THE UNIQUE PROMISE OF THE ALASKA CONSTITUTION: THE RIGHT TO REHABILITATION

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ABSTRACT

The Alaska Constitution creates a unique promise for those convicted of crimes. In Abraham v. State*, the Alaska Supreme Court held that article I, § 12 grants offenders a "right to rehabilitation." Such a right is uncommon; few states, if they have similar protections at all, have labeled it a right. In the years since Abraham, the Court has occasionally addressed claims invoking the right, making clear that its decision was not an aberration. The court's most thorough examination of the right occurred this term in* Department of Corrections v. Stefano*. This article seeks to examine and clarify the current doctrine before arguing that litigants and the Court should continue developing the right to rehabilitation. What's certain is that the right places due process limitations on the state's ability to terminate an offender's participation in formal rehabilitative programming or deprive an inmate of a benefit without providing a comparable rehabilitative alternative. But I argue that litigants should seek broader application of the right in other areas of the criminal justice system.*

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I. INTRODUCTION

In 1976, Mickey Abraham entered a plea of nolo contendere to a charge of manslaughter for drunkenly beating his wife to death.[1] The sentencing judge imposed a five-year term of incarceration, with four years suspended and a requirement that he refrain from consuming alcohol during his probation.[2] A resident of Bethel who only spoke the Yupik language, Abraham argued in an appeal to correct his sentence that being incarcerated away from his hometown, in a setting where he could not communicate with correctional staff or other inmates, amounted to cruel and unusual punishment and a deprivation of his right to rehabilitation under article I, § 12 of the Alaska Constitution.[3] He claimed that the language barrier would effectively prevent him from receiving treatment for his alcohol dependency.[4]

The Alaska Supreme Court rejected Abraham's contention that the conditions of his imprisonment amounted to cruel and unusual punishment, noting that communication issues with prison staff could be overcome and that being imprisoned outside of Bethel was not excessively punitive.[5] Remarkably, however, the court did hold that Abraham had a constitutional right to rehabilitative treatment, particularly treatment for his alcoholism, and remanded the case for an evidentiary hearing so that the superior court could take the steps necessary to make the "right a reality and not simply something to which lip service is being paid."[6] Even the dissent did not dispute the existence of this seemingly new-found right.[7]

In countenancing Abraham's claim to rehabilitation, the court recognized that the Alaska Constitution contains a unique promise. Article I, § 12 specifies that "[c]riminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution

1. Abraham v. State, 585 P.2d 526, 527 (Alaska 1978).

2. *Id.* The State had earlier appealed this sentence to the Alaska Supreme Court, arguing it was too lenient. However, Alaska law at the time only permitted the supreme court to increase a sentence on appeal if the defendant had also appealed the sentence. *Id.* at n.1. Abraham's action here was merely a motion to correct his sentence. *Id.* at 528.

3. *Id.* at 528.

4. *Id.*

5. *Id.* at 533. In discussing the claims of people convicted of crimes, this Note focuses exclusively on those grounded in article I, § 12 of the Alaska Constitution's "principle of reformation" and not any other legal claims a particular offender may have.

6. *Id.*

7. *See id.* at 534 (Matthews, J., dissenting) (arguing that there was insufficient time remaining in Abraham's sentence for the majority's approach to work).

from the offender, and the principle of reformation."[8] It is that last phrase—the principle of reformation—on which the court has based the "right to rehabilitation," and it has sparked much litigation since, with the Alaska high court reaffirming its vitality in 2022 in *Department of Corrections v. Stefano*.[9]

The promise of rehabilitation matters—Alaska's criminal justice system faces grave challenges. As other states were reducing their prison populations during the COVID-19 pandemic, Alaska was the only state to *increase* its prison population.[10] In the state's largest prison, Goose Creek Correctional Center near Wasilla, nearly every inmate contracted COVID-19.[11] In recent years, the state's recidivism rate has been the highest in the country,[12] and the state now spends more on its prisons than its university system.[13] According to a 2011 report, eighty-six percent of the Department of Corrections population may have a substance abuse problem.[14] A legal theory grounded in rehabilitation could aid litigants and courts seeking to ensure offenders reenter society successfully.

In this note, I begin by reviewing the origins of this "right to rehabilitation"[15] in the Alaska Constitution, before surveying the current

8. ALASKA CONST. art I, § 12.

9. *See* Dep't of Corr. v. Stefano, 516 P.3d 486, 493–94 (Alaska 2022) (explaining the scope of the right to rehabilitation).

10. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 302776, PRISONERS IN 2020 – STATISTICAL TABLES 1 (2021) (noting that while the national prison population decreased by fifteen percent, Alaska's increased by two percent).

11. Tess Williams, *Nearly Every Inmate in Alaska's Largest Prison Has Now had COVID-19, Officials Say*, ANCHORAGE DAILY NEWS (Dec. 29, 2020), https://www.adn.com/alaska-news/2020/12/29/nearly-every-inmate-in-alaskas-largest-prison-has-now-had-covid-19-officials-say/. According to the Department of Corrections, there have been six COVID-related deaths. Megan Pacer, *Inmate who Died Friday is Sixth COVID-19 Related Death Among Alaska Prisoners*, ALASKA'S NEWS SOURCE (Oct. 11, 2021), https://www.alaskasnewssource.com/2021/10/11/inmate-who-died-friday-is-sixth-covid-19-related-death-among-alaska-prisoners/.

12. Val Van Brocklin, *A Modest Step Toward Getting 'Smart on Crime' in Alaska*, ANCHORAGE DAILY NEWS (Apr. 18, 2021), https://www.adn.com/opinions/2021/04/16/a-modest-step-toward-getting-smart-on-crime/.

13. James Brooks, *Alaska Now Spends More on Prisons than its University System, and the Gap Is Widening*, ANCHORAGE DAILY NEWS (Mar. 7, 2021), https://www.adn.com/politics/alaska-legislature/2021/03/07/alaska-now-spends-more-on-prisons-than-its-university-system-and-the-gap-is-widening.

14. STEVEN B. KING, ALASKA DEP'T OF CORR., *Alaska Department of Corrections Substance Abuse Treatment Services Status Report* 2 (2011).

15. I use the terms rehabilitation and reformation interchangeably. In *Abraham*, the Alaska Supreme Court interpreted the Constitution's "principle of reformation" as creating a "right to rehabilitation," but it has since used both terms, and they appear to have the same meaning. The *Abraham* court used both. *See Abraham*, 585 P.2d at 530. Reformation, the *Stefano* court explained, "relates to something being done to rehabilitate the offender into a noncriminal member of

contours of the right. Next, I examine two other states with similar constitutional provisions, comparing their relatively undeveloped rights with Alaska's right. Finally, I argue that the court should be clearer about the circumstances where the right applies, and I offer jurisprudential tests for assessing violations in several situations.

II. HISTORY OF THE CONSTITUTIONAL PROVISION AND ITS INTERPRETATION

Cases discussing the right to rehabilitation frequently give short shrift to its origin story. In this Part, I attempt to fill that gap by surveying the history of the right to rehabilitation, starting with the debates about Alaska's criminal justice system during the state's constitutional convention and continuing with the court cases that firmly established its existence. I then examine its evolution over the decades and its continued vitality even after a constitutional amendment modified the constitutional provision's text.

A. The History of the Right

As the host of Alaska's constitutional convention, Fairbanks was the place to be in the winter of 1955 and 1956. There, fifty-five delegates from across the territory and from many walks of life gathered to chart the future state's central document.[16] Commentators have noted that many delegates were deeply influenced by reform-minded approaches to law burgeoning during the mid-twentieth century.[17] The delegates were divided into committees, and each began work drafting a portion of the Constitution.[18]

One committee focused on the Preamble and Bill of Rights.[19] An early draft of its proposal included the sentence, "The administration of criminal justice shall be founded on principles of reformation, and not vindictiveness."[20] According to Delegate James Doogan of Fairbanks, this language, which ultimately became section 12, was deeply influenced by

society." *Stefano*, 516 P.3d at 494 (Alaska 2022) (quoting *Abraham*, 585 P.2d at 531).

16. Thomas Metzloff, *Preparing the Way: Tom Stewart's Recollections on the Alaska State Constitutional Convention*, 35 ALASKA L. REV. 289, 296 (2018).

17. G. Alan Tarr, *Of Time, Place, and the Alaska Constitution*, 35 ALASKA L. REV. 155, 171 (2018).

18. *Id.* at 301.

19. Alaska Const. Convention Comm. on Style and Drafting, Comm. Proposal 7, at 4 (Jan. 25, 1956), https://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Folder%20310.7.pdf.

