MORE THAN JUST A PRIVATE AFFAIR: IS THE PRACTICE OF INCARCERATING ALASKA PRISONERS IN PRIVATE OUT-OF-STATE PRISONS UNCONSTITUTIONAL?

This Note examines the constitutionality of Alaska's current policy of transferring Alaska state prisoners to privately run prisons in other states. The Note describes the developing interplay between federal law, state law, and the rights of the incarcerated. The Note then introduces a 1997 Alaska Supreme Court case, Brandon v. State Department of Corrections*, and draws from the decision's interpretation of the Alaska Constitution to emphasize how the rights of Alaska state prisoners may surpass those granted by federal law, and that a right to rehabilitation is an intrinsic right granted to all Alaska prisoners. The Note proceeds to demonstrate that the right to receive visitors is an integral element of the right to rehabilitation, and that Alaskans transferred to out-of-state prisons are deprived of this constitutional right. The Note concludes by lauding the Alaska Supreme Court's decision in* Brandon *for its recognition of the rights of all Alaskans, including Alaska prisoners, but warns that this single decision may not be enough to protect the constitutional guarantees granted to all state citizens, and that additional attention to the problem is required.*

I. INTRODUCTION

In 1997, Richard Brandon, an Alaska prisoner, was serving twenty-five years at Alaska's Spring Creek Correctional Center prison for a 1990 conviction.[1] Because of overcrowding, the Department of Corrections ("DOC") entered into a contract with Corrections Corporation of America ("CCA") whereby CCA would transfer approximately 200 Alaska prisoners to its Central

1. *See* Brandon v. State Dep't of Corr., 938 P.2d 1029, 1030 (Alaska 1997).

Arizona Detention Center in Florence, Arizona.[2] When the DOC failed to solicit enough volunteers to transfer to Arizona, it selected additional inmates based on the length of their remaining sentences.[3] Brandon was selected from a group of inmates with seven and one-half or more years remaining.[4]

Shortly thereafter, a classification hearing was held to determine if Brandon would actually be transferred to Arizona.[5] Despite noting that Brandon's family visited him weekly, the hearing officer recommended that the DOC transfer Brandon to Arizona, where visitation would be virtually impossible.[6] The DOC followed the hearing officer's recommendation, and Brandon appealed to the DOC commissioner.[7] When Brandon's appeal was denied, he filed a petition with the superior court on the ground that his appeal to the DOC commissioner was arbitrarily rejected.[8] Believing that Brandon's transfer decision was the result of an administrative hearing not subject to judicial review, as opposed to a judicially reviewable adjudicative proceeding, the superior court dismissed Brandon's case for lack of jurisdiction.[9] At that point, Brandon had already been transferred to Arizona.[10]

Brandon claimed that his transfer substantially impaired his rehabilitation in violation of the Alaska Constitution and Alaska Statutes section 33.30.061.[11] The Alaska Supreme Court held that because Brandon's fundamental right to rehabilitation was arguably at stake, the superior court could review the results of a classification hearing.[12] The court found that the superior court's jurisdiction is established by a prisoner's "right to judicial review of major disciplinary proceedings when issues of constitutional magnitude are raised."[13] The court reasoned that housing Alaska prisoners in private Arizona prisons is an issue of constitutional magnitude be-

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2. *See id*. CCA is a private entity engaged in the prison business. Founded in 1983, the publicly traded company boasts of being "the leading private sector provider of detention and corrections services to federal, state and local governments." *Company Overview* (visited Oct. 1, 2000) <http://www.correctionscorp.com/info.html>.

3. *See Brandon*, 938 P.2d at 1030.

4. *See id*.

5. *See id*.

6. *See id*.

7. *See id*.

8. *See id*. at 1031.

9. *See id*.

10. *See id*.

11. *See id*. at 1032.

12. *See id*. at 1033.

13. *Id*. at 1031 (quoting Hertz v. Carothers, 784 P.2d 659, 660 (Alaska 1990)).

cause the Alaska Constitution grants prisoners a constitutional right to rehabilitation, of which the right of visitation is a vital component.[14] According to the court, the distance between Alaska and Arizona seriously impedes visitation and, thus, inhibits rehabilitation.[15] In essence, because a transfer to Arizona effectively prevents visitation, which is a key element of rehabilitation, the commissioner's decision to transfer Brandon to Arizona put Brandon's constitutional rights at risk.[16]

Brandon represents the first time that the Alaska Supreme Court has squarely faced this issue, and no other court appears to have addressed this issue since then. It demonstrates the supreme court's commitment to respecting fundamental constitutional rights for all Alaskans, including Alaska prisoners. *Brandon* is only a starting point, however; more is needed to assure that prisoners' constitutional rights are safeguarded. Indeed, with nothing more than the *Brandon* emphasis on prisoners' right to a fair hearing before being transferred out-of-state, the prisoners' constitutional rights may be virtually nullified by Alaska's reliance upon private prisons — a thousand miles away — to house Alaska prisoners.

This Note addresses this important issue. Part II presents an historical background that explains why the private sector plays such an intimate role in the correction process and a summary of the current debate surrounding the privatization of prisons.[17] Part

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14. *See id*. at 1032.

15. *See id*. This Note focuses on transfers of prison inmates from Alaska to Arizona primarily because it forms the basis for the dispute in *Brandon*. However, given Alaska's isolation from the contiguous United States, all analyses and conclusions would apply to any transfer outside of Alaska. As for transfers between states in close proximity within the contiguous U.S., creating a "bright-line" rule based on geographical borders may not be the best method of addressing the impact of distance on the right to receive visitors. For example, instead of preventing out-of-state transfers, other states may consider preventing out-of-state transfers that exceed the distance between the prisoner's home and the most distant in-state facility. Of course, the need to limit gross restrictions on visitation is contingent upon a state law that grants prisoners a right to rehabilitation. Additionally, because the analysis in this Note relies heavily on the principle of rehabilitation accomplished through visitation, it may be inapplicable for capital defendants.

16. *See id*. at 1034 (Rabinowitz, J., dissenting in part).

17. A body of literature exists that addresses in detail the controversies underlying the differences between private and public prisons. *See generally* Charles H. Logan, *Well Kept: Comparing Quality of Confinement in Private and Public Prisons*, 83 J. CRIM. L. & CRIMINOLOGY 577 (1992); Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531 (1989); Robert L. Wilkins, *Federal Influence on Sentencing Policy in the District of Columbia: An*

III traces the development of federal and Alaska law governing the transfer of prisoners across state lines. Part IV recounts the holding in *Brandon* in greater detail, and Part V provides an analysis of why it is unconstitutional to transfer Alaska prisoners to private out-of-state facilities. This Note will argue that because the right to visitation is crucial to rehabilitation, and transfers outside of Alaska severely impede visitation, these out-of-state transfers are de facto unconstitutional.

