures to find that a statute is rational rather than arbitrary or irrational.[99] Courts will allow legislatures to attack only some part, but not all of a problem.[100]

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87. See *infra* notes 111-18 and accompanying text for discussion of suspect classifications.

88. 2 ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE ¶ 18.4 (1986).

89. *Id.*

90. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting) (stating that every statute except one that was subjected to strict scrutiny was found unconstitutional, whereas only one classification subject to the rational basis test was found irrational).

91. Faircloth v. Finesod, 938 F.2d 513, 516 (4th Cir. 1991).

92. 2 ROTUNDA ET AL., *supra* note 88, ¶ 18.2.

93. *Id.*

94. N.Y. State Club Ass'n. v. City of N.Y., 487 U.S. 1, 17 (1988) (finding the appellant failed to meet the burden of showing the legislative classification had no reasonable support in fact).

95. Vance v. Bradley, 440 U.S. 93, 97 (1979) (stating court should not intervene even though it believes a political branch has acted unwisely).

96. *Id.*

97. Dandridge v. Williams, 397 U.S. 471, 485 (1970) (stating that if a classification is reasonable, it does not have to be made with "mathematical nicety").

98. American Booksellers v. Webb, 919 F.2d 1493, 1511 (7th Cir. 1992); U.S. v. Doyan, 909 F.2d 412, 416 (10th Cir. 1990); People v. Adams, 581 N.E.2d 637, 642 (Ill. 1991); City of Batavia v. Allen, 578 N.E.2d 597, 599 (Ill. App. Ct. 1991).

99. McLaughlin v. State of Fla., 379 U.S. 184, 191 (1964).

100. *Id.* at 191. *See also* ROTUNDA ET AL., *supra* note 88, ¶ 18.2 (discussing the differences between over-inclusive and under-inclusive laws); Joseph Tuss-

However, the test courts employ changes when a statute affects a fundamental right[101] or involves a suspect classification.[102] Under those circumstances, the statute must pass the strict scrutiny standard.[103]

B. The Strict Scrutiny Standard

When legislation affects a fundamental right[104] or creates a suspect classification,[105] courts utilize the more difficult standard of strict scrutiny to evaluate the constitutionality of a statute.[106] Under the strict scrutiny standard, a court will uphold a statute only if there is a compelling state interest involved and the court finds the legislature could not accomplish its goal through a less restrictive alternative.[107] Unlike the rational basis standard,[108] a court applying strict scrutiny examines whether or not a legislature has a valid justification for enacting the statute.[109] Therefore, a court will more often find a statute unconstitutional under the strict scrutiny standard.[110]

Both commentators[111] and courts[112] have attempted to articu-

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man & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344-53 (1949) (distinguishing over-inclusive and under-inclusive laws through examples).

101. See *infra* note 104 for a discussion of fundamental rights.

102. See *infra* notes 111-18 and accompanying text for a discussion of suspect classifications.

103. LaRouche v. Kezer, 787 F. Supp. 298, 303 (D. Conn. 1992).

104. For purposes of this Note, the author concedes that the Automatic Transfer Statute affects no fundamental rights. A right that may have presented an issue, the right to private housing, is not a fundamental right. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974); Illinois Hous. Dev. Auth. v. Van Meter, 412 N.E.2d 151, 153 (Ill. 1980).

The Supreme Court has stated that a right must be explicitly or implicitly guaranteed in the United States Constitution in order for it to be considered a fundamental right. San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 33-34 (1973). The Court has found certain rights to be fundamental. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (right to travel); Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (right to privacy); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (right to privacy); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to marriage and procreation).

105. See *infra* notes 111-18 and accompanying text for a discussion of suspect classes.

106. *LaRouche*, 787 F. Supp. at 303.

107. *Id.*

108. Dandridge v. Williams, 397 U.S. 471, 486 (1970) (stating that since the rational basis standard applied, the Court did not have to explore the justifications given by the state).

109. *Shapiro*, 394 U.S. at 634-38 (1969) (analyzing whether any of the justifications argued by the state would satisfy the compelling interest standard under the strict scrutiny test).

110. See *infra* notes 226-29 and accompanying text for a discussion of the burden placed on a state to justify its actions under a strict scrutiny analysis.

111. *See* Strasser, *supra* note 83, at 938-39 (stating the different terminology used by the Supreme Court in determining which groups should receive a greater degree of protection through the use of a strict scrutiny test); *see also*

late the criteria needed to establish a suspect class. Common themes include whether any history of discrimination exists against the group,[113] whether the group has some immutable characteristics that define the individuals in the group,[114] and whether the group has a history of political powerlessness.[115] The Supreme Court has held that race,[116] nationality,[117] and alienage[118] are suspect classes. Therefore, if the Illinois Automatic Transfer Statute classifies offenders on the basis of a suspect class, courts must use the strict scrutiny test. If the statute fails this test, courts will find the ATS unconstitutional under the equal protection clauses of the Fourteenth Amendment of the United States Constitution[119] and the equal protection provision of the Illinois Constitution.[120]

1. Inviduous Discrimination

The states ratified the Fourteenth Amendment in order to prevent state officials from discriminating on the basis of race.[121] A statute need not be discriminatory solely on its face to violate the equal protection clause of the Fourteenth Amendment.[122] A stat-

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Tussman & TenBroek, *supra* note 100, at 356 (stating that articulating a complete list of suspect classifications serves no purpose).

112. *High Tech Gays*, 895 F.2d at 573 (arguing suspect classes are groups that have suffered a history of discrimination, that have some immutable, distinguishing characteristics, and that must be politically powerless). *See also San Antonio Sch. Dist.*, 411 U.S. at 28 (arguing that a suspect class requires the need of protection from the political process since they have long been discriminated against and have long been politically powerless).

113. *San Antonio Sch. Dist.*, 411 U.S. at 28; *High Tech Gays*, 895 F.2d at 573.

114. *Id.*

115. *Id.*

116. *See, e.g.*, Strauder v. W. Va., 100 U.S. 303, 306 (1880) (indicating blacks have suspect status).

117. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) (indicating nationality is a basis for suspect status).

118. *See, e.g.*, Takashi v. Fish and Game Comm'n, 334 U.S. 410, 420 (1948) (indicating alienage is a basis for suspect status).

119. U.S. CONST. amend. XIV, § 1.

120. ILL. CONST. art. I, § 2.

121. Washington v. Davis, 426 U.S. 229, 239 (1976) (discussing the central purpose of the Fourteenth Amendment); *see also* Loving v. Virginia, 388 U.S. 1, 10 (1967) (discussing the clear and central purpose of the Fourteenth Amendment).