20. *Id.*

a similar provision in Indiana's Constitution.[21] He said the committee's view was that the reformation portion of the text only applied "after a person had received [a] sentence," that it was "more or less advisory or instructive to penal institutions," and that they should prioritize rehabilitation rather than "lock[ing] [prisoners] up on bread and water and forget[ting] about them."[22]

The committee's draft text made its way to the floor of the convention, and during one exchange,[23] Delegate Ralph Rivers of Fairbanks successfully moved to amend the text to remove the language forbidding vindictiveness.[24] Concerned that harsh behavior by district attorneys could not be "legislate[d] away," he proposed that the provision read, "the administration of criminal justice shall be founded upon the principle of reformation as well as upon the need for protecting the public."[25] Speaking in support of the amendment, Delegate Mildred Hermann of Juneau argued that the chief aim of criminal justice should be protecting the public before adding that it was "high time that some state constitution had in it some mention of the need of reformation of people who seem criminally inclined rather than the need of constantly stressing punishment for them."[26] Rivers' amendment prompted another delegate to inquire of the drafting committee whether the language about reformation was intended to preclude capital punishment. Delegate Dorothy Awes of Anchorage responded that she had heard similar objections at the committee level but that the language appeared in several other state constitutions and their respective supreme courts had held that it did not abolish the death penalty.[27] With little other debate,

21. Alaska Const. Convention, Forty-Fourth Day, at 1309 (Jan. 5, 1956), https://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Day%2044%20-%20January%2005%201956%20-%20Pages%201218-1320.pdf. Indiana's Constitution states, "The penal code shall be founded on the principles of reformation, and not of vindictive justice." IND. CONST. art. I, § 18.

22. Alaska Const. Convention, Forty-Fourth Day, at 1309 (Jan. 5, 1956), https://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Day%2044%20-%20January%2005%201956%20-%20Pages%201218-1320.pdf.

23. Many of the committees that did the initial drafting work did not keep detailed records or transcripts, resulting in a dearth of materials for judges seeking to interpret the framers' intent. Metzloff, *supra* note 16 at 303.

24. Alaska Const. Convention, Forty-Fourth Day, at 1309 (Jan. 5, 1956), https://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Day%2044%20-%20January%2005%201956%20-%20Pages%201218-1320.pdf.

25. *Id.*

26. *Id.* at 1310.

27. *Id.* at 1309. As it happened, the territorial legislature would ban the death penalty in 1957, two years before Alaska became a state. Melissa S. Green, *The*

the language was adopted by the full body,[28] and the Constitution was ultimately ratified by voters on April 24, 1956.[29] This appears to be the extent of the ratification history available about this provision.

About two decades later, Alaska's courts began to grapple with what this provision meant. In *Rust v. State*,[30] a case decided shortly before *Abraham*, a prisoner asked the court to order services for his dyslexia and vocational training, alleging a violation of his "right to treatment."[31] After surveying federal court precedents interpreting the Eighth Amendment, the court ultimately made a statutory holding that Alaska law provided prisoners a right to psychological or psychiatric care should a health care provider conclude it would be useful.[32] It explicitly left for a future case whether prisoners would have a constitutional claim to rehabilitative services.[33]

That case would come soon thereafter in *Abraham v. State*.[34] Evaluating Mickey Abraham's claims relating to alcohol treatment and being housed in a facility far from his home community, the court held that he had an enforceable right to rehabilitation. In support, the court noted that its holding in *State v. Chaney*,[35] concerning the criteria courts should use during sentencing, had been based on the reformation provision in the Alaska Constitution. Writing for the court, Justice John Dimond read the provision's "protection of the public" clause broadly, arguing that the public would benefit from rehabilitation of inmates.[36] "True, society will benefit from this," he wrote. "But so will the offender since, to the extent that he is rehabilitated into a law-abiding person, his inherent dignity as a human being will be enhanced."[37] Bolstering his claim that the constitutional language creates an individual guarantee

Death Penalty in Alaska, 25 ALASKA JUST. F., Winter 2009, at 11, 11; Sharon Chamard et al., *Capital Punishment 2007 and 2008*, 25 ALASKA JUST. F., Winter 2009, at 4, 4.

28. Alaska Const. Convention, Forty-Fourth Day, at 1310 (Jan. 5, 1956), https://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Day%2044%20-%20January%2005%201956%20-%20Pages%201218-1320.pdf.

29. *The Constitution of the State of Alaska*, OFF. OF THE LIEUTENANT GOVERNOR, https://ltgov.alaska.gov/information/alaskas-constitution/ (last visited Apr. 27, 2023).

30. Rust v. State, 582 P.2d 134, 134 (Alaska 1978).

31. *Id.* at 138.

32. *Id.* at 143.

33. *Id.* at 144 n.35 ("We have determined that the case at bar does not present an appropriate vehicle for delineation of the contours of a prisoner's right to rehabilitation under [] Article I, section 12 of the Alaska Constitution . . . .").

34. *See* Abraham v. State, 585 P.2d 526, 527 (Alaska 1978) (recognizing a constitutional right to rehabilitation).

35. State v. Chaney, 477 P.2d 441, 443 (Alaska 1970), discussed *infra* at pp. 21.

36. See *Abraham*, 585 P.2d at 531.

37. *Id.*

rather than merely serving as a statement of principle, Justice Dimond noted that it is placed within article I, the "Declaration of Rights" section of the Constitution.[38] Ultimately, the court remanded Abraham's specific allegations about the adequacy of the substance abuse treatment programming to the superior court for an evidentiary hearing.[39]

Abraham represented a significant move. The court could have easily adopted a less expansive interpretation of the right based on the records of the constitutional convention. After all, a delegate had commented that the drafting committee viewed the language as "more or less advisory" for penal institutions.[40] Yet the court declined to do so and instead found that it created an individual right.

B. The Right's Evolution Over Time

Subsequent decisions discussing rehabilitation rarely question the existence of an enforceable right grounded in article I, § 12. However, as Part IV will examine, the court has frequently declined to hold the right applicable to the circumstances before it. And some jurists have expressed discontent with the court's framing of the right. For instance, Justice Jay Rabinowitz advocated for a narrower reading of *Abraham* while dissenting in part from a 1997 court decision incorporating prisoner visitation into the right. Under his interpretation, the right would only provide an enforceable interest "in the context of institutional programs designed to rehabilitate the inmate."[41]

38. *Id.*

39. *Id.* at 532–34. It is likely that broader concerns about alcohol abuse and its connection to crime partially motivated the court. The court recognized that the legislature had recently made more resources available for treatment but noted that sixty-four percent of all homicides and forty-one percent of aggravated assaults were connected to alcohol in some way. Alcohol's larger impact was evident in misdemeanors, however, which meant that it played a role in nearly forty percent of all arrests. The court calculated that the cost of alcohol crime to the criminal justice system was more than $15 million annually, not including the cost to victims or economic losses. *Id.* at 532 n.19.

40. Alaska Const. Convention, Forty-Fourth Day, at 1309 (Jan. 5., 1956), https://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Day%2044%20-%20January%2005%201956%20-%20Pages%201218-1320.pdf. However, I do not think such a method of constitutional reasoning, based on evidence of the framers' original intentions, would necessarily have been wise. As mentioned, little convention history discusses the framers' views of the provision's effect (though there may have been an unspoken consensus that it did not abolish the death penalty). Many may have believed the text spoke for itself, creating an enforceable right. Lacking further evidence, Justice Dimond's use of arguments based on the Constitution's text and structure puts his reasoning on stronger footing.

41. Brandon v. State, 938 P.2d 1029, 1043 (Alaska 1997) (Rabinowitz, J., dissenting in part).

In a similar vein, Judge James Singleton (then on the court of appeals),[42] rejected a challenge to the state's presumptive sentencing scheme that invoked the right to rehabilitation. In his concurrence, he noted the provision's framers had drawn heavily from Indiana's Constitution.[43] If the "principle of reformation" language did not end capital punishment there, it could not be said to strike down a less severe punishment (that promotes the protection the public through deterrence) like a presumptive sentencing scheme, as unconstitutional.[44] Although he did not contest the existence of a right, his concurrence suggested the legislature's creation of a system of three-judge panels to review sentences in extraordinary circumstances[45] provided a sufficient "safety valve" for rehabilitation.[46] Despite these jurists' slight dissatisfaction with how the court had framed the right, neither questioned whether there was one.

The right's clearest test came in 1994, when legislators proposed, and voters overwhelmingly adopted,[47] a victims' rights amendment to the Constitution.[48] The amendment added a new section to article I that provided crime victims with, among other things, a right to participate in sentencing proceedings, a right to be reasonably protected from the accused, and a right to confer with prosecutors.[49] However, the amendment also wrought changes to article I, § 12, most notably by adding three new goals for the criminal justice system beyond protecting the public and the "principle of reformation." These were community condemnation of the offender, the rights of victims of crimes, and restitution from the offender.[50] Reformation would now be listed last among the goals.[51]

As initially proposed, the amendment would have required each

42. Singleton is now a senior judge on the United States District Court for the District of Alaska. Judge's Info, UNITED STATES DIST. CT. FOR THE DIST. OF ALASKA, https://www.akd.uscourts.gov/judges-info (last visited Apr. 27, 2023).

