SB

71

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

No. 4
Bill Version: SB71
(S) Publish Date: 1/30/97

Revision Date:
Title: "An Act relating to the issuance, suspension, limitation, revocation, and reinstatement of drivers' licenses...:
Sponsor: Rules Committee
Requestor: Governor

Department Affected: Administration
BRU: Public Defender Agency
Component: Public Defender Agency
COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	***	***	***	***	***	***
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	***	***	***	***	***	***
CAPITAL EXPENDITURES	***	***	***	***	***	***
CHANGE IN REVENUES ( )	***	***	***	***	***	***

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts	***	***	***	***	***	***
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
OTHER						
TOTAL	***	***	***	***	***	***

Estimate of any current year (FY 97) cost: $ -0-

POSITIONS:

FULL-TIME	***	***	***	***	***	***
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

Creating a mechanism to monitor compliance of education and treatment requirements for minors may result in additional probation revocation proceedings. Too speculative to quantify.

Prepared by: Barbara K. Brink, Acting Director
Division: Public Defender Agency
Phone: (907) 264-4414
Date:

Approved by Commissioner: Mark Boyer *Mark Boyer*
Agency: Department of Administration
Date: 1/8/97

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FISCAL NOTE

No. 3

STATE OF ALASKA
1997 LEGISLATIVE SESSION

. Version: SB71
(S) Publish Date: 1/30/97

Revision Date:
Title: Relating to issuance, suspension, limitation revocation, and reinstatement of driver's license...
Sponsor: Rules by Request
Requestor: Governor

Dept. Affected: Health and Social Services
BRU: Alcohol and Drug Abuse Services
Component: CAASA
COMPONENT SERIAL NO. 1413
See also (SN#):

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY98	FY99	FY00	FY01	FY02	FY03
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES						
GRANTS, CLAIMS	500.0	500.0	500.0	500.0	500.0	500.0
MISCELLANEOUS						
TOTAL OPERATING	500.0	500.0	500.0	500.0	500.0	500.0
CAPITAL EXPENDITURES						
CHANGES IN REVENUES						

FUND SOURCE

	FY98	FY99	FY00	FY01	FY02	FY03
1002 Federal Receipts						
1003 GF Match						
1004 GF	500.0	500.0	500.0	500.0	500.0	500.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (please specify)						
TOTAL	500.0	500.0	500.0	500.0	500.0	500.0

POSITIONS:

	FY98	FY99	FY00	FY01	FY02	FY03
FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of any current year (FY97) cost: $0.0

ANALYSIS: (Attach a separate page if necessary)

See Next Page

Prepared by: Loren A. Jones
Division: Alcoholism and Drug Abuse
Phone: 465-2071
Date: 01/08/97

JMA 1/9/97
Approved by Commissioner: Karen Perdue, Commissioner
Date: 1/-/97
Agency: Department of Health & Social Services

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ANALYSIS (cont.):

This bill would transfer to the Division of Alcoholism and Drug Abuse the responsibility for the approval of alcohol information courses (Alcohol Information Schools (AIS)) for all persons needing such a course as a result of alcohol related crimes, primarily minor consuming, minor in possession and driving while intoxicated. Currently all such AIS classes also contain a driver improvement section and are targeted primarily at adults.

The current curriculum being used has not been reviewed and updated in many years. There are no outcomes or expectations for the AIS (other than to not have repeated the criminal behavior) or for the impact on the individual. It is time that this was updated and specific outcomes and expectations be established.

With the passage of the "Use It and Lose It" law there has been a dramatic increase in the number of minors loosing their drivers license and being required to complete an AIS or treatment in order to have their license re-instated. This new law has shown a significant gap in our ability to respond appropriately and to assure that the education received is of value and will result in positive outcomes for the youth.

A number of these youth, like adults, may need more than an AIS to address their needs. In reviewing the number of minors losing their driver's license the number of second or more offenders is about equal to the first time loss. This would indicate that the law, in and of itself is not stopping repeat offenses. An age appropriate AIS will impact this but for some additional services may be needed.

The Division also feels that to provide appropriate AIS a different curriculum and teaching method is need for minors. The Division will locate and/or develop an appropriate model for adult and youth Alcohol/Drug Information School (AIS). These courses would be age appropriate and meet the needs of DMV for driving related issues. There will be a different response for the 18-20 year olds than for those under age 18. One major difference will be information on inhalants for the under 18 age group.

The Division of Alcoholism and Drug Abuse would establish a set of policy guidelines and outcomes for communities to use in developing a local approach to establishing the appropriate entry program for these minors. This would include policies on defining appropriate assessment, referral, defining compliance and completion of appropriate services, and evaluation standards for the program. Thus those who need only AIS would be sent in the correct direction and those who need additional services would also get those.

These policies would include the role of partnership with schools for alternative to suspension programs, for working with courts, working with youth probation, and with local treatment agencies. We would need to address differences for rural villages. We would need to address development of a community based prevention and intervention services.

The Division would require two new positions consisting of 1 probation officer and 1 clerical staff for program & policy development, quality assurance of the AIS classes and staff support. This staff would write the P&P, Regulations and monitor compliance of the AIS providers and the local agencies providing the services.

The Division would propose that an additional $500,000 be allocated for both assessment projects and to increase the capacity of the youth outpatient services. It is anticipated that each community would need about $100,000 to fully implement a new service that would include assessment, education, outpatient services, and aftercare. These funds would be issued under AS 47.37.045, the Community Action Against Substance Abuse program.

All Requests for Proposals for substance abuse services should require proposers to specifically discuss prevention strategies either available in the program or in the community. These strategies need to reflect a community-based, risk reduction model and incorporate "best practice" models as supported by the research. There needs to be a targeted prevention effort in rural areas of Alaska dealing with inhalant abuse. This would help also get a prevention message out about alcohol and drugs as inhalants tend to be used by youth at an age prior to first use of alcohol or drugs.

The revenue generated from the increase in the fee charged to reinstate revoked drivers licenses would provide the increase in funds to pay for this new service. The Department of Public Safety has a fiscal note showing revenues of $1,086,300 with the passage of this legislation.

FISCAL NOTE

No. 2

STATE OF ALASKA
1997 LEGISLATIVE SESSION

. Version: SB 71

(S) Publish Date: 1/30/97

Revision Date:

Title: Relating to issuance, suspension, limitation revocation, and reinstatement of driver's license...

Sponsor: Rules by Request

Requestor: Governor

Dept. Affected: Health and Social Services

BRU: Alcohol and Drug Abuse Services

Component: ADA Admin

COMPONENT SERIAL NO. 302

See also (SN#):

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY98	FY99	FY00	FY01	FY02	FY03
PERSONAL SERVICES	92.0	95.0	98.0	101.0	104.0	107.0
TRAVEL	4.0	4.0	4.0	4.0	4.0	4.0
CONTRACTUAL	2.0	2.0	2.0	2.0	2.0	2.0
SUPPLIES	2.0	2.0	2.0	2.0	2.0	2.0
EQUIPMENT	5.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES						
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS						
TOTAL OPERATING	105.0	103.0	106.0	109.0	112.0	115.0
CAPITAL EXPENDITURES						
CHANGES IN REVENUES						

FUND SOURCE

1002 Federal Receipts						
1003 GF Match						
1004 GF	105.0	103.0	106.0	109.0	112.0	115.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (please specify)						
TOTAL	105.0	103.0	106.0	109.0	112.0	115.0

POSITIONS:

FULL-TIME	2	2	2	2	2	2
PART-TIME						
TEMPORARY						

Estimate of any current year (FY97) cost: $0.0

ANALYSIS: (Attach a separate page if necessary)

See Next Page

Prepared by: Loren A. Jones
Division: Alcoholism and Drug Abuse
Phone: 465-2071
Date: 01/08/97

MA 1/8/97
Approved by Commissioner: Karen Perdue, Commissioner
Agency: Department of Health & Social Services
Date: 1/9/97

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FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

No. 1
BILL NO: SB
Bill Version: 71
(S) Publish Date: 1/20/97

Revision Date:
Title: An Act relating to the issuance.....driver's license, and youth assessment for minors.
Sponsor: Rules
Requestor: Governor

Dept. Affected: Public Safety
BRU: Motor Vehicles
Component: Administration
COMPONENT SERIAL NO.

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	5.0					
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	5.0					
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( ) Revenue Code	1086.3	1086.3	1086.3	1086.3	1086.3	1086.3

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	5.0					
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	5.0					

Estimate of current year (FY 97) impact: $

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)
The revenue projected is derived from the increase of reinstatement fees for first time offenders. It is estimated there are approximately 7,242 individuals who had their driver's license revoked or suspended for the first time during calendar 1996. This bill will increase the reinstatement fee for those individual's from $100.00 to $250.00. The increase of the additional $150.00 per reinstatement of a driver's license will generate approximately $1,086,300.00 in new revenues. Cost are associated with software maintenance and reprogramming the computer system to reflect the change and increase of reinstatement fee.

Prepared By: Juanita M. Hensley
Division: Motor Vehicles
Phone: 465-2650
Date: 1/6/97

Approved by Commissioner: [signature]
Agency: Ronald L. Otte, Dept. of Public Safety
Date: 1/9/97

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71

January 30, 1997

The Honorable Mike Miller
President of the Senate
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear President Miller:
Mike

Alcohol abuse among minors is one of the most serious and disturbing problems facing this state. It is crucial that we discourage young Alaskans from making the wrong choices about alcohol. This bill helps achieve that goal by enhancing our current laws regarding treatment for underage drinkers . It is part of my package of legislation based on recommendations of the Governor's Conference on Youth and Justice.

This bill ensures that minors whose driver's licenses have been revoked for alcohol-related offenses are properly screened and monitored for compliance with education and treatment programs before their licenses are reinstated. It does so by extending toward minors a treatment program which has proved successful for adult offenders -- the alcohol safety action program, or ASAP.

The state oversees the ASAP which screens offenders, determines what education or treatment is appropriate for them and then monitors their compliance with the recommendations. If the offender fails to comply, further court proceedings are initiated.

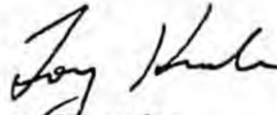
My proposal for zero tolerance for underage drinking and driving was passed last year and is now in effect in addition to our "use it, lose it" law. Under the zero tolerance law, a minor's driver's license is revoked if the minor drives a vehicle after consuming any quantity of alcohol. The "use it, lose it" law revokes a minor's driver's license if the minor possesses or consumes unlawful drugs or alcohol, regardless of whether the minor was driving a vehicle at the time. Both laws require the minor complete an education or treatment program before the license may be reinstated. However, there is currently no program for minors similar to the ASAP.

The Honorable Mike Miller
January 30, 1997
Page 2

To fill this gap, this legislation proposes a program for minors that would be housed in the Department of Health and Social Services. The program would be funded with the fees charged for reinstating any driver's license that has been revoked. This bill increases that fee for first-time offenders from $100 to $250 -- creating another deterrent to underage drinking and drinking and driving for anyone, at any age. The increased fee is expected to generate more than $1 million which will easily cover the $605,000 cost of the youth treatment program.

This bill to address the problem of underage drinking is an integral component of my package on the youth justice system and an attempt to take an aggressive approach toward ending a growing crisis in our state.

Sincerely,



Tony Knowles
Governor

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF ALCOHOLISM AND DRUG ABUSE

P.O. BOX 110607
JUNEAU, ALASKA 99811-0607
PHONE: (907) 465-2071
FAX: (907) 465-2185

February 25, 1997

Senator Gary Wilken
Senate HESS Committee
Alaska State Senate
State Capitol
Juneau, Alaska 99801

Dear Senator Wilken:

I want to thank you and your committee for hearing SB 71 on Monday February 24, 1997. At that hearing you requested that the Division of Alcoholism and Drug Abuse clarify one section of our Fiscal Note Analysis. In particular you wanted us to enhance the section dealing with how the Division would allocate the funds.

The Division would propose using the $500,000 to fund local programs via a competitive process under AS 47.30.470 - AS 47.30.500, which is our grant-in-aid process. In the competitive process we would seek to reach three main objectives: award funds to communities that have a collaborative plan to address the specific needs in their community; assure that the agency receiving the grant will be able to achieve the stated goals; and assure that the funds went to communities with the greatest need.

In an earlier analysis of data from the Division of Motor Vehicles (CY 1995 and six months of CY 96) the large majority of minors losing their driver's license occurred in Anchorage, Fairbanks, Juneau, Soldotna, Ketchikan, Sitka and Palmer. These would be areas in which we would target for funding if the other two goals are met.

We must, as noted in the analysis, deal with rural areas where the numbers may not be high, but services are required. The numbers may not be high due to enforcement issues (lack of police and more serious crimes) but youth services are scarce. We would look at this problem and try to set aside some funds for enhancing rural efforts to address the issue of minor consuming.

As you pointed out in your discussion the reason that this program is vital is the number of repeat offenders is increasing even though this is the start of the third year of the "Use It and Lose It " law. One of the major objectives then will be to decrease the number of

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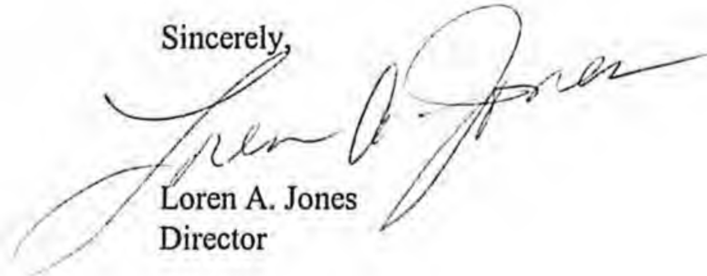
repeat offenders as well as the number who commit their first offense. We have not yet done the analysis to see if these same communities have the highest repeat offenders but we would assume this to be true.