122. There are three ways to establish that a statute creates a suspect classification. 2 ROTUNDA ET AL., *supra* note 88, ¶ 18.4. First, a party may show the law creates a classification on its face. *Id.*; *see, e.g., Loving*, 388 U.S. 1 (determining the constitutionality of a statute which prohibited marriage of interracial couples); McLaughlin v. Florida, 379 U.S. 184 (1964) (determining the constitutionality of a statute which made it illegal for a white person and a nonwhite person of the opposite sex, who were not married to each other, to occupy the same room at night). Secondly, a party may prove that although a statute is facially neutral, the person administers the law has done so in a discriminatory manner. 2 ROTUNDA ET AL., *supra* note 88, ¶ 18.4; *see, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886). In *Yick Wo*, a San Francisco ordinance forbade the operation of wooden laundries in San Francisco without the consent of the

ute may be discriminatory solely by its intent or purpose. A court will apply the strict scrutiny test whenever it believes a legislature enacted a neutral statute with an underlying discriminatory motive.[123]

In *Washington v. Davis*,[124] the Court clarified the law regarding the proof necessary to prove a claim of invidious racial discrimination.[125] In *Davis*,[126] the plaintiffs challenged the recruiting procedures of the Washington, D.C., police departments[127] alleging they discriminated against black applicants desiring to become po-

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board of supervisors. *Id.* Although the ordinance was facially neutral, the city of San Francisco denied every one of over two hundred Chinese applicants that applied for consent permits. *Id.* However, all non-Chinese applicants except one were given consent by the board. *Id.* A third way in which a party can establish that a statute creates a suspect classification is by showing that the legislature enacted the statute for a discriminatory purpose or with discriminatory intent. 2 ROTUNDA ET AL., *supra* note 88, ¶ 18.4.

123. See *infra* notes 155-60 and accompanying text for a discussion on the ways in which a party may prove discriminatory intent.

124. 426 U.S. 229 (1976).

125. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973) (stating that to prove de jure segregation in a school segregation case, a party must show there was an intent to segregate); *cf.* Wright v. Council of Emporia, 407 U.S. 451, 462 (1972) (stating that in school desegregation cases, a party can prove discrimination by showing the racial impact of the law). In cases involving state action other than school segregation cases, it seemed as if the court had established clear law. In Palmer v. Thompson, 403 U.S. 217 (1971), the city of Jackson, Mississippi, closed five swimming pools after the Fifth Circuit Court of Appeals had ordered to desegregate them. *Id.* at 219. Some African-American residents of Jackson filed suit asking the court to force the city to reopen the pools. *Id.* The district court ruled the city did not deny the African-American residents the equal protection of the laws and the Fifth Circuit Court of Appeals affirmed. *Id.* The African-American residents argued to the Supreme Court that although the impact of the state action was the same for blacks and whites, the city acted with a discriminatory purpose. *Id.* at 224. The Court stated that a legislative act cannot violate the equal protection clause solely because of the motivation behind those who enacted it. *Id.* Instead, courts must focus on the impact of the legislation. *Id.* at 225. The decision in *Thompson* closely followed the reasoning of the Court in United States v. O'Brien, 391 U.S. 367 (1968). The *O'Brien* Court stated that legislative intent is not the critical element in an equal protection case. *Id.* at 383. Rather the effect of the legislation is the relevant factor. *Id.* at 385. For an interesting look at the question of intent prior to *Washington v. Davis*, compare Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95 (arguing that a court should look into the motivation behind legislation rather than avert its eyes to the obvious) with John Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970) (arguing that a court should search for any rationally neutral motivation which may justify the law).

126. 426 U.S. 229.

127. The questioned governmental conduct surrounded the administration of a police exam in the District of Columbia. *Id.* at 232. African-American police applicants claimed the recruiting procedures of the police departments were racially biased. *Id.* at 233. Specifically, the applicants pointed to Test 21, a written personnel test which tested verbal ability, vocabulary, reading, and comprehension. *Id.* at 235. Test 21 was a uniform test developed by the Civil Service Commission. *Id.*

lice officers.[128] The procedures were racially neutral on their face since both black and white applicants were treated identically.[129] The black applicants never claimed the police department enacted the procedures in order to intentionally discriminate against black applicants.[130] Their argument rested solely on the fact that the procedures disqualified a disproportionately higher number of black applicants than white applicants.[131]

The District of Columbia Circuit Court of Appeals[132] held the disproportionate negative impact of the recruiting procedure on black applicants was enough to shift the burden to the government to prove the recruiting procedures were substantially related to job performance.[133] The Unites States Supreme Court reversed.[134] The Supreme Court reiterated that it had never held that disparate impact alone was enough to prove that a neutral law was unconstitutional.[135] However, the Court stated that a court should consider the impact along with other relevant factors.[136]

The following term in *Arlington Heights v. Metropolitan Housing Development Corp.*,[137] the Supreme Court articulated the other factors needed to prove invidious racial discrimination.[138] In *Arlington Heights*, a real estate developer attempted to have a zoning board rezone property he had purchased so he could build low- and middle-income town houses.[139] The village zoning board refused to rezone the property for two reasons.[140] First, the board asserted that rezoning threatened the value of surrounding property.[141] Secondly, the current zoning served as a buffer between single family homes and the commercial district.[142]

The real estate developer and three African American individuals brought suit against the Village of Arlington Heights asserting the zoning board violated their equal protection rights.[143] The Dis-

128. *Id.* at 235.
129. *Id.* at 245.
130. *Id.* at 235.
131. Four times more black applicants than white applicants were disqualified from employment because they failed to achieve the requisite score of 40 out of 80 on Test 21. *Davis*, 426 U.S. at 237.
132. Davis v. Washington, 512 F.2d 956, 958 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976).
133. *Id.*
134. Washington v. Davis, 426 U.S. 229 (1976).
135. *Id.* at 242.
136. The Court did not identify these other relevant factors. *Id. But see Village of Arlington Heights*, 429 U.S. at 267-68 (describing the other relevant factors).
137. 429 U.S. 252, 267-68 (1977).
138. *Id.*
139. *Id.*
140. *Id.* at 258.
141. *Id.*
142. *Village of Arlington Heights*, 429 U.S. at 258.
143. *Id.* at 258.

trict Court found that the actions of the village board were not discriminatory.[144] The court held the village had a legitimate motive for refusing to rezone the property.[145] However, the Seventh Circuit Court of Appeals reversed[146] and held the disproportionate impact upon blacks,[147] along with the segregative history of Northwest Cook County,[148] was enough to shift the burden to the village to demonstrate that the board based its decision upon a compelling state interest.[149]

The United States Supreme Court reversed[150] and reaffirmed its holding in *Davis* by stating that disproportionate impact alone did not violate the equal protection clause.[151] A party challenging

144. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 212 (N.D. Ill. 1974).

145. *Id.* at 211.

146. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975).

