

# SHIFTING AWAY FROM REHABILITATION: *STATE V. LADD'S* EQUAL PROTECTION CHALLENGE TO ALASKA'S AUTOMATIC WAIVER LAW

*This Note discusses the current controversy in Alaska regarding Alaska's automatic waiver provision. The provision permits juveniles accused of serious crimes to be tried as adults, and includes a burden-shifting provision for juveniles petitioning to return to the juvenile system. The potential for disparate sentencing for identical crimes implicates the Equal Protection Clause of the Alaska Constitution. The Note traces the case of State v. Ladd, currently before the Alaska Supreme Court, and discusses the equal protection issues that arise. First, the Note explains the burden shifting provision. Second, the Note argues that a minor has an important interest in remaining in the juvenile system. Third, the Note contends that the state's does not have a compelling interest in shifting the burden of proof. Fourth, the Note asserts that waiver provision was not a reasonably close fit between the means chosen by the legislature and the goals of the legislation. The Note concludes by suggesting constitutional alternatives that more effectively promote the state's goal of rehabilitating juveniles.*

## I. INTRODUCTION

The Alaska Supreme Court recently granted review to a case that implicates the equal protection rights of juvenile defendants. In *State v. Ladd*,<sup>1</sup> the Fairbanks public defender's office challenged a provision of Alaska's automatic waiver law that effectively can create a disparate sentencing structure for juveniles convicted of the same crime. The automatic waiver law – which came into effect in 1994 when the Alaska legislature amended its juvenile delinquency laws – removes from the jurisdiction of juvenile courts minors over the age of sixteen charged with specified serious felo-

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1. 951 P.2d 1220 (Alaska Ct. App. 1998).

nies.<sup>2</sup> The minor can be returned to the juvenile system for sentencing if he or she is not convicted of the serious felony but is instead convicted of a charge that would not have triggered the waiver provision. However, to regain the benefits of juvenile treatment, the minor must demonstrate at a judicial hearing that he or she is amenable to treatment in juvenile rehabilitation programs.

This procedure differs from that accorded to juveniles originally charged only with the same lesser offense that is exempt from the automatic waiver. Minors originally charged with the lesser offense remain in the juvenile system unless the state requests a hearing and proves that the juvenile is not amenable to the treatment offered in juvenile rehabilitation programs, and consequently, should be tried in adult court. Adjudication and sentencing in adult rather than juvenile court deprives the minor of significant legal protections and presumptions. This Note argues that shifting the burden of proof to juveniles subject to the automatic waiver unfairly discriminates between these juveniles and those juveniles convicted of the same crimes but who were not subject to the waiver. This discrimination violates the Equal Protection Clause of the Alaska Constitution.

Despite due process and equal protection challenges, automatic waivers have been upheld in a number of jurisdictions.<sup>3</sup>

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2. Former ALASKA STAT. § 47.10.010(e) (Michie 1995) (repealed 1996). In 1996, the Alaska legislature revised and renumbered the statutory sections addressing children in need of aid and delinquent minors. See 1996 Alaska Sess. Laws 59. Alaska Statutes § 47.12.100 provides for a waiver of children's court jurisdiction if, after a hearing, a court finds "that there is probable cause for believing that a minor is delinquent and finds that the minor is not amenable to treatment." ALASKA STAT. § 47.12.100 (1998) (Due to their recent passage, many of the Alaska Statute sections cited in this Note currently are available electronically only. Those sections are noted by the absence of "Michie" in the citation parenthetical containing the year.). Alaska Statutes § 47.12.030 provides for automatic waiver by removing from the protection of the Alaska Delinquency Rules without a hearing those juveniles over the age of sixteen who have been charged with one of the enumerated felony offenses. See ALASKA STAT. § 47.12.030 (1998).

3. See, e.g., *United States v. Bland*, 472 F.2d 1329, 1333-34 (D.C. Cir. 1973) (upholding the District of Columbia's automatic waiver law); *Woodard v. Wainwright*, 556 F.2d 781, 783-86 (5th Cir. 1977) (upholding Florida statute that provided for automatic waiver of juveniles indicted of offenses punishable by death or life imprisonment); *Cox v. United States*, 473 F.2d 334, 335 (4th Cir. 1973) (upholding a U.S. Attorney's discretion to determine whether a juvenile would be tried and sentenced as an adult as "a prosecutorial decision beyond the reach of the due process rights of counsel and a hearing"); *People v. Parrish*, 216 Mich. Ct.

However, the provision at issue in *Ladd* differs from the waiver statutes of most states because it creates an unnecessary presumption against juvenile treatment *after* the juvenile has been found not guilty of the offense that triggered the waiver.

Part II of this Note explains the constitutional issues that arise from the automatic waiver statute and the resulting shift in the burden of proof. It also reviews the history of *Ladd*, the constitutional analysis applied by the underlying courts, and the question that is currently before the Alaska Supreme Court.

Part III then examines the first prong of the Alaska Constitution's three-pronged equal protection analysis: The minor's interest in being sentenced as a juvenile. Adult sentencing is significantly different than juvenile sentencing. As a juvenile, a minor is entitled to privacy, treatment, and leniency. Juveniles convicted as adults face harsher penalties and a permanent criminal record. Minors have little likelihood of rehabilitation when incarcerated with adult felons in prisons that lack suitable treatment programs. Part IV investigates the second prong of the court's analysis: the strength of the state interest in placing the burden of proof on the juvenile. Part V examines the third prong – the tightness of the relationship between the statutory provision and the goals the legislature intended to fulfill – and concludes that the Alaska Supreme Court should reverse the court of appeals and declare Alaska Statutes section 47.12.030(a) unconstitutional. In closing, Part VI discusses alternatives that accomplish the state's goals and promote the rehabilitation of youthful offenders, while avoiding the equal protection problems that the current statute creates.

## II. CONSTITUTIONAL IMPLICATIONS OF *STATE V. LADD*

### A. Automatic Waiver in Alaska

In 1994, Alaska amended its juvenile justice provisions to include an automatic waiver law. The automatic waiver law removes from the protection of the Alaska Delinquency Rules, without a judicial hearing, those sixteen or seventeen year-old minors who are charged with an offense “(1) that is an unclassified felony or a class A felony and the felony is a crime against a person; or (2) of

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App. 178, 181-82 (Mich. App. 1996) (rejecting due process challenge to Michigan statute that permitted prosecutor to choose forum in which to try 15 to 17 year-old minors charged with an enumerated offense). *But see* *State v. Mohi*, 901 P.2d 991, 1006 (Utah 1995) (striking down statute that permitted prosecutors to bypass the juvenile system and directly file charges in adult court); *Hughes v. State*, 653 A.2d 241, 253 (Del. 1994) (rejecting constitutionality of statute providing for waiver of juveniles who reached the age of eighteen prior to adjudication).

arson in the first degree.”<sup>4</sup> The removal causes the minor to be “charged prosecuted and sentenced in the superior court in the same manner as an adult.”<sup>5</sup> In 1998, the statute was amended to include additional offenses within its provisions.<sup>6</sup>

The Alaska legislature was mindful that in some instances minors subject to automatic waiver would not be convicted of the original charge. The statute explicitly provides that a minor convicted of an offense that would not originally have triggered the waiver provision, “may attempt to prove, by a preponderance of the evidence, that the minor is amenable to [rehabilitative] treatment.”<sup>7</sup> Four factors will be considered in order to determine the minor’s amenability to rehabilitation under juvenile programs: the seriousness of the offense with which the minor is charged, the minor’s history of delinquency, the probable cause of the minor’s delinquent behavior, and the facilities available for treatment.<sup>8</sup>

If a juvenile is not charged with one of the aforementioned offenses, he will remain in the juvenile system unless the state petitions the juvenile court for a waiver of jurisdiction. If removal is granted, the juvenile will be prosecuted in adult court.<sup>9</sup> In order to prevail at a juvenile hearing convened to consider the waiver, the state must show that the minor cannot be rehabilitated by the age of twenty.<sup>10</sup>

Therefore, if a juvenile originally is charged with an offense that would not trigger the waiver provision, the minor is presumed to be amenable to treatment, and under the Alaska Delinquency Rules for the same lesser crime, the state bears the burden to have

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4. Former ALASKA STAT. § 47.10.010(e) (Michie 1995) (repealed 1995).

5. *Id.* The statute was amended in 1998 to read: “The minor shall be charged, held, released on bail, prosecuted, sentenced, and incarcerated in the same manner as an adult.” ALASKA STAT. § 47.12.030(a) (1998).

6. The statute presently excludes from the protections of the Alaska Delinquency Rules juveniles charged with

an offense that is a class B felony and the felony is a crime against a person in which the minor is alleged to have used a deadly weapon in the commission of the offense and the minor was previously adjudicated as a delinquent or convicted as an adult, in this or another jurisdiction, as a result of an offense that involved use of a deadly weapon in the commission of a crime against a person or an offense in another jurisdiction having elements substantially identical to those of a crime against a person and the previous offense was punishable as a felony.

*Id.* at. § 47.12.030(a)(3) (as amended and enacted into law July 1, 1998).

7. ALASKA STAT. § 47.12.030(a) (Michie 1996).

8. ALASKA STAT. § 47.12.100(b) (Michie 1996).

9. *See id.* § 47.12.100(a).

10. *See id.* § 47.12.100(b).

the juvenile placed in adult court.<sup>11</sup> Alternatively, when a minor is charged with a triggering offense, but is convicted instead of a lesser offense not specified in the statute, the minor is presumed to be unamenable to treatment.<sup>12</sup> This sentencing scheme treats two similarly-situated minors convicted of the same crime differently, and therefore implicates Alaska's constitutional guarantee of equal protection under the law.

#### B. Equal Protection Under the Alaska Constitution

The Alaska Constitution reflects equal protection principles<sup>13</sup> that are distinct from federal equal protection principles, and employs a "sliding scale"<sup>14</sup> in order to determine what kind of state justification permits encroachment on an individual interest.<sup>15</sup> As such, the Alaska Equal Protection Clause is more protective of individual rights than the United States Constitution and permits courts to enumerate interests deserving greater judicial protection beyond strictly defined classifications. A court may determine that an individual interest is very important and safeguard the right from state encroachment regardless of whether the classification (the types of individuals that are treated differently by the law) is based on race or gender or affects a fundamental right.<sup>16</sup> Even if

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11. See *State v. Ladd*, 951 P.2d 1220, 1221 (Alaska Ct. App. 1998).

