

ESSAY QUESTION NO. 8

Answer this question in booklet No. 8

In response to a rising rate of domestic violence and recidivism for domestic violence offenders in K-Berg (a small Alaska town) a law was passed requiring a mandatory minimum sentence of seven days in jail for a person convicted of a first domestic violence assault. The law also permits a judge to suspend the mandatory minimum sentence if the offender completes a Batterer's Accountability Program (BAP program). In K-Berg the BAP program is called KBAP and is run by the town.

In K-Berg the vast majority of domestic violence is male on female. Because of its emphasis, participation in KBAP is for men only since the KBAP designers believed, and studies support, that having a woman in a male-centered BAP program would lessen the efficacy of the program for men. For the several years that KBAP has been in existence, domestic violence in K-Berg has dropped significantly. Likewise, the recidivism rate for first time domestic violence offenders in K-Berg has also decreased significantly. KBAP operates on a shoestring budget and any additional strains on its resources will likely force closure of the program.

Ann lives in K-Berg. Recently, after a jury trial, Ann was convicted of a domestic violence assault against her husband. It is her first offense. At Ann's sentencing, she asked to be sent to KBAP instead of jail. That request was denied. Her sentence was stayed pending an appeal of that denial.

1. Discuss Ann's claims under the Alaska Constitution challenging her exclusion from KBAP.



GRADER'S GUIDE

*** QUESTION NO. 8 ***

SUBJECT: CONSTITUTIONAL LAW

I. EQUAL PROTECTION
A. Overview (25 pts.)

Principally, this is an equal protection question and applicants are expected to do a thorough analysis of equal protection in Alaska. Additionally, both due process and the constitutional right to rehabilitation are implicated. Standing is not an issue as KBAP is a K-Berg program.

Ann's principal claim under the Alaska Constitution rests on Article I, Section 1 which states: "all persons are equal and entitled to equal rights, opportunities, and protection under the law." Though this is often referred to as the "equal protection clause," this clause actually guarantees not only equal "protection," but also equal "rights" and "opportunities" under the law." ACLU v. State, 122 P.3d 781, 785 (Alaska 2005). In addition, Article 1§3 of the Alaska Constitution provides that no person shall be denied civil or political rights because of gender.

Further, the Alaska Supreme Court has held: "We have long recognized that the Alaska Constitution's equal protection clause affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment." Malabed v. North Slope Borough, 70 P.3d 416, 420 (Alaska 2003). This means that the Fourteenth Amendment provides the floor of constitutional equal protection while Alaska's Constitution provides the ceiling.

Like its federal counterpart, Alaska's equal protection clause mandates equal treatment of those similarly situated. ACLU v. State, 122 P.3d 781, 787 (Alaska 2005).

In applying Alaska's more "stringent" equal protection standard, the court uses a so-called "sliding-scale" approach. Specifically, the Alaska Supreme Court has stated: "[W]e have adopted a three-step, sliding-scale test that places a progressively greater or lesser burden on the state depending upon the importance of the individual right affected by the disputed classification and the nature of the governmental interest at stake. . . ." Id. (internal citation omitted). Significantly, the Alaska Supreme Court has stated that "in the sixteen years since the sliding scale approach was first formulated", it has "only identified three stops on the sliding scale--at the relaxed, intermediate, and strict levels of scrutiny." Stanek v. Kenai Penn. Borough, 81 P.3d 268, 270 (Alaska 2003) (citations omitted).

B. Threshold Analysis: Was there Disparate Treatment? (15 pts.)

An analysis of an equal protection claim under Alaska's Constitution begins with the following question: Is the challenged program treating similarly situated persons differently? ACLU v. State, 122 P.3d 781, 787 (Alaska 2005). (internal citation omitted). If no such showing of "disparate" treatment can be made, the challenged law does not violate a group's right to equal protection and there is no need to undertake a sliding-scale analysis. Id. (internal citation omitted).

Here, it appears that Ann can make such a showing. In K-Berg, male first-time domestic violence offenders are afforded the opportunity to avoid one week in jail by attending KBAP. Because KBAP is for men only, female offenders such as Ann are denied that opportunity.

Some applicants might argue that since the KBAP program was not designed to intentionally discriminate against women, the program does not violate equal protection. The Alaska Supreme Court has rejected this reasoning and has stated that all that is required is that the challenged program be facially discriminatory, that is, "by its own terms classifies persons for different treatment." Id. at 788. Here, KBAP meets that lower standard.

C. Sliding Scale Analysis (40 pts.)

1. Determining Implicated Interest and Level of Scrutiny

The next step in performing an equal protection analysis is to determine the weight of the constitutional interest affected by the challenged program. Id. at 790. This factor determines the level of scrutiny that is applied under Alaska's sliding-scale. At the most deferential end of the scale is disparate treatment between similarly situated groups that affects, for example, economic interests. Id. For disparate treatment to pass the lowest level of scrutiny, the government's interest must be "legitimate" and "bear a fair and substantial relationship" to the governmental interest. Id.