147. The Seventh Circuit Court of Appeals found the refusal to rezone the property would have an adverse impact on African-Americans. *Id.* at 413. Blacks comprised 40% of the population eligible for the low-and middle-income housing at issue. *Id.* at 414. Yet, blacks constituted a lower percentage of the population in general. *Id.*

148. The Court of Appeals stated that the disproportionate impact upon blacks alone would not justify application of the strict scrutiny test. *Id.* However, the court noted the segregative history of Arlington Heights along with the discriminatory impact on African-Americans, may justify application of the strict scrutiny standard. *Id.* The population of Arlington Heights in 1970 was 64,884. *Id.* at 413. Of these residents, only 27 were African-American. *Id.* at 414. In addition, the Northwest Cook County area had a population of 219,000, of which only 170 were African-American residents. *Id.* At the time, while the percentage of African-Americans in the Chicago area increased, the percentage in Northwest Cook county decreased. *Id.* The Court stated the decision of the zoning board will effectively bar construction of low- and middle-income housing in Arlington Heights. *Id.* Additionally, the court determined that if such housing was not built in Arlington Heights, the segregative policies would continue. *Id.*

149. See *infra* notes 226-29 and accompanying text for a discussion of the burden placed on the state to justify its actions under the strict scrutiny standard.

150. Village of Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252 (1977).

151. *Id.* at 264-65. However, the impact alone may justify application of the strict scrutiny standard where the state action results in such an obvious pattern of discrimination that it cannot be explained any other way. *Id.* at 266; *see also Davis*, 426 U.S. at 242 (noting that in certain situations, the impact of the state action will be so great in and of itself that it may demonstrate the unconstitutionality of the action).

One example where the impact of state legislation was alone sufficient to demonstrate the unconstitutionality of the law is Gomillion v. Lightfoot, 364 U.S. 339 (1960). In *Gomillion*, African-American residents claimed they were being disenfranchised by local act which redefined the voting districts in Tuskegee, Alabama. *Id.* at 341. The act created a 28 sided figure that excluded all but four or five of the black voters from the city. *Id.* The figure, however, did not exclude any white voters from the city. *Id.* The Court held that this odd shaped figure and its resulting impact was enough to prove the act was unconstitutional. *Id.* at 347. See also *supra* note 122 for a discussion of Yick Wo v. Hopkins, 118 U.S. 356 (1886).

the action must prove that the official conduct was brought about due, at least in part,[152] to a racially discriminatory intent or purpose.[153] The Court admittedly established a difficult burden for the challenging party.[154] However, the Court provided a party with the evidentiary sources available to prove the subjective intent of the government official or agency.

In *Arlington Heights*[155] and subsequent decisions,[156] the United States Supreme Court has enumerated the evidentiary sources of discriminatory intent or purpose. First, a party may show a statute has a disproportionate impact.[157] Second, a party

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However, the Supreme Court has shown that disproportionate impact alone is almost impossible to prove. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987). In *McCleskey*, the Georgia Supreme Court convicted the defendant for armed robbery and murder and sentenced him to death. *Id.* at 283-84. After numerous unsuccessful appeals, McCleskey filed a writ of habeas corpus in the Federal court. *Id.* at 285-86. McCleskey claimed the state administered the capital sentencing process in a racially discriminatory manner. *Id.* at 286. McCleskey admitted the Baldus study as evidence. *Id.* The study analyzed 2,000 murder cases in Georgia during the 1970s. *Id.* The study indicated that a defendant charged with killing a white victim is 4.3 times more likely to receive the death penalty than a defendant who kills a black victim. *Id.* at 287. Black defendants were also 1.1 times more likely to receive death sentences than other defendants. *Id.* McCleskey argued he was likely to receive the death penalty since he was a black man and had killed a white victim. *Id.* The Court held the statistics were not extreme enough to demonstrate the legislature enacted and maintained the capital punishment statute due to an underlying discriminatory intent. *Id.* at 298-99.

152. *Id.* *See also* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 277 (1979) (stating a court can not measure discriminatory intent since the intent either influenced the legislature or it did not).

153. *Arlington Heights*, 429 U.S. at 265.

154. McGinnis v. Royster, 410 U.S. 263, 276-77 (1973) (indicating that due to the many purposes behind legislation, it is very difficult to find the primary purpose of the legislature); *see also* U.S. v. O'Brien, 391 U.S. 367, 383-84 (1968) (stating that any attempt to determine legislative purpose or motive will lead to uncertain results).

155. 429 U.S. at 267-68. In Arlington Heights, the Court listed four evidentiary sources that may prove a discriminatory purpose. *Id.* First, a party may show the historical background surrounding the action points to a history of discriminatory treatment. *Id.* Second, a party may prove intent by observing the events leading up to the governmental decision. *Id.* at 268. Third, if the governmental action was somehow different from its normal procedures, a court may find that relevant. *Id.* Finally, a party may prove intent through legislative or administrative history. *Id.* The Court cautioned that the four factors were not meant to be exhaustive. *Id.*

156. After *Arlington Heights*, the Court indicated a party may prove intent by showing the adverse impact was foreseeable at the time the legislature enacted the statute. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465-66 (1979). The concept of foreseeability has been adopted by lower courts. Baker v. City of Kissimmee, 645 F. Supp. 571, 585 (M.D. Fla. 1986); Bryan v. Koch, 492 F. Supp. 212, 217-18 (S.D.N.Y. 1980), *aff'd*, 627 F.2d 612 (2d Cir. 1980).

157. *Arlington Heights*, 429 U.S. at 266. However, there are times where the discriminatory impact alone will be enough to shift the burden of proof to the state. For example, a party does not need to show purposeful discriminatory intent when that party claims discrimination was present in the selection of his jury. Castaneda v. Partida, 430 U.S. 482, 494 (1977). The Supreme Court de-

may attempt to prove that the events leading up to the decision or legislation provide some evidence of a discriminatory purpose.[158] Next, a court may also consider any legislative or administrative history to ascertain whether a discriminatory underlying purpose was present.[159] Last, a party may show the resulting impact on a group was foreseeable at the time the legislature enacted the law.[160] Therefore, the Supreme Court has provided a party challenging legislation with the evidentiary sources that may prove the legislature enacted a statute, at least in part, for a discriminatory purpose.