12. See *id.* at 1222.

13. ALASKA CONST. art. I, § 1 states:

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that *all persons are equal and entitled to equal rights, opportunities, and protection under the law*; and that all persons have corresponding obligations to the people and to the State.

*Id.* (emphasis added).

14. See *Ladd*, 951 P.2d at 1221.

15. See Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209 (1998) (offering an in-depth discussion of Alaska's equal protection jurisprudence as distinguished from its federal counterpart).

16. The United States Supreme Court generally has determined the amount of equal protection scrutiny with which it will look at a challenged statute by the type of classification system that the statute creates. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (plurality opinion) (applying strict scrutiny to municipal plan requiring contractors to award subcontracts to "Minority Business Enterprises" and finding plan an impermissible race-based classification); *Eisenstadt v. Baird*, 405 U.S. 438, 446-47 (1972) (rejecting Massachusetts statute permitting married persons, but not unmarried persons, to obtain contraceptives on the ground that there was no rational basis for the differential treatment).

the court finds that the interest is not very important, it must still require that the government's methods have a "fair and substantial relation" to the statute's intended purpose.

The Alaska Supreme Court has rejected "the traditional two-tiered federal approach in favor of a more flexible 'sliding scale' test."<sup>17</sup> The difference in these types of analyses was set forth in *State Department of Revenue v. Cosio*<sup>18</sup>:

Analysis under our state equal protection clause is considerably more fluid than under its federal counterpart. Instead of using three levels of scrutiny, we apply a sliding scale under which "[t]he applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme." As the right asserted becomes "more fundamental" or the classification scheme employed becomes "more constitutionally suspect," the challenged law "is subjected to more rigorous scrutiny at a more elevated position on our sliding scale."<sup>19</sup>

The Alaska sliding scale inquiry consists of a three-step analysis of the interests involved to determine "what weight should be afforded the constitutional interest impaired by the challenged enactment."<sup>20</sup> The first step is to determine the nature of the interest at stake.<sup>21</sup> As the supreme court has noted, "[t]he nature of this interest is the most important variable in fixing the appropriate level of review" and may be determinative of the eventual disposition of the case.<sup>22</sup> A purely economic interest, such as a right to receive a permanent fund dividend while incarcerated,<sup>23</sup> a right to receive unemployment benefits,<sup>24</sup> or a right to be free from disparate taxation,<sup>25</sup> does not require stringent review. However, an interest affecting "a basic necessity" or "a fundamental right" will qualify for enhanced scrutiny,<sup>26</sup> and such heightened scrutiny places a heavy burden on the state to justify the suspect legislation, increasing the likelihood that the statute will be struck down.<sup>27</sup> If a court finds instead that the interest at stake does not warrant heightened scru-

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17. *State v. Anthony*, 810 P.2d 155, 157 (Alaska 1991).

18. 858 P.2d 621 (Alaska 1993).

19. *Id.* at 629 (quoting *State v. Ostrosky*, 667 P.2d 1184, 1192-93 (Alaska 1983)).

20. *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 269 (Alaska 1984).

21. *See id.*

22. *Id.*

23. *See* 810 P.2d 155, 158 (Alaska 1991).

24. *See Sonneman v. Knight*, 790 P.2d 702, 705 (Alaska 1990).

25. *See Atlantic Richfield Co. v. State*, 705 P.2d 418, 436-37 (Alaska 1985).

26. *Anthony*, 810 P.2d at 158.

27. *See Brown*, 687 P.2d at 269.

tiny, then the challenger faces a heavy burden to show that the statute is unconstitutional.<sup>28</sup> Therefore, the initial determination regarding the importance of the interest significantly affects the eventual disposition.

Once the nature and scope of the affected interest is determined, the court will assess the purpose or purposes the statute was intended to serve.<sup>29</sup> The extent to which a court will question the legislature's motivations depends on the importance of the interest. For instance, "the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest."<sup>30</sup> If the interest is only granted minimum scrutiny, then the challenger has a very heavy burden: to prove that the statute is *not* reasonably related to a legitimate government interest, while "[t]he state need only show that the distinctions drawn bear a fair and substantial relationship to the statute's objective."<sup>31</sup> Alternatively, if the interest is so important that it warrants heightened scrutiny, the court must find a "compelling" state interest in upholding the statute that justifies the encroachment on important individual rights.<sup>32</sup>

The third prong of the inquiry requires the court to evaluate the means-ends fit of the method employed by the state. At the high end of the scale, "if the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated."<sup>33</sup> If only minimum scrutiny is granted, the state needs to show that the enactment bears "a fair and substantial relationship" to the legislative purpose.<sup>34</sup> Under this test, the court will not look at the availability of other alternatives.<sup>35</sup> Rather, if the statute merely accomplishes a legitimate legislative purpose, even through broad-

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28. See *Anthony*, 810 P.2d at 158.

29. See *id.* at 157; *Brown*, 687 P.2d at 269.

30. *Brown*, 687 P.2d at 269-70.

31. *Anthony*, 810 P.2d at 159.

32. See *id.* at 157.

33. *Id.* (quoting *Brown*, 687 P.2d at 269-70).

34. See *id.* at 159; *Sonneman v. Knight*, 790 P.2d 702, 705 (Alaska 1990).

35. See *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976) (discussing Alaska's shift toward a more exacting scrutiny and stating that "as a result, we will no longer hypothesize facts which would sustain otherwise questionable legislation"); *Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1264 n.39 (Alaska 1980) (commenting on *Isakson's* rejection of a hypothesized purpose because "close examination of the statutory scheme will usually yield several concrete legislative purposes having a substantial basis in reality").

reaching means, the most narrow alternative need not be adopted.<sup>36</sup>

C. *State v. Ladd*

Already, *State v. Ladd* has emerged as a case that demonstrates the inequality inherent in the waiver statute. In October 1995, sixteen year-old Anthony Ladd allegedly shot another boy and was charged with assault in the first degree, a Class A felony. Pursuant to Alaska's automatic waiver law, Ladd was tried in adult court.<sup>37</sup> In February 1996, Ladd was found not guilty of the felony charge and was convicted of fourth degree assault, a misdemeanor.<sup>38</sup> In order for Ladd to return to the juvenile system for sentencing, the waiver law required him to prove his amenability to treatment.<sup>39</sup> However, had Ladd originally been charged with the lesser offense, the state, rather than Ladd, would have borne the burden of showing that Ladd was not amenable to treatment in order to remove him to adult criminal court.<sup>40</sup>

By the time Ladd was convicted, however, the superior court had found the burden shift unconstitutional in the companion case to *Ladd*, *State v. Nao*.<sup>41</sup> When Ladd moved for an adjudication of delinquency,<sup>42</sup> the superior court applied its earlier ruling in *Nao* and held that unless the state accepted its opportunity to file a waiver petition to have Ladd sentenced as an adult, the "verdicts [would] form a legal basis for an adjudication of delinquency."<sup>43</sup>

Superior Court Judge Niesje J. Steinkruger had examined the burden-shifting provision in *Nao*, prior to the defendant's conviction.<sup>44</sup> She ruled that the Alaska Equal Protection Clause of the

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36. See *Apokedak*, 606 P.2d at 1264 (citing *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978)).

37. See *State v. Ladd*, Case No. 4FA-395-3316CR, at 5 (Alaska Super. Ct. Apr. 19, 1996).

38. See *id.* at 1-2; see also Defendant's Motion for Disposition After Jury Trial, *State v. Ladd*, No. 4FA-S95-3316CR (Alaska Super. Ct. Mar. 1, 1996).

39. See *Ladd*, No. 4FA-S95-3316CR, at 7.

40. See *id.* at 7-8.

41. Case No. 4FA-94-3671CR (Alaska Super. Ct. Mar. 8, 1995). The court in *State v. Nao* decided in March 1996 that the burden-shifting provision of the automatic waiver statute was unconstitutional. *Ladd* was decided in April 1996. The court in *Ladd* adopted the arguments and conclusions of *Nao*.

42. Ladd's motion requested that the superior court proceed under the Alaska Delinquency Rules for sentencing under its ruling in *State v. Nao*. See Motion for Disposition of Matter After Jury Trial, *State v. Ladd* (No. 4FA-S95-3316CR) (Mar. 8, 1995).

43. *Ladd*, No. 4FA-S95-3316CR, at 11.

44. See *Nao*, No. 4FA-94-3671CR, at 8-21.

state constitution prohibited such discrimination between “similarly situated individuals” during sentencing.<sup>45</sup> Using the three-prong equal protection analysis, she determined that a juvenile’s interest in not bearing the burden to prove that he is amenable to treatment as a juvenile is very important, and she afforded heightened scrutiny to the legislature’s classification scheme.<sup>46</sup> She found that “the state . . . failed to set out a compelling state interest for treating juveniles different for disposition purposes when they are convicted of a lesser crime,” and struck the provisions of the statute containing the burden of proof requirement, leaving the remainder of the automatic waiver provision intact.<sup>47</sup>

In Alaska, “[e]qual protection requires that those similarly situated be treated equally and that those classifications made by government which call for different treatment of its citizens be reasonable.”<sup>48</sup> The superior court determined that juveniles who automatically are waived to adult court but convicted only of a non-specified offense are similarly situated to juveniles who originally were charged with that same offense and therefore did not trigger the automatic waiver provision.<sup>49</sup> The *Nao* decision subjected the burden-shifting provision to heightened equal protection scrutiny. The court found that

[b]ecause the individual rights are of high importance, the level of scrutiny should be elevated. The right to be treated by the court’s juvenile jurisdiction for all crimes not specified in [current Alaska Statutes section 47.12.030(a),] and receive the attendant “non-adult” alternatives, is a “more fundamental” right requiring substantial scrutiny of the classification created by the legislat[ure] for burden of proof shifting. Therefore, the state must meet a high burden for justifying making one group of sixteen and seventeen year old individuals carry the burden of proving by a preponderance of evidence they are amenable to treatment while the state has the burden of proving non-amenability to treatment for a similarly situated group of sixteen and seventeen year old individuals for waiver to adult status.<sup>50</sup>

By granting heightened scrutiny to the juvenile’s right to be tried in a juvenile court, the superior court required the state to set out a compelling reason for the statute. The court then looked to the purposes behind the legislation and determined that while

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45. *See id.* at 12-21.