II. THE EMERGENCE OF THE PRIVATE PRISON INDUSTRY

Understanding the significance of *Brandon* requires that one examine the intimate role the private sector plays in the correctional system. Indeed, privatization of the prison system encourages out-of-state transfers because private entities can choose to build prisons in states that offer the most economic benefits. These out-of-state private entities are then able to enter into contracts with correctional systems in other states to house prisoners. As described below, many states consider this a viable option to address massive overcrowding. Section A examines the recent problem of prison overcrowding. Section B looks at the historical relationship between correctional institutions and the private sector. Section C summarizes the debate over the private prison industry.

A. Prison Overcrowding[18]

Between 1988 and 1997, the number of people incarcerated in the United States nearly doubled, skyrocketing from 627,600 in 1988 to 1,244,554 prisoners in 1997.[19] This dramatic increase re-

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Oppressive and Dangerous Experiment, 2 FED. SENT. R. 143 (1999); Brian B. Evans, Comment, *Private Prisons*, 36 EMORY L.J. 253 (1987); James L. Ahlstrom, Note, *McKnight v. Rees: Delineating the Qualified Immunity "Haves" and "Have-Nots" Among Private Parties*, 1997 BYU L. REV. 385 (1997); John G. Di Piano, Note, *Private Prisons: Can They Work? Panopticon in the Twenty-First Century*, 21 NEW ENG. J. CRIM. & CIV. CONFINE. 171 (1995); Douglass W. Dunham, Note, *Inmates' Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475 (1986).

18. Although more recent prison statistics are available, this Note relies primarily on statistics between 1988 and 1997 for several reasons. First, the most drastic increase in prison rates occurred during this time period. Second, *Brandon* was decided during this decade. Finally, statistics regarding prisoners have not changed significantly since 1997, especially with regard to the overall state and federal capacity rates. For more recent statistics, *see* Allen J. Beck, *Prisoners in 1999*, BUREAU OF JUSTICE STATISTICS, Aug. 2000 [hereinafter *Prisoners in 1999*].

19. *See Growth in Corrections: State, National and International Numbers*, 15 ALASKA JUST. F. 4, 1 (1999) [hereinafter *Growth in Corrections*]. By the end of 1999, the number of prisoners incarcerated in the United States had increased to

sulted largely from legislative acts that advocate getting "tough on crime" through such avenues as severe intolerance for drugs and weapons violations,[20] mandatory minimum sentencing, preventive detention, habitual offender statutes, and reduced use of parole.[21]

While virtually every state experienced increased rates of incarceration during the last decade, Alaska was especially notable.[22] In 1997, Alaska's incarceration rate increased by over 13%, the third largest increase in the nation.[23] By 1998, Alaska's alarming rate of incarceration had increased by 18%, which was 2% more than the state's overall population increase rate.[24] Although Alaska's rate of incarceration decreased by 3.6% in 1999, the state still complained of severe prison overcrowding.[25]

At the same time that incarceration rates were skyrocketing, the electorate became increasingly hostile to new taxes and construction bonds, the most popular methods of financing state and local prison projects.[26] This combination resulted in massive prison overcrowding.[27] By the end of 1997, the federal prison system complained that it was functioning at 19% over capacity.[28] Meanwhile, state prisons were at least equally overburdened, functioning at 24% over capacity.[29] Specifically, thirty-six states complained that their prisons were at 100% capacity or more while Washington, D.C., and several other states were 99% full.[30] New Mexico,

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1,366,721. *See Prisoners in 1999*, *supra* note 18, at 1 (noting that this number reflects those incarcerated under state or federal adult correctional authorities).

20. *See* Darrell K. Gilliard & Allen J. Beck, *Prisoners in 1997*, BUREAU OF JUSTICE STATISTICS, Aug. 1998, at 12. Sixty percent of federal prisoners incarcerated in 1996 were serving time for drug violations, and the number of inmates serving sentences for weapons violations doubled between 1990 and 1996. *See id*.

21. *See* Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 911 (1988).

22. *See Prisoners in 1997: The State and Federal Picture (A BJS Report),* 15 ALASKA JUST. F. 2, 2 (1998).

23. *See id*. Maine tied with Alaska for the number three spot. Hawai'i ranked first and West Virginia ranked second, with incarceration rates of 23.4% and 15.4%, respectively. *See id*. When considering Alaska's inmate population, it is important to note that unlike most states, the federal and state prison system in Alaska is unified. *See id*.

24. *See Growth in Corrections*, *supra* note 19, at 1.

25. *See Prisoners in 1999*, *supra* note 18, at 4-8.

26. *See* David N. Wecht, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 816-17 & n.10 (1987).

27. *See id*. at 816-18.

28. *See* Gilliard & Beck, *supra* note 20, at 9.

29. *See id*.

30. *See id.*

functioning at 82% of its capacity, was in the nation's best position while California, whose prisons were 206% full, was in the worst.[31] Not far behind California, the Alaska prison system was operating at 147% of capacity.[32]

With such massive overcrowding problems, the federal government and the states urgently began to explore new methods of housing prisoners.[33] Promising reduced costs, expediency, and better conditions overall, the private sector seemed like an obvious remedy for this virtually insatiable need for prison space.[34] In addition, the long relationship between the private sector and the prison system made this choice even more attractive. Subsection B explores this relationship.

B. The Private Sector's Continuing Role in Correctional Institutions[35]

While Alaska's use of out-of-state private prisons to house inmates is a very recent phenomenon, the relationship between correctional institutions and the private sector dates back to the nation's beginnings.[36] During the early republic, private jailers housed criminals because the new nation was unable to do so.[37] By the early nineteenth century, private entities controlled the entire prison industry in some states.[38] This control was exhibited primarily through leases, as states leased prison systems to private enti-

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31. *See id*. at 8.

32. *See id.*

33. *See* Wecht, *supra* note 26, at 816-17. While the dangers of operating a prison system above capacity are evident, even states like New Mexico that are not at full capacity may have significant problems. For example, they may be unable to provide space for protective custody and disciplinary cases or for emergencies. *See* Gilliard & Beck, *supra* note 20, at 8.

34. *See* Wecht, *supra* note 26, at 816-17.