IV. APPLYING THE EVIDENTIARY SOURCES TO THE ATS

This section will address the amended Illinois ATS and will argue that the evidentiary sources show the Illinois Legislature enacted the ATS with a discriminatory purpose or intent. This section will analyze the legislative history of the statute,[161] the impact of the statute,[162] and the foreseeability of that impact at the time the legislature enacted the ATS.[163] A court cannot find discriminatory intent upon the showing of any one of these sources alone. A court must look to the totality of the evidence in determining the question

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cided *Castaneda* the same year as *Arlington Heights*. In *Castaneda*, the Court held the disproportionate representation of a class in jury selection proceedings is enough to shift the burden of proof to the state. *Id.* The 1970 census statistics showed that Hildago County, Texas, was made up of 79.1% Mexican-Americans. *Id.* at 495. Yet, over an 11 year period, only 39% of those summoned for grand jury duty were Mexican-American. *Id.* This alone was enough to shift the burden of proof to the state to show that discrimination was not involved in the grand jury selection process. *Id.* at 497-98. *See also* Whitus v. Georgia, 385 U.S. 545 (1967) (holding that the jury selection procedure was unconstitutional because it resulted in the underrepresentation of blacks on the grand jury and petit jury).

A party bringing a Title VII discrimination suit also does not have to prove purposeful discrimination. Griggs v. Duke Power Co., 401 U.S. 424 (1971). In *Griggs*, the Court held that under Title VII claims, a party can prove discrimination through the effects or impact of the actions of an employer. *Id.* Congress directed the Act to the impact of the action, not the motivation behind it. *Id.* at 432. The fact that the employer acted with the best intentions is irrelevant. *Id.* If the adverse impact is established, the employer has the burden of proving that the requirement is related to job qualifications. *Id.* *See also* Hudson v. Int'l Machs. Corp., 620 F.2d 351, 355 (2d Cir. 1980) (stating that statistical evidence of discriminatory impact is enough to shift the burden of proof to the employer in claims of discriminatory employment practices).

158. *Arlington Heights*, 429 U.S. at 266.

159. *Id.*

160. *Penick*, 443 U.S. at 464-65.

161. See *infra* notes 172-86 and accompanying text for a discussion of the legislative history of the ATS.

162. See *infra* notes 187-206 and accompanying text for a discussion of the discriminatory impact of the ATS.

163. See *infra* notes 207-21 and accompanying text for a discussion of the foreseeability of the impact.

of discrimination.[164] When one examines the totality of the evidence, it is clear that the Illinois Legislature enacted the ATS with an underlying discriminatory intent. Therefore, a suspect classification is created,[165] and a court must apply the strict scrutiny test to determine the constitutionality of the statute.[166]

A. Legislative History

The Supreme Court has cautioned against placing too much emphasis on statements made by opponents of legislation when trying to determine the meaning of a statute.[167] Rather, if the true meaning of a statute is not clear, a court should look to the statements of its sponsor.[168] Courts have carried this method of analysis over to determinations of whether a statute violates the equal protection clause.[169] Thus, a court should look to the statements of the sponsor in attempting to discern the intent or purpose of a statute.[170] Although the statements of the opponents are not irrelevant, a court should place greater emphasis on the statements of the sponsor.[171] Nevertheless, attempts to discern the intent of the ATS by observing the statements of its sponsor are of little value. The sponsor never gave a straightforward answer when questioned about the true intent of the statute.[172] Thus, the reservations enunciated by the Supreme Court as to placing too much emphasis on the statements of opponents to the statute do not present a problem in proving the racially discriminatory intent of the Illinois Legislature in enacting the ATS.

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164. *Davis*, 426 U.S. at 242.

165. See *supra* notes 111-18 and accompanying text for a discussion of suspect classifications.

166. See *supra* notes 101-20 and accompanying text for a discussion of the strict scrutiny standard.

167. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 n.24 (1976) (stating that opponents of a bill tend to overstate their position); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951) (noting that in order to determine the meaning of a statute, one should not place too much emphasis on the statements made by the opponents of the legislation).

168. *Schwegmann*, 341 U.S. at 394-95.

169. Butts v. City of New York, 779 F.2d 141, 147 (2d Cir. 1985) (arguing that a court should look at statements of the sponsor if the true purpose of a statute is not clear).

170. *Id.*

171. In *Butts*, District Court Judge Brieant held that the New York legislature enacted the run-off statute with a discriminatory motive. *Id.* Judge Brieant primarily based his decision on the statements made by the opponents of the legislation. *Id.* In reversing, the court of appeals held that a statute is not unconstitutional solely due to statements made by opponents during legislative debates. *Id.* If the party challenging the legislation had introduced other sources of evidence to prove discriminatory intent, the Second Circuit Court may have upheld the decision of the District Court. *Id.*

172. See *infra* notes 173-86 and accompanying text for a discussion of the legislative debates.

During debate in the Illinois House of Representatives, opponents of the ATS argued there was some question as to the intent of the sponsor of the statute.[173] Representative Jones of Cook County was the first to question the sponsor, Representative DeLeo, as to the reason why the bill only pertained to public housing.[174] Representative Jones argued the gang problems addressed by the bill were city-wide problems and not only confined to public housing.[175]

Representative Davis of Cook County questioned why a juvenile should receive an enhanced penalty because he lives in public housing.[176] In addition, she questioned whether the legislature was attempting to create a different criminal code for those who live in public housing as opposed to those who live in predominantly white neighborhoods or suburbs.[177] In fact, Representative Davis came right out and stated that a judge would find the statute unconstitutional, clearly recognizing the underlying intent of the legislature would not be lost on a judge.[178] Thus, statements made by certain legislators indicate they questioned the intent of the ATS at the onset of discussions.

Although members of the legislature questioned the true motive of the bill, the sponsor, Representative DeLeo, never clearly addressed the inquiries.[179] Instead, he repeatedly stated the bill

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173. H.R. Rep. No. 155, 86th Ill. Leg. (daily ed. June 15, 1989).

174. *Id.* at H155 (statement of Rep. Jones).

175. *Id.* at H155-56. The sponsor, Representative DeLeo, indicated the purpose of the legislation was to reduce gang activity in and around public housing. *Id.* He also stated the bill would be an extension of the 1984 safe school zone bill. *Id. (referring to* 705 ILCS 405/5-4 (7)(a) (1992)). The safe school zone bill automatically transfers juveniles charged with selling drugs on or near school property to the criminal court. 705 ILCS 405/5-4 (7)(a) (1992). The Illinois Supreme Court has upheld the constitutionality of the safe school zone statute. People v. M.A., 529 N.E.2d 492 (Ill. 1988).

The Illinois legislature enacted a similar statute in 1986 to fight gang crime. 705 ILCS 405/5-4 (3.2) (1992). To be eligible for the automatic transfer to the criminal court under the gang transfer statute, a juvenile must be at least 15 years old. *Id.* In addition, the juvenile must commit a forcible felony as defined under 720 ILCS 5/2-8 (1992). Also, a juvenile court judge must have previously found the juvenile to be a delinquent. Lastly, the juvenile must commit the felony in furtherance of gang activity. 705 ILCS 405/5-4 (3.2) (1992). The Illinois Supreme Court has upheld the constitutionality of the gang transfer statute. People v. P.H., 582 N.E.2d 700 (Ill. 1991).