We have not been specific about the cost of new services in each community as each has different resources, may wish to configure their services differently, and may have more local funds. We will be requiring a local match. We will look at current resources and be adding to those not replacing them.

If I can answer any other questions please let me know.

Sincerely,



Loren A. Jones
Director

cc: Karen Perdue, Commissioner
Russ Webb, Deputy Commissioner

MEMORANDUM

ALASKA PUBLIC DEFENDER AGENCY

900 West Fifth Avenue, Suite 200
Anchorage, Alaska 99501

Tel: (907) 264-4400
Desk: (907) 264-4433
Fax: (907) 269-5476

TO: Senator Gary Wilken, Chairman
Senate Health, Education, and Social Services Committee

FROM: Blair McCune, Deputy Director
Alaska Public Defender Agency

RE: SB 71

DATE: February 27, 1997

I understand that the committee had some questions about our fiscal note on SB71. I listened to the hearing on this bill on February 24, 1997. It was very interesting and informative. Unfortunately, as I was about to speak, the Juneau/Anchorage telephone link went out. I thought I would write and comment on our fiscal note. I also had some other information that occurred to me at the hearing that I thought might be of help.

Our fiscal note stated that creating a mechanism to monitor treatment programs for minors might result in more probation revocations. We said we might have more cases because of this change, although we recognized that any conclusion about fiscal impact would be speculative.

After listening to the hearing and thinking about this some more, I believe that we might be impacted with additional cases, but not for probation revocations for minors. As I understand the bill, the approvals for alcohol education and rehabilitation programs only apply to reinstatement of drivers licenses by the Division of Motor Vehicles (DMV). I do not believe now that it will have an effect on probation revocations.

The possible fiscal impact that I see comes from Section 3 of the bill which would raise the reinstatement fee for licenses from $100.00 to $250.00. Driving with a canceled, suspended, or revoked license (DWLC,S,R) is a serious misdemeanor offense in Alaska. AS 28.15.291 In our experience, people sometimes have difficulty coming up with the $100 reinstatement fees and, taking a chance they obviously should not, continue to drive. They are often

caught, especially in small communities, because the police recognize them. They are also caught while committing other crimes, like driving while intoxicated, and charged with DWLC,S,R, too. I would think that increasing the fee to $250 dollars would result in more of these cases. $250 is a lot of cash for people to come up with.

It is difficult to quantify how many additional cases would be brought. I know we get a lot of DWLC,S,R cases in our Palmer office, so I checked with them. They said they estimate that they had over 200 cases currently open where there had been a DWLC,S,R charge. (This would include probation revocations cases and more serious cases that also include a DWLC,S,R.)

There are also several sections of the bill which require that alcohol education and treatment programs be approved by the Department of Health and Social Services. I understand that there is an approval process now, but I am a bit concerned about the effect requiring state approval by law might have. Currently, that are many community organizations that have substance abuse programs. These programs include Alcoholics Anonymous (AA) and programs like the Salvation Army Clitheroe Center outpatient treatment program in Anchorage. In our experience, if people attend and make progress in these programs, they can get their licenses reinstated.

If official state approval were required, some of these community and religious organizations might not qualify. I'm enclosing a copy of a federal case from New York, Warner v. Orange County Dept. of Probation, in which the court decided that AA was religiously-based organization and a state could not require a probationer to attend AA meetings without violating the First Amendment to the United States Constitution. If people can't satisfy reinstatement requirements by attending these inexpensive (and effective) community and religious programs, there might be additional people who would have difficulty getting their licenses reinstated.

I hope these comments clarify our fiscal note.

There were several other comments that I thought the committee might want to consider. I was really interested in Ms. Valerie Therrien's testimony and the testimony of the young people attending the hearing. It is clear from this testimony, and our experience, that Alaska has serious problems caused by substance abuse. We estimate 85-90% of our cases relate to alcohol and drug abuse in some way.

However, I think it is important that the committee recognize that, for the most part, the young people of this state are high-achieving, successful kids. It would really be interesting to see the statistics on how we rank in terms of academic achievement, in

athletics, etc., as compared with other states. The recent Governor's Conference on Youth and Justice report shows that Alaska is among the lowest states in the nation in terms of our rate of violent juvenile crimes. (Alaska ranks 37th out of 50 states.)

Also, I think it is important to note another statistic. Although we're 37th in terms of the juvenile crime rate, the Governor's report shows that we rank 2nd in the nation in terms of the number of children incarcerated in secure juvenile institutions.

There was some testimony to the effect that some people believe that Alaska is generally lenient toward juvenile offenders. This is certainly not true in terms of the rate of locking kids up. It might be true, however, in terms of not having the option of close probation supervision and treatment programs specifically aimed at young people. These are expensive programs, but where they can be used as a substitute for the much more expensive option of incarceration, they save money. Also, if they are more effective, as we believe they are, in rehabilitation of offenders while they are young, they prevent the immense costs to society of future criminal behavior.

The last comment I want to make involves the "use it, lose it" law. First, the committee should be aware that an Anchorage court in Jada Quinn v. State, No. 3AN-95-8805 CV (Super. Ct. 3d Dist. Feb. 13, 1997), has found some significant problems with the part of the law that allows an administrative DMV license revocation for minor consuming alcohol when there is no indication that the person was or had been driving a motor vehicle. The court said that, under the circumstances, the revocation could not be considered merely a "civil" sanction. The court found the rights of a defendant in a criminal case apply. These include the right to a jury trial and to court-appointed counsel for indigents. I have enclosed a copy of the opinion. Also, for court (as opposed to DMV) revocations, the court of appeals in State v. District Court, ___ P.2d ___ Op. No. 1504 (Alaska App. December 6, 1996), decided that court revocations are "criminal," and the right to a jury trial and court-appointed counsel would attach to these cases as well.

Although these cases are no doubt going to be the subject of further appeals, the status of the "use it, lose it" laws and the status of minor consuming alcohol as a "civil" offense are certainly in doubt.

I hope these comments clarify our fiscal note and are helpful to the committee in considering this bill.

BMC/attachments

Part of teen alcohol law declared unconstitutional

■ *State revocation of minors' drivers licenses takes hit*

THE ASSOCIATED PRESS

ANCHORAGE – A Superior Court judge has declared unconstitutional a portion of the state's "use it, lose it" law, which says minors can lose their driver's license if they drink alcohol – even if they are nowhere near a car.

The law, in effect since 1994, says the state can revoke licenses of drivers younger than 21 if a police officer had probable cause to believe the minor possessed or consumed any amount of alcohol. The law imposes a mandatory 90-day revocation for a first incident, a one-year revocation for a minor caught twice and a three-year revocation for a third-time offender.

Two young women, Jada Quinn and Nina Storm, challenged the law. They lost their licenses after police found the women, three friends and a 12-pack of beer at a campfire at an Anchorage near in 1995. Quinn and Storm, both 20 at the time, thought the law was unfair, said their lawyer, Tim Petumenos.

Judge Rene Gonzalez, in a decision he issued last week, sided with them.

Gonzalez said the license revocation "is not cruel and unusual punishment." But since Quinn and Storm were not driving when they were drinking, the judge ruled that part of the law unfair.

"They were, in fact, not even in close proximity to a motorized vehicle," Gonzalez wrote.

Quinn and Storm admitted drinking a small amount of beer. A portable breath test showed they had blood-alcohol levels of 0.003 and 0.006 percent – well below the 0.10 legal limit for driving.

Police gave the women notices that their licenses would be revoked. The women protested the revocations at a hearing at the Department of Motor Vehicles, to no avail.

Quinn and Storm appealed the revocation in Superior Court.

Their case, Judge Gonzalez said, turned on whether the license revocation was meant to punish the young women or to protect other motorists from irresponsible drivers.

"We think the purpose of this is to protect people rather than punish the offender," assistant attorney general Eric Johnson said.

Gonzalez disagreed, noting the reason for the license revocation – a belief the women had alcohol at a small social gathering – had nothing to do with driving.

Johnson said the state will appeal to the Alaska Supreme Court. In the meantime, the Department of Motor Vehicles will continue to revoke licenses, because other state judges have come to the opposite conclusion as Gonzalez, Johnson said.

In 1995 and 1996, more than 6,600 drivers' licenses were revoked under the "use it, lose it" law, said Kerry Hennings, a manager with the Division of Motor Vehicles.

MEMORANDUM

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TO: Senator Gary Wilken, Chairman
Senate Health, Education, and Social Services Committee

FROM: Blair McCune, Deputy Director
Alaska Public Defender Agency

RE: SB 71

DATE: February 27, 1997

==

I understand that the committee had some questions about our fiscal note on SB71. I listened to the hearing on this bill on February 24, 1997. It was very interesting and informative. Unfortunately, as I was about to speak, the Juneau/Anchorage telephone link went out. I thought I would write and comment on our fiscal note. I also had some other information that occurred to me at the hearing that I thought might be of help.

Our fiscal note stated that creating a mechanism to monitor treatment programs for minors might result in more probation revocations. We said we might have more cases because of this change, although we recognized that any conclusion about fiscal impact would be speculative.

After listening to the hearing and thinking about this some more, I believe that we might be impacted with additional cases, but not for probation revocations for minors. As I understand the bill, the approvals for alcohol education and rehabilitation programs only apply to reinstatement of drivers licenses by the Division of Motor Vehicles (DMV). I do not believe now that it will have an effect on probation revocations.

The possible fiscal impact that I see comes from Section 3 of the bill which would raise the reinstatement fee for licenses from $100.00 to $250.00. Driving with a canceled, suspended, or revoked license (DWLC,S,R) is a serious misdemeanor offense in Alaska. AS 28.15.291 In our experience, people sometimes have difficulty coming up with the $100 reinstatement fees and, taking a chance they obviously should not, continue to drive. They are often

caught, especially in small communities, because the police recognize them. They are also caught while committing other crimes, like driving while intoxicated, and charged with DWLC,S,R, too. I would think that increasing the fee to $250 dollars would result in more of these cases. $250 is a lot of cash for people to come up with.

It is difficult to quantify how many additional cases would be brought. I know we get a lot of DWLC,S,R cases in our Palmer office, so I checked with them. They said they estimate that they had over 200 cases currently open where there had been a DWLC,S,R charge. (This would include probation revocations cases and more serious cases that also include a DWLC,S,R.)

There are also several sections of the bill which require that alcohol education and treatment programs be approved by the Department of Health and Social Services. I understand that there is an approval process now, but I am a bit concerned about the effect requiring state approval by law might have. Currently, that are many community organizations that have substance abuse programs. These programs include Alcoholics Anonymous (AA) and programs like the Salvation Army Clitheroe Center outpatient treatment program in Anchorage. In our experience, if people attend and make progress in these programs, they can get their licenses reinstated.

If official state approval were required, some of these community and religious organizations might not qualify. I'm enclosing a copy of a federal case from New York, Warner v. Orange County Dept. of Probation, in which the court decided that AA was religiously-based organization and a state could not require a probationer to attend AA meetings without violating the First Amendment to the United States Constitution. If people can't satisfy reinstatement requirements by attending these inexpensive (and effective) community and religious programs, there might be additional people who would have difficulty getting their licenses reinstated.

I hope these comments clarify our fiscal note.

There were several other comments that I thought the committee might want to consider. I was really interested in Ms. Valerie Therrien's testimony and the testimony of the young people attending the hearing. It is clear from this testimony, and our experience, that Alaska has serious problems caused by substance abuse. We estimate 85-90% of our cases relate to alcohol and drug abuse in some way.

However, I think it is important that the committee recognize that, for the most part, the young people of this state are high-achieving, successful kids. It would really be interesting to see the statistics on how we rank in terms of academic achievement, in

athletics, etc., as compared with other states. The recent Governor's Conference on Youth and Justice report shows that Alaska is among the lowest states in the nation in terms of our rate of violent juvenile crimes. (Alaska ranks 37th out of 50 states.)

Also, I think it is important to note another statistic. Although we're 37th in terms of the juvenile crime rate, the Governor's report shows that we rank 2nd in the nation in terms of the number of children incarcerated in secure juvenile institutions.

There was some testimony to the effect that some people believe that Alaska is generally lenient toward juvenile offenders. This is certainly not true in terms of the rate of locking kids up. It might be true, however, in terms of not having the option of close probation supervision and treatment programs specifically aimed at young people. These are expensive programs, but where they can be used as a substitute for the much more expensive option of incarceration, they save money. Also, if they are more effective, as we believe they are, in rehabilitation of offenders while they are young, they prevent the immense costs to society of future criminal behavior.

The last comment I want to make involves the "use it, lose it" law. First, the committee should be aware that an Anchorage court in Jada Quinn v. State, No. 3AN-95-8805 CV (Super. Ct. 3d Dist. Feb. 13, 1997), has found some significant problems with the part of the law that allows an administrative DMV license revocation for minor consuming alcohol when there is no indication that the person was or had been driving a motor vehicle. The court said that, under the circumstances, the revocation could not be considered merely a "civil" sanction. The court found the rights of a defendant in a criminal case apply. These include the right to a jury trial and to court-appointed counsel for indigents. I have enclosed a copy of the opinion. Also, for court (as opposed to DMV) revocations, the court of appeals in State v. District Court, ___ P.2d ___ Op. No. 1504 (Alaska App. December 6, 1996), decided that court revocations are "criminal," and the right to a jury trial and court-appointed counsel would attach to these cases as well.