43. Koteles v. State, 660 P.2d 1199, 1201–02 (Alaska Ct. App. 1983) (Singleton, J., concurring).

44. *Id.*

45. *See* ALASKA STAT. § 12.55.165 (2021) (specifying conditions for the use of three-judge panels). However, the law forbids sentencing courts from referring a defendant to a three-judge panel based on their potential for rehabilitation if the court has found certain aggravating factors. *Id.*

46. *Koteles*, 660 P.2d at 1202 (Singleton, J., concurring).

47. The measure passed with 86.6 percent voting in favor. *1994 General Election Official Results*, ALASKA DIV. OF ELECTIONS, https://www.elections.alaska.gov/Core/Archive/94GENR/result94.php (last visited Apr. 27, 2023).

48. *Id.*

49. *See* ALASKA CONST. art. I, § 24.

50. *Id.* at § 12.

51. *Id.*

goal to be considered by a sentencing court in the order listed, but this requirement was removed before final passage.[52] Proponents of the amendment stated that they supported giving the goals besides rehabilitation equal, if not greater, weight in the criminal justice system.[53] Representative John Davies, a Democrat from Fairbanks, was one of the few voices opposed to the amendment, though he said he supported its underlying goal of aiding victims.[54] His opposition rested on a concern that the modifications to § 12 would dilute the Constitution's support for rehabilitation and justify capital punishment because of its use of the phrase "condemnation of the offender."[55]

One might hypothesize that the amendment's passage would prompt the Alaska Supreme Court to revisit its cases treating rehabilitation as a right, but as will be discussed in the next several sections, this has not proven to be the case.[56] On numerous occasions, the court has re-stated the constitutional guarantee. In an important decision during the late 1990s, the court removed an initiative from the ballot that would have restricted the rights of prisoners to those guaranteed by the federal Constitution, thus protecting the existence of a right to rehabilitation grounded in state law.[57] The court held that the proposal was a constitutional revision beyond what the initiative process could permissibly accomplish.[58] And in 2013, the supreme court, while denying an offender's claim that the Department of Corrections' rejection of his furlough violated his due process rights under the Constitution, summarized the court's view on the status of the right to rehabilitation:

We have 'interpreted the due process guarantee under the Alaska Constitution more broadly than the United States Supreme Court has interpreted the identical provision of the United States Constitution.' For example, article 1, section 12 of the Alaska Constitution gives rise to a constitutional right to rehabilitation affecting the due process analysis of a prisoner's liberty interests . . .[59]

52. H.R.J. Res. 43, 18th Leg., 2nd Sess., at 4304 (Alaska 1994).

53. *See* Minutes of Joint Senate and House Judiciary Committee, Nov. 16, 1993 (Statement of Rep. Porter).

54. Liz Ruskin, *Campaign 94 Notebook Davies a Lonely Voice on Victims' Rights*, ANCHORAGE DAILY NEWS, Nov. 1, 1994, at B1. Davies said he was the only person the Division of Elections could find to write an opposition statement concerning the ballot measure for the official election pamphlet, a fact his opponent used against him during the campaign. *Id.*

55. *Id.*

56. For a discussion of victims' rights in Alaska, see Richard Allen, *Is the Office Closed? The Role of the Office of Victims' Rights After* Cooper v. District Court, 24 ALASKA L. REV. 263 (2007).

57. *See* Bess v. Ulmer, 985 P.2d 979, 981–82 (Alaska 1999).

58. *Id.* at 987–88.

59. Hertz v. Macomber, 297 P.3d 150, 157 (Alaska 2013) (quoting James v.

Recently, the court has again affirmed the existence and continued vitality of the right as it addressed a claim that the termination of a prisoner's electronic monitoring privileges was reviewable in the superior court as a constitutional issue.[60]

III. APPLYING THE "PRINCIPLE OF REFORMATION"

Litigants have invoked article I, § 12's "principle of reformation" in three primary areas of the criminal justice system: prison conditions, sentencing, and probation and parole decisions. The principle of reformation operates differently in each, providing more robust protections in some areas than others. For instance, in some contexts, the court has used the language of a "right to rehabilitation" even though the concept seems to be operating more as a background principle influencing a case. But in others—especially prison conditions litigation—it seems to provide more specific protections. In this Part, I survey the case law, providing a theory for how the right to rehabilitation functions—or doesn't—in each portion of the post-conviction criminal justice system.

A. Prison Conditions

Prisons and jails in Alaska are a site where rehabilitation is supposed to occur, and, therefore, they must be places where it can *successfully* occur.[61] Indeed, much of what we know about Alaska's right to rehabilitation comes from litigation over prison conditions. In this Section, I discuss the procedural requirements for bringing a rehabilitation claim in the prison context before addressing the leading case clarifying the doctrine and other cases that shed light on its bounds.

In Alaska, the Department of Corrections (DOC) maintains primary authority over the terms of a prisoner's incarceration. A claim invoking the right to rehabilitation to contest the conditions of an incarceration must be brought as a separate civil action, not during the sentencing

Dep't of Corr., 260 P.3d 1046, 1051 (Alaska 2011)). The court noted that the right to rehabilitation does not create a right to furlough "for all prisoners." *Id.*

60. *See* Dep't of Corr. v. Stefano, 516 P.3d 486, 491, 493 (Alaska 2022) (discussing the right to rehabilitation).

61. In the 1980s, prison administration in Alaska underwent major changes as the result of the settlement of a class action lawsuit filed on behalf of prisoners alleging violations of their right to be free from cruel and unusual punishment under art. I, § 12 of the Alaska Constitution.

For a discussion of this landmark litigation, see Bradford J. Tribble, *Prison Overcrowding in Alaska: A Legislative Response to the* Cleary *Settlement*, 8 ALASKA L. REV. 155 (1991).

phase.[62] As one example of this procedural hurdle in action, consider *LaBarbera v. State*.[63] There, the court held that a sentencing court does not have the authority to structure the particulars of how a term of incarceration is carried out.[64] Rejecting LaBarbera's request that the trial court modify his sentence so that he could be released to a therapeutic program after completing three years of a fifteen-year sentence, the court said that only when a prisoner challenges the conditions of their sentence for "a demonstrated failure to provide an appropriate rehabilitation program" should the judiciary intervene.[65] In essence, the DOC gets the first chance to make services available to an offender. If it fails do to so, the offender can then sue in superior court.[66]

Prisoners have filed numerous civil actions challenging various aspects of their detention with varying degrees of success. In response, the court has issued several important decisions about the right to rehabilitation in prisons and jails. The most recent case, handed down in 2022, is *Department of Corrections v. Stefano*.[67] In that case, the court considered whether an inmate's removal from "electronic monitoring and return to prison implicates the right to rehabilitation."[68] Surveying its cases, the court distilled several rules:

First, a prisoner "has a protected interest in continued participation in formal rehabilitative programs."[69] These programs are those that attempt to address the "antisocial conduct" that led to the criminal behavior.[70] Terminating an inmate's participation requires procedural protections.[71]

62. Abraham v. State, 585 P.2d 526, 531–34 (Alaska 1978); *see also* State v. Lundy, 188 P.3d 692, 694 (Alaska Ct. App. 2008) ("We agree with the State that the superior court lacked subject matter jurisdiction to decide this issue as part of its sentencing order in a criminal case.").

63. LaBarbera v. State, 598 P.2d 947 (Alaska 1979).

64. *See id.* at 949 ("[O]ur recognition of the right to rehabilitation does not imply that a court at the time sentence is pronounced has the authority to designate a particular facility for incarceration of the defendant or a particular program for his rehabilitation.").

65. *See id.* at 947–49; *see also* State v. Hiser, 924 P.2d 1024, 1024–25 (Alaska Ct. App. 1996) (rejecting a sentencing court's authority to order certain medical care).

66. *See* Lord v. State, 489 P.3d 374, 378 n.9 (Alaska Ct. App. 2021) (listing cases).

67. Dep't of Corr. v. Stefano, 516 P.3d 486 (Alaska 2022).

68. *Id.* at 488. The outcome to that question mattered because the superior court had exercised appellate jurisdiction over the decision of the Department of Corrections. Such jurisdiction is only proper if a fundamental constitutional right is at stake. *Id.* at 491.

69. *Id.* at 493.

70. *Id.* at 494–95 (adopting Justice Rabinowitz's definition of formal rehabilitative programming from Brandon v. Dep't of Corr., 938 P.2d 1029, 1034 (Alaska 1997) (Rabinowitz, J., dissenting in part)).

71. *Id.* at 493.

Second, the withdrawal of an inmate's "privilege or benefit" does not generate a successful claim absent a "clear connection to rehabilitation" and a lack of "comparable rehabilitative opportunities."[72]

Finally, DOC prisoner classifications are typically not reviewable unless the choice "will substantially impair access to rehabilitative opportunities."[73]

By making explicit reference to "prisoners" and "inmates," the court's test centers the "right to rehabilitation" on the prison context.[74] For potential litigants, prisons are the area where the court has most clearly articulated a judicially enforceable right.