35. In cataloging this history, this Note relies heavily on Joseph Field*, Making Prisons Private: An Improper Delegation of Governmental Power*, 15 HOFSTRA L. REV. 649 (1987).

36. *See id*. at 651.

37. *See* Wecht, *supra* note 26, at 815-16.

38. *See* Ward M. McAfee, *Symposium: Privatization of Prisons*, 40 VAND. L. REV. 851, 852-53 (1987) (noting that during the nineteenth century, Alabama, California, Illinois, Indiana, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, Oregon, and Wyoming had lease systems whereby private entities contracted with the states to use prisoner labor).

ties.[39] Private entities generated profits primarily by using prison labor to manufacture goods or to provide services.[40]

As the nineteenth century came to an end, the use of the private sector to house prisoners was rapidly declining, and the government role in administering prisons increased.[41] Additionally, some states discovered that the financial benefits they had hoped to gain from turning the prison system over to the private sector were illusory.[42] Concerns about abusive conditions also soured views of private prisons.[43] Consequently, support for this "industry" and development of private prisons fell out of favor, and "the private prison industry fell apart."[44]

Private interests did not completely disappear from the scene.[45] Indeed, during the nineteenth and twentieth centuries, governments regularly contracted prison labor out to private parties.[46] The private sector often used the prisoners as plantation and factory laborers.[47] When the rise of labor organizations brought an end to this popular use of prison labor during the twentieth century, the private sector found other ways to continue its relationship with correctional institutions.[48] For example, the private sector began providing many prisons with food services, medical services, and educational services.[49] The private sector's relationship with the correctional system was primarily limited to this capacity until the early 1980s.[50] At that time, the private sector began operating half-way homes, facilities for juveniles, alien detention centers, and work-release programs.[51] In 1984, Corrections Corporation of America began operating the nation's first private prison since the nineteenth century.[52]

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39. *See* Peter J. Duitsman, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C. L. REV. 2209, 2215 (1998). There were states that simply sold the prison industry to the private sector. *See id*.

40. *See id*.

41. *See* Wecht, *supra* note 26, at 816.

42. *See* McAfee, *supra* note 38, at 853.

43. *See* Duitsman, *supra* note 39, at 2215.

44. *Id*. at 2216.

45. *See id*. at 2216-17.

46. *See* Field, *supra* note 35, at 651.

47. *See id*.

48. *See id.* at 652. Labor unions viewed this use of prison labor as a threat to union jobs. Their increased "strength enabled labor organizations to secure legislation which limited the role of prison labor in the economy." *Id*.

49. *See id*.

50. *See id.*

51. *See* Wecht, *supra* note 26, at 816.

52. *See Company Overview*, *supra* note 2.

Federal support from both the legislative and executive branches provided the necessary encouragement for the private sector to operate this new business successfully.[53] In 1988, Congress adopted new legislation authorizing the Attorney General to enter into agreements with private entities to house prisoners.[54] In 1992, President George Bush, believing that privatization could help achieve the most beneficial economic use of resources, issued an executive order requiring all federal agencies to encourage state and local governments to utilize private prisons.[55] Combined with the judiciary's historical validation of acts that delegate power to private entities, these measures virtually assured the continued use of private prisons.[56]

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53. *See id.*; *see also infra* notes 55-56 and accompanying text.

54. *See* 18 U.S.C. § 4013 (1994). This provision reads, in pertinent part

> [t]he Attorney General, in support of United States prisoners in non-Federal institutions, is authorized to make payments from funds appropriated for the support of United States prisoners for (1) necessary clothing; (2) medical care and necessary guard hire; (3) the housing, care, and security of persons held in custody of a United States marshal pursuant to Federal law under agreements with State or local units of government or contracts with private entities.

Id. § 4013(a).

55. *See* Warren L. Ratliff, Note, *The Due Process Failure of America's Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371, 404 (1997). Labeled "Infrastructure Privatization," this Executive Order applied to privatization in various areas, including prisons, airports, roads, waterways, housing, and schools. The primary purpose of the act was to "ensure that the United States achieves the most beneficial economic use of its resources." Exec. Order No. 12,803, 57 Fed. Reg. 19,063 (Apr. 30, 1992). President Bush believed that "[p]rivate enterprise and competitively driven improvements are the foundation of our Nation's economy and economic growth." *Id*. Thus, he sought to give state and local governments "greater freedom to privatize infrastructure assets." *Id*.

56. During the mid-1980s, the Supreme Court had not directly considered the delegation doctrine as it related to private prisons, but it had upheld privatization in similar contexts. *See* Robbins, *supra* note 21, at 922. For example, the Court upheld the Maloney Act, which "authorizes self-regulation of the securities industry." *Id*. Moreover, the Supreme Court has not invalidated a private delegation since the New Deal era in Carter v. Carter Coal Co., 298 U.S. 238 (1936). *See id*. at 919-20. Thus, private entities did not consider the courts a major threat to their business. Apparently they were correct, because in the 1990s, the Supreme Court and a host of federal courts issued rulings that, as a threshold issue, presumed the constitutionality of private prisons. *See, e.g.*, Richardson v. McKnight, 521 U.S. 399, 402 (1997) (stating that "Tennessee had 'privatized' the management of a number of its correctional facilities, and that consequently a private firm, not the state government, employed the guards."); Wyatt v. Cole, 504 U.S. 158 (1992); Giron v. Correctional Corp. of America, 14 F. Supp. 2d 1245, 1249 (D.N.M. 1998) (stating that if a private company operates a prison, the state is directly involved in

Like the federal government, state support of the private prison industry also contributed to the industry's significant growth over the last decade. Indeed, just as the federal government began authorizing privatization of prisons, so did state governments, including Alaska. In 1986, Alaska enacted Alaska Statutes section 33.30.031, which provides that the Commissioner of Health and Welfare may enter into contracts with public or private entities to provide for the confinement of inmates when the state lacks proper facilities.[57] These private facilities may be located outside the state upon the Commissioner's determination that the state lacks appropriate in-state facilities or that out-of-state private facilities are necessary because of health or security reasons or due to imminent overcrowding.[58] Similarly, Alaska Statutes section 33.30.061 authorizes the Commissioner of Health and Welfare to contract with private out-of-state facilities to house Alaska prisoners, as long as the Commissioner determines that rehabilitation or treatment of the prisoner will not be substantially impaired.[59]

Given the way the federal government and states like Alaska have supported the private sector's prison ventures and the booming market,[60] it is perhaps not surprising that by 1996 there were more than one hundred private jails and prisons located across twenty-seven states.[61] As of 1997, the private prison industry was

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some aspects of the prison life). To date, no federal court has outlawed private prisons.