Although these cases are no doubt going to be the subject of further appeals, the status of the "use it, lose it" laws and the status of minor consuming alcohol as a "civil" offense are certainly in doubt.

I hope these comments clarify our fiscal note and are helpful to the committee in considering this bill.

BMC/attachments

Robert WARNER, Plaintiff-Appellee,
v.
ORANGE COUNTY DEPARTMENT OF PROBATION, Defendant-Appellant.

No. 1760, Docket 95-7055.

United States Court of Appeals,
Second Circuit.

Argued July 20, 1995.

Decided Sept. 9, 1996.

Probationer brought § 1983 action against county department of probation, alleging that establishment clause was violated by department's recommendation to sentencing judge that probationer attend meetings of religiously based alcohol rehabilitation organization. The United States District Court for the Southern District of New York, Gerard L. Goettel, J., 870 F.Supp. 69, entered judgment in favor of probationer, and department appealed. The Court of Appeals, Leval, Circuit Judge, held that: (1) department's recommendation was a proximate cause of probationer's injury; (2) department was not entitled to quasi-judicial immunity from suit; and (3) requirement that probationer attend meetings violated establishment clause.

Affirmed.

Winter, Circuit Judge, dissented and filed opinion.

[1] CIVIL RIGHTS ⚷ 206(3)
78k206(3)
To establish county department of probation's liability for probationer's allegedly unconstitutional sentence under § 1983, probationer was required to demonstrate that his injury resulted from custom or policy of county, as opposed to isolated instance of conduct. 42 U.S.C.A. § 1983.

[2] CIVIL RIGHTS ⚷ 110.1
78k110.1
In cases brought under § 1983, a superseding cause, as traditionally understood in common-law tort doctrine, will relieve defendant of liability. 42 U.S.C.A. § 1983.

[3] CIVIL RIGHTS ⚷ 110.1
78k110.1
Tort defendants, including those sued under § 1983, are responsible for natural consequences of their actions. 42 U.S.C.A. § 1983.

[3] TORTS ⚷ 15
379k15
Tort defendants, including those sued under § 1983, are responsible for natural consequences of their actions. 42 U.S.C.A. § 1983.

[4] TORTS ⚷ 15
379k15
An actor may be held liable for those consequences attributable to reasonably foreseeable intervening forces, including acts of third parties.

[5] CONSTITUTIONAL LAW ⚷ 75
92k75
Under New York law, determination of probation terms is a judicial task, which may not be delegated to probation officers.

[6] CIVIL RIGHTS ⚷ 135
78k135
In § 1983 action, fact that sentencing judge ultimately determined probation term did not preclude finding that county probation department proximately caused probationer's alleged injury by recommending to judge that probationer be required to attend meetings of religiously based alcohol rehabilitation organization as a condition of probation. 42 U.S.C.A. § 1983.

[7] FEDERAL COURTS ⚷ 858
170Bk858
In § 1983 action, whether it was reasonably foreseeable that sentencing judge would adopt county probation department's recommendation that probationer attend meetings of religiously based alcohol rehabilitation organization was a question of fact, which was subject to review for clear error. Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

[8] CIVIL RIGHTS ⚷ 135
78k135
In § 1983 action, probationer's failure to object to probation condition that he attend meetings of religiously based alcohol rehabilitation organization did not constitute consent. 42 U.S.C.A. § 1983.

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[9] CIVIL RIGHTS ⇐ 135
78k135
Actions of religiously based alcohol rehabilitation organization did not break chain of causation, and thus county probation department could be held liable under § 1983 for recommending probationer's attendance at such meetings as a condition of probation; department was well aware of religious nature of program. 42 U.S.C.A. § 1983.

[10] CIVIL RIGHTS ⇐ 214(7)
78k214(7)
County department of probation was not entitled to quasi-judicial immunity in § 1983 action for department's action of recommending probationer's terms of probation to sentencing judge. 42 U.S.C.A. § 1983.

[11] C. . ISTITUTIONAL LAW ⇐ 84.5(1)
92k84.5(1)
Establishment clause was violated by probation condition that probationer attend religiously based meetings of alcohol rehabilitation organization; meetings were intensely religious events, and probationer would have been subject to imprisonment for violation of probation had he failed to attend meetings of that particular organization. U.S.C.A. Const.Amend. 1.

[11] CRIMINAL LAW ⇐ 982.5(2)
110k982.5(2)
Establishment clause was violated by probation condition that probationer attend religiously based meetings of alcohol rehabilitation organization; meetings were intensely religious events, and probationer would have been subject to imprisonment for violation of probation had he failed to attend meetings of that particular organization. U.S.C.A. Const.Amend. 1.

[12] CONSTITUTIONAL LAW ⇐ 84.1
92k84.1
At a minimum, Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in way which establishes state religion or religious faith, or tends to do so. U.S.C.A. Const.Amend. 1.

[13] CONSTITUTIONAL LAW ⇐ 84.1
92k84.1
Under establishment clause, government should not prefer one religion to another, or religion to irreligion. U.S.C.A. Const.Amend. 1.

*203 Robert N. Isseks, Goshen, NY (Alex Smith, Middletown, NY, of counsel), for Plaintiff-Appellee.

Richard B. Golden, Orange County Attorney, Goshen, NY (M. Kevin Coffey, Antoinette Gluszak, Laurie T. McDermott, of counsel), for Defendant-Appellant.

Before: WINTER, LEVAL, and CALABRESI, Circuit Judges.

LEVAL, Circuit Judge:

Orange County Department of Probation ("OCDP"), the defendant, appeals from a decision of the district court awarding declaratory *204 judgment, nominal damages of one dollar, and attorney's fees to plaintiff Robert Warner in his civil action under 42 U.S.C. § 1983. Warner claimed that a probation condition imposed on him as part of a criminal sentence, which required him to attend meetings of Alcoholics Anonymous ("A.A."), forced him to participate in religious activity in violation of the First Amendment's Establishment Clause, and that OCDP was responsible, in part because it recommended the A.A. therapy to the sentencing court as a condition of probation. OCDP argues on several grounds that it cannot be liable for Warner's exposure to A.A. pursuant to a sentence imposed by the court. We reject OCDP's arguments, and affirm the judgment.

Background

On November 13, 1990, Warner pleaded guilty to driving drunk and without a license in violation of New York law. N.Y.Veh. & Traf.Law §§ 511(2), 1192(1) (McKinney 1986 & Supp.1996). This was his third alcohol-related driving offense in a period of little more than a year. Judge David L. Levinson, of the Town of Woodbury's Justice Court in Orange County, New York, accepted the plea and ordered the Orange County Department of Probation to prepare a presentence report.

The OCDP's report recommended a term of probation with six special conditions, which the department routinely recommends in cases of

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defendants with alcohol problems. These included that the probationer "totally abstain from the use of intoxicating beverages," avoid "establishment[s] where the primary business is the sale or consumption of alcohol," and, as the fifth recommended condition, that he "attend Alcoholics Anonymous at the direction of [his] probation officer."

These recommended special conditions were set forth on a standard form rider which OCDP routinely provided to sentencing judges in such cases. Judge Levinson sentenced Warner to three years of probation, imposing the special conditions recommended by the OCDP. In imposing these special conditions, Judge Levinson endorsed the Probation Department's standard form.

Warner attended A.A. meetings at the direction of his probation officer, Neal Terwilliger, from November 1990 through September 1992. However, in January of 1991, Warner complained to Terwilliger that, as an atheist, he found the religious nature of the A.A. meetings objectionable. The probation officer instructed Warner to continue his attendance. Some months later, Terwilliger determined that Warner lacked sufficient commitment to the program; he directed Warner to attend "Step meetings" and to seek another more advanced A.A. member as a "sponsor" to give him guidance and encourage his adherence to the program. The Step meetings were devoted to discussion of A.A.'s "Twelve Steps," which represented the heart of the therapy program.

The district court found that the program Warner was required to attend involved a substantial religious component. For example, the "Twelve Steps" included instruction that participants should "believe that a Power greater than ourselves could restore us"; "[make] a decision to turn our will and our lives over to the care of God as we [understand] Him "; "[a]dmit[ ] to God ... the exact nature of our wrongs"; be "entirely ready to have God remove all these defects ... [and] ask Him to remove our shortcomings"; and "[seek] through prayer and meditation to improve our conscious contact with God, as we [understand] Him." (Emphasis in original.)

Group prayer was a common occurrence at the meetings Warner attended. They frequently began with a religious invocation, and always ended with a Christian prayer. The district court found that the program "placed a heavy emphasis on spirituality and prayer, in both conception and in practice."

In July of 1992, Warner filed a motion in the Town of Woodbury Justice Court challenging the constitutionality of his consignment to A.A. The OCDP--after meeting with representatives from the local district attorney's office--responded by offering Warner therapy in another program. The municipal court judge then dismissed Warner's motion as moot. Warner subsequently brought this action in federal district court, seeking damages, as well as a declaratory *205 judgment that OCDP had violated his First Amendment rights. After a bench trial, the district court found that compelling Warner to attend the program violated the Establishment Clause, and further determined that the OCDP was liable for the constitutional injury, notwithstanding that it was the sentencing judge--not the Probation Department--who had imposed the condition of A.A. participation. The court, however, found that Warner's claims of financially compensable injury were not convincing, and thus awarded nominal damages in the amount of one dollar, plus attorney's fees.

Discussion

OCDP asserts that the trial court committed a variety of errors. First, it claims that it cannot be liable because, under New York law, the determination of probation conditions is solely the responsibility of the sentencing judge. Second, the OCDP argues that if it is responsible for Warner's probation terms, it is protected from any damages judgment by a quasi-judicial absolute immunity. Finally, it contests the district court's conclusion that requiring Warner to attend A.A. violated the Establishment Clause. We disagree with these contentions.

I. OCDP's Responsibility for the Sentence

[1] To establish OCDP's liability for his sentence under 42 U.S.C. § 1983, Warner must first demonstrate that his injury resulted from a custom or policy of Orange County, as opposed to an isolated instance of conduct. Monell v. Department of Social Servs., 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36, 56 L.Ed.2d 611 (1978); see also

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Adickes v. S.H. Kress & Co., 398 U.S. 144, 162-67, 90 S.Ct. 1598, 1611-13, 26 L.Ed.2d 142 (1970) (describing congressional intent in creating liability for custom or practice). The OCDP's recommendation that Warner be required to participate in A.A. therapy was unquestionably made pursuant to a general policy. This was one of six standard special conditions, set forth on a form captioned "Additional Conditions of Probation Pertaining to Alcohol," which OCDP routinely submitted to sentencing judges in alcohol cases.

[2] OCDP argues that it is nonetheless not legally responsible because it was the judge's sentencing decision, not the Probation Department's recommendation, that caused the harm. The County is certainly correct that in cases brought under § 1983 a superseding cause, as traditionally understood in common law tort doctrine, will relieve a defendant of liability. Jeffries v. Harleston, 52 F.3d 9, 14 (2d Cir.), cert. denied, --- U.S. ----, 116 S.Ct. 173, 133 L.Ed.2d 114 (1995); Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 561 (1st Cir.1989); Wagenmann v. Adams, 829 F.2d 196, 212 (1st Cir.1987). "[T]he Supreme Court has made it crystal clear that principles of causation borrowed from tort law are relevant to civil rights actions brought under section 1983." Buenrostro v. Collazo, 973 F.2d 39, 45 (1st Cir.1992); see Malley v. Briggs, 475 U.S. 335, 344 n. 7, 106 S.Ct. 1092, 1098 n. 7, 89 L.Ed.2d 271 (1986); Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961).

[3][4] However, tort defendants, including those sued under § 1983, are " 'responsible for the natural consequences of [their] actions.' " Malley, 475 U.S. at 344 n. 7, 106 S.Ct. at 1098 n. 7 (quoting Monroe, 365 U.S. at 187, 81 S.Ct. at 484). As the First Circuit has explained, an actor may be held liable for "those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties." Gutierrez-Rodriguez, 882 F.2d at 561 (citations omitted). [FN1]

FN1. The First Circuit went on to state: A negligent defendant will not be relieved of liability by an intervening cause that was reasonably foreseeable, even if the intervening force may have "directly" caused the harm. An "unforeseen and abnormal" intervention, on the other hand, "breaks the chain of causality," thus shielding the defendant from liability. See also Stagl v. Delta Airlines, Inc., 52 F.3d 463, 473-74 (2d Cir.1995)(under New York law liability turns upon whether the intervening act is "a normal and foreseeable consequence of the situation created by the defendant's negligence")(quoting Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166, 414 N.E.2d 666 (1980)); Bonsignore v. City of New York, 683 F.2d 635, 638 (2d Cir.1982)(same); White v. Roper, 901 F.2d 1501, 1506 (9th Cir.1990); Marsh v. Barry, 824 F.2d 1139, 1143 (D.C.Cir.1987)(question in § 1983 case where intervening cause is alleged is "whether the resulting harm was reasonably foreseeable"); Springer v. Seaman, 821 F.2d 871, 876-77 (1st Cir.1987); Restatement (Second) Torts §§ 442A, 442B, 443, 447 (1965).