Another important aspect of the *Stefano* decision is its treatment of rehabilitation claims versus "true" liberty interests that are grounded in the state Constitution's due process clause. The court ultimately determined that the state's electronic monitoring program, created to alleviate prison overcrowding,[75] did not implicate the right to rehabilitation but was a liberty interest protected by the Alaska Constitution.[76] The implications of that distinction are subtle. Not all rehabilitation claims (which the court referred to as "rehabilitation-based liberty interest[s]")[77] will be true liberty claims, though the court noted that both are protected by operation of the due process clause.[78] For instance, it would be hard to characterize a prisoner's removal from a substance abuse support group as a deprivation of his liberty, but it may be a violation of his right to rehabilitation.[79] Thus, where they apply, rehabilitation claims sweep more broadly than liberty claims, allowing more room to challenge the conduct of corrections officials. Here, the court's decision to treat electronic monitoring as a liberty interest can be attributed to its desire to avoid straining the definition of "rehabilitation," while recognizing that placing someone in physical custody versus on electronic monitoring unquestionably deprives a person of his or her liberty.[80]

But beyond the rules described in *Stefano* the court's other right to rehabilitation cases shed further light on the doctrine. First, as a threshold matter, even if in need of rehabilitation, a prisoner must have had more

72. *Id.*
73. *Id.* at 493–94.
74. *Id.*
75. *Id.* at 495.
76. *Id.* at 504.
77. *Id.* at 499.
78. *Id.* at 499 n.90.
79. In the prison context, liberty interests are only implicated where a policy "impos[es] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 502 (internal quotations omitted).
80. *Id.* at 503.

than a de minimis term of incarceration for the right to attach. In *Goodlataw*,[81] the court rejected a wrongful death action based on a theory that prison officials had a duty to provide rehabilitative services under article I, § 12.[82] The suit was brought by the mother of a man convicted of unlawful entry who disappeared shortly after being released from temporary custody.[83] The man struggled with alcoholism but as part of his suspended sentence, the court permitted him to work a job in a rural area before completing a detoxification program.[84] The court held that the man's twenty-three-hour state custody was insufficient to trigger a right to rehabilitation.[85] The state satisfied its obligations by providing for his safety and welfare while he was in custody—providing alcohol treatment upon release is not a constitutional mandate.[86] Only when someone convicted of a crime lacks the freedom to seek treatment does the state bear a responsibility to provide such services.[87]

Some prisoner litigants have raised successful rehabilitation claims against the DOC, and their cases help clarify the breadth of the doctrine. One such litigant was Duane Ferguson, an inmate at Palmer Correctional Institute who had a job at the prison's meat packing plant, part of the Alaska Correctional Industries (ACI) program.[88] Ferguson tested positive for marijuana during a random drug test and was immediately removed from the ACI program without any disciplinary hearing, a response he challenged in superior court.[89] Citing *Abraham* and *Chaney,* the court said that prisoners have an "enforceable interest in continued participation in rehabilitation programs" and refused to render article I, § 12 a "meaningless guarantee."[90] Because it was a rehabilitation program, participation was willing, and it provided "special privileges," the DOC could not deprive him of his status as an ACI employee absent due process protections.[91]

81. Goodlataw v. Dep't of Health & Soc. Servs., 698 P.2d 1190 (Alaska 1985).
82. *Id.* at 1192–93.
83. *Id.* at 1191–92.
84. *Id.* at 1192.
85. *Id.* at 1194.
86. *Id.*
87. *Id.* The court did not address the fact that the completion of an alcohol treatment program was a condition of his suspended sentence. *Id.* at 1192.
88. Ferguson v. Dep't of Corr., 816 P.2d 134, 136 (Alaska 1991).
89. *Id.* at 136–37. Ferguson was denied the opportunity for a re-test unless he paid for it from his own funds. *Id.* No evidence demonstrated that Ferguson had ever possessed the drug. *Id.* at n.5.
90. *Id.* at 139. The court noted that this state protection is broader than that provided by federal law. *Id.* at 139 n.12.
91. *Id.* at 140. The court's conclusion seems to have been bolstered by its suspicions about the drug test's reliability. *See id.* at 135 n.2 (discussing problems with the drug test that could lead to false positives).

Yet not all adverse employment actions in prison jobs have been deemed to violate the right. For example, in *Hays*, the court allowed the DOC to transfer a prisoner between prison jobs without full due process procedures,[92] and in *Smith* the court held that the due process procedures followed as part of prisoner administrative segregation hearings were sufficient to support an inmate's termination from prison jobs.[93] These varying results are hard to square, and the *Stefano* court ultimately rejected the *Ferguson* "special privileges" test because of its inconsistent application and overbreadth.[94]

But rehabilitation is about more than participation in a particular job or program—access and communication between prisoners and families have also been held to be part of the right.[95] Notably, the court recognized in *Brandon* that superior courts have jurisdiction to hear challenges to a prisoner's transfer to an out-of-state prison because it is a question implicating their fundamental right to rehabilitation.[96] There, the record suggested that Brandon's family visited him weekly, which likely would have been impossible had he been transferred to an Arizona prison, potentially impairing his rehabilitation.[97] This conclusion did not draw unanimous support. Dissenting in part, Justice Rabinowitz noted that the court in *McGinnis v. Stevens*[98] did not find that the Alaska Constitution compelled conjugal visits.[99] Instead of reading the right to countenance factors that may *aid* in rehabilitation, he suggested it should be limited to the denial of access to programs "designed to rehabilitate the prisoner," which might include substance abuse treatment, sex offender counseling, and literacy programs.[100] Justice Rabinowitz's narrower vision has not

92. Hays v. State, 830 P.2d 783, 785 (Alaska 1992).

93. Smith v. Dep't of Corr., 447 P.3d 769, 777–79 (Alaska 2019).

94. *See* Dep't of Corr. v. Stefano, 516 P.3d 486, 494 (Alaska 2022) (discussing Moody v. Dep't of Corr., No. S-12303, 2007 WL 3197938, at *2 (Alaska Oct. 31, 2007), in which the court held that the denial of art supplies, though arguably meeting the *Ferguson* test, did not fall under the right to rehabilitation).

95. Brandon v. Dep't of Corr., 938 P.2d 1029, 1032 n.2 (Alaska 1997).

96. *Id.* at 1031–32.

97. *See* Shymeka L. Hunter, *More Than Just A Private Affair: Is the Practice of Incarcerating Alaska Prisoners in Private Out-of-State Prisons Unconstitutional?*, 17 ALASKA L. REV. 319, 320 (2000). The court emphasized that "visitation is indispensable to any realistic program of rehabilitation." *Brandon*, 938 P.2d at 1032 n.2.

98. McGinnis v. Stevens, 543 P.2d 1221 (Alaska 1975).

99. *Brandon*, 938 P.2d at 1034 (Rabinowitz, J., dissenting in part). The prisoner's claim in 1975 was framed in terms of cruel and unusual punishment, though. *McGinnis*, 543 P.2d 1221, 1237–38 (Alaska 1975).

100. *Brandon*, 938 P.2d at 1034–35 (Rabinowitz, J., dissenting in part); *see also* Mathis v. Sauser, 942 P.2d 1117 (Alaska 1997) (noting that a policy preventing an inmate from having a printer in his cell might not implicate the right to rehabilitation because he was not enrolled in any rehabilitative programming).

taken root.[101] Indeed, the second and third points of *Stefano*'s test reject it.[102] And recently, the Alaska Supreme Court remanded to the superior court a prisoner's challenge to the DOC's increase in local phone rates so the court could determine whether the new fee violated the inmate's right to rehabilitation.[103]

Some prisoner claims have fared worse. The garnishment of prisoner wages to pay for child support does not violate the right to rehabilitation (and indeed may have rehabilitative benefits, according to the court).[104] Other claims are more fact bound. In 1999, the Alaska Supreme Court released an unpublished opinion holding that a prisoner's right to rehabilitation is not infringed by a denial of access to word processing software because he still had access to other educational programming.[105] In a case alleging inadequate dental care, the court held that article I, § 12 did not create an implied cause of action against prison staff since alternative medical malpractice and federal civil rights remedies exist.[106]

Further, prison security can easily trump the right. Acknowledging *Brandon*'s central holding that the right to rehabilitation includes visitation, the court in *Larson v. Cooper*[107] held that preventing a maximum security prisoner from holding his wife's hand during a prayer does not violate the right to rehabilitation.[108] According to the court, nothing about the right precludes prison officials from placing reasonable restrictions on maximum security prisoners' physical contact with visitors, even if such contact could be shown to have a rehabilitative effect.[109] In another case, the court denied a prisoner's claim that the DOC had violated his rights by preventing visitation between him and a former staff member with whom he had formed an intimate relationship during his incarceration.[110]

101. This makes sense if one views the prison experience *as a whole* as promoting rehabilitation, not just a program or two within it. Justice Rabinowitz's test would prevent rehabilitation claims attacking larger administrative decisions about prison life.

102. Dep't of Corr. v. Stefano, 516 P.3d 486, 493–94 (Alaska 2022) (describing ways to allege a violation of the right to rehabilitation beyond the termination from a formal rehabilitative program without due process).