57. ALASKA STAT. § 33.30.031 (LEXIS 1998). The statue provides in pertinent part

> [i]f the commissioner determines that suitable state correctional facilities are not available, the commissioner may enter into an agreement with a public or private agency to provide necessary facilities. Correctional facilities provided through agreement with a public agency for the detention and confinement of persons held under authority of state law may be in this state or in another state. Correctional facilities provided through agreement with a private agency must be located in this state unless the commissioner finds in writing that (1) there is no other reasonable alternative for detention in the state; and (2) the agreement is necessary because of health or security considerations involving a particular prisoner or class of prisoners, or because an emergency of prisoner overcrowding is imminent.

58. *See id.*

59. *See id*. § 33.30.061.

60. As of the end of 1997, other states that support prison privatization include: Georgia, Montana, New Mexico, Oklahoma, Oregon, Pennsylvania, and Utah. *See* Ratliff, *supra* note 55, at 407 n.184 (listing the states that have very relaxed rules governing private prisons).

61. *See* Laura Suzanne Farris, Comment, *Private Jails in Oklahoma: An Unconstitutional Delegation of Legislative Authority*, 33 TULSA L.J. 959, 959 (1998).

grossing 550 million dollars annually;[62] Alaska is among the twenty-five states that make use of private prisons.[63] Thirty-one states, the Federal system, and Washington, D.C., reported a housing total of 71,208 prisoners in private facilities in 1999.[64] Specifically, Alaska housed thirty-five percent of its prison population in private facilities during 1999, making it second only to New Mexico's thirty-nine percent.[65]

C. Responses to the Rapid Growth of the Private Prison Industry[66]

This rapid growth of the private prison industry has been the center of much debate.[67] Opponents of privatization not only question the proponents' claim that privatization is more cost-efficient and expedient, but they also insist that the government, not the private sector, is the proper vehicle for operating prisons.[68] Particularly, they argue that the non-delegation doctrine requires that governmental entities administer prisons, thereby prohibiting private entities from operating them.[69] Furthermore, privatization opponents doubt that the private sector can fully carry out the goals of the penal system given its obvious primary concern with

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62. *See* Cathy Lazere, *Privatizing Prisons: Finance Chiefs Face a Peculiar Lineup of Problems Helping Move a Business Out of the Public Sector*, CFO MAGAZINE (Feb. 1997), *available at* <http://www.cfonet.com>.

63. *See* Ratliff, *supra* note 55, at 414.

64. *See Prisoners in 1999*, *supra* note 18, at 6.

65. *See id.*

66. The debate surrounding private prisons centers around numerous issues. While this section focuses on the two most prominent concerns, other concerns include the quality of the services provided, liability, accountability, dependency, and flexibility. For a detailed discussion on the pros and cons of private prisons, see CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS 41-48 (1990), *available at* <http://www.ucc.uconn.edu/~wwwsoci/proscons.html> (last visited Oct. 1, 2000).

67. *See* Field, *supra* note 35, at 653-56.

68. *See* Lazere, *supra* note 62. Opponents of private prisons also correctly point out that private companies reduce a large amount of their costs by hiring non-union guards. *See The Prison Industrial Complex*, ATLANTIC MONTHLY, Dec. 1998, *available at* <http://www.theatlantic.com/issues/98dec/pris2.html>. In 1996, a study prepared by the U.S. General Accounting Office was unable to determine whether there were any cost savings or improved services in private prisons. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, *Private and Public Prisons*: *Studies Comparing Operational Costs and/or Quality of Service* (Aug. 16, 1996), *available at* <http://www.gao.gov>.

69. *See* Duitsman, *supra* note 39, at 2218.

profit.[70] In short, opponents argue that private prisons may fail to observe prisoners' constitutional rights properly.[71]

Proponents of privatization subscribe to the private sector's claim that privatization is cheaper and more expedient than a strictly public prison system.[72] Boasting of less bureaucratic roadblocks, the private sector claims that on average it takes twelve to eighteen months to build a private prison, while state or federal governments take at least a year longer.[73] Proponents may also insist that privatization does not violate constitutional principles, namely the non-delegation rule and due process. They would argue that the right to punish criminals does not belong to the state, but to the people who delegate it to the government, which in turn can contract it to agents. Adherents to such a view see little difference between the private sector administering the correctional system through contracts and government employees administering the correctional system.

III. THE DEVELOPMENT OF THE RIGHT TO TRANSFER PRISONERS

Because the development of Alaska law governing prison transfers has, in many ways, mirrored the development of the federal law in this area, it is helpful to discuss the federal law before outlining Alaska law. Section A provides a brief account of federal laws governing prison transfers, while Section B describes Alaska law.

A. Federal Law

Meachum v. Fano[74] is one of the earliest and most significant cases concerning prison transfers. In that case, the United States Supreme Court held that absent a statutory or customary mandate to the contrary, the Due Process Clause of the Fourteenth Amendment does not, by itself, "create a liberty interest in prison-

70. *See* Field, *supra* note 35, at 662-64. Stephen Ingley, executive director of the American Jail Association, stated the primary concern with private prisons when he insisted that "[a] publicly held corporation's sole interest is to establish a profit for its shareholders, and you're granting the corporation the use of force, including deadly force." Lazere, *supra* note 62.

71. *See* Field, *supra* note 35, at 654.

72. *See id*.

73. *See* Lazere, *supra* note 62.

74. 427 U.S. 215 (1976). In *Meachum*, inmates claimed that transfers from a medium-security prison to a maximum-security facility with less favorable conditions implicated the Due Process Clause. *See id.* at 222. The Court disagreed, pointing out that there was not a state law which granted the prisoners a liberty interest not to be transferred for any particular reason. *See id.* at 226-29.

ers to be free from intrastate prison transfers."[75] In so holding, the Court rejected the argument that any change in the conditions of a prisoner's confinement that impacts the prisoner in a significant and negative manner automatically triggers due process protections.[76] Thus, unless specifically required by state law, prison administrators are not obligated to provide hearings before transferring prisoners to less hospitable prisons.[77] Explaining its support for granting prison administrations such latitude in transfers, the Court noted that

> given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. The Constitution does not require that the State have more than one prison for convicted felons; nor does it guarantee that the convicted prisoner will be placed in any particular prison if, as is likely, the State has more than one correctional institution .... The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons.[78]

While *Meachum* provided some guidance on how states should address the issue of due process and intrastate prison transfers, there were, and still are, many unresolved nuances concerning prison transfers. Four years after *Meachum*, the Supreme Court found itself faced with one such nuance in *Vitek v. Jones*,[79] which concerned the transfer of prisoners to mental institutions. In that case, the Court considered a Nebraska statute that authorized the Director of Correctional Services to transfer prisoners to mental hospitals upon the determination of a certified physician or psychologist that the prisoner "suffers from mental disease of defect . . . and cannot be given proper treatment" in prison.[80] While the Court did not invalidate the statute on its face, it did affirm the lower court's holding that an involuntary transfer from a prison to a mental hospital "implicated a liberty interest that is protected by the Due Process Clause [of the Fourteenth Amendment]."[81] According to the Court, the statute grants prisoners a liberty interest whereby a prisoner "could reasonably expect" that he would be

75. Sandin v. Conner, 515 U.S. 472, 478 (1995) (citing *Meachum*, 427 U.S. at 225).

76. *See Meachum*, 427 U.S. at 224.