*206 A complex chain of events led to Warner's participation in religious exercises at the A.A. meetings. Two candidates present themselves as possible superseding causes of his injury that might relieve OCDP of liability: First, as the County argues, the judge's sentencing determination; second, the actions of the A.A. chapter that Warner attended.

A. Act of the Sentencing Judge

[5][6] As the OCDP correctly points out, under New York law the determination of probation terms is a judicial task, which may not be delegated to probation officers. People ex. rel. Perry v. Cassidy, 23 A.D.2d 706, 257 N.Y.S.2d 228, 229 (1965); see also People v. Fuller, 57 N.Y.2d 152, 455 N.Y.S.2d 253, 256, 441 N.E.2d 563, 566 (1982) (sentencing court must independently decide how much of probation department report to adopt). The probation department therefore argues that its role was purely advisory, and cannot have been the proximate cause of Warner's injury.

The Supreme Court, however, in Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), rejected a similar argument. Malley was a civil rights action under § 1983 against a state trooper who had procured a warrant for the plaintiff's arrest by submitting an affidavit. Plaintiff claimed the affidavit was legally insufficient. The district court had dismissed the case, believing the police officer to be absolutely immune when swearing out a warrant. The Court of Appeals

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reversed, resuscitating the action. The officer argued in the Supreme Court not only that he was immune, but also that he was shielded from responsibility by his entitlement to rely on the judgment of the judicial officer in finding probable cause and issuing the warrant. The Supreme Court ruled that such reliance was not justified if "a reasonably well-trained officer in [the same] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." Id. at 345, 106 S.Ct. at 1098. If such was the case, the officer's application for a warrant was not objectively reasonable, because it risked an unnecessary danger of unlawful arrest. "It is true," the Court observed,

> that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this damage by exercising reasonable professional judgment.

Id. Commenting on the claim that the judge's decision to issue the warrant broke the "causal chain" between the application and the wrongful arrest, the Court noted that such an argument was "inconsistent with our interpretation of § 1983," which makes defendants " 'responsible for the natural consequences of [their] actions.' " Id. at 344 n. 7, 106 S.Ct. at 1098 n. 7 (quoting Monroe, 365 U.S. at 187, 81 S.Ct. at 484); see also Gutierrez-Rodriguez, 882 F.2d at 561 (defendants in § 1983 cases liable for consequences caused by "reasonably foreseeable intervening forces").

The circumstances in Malley were more favorable than those here to the argument of exoneration by reason of the intervening decision of the judge. That is because a police officer applying for an arrest warrant appears in a partisan role. The magistrate to whom the application is addressed is automatically on notice that the application comes from an interested party and therefore knows that scrutiny is warranted. The probation officer, on the other hand, is not a partisan advocate aligned with either the prosecution or the defendant. He is a neutral adviser to the court. [FN2] Schiff v. Dorsey, *207 877 F.Supp. 73, 77 & n. 1 (D.Conn.1994) (describing analogous role of federal probation officer; "the sentencing judge's need for complete and accurate information about an offender requires that he enjoy a relationship of the utmost trust and confidentiality with the federal probation officer"); see also Sharon Bunzel, Note, The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows, 105 Yale L.J. 933, 945 (1995) (describing historical role of probation officer as "neutral information gatherer with loyalties to no one but the court"). The district court noted a high likelihood of court adoption of such recommendations by the probation department.

FN2. New York law prohibits a court from sentencing a defendant to a term of probation not agreed upon by the parties without first considering the probation department's pre-sentence report ("PSR"). N.Y.Crim. Proc. § 390.20 (McKinney 1994). PSR's include not only material the department thinks appropriate, but also any other information the court may direct the investigation to include. Id. at § 390.30(3)(a). Once written, PSR's become confidential court documents. Id. at § 390.50(1). Although not formally located within the judicial branch, Bowne v. County of Nassau, 37 N.Y.2d 75, 371 N.Y.S.2d 449, 452, 332 N.E.2d 323, 325 (1975), New York statutes intimately tie the probation department to the sentencing process.

Given the neutral advisory role of the probation officer toward the court, it is an entirely "natural consequence[ ]," Malley, 475 U.S. at 344 n. 7, 106 S.Ct. at 1098 n. 7, for a judge to adopt the OCDP's recommendations as to a therapy provider without careful scrutiny. Such action by a judge is neither "abnormal" nor "unforeseen." Gutierrez-Rodriguez, 882 F.2d at 561.

Court adoption of the probation officer's recommendation is particularly likely when the recommendation deals with a provider of therapy. Judges are unlikely to possess particularized information about the relative characteristics and merits of different providers of therapy. For this type of information, courts generally rely heavily on probation department recommendations. [FN3]

FN3. The dissent suggests that we malign New York's judiciary by finding that the sentencing judge merely "rubber stamped" the probation office recommendation. We neither find nor imply any such thing. First, to say, as we do, that it was reasonably foreseeable that the sentencing judge

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would accept probation's recommendation on this point does not imply that the judge did not make his own determination. Second, our discussion relates only to the selection of a therapy provider and not at all to the court's determination of appropriateness of probation and of alcohol therapy. The selection of a provider of therapy is not an issue of law, and courts are ill equipped to perform this task without relying heavily on recommendations. For sentences involving alcohol abuse therapy, furthermore, the probation department's role is particularly significant. New York law allows a judge to sentence a defendant to a term of probation conditioned on "participat[ion] in an alcohol ... abuse program ... approved by the court after consultation with the local probation department having jurisdiction, or such other public or private agency as the court determines to be appropriate." N.Y. Penal § 65.10(2)(e)(emphasis added). The statutory requirement that the judge seek advice in approving a particular alcohol abuse program suggests judicial reliance on the department's expertise in selecting a program.

[7] Whether it was reasonably foreseeable that the sentencing judge would adopt the OCDP's recommendation that Warner attend A.A. is a question of fact. See Springer, 821 F.2d at 876; Restatement (Second) of Torts § 453 cmt. b (1965). The district judge found a high likelihood that a judge would follow such a recommendation of the probation department. We review this determination for clear error, and find none. Fed.R.Civ.P. 52(a); Anderson v. City of Bessemer City, 470 U.S. 564, 572, 105 S.Ct. 1504, 1510-11, 84 L.Ed.2d 518 (1985).

Finally, the dissent argues that, because Warner--following the advice of his attorney--sampled A.A. sessions prior to sentence and made no objection to their religious content at the time of sentence, the probation department's recommendation was not a proximate cause of the injury. The dissent argues also that Warner's conduct constituted consent. We are not persuaded by either argument.

The issue of proximate cause is not resolved by the mere fact that Warner's failure to object was an intervening event, subsequent to the probation recommendation and prior to the sentence. The issue, as noted above, is whether, when probation made its recommendation, it was reasonably foreseeable that the recommendation would result in the harm. Warner's failure to object was entirely foreseeable. Assuming his early visits made him aware of the full extent of the religious content of the A.A. therapy, it was *208 not clear that Warner was aware at the time that the religious content gave him any legal basis to object, or that he had even told his lawyer about the religious content.

Furthermore, even if aware of his rights, he might well have been afraid to annoy the sentencing judge by objecting to the standard recommendation of the probation department. In short, for several reasons, it was entirely foreseeable at the time probation made its recommendation that Warner might not object.

[8] For the same reasons and others, Warner's conduct did not constitute consent. Had Warner either suggested A.A. as a condition of probation, or somehow communicated his agreement to such a condition, we might well agree with Judge Winter. But the mere fact of his presentence attendance, designed to demonstrate his commitment to rehabilitation, did not amount to a consent to the aspect of the sentence that essentially required him to attend religious exercises. A defendant facing sentence may well undertake daily attendance at mass in the hope of convincing the sentencing judge of his penitence. We do not see how such conduct, without more, could be construed as consent to a sentence of probation conditioned on daily attendance at mass. The defendant's voluntary attendance may suggest that the illegal sentence caused him no great harm and may explain, in part, the setting of damages at $1, but it does not show consent.

B. Acts of Alcoholics Anonymous

The immediate cause of Warner's injury was not the sentencing judge's decision to send him to an alcohol rehabilitation program, but rather the actions of those who conducted the A.A. meetings Warner attended. Whether the religion-infused meetings should be regarded as a break in the causal chain between OCDP's action and plaintiff's injury, thus shielding the probation department from liability, depends, again, upon whether those actions were reasonably foreseeable to OCDP at the time it made the recommendation. Gutierrez-Rodriguez, 882 F.2d at 561; see also Malley, 475 U.S. at 344 n. 7,

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106 S.Ct. at 1098 n. 7.

[9] On this point, the district court made no findings. The probation department was, of course, obligated to use reasonable care to inform itself of the suitability of therapy programs it recommended to the court, especially where such recommendations were repeatedly made as a matter of policy. Furthermore, the parties stipulated prior to trial that OCDP, when it formulated its policy of recommending A.A., was aware of the program's Twelve Steps and of their deeply religious character. Accordingly, there can be no question as to the reasonable foreseeability of the religious nature of the program OCDP was recommending for Warner; OCDP was well aware of it. The actions of A.A. cannot be considered to have broken the chain of causation. OCDP is responsible for any resulting injury to Warner's First Amendment rights

II. Orange County's Other Defenses

A. Immunities

OCDP contends that even if its recommendation to the judge was a proximate cause of Warner's sentence, it is immune from liability. It claims that probation department sentence recommendations are so integral a part of the judicial process as to benefit from an absolute quasi-judicial immunity similar to that enjoyed by prosecutors. Cf. Cleavinger v. Saxner, 474 U.S. 193, 200, 106 S.Ct. 496, 500, 88 L.Ed.2d 507 (1985)(noting "exten[sion of] absolute [judicial] immunity to certain others who perform functions closely associated with the judicial process"); Imbler v. Pachtman, 424 U.S. 409, 420, 431, 96 S.Ct. 984, 990, 995-96, 47 L.Ed.2d 128 (1976) (prosecutor's actions taken pursuant to prosecutorial function benefit from absolute quasi-judicial immunity).

Were this suit brought against the probation officer, Terwilliger, the claim for absolute immunity would likely have merit. We have held that actions of federal probation officers in preparing and furnishing presentence reports to courts are protected by an absolute immunity from suit for damages. Dorman v. Higgins, 821 F.2d 133, 137 (2d Cir.1987). In so holding, we noted that this determination was consonant "with the similar conclusions of other circuits with respect *209 to state probation officers operating within similar frameworks." Id. at 138 (citing Demoran v. Witt, 781 F.2d 155, 157-58 (9th Cir.1985); Hughes v. Chesser, 731 F.2d 1489, 1490 (11th Cir.1984)). A district court of this circuit, recognizing the close similarities between the roles of New York state and federal probation officers in preparing presentence reports, has held that New York state probation officers benefit from a similar absolute immunity. Shelton v. McCarthy, 699 F.Supp. 412, 414-15 (W.D.N.Y.1988).

[10] This case, however, does not require us to determine whether New York state probation officers benefit from immunity covering their submission of presentence reports, for Warner did not name any probation officers as defendants. The suit is brought only against the Orange County Department of Probation. The question is thus whether the claimed immunity extends to the governmental entity. We find that it does not.

Although the Supreme Court has not yet ruled on the applicability of absolute quasi-judicial immunities to municipal government entities, it has repeatedly suggested that such protections are not available. In Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), Justice Rehnquist explained on behalf of a unanimous Court that past "decisions make it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit--either absolute or qualified--under § 1983." Id. at 166, 113 S.Ct. at 1162. [FN4] Similarly, in Kentucky v. Graham, 473 U.S. 159, 166-67, 105 S.Ct. 3099, 3105-06, 87 L.Ed.2d 114 (1985), the Court indicated that the absolute prosecutorial immunity doctrine set forth in Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), did not extend to claims brought against government entities under § 1983. "The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, qua entity, may possess, such as the Eleventh Amendment." Id. at 167, 105 S.Ct. at 3106. These rulings follow directly from the Supreme Court's decision in Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), which held that municipalities do not benefit from the qualified immunity of their officers.

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FN4. Justice Rehnquist referred in particular to the Court's decision in Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), overruling Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), and holding that local governments were no longer absolutely immune from suit under § 1983. Monell expressly reserved the question of whether municipalities might be entitled to some more limited form of immunity. 436 U.S. at 701, 98 S.Ct. at 2041. In Owen v. City of Independence, 445 U.S. 622, 638, 100 S.Ct. 1398, 1409, 63 L.Ed.2d 673 (1980), the Supreme Court rejected the notion that the qualified immunity of municipal officials extends to municipalities themselves.

Following the direction of these cases, we refused in Pinaud v. County of Suffolk, 52 F.3d 1139 (2d Cir.1995), to extend the absolute prosecutorial immunity of the Suffolk County district attorney to the County itself. Id. at 1153 (citing Leatherman). [FN5] The Pinaud ruling guides our decision here, for in origin the quasi-judicial immunities of probation officers and prosecutors are closely linked. Indeed, our holding in Dorman v. Higgins that federal probation officers are protected by an absolute immunity in the preparation of presentence reports was grounded in significant part on the similarities between the prosecutorial function and the task of the probation officer, as well as probation officers' close relationship to the judicial process. [FN6] Dorman, 821 F.2d at 136- *210 37. As we have found in Pinaud that the absolute quasi-judicial immunity of prosecutors does not extend to the municipalities that employ them, the answer to the closely parallel question whether any immunity possessed by municipal probation officers would similarly benefit the municipality follows directly. We conclude on the basis of the authorities cited above that no such protection inures in Orange County by virtue of any immunity that may be possessed by its probation officers.