103. Antenor v. Dep't of Corr., 462 P.3d 1, 15 (Alaska 2020).

104. *See* Smith v. Dep't of Revenue, Child Support Enf't Div., 790 P.2d 1352, 1354 (Alaska 1990).

105. Adkins v. Crandell, No. S-7794, 1999 WL 33958768, *1 (Alaska Jan. 13, 1999).

106. *See* Hertz v. Beach, 211 P.3d 668, 677 n.12 (Alaska 2009).

107. Larson v. Cooper, 90 P.3d 125 (Alaska 2004).

108. *See id.* at 134 ("The security risks posed by contact visits and the high costs of mitigating such risks convince us that the degree of contact permitted between visitors and maximum security prisoners lies within the sound discretion of prison administrators.").

109. *Id.* at 133–34.

110. *See* Ebli v. Dep't of Corr., 451 P.3d 382, 388–89 (Alaska 2019).

Recently, the court held that a prisoner's right to rehabilitation was not infringed by the denial of access to a specific computer coding textbook the DOC thought could present security risks, particularly because he was permitted enrollment in other electronics and computer courses.[111] Perhaps most significantly, the court has held that the DOC's inmate security-level classification determinations are typically not reviewable for a violation of the right to rehabilitation.[112]

Ultimately, a review of the relevant case law suggests that prisoners have an enforceable right to rehabilitative conditions in prison—and these rehabilitative conditions have been interpreted relatively broadly. Typically, the right is enforced via a civil action against the DOC. But the state can adequately justify its deprivations in many individual cases, especially when security is at stake.

B. Sentencing

Although the right to rehabilitation is most evident when applied to prison conditions, the state Constitution's "principle of reformation" language—the original source of the right—has influenced other portions of the criminal justice process. Consider the state's sentencing procedures. Typically, the "principle of reformation" in the sentencing context is considered in conjunction with claims that a defendant's sentence is excessive. This makes sense as article I, § 12 also houses the state Constitution's prohibition on cruel and unusual punishment.[113] However, there is little case law to suggest that facial challenges to sentencing schemes would work. Instead, rehabilitation plays a more subtle role in the analysis. Under court precedent and Alaska statute, courts weigh multiple factors when determining the sentence they will impose.[114] In *State v. Chaney*, the court interpreted article I, § 12 to identify five goals for sentencing:

[R]ehabilitation of the offender into a noncriminal member of society, isolation of the offender from society to prevent criminal conduct

111. Antenor v. Dep't of Corr., 462 P.3d 1, 15–16 (Alaska 2020).

112. Dep't of Corr. v. Stefano, 516 P.3d 486, 493–94 (Alaska 2022) (citing Hertz v. Macomber, 297 P.3d 150, 157–58 (Alaska 2013)).

113. ALASKA CONST. art. I, § 12 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Criminal administration shall be based upon 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.").

114. *See* State v. Chaney, 477 P.2d 441, 444 (Alaska 1970) ("[D]etermination of an appropriate sentence involves the judicious balancing of many ofttimes competing factors (of which) primacy cannot be ascribed to any particular factor.").

during the period of confinement, deterrence of the offender himself after his release from confinement or other penological treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender . . . .[115]

When considering these factors, courts must weigh each, but may determine the priority and weight to give them.[116] Appellate courts will reverse a trial court's sentence only if it is clearly mistaken.[117] Because sentencing is so fact-intensive, bright lines that indicate when a sentence does not meet constitutional standards for rehabilitation are hard to come by. A few examples are illustrative.

The Alaska courts have rejected arguments that presumptive sentences imposed by the legislature violate the principle of reformation.[118] And efforts to use the provision to limit the duration of sentences have fallen flat. Although Alaska does not have life sentences, it does have ninety-nine-year terms of incarceration, and these can be imposed consecutively.[119] The Alaska Supreme Court has held that such sentences are not per se unconstitutional under a theory that they conflict with article I, § 12.[120] In *Nukapigak*, the trial court imposed three consecutive ninety-nine-year sentences for an offender who murdered his stepdaughter and her boyfriend before raping and murdering a third victim.[121] The defendant argued that ninety-nine years should be the maximum possible sentence.[122] Finding no clear error in the trial court's determination that Mr. Nukapigak was "devoid of hope of rehabilitation," the court refrained from accepting his contention and affirmed his sentence, commenting that "absent a magical cure for alcoholism" society would never be safe with him in it.[123] Although this may seem inconsistent with prior decisions suggesting that rehabilitation from alcoholism is possible, the court emphasized its holding in *Bell v.*

115. *Chaney*, 477 P.2d at 444.
116. *See* ALASKA STAT. § 12.55.005 (following the *Chaney* factors).
117. McClain v. State, 519 P.2d 811, 813–14 (Alaska 1974).
118. *See* Koteles v. State, 660 P.2d 1199, 1200 (Alaska Ct. App. 1983) ("We do not find that the presumptive sentencing provisions which were applied in Koteles' sentencing violated article I, § 12."); *see also* Nell v. State, 642 P.2d 1361, 1369 (Alaska Ct. App. 1982) ("[W]e do not see the presumptive sentencing provisions as being in conflict with article 1, section 12.").
119. *See* Margot Graham, *Alaska's Lengthy Sentences Are Not the Answer to Sex Offenses*, 39 ALASKA L. REV. 75, 96 (2022) ("Although Alaska does not officially allow the death penalty or life sentences, the long sentences that result from stacked sentences are effectively life sentences.").
120. Nukapigak v. State, 663 P.2d 943, 945–46 (Alaska 1983).
121. *Id.* at 944.
122. *Id.*
123. *Id.* at 945.

State: rehabilitation does not have to be provided for in a particular sentence if the court finds the "offender has no potential for rehabilitation within the time constraints of the penalty."[124]

Some offenders have raised claims contesting less severe criminal consequences; so far, they have not fared better. The court of appeals has held that the suspension of driver's licenses for people convicted of multiple DWIs did not violate the right to rehabilitation.[125] Recently, the court of appeals held in an unpublished opinion that a sentence requiring the forfeiture of fishing equipment did not violate the right to rehabilitation because the petitioner could still earn a livelihood as a commercial fisherman on another boat.[126]

However, the potential for rehabilitation and the receipt of services does affect how courts are to promulgate sentences. Alaska courts have held that psychiatric and psychological rehabilitation is possible and that both should be considered when determining a sentence, if relevant.[127] For instance, the Alaska Court of Appeals vacated and remanded Road Yu's fifty-year sentence for second degree murder because the sentencing judge failed to adequately consider the availability of psychological treatment for the "jealousy" that prompted his actions.[128] Evaluating the severity of his crime in conjunction with the lack of evidence that he was a "hardened criminal," the court determined that his alcoholism had aggravated a jealousy disorder, which could be treated.[129] Here, the idea of rehabilitation—grounded in the constitutional guarantee—had a profound impact on the court's conclusion that Yu's sentence was excessive. In another case, the fact that the defendant had a readily treatable psychiatric illness that contributed to the crime was persuasive to the supreme court in reducing his sentence for a larceny conviction.[130] Although a psychological or psychiatric condition does not necessarily

124. *Id.*

125. *See* Snyder v. State, 879 P.2d 1025, 1030 (Alaska Ct. App. 1994), *rev'd on other grounds*, 930 P.2d 1274 (Alaska 1996). The petitioner had argued that he was entitled to a license that would let him drive to work, which would not be a threat to the public. Without discussion, the court rejected this idea. *Id.*

126. Demmert v. State, No. A-13082, 2021 WL 3754590, at *6 (Alaska Ct. App. Aug. 25, 2021).

127. *See* Gest v. State, 619 P.2d 724, 726 n.8 (Alaska 1980) ("Where a crime stems from psychological aberration as much as from a general criminal propensity, the potential for psychological rehabilitation is of course a paramount consideration in determining the appropriate sentence."). This is broader than *Abraham*'s discussion of alcohol and substance abuse treatment.

128. *See* Yu v. State, 706 P.2d 348, 349 (Alaska Ct. App. 1985) (vacating Yu's conviction on the grounds that the lower court judge mistakenly concluded that jealousy could not be rehabilitated).

129. *Id.* at 351.

130. *See* Hansen v. State, 582 P.2d 1041, 1047–48 (Alaska 1978) (describing rehabilitation as an important justification for reversing the defendant's sentence).

excuse a crime, it is an important factor courts review when determining an appropriate sentence.

Overall, the court has given the legislature substantial deference in fashioning sentences, even in the face of some, like consecutive ninety-nine-year terms, that would foreclose a defendant's ability to ever reenter society.[131] Yet the state Constitution's "right to rehabilitation" does have a role in this area. It provides a level of procedural protection: rehabilitation must be considered by a sentencing court and appellate courts provide review to ensure this occurs.