46. *See id.* at 13-15

47. *Id.* at 18.

48. *Id.* at 12 (quoting *Ketchikan Gateway Borough, Alaska v. Breed*, 639 P.2d 995 (Alaska 1991)).

49. *See id.* at 20.

50. *Id.* at 15.

“[t]here are legitimate and compelling state interest reasons for treating juveniles differently based on the severity of the crime . . . and age . . . , the state has failed to set out a compelling state interest for treating juveniles different for disposition purposes when they are convicted of a lesser crime.”<sup>51</sup> The distinction between crimes alleged prior to trial and those for which a juvenile actually was convicted, was sufficiently important to overcome other justifications for the burden-shifting.

The court’s analysis rejecting the burden-shifting provision initially was spelled out in *Nao*.<sup>52</sup> Daniel Nao was convicted as charged in adult criminal court. As Nao was convicted of the initial waivable offense with which he was charged, he was never given the opportunity to petition for return to the juvenile system. Thus, the constitutionality of the burden-shifting provision was not at issue on appeal.<sup>53</sup> The court adopted the *Nao* analysis in *Ladd*. After Anthony Ladd was convicted on a lesser charge, the state appealed the decision of the superior court in *Ladd*, effectively appealing *Nao*’s determination that the statute is unconstitutional.<sup>54</sup>

In January 1998, in an opinion written by Judge Mannheimer, the court of appeals reversed the superior court.<sup>55</sup> The court of appeals noted that in order to arraign the minor in adult court, there must have been, in addition to the prosecutor’s initial decision to charge the minor with a waivable offense, an original grand jury finding of probable cause that the minor committed the alleged enumerated offense.<sup>56</sup> The court concluded that the differential treatment of minors eventually convicted of the same offense was justified because “there ha[d] been an independent determination of probable cause to believe that the minor committed the more serious crime.”<sup>57</sup>

The court of appeals agreed that the two groups of convicted juveniles “must presumptively be deemed ‘similarly situated’ for purposes of disposition – and, in particular, for purposes of deciding whether the state or the minor should bear the burden of proof on the issue of amenability to juvenile treatment.”<sup>58</sup> However, the court rejected the reasoning that the legislature classified the two groups differently based solely on a discretionary prosecutorial de-

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51. *Id.* at 17-18.

52. *See id.* at 8-21.

53. *See Nao v. State*, 953 P.2d 522 (Alaska Ct. App. 1998).

54. *See State v. Ladd*, 951 P.2d 1220 (Alaska Ct. App. 1998).

55. *See id.*

56. *See id.* at 1223.

57. *Id.*

58. *Id.* at 1222.

cision.<sup>59</sup> The prosecutor's demonstration of probable cause that the minor committed the more serious offense was a "plausible basis" for the legislature's decision to impose the burden-shifting provision on one group of juveniles and not the other.<sup>60</sup> The court reviewed the statute with minimal scrutiny<sup>61</sup> and concluded that "a juvenile offender has no constitutional right to be tried in a juvenile court."<sup>62</sup> Thus, the state legislature could restrict access to juvenile treatment "so long as no arbitrary or discriminatory classification is involved."<sup>63</sup>

By requiring only a "plausible basis" for the legislature's action, the court implicitly stated that when a statute is subjected to minimal scrutiny, any rational reason given by the legislature for the statute will be sufficient. Under prior Alaska equal protection case law, the court of appeals should have sought at least a "fair and substantial relation" between the means and the ends of the statute.<sup>64</sup> Alaska courts have applied this standard to place a greater burden on the state to justify legislation that encroaches upon important individual interests.<sup>65</sup> In this case, the individual interest at stake is sufficiently important to merit close scrutiny of the legislature's actions.

The next section of the Note begins the appropriate equal protection analysis, applies it to *State v. Ladd* and concludes that minors have a vital interest in remaining in the juvenile justice system.

### III. THE FIRST PRONG: THE VITAL INTEREST IN REMAINING IN THE JUVENILE JUSTICE SYSTEM

Juveniles who are tried as adults lose protections afforded by the Alaska Delinquency Rules, and the difference between treatment as a juvenile and treatment as an adult offender is significant. The legislature intended to solve a legitimate problem by placing the burden of proof on the party it believed had better access to relevant information regarding amenability to treatment. The resolution of this issue, however, implicated an important constitutional right. The supreme court should apply heightened equal

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59. *See id.*

60. *Id.* at 1223.

61. *See id.* at 1225.

62. *Id.* at 1224 (quoting *W.M.F. v. State*, 723 P.2d 1298, 1300 (Alaska Ct. App. 1986)).

63. *Id.* at 1224-25 (quoting *W.M.F.*, 723 P.2d at 1300.)

64. *See Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1264 n.39 (Alaska 1980); *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976).

65. *See Apokedak*, 606 P.2d at 1264 n.39; *Isakson*, 550 P.2d at 362.

protection scrutiny to the automatic waiver's burden-shifting provision because the presumption in favor of amenability or unamenability to treatment may determine the eventual disposition of a juvenile's case.

The shifting of the burden of proof in waiver hearings<sup>66</sup> was the legislative response to *R.H. v. State*.<sup>67</sup> The charges against R.H. included first-degree murder and first-degree robbery.<sup>68</sup> R.H. was two months shy of his seventeenth birthday when he allegedly committed the crimes with which he was charged.<sup>69</sup> R.H.'s history of delinquent behavior and his confessions of robbery and murder led the state to file a petition for waiver of children's court jurisdiction. The prosecutor requested a psychological evaluation to support the petition.<sup>70</sup> The superior court granted a petition to compel R.H. to submit to psychiatric evaluation to determine amenability to rehabilitation.<sup>71</sup> The evaluation involved elaborate procedural safeguards designed to protect R.H. from self-incrimination and ensure his right to counsel.<sup>72</sup> On appeal, however, the court of appeals remanded the case for re-examination without the psychiatric evaluation, holding that the compelled evaluation violated R.H.'s constitutional privilege against self-incrimination.<sup>73</sup>

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66. The Alaska legislature has shifted the burden of proof in two types of waiver hearings. Under Alaska Statutes § 47.12.030(a), a 16 or 17 year-old minor is entitled to a hearing only after he has been charged with a serious felony and waived to adult court but has been convicted of less serious charges. Alaska Statutes § 47.12.100(c) applies to minors *under the age of sixteen* who also are charged with certain serious felonies. These minors can be waived into adult court only after a hearing at which they bear the burden to show that they are amenable to treatment as juveniles.

67. 777 P.2d 204 (Alaska Ct. App. 1989); *see also* House Judiciary Committee, Letter of Intent for H.C.S. CSSB 54 (JUD), 1993 HOUSE J. 1382, *available in* BASIS Alaska State 18th Legislature (visited Sept. 1, 1998) <<http://www.legis.state.ak.us/BASIS20.htm>>.

68. *See R.H.*, 777 P.2d at 205.

69. *See id.* at 206.

70. *See id.*

71. *See id.* at 207.

72. *See id.*

73. *See id.* at 211. The court of appeals distinguished *R.H.* from the United States Supreme Court's decision in *Estelle v. Smith*, 451 U.S. 454 (1981). *Smith* rejected the use of a psychiatric evaluation in sentencing proceedings when the examination was held outside the presence of defendant's counsel and without advising the defendant of his right to remain silent. *See id.* at 462-63. The *Smith* Court suggested that the evaluation could be used for the "limited neutral purpose of determining [Smith's] competency," but rejected its use at the sentencing phase, stating that the evaluation violated the defendant's protection against self-incrimination. *Id.* at 465. In *R.H.*, the court held that juvenile waiver proceedings

The structure of Alaska's present waiver system, which places the burden of proof on the juvenile in waiver hearings, is an outgrowth of the state's inability to compel a psychiatric evaluation unless the defendant himself places his mental state at issue.<sup>74</sup> The legislature therefore intended to place the burden of evidence on the party that supposedly has the best access to relevant information.<sup>75</sup>

However, this legislation trammels a juvenile's constitutional right to equal protection in being treated as a juvenile. The *R.H.* court itself highlighted the uniqueness and significance of juvenile waiver hearings by aligning those hearings with the adult sentencing proceedings, holding that "[i]n contrast to competency proceedings, juvenile waiver hearings are hardly 'neutral proceedings.' Rather, they are fully adversary proceedings in which the burden of establishing a child's probable unamenability to treatment is formally allocated to the state."<sup>76</sup> The court underscored the gravity of waiver proceedings:

Nor can juvenile waiver proceedings realistically be said to affect "only the forum where the issue of guilt will be adjudicated." A juvenile waiver proceeding is the only available avenue by which the state may seek to prosecute a child as an adult. Consequently, the stakes involved in such proceedings are high: "The result of a fitness hearing is not a final adjudication of guilt; but the certification of a juvenile offender to an adult court has been accurately characterized as 'the worst punishment the juvenile system is empowered to inflict.'"<sup>77</sup>

A minor unable to defeat the presumption will face sentencing in adult court.<sup>78</sup> An adult sentence may irreparably harm a young offender, and may even undermine the state's interest in rehabilitating youthful defendants.

The recently enacted legislative reforms, including the waiver provision, involve a drastic shift away from a more lenient and

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were not "neutral," and that therefore the juvenile's procedural rights needed greater protection in such proceedings. See *R.H.*, 777 P.2d at 210-211.

74. See House Judiciary, Letter of Intent, *supra* note 67; see also *R.H.*, 777 P.2d at 211 ("[T]he same conclusion [that the psychiatric examination violated the constitutional privilege] would not be warranted had R.H. sought to present psychiatric evidence on his own behalf at the waiver hearing or had he otherwise affirmatively placed his mental condition at issue.").

75. See House Judiciary, Letter of Intent, *supra* note 67 and accompanying text.

76. *R.H.*, 777 P.2d at 210.

77. *Id.* (quoting *Ramona R. v. Superior Court*, 693 P.2d 789, 795 (Cal. 1985)).