FN5. See also Baez v. Hennessy, 853 F.2d 73, 75-76 (2d Cir.1988)(noting Supreme Court's agreement in dictum with view that absolute prosecutorial immunity does not extend to County government)(citing Kentucky v. Graham), cert. denied, 488 U.S. 1014, 109 S.Ct. 805, 102 L.Ed.2d 796 (1989). A few district courts had taken a different course, but these opinions were overruled by Pinaud. See Whelehan v. County of Monroe, 558 F.Supp. 1093, 1108 (W.D.N.Y.1983); Armstead v. Town of Harrison, 579 F.Supp. 777, 782-83 (S.D.N.Y.1984).

FN6. We noted, paraphrasing the Supreme Court's language in Imbler setting forth the limits of prosecutorial immunity, that "a federal probation officer acts as an arm of the court and that ... task is an integral part of one of the most critical phases of the judicial process." Dorman, 821 F.2d at 137. And we made clear that federal probation officers deserve absolute immunity because they fall into a class of persons, such as prosecuting attorneys and witnesses testifying in judicial proceedings, whose activities require them to "perform functions [so] closely associated with the judicial process" that they "have also been accorded [absolute judicial] immunity." Id. (citation omitted).

We are fortified in this view by our own opinions and those of other circuits, which have in a variety of contexts refused to extend immunities--either absolute or qualified--to municipalities. As Judge Posner has explained:

> [T]he municipality's liability for [its officials'] acts extends to acts for which the policy-making officials themselves might enjoy absolute immunity because the acts were legislative or judicial in character. Owen ... so held with regard to the qualified immunity of municipal officers for their executive acts, and we cannot see why there should be a different result here just because these officers' immunity is absolute rather than qualified.

Reed v. Village of Shorewood, 704 F.2d 943, 953 (7th Cir.1983). Also, in Goldberg v. Town of Rocky Hill, 973 F.2d 70 (2d Cir.1992), we held that a municipality is liable for the unconstitutional acts of its legislature even though the legislators themselves are protected by absolute immunity. Id. at 74. We stated in that case that "there is no immunity defense, either qualified or absolute, available to a municipality sought to be held liable under 42 U.S.C. § 1983." Id.; see also Ferran v. Town of Nassau, 11 F.3d 21, 23 (2d Cir.1993) ("[T]he town and county have no § 1983 immunity."), cert. denied, --- U.S. ----, 115 S.Ct. 572, 130 L.Ed.2d 489 (1994); Reed, 704 F.2d at 953 (municipality has no absolute legislative or judicial immunity). Indeed, the circuit courts that have addressed the question are unanimous that the absolute immunity of local legislators does not

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extend to the municipalities they serve. See Berkley v. Common Council of Charleston, 63 F.3d 295, 296 (4th Cir.1995)(en banc), cert. denied, --- U.S. ----, 116 S.Ct. 775, 133 L.Ed.2d 727 (1996).

We are similarly not alone in the view that quasi-judicial absolute prosecutorial immunity does not extend to municipalities. The Ninth Circuit made a similar ruling in Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 681 (9th Cir.1984) ("[Local governments] enjoy no immunity under § 1983 for damages."). At least one circuit has even gone so far as to hold that the absolute judicial immunity of courts themselves does not extend to local governments where a municipal official acts in a judicial capacity. Reed, 704 F.2d at 953; Soderbeck v. Burnett County, 752 F.2d 285, 293 (7th Cir.), cert. denied, 471 U.S. 1117, 105 S.Ct. 2360, 86 L.Ed.2d 261 (1985); see also Haynesworth v. Miller, 820 F.2d 1245, 1272 n. 227 (D.C.Cir.1987)(noting that "municipality may ... face § 1983 liability for the conduct of officials who enjoy absolute personal immunity" including liability for "conduct of a judge"). [FN7] In any event, we hold that even *211 if OCDP's probation officers are absolutely immune from liability, that protection does not extend to the County itself.

FN7. We do not imply that we would rule similarly where the asserted liability of the municipality derives from the conduct of a judge. A number of questions arise that may distinguish such a case. It is difficult to say that a municipal judge has "final authority to establish municipal policy" under state law at all. Walker v. City of New York, 974 F.2d 293, 296 (2d Cir.1992), cert. denied, 507 U.S. 961, 113 S.Ct. 1387, 122 L.Ed.2d 762 (1993); City of St. Louis v. Praprotnik, 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988) (plurality opinion), as such rulings are almost always--as here--appealable to higher courts within the state system. See Eggar v. City of Livingston, 40 F.3d 312, 314-15 & n. 3 (9th Cir.1994), cert. denied, --- U.S. ----, 115 S.Ct. 2566, 132 L.Ed.2d 818 (1995); N.Y. Uniform Justice Court Act §§ 1701, 1702 (McKinney 1989). "Local" judicial decisions are therefore neither final, nor exclusively local. Eggar, 40 F.3d at 314-15 & n. 3. Moreover, when a municipal judge enforces state law he does not act as a municipal official or lawmaker, but rather serves only to effectuate state policies. See Eggar, 40 F.3d at 314-15; Johnson v. Moore, 958 F.2d 92, 94 (5th Cir.1992); Bigford v. Taylor, 834 F.2d 1213, 1222 (5th Cir.)(judge's " 'deliberate or mistaken departure from the controlling [state] law' cannot be said to represent county policy")(quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 486, 106 S.Ct. 1292, 1302, 89 L.Ed.2d 452 (1986)), cert. denied, 488 U.S. 851, 109 S.Ct. 135, 102 L.Ed.2d 108 (1988); Carbalan v. Vaughn, 760 F.2d 662, 665 (5th Cir.), cert. denied, 474 U.S. 1007, 106 S.Ct. 529, 88 L.Ed.2d 461 (1985); Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir.1980). Courts have also denied municipal liability where--as is frequently the case--state law makes judges who are casually referred to as "county" officials in fact officers of state government, and a part of the state judicial system. See Eggar, 40 F.3d at 314 & n. 3 (power of city judges under Montana law derives from state statutes, and the judges are in the hierarchy of the state judicial system); Woods v. Michigan City, 940 F.2d 275, 279 (7th Cir.1991)(under Indiana law county courts are a branch of the "state's constitutional system"); Thompson v. County of Rock, 648 F.Supp. 861, 866-67 (W.D.Wis.1986)(denying municipal liability for acts of Wisconsin county court commissioners on grounds that they are in fact state officials). Since New York municipal courts are "part of the unified court system for the state," N.Y. Uniform Justice Court Act § 102 (McKinney 1989), this logic might well apply in New York as well. Finally, we note that even in the event that the law were to allow a municipality to be liable for judicial actions, judges themselves may be protected against providing testimony as to their thought processes in issuing an opinion. A number of courts have so held in the context of federal habeas corpus review of state court decisions. See Weidner v. Thieret, 866 F.2d 958, 963 (7th Cir.1989)(recommending that state trial judges offer testimony in federal habeas cases, if at all, by voluntary affidavit since "it would be unseemly for a federal district judge to summon the state trial judge as a witness ... to give testimony and be cross-examined"); Washington v. Strickland, 693 F.2d 1243, 1263 (5th Cir. Unit B 1982)(prohibiting testimony of state trial judges in federal habeas cases on rationale underlying their initial decision, inter alia, for reasons of federalism and comity), rev'd on other grounds, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A similar logic would apply in collateral review of municipal court decisionmaking under § 1983.

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B. Establishment Clause

[11][12] The County also argues that forcing Warner to attend Alcoholics Anonymous did not violate the First Amendment's Establishment Clause. We disagree. The Supreme Court has repeatedly made clear that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' " Lee v. Weisman, 505 U.S. 577, 587, 112 S.Ct. 2649, 2655, 120 L.Ed.2d 467 (1992) (quoting Lynch v. Donnelly, 465 U.S. 668, 678, 104 S.Ct. 1355, 1362, 79 L.Ed.2d 604 (1984)); see County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 591, 109 S.Ct. 3086, 3100, 106 L.Ed.2d 472 (1989); Everson v. Board of Educ., 330 U.S. 1, 15-16, 67 S.Ct. 504, 511-12, 91 L.Ed. 711 (1947); see also Katcoff v. Marsh, 755 F.2d 223, 231-32 (2d Cir.1985) (observing that army chaplaincy program "meets the requirement of voluntariness by leaving the practice of religion solely to the individual soldier, who is free to worship or not as he chooses without fear of any discipline or stigma").

The A.A. program to which Warner was exposed had a substantial religious component. Participants were told to pray to God for help in overcoming their affliction. Meetings opened and closed with group prayer. The trial judge reasonably found that it "placed a heavy emphasis on spirituality and prayer, in both conception and in practice." We have no doubt that the meetings Warner attended were intensely religious events. [FN8]

FN8. As noted above, the district court made no finding on OCDP's awareness of the religious nature of the A.A. program. We nonetheless found OCDP's responsibility by reason of the stipulation of the parties that OCDP knew the religious nature of A.A.'s Twelve Steps. The district judge's finding of a violation of the Establishment Clause was based in part on several factors, recited above, that were not included in the Stipulation covering OCDP's knowledge--particularly the prayers. Although there was no finding that OCDP knew (or should have known) of the prayers, the finding of Establishment Clause violation and of OCDP's responsibility are adequately supported by the stipulated facts.

There can be no doubt, furthermore, that Warner was coerced into participating in these religious exercises by virtue of his probation sentence. Neither the probation recommendation, nor the court's sentence, offered Warner any choice among therapy *212 programs. The probation department's policy, its recommendation, and its printed form all directly recommended A.A. therapy to the sentencing judge, without suggesting that the probationer might have any option to select another therapy program, free of religious content. Once sentenced, Warner had little choice but to attend the A.A. sessions. If Warner had failed to attend A.A., he would have been subject to imprisonment for violation of probation. See N.Y.Penal Law §§ 60.01(4), 65.00(2) (McKinney 1987); N.Y.Veh. & Traf.Law §§ 511(2), 1192(1) (McKinney 1986 & Supp.1996).

Had Warner been offered a reasonable choice of therapy providers, so that he was not compelled by the state's judicial power to enter a religious program, the considerations would be altogether different. Our ruling depends, as in Lee, on the "fundamental limitation[ ] imposed by the Establishment Clause" that bars government from "coerc[ing] anyone to support or participate in religion or its exercise." 505 U.S. at 587, 112 S.Ct. at 2655. In circumstances similar to our case, the New York Court of Appeals recently reached the same conclusion. Griffin v. Coughlin, No. 73, 1996 WL 317180, --- N.Y.2d ----, --- N.Y.S.2d ---- , --- N.E.2d ---- (June 11, 1996). In Griffin, the New York court held that a prisoner's family visiting privileges may not be conditioned on participation in a treatment program that adopts the "religious-oriented practices and precepts of Alcoholics Anonymous." Id. at *1, --- N.Y.S.2d at ----, --- N.E.2d at ----. The court emphasized that it was not proscribing A.A. programs offered to prisoners on a voluntary basis. Id. at *11, --- N.Y.S.2d at ----, --- N.E.2d at ----. It was the coercive circumstances, conditioning a desirable privilege on the prisoner's participation in a religious program, without alternative, that drove the New York court to find a violation of the Establishment Clause. [FN9]

FN9. See also O'Connor v. California, 855 F.Supp. 303 (C.D.Cal.1994)(no Establishment Clause violation where probationers were offered a choice between A.A. and a secular program).

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Orange County argues that even if Warner was forced to attend the meetings, he was not required to participate in the religious exercises that took place. The County argues that, as a mature adult, Warner was less susceptible to such pressure than the children who were required to stand in respectful silence during a school prayer in Lee v. Weisman, 505 U.S. at 591-95, 112 S.Ct. at 2658-59; it points out that the Supreme Court expressly questioned whether the obligation imposed by the school in Lee might have been constitutionally tolerable "if the affected citizens [had been] mature adults." Id. at 593, 112 S.Ct. at 2658.

We do not find Orange County's argument convincing. Although it is true Warner was more mature, his exposure was more coercive than the school prayer in Lee. The plaintiff in Lee was subjected only to a brief two minutes of prayer on a single occasion. Warner, in contrast, was required to participate in a long-term program of group therapy that repeatedly turned to religion as the basis of motivation. And when he appeared to be pursuing the Twelve Steps of the A.A. program with insufficient zeal--"Thirteen Stepping" in A.A. parlance--the probation officer required that he attend "Step meetings" to intensify his motivation. Warner was also paired with another member of A.A. as a method of enhancing his indoctrination into the group's approach to recovery from alcoholism. Most importantly, failure to cooperate could lead to incarceration. Although the trial judge found that Warner's success in remaining aloof diminished his damages to a token of one dollar, the fact that Warner managed to avoid indoctrination despite the pressure he faced does not make the County's program any less coercive, nor nullify the County's liability.