C. Probation and Parole

In Alaska, many prisoners may apply to the parole board for early release after they have completed a portion of their incarceration.[132] Alaska's parole system, which has undergone numerous legislative modifications in recent years, may be a particularly fruitful candidate for right to rehabilitation claims. In 2016, Governor Bill Walker signed Senate Bill 91, which, among other changes, reduced parole offenses from misdemeanors to violations and expanded access to parole for people convicted of low-level misdemeanors, the elderly, and those meriting discretionary determinations.[133] In 2017, after a spike in crime, the legislature passed Senate Bill 54, which undid the change to misdemeanor classifications and repealed much of the administrative parole system.[134] Yet with the passage of House Bill 49 in 2019, the parole board regained additional discretion over which offenders to release.[135] But according to a June 2021 report, only sixteen percent of inmates who applied for discretionary parole in 2020 were successful, down from sixty-six percent

131. It is possible to imagine that a legislatively enacted sentence or sentencing procedure could violate the right. For example, a procedure that foreclosed courts from considering a defendant's prospects of rehabilitation entirely might be impermissible, but such a case has not come before the court.

132. *See* ALASKA STAT. § 33.16.010 (2021) (specifying parole procedures).

133. *See* Michael A. Rosengart, Note, *Justice Reinvestment in Alaska: The Past, Present, and Future of SB 91*, 34 ALASKA L. REV. 237, 261–62 (2017) (discussing the history and revisions of SB 91). Although a full analysis of the shifting parole legal landscape is beyond the scope of this note, whether a prisoner has been rehabilitated plays an important role in a discretionary parole determination and the drastic decline in successful applications may portend a constitutional challenge.

134. *See id.* at 239–40 (discussing Governor Walker's prioritization of SB 54 after an increase in crime); *see also* 2017 Alaska Sess. Laws ch. 1, 14.

135. Lex Treinen, *The Number of Alaskans Released on Discretionary Parole Fell Sharply in 2020*, ALASKA PUB. MEDIA (June 3,2021), https://www.alaskapublic.org/2021/06/03/the-number-of-alaskans-released-on-discretionary-parole-fell-sharply-in-2020/.

in 2015.[136] Discretionary parole was more likely to be granted to white inmates than to other minority groups.[137] Jeff Edwards, director of the state's parole board, noted that this decline may be partially attributable to the COVID-19 pandemic's shuttering of rehabilitation programming, which can be a requirement for parole, though success rates had been declining before the pandemic.[138]

The Alaska Supreme Court has not clearly addressed whether the right to rehabilitation creates any right to a parole hearing or a particular parole disposition, but it has cited to a United States Supreme Court case holding that the federal due process clause does not include a right to parole.[139] However, Alaska courts do scrutinize parole and probation conditions and violations. Recently, the court of appeals reviewed an offender's challenge to a probation condition that would have required he seek approval any time he wished to access the internet.[140] Similar conditions had previously been upheld, but the court remanded the challenge so the trial court could craft less restrictive ways of monitoring the probationer's internet access.[141] It was persuaded by the notion that the internet is of growing importance for the full rehabilitation of offenders and the fact that this offender's crimes were less internet-based than those of the offenders whose restrictions had previously been upheld.[142] Although not explicitly invoking the offender's right to rehabilitation, the court seemed to construe the condition with an eye

136. *Id.*

137. *Id.*

138. *Id.* Megan Edge, spokesperson for the American Civil Liberties Union of Alaska, also suggested that the parole board may have granted parole to fewer applicants because it was "chaired by the mother of a murder victim." *Id.*

139. *See* Larson v. Cooper, 90 P.3d 125, 134 (Alaska 2004) ("[T]he [federal] guarantee of due process does not provide a right to parole.") (citing Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1, 7 (1979)); *see also* Dep't of Corr. v. Stefano, 516 P.3d 486, 501–04 (Alaska 2022) (noting that removing a prisoner from electronic monitoring "results in a loss of freedom only somewhat less severe than placing the prisoner in custody," but declining to consider whether a prisoner's "right to rehabilitation" created an affirmative right to parole).

140. *See generally* Dalton v. State, 477 P.3d 650 (Alaska Ct. App. 2020).

141. *Id.* at 656 ("On remand, we encourage the trial court to resume its consideration of less restrictive alternatives to limit Dalton's internet access. We note that the trial court's proposed modification would allow Dalton to join the vast majority of American adults who use the internet on a daily basis for a full range of activities, including those implicating First Amendment rights. But it would also allow his probation officer to monitor his internet use from a discrete access point, without having to police Dalton's access to a potentially unlimited number of devices and accounts. On remand, the trial court may again consider this potential restriction or any other narrowly tailored condition consistent with the principles discussed above.").

142. *Id.*

toward the goals of rehabilitation and protecting the public listed in article I, § 12.[143] Such a reading accords with how the Alaska Supreme Court seems to apply article I, § 12 in this area: requiring that each condition of probation "be reasonably related to at least one of [§ 12's] principles."[144]

IV. SIMILAR LANGUAGE IN OTHER STATE CONSTITUTIONS

A fifty-state survey indicates that seven other states have constitutional provisions making explicit mention of reform or rehabilitation in conjunction with their criminal justice systems.[145] Three other states have constitutional provisions mandating that prisons be sites of rehabilitation or reformation.[146] Many state constitutions make

143. *See id.* at 654 ("We agree with the reasoning of those courts that have recognized the growing necessity of internet access for full participation in modern society, and for the rehabilitation of offenders.").

144. *See* State v. Pulusila, 467 P.3d 211, 219 (Alaska 2020) (quoting State v. Ranstead, 421 P.3d 15, 20 (Alaska 2018)). The court noted that the 1994 constitutional amendment added principles a court should consider. *Id.*

145. *See* ILL. CONST. art. I, § 11 ("All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."); IND. CONST. art. I, § 18 ("The penal code shall be founded on the principles of reformation, and not of vindictive justice."); MONT. CONST. art. II, § 28 ("Laws for the punishment of crime shall be founded on the principles of prevention and reformation."); N.H. CONST. pt. I, § 18 ("The true design of all punishments being to reform, not to exterminate mankind."); N.C. CONST. art. XI, § 2 ("The object of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact."); OR. CONST. art. I, § 15 ("Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation."); WYO. CONST. art. I, § 15 ("The penal code shall be framed on the humane principles of reformation and prevention."). Interestingly, the Constitution of the former Republic of Texas had a similar provision. TEX. CONST. of 1836, General Prov. § 7 ("[T]here shall be a penal code formed on principles of reformation, and not of vindictive justice.").

146. *See* CAL. CONST. art. I, § 23 ("The following provisions are hereby enacted to enhance public safety, improve rehabilitation . . . ."); N.M. CONST. art. XX, § 15 ("The penitentiary is a reformatory and an industrial school, and all persons confined therein shall, so far as consistent with discipline and the public interest, be employed in some beneficial industry; and where a convict has a dependent family, his net earnings shall be paid to said family if necessary for their support."); S.C. CONST. art. XII, § 2 ("The General Assembly shall establish institutions for the confinement of all persons convicted of such crimes as may be designated by law, and shall provide for the custody, maintenance, health, welfare, education, and rehabilitation of the inmates."); *see also* P.R. CONST. art. VI, § 19 ("It shall be the public policy of the Commonwealth . . . to regulate its penal institutions in a manner that effectively achieves their purposes and to provide, within the limits of available resources, for adequate treatment of delinquents in order to make possible their moral and social rehabilitation.").

mention of the responsibility of the state to create reformatory institutions for youth.[147] This analysis does not include states whose courts or legislatures may emphasize rehabilitation or reform in other areas of the law, derived from statutes or substantive due process, for instance—it simply evaluates the text of state constitutions.[148]

However, a constitutional provision is no guarantee of robust doctrine. In this Part, I will examine two state constitutions that contain explicit rehabilitation provisions and evaluate how claims based on these provisions have fared in their courts before attempting to summarize the state of Alaska's right to rehabilitation as a contrasting example.[149]

A. Indiana

As discussed in Part II, Alaska's constitutional provision was drawn from Indiana's Constitution and influenced by its interpretation. However, while Indiana's provision is plainly written—"[t]he penal code shall be founded on the principles of reformation, and not of vindictive justice"[150]—its courts have vitiated much of its potential.[151] One might think that the plain language would spell the end of the death penalty in the state—after all, it's hard to reform a dead person.[152] The state's supreme court took a different tack, noting that the death penalty is retributive rather than vindictive and that the Constitution's call would be satisfied if the entire penal code promoted rehabilitation, notwithstanding individual sentences.[153]

Similarly—with little discussion—the court has held that the state's

147. *See, e.g.*, MISS. CONST. art. X, § 225 ("[The legislature] may establish a reformatory school or schools, and provide for keeping of juvenile offenders from association with hardened criminals.").

148. West Virginia's supreme court has held that inmates have a right to rehabilitation, grounded in its statutes and enforceable by the state Constitution's substantive due process guarantee. *See* Cooper v. Gwinn, 298 S.E.2d 781, 787–88 (W. Va. 1981).

149. *See generally* the source cited *infra* note 151 for a more thorough discussion of the two state's constitutional provisions and their interpretation.

150. IND. CONST. art. I, § 18.

151. *See* Marcus Alexander Gadson, *Constitutionalizing Rehabilitation Did Not Work: Lessons from Indiana and Oregon and a Way Forward*, 54 WILLAMETTE L. REV. 269, 276 (2018) (describing Indiana and Oregon's constitutional provisions as a "dead letter").