77. *See id.*

78. *Id*.

79. 445 U.S. 480 (1980).

80. *Id*. at 483.

81. *Id*. at 494.

transferred to a mental hospital only upon a finding that he was suffering from a mental illness that the prison could not adequately treat.[82] Moreover, the Supreme Court also believed that the stigmatizing consequences and the "mandatory behavior modification treatment" involved in this kind of a transfer constitutes a major change in confinement conditions that amount to a "grievous loss" and as such, should not be imposed without notice of an adequate hearing.[83] Thus, before transferring prisoners to mental institutions pursuant to this statute, the Court insisted that Nebraska provide the prisoner with the following: adequate notice of the potential transfer, an adversarial hearing before a disinterested party, a written statement by the finder of facts cataloging the evidence relied upon and the reasons for the transfer, and the availability of counsel for indigents.[84]

Vitek raised important questions in the context of prison transfers. Having provided the first major limitation on prison transfers, would the Court now move toward restricting transfers in other contexts? This question received an emphatic response two years later in *Olim v. Wakinekona*.[85] There, the Supreme Court held that an interstate prison transfer, including one from Hawai'i to California, does not deprive an inmate of any liberty interest protected by the Due Process Clause.[86] In so holding, the Court reasoned that, "[j]ust as an inmate has no justifiable expectation that he will be incarcerated in any particular prison within a State, he has no justifiable expectation that he will be incarcerated in any particular State."[87] The Court went on to note that overcrowding and the need to separate particular prisoners, among other things, have led states and the federal government to enact "[s]tatutes and interstate agreements [which] recognize that, from time to time, it is necessary to transfer inmates to prisons in other States."[88] Distin-

82. *See id*.

83. *See id.*

84. *See id*. at 494-95.

85. 461 U.S. 238 (1983). In this case, a Hawai'i prison inmate claimed that he was denied due process when he was transferred from Hawai'i to a state prison in California. Noting the prisoner's disruptive behavior, a one-man hearing committee recommended that the administrator transfer the prisoner to another facility. This recommendation was followed. Since there were no other maximum-security prisons in the state, the prisoner, who was serving a life sentence without parole for murder plus additional sentences for rape, robbery, and escape, was to be transferred out-of-state. *See id*.

86. *See id*. at 251.

87. *Id*. at 245.

88. *Id.* at 246.

guishing this case from *Vitek v. Jones*, the Court reasoned that "[c]onfinement in another state, unlike confinement in a mental institution, is 'within the normal limits or range of custody which the conviction has authorized the state to impose.'"[89]

With this significant and explicit support of out-of-state prison transfers, the Supreme Court had set the tone. In the cases that followed, prisoners sought to use the specific language in particular statutes to gain various procedural rights.[90] The Court put an end to these attempts in *Sandin v. Conner*,[91] in which it held that the Due Process Clause did not entitle a prisoner to procedural protections from administrative decisions that are within the range of confinement that can normally be expected for one serving a particular sentence.[92] In other words, the Court determined that a prisoner's liberty interests resulting from the Due Process Clause "will be generally limited to freedom from restraint, which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[93] Because the Court had already explicitly stated that it is reasonable to expect that prisoners may be transferred to another prison, including out-of-state prisons, *Sandin* further solidified judicial support of transfers.[94] Indeed, taken together, these cases allow prison administrators wide latitude in transferring prisoners to out-of-state prisons. As long as due process is provided, usually in the form of a classification hearing, prison administrators can transfer prisoners across state lines with little or no fear of being subject to judicial chastisement.

With the legal authority to utilize private out-of-state prisons, states began to increasingly turn to these facilities to provide the services they were unwilling to provide.[95] Alaska soon joined the ranks. While using the federal government's rationale as a model for addressing the constitutionality of private prisons is helpful, individual states cannot restrict the analysis to that of federal law. Indeed, because of our dual system of government, the issue of the constitutionality of private prisons does not stop at the parameters

89. *Id*. at 247 (quoting *Meachum*, 427 U.S. at 225).

90. *See, e.g.*, Hewitt v. Helms, 459 U.S. 460, 472 (noting that the state created a protected liberty interest for prisoners by the repeated use of explicitly mandatory statutory language).

91. 515 U.S. 472.

92. *See id*. at 487.

93. *Id*. at 484.

94. *See, e.g.*, Kharrat v. Ramirez, No. 98-16868, 1999 U.S. App. LEXIS 16241, at *2 (9th Cir. July 15, 1999) (interpreting *Sandin* as not requiring a due process hearing before transferring a federal prisoner).

95. *See* Wecht, *supra* note 26.

set by federal law alone. "[F]ederal constitutional law sets a floor, not a ceiling, for the provisions of rights .... [A] state is free to grant its citizens greater constitutional entitlements than they have under the federal Constitution."[96] Alaska does this with regard to rehabilitation. Indeed, Alaska's state constitution and statutes provide rights to the general public, including prison inmates, that are not offered in the United States Constitution or in federal statutes. Namely, the Alaska Constitution provides that "[c]riminal administration shall be based on the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and *the principle of reformation*."[97]

B. Alaska Law

Like the federal courts, the Alaska courts have also supported prison transfers. One of the most significant cases concerning Alaska prison transfers is *Dwyer v. State*.[98] In that case, the Alaska Supreme Court held that the Alaska Constitution does not preclude the transfer of Alaska prisoners to out-of-state federal prisons.[99] The court relied largely on 18 U.S.C. § 5003[100] which authorizes the Attorney General to contract with the states to house federal prisoners, and Alaska Statutes section 33.30.060,[101] which

96. 2 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 12.01 (Donald T. Kramer ed., 2d ed. 1993).