[13] The County argues further that the non-sectarian nature of the A.A. experience immunizes its use of religious symbolism and practices from Establishment Clause scrutiny. The argument is at the very least factually misleading, for the evidence showed that every meeting included at least one explicitly Christian prayer. Furthermore, the claim that non-sectarian religious exercise falls outside the First Amendment's scrutiny has been repeatedly rejected by the Supreme Court. As the Court made clear in Board of Education of Kiryas Joel v. Grumet, --- *213 U.S. ----, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994), "a principle at the heart of the Establishment Clause [is] that government should not prefer one religion to another, or religion to irreligion." Id. at ----, 114 S.Ct. at 2491; see also Allegheny, 492 U.S. at 591, 109 S.Ct. at 3100; School Dist. of Abington Township v. Schempp, 374 U.S. 203, 216-17, 83 S.Ct. 1560, 1568-69, 10 L.Ed.2d 844 (1963). [FN10]

FN10. Orange County relies upon Stafford v. Harrison, 766 F.Supp. 1014 (D.Kan.1991), for the proposition that A.A. participation is not a religious exercise. Stafford involved a mandatory prison-based substance abuse program, structured around the principles of A.A. The court upheld the program, arguing that A.A.'s notions of a "higher power" and "God" were sufficiently flexible and non-denominational that the program could not be said to constitute a "religion." This is a misapplication of First Amendment doctrine, which prohibits coerced participation in religious exercise of any variety for its favoritism of religion over non-religion. We decline to follow that case, which has been criticized for misreading relevant Supreme Court precedent. See Scarpino v. Grosshiem, 852 F.Supp. 798, 804 n. 5 (S.D.Iowa 1994); Warner v. Orange County Dep't of Probation, 827 F.Supp. 261, 267 (S.D.N.Y.1993).

Similarly, the County's reliance on Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), is unavailing. In Marsh, the Supreme Court held that the Nebraska state legislature did not violate the Establishment Clause by commencing its sessions with a sectarian prayer. That opinion relied heavily on the long tradition of public prayer in this context. Id. at 786-90, 795, 103 S.Ct. at 3333-35, 3338 (noting "unbroken practice for two centuries in the National Congress"). The Court in Lee noted the significant differences between the opening ceremony of a state legislative session where adults are free to "enter and leave with little comment and for any number of reasons" and the powerful emotional compulsion for a child to be present at her high school graduation. Lee, 505 U.S. at 595-97, 112 S.Ct. at 2660. The differences between the invocation at a session of the state legislature and Warner's compulsory adherence to the A.A. program are even more obvious. [FN11]

FN11. The parties also offer analyses of this case within the much-maligned but still viable framework

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of Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Compare Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 n. 7, 113 S.Ct. 2141, 2148 n. 7, 124 L.Ed.2d 352 (1993)(noting ongoing viability of Lemon) with Lee, 505 U.S. at 643-45, 112 S.Ct. at 2685 (Scalia, J., dissenting) (noting criticism of Lemon) and Lamb's Chapel, 508 U.S. at 397-400, 113 S.Ct. at 2149-50 (Scalia, J., concurring)(same). Whatever other tests may be applicable in the Establishment Clause context, the Supreme Court has made clear that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." Lee, 505 U.S. at 587, 112 S.Ct. at 2655. Because sending Warner to A.A. as a condition of his probation, without offering a choice of other providers, plainly constituted coerced participation in a religious exercise, we find a violation of the Establishment Clause.

Resolving questions as to the reach of the Establishment Clause "of necessity [requires] line-drawing, ... determining at what point a dissenter's rights of religious freedom are infringed by the State." Id. at 598, 112 S.Ct. at 2661. We have little difficulty concluding that the constitutional line was crossed here.

Conclusion

We have considered Orange County's other claims, and find them to be without merit. The judgment of the district court is affirmed.

WINTER, Circuit Judge, dissenting:

I respectfully dissent.

The pertinent facts concerning Warner's plea and sentencing are not in dispute. He was arrested and pled guilty to his third alcohol-related driving offense in a year. Prior to meeting with the probation officer who would recommend a sentence, Warner voluntarily began to attend Alcoholics Anonymous meetings. This was on the advice of his lawyer, who, according to Warner's testimony, believed "that the court would look upon me more favorably in the sentencing procedure if I can show that I was pursuing a program of rehabilitation." The probation officer subsequently recommended to the sentencing court that Warner continue his ongoing attendance at A.A. meetings as a special condition of probation. The sentencing ***214** judge, who is obliged by state law to make an independent sentencing decision, imposed that condition. Warner registered no objection at the sentencing hearing and took no appeal. Later, he moved the sentencing court to relieve him of any obligation to attend meetings with a religious component and was quickly accommodated with a non-religious counseling program. Based on these facts, my colleagues hold that the county probation authority may be sued for damages under Section 1983 for violating the Establishment Clause.

My dissent is based on two of the available grounds. First, Warner waived his claim or, applying tort law, consented to the probation officer's alleged intentional tort of recommending to the court attendance at A.A. meetings as a condition of probation. Indeed, Warner voluntarily began attendance at A.A. meetings before any involvement by the probation office in order to convince the sentencing judge that his voluntary selection of this particular rehabilitative program obviated the need for a stiffer sentence. Moreover, the judge exercised his exclusive authority to determine what sentence should be imposed. The imposition of the sentence by the court was, therefore, an independent cause that superseded the recommendation of the probation officer in causing the injuries. Second, the invocation of the Establishment Clause, rather than the Free Exercise Clause, puts into play a principle that portends changes in our penal system that are not required, in my view, by the Constitution.

I

I turn first to the consent and causation issues.

This lawsuit is an instance of remarkable gall. Warner voluntarily selected and began attendance at A.A. meetings on the advice of counsel in order to impress the sentencing court with his determination to overcome his alcoholism. Now he complains that a subsequent recommendation of a probation officer that he attend such meetings entitles him to monetary damages.

Although we do not have the minutes of the sentencing hearing, Warner's testimony in the district court stated that his ostensible desire to

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attend A.A. meetings was to be used as a plus in his favor in persuading the sentencing court to be lenient. The judge thus imposed a condition of probation embraced by Warner on his own initiative. Warner never indicated to the sentencing court his view that a condition of probation requiring attendance at A.A. meetings rendered the proposed sentence unconstitutional. Nor did Warner appeal from the sentence imposed.

By any measure known to me, Warner's conduct was a waiver, the purposefully planned abandonment of a known right or, in common law tort doctrine, consent to an intentional tort, a full defense under New York law. See Van Vooren v. Cook, 273 A.D. 88, 75 N.Y.S.2d 362 (4th Dep't 1947); see also Prosser and Keeton on the Law of Torts § 18. I would hold, therefore, that his claim for damages is barred.

Even if the principles relating to injuries caused by negligence relied upon by my colleagues are applied, Warner's claim fails. Warner's initiative in voluntarily selecting and attending A.A. meetings and his failure to bring his present claim to the court's attention were the cause of whatever constitutional harm he suffered from the recommendation of the probation officer. [FN1] As his successful petition for state collateral review under N.Y.Crim. Proc. L. § 440.20(1) and the recent decision in the New York Court of Appeals in Griffin v. Coughlin, 1996 WL 317180, --- N.Y.2d ----, ---N.Y.S.2d ----, --- N.E.2d ---- (June 11, 1996), demonstrate, relief was his for the asking.

FN1. I do not mean to suggest that, if the constitutional challenge were unsuccessfully brought to the court's attention, Warner's suit against the probation authority would have merit. Rather, an appeal--to the United States Supreme Court if necessary--would have been in order.

I also cannot agree with the "finding" that the sentencing judge did not make the independent judgment required of him by state law, see People ex rel. Perry v. Cassidy, 23 A.D.2d 706, 257 N.Y.S.2d 228, 229 (1965), and that that judgment was not, in the jargon of negligence law, a superseding cause of Warner's injuries. In my view and that of others, *215 see People ex rel. Brown v. La Vallee, 13 A.D.2d 556, 211 N.Y.S.2d 728, 729 (1961); Honeycutt v. Ward, 612 F.2d 36, 41 (2d Cir.1979), cert. denied, 446 U.S. 985, 100 S.Ct. 2969, 64 L.Ed.2d 843 (1980), a heavy presumption of correctness attends proceedings such as the one before us where no error was brought to the attention of the sentencing judge. [FN2] My colleagues, and the district judge, indulge in the contrary presumption, namely, that acceptance of the sentencing recommendation of a probation officer as to sources of treatment is merely "rubberstamping." They do this notwithstanding testimony that New York judges frequently reject special conditions of probation recommended by probation authorities. [FN3] They also ignore the possibility that recommendations of probation officers may be tailored to the known views of judges, creating a false appearance of rubberstamping. [FN4]

FN2. I need not reach the issue given the facts of this case, but there is a strong argument to be made that, where the sentencing judge cannot under state law delegate the power to determine a sentence to probation officers--as in New York--an illegal delegation is itself a superseding cause and a defendant's remedy is an appeal rather than a Section 1983 action.

FN3. My colleagues rely upon N.Y. Penal Law § 65.10(2)(e) regarding the requirement that a court consult with the local probation authority regarding selection of an alcohol abuse program. Because this provision requires that the consultation be with the probation authority "or ... other public or private agency," it does not give any special status to probation authorities over other sources of information.

FN4. I believe this presumption to be rather unfair to state court judges. They lack any practical method of responding to the conclusion that they abdicated responsibility, at least short of asking to testify in the federal proceeding that "I was indeed following the law, just as the record indicates."

Moreover, as noted, the record is not silent as to whether the particular sentencing judge would have imposed the requirement of attendance at A.A. meetings had Warner indicated his concerns about the religious aspects of A.A. In fact, it fairly shouts that the judge would have rejected the condition. After sentencing, Warner complained to the probation officer about the religious aspects of A.A.

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At this point, of course, the officer lacked power to alter the sentence. [FN5] Warner then, for the first time, challenged the sentence by filing a petition under N.Y.Crim. Proc. L. § 440.20(1) (McKinney 1995) to set aside the pertinent part of his sentence on the ground that it was invalid. The court ruled that Warner could comply with the conditions of probation by going to a non-religious alcohol counseling program and denied the petition as moot. Indeed, Warner's complaint alleged that "[a]s a result of the Town of Woodbury Justice Court's Decision and Order, plaintiff is currently no longer required by his probation officer to participate in Alcoholics Anonymous but is, instead, required to attend an alternative program." In short, Warner's own papers indicate that as soon as the judge was alerted to Warner's distaste for the religious aspects of A.A., the judge immediately altered that condition of probation. That being the case, the record support for the finding that the judge merely rubberstamped the recommendation of the probation officer is not apparent to me.

FN5. One of Warner's original theories was that the sentence vested discretion in the probation officer to vitiate the requirement of A.A. attendance and that the probation officer's exercise of discretion in requiring continued attendance, rather than the original recommendation, was the basis of liability. The district court and my colleagues focus instead on the recommendation. Because I read the sentence to vest discretion to excuse further A.A. attendance only upon a completed rehabilitation and not for other reasons, such as a probationer's distaste for the religious aspects of the program, I agree that the focus should be on the recommendation.

Furthermore, another finding, not made by my colleagues, is necessary to establish the recommendation of the probation officer as the legal cause of Warner's injuries. To reach my colleagues' conclusion, we would also have to find that an appeal from the sentence would have been fruitless because the New York appellate courts would simply not have given any consideration whatsoever to Warner's constitutional challenge out of blind and unhesitating deference to the recommendation of the Orange County probation officer. Quite the contrary, we now know that relief was available. See Griffin.

Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), works against *216 Warner. The procuring of a search warrant is not an adversary proceeding, much less one like sentencing, in which the subject has a constitutional right to counsel and a hearing on the merits. Because the magistrate issuing a warrant is not subject to adversary argument revealing flaws in the application and affidavit, the magistrate's intervening decision does not immunize the officer's unreasonable conduct. Malley simply has no application to a proceeding that is adversary and subject to immediate appellate review.

II

I now turn [FN6] to the use of the Establishment Clause to invalidate a condition of probation that requires attendance at A.A. meetings. I will assume that the religious aspects of A.A. are sufficient to trigger a violation of either the Establishment or Free Exercise Clause if the other requisites of such claims are met. Nevertheless, I do not agree that the Establishment Clause provides a basis for relief to Warner.

FN6. I do not reach the immunity issues. I do note, however, that the immunity of probation officers is generally believed to be derived from judicial immunity. See Dorman v. Higgins, 821 F.2d 133, 136-37 (2d Cir.1987). My colleagues' attempt in footnote 7 to distinguish a claim of municipal liability for the conduct of judges seems, therefore, somewhat incomplete.

In finding an Establishment Clause violation, my colleagues rely heavily upon the fact the probation authority did not recommend to the sentencing court that Warner have a choice between A.A. and a non-religious rehabilitation program. As a result, he was, in their view, coerced into participation in A.A. (In my view, of course, he freely chose A.A.) Although, as my colleagues point out, coerced participation in religious ceremonies may be a factor in finding an Establishment Clause violation, see Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), it is not a necessary element of such a claim, and a choice among all available options is not a remedy for a valid Establishment Clause claim.

Relevant Establishment Clause precedent bars

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governmental endorsement and support of religion even in contexts in which no coercion exists. The "preservation and transmission of religious beliefs and worship is ... committed to private sphere," Lee at 589, 112 S.Ct. at 2656, and government may not support religious practices even when those engaged in them have freely chosen to do so. Government may not aid "a single religion or religion generally," School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 382, 105 S.Ct. 3216, 3221, 87 L.Ed.2d 267 (1985), but must "maintain a course of neutrality among religions, and between religion and nonreligion." Id. A law that merely facilitates citizens in the practice of their religion may, therefore, be invalid even though no non-believer is negatively affected--even as a taxpayer. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, --- U.S. ----, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994).