152. *See id.* (noting that shortly after ratification, one Indiana state representative advocated for a bill ending the death penalty, remarking, "[s]trange method of accomplishing the reformation of the offender . . . to kill him!").

153. *See* Driskill v. State, 7 Ind. 338, 343 (Ind. 1855) ("The punishment of death for murder in the first degree, is not, in our opinion, vindictive, but is even-handed justice. There is, indeed, nothing vindictive in our penal laws. The main object of all punishment is the protection of society.").

habitual offender laws, which, as applied to the facts of the case it was reviewing, added thirty years to the offender's initial burglary sentence of two years, were not unconstitutional under its reformation provision.[154] Other challenges based on Indiana's reformation provision have also fallen flat.[155] One survey of the Indiana cases demonstrates the courts have rejected challenges to: a failure to offer rehabilitative programming, a failure to separate juveniles and adults in prison, and even a trial court's exclusion of jury instructions noting that guilt determinations should not be based on a desire to punish.[156] The state's supreme court has emphasized that the provision only applies to the penal code as a whole—not specific sentences, thereby barring as-applied challenges.[157]

More recently, one indication that the provision may have some life came from a case where a man challenged his sentence on the basis that the legislature had passed a new minimum sentence for his offense three days before his sentencing hearing.[158] While ultimately rejecting the defendant's claim, the Indiana Court of Appeals connected the state's doctrine of amelioration (which would allow the application of the new, lesser penalty if the legislature's intent was evident) to the Constitution's prohibition on vindictive punishment.[159] In the court's estimation, a statement from the legislature that the old penalty was too severe would suggest that using it would be an impermissible example of "vindictive justice." But, as one commentator points out, obtaining relief under the doctrine in Indiana is challenging—so challenging that he believes its

154. *See* Funk v. State, 427 N.E.2d 1081, 1086 (Ind. 1981) ("We here reaffirm our position that the habitual offender statute does not violate the proscription against cruel and unusual punishment by improperly vesting unlimited discretion in the prosecutor to determine whom and whom not to punish under the statute.").

155. *See* Gadson, *supra* note 151, at 286–88.

156. *Id.*

157. *See* Scruggs v. State, 737 N.E.2d 385, 387 n.3 (Ind. 2000) ("Although the defendant does not present these as independent appellate claims, we find that they would be unavailing . . . . With respect to the need to seek reformation and avoid vindictive justice, we have repeatedly stated that Section 18 applies only to the penal code as a whole and not to individual sentences."); *see also* Hazelwood v. State, 3 N.E.3d 39, 42 (Ind. Ct. App. 2014) (citing *Scruggs* for the same principle).

158. *See* Gadson, *supra* note 151, at 291–92. In Indiana, the statute in place at the time of the crime governs for sentencing purposes. *Id.* at 292.

159. *See* Dowdell v. State, 336 N.E.2d 699, 702 n.8, 703 (Ind. Ct. App. 1975) ("If there is an express statement by the legislature that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the proscribed act, then to hold that the more severe penalty should apply would serve no purpose other than to satisfy a constitutionally impermissible desire for vindictive justice."). Several subsequent opinions have applied the doctrine of amelioration. *See, e.g.*, Watford v. State, 384 N.E.2d 1030, 1033 (Ind. 1979).

strict application may be inconsistent with the reformation provision's general prohibition on vindictive punishment (if the doctrine is indeed grounded in that portion of the state's Constitution).[160] Still, aside from that one example, it appears that the Indiana constitutional provision on reformation, which inspired Alaska's own, has little legal force now and does not provide litigants with strong claims.

B. Oregon

Oregon's Constitution also includes a provision about reformation that, like the Alaska provision, was influenced by the Indiana Constitution.[161] As in Indiana, its courts have limited its impact. For instance, the Oregon Supreme Court upheld the state's death penalty against a claim that it violated the Constitution's explicit reference to reformation. It did so by pointing to the understanding of the Constitution's framers that it would maintain capital punishment, another constitutional provision explicitly referencing executive clemency in death penalty cases, and the fact that it was adapted from Indiana's provision.[162] In a decision upholding Oregon's habitual offender statute, the supreme court seemed to acknowledge that such laws are inconsistent with the idea of reformation.[163] However, the court proceeded to read into the constitutional provision something absent from the text altogether: that protection of the people from crime is the most important foundational principle of the criminal justice system.[164] Justice Denecke, writing for the court, stated, "We interpret [the provision] to command and require that Oregon sentencing laws have as their object reformation and not retaliation, but they do not require that reformation be sought at substantial risk to the people of the state."[165] In a sense, the court decided that foundational guarantees could give way when a person is sufficiently a nuisance to society. This sort of reasoning contrasts sharply with the Alaska Supreme Court's recognition that

160. *See* Gadson, *supra* note 151, at 293–94.

161. *Id.* at 275; OR. CONST. art. I, § 15 ("Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation.").

162. State v. Finch, 103 P. 505, 511–12 (Or. 1909) (explaining the origin of the state Constitution's provision requiring punishment to be "founded on the principles of reformation" and how that language must be read in light of founding era understandings of capital punishment).

163. *See* Tuel v. Gladden, 379 P.2d 553, 555 (Or. 1963) ("It has been suggested that life confinement is not inconsistent with reformation . . . . That view, we believe, is contrary to an implied essential corollary of reformation, that permanent reformation should be followed by release from confinement.").

164. *Id.* at 5–6.

165. *Id.* at 6.

society benefits from a prisoner's rehabilitation.[166]

Like Indiana, Oregon's jurisprudence likely only contemplates facial challenges to laws rather than challenges to a particular sentence.[167] Although occasionally characterized as solely a "hortative philosophical base" for the "penal code and correctional programs,"[168] the court's decisions have left some room for the provision to benefit offenders. In *State v. Grady*,[169] an incarcerated mother appealed the termination of her parental rights to three children.[170] Deciding against termination, the court referenced the rehabilitation provision of the Oregon Constitution, deeming it "salutary," and suggesting that her hope to be reunited with her children was motivating a positive change in her life.[171] Yet on the whole, Oregon has interpreted its reformation provision narrowly and few recent cases invoke it.

C. Compared to Alaska

If reformation is explicitly mentioned in the Constitutions of Indiana and Oregon, why does it offer such sparse protection? Professor Marcus Gadson[172] argues that the failure was not due to jurists' political concerns, the idea that the provisions apply to the penal code writ large, or the notion that it was simply hortatory language. Rather, he suggests courts lack a workable framework for evaluating these claims.[173] Although Alaska's reformation provision has more of an impact than Indiana's or Oregon's provision, particularly for prison conditions litigation, where *Stefano*'s test will add clarity, other aspects of the right are murkier. This is understandable given the amorphous nature of words like rehabilitation, the undeveloped law in sister states, and the importance of deference to the determinations of trial courts.

166. *See* Abraham v. State, 585 P.2d 526, 531 (Alaska 1978) (describing the public as the "beneficiary" of the principle of reformation).

167. *See* State v. Shumway, 630 P.2d 796, 806–07 (Or. 1981) (Tanzer, J., concurring in part) ("We early held that when a particular penal statute is reviewed for conformity to [a]rticle I, section 15 [of the Constitution of the State of Oregon], it must be scrutinized as a part of its statutory scheme rather than standing alone.").

168. Kent v. Cupp, 554 P.2d 196, 198 (Or. Ct. App. 1976).

169. 371 P.2d 68 (Or. 1962).

170. *Id.* at 68.

171. *See id.* at 70 ("What better inducement can she have for redemption than the assurance that she may have again her little girls in one united family?").

172. Marcus Gadson is an assistant professor of law at the Norman Adrian Wiggins School of Law at Campbell University. *Marcus Gadson*, CAMPBELL UNIV. DIRECTORY, https://directory.campbell.edu/people/marcus-gadson/ (last visited Apr. 27, 2023).

173. *See* Gadson, *supra* note 151, at 294–313 (surveying reasons for the failure to use the reformation provisions).

Overall, in Alaska there is no apparent bar to as-applied challenges to particular sentences or state actions as is the case in Indiana,[174] and article I, § 12 does not make merely hortatory statements about the administration of criminal justice but is the source of an enforceable right,[175] especially in the context of prison litigation where inmates can follow the *Stefano* framework.[176] As with both Indiana and Oregon, claims about sentences, probation, and parole have fared poorly—though not uniformly[177]—but even opinions rejecting such claims have not extinguished their viability entirely.[178] Finally, Alaska's provision seems to also operate as a background principle, both creating the factors courts must consider when imposing a sentence[179] and potentially motivating a canon of constitutional avoidance for statutory interpretation (i.e., "This might violate the Constitution unless . . ."). Some opinions also suggest the provision grants offenders a "special interest in rehabilitative treatment."[180]

However, some basics could use clarification. Should a prisoner challenging his sentence raise the right to rehabilitation as connected with a cruel and unusual punishment claim,[181] a due process argument,[182] an equal protection violation,[183] an independent ground for relief,[184] or perhaps all of the above? And does the right to rehabilitation create

174. *Compare* Dalton v. State, 477 P.3d 650, 652 (Alaska Ct. App. 2020), *with* Scruggs v. State, 737 N.E.2d 385, 387 n.3 (Ind. 2000).