176. H.R. Rep. No. 156, 86th Ill. Leg. (daily ed. June 15, 1989) (statement by Rep. Davis).

177. *Id.* at H157. Representative Morrow also opposed the bill because he thought it attempted to single out one group of people. *Id.* at H161. He stated that crime is crime regardless of whether the juvenile committed it in a white suburb or a CHA building. *Id.* Representative Williams argued the legislature should not single out a certain group only because the group lives in a place that most people do not like. *Id.* at H160.

178. *Id.* at H158.

179. *Id.* at H155-59.

extended the safe school zone protection area[180] to include public housing.[181] In doing so, Representative DeLeo claimed residents of public housing were the greatest victims of gang activity.[182] Aside from that single statement, Representative DeLeo never explained the reason for extending the protection zone specifically to include public housing.[183] However, Representative Jones quickly retorted that the statistics do not prove that assertion.[184] When faced with the statement that a judge would find the statute unconstitutional, Representative DeLeo responded very vaguely.[185] Representative DeLeo had many opportunities[186] to explain his basis for singling out public housing in the statute. Had he taken advantage of these opportunities, he may have alleviated some reservations of his fellow legislators. However, by not addressing these inquiries, it appears that Representative DeLeo had an underlying motive which he did not want to address. Although a court might consider the legislative debates enough to show discriminatory intent, the intent becomes more apparent to the court when it also examines the disproportionate impact upon African-Americans.

B. Disproportionate Impact on African-Americans

The ATS empowers the juvenile court to automatically transfer any fifteen or sixteen year old who sells drugs on or near property owned by a public housing agency to the criminal court system.[187] The legislature concerned itself with gang problems arising in and around public housing.[188] The Illinois Legislature also addressed this concern when it enacted a similar statute. The statute enhanced the penalty[189] under the Illinois Criminal Code if an of-

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180. 705 ILCS 405/5-4 (7)(a) (1992). See also *supra* note 175 for a discussion of the safe school zone statute.

181. H.R. Rep. No. 152, 86th Ill. Leg. (daily ed. June 15, 1989) (statements of Rep. DeLeo).

182. *Id.* at H156.

183. *Id.*

184. *Id.*

185. *Id.* at H158. When Representative Davis stated a judge would find the ATS unconstitutional, the sponsor responded ambiguously that he did not know "what's in the appellate court." *Id.*

186. Representative DeLeo had many opportunities to explain why the legislation singled out public housing. *Id.* at H155 (following the statements of Rep. Jones); *id.* at H156 (following the statement of Rep. Jones); *id.* (following the statements of Rep. Davis); *id.* at H157 (following the statements of Rep. Davis); *id.* at H158 (following the statements of Rep. Davis); *id.* at H159 (during the closing statement of Rep. DeLeo himself).

187. 705 ILCS 405/5-4 (7)(a) (1992). See also *supra* notes 55-79 and accompanying text for a discussion of how the legal system transfers juveniles to the criminal court system.

188. See *supra* notes 173-86 and accompanying text for a discussion of the legislative history of the ATS.

189. Section 401 of the Illinois Controlled Substance Act enumerates the penalties an offender will receive if convicted of manufacturing or delivering a

fender is convicted of selling drugs near or on public housing property.[190] In *People v. O.C. Shepard*,[191] the Illinois Supreme Court found this enhancement statute constitutional as it did not violate the equal protection clauses of the Fourteenth Amendment[192] or the Illinois Constitution.[193] The court stated that the legislature directed the statute toward those who sell drugs near public housing, not those who live in public housing.[194] Accordingly, a court should not consider the racial constituency of public housing when analyzing the constitutionality of an enhancement statute.

However, in determining the constitutionality of the ATS, a court must take into consideration the distinction between the ATS and the enhancement statute in dispute in *O.C. Shepard*. The ATS only addresses the conduct of juveniles,[195] whereas the enhancement statute principally addresses the conduct of adult offenders.[196] There are many differences between adults and juveniles. One difference is that, generally, adults are much more mobile than juveniles. Juveniles are more likely to conduct their activities in the neighborhoods in which they live.[197] If a juvenile living in public housing sells drugs, he will do so in and around his public housing complex.[198] Similarly, a juvenile who lives in the Bridgeport

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controlled substance. 720 ILCS 570/401 (1992). The severity of the penalty will depend on the type of drug involved and the amount of drugs in question. *Id.* For instance, if a court convicts an offender for manufacturing or delivering 10 or more grams, but less than 15 grams of heroin, the offender is guilty of a Class 1 felony. *Id.* § 570/401 (c)(1). As a result, the court may sentence the offender to the penitentiary for no less than 4 years but no more than 15 years. 730 ILCS 5/5-8-1 (a)(4) (1992). The court may also fine the offender up to $250,000. 720 ILCS 570/401 (c)(1) (1992). If the court convicted this offender of manufacturing or delivering between 10 and 15 grams of heroin within 1,000 feet of public housing property, the penalty is even greater. 720 ILCS 570/407 (b) (1992). Under the enhancement statute, the offender is guilty of a Class X felony. *Id.* The court may then sentence the offender to the penitentiary for not less than 6 years but not more than 30 years. 730 ILCS 5/5-8-1 (a)(3) (1992). The court may also fine the offender up to $500,000. 720 ILCS 570/401 (b) (1992).

190. 720 ILCS 570/407 (1992).

191. People v. O.C. Shepard, 605 N.E.2d 518 (Ill. 1992).

192. U.S. CONST. amend. XIV, § 1.

193. ILL. CONST. art. I, § 2.

194. *O.C. Shepard*, 605 N.E.2d at 523.

195. 705 ILCS 405/5-4 (7)(a) (1992).

196. At times, the enhancement statute will affect juveniles, such as those transferred to the criminal court system pursuant to the ATS. In effect, the juvenile will receive a double enhancement: The transfer to the criminal court and the increased penalty under the enhancement statute. People v. Lawrence, No. 92-CR-4907 (Cook County Crim. Div. Jan. 20, 1993), *rev'd* People v. R.L., No. 75081, 75082, 75083, slip op. at 1-8 (Ill. March 29, 1994). Thus, a court may have to administer harsher penalties since the statute imposes mandatory prison time. *Id.* at 3.

197. *Id.* at 3-4.

198. *Id.* at 4-5.

neighborhood and sells drugs will conduct his operation in his Bridgeport neighborhood.[199] For the most part, juveniles who are charged with selling drugs near or on public housing live in public housing. Therefore, it is crucial that a court take into consideration the racial make-up of the residents of public housing to determine the discriminatory impact of the ATS.