If attendance at A.A. meetings as a condition of probation violates the Establishment Clause, it is because such a condition entails governmental sponsorship of religion over nonreligion. Following the logic of Establishment Clause jurisprudence, it would seem to me that such a condition is a violation whether or not the only person directly affected, the probationer, preferred a religiously oriented program over a secular one. The lack of governmental neutrality is precisely what caused the Supreme Court in Grumet to strike down a state law establishing a school district for the Village of Kiryas Joel, which was populated only by persons with a common religion. And, in Lee, surely the plaintiff's constitutional claim could not be satisfied by an offer of an additional ceremony at the high school graduation allowing speakers of her choice to express whatever spiritual or atheistic views--or disagreements with the spiritual or atheistic views of others--that were congenial to her.

Establishment Clause logic, if followed, therefore, would endanger any number of ubiquitous penal programs that are, in my view, clearly permissible. To take just two common examples, prisons may have chaplains, who systematically offer religious counseling, services, and other programs to prisoners. They may be selected, paid, and even monitored by state officials. Also, sentences to community service may involve service at *217 soup kitchens, many of which are operated by churches where a meal begins with a prayer and religious tracts are distributed.

None of the programs described above violate the Establishment Clause in my view. Applying the three-part test established in Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), each has a secular purpose in that they all further rehabilitation in one way or another. None have as a principal or primary effect the advancement or inhibition of religion. Any such effect is incidental. Finally, they do not lead to excessive entanglement of the government in religion. I very much doubt that substantial disagreement exists over this point. The state's control over the lives and activities of prisoners certainly justifies its making religious programs available to them. Indeed, under our caselaw, a state must offer some congregate programs of a sectarian nature. See Salahuddin v. Coughlin, 993 F.2d 306 (2d Cir.1993); Young v. Coughlin, 866 F.2d 567, 570 (2d Cir.), cert. denied, 492 U.S. 909, 109 S.Ct. 3224, 106 L.Ed.2d 573 (1989). However, I also see no difference between the penal programs described above and Warner's sentence so far as the Establishment Clause--in contrast to the Free Exercise Clause--is concerned.

To be sure, my colleagues do not hold that attendance at A.A meetings can never be a condition of probation. Indeed, they expressly state that Warner should have been given a choice, a statement I take to mean that persons facing a sentence for alcohol-related offenses may constitutionally be offered a choice between A.A. meetings (or other religiously-based rehabilitation programs) and alternative secular programs as a condition of probation. My disagreement is simply over whether such a choice is required, or even permitted, by the Establishment Clause.

I hasten to add that I do not view compulsory activity with a substantial religious component as a valid penal measure, at least where equally effective secular rehabilitative programs are available. [FN7] See O'Lone v. Estate of Shabazz, 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) (restriction on free exercise rights must be reasonably related to valid penalogical interest). Compulsory attendance at religious ceremonies as part of a penal sentence surely raises serious issues under the Free Exercise Clause and might well require the provision of a choice between secular and sectarian programs.

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Warner makes no Free Exercise claim, however.

FN7. It is conceivable that in some areas the only rehabilitative program available, e.g., A.A., has some religious content.

III

This is a decision with important ramifications. It transports tort doctrine of proximate cause and foreseeability drawn from the law of negligence to the judicial process. In so doing, it fails to give any recognition to the more appropriate rules governing intentional torts, to the power of a party to a court proceeding to avoid harm by raising objections and taking appeals, or to the role of the judge as an independent decision-maker. It thus may have implications for advocates as well as for those who advise judges. See Note 6, supra. It also brings to sentencing, probation, and penal institutions Establishment Clause doctrine that may not be easily cabined.

At a practical level, my colleagues' decision exposes every probation authority in this circuit to suits for damages and attorney's fees in virtually every case in which a recommendation of attendance at A.A. meetings has been made and accepted within the statute of limitations period, if no available alternative was offered and such recommendations were commonly made. Liability will follow no matter whether the defendant ever brought the constitutional issue to the attention of the sentencing court. Other claims of unconstitutional recommendations under Section 1983 will follow notwithstanding failure to make objections to sentencing courts.

I therefore respectfully dissent.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

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PUBLIC DEFENDER AGENCY
ANCHORAGE

JADA QUINN and NINA STORM,)
)
Appellants,)
)
vs.)
)
STATE OF ALASKA, DOPS, DMV,)
)
Appellee.)
) Case No. 3AN-95-8805 Civil

OPINION

This appeal involves the constitutionality of AS 28.15.183, which provides for administrative revocation of a minor's license to drive if a peace officer has probable cause to believe that a person is at least 14 years of age but not yet 21 years of age and possessed or consumed alcohol in violation of AS 04.16.050. Under AS 04.16.050, it is unlawful for a person under the age of 21 years to possess, control, or consume any amount of alcoholic beverage.

The provision of AS 28.15.183 at issue in this appeal does not require that a minor be operating or even be in close proximity to a motorized vehicle, nor does it require the minor to be impaired in any way when said minor is in possession of or consuming alcohol. If an administrative officer finds that a peace officer had probable cause to believe that a minor possessed or consumed alcohol, a mandatory 90 day revocation of the minor's driver's license is imposed for the first incident, one year revocation is imposed for the second incident, and three year's revocation is imposed for the third incident. AS 28.15.183 (d).

FACTS

On July 22, 1995, at approximately 11:30 p.m., Anchorage Police Officer Brown, who was wearing plain clothes, and Officer Rochford, who was wearing a police uniform, approached five persons who were around a campfire on a beach near Point Woronzof Park in Anchorage. The officers observed several opened beer containers and some unopened beers in a 12-pack within the control of the five individuals. Upon arriving on the scene, Brown and Rochford identified themselves as police officers and inquired as to the age of each of the five young women. Jada Quinn and Nina Storm each disclosed that they were 20 years of age. After the officers determined that every one of the five women were under the age of 21 years, each was detained for further questioning. During the detention, each of the five young women was under the control of the officers, as they were not free to leave.

The officers questioned the young women without advisement of any of their Miranda rights. Quinn and Storm were questioned as to the amount of alcohol they had consumed, and they admitted having consumed a small amount of beer. Both were administered a portable breath test which revealed a reading of .003 for Quinn and .006 for Storm. Both readings were substantially below the .10 blood alcohol level required for the commission of the crime of driving while intoxicated under AS 28.35.030.

There was no evidence that any of the minors had been operating a motorized vehicle immediately before or during the detainment, nor that any of them intended to do so at a later time

that evening.

Officer Brown issued citations to each of the five young women charging them with a criminal offense in violation of AS 04.16.050. Quinn was charged with "unlawfully consum[ing] a quantity of alcoholic beverage while less than 21 years old" and Storm was charged with "unlawfully possess[ing] and consum[ing] some quantity of alcoholic beverage while less than 21 years old." The citations issued to both Quinn and Storm included mandatory court appearances, and ordered them to appear in court on August 23, 1995, at 9:00 a.m. to answer the criminal charge.

In addition to the criminal citations, each was given a notice that their driver's license was being revoked for "being in POSSESSION OF OR CONSUMPTION OF ALCOHOL as prohibited by AS 14.16.050." The notices additionally stated "YOUR DRIVER'S LICENSE OR PRIVILEGE TO DRIVE IN THIS STATE IS REVOKED. THIS IS YOUR OFFICIAL NOTICE OF REVOCATION. THIS REVOCATION WILL TAKE EFFECT 7 DAYS AFTER THE DATE SHOWN ABOVE, UNLESS YOU REQUEST AN ADMINISTRATIVE REVIEW OF THE REVOCATION." Both Quinn and Storm made timely requests for administrative review. After an administrative hearing, the hearing officer upheld the revocation of the licenses for the mandated statutory period of 90 days for the first offense.

The criminal citations against both Quinn and Storm were never tried in District Court, as they were dismissed by the Municipal Attorney. Had the charges against Quinn and Storm been tried in District Court, both defendants would have had all of the

constitutional protections of a criminally accused, including the right against self-incrimination, the right of confrontation, and the right to trial by jury. See, State of Alaska v. District Court, Court of Appeals No. 1504 (Alaska App. Dec. 6, 1996). In the District Court decision, the Court of Appeals also upheld the right to court-appointed counsel for indigent minors accused of underage drinking or possession of alcohol (citing Alexander v. Anchorage, 490 P.2d 910, 913 (Alaska 1971)).

As neither Quinn nor Storm were ever tried in a criminal proceeding and found guilty of violating AS 04.16.050, their driver's license revocations were simply administrative revocations on a finding of probable cause. This is important to note, because the cases cited by the state in support of upholding the constitutionality of the section of AS 28.15.183 in question are cases where the subjects have either been found guilty in a companion criminal case or in a juvenile proceeding.

ANALYSIS

The central question presented in this appeal is whether it is constitutional for the state to administratively revoke the driver's license of a person who is under the age of 21 years on the ground that the minor consumed or possessed alcohol at a time unrelated to the operation or control / the minor of a motor vehicle. For the reasons stated below, this court finds that it is a violation of the minor's constitutionally protected rights for the state to administratively revoke the driver's license of the minor for possessing or consuming alcohol at a time that the minor

neither is operating or has control of a motorized vehicle.

A driver's license is a recognized valuable license that cannot be revoked without affording the holder of the license recognized constitutional protections. The Alaska Supreme Court has held that the state must grant a hearing to a driver before his or her license can be revoked. Graham v. State, 633 P.2d 211, 216 (Alaska 1981). In Bell v. Burson, 402 U.S. 553 (1971), the United States Supreme Court ruled that a driver's license is a "property" right for purposes of the Fourteenth Amendment and required state governments to provide procedural due process protections before a person's driver's license can be taken away.

In criminal cases, a defendant is entitled to a jury trial where he or she risks losing his or her driver's license. See, Baker v. Fairbanks, 471 P.2d 386 (Alaska 1970). Minors criminally prosecuted for underage drinking or possession of alcohol are entitled to a jury trial and to court appointed counsel if they are indigent. District Court, Court of Appeals Decision No. 1504. In Baker, the Supreme Court held, however, that a person is not entitled to a jury trial in an administrative proceeding even if it results in loss of a driver's license.

The constitutional challenge to AS 28.15.183 turns on whether the proceeding against Quinn and Storm is in the nature of a criminal matter or in the nature of an administrative proceeding. If the proceeding is found to be in the nature of a criminal

matter, the minor is entitled to all of the well-defined constitutional protections of a criminal defendant. If the proceeding is in the nature of an administrative proceeding, on the other hand, then the minor's driver's license can be revoked, as was done in this case, on a finding of probable cause without affording the subject the constitutional protections of a criminally accused person.

The test for determining whether a proceeding is criminal or administrative in nature was set forth by the Court of Appeals in State v. Zerkel, 900 P.2d 764 (Alaska App. 1995). In Zerkel, the Supreme Court held that if the sanction imposed is "remedial" in nature, the matter is an administrative proceeding; on the other hand, if the sanction is "punitive", then the proceeding is a criminal matter. The constitutional issue in Zerkel was whether the federal double jeopardy clause of the United States Constitution was violated by a driver having his or her license revoked in an administrative proceeding and then subsequently being prosecuted for driving while intoxicated or refusing a breath test. The court held that the administrative revocation of a person's driver's license was no impediment to a later prosecution for driving while intoxicated or refusing the breath test. The court's decision is based on the finding that:

> . . . administrative revocation of a driver's license is "remedial" even though it may have a deterrent goal and may achieve some deterrent effect. We hold that, when the government employs a licensing scheme to regulate a profession or an activity that affects the public welfare, administrative revocation or suspension of that license can legitimately serve to deter conduct and still remain "remedial" for double jeopardy purposes so long

> as the revocation or suspension is based on conduct that bears a direct relation to the government's regulatory goals or to the proper administration and enforcement of the regulatory scheme.

Id. at 757 (emphasis added).

In his concurring opinion, Chief Judge Bryner stated:

> I agree with the court's opinion and I write separately only to emphasize what I see as its core rationale. Whenever the public welfare justifies regulating an activity by implementing and enforcing a licensing requirement, the state will necessarily have a legitimate regulatory -- that is, non-punitive -- interest in encouraging compliance with the regulations upon which the original issuance and continued validity of the license are conditioned. Conversely, the state will necessarily have a legitimate regulatory interest in deterring noncompliance with these regulations. Thus, in the particular context of a licensed activity, enforcement efforts by the state will always play an essentially remedial role, even if one of the avowed purposes of those efforts is deterrence.
>
> This is not to say that all measures aimed at deterring noncompliance with the laws regulating a licensed activity must be deemed non-punitive. The imposition of sanctions having no direct connection to the regulation of the licensed activity certainly might be deemed punitive in some cases . But the sanction of suspending or revoking a license for noncompliance with the conditions governing its very issuance or continued existence necessarily bears an inherent relationship to the remedial goal of restoring regulatory compliance. Indeed, it is difficult to conceive of any sanction that could more directly remedy a licensee's noncompliance with the regulations governing a licensed activity than suspending or revoking the license itself. Accordingly, . . . the sanction at issue in the current cases--suspension or revocation of a driver's license for violation of the laws governing the licensed activity of driving--is necessarily remedial, not punitive.

Id. at 758 (emphasis added). This court finds that the current case presents the "imposition of sanctions having no direct connection to the regulation of the licensed activity" as alluded to by Judge Bryner in Zerkel.