78. See ALASKA STAT. § 47.12.030(a) (Michie 1996).

sympathetic attitude toward juvenile offenders.<sup>79</sup> When the concept of a separate system for juveniles was originally conceived, "all children were believed to be redeemable."<sup>80</sup> States have established juvenile justice systems in order to provide a more flexible system wherein child offenders may be provided with the social services necessary for their rehabilitation. Based on the common law theory of *parens patriae*, the juvenile justice system is rooted in the idea that benevolent juvenile court judges with wide discretion will redirect wayward children toward the path of reform.<sup>81</sup>

Generally, juvenile courts tend to be more lenient than adult criminal courts,<sup>82</sup> attempting to balance the youth's age and family circumstances with public safety concerns. A 1987 national conference on juvenile justice in New Orleans underscored the appropriateness of this leniency by recommending that juvenile courts emphasize three goals: "(1) protection of the community, (2) imposing accountability, and (3) helping juveniles and equipping them to live productively and responsibly in the community."<sup>83</sup> Furthermore, the Conference noted that "[t]he justice system perceives juveniles to have greater rehabilitative possibilities than adults."<sup>84</sup> Youth implies flexibility and adaptability, and consequently juveniles may be more likely to learn from their mistakes and become responsible community members.

Special juvenile courts rely on discretionary sentencing to make an individualized determination of a juvenile's rehabilitative potential.<sup>85</sup> The feasibility of the system requires safeguarding the juvenile's due process rights by granting certain fundamental protections, but at the same time withholding others in order to provide necessary flexibility within the system. When dealing with

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79. Other indications of this shift include the enactment of victim's rights legislation that amended the Alaska Rules of Criminal Procedure 6 and 43(d), Alaska Rules of Evidence 404 and 615, and the Alaska Delinquency Rule 3. *See e.g.*, 1997 Alaska Sess. Laws 63. Among the Act's modifications to existing law is a provision that prevents a court from excluding a victim from a hearing or proceeding against a juvenile, even if the victim intends to be a witness against the juvenile at a hearing.

80. Catherine J. Ross, *Disposition in a Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System*, 36 B.C. L. REV. 1037, 1038 (1995).

81. *See id.* at 1038-39.

82. *See* DEAN J. CHAMPION & G. LARRY MAYS, TRANSFERRING JUVENILES TO CRIMINAL COURTS: TRENDS AND IMPLICATIONS FOR CRIMINAL JUSTICE 85-86 (1991).

83. *Id.* at 86 (citing Dennis Maloney et al., *Juvenile Probation: The Balanced Approach*, 39 JUV. & FAM. CT. J. 1 (1988)).

84. *Id.*

85. *See* Ross, *supra* note 80, at 1038-39.

minors accused of crimes that may result in incarceration, juvenile courts must provide the following procedural protections: “representation by counsel, notice of charges, confrontation and cross-examination of witnesses, protection against self-incrimination, protection from double jeopardy, proof of delinquency charges ‘beyond a reasonable doubt,’ and protection from judicial transfer to criminal court without hearing, without effective assistance of counsel, and without a statement of reasons.”<sup>86</sup> However, the United States Supreme Court has not required that minors be provided every procedural safeguard afforded adult criminal defendants. For example, juvenile defendants do not have a constitutional right to a jury trial, minors “may be detained prior to trial on a far lower standard than would apply to an adult, and [they] may be subjected to far greater judicial discretion in disposition than adults in comparable circumstances.”<sup>87</sup>

The critical pronouncement on waiver hearings is set out in the United States Supreme Court’s decision in *Kent v. United States*.<sup>88</sup> The Court held that juvenile offenders are entitled to assistance of counsel at waiver hearings,<sup>89</sup> and noted that the flexibility of juvenile courts does not negate the minor’s right to procedural fairness:

The [j]uvenile [c]ourt is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment . . . . But the admonition to function in a “parental” relationship is not an invitation to procedural arbitrariness.<sup>90</sup>

The *Kent* court found that the consequences of waiver are sufficiently serious to require important procedural protections:

[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony – without hearing, without effective assistance of counsel, without a statement of reason. It is inconceivable that a court of justice dealing with adults . . . would proceed in this manner. It would be extraordinary if society’s special concern for children . . . permitted this procedure. We hold that it does not.<sup>91</sup>

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86. *Id.* at 1040 (citing *In re Gault*, 387 U.S. 1, 41, 33, 55, 57 (1967); *Breed v. Jones*, 421 U.S. 519, 541 (1975); *In re Winship*, 397 U.S. 358, 364 (1970); *Kent v. United States*, 383 U.S. 541, 553 (1966)).

87. *Id.*

88. 383 U.S. 541 (1966).

89. *See id.* at 561.

90. *Id.* at 554-55.

91. *Id.* at 554.

Alaska consistently has recognized the goals of treatment and rehabilitation and generally has promulgated juvenile justice laws in order to foster the promotion of those goals. Recent amendments to the juvenile justice laws have emphasized that young offenders should be rehabilitated.<sup>92</sup> Removing a juvenile offender from the juvenile system and trying him as an adult may have a significant impact on the final disposition of the case. Juveniles who are sent to adult court face the elimination of all rehabilitative possibilities as the full weight of the criminal law is brought against them.<sup>93</sup>

In addition to being convicted and labeled with a stigmatizing criminal record, juveniles tried as adults lose the protections of the Alaska Delinquency Rules, including: (1) treatment in the best interest of the child; (2) protection of the privacy of the child; (3) expungement of the child's delinquency records; (4) consideration of sentence length in light of offender's youth; and (5) consideration of what kind of facility in which to place the child (i.e., an adult prison, a youth facility or other dispositional alternatives such as residential group homes, foster care or probation).<sup>94</sup> These gener-

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92. See ALASKA STAT. § 47.12.010 (1998).

93. See, e.g., ALASKA STAT. § 33.30.901(12) (1998) (defining "prisoner" as "includ[ing] a minor committed to the custody of the commissioner when, under Alaska Statutes section 47.12.030, 47.12.065, or 47.12.100, the minor has been charged, prosecuted, or convicted as an adult").

94. *State v. Nao*, Case No. 4FA-94-3671CR, at 14 (Alaska Super. Ct. Mar. 8, 1995). In making its dispositional orders, a juvenile court shall

(1) consider both the best interests of the minor and the interests of the public, and, in doing so, the court shall take into account

(A) the seriousness of the minor's delinquent act and the attitude of the minor and the minor's parents toward that act;

(B) the minor's culpability as indicated by the circumstances of the particular case;

(C) the age of the minor;

(D) the minor's prior criminal or juvenile record and the success or failure of any previous orders, dispositions, or placements imposed on the minor;

(E) the effect of the dispositional order to be imposed in deterring the minor from committing other delinquent acts;

(F) the need to commit the minor to the department's custody or to detain the minor in an institution or other suitable place in order to prevent further harm to the public;

(G) the interest of the public in securing the minor's rehabilitation; and

(H) the ability of the state to take custody of and care for the minor; and

(2) order the least restrictive alternative disposition for the minor; for purposes of this paragraph, the "least restrictive alternative disposition" means that disposition that is no more restrictive than is, in the judgment

ous provisions differ greatly from those afforded adult defendants, supporting the conclusion that, "the right [to be tried as a juvenile] is one of great importance and . . . has the potential to impact the defendant throughout his entire life."<sup>95</sup>

Alaska's courts traditionally have granted substantial protection to juveniles that the state sought to remove to adult court, recognizing that juveniles have a substantial interest in remaining within the jurisdiction of juvenile courts. In *P.H. v. State*,<sup>96</sup> the Alaska Supreme Court held that the statutory reference to "under 18 years of age" applied to the minor's age at the time that the crime was committed, not at the time that the minor was charged.<sup>97</sup> The court stated:

[W]e note the principal precept behind the children's court concept: that a person under eighteen years of age does not have mature judgment and may not fully realize the consequences of his acts, and that therefore he should not generally have to bear the stigma of a criminal conviction for the rest of his life. To allow officials charged with the execution of the law to prosecute a child offender as a criminal merely by deferring action until the child's eighteenth birthday would frustrate this purpose. Finally, *serious constitutional issues would arise if the nature of the proceedings against a child offender were to depend on the arbitrary decision of law enforcement officials.*<sup>98</sup>

The court recognized that the impact of a waiver hearing is "critically important" to the remainder of a juvenile's life, and stated that "[b]ecause the consequences of waiver are great, 'the hearing must measure up to the essentials of due process and fair treatment.'"<sup>99</sup>

Other Alaska court decisions and statutory schemes have recognized the gravity of any decision to remove juveniles to adult court. In *R.J.C. v. State*,<sup>100</sup> the Alaska Supreme Court stated that a

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of the court, most conducive to the minor's rehabilitation taking into consideration the interests of the public.

ALASKA STAT. § 47.12.140 (1998); *see also* ALASKA STAT. § 47.12.240 (Michie 1996) (permitting detention of a juvenile in an adult correctional facility for only a limited time and requiring the minor's separation from adult prisoners during that time).

95. *State v. Nao*, Case No. 4FA-94-3671CR, at 14 (Alaska Super. Ct. Mar. 8, 1995).

96. 504 P.2d 837 (Alaska 1972).

97. *See id.* at 841-42. In *P.H.*, juvenile disposition was available because the defendant was under 18 at the time of the crime. However, the supreme court upheld the waiver to adult court because there was sufficient evidence that she was not amenable to treatment as a child. *See id.* at 846.

98. *Id.* at 841-42 (emphasis added).

99. *Id.* at 842 (quoting *Kent v. United States*, 383 U.S. 541, 562 (1966)).