The breakdown of the residents of the Chicago Housing Authority (CHA), a public housing agency, lacks any racial balance whatsoever.[200] In 1991 and 1992, there were 25,357 CHA residents living in family housing.[201] Of those residents, 23,111 (91%) were African-American, while only 537 (2%) were white.[202] When one contrasts these figures with the overall demographics of Chicago, it becomes clear that African-Americans are greatly overrepresented in the CHA. In Chicago, the overall population is 2,783,726, including 1,263,524 (45%) whites, 1,087,711 (39%) African-Americans, and 432,491 (16%) others.[203] Therefore, although African-Americans only comprise 39% of the residents of Chicago, they constitute 91% of the residents of the CHA.

Even though the percentage of African-Americans living in the CHA is enough to show a sufficient disproportionate impact, the disproportionate impact becomes even greater when a court looks at the individuals actually transferred due to the ATS. Since the ATS went into effect on January 1, 1990,[204] thirty-four juveniles of fifteen and sixteen years of age have been transferred to the criminal court under the ATS.[205] Each of the thirty-four juveniles have been African-Americans.[206] Therefore, the overwhelming statistical evidence shows that the Illinois ATS has a disparate impact on African-Americans. Furthermore, a party challenging the ATS can show that its impact was foreseeable at the time the legislature enacted the ATS.

C. Foreseeable Discriminatory Impact

In order to show the foreseeability of the discriminatory impact at the time the legislature enacted the statute, a party must prove

199. *Id.*

200. STATISTICAL PROFILE: THE CHICAGO HOUSING AUTHORITY, 1991 TO 1992, *in* People v. Lawrence, No. 92-CR-4907, at Exhibit B (Cook County Crim. Div. Jan. 20, 1993).

201. The statistical profile contains two sections: (1) family housing and (2) senior housing. *Id.* This Note will focus only on family housing since the ATS pertains to juveniles, the majority of whom live in family housing.

202. *Id.* The remainder of the residents consisted of 2% Hispanic, .07% Asian and Native American, and 5% other. *Id.*

203. People v. Lawrence, No. 92-CR-4907 (Cook County Crim. Div. Jan. 20, 1993), Reply in Support of Defendant's Motion to Dismiss.

204. 705 ILCS 405/5-4 (7)(a) (1992).

205. *Lawrence*, No. 92-CR-4907, at Defense Exhibit 3.

206. *Id.*

the legislators recognized the possible consequences of the statute upon the affected class.[207] As with the other evidentiary sources of discriminatory intent, a party may have to show foreseeability through circumstantial evidence.[208] The most relevant and available evidence a party challenging the ATS can introduce is the racial composition of the CHA.[209] The statements made by members of the Illinois House of Representatives during the legislative debates are also relevant. These statements are strong circumstantial evidence that the legislature could foresee the impact upon African-Americans.[210] When a court considers these two forms of circumstantial evidence, it must find that the legislators were aware of the foreseeability of the disproportionate impact. The court must then consider this along with the legislative history and the disproportionate impact which has resulted to determine the constitutionality of the ATS.[211]

As noted, ninety-one percent of the residents in CHA family housing are African-American.[212] This is in sharp contrast to the overall population of Chicago.[213] Representative DeLeo, the sponsor of the ATS, indicated he was familiar with public housing in Chicago.[214] In fact, he stated he was from the Northwest Side of Chicago and his statements show he was cognizant of public housing complexes throughout the city.[215] Thus, a court could infer Representative DeLeo knew of the racial imbalance of the CHA.

In addition, statements made by other legislators during the House debates are also relevant. These statements indicate that some legislators anticipated the ATS would affect those who live in public housing much more than those who do not.[216] Representative Williams of Cook County opposed the bill because he thought the ATS singled out those who lived in public housing.[217] Representative Morrow of Cook County also opposed the bill since he be-

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207. Baker v. City of Kissimmee, 645 F. Supp. 571, 587 (M.D. Fla. 1986) (stating a party can show discriminatory purpose through the foreseeability of the disproportionate impact upon the class).

208. *Id.* at 586.

209. See *supra* notes 200-02 and accompanying text for a discussion of the racial composition of the CHA.

210. See *infra* notes 173-86 and accompanying text for a discussion of the statements made during debates in the Illinois House of Representatives.

211. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 (1977).

212. See *supra* notes 200-02 and accompanying text for a discussion of the racial composition of the CHA.

213. See *supra* note 203 and accompanying text for a discussion of the racial composition of the City of Chicago.

214. H.R. Rep. No. 157, 86th Ill. Leg. (daily ed. June 15, 1989) (statements of Rep. DeLeo).

215. *Id.*

216. *Id.* at H155-61.

217. *Id.* at H159-160 (statement of Rep. Williams). Rep. Williams stated the legislature should not single out one category of people only because they live in

lieved it would provide harsher penalties for those who lived in public housing.[218] The strongest statement came from Representative Davis of Cook County who argued the ATS actually enacted a separate criminal code for those who live in public housing.[219] These statements indicate that some of the legislators foresaw the discriminatory impact of the ATS.

Representative DeLeo responded that the ATS provided harsher penalties for those who sell drugs on public housing property, not those who live in public housing.[220] However, in defending a constitutional attack on the ATS, Representative DeLeo cannot argue the impact of the statute was unforeseeable. He knew of the racial imbalance in the CHA and his fellow legislators impressed upon him the notion that the ATS would overwhelmingly affect those who lived in public housing. As a result, the legislature could foresee the discriminatory impact the ATS would have upon African-Americans. A court analyzing the constitutionality of the ATS must take into account the impact itself, its foreseeability and the legislative history.[221]

As a result, a party challenging the constitutionality of the ATS can prove the legislature enacted the statute with a discriminatory intent or purpose.[222] The legislature created a classification on the basis of race. Since race is a suspect classification,[223] a court must apply the strict scrutiny test[224] to the ATS. Therefore, the state has the burden of proving the legislature narrowly tailored the ATS to serve a compelling state interest.[225] If the state does not meet this burden, a court must find the ATS unconstitutional.

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an area of poverty. *Id.* He also stated the legislature should not create special categories of crime for certain citizens. *Id.*

218. 86th Gen. Ass. H161 (daily ed. June 15, 1989) (statement of Rep. Morrow). Rep. Morrow argued the legislature should not single out public housing since gangs and drugs are a problem in almost every neighborhood. *Id.*

219. *Id.* at H157 (statement of Rep. Davis). Representative Davis questioned the sponsor about whether the legislature was creating a different criminal code for those who live in public housing. *Id.* She also argued that crime is crime regardless of where it is committed. *Id.*

220. *Id.* at H156 (statement of Rep. DeLeo). Representative DeLeo argued that the ATS is directed toward those selling drugs on public housing property, not those who live in public housing. *Id.* The Illinois Supreme Court followed the same reasoning in upholding a similar statute. People v. O.C. Shepard, 605 N.E.2d 518 (Ill. 1992).

221. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977).

222. See *supra* notes 173-221 and accompanying text for a discussion of the legislative history of the ATS, its discriminatory impact, and the foreseeability of its impact.

223. See *supra* notes 111-18 and accompanying text for a discussion of suspect classifications.

224. See *supra* notes 101-20 and accompanying text for a discussion of the strict scrutiny test.

225. See *infra* notes, 226-29 and accompanying text for a discussion of the burden placed on the state.

D. The Response of the State

Once the party challenging the ATS establishes a prima facie case of racially discriminatory intent through the use of the legislative history, the discriminatory impact, and the foreseeability of that impact, the burden shifts to the state. The state must then prove the legislature enacted the ATS due to a compelling state interest.[226] In addition, the state must prove the legislature could not have accomplished that interest through a less restrictive alternative.[227] Courts have placed this onerous burden on states since race, or any other suspect classification, is seldomly related to the achievement of a legitimate state interest.[228] More often, the creation of a suspect classification by the legislature will reflect prejudice on the part of the legislature.[229] Therefore, the state has the burden of proving that the legislature enacted the ATS due to a compelling state interest, and that the ATS is the least restrictive means available.

The state must first show the legislature enacted the statute due to a compelling state interest.[230] The sponsor of the ATS, Representative DeLeo, stated the purpose of the ATS was to decrease gang activity in public housing.[231] Furthermore, he stated the legislature needed to target public housing since the residents of public housing are the greatest victims of gang activity.[232] Therefore, the legislature clearly expressed that its purpose for enacting the ATS was to reduce rampant criminal gang activity in public housing.

Any party challenging the ATS would acknowledge the state has a compelling interest in reducing gang activity and protecting society from criminal activity. However, the ATS fails to reduce gang activity in general[233] or protect society as a whole.[234] Instead, the ATS attempts to reduce gang activity only in and around public

226. LaRouche v. Kezer, 787 F. Supp. 298, 303 (D. Conn. 1992).

227. *Id.*

228. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (stating that race, alienage, and national origin are seldom related to a legitimate state interest).

229. *Id.* The Court stated that when a law creates a suspect classification, it often reflects prejudice. *Id.* Similarly, it shows the legislature believes those in suspect classes are inferior to those not in such classes. *Id.*

230. *Larouche*, 787 F. Supp. at 303.

231. H.R. Rep. No. 152, 86th Ill. Leg. (daily ed. June 15, 1989) (statement of Rep. DeLeo) (stating that public housing may be the greatest recruitment area for gangs).

232. *Id.* at H156 (statement of Rep. DeLeo). Representative Jones asked Representative DeLeo why the ATS focuses on public housing. *Id.* Representative DeLeo responded that people in public housing tend to be the greatest victims of gang activity. *Id.*

233. For a statute addressing gang activity in general, see the gang transfer statute, 705 ILCS 405/5-4 (3.1) (1992).

234. 705 ILCS 405/5-4 (7)(a) (1992).

housing and to protect those who live in public housing.[235] The racially motivated belief of the legislature that more criminal gang activity occurs in public housing than elsewhere will not convince a court that a compelling state interest is present.[236]

Nevertheless, even if a court determines a compelling state interest exists, the state cannot satisfy the second prong of the strict scrutiny test. The state must also show that the legislature could not have accomplished that interest through a less restrictive alternative.[237] The legislature must have enacted the legislation in an attempt to achieve a narrowly tailored purpose.[238] Therefore, the state will fail to meet its burden of proof if a party can prove that the Illinois Legislature could have achieved its purpose of reducing gang activity in public housing through a less restrictive alternative. If the state fails to meet its burden, a court must find the ATS unconstitutional.

There are two ways in which the Illinois legislature could have enacted the ATS in a less restrictive manner. First, the legislature could have enacted the ATS to require juvenile court judges to automatically transfer any fifteen or sixteen year old charged with violating Section 401 of the Illinois Controlled Substance Act[239] to the criminal court system. Through this method, the legislature would accomplish its goal of getting tough on crime.[240] In addition, the statute would not target only public housing. Rather, it would treat everyone charged with the same offense equally.[241] Thus, the legis-

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235. *Id.* (7)(a).

236. Palmore v. Sidoti, 466 U.S. 429, 431 (1984) (stating that although the Constitution cannot control private bias, it likewise does not tolerate bias). *See also* Watson v. City of Memphis, 373 U.S. 526 (1963). In *Watson*, the plaintiff brought an action requesting the court to direct the city to desegregate parks and other public facilities. *Id.* The state argued it needed a long period of time to desegregate the parks and public facilities since it feared public unrest would increase when the desegregation occurred. *Id.* at 535. The Supreme Court ruled the vague assertions of fear and violence asserted by the state were not enough to overcome the constitutional rights of the plaintiff. *Id.* at 539. The state was unable to demonstrate that any violent disturbances had occurred as a result of the desegregation. *Id.* at 536.

237. LaRouche v. Kezer, 787 F. Supp. 298, 303 (D. Conn. 1992).

238. City of Cleburne v. Cleburne Living Ctr., 437 U.S. 432, 440 (1985) (holding the state must prove the statute is suitably tailored to serve a compelling state interest); F. Buddie Contracting Co. v. City of Elyria, 773 F. Supp. 1018, 1030 (N.D. Ohio 1991) (ruling the state must prove the ordinance is narrowly tailored to achieve its purpose).

239. 720 ILCS 570/401 (1992).

240. S. reg. 80-81, 86th Ill. Leg. (daily ed. Oct. 18, 1989) (statement of Sen. Marovitz). Senator Marovitz stated the legislature was sending a message by enacting the ATS. *Id.* According to Senator Marovitz, the legislature told everyone that it was getting tough on crime. *Id.*

241. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (stating that when a law lays an unequal hand on those who have committed the same offense, the law is as discriminatory as if it had selected a particular group for oppressive treatment).

lature could have addressed the compelling state interest in a less restrictive manner.

Second, the Illinois legislature could have addressed its perceived need to control gang activity in public housing in a less restrictive manner. Instead of automatically transferring juveniles charged with selling drugs near public housing,[242] the legislature could have allowed juvenile court judges to take that into consideration when making their waiver decision.[243] Thus, the juvenile would not automatically lose the protection of the juvenile court system.[244] The legislature would allow the juvenile court judge to use his discretion in determining whether the juvenile court system is the better forum for the juvenile. Therefore, the legislature could have addressed the perceived state interest and still have enacted a less restrictive statute.