97. ALASKA CONST. art. I, § 12 (emphasis added).

98. 449 P.2d 282 (Alaska 1969). Here, inmate Dwyer was transferred from a prison in Alaska to a federal prison in California because of overcrowding in Alaska prisons. *See id.* at 282.

99. *See id*. at 284.

100. 18 U.S.C. § 5003(a) (1994) provides that if the director of the Bureaus of Prisons determines that adequate personnel and facilities are available, the Attorney General of the United States may contract with "the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory."

101. This statute was repealed in 1986. *See* 1986 Alaska Sess. Laws § 12 ch. 88. It read in pertinent part

> if the commissioner determines that suitable state prison facilities are not available, he may enter into an agreement with the proper authorities of the United States, another state, or a political subdivision of this state to provide for the safekeeping, care, subsistence, proper government, discipline and to provide programs for the reformation and rehabilitation and treatment of prisoners. Prison facilities made available to the commissioner by agreement may be in this state, or in any other state, territory, or possession of the United States.

(quoted in *Dwyer*, 449 P.2d at 282-83).

authorizes Alaska's Commissioner of Health and Welfare to enter similar contracts regarding Alaska prisoners.[102]

Like courts before it, the *Dwyer* court rejected the argument that these kinds of statutes constitute an improper delegation of power.[103] Essentially, proponents of the improper delegation of power argument maintain that the United States Constitution does not explicitly or implicitly delegate to Congress the power to confine state prisoners.[104] Consequently, they argue that statutes allowing for the transfer of state prisoners to federal facilities are unconstitutional.[105] Disagreeing with this rationale, the *Dwyer* court insisted that "under our dual form of government there may be a pooling of state and federal power for cooperative action, to the end that the public welfare of both state and nation may be simultaneously promoted, where both have a common concern, is now well settled."[106] Thus, the court unanimously agreed that incarceration of Alaska prisoners in out-of-state federal prisons was lawful.[107]

While *Dwyer* settled the question of the legality of transfers to public out-of-state prisons, important nuances concerning transfers remained unclear, and nearly a decade later the Alaska Supreme Court was still answering questions. Following *Dwyer*, Alaska law governing transfers from one prison to another was further developed in cases where prisoners sought to compel the Division of Corrections[108] ("DC") to modify sentences in accordance with recommendations by the sentencing court. In each of these cases, the modification sought was a transfer to the prison initially recommended by the sentencing judge.

Rust v. State[109] is one of the most important of these cases. In that case, the Alaska Supreme Court held that the DC is not obligated to comply with a sentencing court's recommendations concerning rehabilitation, and absent a compelling need, the sentencing court lacks authority to order the DC to incarcerate an inmate

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102. *See Dwyer*, 449 P.2d at 283.

103. *See, e.g.*, Rosenberg v. Carroll, 99 F.Supp. 630 (D.C.N.Y. 1951) (allowing the federal government and the state to transfer federal prisoners to state prisons); Duncan v. Ulmer, 191 A.2d 617 (Me. 1963) (upholding the transfer of a state prisoner in a federal facility).

104. *See Dwyer*, 449 P.2d at 283.

105. *See id*.

106. *Id*. (quoting Duncan v. Madigan, 278 F.2d 695, 696 (9th Cir. 1960)).

107. *See Dwyer*, 449 P.2d at 284.

108. The Division of Corrections was the predecessor to the Department of Corrections.

109. 582 P.2d 134 (Alaska 1978).

in a particular facility.[110] The sentencing court recommended that the defendant, Rust, be incarcerated in Anchorage because there he could improve his dyslexia, increase his vocational skills, and be closer to his family.[111] When Rust was then incarcerated in Juneau, he sought a transfer to Anchorage in accordance with the sentencing court's recommendation.[112] The supreme court, reasoning that the Alaska Legislature statutorily committed the power to control the correction system to the DC and not to the judiciary, affirmed the lower court's refusal to order a transfer on this basis.[113]

Significantly, the court's analysis of Rust's transfer did not end there. The court went on to hold that prisoners are entitled to necessary medical treatment if a health care provider determines that such treatment will substantially help.[114] In such instances, the right to treatment is fundamental and the judiciary has a duty to intervene in DC decisions that challenge this right.[115] Accordingly, the validity of Rust's transfer rested on whether his claims rose to the level of a *fundamental* right.[116] If, on remand, Rust showed that medical treatment would substantially help his medical condition of dyslexia, it would qualify as a fundamental right and Rust would prevail.[117]

While the *Rust* opinion acknowledged important rights for prisoners, the court was silent on whether any weight should be given to Rust's contention that incarceration in Anchorage would improve his vocational skills and would allow him to be closer to his family. The court was silent on these claims because it did not believe that Rust's case "present[ed] an appropriate vehicle for delineation of the contours of a prisoner's right to rehabilitation under either [a]rticle I, section 12 of the Alaska Constitution or [Alaska Statutes section] 33.30.020."[118] Instead, the court based its determination on the statute requiring provision of medical care and the Constitutional prohibition against cruel and unusual punishment.[119] Nonetheless, it would only be a matter of time before

110. *See id*. at 137-38.
111. *See id*. at 135.
112. *See id*. at 136.
113. *See id*. at 136-38.
114. *See id*. at 143.
115. *See id*.
116. *See id*. at 142-43 (stating that the essential test is one of medical necessity, not simply desirability).
117. *See id*. at 143-44.
118. *Id*. at 144 n.35. This statute was repealed in 1986. *See* Act of June 5, 1986, § 12, 1986 Alaska Sess. Laws ch. 88.
119. *See Rust*, 582 P.2d at 142-43.

the court would have to directly address claims that the distance between the prisoner and his family played a part in rehabilitation.