100. 520 P.2d 806 (Alaska 1974).

waiver hearing requires a “thorough examination of (1) the probable cause for believing that the child committed the act with which he was charged and (2) the amenability of the child to juvenile treatment.”<sup>101</sup> Without judicial inquiry into *both* probable cause and amenability, “there is no evidentiary basis for a waiver decision.”<sup>102</sup> Additionally, prior to 1994 and the enactment of Alaska Statutes section 47.10.010(e), waiver to adult court required a thorough, meaningful review because of the severe and far-reaching implications of trying and sentencing a minor as an adult.<sup>103</sup>

In *W.M.F. v. State*,<sup>104</sup> the court of appeals examined the “preponderance of the evidence” standard of proof that the state must sustain to show non-amenability to treatment at a waiver hearing. Although the court declined to raise the standard on due process grounds, it recognized that “the interest of the minor is important because the waiver hearing can mean the difference between six years’ imprisonment and a life sentence.”<sup>105</sup>

Inherent in the benefits of disposition as a juvenile – confidentiality, opportunities for treatment, a greater possibility of being given a “second chance” – is the juvenile’s very important interest in being treated as a child.<sup>106</sup> Automatic waiver of juveniles above a certain age effectively cuts off a group of juveniles from being treated as children regardless of their individual characteristics and circumstances. As the Supreme Court noted, “[i]t is clear beyond dispute that the waiver of jurisdiction is a ‘critically important’ action determining vitally important statutory rights of the juvenile.”<sup>107</sup>

The real harshness in treating youthful offenders as adults lies in the impact of adult sentences on a minor’s development. One scholar has noted that “[t]he mere fact that an eleven-year-old – or even a seventeen-year-old – commits a crime does not suddenly

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101. *Id.* at 807.

102. *Id.* (citing *P.H.*, 504 P.2d at 846).

103. *See* Former ALASKA STAT. § 47.10.060 (Michie 1995); *P.H.*, 504 P.2d at 845 (“To waive children’s court jurisdiction without a hearing or opportunity for adversary presentation would be a denial of fair process. To waive such jurisdiction without substantial evidence having been presented that the child is unnameable to juvenile rehabilitation programs is no less so.”).

104. 723 P.2d 1298 (Alaska Ct. App. 1986).

105. *Id.* at 1300; *see also* *R.H. v. State*, 777 P.2d 204, 210 (Alaska Ct. App. 1989).

106. *See* Ross, *supra* note 80, at 1039.

107. *Kent v. United States*, 383 U.S. 541, 556 (1966).

transform that child into an adult.”<sup>108</sup> Juveniles incarcerated in prison are especially vulnerable to inmate violence and sexual assault,<sup>109</sup> and have a high risk of contracting AIDS.<sup>110</sup> The isolation associated with incarceration may breed mental illness or reinforce existing feelings of anger and alienation,<sup>111</sup> and adult prisons lack treatment facilities that juvenile centers may be able to provide. Imprisoned juveniles also have a high risk of suicide.<sup>112</sup> As Kenneth Wooden observed in his exposé of the brutalities of juvenile incarceration, *Weeping in the Playtime of Others*:

[G]iven the conditions of solitary confinement and incarceration in general, it is impossible for a child about to commit suicide to go to a crisis intervention center or make a hot line call. There are no hot lines for the isolated youngster. There are no clergymen or counselors or friends to keep him company. There are no rehabilitation programs. A suicidal incarcerated child is left alone to cope with his own worst enemy – himself.<sup>113</sup>

As detailed above, a judgment that a minor is unamenable to treatment can have serious repercussions throughout the rest of the young offender’s life. By shifting the burden of proof in waiver hearings, the legislature unwisely has decided that minors guilty of less serious offenses than at first charged should be presumed untreatable. The critical nature of the interest at stake should mandate stricter scrutiny by the supreme court.

#### IV. THE SECOND PRONG: THE COUNTERVAILING STATE INTEREST

##### A. Conflicting State Interests: Deterrence and Rehabilitation

Equal protection analysis under the Alaska Constitution requires courts to weigh the juvenile’s interest in being sentenced as a juvenile against the state’s countervailing interest in enforcing the waiver statute. Juvenile crime laws serve conflicting public interests. The state has an interest in protecting public safety and keeping dangerous offenders off the streets.<sup>114</sup> Yet “[t]he public

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108. Abbe Smith, *They Dream of Growing Older: On Kids and Crime*, 36 B.C. L. REV. 953, 989 (1995).

109. See KENNETH WOODEN, *WEEPING IN THE PLAYTIME OF OTHERS: AMERICA’S INCARCERATED CHILDREN* 110 (1976).

110. See James Farrow, *Meeting the Challenges of Juvenile Health Care*, CORRECTIONS TODAY, Apr. 1, 1998, at 118, available in 1998 WL 13892424.

111. See WOODEN, *supra* note 109, at 133.

112. See *id.* at 158.

113. *Id.*

114. See *State v. Ladd*, 951 P.2d 1220, 1225 (Alaska Ct. App. 1998).

[also] has an interest in rehabilitating wayward youths who are rehabilitatable in their youth.”<sup>115</sup> One study of public attitudes toward juvenile justice concluded that the primary motivation behind public support of treating juveniles as adults is the fear of being a victim of crime.<sup>116</sup> However, the study also found that “[t]he public supports the juvenile court and its traditional emphasis on treatment and rehabilitation.”<sup>117</sup>

The perception that juveniles who commit felonies are not treatable and pose a serious danger to society may be overblown. Public perceptions of juvenile crime may be disproportionate to the actual rate of violent crime in Alaska. The 1996 Governor’s Conference on Youth and Justice noted that although Alaska has a high rate of youthful petty offenders, the state ranks thirty-seventh in the nation in percentage of violent juvenile offenders.<sup>118</sup> Despite these statistics, Alaska rates second in the nation regarding the percentage of its juveniles that are incarcerated and the length of their confinement.<sup>119</sup> The Governor’s Conference drew the “unavoidable conclusion” that “Alaska is already tough on juvenile crime.”<sup>120</sup> An alternative conclusion that may be drawn, however, is that a number of juvenile offenders in secure confinement may be there unnecessarily. Furthermore, although courts and legislatures nationwide have become tougher on juvenile crime, the harsher penalties seem to have had little impact on the rate of juvenile crime.<sup>121</sup>

Punitive treatment of juveniles as adults may assuage public fears of violent young predators, but early institutionalization without rehabilitation is likely to lead to recidivism.<sup>122</sup> As one study found, “[n]ot only do a greater number of those who receive punitive treatment continue to violate the law, but they also commit more serious crime with greater rapidity than those who expe-

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115. *W.M.F. v. State*, 723 P.2d 1298, 1300 (Alaska Ct. App. 1986).

116. See Ira M. Schwartz, *Public Attitudes Toward Juvenile Crime and Juvenile Justice: Implications for Public Policy*, 13 *HAMLIN J. PUB. L. & POL’Y* 241, 260 (1992).

117. *Id.* at 257.

118. See THE GOVERNOR’S CONFERENCE ON YOUTH AND JUSTICE, STATE OF ALASKA, FINAL REPORT, at xiii (1996) (on file with *Alaska Law Review*).

119. See *id.* at xv.

120. *Id.*

121. See Smith, *supra* note 108, at 1008-09. Smith notes that the crime statistics at issue are conflicting and difficult to analyze, given the group nature of juvenile crime. She concludes, however, that “[t]hough we are now locking up more kids than ever before and are doing so for longer and longer periods, the juvenile crime rate has not been affected.” *Id.* at 1008-09 n.215.

122. See WOODEN, *supra* note 109, at 39-43.

rience a less constraining contact with judicial and correctional systems.”<sup>123</sup>

It is in the public’s interest to rehabilitate juvenile offenders successfully. Recent amendments to Title 47 of the Alaska Statutes recognized the state goals of “promot[ing] a balanced juvenile justice system . . . to protect the community, impose accountability for violations of law, and equip juvenile offenders with the skills needed to live responsibly and productively.”<sup>124</sup> The legislature recognized that a legitimate and important goal of a juvenile justice system is to “provide an early, individualized assessment and action plan for each juvenile offender in order to prevent further criminal behavior through the development of appropriate skills in the juvenile offender so that the juvenile is capable of living productively and responsibly in the community.”<sup>125</sup> This significant state interest, combined with the minor’s individual interest in being sentenced as a juvenile, should influence significantly the supreme court’s equal protection analysis.

#### B. The State Interest in Allocating Risk to the Juvenile

In *Ladd*, the court of appeals identified the state interest as merely an allocation of risk to the juvenile offender in “close cases.”<sup>126</sup> The court of appeals in *Ladd* described the legislative purpose behind the burden-shifting provision: “In cases where the evidence does not disclose whether a minor can be rehabilitated under the juvenile system by age [twenty] . . . , the decision turn[s] on whether the state has previously established probable cause to believe that the minor has committed one of the [more] serious felonies listed.”<sup>127</sup> The court’s interpretation of this interest as merely allocating the risk of error to the juvenile seriously underestimates the significance of waiver proceedings.

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123. *Id.* at 40 (quoting “Delinquency in a Birth Cohort,” study at the University of Pennsylvania).

124. ALASKA STAT. § 47.12.010(a) (1998).

125. *Id.* § 47.12.010(b)(11).

126. *State v. Ladd*, 951 P.2d 1220, 1225 (Alaska Ct. App. 1998). The court of appeals agreed with the superior court’s assumption that minors who have been convicted of the same offense “must presumptively be deemed ‘similarly situated’ for purposes of disposition – and, in particular, for purposes of deciding whether the state or the minor should bear the burden of proof on the issue of amenability to juvenile treatment.” *Id.* at 1222. It was the superior court’s second assumption – that the basis for the difference in treatment between “similarly situated” juveniles rested merely on the prosecutor’s initial charging decision – that the appellate court rejected. *Id.*

127. *Id.* at 1225.

As noted above, the legislature enacted the statute in response to *R.H. v. State*.<sup>128</sup> The letter of intent from the House Judiciary Committee prior to enactment underscores the legislative intent to place the burden of proof on the party that had the best access to the relevant facts:

[I]t is the offender himself who is in the best position to show that he would be treatable in the juvenile court system. The juvenile offender and his attorney are the ones who know the most about the offender's family and educational experiences, and are in the best position to present information relating to the issue of treatability to the court.<sup>129</sup>

This rationale is contradicted by the requirements of the statute itself, because it lists a number of factors that a court may take into account. As noted above, the statute permits, but does not require, the court to consider four factors in determining whether a juvenile can be rehabilitated: "the seriousness of the offense the minor is alleged to have committed, the minor's history of delinquency, the probable cause of the minor's delinquent behavior, and the facilities available to the department for treating the minor."<sup>130</sup>

Both the state and the defendant will have equal access to information about the first two enumerated factors in the indictment and the minor's prior criminal or delinquency records. While the minor may have better access to information regarding his childhood, his family, and his education, the state undoubtedly will be more knowledgeable about adequate treatment facilities. After trial in adult court, the state should have full access to the information about the minor. The shift in the burden unfairly places both the responsibility for obtaining accurate information about these factors and for overcoming a strong presumption against treatment on the juvenile, who may lack adequate resources for investigation and legal assistance.