A driver's license authorizes a person to operate a motor vehicle. When a person's conduct in driving a motor vehicle:

> shows that he or she is unwilling to abide by the terms of a driver's license, or shows that he or she cannot be trusted to drive safely, then that person's continuing authorization to drive is itself a hazard to the public welfare, a potential instrument of public harm. Revocation. . . of this authorization is remedial.

Id. at 752, n.5. The revocation of a license serves the purpose of depriving an unsafe or irresponsible driver of his or her authority to continue to operate a motor vehicle.

The above justification has no application to the instant case because the license revocation resulted from conduct that has nothing to do with the operation of a motor vehicle. The license was revoked on the basis of a finding of probable cause that two persons possessed or consumed alcohol at a small social gathering of friends: conduct that had nothing to do with operating a motor vehicle. There is no direct relationship between the conduct resulting in the license revocation and the licensed activity; that is, authorization to drive a motor vehicle.

The state argues that the license revocation of a minor who possesses or consumes alcohol is remedial because it "served the basic purpose of the licensing statutes, which is to ensure that only persons who are personally and morally fit are allowed to engage" in the licensed activity (citing Alaska Board of Fish and Game v. Loesche, 537 P.2d 1122, 1125 (Alaska 1975)). The court is not persuaded by the reference to Loesche or the other cases offered by the state because all of the cases cited involved a nexus between the act committed by the licensed individual and the

conduct that is regulated by the licensing authority.

The state argues that the conduct of a minor possessing or consuming any amount of alcohol "reflects adversely on the minor's moral fitness to drive." In essence, what the state argues is that a minor's mere possession or consumption of any amount of alcohol at a time unrelated to the minor's operation or control of a motor vehicle reflects adversely on the minor's capability to make the distinction between right and wrong sometime in the future in the operation of a motor vehicle. This court finds the state's argument unpersuasive. To base the revocation of a valuable license on such logic would be to accept as a valid proposition that: A person under the age of 21 who possesses or consumes any amount of alcohol is a lawbreaker; because that person is a lawbreaker he or she is not capable of making a distinction between right and wrong; to drive one must be "morally fit"; and because that minor was morally unfit and or irresponsible in one context by breaking the law, that minor should not be allowed to drive. This illogical proposition falls far short of meeting the "direct relationship" principle announced in Zerkel that there be a clear nexus between the conduct that results in a license revocation and the governmental interest in keeping the state's roadways safe from drivers impaired by alcohol.

There is no question that the state has a strong interest in fostering safety by temporarily removing from public thoroughfares those licensees who have exhibited dangerous behavior such as being under the influence of intoxicants while operating a motorized

vehicle. However, the state's strong interest in safety on the public thoroughfares must be accomplished in a constitutional way.

The revocation of the driver's license of a person under the age of 21 who possesses or consumes alcohol at a time when there is no direct connection to the operation or control of a motor vehicle is clearly punitive and not remedial. Because the sanction imposed is punitive and not remedial, the matter is criminal in nature and not administrative. As a criminal matter, a person under the age of 21 is entitled to the constitutional protections of a criminally accused person before his driver's license can be revoked.

The only case cited by either party that has ruled on a similar issue is from the State of Wyoming. In Johnson v. State, 838 P.2d. 158 (Wyo. 1992), the Wyoming Supreme Court declared a statute similar to AS 28.15.183 unconstitutional. The Johnson court found that the administrative revocation of the driver's license of an underage individual for consuming alcohol where no motor vehicle was involved constituted a punitive, not a remedial, measure. This court agrees.

For the above stated reasons, the provision of AS 28.15.183 which provides for the revocation of a minor's license to drive if a peace officer has probable cause to believe that the person is under the age of 21 years and possesses or consumes alcohol is hereby found to be unconstitutional.

PROCEDURAL DUE PROCESS

Quinn and Storm assert that the administrative proceeding

violated procedural due process because the hearing officer: denied their demand for application of the criminal burden of proof; denied their request for exclusion of evidence obtained in violation of their rights against self-incrimination; denied their request for application of the rules of evidence; denied their request for application of the right of confrontation; denied their request for application of their right to effective assistance of counsel; and denied their demand for a jury trial.

Quinn's and Storm's arguments rest on the license revocation proceeding being deemed punitive and thus in the nature of a criminal proceeding. The state's arguments on the other hand, rest on the license revocation being deemed an administrative proceeding and remedial, rather than punitive. As the revocation of the driver's licenses has been found to be punitive and not remedial. This court finds that Quinn's and Storm's procedural due process rights were violated when their licenses were revoked administratively on the sole basis that there was probable cause that they possessed or consumed alcohol.

SUBSTANTIVE DUE PROCESS

Storm and Quinn argue that AS 28.15.183 violates substantive due process. To meet the requirements of substantive due process, age-based legislation affecting an individual's license to drive "must be rationally related to a valid legislative purpose." Allam v. State, 830 P.2d 435 (Alaska App. 1992) (citing State v. Ensearch Alaska Construction, Inc., 787 P.2d 624, 632 n. 12 (Alaska 1989)). Legislation affecting an individual's license to drive is not

subject to the heightened scrutiny of compelling governmental interest under the equal protection clause because a license to drive is not a fundamental right under the federal or our state constitutions.

The state argues that the legislative purpose of the statute is to keep "unfit drivers off the public roadways." The state reasons that since consumption or possession of alcohol "reflects adversely on the minor's fitness to drive" the revocation of the minor's license serves the state's interest. The state's argument is not found persuasive because there is no relationship between the conduct of possessing or consuming alcohol on the one hand, and the operation or control of a motorized vehicle by the minor on the other hand. By analogy, the state could not revoke the driver's license of an adult simply because the adult was intoxicated when that conduct was not related to the adult having control of or operating a motorized vehicle. To accept the state's argument would be akin to concluding that an adult's driver's license can be revoked because of his intoxication at a time when he neither had control of nor operated a motorized vehicle merely because his intoxication "reflects adversely" on the adult's fitness to drive in the future.

Because there is no required relationship in the statute between the minor's conduct of possessing or consuming alcohol and the operation or control of a motor vehicle, this court finds that the provision of AS 28.15.183, which revokes a minor's driver's license on a finding of probable cause that the minor possessed

or consumed alcohol, violates constitutional substantive due process. The legislation is not rationally related to the legislative purpose of maintaining safety on the state's roadways.

EQUAL PROTECTION

Quinn and Storm assert that, as minors, the administrative suspension of their driver's licenses violated their rights to equal protection of the law.

1. The Federal Equal Protection Clause:

Under federal equal protection analysis, where there is no fundamental right at stake, and where there is no suspect or quasi-suspect class at issue, the courts will apply the minimal standard of scrutiny: the rational relationship test. Vance v. Bradley, 440 U.S. 93, 97 (1979). The federal analysis does not recognize driving as a fundamental right. While Quinn and Storm have cited to Graham v. State, 633 P.2d 211, 216 (Alaska 1981), which supports the proposition that a license to drive is a protected property right in Alaska, they have not established that the right to drive is a fundamental right necessitating an elevated level of scrutiny for the sake of an equal protection analysis. The right to drive is not a fundamental right. Neither is a minor's right to consume alcohol a fundamental right such that an elevated level of scrutiny is required.

Under federal equal protection law, age classification is neither suspect nor quasi-suspect. In Alaska, courts have applied the rational basis test for classifications based on age, hence treating the classification as neither suspect or quasi-suspect.

See, Allam, 830 P.2d at 439 (finding that setting the age for marijuana use at 19 years is a "rational" choice). "Within our system of government, subject to constitutional limitations, it is the legislature's prerogative," to establish the age at which a person can be presumed to be trusted with an intoxicating substance. Id. at 438, 439.

Given that no fundamental right is at stake, and given that no suspect or quasi-suspect class is at issue, under the federal analysis, the test this court applies is that invalidation of the statute will only occur where "'varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that . . . the legislature's actions were irrational.'" As the court in Allam found, this "rational basis" test is "essentially the same as Alaska's substantive due process test." Id. (citations omitted).

2. Alaska Constitution's Equal Protection Guarantee:

Article I, Section 1 of the Alaska Constitution provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law." The Alaska Supreme Court has created a sliding scale test through which to interpret this clause. This sliding scale test, as described in State v. Ensearch Alaska Construction, 787 P.2d 624, 631 (Alaska 1989), "often provides greater protection to individual rights than does the U.S. Constitution." The elements of the test are as follows:

FIRST: "determine the importance of the individual interest impaired by the challenged enactment."

SECOND: "examine the importance of the state interest

underlying the enactment."

NEXT: place the state's interest somewhere on a continuum from mere legitimacy to compelling state interest.

FINALLY: examine the nexus between the state interest and the state's means of furthering that interest, placing the nexus somewhere on the continuum from substantial relationship to least restrictive means.

Id. at 631, 632.

The individual interest at stake here is the right to drive. While Graham recognizes the driver's license as a "property interest," the case does not represent, as appellants' propose, that the right to drive is "an extremely valuable right." Merely because a driver's license constitutes a property interest is not, in of itself, grounds for heightening the standard of review. The right to drive, no doubt, has some importance in our society, but is by no means an absolute right. Age restrictions on the ability to drive are universal. One must pass a written and road test, and maintain an insurance policy on the vehicle driven, as well, in order to "qualify" for the right to drive. Driving is often characterized by governmental agencies as a "privilege" rather than a right in order to highlight that if rules are not obeyed, one could lose qualifications. The right to drive is perhaps its most valuable when utilized as means of getting to and from a place of employment in order to maintain a livelihood. This most important aspect of the right to drive is not eliminated by the statute at issue, since there are provisions for the issuance of a limited license for the purpose of getting to and from work.

Next we must examine the importance of the state's interest

underlying AS 28.15.183. The state's interest is to assure safe roadways, free of dangerous drivers. This is certainly a legitimate state interest. Given the vast numbers of people who drive or ride as passengers in automobiles in Alaska, and given that these people rely almost exclusively on the government for maintaining roadway safety, and given the high incidence of traffic accidents and fatalities, the state's interest to assure roadways free of dangerous drivers is very important.

As an important function of government that affects so many individuals, the state's interest in assuring safe roadways and keeping dangerous drivers off the road is compelling. The nexus required for treating those under 21 differently than those over 21 is that AS 28.15.183 must bear a substantial relationship to the purpose of keeping the streets safe and free of dangerous drivers. This is the lowest nexus requirement on the Ensearch continuum.

Review of case law from other jurisdictions reveals that states have rejected equal protection challenges to laws revoking the driver's licenses of underage drinkers/drug offenders. See, State v. Shawn, 859 P.2d 1220 (Wash. 1993); People v. Valenzuela, 5 Cal.Rptr.2d 492, 493 (Cal. Super. 1991); Matter of Maricopa County, 770 P.2d 394, 395 (Ariz. App. 1989). The only case appellants cite to where a court found equal protection violations in an underage drinker revocation statute was Wyoming's Johnson decision. The statute in that case is dissimilar to the present statute and, for equal protection purposes, is inapplicable as precedent. The Wyoming court found that a statute violates equal

protection where it provided that underage drinkers 18 years and younger would have their driver's licenses suspended; however, underage drinkers 19 and 20 years old would not be subject to license suspension. The Johnson court found that the equal protection right of those 18 years and younger were violated as there was no convincing justification for exempting 19 and 20 year old drinkers from suspension. With the Alaska statute, however, all underage drinkers are treated equally -- no distinction is made between older and younger underage drinkers -- so the Johnson equal protection rationale does not apply here. Given how neighboring jurisdictions have ruled on equal protection challenges to underage drinking distinctions, and given that a mere substantial relationship test need be applied to the question of age based distinctions for underage drinking, this court finds that AS 28.15.183 does not violate the equal protection clause of the Alaska Constitution, Article I, Section 1. Given the foregoing, neither does it violate the equal protection clause of the federal constitution.

CRUEL AND UNUSUAL PUNISHMENT

Quinn and Storm argue that the 90 day revocation of their driver's license for possession or consumption of alcohol when their conduct had no relation to the operation or control of a motorized vehicle constitutes cruel and unusual punishment.

In Alaska, the test to determine whether a statutory penalty

constitutes cruel and unusual punishment is a singular test: a punishment which is so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice is unconstitutional. See, Dancer v. State, 715 P.2d 1174, 1180-81 (Alaska App. 1986).

As a general proposition, a 90 day revocation of a driver's license for an underage person who is in control of or driving a motorized vehicle and is under the influence of alcohol is not cruel and unusual punishment. In this case, however, we do not have an underage person in control of or operating a motorized vehicle at the time the person is in possession of or consuming alcohol. At the time the citations were issued to Quinn and Storm, they were not involved in any way in the operation of or control of a motorized vehicle. They were, in fact, not even in close proximity to a motorized vehicle.

When the conduct being sanctioned, underage possession of or consumption of alcohol, has no relation or connection to the sanction being imposed, the suspension of a driver's license, the end result is unreasonable and arbitrary punishment. Under the facts of this case, the court finds that the statutory penalty is so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice and, therefore, unconstitutional.

CONCLUSION

For the aforementioned reasons, the administrative decision revoking, for a period of 90 days, the driver's licenses of Quinn

and Storm is hereby REVERSED.

Dated this 13th day of February, 1997, at Anchorage, Alaska.

RENE J. GONZALEZ
Superior Court Judge

...ify that on 2/14/97
copy of the above was personally
handed to each of the following:

Secretary/Deputy Clerk