Another important case addressing sentence modification that has contributed greatly to the law on prison transfers is *Abraham v. State*.[120] Extending the holding of *Rust*, the Alaska Supreme Court held that judicial intervention with the DC's designation of a particular facility is also appropriate if the inmate shows that the original designation denied him rights to rehabilitation in violation of article I, section 12 of the Alaska Constitution.[121] Essentially, the inmate has to show that a transfer is necessary to his rehabilitation.[122] In his appeal, Abraham claimed that because of his addiction to alcohol, his language barrier, and his Native diet, a prison outside of Bethel would not possess the programs or environment needed to rehabilitate him.[123] According to the inmate, Bethel would suffice because of its large Native Alaskan population; there the prisoner would have the necessary communication skills to participate in rehabilitation programs.[124] Because Abraham had not received an evidentiary hearing to determine the validity of his claim that he had been denied rehabilitation, the case was remanded for such a determination.[125] This case had significant meaning in the context of transfers because it articulated the court's belief that prisoners may be transferred if the current facility cannot accommodate their rehabilitative needs.[126]

Finally, *LaBarbera v. State*[127] helped to shape Alaska law governing prison transfers by addressing the issue of how courts should handle a request to modify a sentence. In that case, the Alaska Supreme Court, refusing to allow a prisoner to be transferred to a therapeutic community correction house in order to complete a rehabilitation program, elaborated on its holdings in *Rust* and *Abraham*.[128] The court explained that, although prisoners have a right to rehabilitation under article I, section 12 of the Alaska Constitution, courts cannot, at the time of sentencing, designate a particular prison or program for the prisoner.[129] To the contrary, "it is only after a demonstrated failure to provide an appropriate rehabilita-

120. 585 P.2d 526 (Alaska 1978).
121. *See id*. at 533.
122. *See id*.
123. *See id*. at 528.
124. *See id*.
125. *See id*. at 534.
126. *See id.* at 533-34.
127. 598 P.2d 947 (Alaska 1979).
128. *See id*. at 949.
129. *See id*.

tion program that judicial intervention is proper."[130] Thus, to be transferred, a prisoner must successfully sue the DC in a civil action by demonstrating that the DC's designation denied the prisoner's right to rehabilitation.[131]

IV. *BRANDON V. STATE DEPARTMENT OF CORRECTIONS*

Brandon v. State Department of Corrections[132] serves as the most recent development of Alaska law governing prison transfers. In *Brandon*, the Alaska Supreme Court held that because Alaska law creates a fundamental right to rehabilitation, a superior court may hear appeals from administrative hearings to transfer prisoners to out-of-state facilities.[133] In justifying its position, the court pointed to *Owen v. Matsumoto*,[134] where it was held that "[a]ny alleged violation of fundamental constitutional rights must be afforded judicial review."[135] The court further explained its contribution to prisoner rights by recognizing that the Alaska Constitution creates a fundamental right to rehabilitation,[136] noting that Alaska Statutes section 33.30.061 prevents out-of-state transfers that substantially impair a prisoner's rehabilitation or treatment.[137] Justifying the need to protect prisoners from unrestricted transfers, the court noted that "[v]isiting is the most direct link for an inmate with the world left behind. Indeed, visiting is indispensable to any realistic program of rehabilitation."[138]

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130. *Id*. *See also* State v. Hiser, 924 P.2d 1024, 1025 (Alaska Ct. App. 1996) (explaining that according to *Rust* and *LaBarbera*

> a sentencing court has no power to issue a criminal judgment that dictates the particulars of a prisoner's care and/or treatment. These matters are entrusted in the first instance to the discretion of the Department of Corrections. If a prisoner believes that the Department has abused that discretion, he or she can bring suit against the Department to correct the situation. But the superior court has no authority to tell the Department in advance how it shall care for its sentenced prisoners).

131. LaBarbera lost his appeal. The court considered his desired transfer to a therapeutic community house too lenient of a punishment. Granting LaBarbera the transfer would have effectively reduced his fifteen-year sentence for manslaughter and robbery to a five-year sentence. *See LaBarbera,* 598 P.2d at 947.

132. 938 P.2d 1029 (Alaska 1997).

133. *See id.* at 1033.

134. 859 P.2d 1308 (Alaska 1993).

135. *Brandon*, 938 P.2d at 1031 (quoting *Owen*, 859 P.2d at 1310).

136. *See id.* at 1032.

137. *See id*.

138. *Id*. at 1032 n.2 (quoting MUSHLIN, *supra* note 96, §12.00).

The court's holding relied upon its determination that classification hearings[139] are properly categorized as adjudicative proceedings, and as such, are subject to judicial review.[140] Indeed, this was the first time that an Alaska court explicitly regarded classification hearings as adjudicative proceedings. The court reasoned that "classification hearing[s] [contain] many of the qualities of an adjudication."[141] For example, the court noted that not only are prisoners entitled to proper notice before a classification hearing, but they are also permitted to present evidence before classification committees.[142] Moreover, pursuant to Alaska Statutes section 33.30.061(b), the classification committee must consider whether or not the transfer will significantly impair the prisoner's rehabilitation.[143] Thus, for all practical purposes, the court determined that classification hearings may be considered adjudicative hearings.[144] Furthermore, the court determined that a reviewable record is produced at every classification hearing, because these hearings are tape recorded, transcribed, and contain a written statement by the finder of fact as to the evidence relied upon and the reasons for the decision (pursuant to the Alaska Administrative Code title 22, section 05.216).[145] This "reviewable record" provides teeth to what could otherwise merely be a nominal contribution to prisoner rights. As a consequence, DOC decisions to transfer prisoners are

139. As the name suggests, a classification hearing is an administrative process used to designate the facility where the prisoner will serve time. During a classification hearing, the prisoner's due process rights do not extend past the "expectation of fair and impartial allocation of the resources of the prison system." McGinnis v. Stevens, 543 P.2d 1221, 1237 (Alaska 1975).

140. It is unclear from the court's opinion whether the review must be granted before or after the prisoner is transferred out-of-state. Because most criminals are required to undergo punishment while they await appeal, it is plausible that the prisoner would be shipped to Arizona before his appeal is determined.

141. *Brandon*, 938 P.2d at 1033. The court previously listed qualities of adjudication to include

> adequate notice to persons to be bound by the adjudication, the parties' rights to present and rebut evidence and argument, a formulation of issues of law and fact in terms of specific parties and specific transactions, a rule of finality specifying the point in the proceeding when presentations end and a final decision is rendered, and any other procedural elements necessary for a conclusive determination of the matter in question.

Id. at 1032 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 83(2) (1982)).

142. *See id*. at 1033.

143. *See id*.

144. *See id*.

145. *See id*.

not only subject to judicial review, but the records produced in these hearings make it feasible to do so properly.[146]

V. HOUSING ALASKA PRISONERS OUT-OF-STATE INFRINGES UPON THEIR RIGHT TO REHABILITATION

Experts across the social sciences agree that visitation is the most important component of rehabilitation.[147] Visitation plays such a key role because it prevents prisoners from being "socialized to the life of an inmate [and helps transform them into] individuals who have the necessary skills and emotional stability to face up to their responsibilities as citizens, parents and spouses."[148] Moreover, when prisoners are able to maintain contact with family members during incarceration, they are more likely to sustain their relationships after their release.[149] Inmates who have families to support them upon release are less likely to return to a life of crime.[150] "Preservation of the family unit is important to the reintegration of the confined person and decreases the possibility of recidivism upon release."[151] Not surprisingly, studies also show that tensions are less intense within prisons where inmates receive regular visits.[152]

In *Brandon*, even the Alaska Supreme Court acknowledged that visitation plays an indispensable role in any realistic rehabilita-

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146. *See id*.