### C. The State Interest in Prosecutorial Discretion

The prosecutor exercises significant discretion throughout the charging process and the grand jury proceedings.<sup>131</sup> In fact, the prosecutor "prepare[s] all indictments and presentments for the grand jury, and attend[s] their sittings to advise them of their duties and to examine witnesses in their presence."<sup>132</sup> Even an unbi-

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128. 777 P.2d 204 (Alaska Ct. App. 1989).

129. House Judiciary, Letter of Intent, *supra* note 67, at 1382.

130. ALASKA STAT. § 47.12.100(b) (Michie 1996).

131. See ALASKA R. CRIM. P. 6(i); ALASKA STAT. § 12.40.070 (Michie 1996).

132. ALASKA R. CRIM. P. 6(i); ALASKA STAT. § 12.40.070.

ased jury can be influenced by a zealous prosecutor, who, although an officer of the court, is also an advocate of a successful prosecution.<sup>133</sup> The Alaska Supreme Court has recognized that a prosecutor wears two “sometimes inconsistent” hats during grand jury proceedings, as both the grand jury’s “legal advisor” and as a criminal prosecutor.<sup>134</sup>

The ultimate result of the automatic waiver law and the burden-shifting provision is to entrust to the prosecutor substantial authority to determine a juvenile’s proper jurisdiction. This determination continues to be influential when judicial processes have determined that it is not supported by the evidence, *i.e.*, where removal is based on which charges are brought against a minor. The charges continue to influence disposition of the minor’s case even where the minor is acquitted of the triggering charges. Critically, the state interest in automatic waiver cases also lies in the total discretion of the prosecutor to decide in which forum the minor will be adjudicated, eradicating the need for a judicial waiver hearing. The initial charging decision combined with a grand jury indictment determines whether the juvenile will be tried in adult court.

In *Ladd*, the court of appeals held that the burden-shifting provision was justified by the prosecutor’s showing of probable cause and the grand jury’s decision to indict.<sup>135</sup> The arraignment, which subjects the minor to prosecution as an adult, requires a grand jury indictment, at which the state must show “that the evidence . . . establishe[s] a probability of the [defendant’s] guilt.”<sup>136</sup> Due to this original indictment, juveniles who later are adjudged not guilty of the more serious offenses are presumed to be unamenable to treatment.<sup>137</sup> The initial charging decision, even when determined to have been erroneous, still governs whether the child will be treated as a juvenile.

The appellate court concluded in *Ladd*:

Even if the State ultimately fails to prove beyond a reasonable doubt that the minor committed the felony charged in the indictment, and the minor is convicted of only a lesser offense, the fact remains that there has been an independent determination of probable cause to believe that the minor committed the more serious crime.<sup>138</sup>

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133. See *Coleman v. State*, 553 P.2d 40, 47 (Alaska 1976).

134. *Id.*

135. See *State v. Ladd*, 951 P.2d 1220, 1222 (Alaska Ct. App. 1998).

136. *Id.* at 1222-23 (citing Criminal Rule 6(q), as interpreted in *Sheldon v. State*, 796 P.2d 831, 837 (Alaska Ct. App. 1990)).

137. See *id.* at 1225.

138. *Id.* at 1223.

This distinction is not convincing. A grand jury determination of probable cause has limited utility; it is necessary for a felony indictment that would subject the juvenile to automatic waiver to adult court. After trial, a determination of probable cause that the juvenile committed the more serious offense should have no bearing on further disposition of the case. The juvenile's sentence should be solely a factor of the crimes of which he was found guilty.

The Alaska Supreme Court already has rejected standardless discretion in juvenile cases.<sup>139</sup> In *P.H. v. State*, the court refused to permit prosecuting officials to evade the juvenile system by declining to bring charges until a child's eighteenth birthday.<sup>140</sup> The court noted that "serious constitutional issues would arise if the nature of the proceedings against a child offender were to depend on the arbitrary decision of law enforcement officials."<sup>141</sup>

The lack of a meaningful judicial determination *before* transfer has caused other state courts to reject similar waiver or transfer provisions as unconstitutional. The Supreme Court of Delaware rejected the constitutionality of a statute that provided for automatic transfer to adult court of children who had committed crimes as minors but who had reached the age of eighteen prior to adjudication.<sup>142</sup> The court found the statute "patently arbitrary and bear[ing] no rational relationship to a legitimate government interest,"<sup>143</sup> primarily because the prosecutor could exercise complete discretion in delaying a trial until the minor's eighteenth birthday. The court determined that the lack of judicial review in the waiver process resulted in "the unfettered authority of the state to impose potential arbitrary or capricious charging decisions, a practice viewed as unconstitutional by this Court in [an earlier case]."<sup>144</sup> Pursuant to the waiver statute, decisions were not made with a public, reviewable judicial determination taking into account a child's individual circumstances, but instead behind the closed door of the prosecutor's office.<sup>145</sup> The court declared:

Under this scenario, the fate of a child is entirely entrusted – without impartial judicial review – to the charging authority, which unilaterally decides whether to charge a child with a felony or misdemeanor, without a mechanism to challenge its charging decision or transfer the case to the appropriate forum.

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139. See *P.H. v. State*, 504 P.2d 837, 842 (Alaska 1972).

140. See *id.*

141. *Id.*

142. See *Hughes v. State*, 653 A.2d 241 (Delaware 1994).

143. *Id.* at 253.

144. *Id.* at 247.

145. See *id.* at 248-50.

In essence, the statutory amendment has stripped the judiciary of its independent jurisdictional role in the adjudication of children by granting the charging authority the unbridled discretion to unilaterally determine which forum has jurisdiction.<sup>146</sup>

Utah's legislature drafted a "direct-file" scheme, which was rejected by its supreme court in 1995. The Utah legislation granted discretion to prosecuting authorities to determine in which forum a juvenile offender would be brought to trial.<sup>147</sup> Under the Utah statute, prosecutors could file charges against some juveniles in adult court and permit others to remain in the juvenile system.<sup>148</sup> Utah's highest court found that the statute was unconstitutional under the state constitution's "uniform application of the laws" clause.<sup>149</sup> The clause functions similar to Alaska's Equal Protection Clause and states that "[a]ll laws of a general nature shall have uniform operation."<sup>150</sup> The Utah court examined the statute and found it unconstitutional as applied:

We next consider whether the law in question "applies equally to all members within each class or subclass . . . . Defendants contend that because they are being tried as adults for the same crimes that some of their peers will be tried for as juveniles, they are treated disparately. The State counters that being tried as a juvenile is not a "right" of anyone per se and that by bestowing a benefit on some juveniles but choosing not to bestow that same benefit on others, the legislature is not taking any rights away but merely giving benefits to appropriate persons. We are unable to reconcile this argument with the concept of uniform operation of laws because the selection process for beneficial treatment is arbitrary and standardless.<sup>151</sup>

By conferring complete authority on the prosecutor to determine where charges are filed, the Utah statute threatened arbitrary distinctions between similar juveniles.

The Alaska waiver provision operates similarly: the prosecutor's charging decision determines whether an offender will be waived automatically. If the prosecutor determines that he or she does not want the particular juvenile to be subject to the jurisdiction of the adult court, he or she merely has to reduce the charges.

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146. *Id.* at 249.

147. *See* State v. Mohi, 901 P.2d 991 (Utah 1995).

148. *See* UTAH CODE ANN. § 78-3a-25 (6) (1987) (repealed 1996).

149. *Mohi*, 901 P.2d at 991.

150. *Id.* at 995. The constitutional provision requires that "persons similarly situated be treated similarly." Analysis under this provision is similar to an equal protection analysis in that the court must examine first whether the law applies equally to all classes of persons, and second, whether the legislature had a reasonable objective for the disparity. *See id.* at 997.

151. *Id.* at 998.

This is unfair to juveniles who are not the objects of favoritism or mitigating circumstances that may resonate with a particular prosecutor.

Other state courts have grappled with waiver statutes that shift the burden of proof to the juvenile and have found them constitutional. In these cases, however, the law at issue created a "rebuttable presumption" that the juvenile was unfit for treatment, a presumption that could be challenged at a waiver hearing *prior* to the transfer to adult court. Alaska has a similar provision for minors who are charged with serious felonies but who are not old enough to be automatically waived.<sup>152</sup> These statutes require juveniles to bear the burden of proof at a hearing to show that they can be rehabilitated while in the jurisdiction of the juvenile court.<sup>153</sup> The hearing permits the juvenile to challenge the presumption *before transfer*, and therefore, is in no sense automatic.

For example, California courts presume that minors over sixteen who have committed serious offenses, including murder, arson, and armed robbery, are unfit for treatment in a juvenile facility.<sup>154</sup> However, a minor "presumed unfit" and remanded to criminal court may first try to convince the juvenile court that he is amenable to treatment using five criteria: (1) the degree of criminal sophistication exhibited by the minor; (2) the degree to which the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction; (3) the minor's previous delinquent history; (4) the court's prior success in rehabilitatating the minor; and (5) the circumstances and gravity of the offense alleged to have been committed by the minor.<sup>155</sup> A juvenile charged with other offenses also may be remanded to criminal court if the state proves that the juvenile is unfit for available treatment under the above criteria. Although California shifts the burden of proof to the juvenile, its statute does not have the same equal protection implications as Alaska's automatic waiver provision. In California, the presumption of unfitness arises before the juvenile is transferred to adult court, and therefore, the juvenile has the opportunity to re-

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152. See ALASKA STAT. § 47.12.100(c) (Michie 1996). Under this provision, if a minor is charged with a specified felony and is younger than sixteen, "the minor is rebuttably presumed not to be amenable to treatment . . . and has the burden of proof of showing that [he] is amenable to treatment." *Id.* If unable to prove that he is amenable to treatment at a waiver hearing, the juvenile will be tried in adult court. *Id.*

153. See, e.g., CAL. WELF & INST. CODE § 707 (West 1998); N.J. STAT. ANN. § 2A:4A-26 (West 1987).

154. See CAL. WELF & INST. CODE § 707 (West 1998); see also *Hicks v. Superior Court*, 43 Cal. App. 4th 1649, 1654 (Cal. Ct. App. 1995).