At the middle section of the sliding-scale is the disparate treatment of quasi-suspect groups. In this category, the analysis is similar to that performed under the Federal Constitution. Under both systems, it is usually referred to as "intermediate scrutiny". Under Alaska's equal protection clause, as the right asserted becomes "more fundamental" or the classification scheme employed becomes "more constitutionally suspect," the challenged law "is subjected to more rigorous scrutiny at a more elevated position on our sliding scale." Stanek v. Kenai Penn. Borough, 81 P.3d 268, 270 (Alaska 2003). To pass intermediate scrutiny, the challenged law must not only be "legitimate" but

“important” and the nexus between the important interest it serves “must be close.” ACLU v. State, 122 P.3d 781, 790 (Alaska 2005).

At the high end of the scale is “strict scrutiny” which is applied to suspect classifications such as race. Gonzales v. Safeway Stores, 882 P.2d 389, 396 n.7 (Alaska 1994). Under strict scrutiny, the fit between the means and the end must be much closer and, if there exists a less restrictive alternative, the classification is invalid. ACLU v. State, 122 P.3d 781, 790 (Alaska 2005).

Here then, because the classification is based on gender, an intermediate or higher level of scrutiny would apply.

2. The Governmental Interest at Stake

The second step in the sliding-scale equal protection analysis is to consider the governmental interest at stake and to determine (under intermediate scrutiny) if the governmental interest is not only “legitimate” but if it is “important”. Certainly, reducing domestic violence is both a legitimate and important governmental interest. However, it could be argued that the governmental interest here is not actually reducing domestic violence but, rather, a government interest in saving money. In other words, what is really precluding KBAP/K-Berg from offering services to Ann is limited funding.

3. Means-to-end Fit

Even when the state acts for important and legitimate reasons, “its actions must bear a close connection to those interests to impair an important individual right.” Malabed v. North Slope Borough, 70 P.3d 416, 420 (Alaska 2003). Does KBAP’s prohibition of women from its services meet this test? It is a close question and applicants could argue either side. On the one hand, since KBAP operates on a “shoestring” budget, a good argument could be made that the means-end fit is very close. Because K-Berg has targeted its limited resources at men who are the vast majority of domestic violence offenders, and KBAP is highly effective in stopping male recidivism. This, the argument would go, is closely connected to the important and legitimate goal of reducing overall domestic violence. On the other hand, Ann could argue that allowing her to attend KBAP also furthers the goal of reducing domestic violence because she is a domestic violence offender.

Further, as mentioned above, if the governmental interest here is merely economic, then the means-to-end fit is not as close.

II. SUBSTANTIVE DUE PROCESS (10 pts.)

Ann might argue that she has a fundamental “liberty interest” in staying out of jail. Thus, her rights under substantive due process and potentially equal protection are violated. If this was the case, then arguably both constitutional claims would be analyzed under strict scrutiny. This argument will fail. As the Alaska Court of Appeals has repeatedly held, at least with regard to convicted offenders, the interest in staying out of jail is not fundamental but, rather, is “the relatively narrow interest of a convicted offender in minimizing the punishment for an offense. This interest, though certainly not negligible, is not sufficiently significant to trigger strict scrutiny of the statute's legislative purposes.” State v. Morgan, 111 P.3d 360, 361 (Alaska 2005) (internal citations omitted).

Further, it will be difficult for Ann to prevail on any claim of violation of due process as:

The party claiming a denial of substantive due process has the burden of demonstrating that no rational basis for the challenged legislation exists. This burden is a heavy one, for if any conceivable legitimate public policy for the enactment is apparent on its face or is offered by those defending the enactment, the opponents of the measure must disprove the factual basis for such a justification. Concerned Citizens of S. Kenai Peninsula, 527 P.2d at 452.

Here, as previously argued, there is a legitimate purpose (decreasing domestic violence) for KBAP. Thus, the program and sentencing scheme does not violate substantive due process.

Given that Ann was given a jury trial and her sentence was stayed pending appeal, there is no viable argument on these facts that Ann’s procedural due process rights were violated.

III. CONSTITUTIONAL RIGHT TO REHABILITATION (10 pts.)

The Alaska Supreme Court has long recognized that Article I, Section 12 of the Alaska Constitution, which speaks of the “principle of reformation,” provides for a “fundamental right” of rehabilitation. Brandon v. State DOC, 938 P.2d 1029, 1032 (Alaska 1997). Does the right to rehabilitation give Ann the right to attend KBAP or receive domestic violence treatment during her seven days in jail? The answer is probably not. As the Alaska Supreme Court held in Goodlawtaw v. State, when a prisoner is held for a only “short time,” the state has no duty to provide them with treatment. Goodlawtaw v. State, 698 P.2d 1190, 1995 (Alaska 1985). Likewise, the state has no duty to provide rehabilitative services once a convicted offender is released from incarceration. Id.