147. *See, e.g.*, MUSHLIN, *supra* note 96, § 12.00 n.3 (noting that "[t]here is little, if any, disagreement that the opportunity to be visited by friends and relatives is more beneficial to the confined person than any other form of communication.") (citation omitted). *See also* Brandon v. State Dep't of Corr., 938 P.2d 1029, 1032 n.2 (Alaska 1997) (noting that "[v]irtually every statement on visitation by prison officials . . . and every major textbook on corrections stresses the critical nature of visitation both in terms of the reduction of tension inside the prison and the facilitation of the ultimate rehabilitation of the prisoner by strengthening his ties with the 'free world.'") (citation omitted).

148. Justin Brooks & Kimberly Bahna, "*It's a Family Affair" – The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 277 (1994).

149. *See id*. at 276-77.

150. *See id*. at 285. It is important to note that the positive influence of visitations may not be unidirectional; access to a parent, even if that parent is incarcerated, may serve as a positive influence on the children of inmates and mitigate future risks that these children will likewise engage in criminal conduct and thereby threaten public safety. *See id.* at 272, 276.

151. Kentucky Dep't of Corr. v. Thompson, 490 U.S. 454, 468 (1989) (Marshall, J., dissenting) (quoting MODEL SENTENCING & CORRECTIONS ACT § 4-115 cmt. (1979)).

152. *See Brandon*, 938 P.2d at 1032 n.2.

tive effort.[153] In reference to the social science research findings, the *Brandon* court noted that

> [n]o single factor has been proven to be more directly correlated with the objective of a crime-free return to society than visiting. The reason for this is almost too obvious to state: "Strained ties with family and friends increase the difficulty of making the eventual transition back to the community." If those ties are to be preserved, visiting is imperative.[154]

Despite recognition of this overwhelming evidence, the court shied away from declaring that visitation is indispensable to rehabilitation. Instead, the court noted that "[o]ur recognition that visitation privileges are a component of the constitutional right to rehabilitation does not define their required scope or the permissible limits on their exercise."[155] The scope and limitation of prisoners' rights will have to be defined in further adjudications. By including this statement, the court diminished the importance of this case as a powerful statement of prisoners' rights.

Given the *Brandon* court's recognition that visitation is an indispensable aspect of rehabilitation, its allowance for judicial review of a prison administration's decision to transfer an inmate hundreds of miles away to a private Arizona facility falls far short of protecting the prisoner's fundamental rights.[156] Since rehabilitation is a fundamental right under Alaska law, the virtual elimination of visitation is unjustifiable, with or without judicial review. This is particularly unjustifiable when the out-of-state transfers are motivated strictly on financial factors.[157] Unless the preservation of Alaskans' fundamental rights is considered contingent upon the health of the state's budget, transferring prisoners like Brandon is improper, even with due process and judicial review.

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153. *See id*.

154. *Id*. (quoting MUSHLIN, *supra* note 96, §12.00).

155. *Id*.

156. Cultural differences experienced by Alaskans in Arizona prisons arguably may impede rehabilitation. Although Alaska prisoners may share the same national citizenship as the remaining American prison population, for some Alaskans (those facing striking differences in language, social, religious, and other cultural values) the similarities to other prisoners may end there. This may have a dramatic negative impact on adaptation to prison life and subsequent effective use of rehabilitation programs (e.g., work training) that the prisons may offer. *See generally* MICHAL PLACHTA, TRANSFER OF PRISONERS UNDER INTERNATIONAL INSTRUMENTS AND DOMESTIC LEGISLATION 68-73 (1993) (discussing the difficulties "foreigners" face compared to other prisoners).

157. The primary reason given for housing Alaska prisoners in out of state private facilities is that it is cheaper and more expedient than building prisons in Alaska.

Even when combined with current statutory provisions, *Brandon* still fails to protect prisoners' rights adequately. Upon first glance, it appears that *Brandon's* allowance for judicial review of classification hearings, coupled with the prohibition by Alaska Statutes section 33.30.061 against transfers that substantially impair rehabilitation, is sufficient to protect prisoners' right to rehabilitation.[158] However, since it has been established that visitation is a key element to rehabilitation, transfers to out-of-state private prisons substantially interfere with a crucial aspect of rehabilitation in *virtually all cases*. This is especially true if prisoners lack the resources to fund family visits to Arizona or any other state outside Alaska. Even where an inmate does not receive visitors on a regular basis, incarceration in Alaska remains key: if visiting the incarcerated in Alaska is not a simple undertaking, even on an infrequent basis, it is surely far more difficult to visit an inmate incarcerated in a prison located in a distant state.

The key role visitation plays in rehabilitation is a major issue that *Brandon* hints at but fails to follow through to its logical conclusion. Rather than mandating a per se rule which would prohibit out-of-state prison transfers, the court only went so far as to permit judicial review of such transfer decisions. This inefficient result requires each prisoner to seek judicial review every time the commissioner orders an out-of-state transfer, or to have prisoners bring civil claims alleging an infringement on rehabilitation due to the lack of visitation *when the Alaska Supreme Court has already accepted that visitation is indispensable to rehabilitation*. If visitation is indispensable to rehabilitation, it seems logical to prohibit out-of-state transfers, preventing the de facto elimination of prisoners' visitation rights.

VI. CONCLUSION

As the Alaska Constitution states, prisoners have a fundamental right to rehabilitation. Visitation is one of the most important elements to rehabilitation. Transfers to private out-of-state prisons substantially impair visitation, thus impairing rehabilitation. Accordingly, such transfers violate Alaska's Constitution. *Brandon's* recognition that administrative decisions on prison transfers are subject to judicial review is a critical step in the right direction.

158. *See supra* note 11 and accompanying text. The statute provides in pertinent part that "[t]he commissioner may designate an out-of-state facility under this section only if the commissioner determines that rehabilitation or treatment of the prisoner will not be substantially impaired." ALASKA STAT. § 33.30.061(b) (LEXIS 1998).

Further steps need to be taken in order to safeguard the constitutional rights of Alaska prisoners.

Shymeka L. Hunter