155. See CAL. WELF & INST. CODE § 707 (West 1998).

but that presumption and make a case for the possibility of rehabilitation under the jurisdiction of the juvenile court. In Alaska, the juvenile charged with a serious offense is sent directly to adult court, and even after having been found not guilty of the more serious crime, he is presumed unfit for treatment as a juvenile.

Similarly, New Jersey permits waiver of juveniles over the age of fourteen to adult court after a hearing.<sup>156</sup> The transfer of a juvenile to adult court under the New Jersey Code of Juvenile Justice involves two stages.<sup>157</sup> First, the prosecutor must establish probable cause that the juvenile committed a serious offense. This "creates a rebuttable presumption that the juvenile will be transferred to adult court."<sup>158</sup> Second, the juvenile may defeat that presumption by demonstrating the probability of his rehabilitation by age nineteen and showing that the probability of rehabilitation substantially outweighs the reason for waiver.<sup>159</sup> Admittedly, a juvenile must overcome a very difficult burden to remain in the New Jersey juvenile system. However, unlike Alaska, each juvenile receives an opportunity to convince the court that waiver is inappropriate.

#### V. THE THIRD PRONG: THE MEANS TO ENDS FIT

The third prong of equal protection analysis under the Alaska Constitution requires the court to examine whether the legislature has tailored the statute to fit the stated objectives of the legislation.<sup>160</sup> The narrowness of the fit required depends on the amount of scrutiny granted by the court under the first prong of the test.<sup>161</sup> Even if the interest is not found to be very important, the state must be able to show that the statute has "a fair and substantial relation" to its intended goals.<sup>162</sup> However, when an important interest is implicated, the fit must be much closer.<sup>163</sup> Although the legislature may have had legitimate reasons for enacting the automatic waiver law, the means it chose do not closely fit its goals.

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156. See N.J. STAT. ANN. § 2A:4A-26 (West 1987).

157. See *In the Interest of A.L.*, 638 A.2d 814, 819 (N.J. Super. Ct. App. Div. 1994).

158. *Id.*

159. See *id.*

160. See *State v. Anthony*, 810 P.2d 155, 157 (Alaska 1991).

161. See *id.*

162. *Id.* at 159.

163. See *id.* at 157.

### A. The Provision is Broad-Reaching

The superior court, finding that the statute affected an important interest of juveniles, subjected it to a high level of scrutiny.<sup>164</sup> The court held:

The purpose of the legislation was to treat sixteen and seventeen year old individuals who commit the serious crimes set forth in [current Alaska Statutes section 47.12.030(a)] as adults. However, once a juvenile is convicted of a lesser crime than those specified . . . the legislative purpose is no longer being met. The continuing treatment of a juvenile as an adult, unless the juvenile meets the burden of proof to be remanded to juvenile jurisdiction, does not meet the end objective of having only juveniles who commit the crimes specified . . . treated as adults.<sup>165</sup>

The court determined that the classification was “unreasonable” and lacked a fair and substantial relationship to the legislation’s stated purpose.<sup>166</sup>

The court of appeals reversed the superior court and granted only minimum scrutiny to the burden-shifting provision of the waiver statute.<sup>167</sup> The court then found a “reasonably close fit” between the purpose of the statute and the means employed by the legislature.<sup>168</sup> The court of appeals argued that “Ladd and other minors like him are not barred from receiving a juvenile disposition for their criminal acts.”<sup>169</sup> According to the court, shifting the burden merely represents a reallocation of risk, as the party with the burden of proof bears the risk that the trier of fact will not be persuaded.<sup>170</sup> As the court recognized, effectively “in close cases, when the evidence yields no answer to the question of whether the minor can be rehabilitated within the juvenile system by age twenty, the legislature wants the minor to receive an adult penalty.”<sup>171</sup>

In analyzing the burden-shifting provision as such a “legislative directive,” the *Ladd* court found a reasonably close fit between the provision and the purposes of the statute as stated above.<sup>172</sup> Although minors are given the opportunity to prove their

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164. See *State v. Nao*, Case No. 4FA-94-3671CR, at 19 (Alaska Super. Ct. Mar. 8, 1995).

165. *Id.*

166. *Id.*

167. See *State v. Ladd*, 951 P.2d 1220, 1224 (Alaska Ct. App. 1998).

168. *Id.* at 1225.

169. *Id.*

170. See *id.* (citing *United Bank Alaska v. Dischner*, 685 P.2d 90, 93 (Alaska 1984)).

171. *Id.*

172. *Id.*

amenability to treatment, the statute mandates that the minor sustain a heavy burden of proof.<sup>173</sup> Despite the fact that the minor may be in a better position to provide the court information about their familial and educational experiences,<sup>174</sup> other factors that the court may consider – such as available treatment facilities<sup>175</sup> – may be beyond the minor's ability to research adequately and address in court.

Placing the burden of proof on the juvenile creates a legal presumption that the juvenile will be tried as an adult.<sup>176</sup> The minor will bear the risk that the evidence is inconclusive and “insufficient to persuade the trier of fact that either party is correct.”<sup>177</sup> These juveniles will be more likely to lose at a waiver hearing, ensuring that some juveniles who might otherwise benefit from treatment in juvenile facilities will be sent to adult prisons.

The minor already has presented a defense in criminal court and has been found not guilty of the more serious crimes. The presumption of unamenability discriminates against him compared to others who originally were charged with the same lesser crime. Although this second group of juveniles may have to defend against the state's waiver petition, they do not have to persuade the trier of fact that they should remain in juvenile court. This discrimination does not closely serve the state's purpose, as found by the superior court, to sentence minors who commit serious crimes as adults.<sup>178</sup>

Prior to 1994, waiver required the state to make a two-fold showing: first, that there was probable cause to believe that the minor committed the offense; and second, that the minor was not amenable to treatment.<sup>179</sup> Automatic waiver, based on a grand jury indictment, eradicates any adversarial proceeding at which the juvenile can introduce evidence regarding his amenability to rehabilitation. It focuses solely on the nature of the crime charged, without consideration of the causes of the minor's behavior. The purposes of waiver hearings are thus lost – juveniles who can be rehabilitated are not separated from those who cannot be treated and both groups are sent to adult court. Even after the probable

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173. See ALASKA STAT. § 47.12.030(a) (Michie 1996).

174. See House Judiciary, Letter of Intent, *supra* note 67.

175. See ALASKA STAT. § 47.12.100(b) (Michie 1996).

176. See *Ladd*, 951 P.2d at 1225.

177. *Id.* (citing *Dischner*, 685 P.2d at 93).

178. See *State v. Nao*, Case No. 4FA-94-3671CR, at 17 (Alaska Super. Ct. Mar. 8, 1995).

179. See Former ALASKA STAT. § 47.10.020 (Michie 1995).

cause determination is found to have been in error, the path is difficult for a minor to return to the juvenile system.

#### B. The Provision is Discriminatory as Applied

Statutes that are facially constitutional may be unconstitutional as applied.<sup>180</sup> The discretionary aspects of automatic waiver permit the prosecuting authorities to discriminate in determining which minors can remain in the juvenile system and which cannot. The shift in the burden of proof then perpetuates this discrimination even after a trial where the minor has been found not guilty of the waivable offense.

Despite the fact that the statute outlines the specific charges for which waiver is warranted, prosecuting authorities are left with wide-open discretion to determine which juveniles will be sent to adult court. There are a number of reasons for which a juvenile may be waived that occur in the organizational context and have nothing to do with the crime allegedly committed.<sup>181</sup> Officials may make decisions based on their judgment of the “moral character” of the offender,<sup>182</sup> whether the child has parental support available,<sup>183</sup> or on their own perceptions based on irrational stereotypes, such as race.<sup>184</sup>

Evidence shows that in Alaska, prosecutors are exercising discretion unrelated to “probable cause.” In a number of cases, prosecutors have charged juveniles with waivable offenses and then reduced the charges to permit them to remain in the juvenile system. In 1996, two Pt. Hope juveniles used a gun to rob a man of his paycheck. Originally charged with first-degree assault, the prosecutor reduced the charge to permit the youths to remain in the juvenile system.<sup>185</sup> Prosecutor Jim Benedetto later recalled, “none of us – not me as prosecutor, not the defense lawyers, not the judge were personally comfortable with the idea of prosecuting those boys as adults. The juvenile system had the tools to address their behavior and prevent them from harming anyone in the fu-

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180. See *Gilmore v. Alaska Workers Compensation Bd.*, 882 P.2d 922, 932 (Alaska 1994).

181. See SIMON I. SINGER, RECRIMINALIZING DELINQUENCY 76-77 (1996).

182. See *id.*

183. See *id.* at 78.

184. See *id.* at 79.

185. Telephone Interview with Jim Benedetto, Assistant District Attorney in Kenai District Attorney's Office (Oct. 1, 1998). According to Mr. Benedetto, the two juveniles were under the influence of alcohol. At least one of them was a troubled youth who alternately pointed the gun at the victim and at himself. See *id.*

ture.”<sup>186</sup> In another case in Kotzebue, a minor violently attacked a couple in their home, breaking several of his victim’s bones.<sup>187</sup> After being indicted for first-degree assault, the charges were later reduced to allow the youth to be tried as a juvenile.<sup>188</sup> In 1994, a minor struck three students in the head with a hammer. He was charged with attempted murder, an automatic waiver offense, but the district attorney in Anchorage declined to prosecute, and the youth was returned to the juvenile system.<sup>189</sup>

These examples suggest that prosecuting authorities are considering the effect of the waiver provision in making charging decisions. For example, in the Pt. Hope case discussed above, the prosecutor felt that “[t]he boys were not total screw-ups yet. They had either substance abuse or counseling issues that were not addressed and we didn’t think that it was appropriate to lock them up and throw away the key without giving them another chance to address those issues.”<sup>190</sup> While this emphasis on rehabilitating youthful offenders is laudable, there are no statutory criteria to guide prosecutors in making these critical charging decisions, and therefore the discretionary aspect of the process may permit decisions based on less appropriate reasons.