At the time of the enactment of the ATS, members of the Illinois Legislature,[245] and the Governor of Illinois[246] advocated leaving the discretion to the juvenile court judges. Representative Young of Cook County urged the legislature to grant juvenile court judges the power to determine whether the juvenile system could better rehabilitate juveniles.[247] However, even though Senator Jones stated the importance of getting tough on crime,[248] he argued that juvenile court judges should look at each juvenile charged with selling drugs near public housing individually and make a waiver determination on a case-by-case basis.[249]

Former Illinois Governor James Thompson vetoed the ATS.[250] Although he supported enhanced penalties for those charged with selling drugs near public housing, he did not support the automatic transfer provision.[251] He stated that many juveniles are capable of

242. See *supra* notes 70-79 and accompanying text for a discussion of legislative waiver.

243. See *supra* notes 62-68 and accompanying text for a discussion of judicial waiver.

244. See *supra* note 73 and accompanying text for a discussion of the protection afforded a juvenile under the juvenile court system.

245. H.R. Rep. No. 153-54, 86th Ill. Leg. (daily ed. June 15, 1989) (statement of Rep. Young that the legislature should leave the waiver decision to the juvenile court judges); S. Reg. 82, 86th Ill. Leg. (daily ed. Oct. 18, 1989) (statement of Sen. Jones that the legislature should not create blanket laws, but instead, it should allow juvenile court judges to make waiver decisions on a case-by-case basis).

246. J. SENATE 8589 (Sept. 6, 1989).

247. H.R. Rep. No. 153-54, 86th Ill. Leg. (daily ed. June 15, 1989) (statement of Rep. Young).

248. S. Reg. 82, 86th Ill. Leg. (daily ed. Oct. 18, 1989) (statement of Sen. Jones).

249. *Id.*

250. J. SENATE 8588 (Sept. 6, 1989).

251. *Id.* at 8589. The Governor stated that he strongly supported the enhanced penalties for manufacturing or delivering a controlled substance on public housing property. *Id.* However, he stated he did not support, nor ap-

rehabilitation.[252] In addition, he noted that Illinois already has one of the harshest automatic transfer provisions in the country.[253] The Governor believed juvenile court judges should retain discretion and the court should make the waiver determination on a case-by-case basis.[254] However, the Illinois Legislature was able to override the veto of Governor Thompson.[255] Nonetheless, the statements of the Governor and the legislature indicate the legislature could have addressed the perceived state interest through a less restrictive alternative. Thus, the state cannot meet its burden of proof. Therefore, Judge Getty properly ruled the ATS is unconstitutional in that it violates the equal protection clause of the Fourteenth Amendment to the United States Constitution[256] and the equal protection provision of the Illinois Constitution.[257]

CONCLUSION

The juvenile court system has experienced many changes since the 1960s.[258] These changes have made the juvenile court system similar to that of the adult criminal court system. Some commentators have even advocated abolishing the juvenile system altogether believing the need for seperate systems no longer exists.[259] However, the juvenile court system does cloak the juvenile with certain protections he will not have under the criminal system.[260] Consequently, the decision of a legislature to enact an automatic transfer statute will have a far reaching effect on juveniles.

The Illinois Legislature enacted the ATS to control gang

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prove of the automatic transfer of juveniles charged with that offense. *Id.* Governor Thompson stated that some juveniles are capable of and receptive to rehabilitation. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* The Governor stated juvenile court judges should make waiver decisions on a case-by-case basis. *Id.* The court system should transfer some juveniles. *Id.* However, the juvenile court system could handle many juveniles much better. *Id.* The juvenile court system has some "dispositional options" that may not be available under the criminal court system. *Id.*

255. S. Reg. 86, 86th Ill. Leg. (daily ed. Oct. 18, 1989) (statement of Sen. D'Arco, presiding officer). The Senate voted 35 to 1 to override the veto of Governor Thompson. *Id.* The law only required a 60% vote to override the veto of the Governor. *Id. See also* H.R. Rep. No. 77, 86th Ill. Leg. (daily ed. Nov. 1, 1989) (statement of Speaker Giglio). The House voted 91 to 12 to override the veto of Govenor Thompson. *Id.*

256. U.S. CONST. amend. XIV, § 1.

257. ILL. CONST. art. I, § 2.

258. See *supra* notes 36-54 and accompanying text for a discussion of the changes in the juvenile court system since the 1960s.

259. *See* Ainsworth, *supra* note 15.

260. See *supra* note 73 for a discussion of the protections a juvenile loses when the juvenile court transfers the juvenile to the criminal court system.

problems in public housing.[261] Yet, the legislature was unable to explain the basis for according special treatment to conduct in and around public housing. Judge Getty ruled the ATS was unconstitutional.[262] The legislative history, discriminatory impact, and foreseeability of that impact prove Judge Getty properly found the ATS violates the equal protection clause of the Fourteenth Amendment[263] and the equal protection provision of the Illinois Constitution.[264] Therefore, the Illinois Legislature should repeal the 1989 Amendment. This revision would return the statute to its prior purpose of attacking drugs and gang activity around schools only.[265] Only after the Illinois legislature amends the Automatic Transfer Statute will it be constitutional.[266]

Martin J. O'Hara

261. H.R. Rep. No. 155, 8th Ill. Leg. (daily ed. June 15, 1989) (statement of Rep. DeLeo).

262. People v. Lawrence, No. 92-CR-4907 (Cook County Crim. Div., Jan. 20, 1993), *rev'd* People v. R.L., No. 75081, 75082, 75083, slip op. at 1-8 (Ill. March 29, 1994).

263. U.S. CONST. amend. XIV, § 1.

264. ILL. CONST. art. 1, § 2.

265. The complete text of the proposed revised statute is in the Appendix to this Note.

266. *See* People v. M.A., 529 N.E.2d 492 (Ill. 1988).

APPENDIX: PROPOSED AUTOMATIC TRANSFER STATUTE

(7)(a) The definition of delinquent minor under Section 5-3 of this Act shall not apply to any minor who at the time of an offense was at least 15 years of age and who is alleged to have committed an offense under Section 401 of the Illinois Controlled Substance Act when the offense occurred on or within one thousand (1,000) feet of the property on any school. Property of any school shall include those portions of any building, park, stadium or other structure or grounds which were, at the time of the offense, being used for an activity sponsored by or through a school. School property shall also include any conveyance owned, leased, or contracted by a school to transport students to or from school or a school related activity. These provisions will be in effect regardless of the time of day or the time of year. For purposes of this Section, school is defined as any public or private elementary or secondary school, community college, college, or university. These offenses and all felonies or misdemeanors charged in the complaint which are based on the same act or transaction shall be prosecuted under the Illinois Controlled Substances Act.[267]

267. This proposed statute is a combination of the Illinois Automatic Transfer Statute, 705 ILCS 405/5-4 (7)(a) (1992), and the Idaho Automatic Transfer Statute, IDAHO CODE § 16-1806A (Supp. 1993). The proposed statute allows the legislature to protect students during any school activity.