Additionally, the essential charging decision may be left in the hands of inappropriate persons. One Anchorage attorney asserts that “in certain areas of the state, this decision appears to have been delegated even further, to persons outside the prosecutorial authority.”<sup>191</sup> In a case where a juvenile attempted to rob a food delivery man with a small gun, the minor remained in the juvenile system. In the pleadings in a different case, the state admitted that the assistant district attorney “[did] not know why the juvenile authorities charged [that] defendant with second degree robbery instead of first degree robbery.”<sup>192</sup>

There may be no explicit reasoning regarding which juveniles receive privileged treatment, as the West Virginia Supreme Court recently speculated in a case involving a similar waiver provision: “[I]f two juveniles in different counties commit essentially the

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186. *Id.*

187. *See id.*

188. *See id.*

189. *See* Defendant’s Motion for Discovery, State v. Lewandowski, No. 3AN-S97-8370, at 5 (Alaska Super. Ct. Jan. 16, 1998).

190. Benedetto Interview, *supra* note 185.

191. Defendant’s Motion for Discovery, State v. Lewandowski, No. 3AN-S97-8370, at 3 (Alaska Super. Ct. Jan. 16, 1998).

192. Pleading, State v. Lockhart, No. 3AN-96-2360 (Alaska Super. Ct. Aug. 17, 1997) (*quoted in* Defendant’s Motion for Discovery, State v. Lewandowski, No. 3AN-S97-8370, at 6 (Alaska Super. Ct. Jan. 16, 1998)).

same offense, and are essentially alike in terms of their 'personal factors,' one juvenile could be transferred to adult status and one remain as a juvenile – depending solely upon the different philosophies of two different prosecutors."<sup>193</sup> One scholar has recognized that the discretionary aspect makes it likely that charges will vary for similar crimes among geographic areas, noting that "[l]egal decision making is not only a product of principles as explicitly or implicitly stated in legal rules but also the types of offenses and offenders that officials routinely see in their particular legal setting."<sup>194</sup> This can be to the disadvantage of youths from areas where violent crime is more prevalent.<sup>195</sup>

In Alaska, violent crime is much more prevalent in urban areas.<sup>196</sup> In rural areas, especially tribal communities, prosecutorial discretion may be exercised to *prevent* local children from being removed from the juvenile system. Urban youths may not have the benefit of the charging prosecutor knowing their family, as might be the case for youths living in small towns or villages. An urban prosecutor wearied by a high volume of violent offense cases may not be as willing to see the individual circumstances behind a juvenile's case and offer a juvenile "a second chance" consistent with the goals of the juvenile justice system.

Examples of potential discriminatory applications of the statute reveal its impact on juvenile adjudication. In sum, the legislation does not bear even a fair and substantial relationship to its intended purpose. The supreme court should declare Alaska Statutes section 47.10.030 unconstitutional under the Equal Protection Clause, and require the legislature to draft a constitutional alternative.

## VI. RECOMMENDED ALTERNATIVES

### A. Shift the Burden Back

Some scholars believe that the increased use of waiver eventually will lead to the abolition of the juvenile justice system.<sup>197</sup> By

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193. State v. Robert McL., 496 S.E.2d 887, 891 (W. Va. 1997).

194. See SINGER, *supra* note 181, at 80.

195. See *id.* at 82.

196. See GOVERNOR'S CONFERENCE, *supra* note 118, at 252 ("19,500 of the state's 32,500 serious crimes were committed in the three largest cities." (citing H. Hodgkinson, *Alaska: The Demographic Context*, May 24, 1996)).

197. 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, 285 (1991); SMITH, *supra* note 110, at 996.

permitting juveniles to petition the court for return to the juvenile system, the legislature has recognized that some juveniles will benefit from treatment. However, it has placed an unnecessary hurdle in the path of these juveniles by shifting the burden of proof.

The burden-shifting provision serves a number of different purposes for the state: It facilitates sentencing juveniles as adults and it places the responsibility for proffering evidence regarding a juvenile's rehabilitative prospects squarely on the juvenile. Once the facts are established at trial, however, the state has full access to information regarding the juvenile's history and the extent of his participation in the offense.

The burden of proof at the waiver hearing should remain on the state, which carried the burden at the trial. The presumption against the juvenile merely serves to make it more difficult for the minor to return to children's court, and reduces the state's responsibility at the waiver hearing. By shifting the burden back, an initial prosecutorial theory that did not succeed at trial will not handicap minors like Anthony Ladd twice during the judicial process.

#### B. Dual-Sentencing and Treatment Options: Alternatives to Automatic Waiver

Although this Note primarily has addressed the narrow constitutional issue of the burden-shifting provision, it also has raised concerns about the appropriateness of an automatic waiver system in which the prosecutor determines the jurisdiction of a juvenile defendant's case. Automatic waiver may not be necessary to ensure public safety; dual sentencing and other treatment options are reasonable alternatives to automatic waiver that promote the safe rehabilitation of violent youth while protecting the public welfare.

The Alaska legislature recently adopted a dual-sentencing program,<sup>198</sup> based on the Governor's Conference recommendation that this type of system would promote the safe rehabilitation of juvenile defendants "at risk of becoming chronic serious juvenile offenders."<sup>199</sup> Under this system, a young offender would receive sentences under both the juvenile and the criminal codes.<sup>200</sup> The

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For a recent study in favor of recriminalizing juvenile offense, *see generally* SINGER, *supra* note 136.

198. *See* ALASKA STAT. § 47.12.065 (1998) (enacted July 1, 1998).

199. GOVERNOR'S CONFERENCE, *supra* note 118, at 251.

200. *See* ALASKA STAT. § 47.12.140(1) (1998) (instructing the court to "consider both the best interests of the child and the interests of the public in making its dispositional order").

adult sentence would be suspended unless certain conditions of the juvenile sentence are violated.<sup>201</sup>

A district attorney may seek a dual sentence for minors who are over the age of sixteen and who fit into one of two narrow categories.<sup>202</sup> The minor must be charged with a felony that is a crime against a person and previously must have been adjudicated a delinquent for another felony that was a crime against a person.<sup>203</sup> If a minor is charged with sexual abuse of a minor in the second degree, there is no requirement that the juvenile have committed other crimes.<sup>204</sup>

In particular, minors in Anthony Ladd's position would be prime candidates for dual sentencing. The legislature adopted the burden-shifting provision for "close cases," – where it is unclear whether the juvenile can be rehabilitated successfully.<sup>205</sup> Under a dual sentence, the state can attempt to rehabilitate these minors without sacrificing the option of adult sentencing in the event that the treatment is unsuccessful. Indeed, the threat of the implementation of a harsh criminal sentence may convince a minor to cooperate more fully in his treatment than if there were no further sanctions for his criminal behavior.

A primary goal of Alaska's juvenile justice system is to "[a]ppropriately respond to a juvenile offender's needs in a manner that is consistent with preventing repeated criminal behavior and with community and victim restoration, protection of the public, and the development of the juvenile into a productive citizen."<sup>206</sup> Along these lines, the suggestion of Abbe Smith, relating

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201. Certain triggering conditions can reinstate an adult sentence if the offender:

- (1) commits a subsequent felony offense;
- (2) commits a subsequent offense against a person that is a misdemeanor and involves injury to a person or the use of a deadly weapon;
- (3) fails to comply with the terms of a restitution order;
- (4) fails to engage in or satisfactorily complete a rehabilitation program ordered by a court or required by a facility or juvenile probation officer; or
- (5) escapes from a juvenile correctional facility.

ALASKA STAT. § 47.12.120(d) (1998). The burden of proving by a preponderance of the evidence that the minor committed one of the violations that triggers imposition of the adult sentence on the state. *See id.* § 47.12.120(e). However, the minor can show, by a preponderance of the evidence, that mitigating circumstances exist to justify a continued stay of the adult sentence and that the minor is amenable to treatment as a juvenile. *See id.*

202. *See* ALASKA STAT. § 47.12.065(a) (1998).

203. *See id.*

204. *See id.*

205. *See* State v. Ladd, 951 P.2d 1220, 1223 (Alaska Ct. App. 1998).

206. *See* GOVERNOR'S CONFERENCE, *supra* note 118, at 219.

to the increase of the rehabilitative possibilities for troubled youth is especially pertinent:

The commission of violent crime, like homicide and rape, should not automatically trigger adulthood, though it might trigger longer confinement in a juvenile institution and more intensive treatment. The longer confinement would both protect the public and, given adequate resources, afford an opportunity for effective, long-term intervention . . . . I would rather see an extension of the juvenile court's power to hold a youth adjudicated delinquent of murder or rape to age twenty-five, which would allow a seventeen-year-old offender to be held for eight years – nearly half the juvenile's life – than to send the child to adult court for a shorter sentence and no treatment.<sup>207</sup>

The success of a rehabilitation program may depend on increasing the length and quality of juvenile treatment. Consistent with promoting rehabilitation, the state should work to improve its juvenile treatment facilities. The Governor's Conference found that "[t]he state simply does not have enough social workers, attorneys, judicial officers, treatment programs, beds in detention and mental health facilities, or probation officers to effectively deal with all juvenile offenders."<sup>208</sup> Even in cases where a juvenile is accused of the most serious crimes, both the juvenile and the state have an important interest in the juvenile's rehabilitation into a productive member of society. Alaska's delinquency and waiver laws should reflect that interest and provide its young offenders with adequate and available treatment facilities, sufficient time for rehabilitation, and equal access to the juvenile system.

## VII. CONCLUSION

An automatic waiver statute operates to remove children from the juvenile system based solely on the crimes they are alleged to have committed. Alaska's legislature has recognized that in some cases the violent nature of the crime indicates that there is no hope for the juvenile's rehabilitation. In cases where a juvenile is not convicted as charged after being sent to adult court, a strong presumption against treatment remains. The shift of the burden of proof to the juvenile defendant reinforces legal and societal presumptions against treatment. The current waiver scheme, which imparts too much discretion to local prosecutors, invites bias and discrimination to enter the decision-making process.

The Alaska Supreme Court now has the opportunity to recognize the importance of a minor's individual right to be sentenced as a juvenile. The court should enforce Anthony Ladd's equal pro-

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207. Smith, *supra* note 108, at 1020-1021.

208. *Id.* at xi.

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tection rights under the Alaska Constitution and strike out the discriminatory provision of the waiver law.

*Kimberly S. May*