175. *See* Ferguson v. Dep't of Corr., 816 P.2d 134, 139 (Alaska 1991) ("Th[is] . . . is not a meaningless guarantee; rather, it creates a right to rehabilitation.").

176. *See* Dep't of Corr. v. Stefano, 516 P.3d 486, 501 (Alaska 2022).

177. *See Dalton*, 477 P.3d at 656 (reversing an over-restrictive condition of probation).

178. *See, e.g.*, W.S. v. State, 174 P.3d 256, 262 (Alaska Ct. App. 2008).

179. *See* State v. Chaney, 477 P.2d 441, 444 (Alaska 1970).

180. *See, e.g.*, Watson v. State, 487 P.3d 568, 572 (Alaska 2021), *reh'g denied* (June 18, 2021).

181. Abraham v. State, 585 P.2d 526, 528 (Alaska 1978) (noting that Abraham had asserted a cruel and unusual punishment claim under the Alaska Constitution).

182. Perhaps a challenge to prison conditions is based on due process while a challenge to a sentence is based on the right to be free from cruel and unusual punishment. Some cases indicate that rehabilitation within a prison is a protected interest requiring some level of due process. *See* Ferguson v. State, Dep't of Corr., 816 P.2d 134, 140 (Alaska 1991) ("Since prisoners taking part in [the program] have a protected interest in [it], their participation cannot be terminated without a measure of due process of law."); *see also Stefano*, 516 P.3d at 499 n.90 ("[T]he right to rehabilitation is a liberty interest protected by the due process clause.").

183. *See Watson*, 487 P.3d at 572 (raising an equal protection claim to a sentencing scheme distinguishing between juvenile felony and non-felony traffic offenses).

184. At least in theory, a particular sentence may not generally be excessive but could fail to provide an opportunity for rehabilitation for some offenders. For instance, a habitual felon statute as applied to an elderly offender might fail.

affirmative obligations on the state to provide new programming or modes of criminal justice? This sort of challenge is not part of the *Stefano* framework, but is clearly countenanced by the logic of *Abraham*, where the defendant sought treatment for his alcoholism.[185] Given this murky backdrop, the next Part will propose ways that Alaska could clarify its doctrine and ensure full application of the right.

V. A PROPOSED FRAMEWORK FOR ALASKA

As illustrated above, some rehabilitation claims are more straightforward under current precedent than others. Yet the text of the Alaska Constitution applies the principle of reformation to the entire system of criminal administration—not just part of it.[186] In this Part, I suggest doctrines the court or legislature could implement such that all phases of the criminal justice system have clear tests when confronted with claims alleging a denial of the right to rehabilitation. *Stefano* has likely settled the doctrine in the prison litigation context in the short term, but "the right to rehabilitation" has broader applicability. After all, its underlying constitutional text refers to "[c]riminal administration," not just prisons.[187]

Responding to Indiana and Oregon's failures, Professor Gadson has proposed a framework for reviewing sentencing claims under their Constitutions that would have strong applicability to Alaska.[188] Under Gadson's formulation, a defendant's burden on a facial challenge to a sentencing scheme could be met by showing: "(1) that there is no bona fide reason to think a sentence would reform his particular class of criminals (e.g., thieves) and that there has been no showing that that class of defendants cannot reform, (2) or that a sentence is inherently vindictive."[189] Alaska courts should adjust this slightly: If a sentencing scheme does not provide for rehabilitation or is longer than necessary to reasonably accomplish it, then it is unconstitutional absent a strong justification based on one or more of the other constitutional sentencing goals.

If a particular defendant wished to argue that *his* sentence was insufficiently rehabilitative, Gadson would require the prosecutor to

185. *See supra* note 39.

186. *See* ALASKA CONST. art. I, § 12 ("Criminal administration shall be based upon . . . the principle of reformation.").

187. ALASKA CONST. art. I, § 12.

188. *See* Gadson, *supra* note 151, at 313.

189. *Id.* The latter prong may not hold as much applicability for Alaska as article I, § 12 contains no explicit prohibition on vindictiveness unless one were to interpret such a prohibition as bound up in the idea of rehabilitation. *See* ALASKA CONST. art. I, § 12.

show by clear and convincing evidence that the defendant could not reform.[190] This framework could also work in Alaska. Gadson's formulation would have appellate courts review facial challenges to sentencing statutes de novo and as-applied challenges under a "substantial evidence" standard.[191] These tests could also be adapted to challenge conditions of probation or parole simply.

Although these frameworks do not address other potential claims, such as affirmative prison condition litigation (advocating for improvements in the system), they could be handled via a similar test. If litigants could make a showing that a practice would have a broad and strong rehabilitative benefit, the burden would shift to the state to prove that its decisions were justified by an important government interest and did not substantially burden a prisoner's rehabilitation. This would balance the Department of Corrections' interest in maintaining safety, health, order, and budgetary discipline with the prisoner's—and society's—interest in rehabilitation. For instance, if prisoners demonstrated that free phone calls to their family members would substantially aid in their rehabilitation, the state would have to show its policy of charging for calls was justified.[192]

What might these reformulations accomplish? First, they grant Alaska courts a useful tool for handling the complicated inquiry of when a sentence might be excessive per se or as applied to a particular offender. Alaska courts are not currently particularly amenable to excessive sentence claims on a right to rehabilitation theory, but they should be.[193] Beyond the potential benefits of securing rehabilitation, it would also be easier than the present method balancing multiple factors. As Gadson's proposal demonstrates, courts would evaluate whether a sentence is tailored to the goal of rehabilitation, a simpler exercise than the amorphous *Chaney* criteria they currently employ.

And a new test is not at odds with the fact that the Alaska

190. *See* Gadson, *supra* note 151, at 316–17 ("For example, when the prosecution seeks . . . life without parole for a murderer — sentences foreclosing the possibility of returning an offender to society — the state would need to show, given the totality of the circumstances, that the offender was unlikely to reform.").

191. *Id.* at 319–20.

192. Prisoners and their families have noted that the costs of communicating can be burdensome. Michelle Theriault Boots, *Facing an Indefinite Ban on In-Person Visits, Families of Alaska Prisoners Question Paid Phone Calls*, ANCHORAGE DAILY NEWS (Sept. 21, 2020), https://www.adn.com/alaska-news/crime-courts/2020/09/20/facing-an-indefinite-ban-on-in-person-visits-families-of-alaska-prisoners-question-paid-phone-calls/.

193. Alaska courts evaluating excessive sentencing claims often discuss rehabilitation via reference to statutory sentencing factors, the *Chaney* criteria, or background principles instead of rights-based language. *See, e.g.*, Galindo v. State, 481 P.3d 686, 689–90 (Alaska Ct. App. 2021).

Constitution lists multiple goals for criminal administration. Arguably, Alaska courts have erred in interpreting article I, § 12 to allow these goals to be read in isolation.[194] Because the provision refers to the goals collectively,[195] they should be read together, meaning rehabilitation should be provided for in every sentencing decision—not merely considered.

Interpreting the state Constitution's "principle of reformation," the court has recognized that society at large is one of the primary beneficiaries of rehabilitation. Such arguments appear not only in *Abraham*,[196] but also in *Good v. State*.[197] There, the court was asked to evaluate the 20-year incarceration of a man convicted of armed robbery who argued his heroin addiction should militate in favor of a sentence more compatible with rehabilitation.[198] The court affirmed Good's sentence as a way to protect society from his dangerous behavior, but it saw rehabilitation as ultimately critical to protecting society and remanded the case to the sentencing judge so that the court could add a recommendation for drug treatment.[199] "If nothing more than selfish interest compels us, then the principle of 'reformation' enunciated in our state [c]onstitution is worth the effort, for when it works, it reduces crime," the court wrote.[200] It would be a mistake to draw too sharp a distinction between the principle of reformation and other principles listed in article I, § 12 based on their import for the individual criminal versus society.

True, after 1994, article I, § 12 features important keystones for criminal administration beyond reformation: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, and restitution from the offender. However, none of these are at odds with the principle of reformation.[201] In fact, each is deeply connected

194. *See, e.g.*, Koteles v. State, 660 P.2d 1199, 1202 (Alaska Ct. App. 1983) (Singleton, J., concurring) ("Consequently, the Convention made explicit what the Indiana Supreme Court had found implicit in the predecessor provision, namely that a sentence which addressed *either* reformation or community protection would be constitutionally valid.") (emphasis added); State v. Pulusila, 467 P.3d 211, 219 (Alaska 2020) (listing principles, *at least one* of which must be considered).

195. Article I, § 12 uses an "and" rather than an "or" in enumerating the goals of criminal administration. ALASKA CONST. art. I, § 12.

196. *See* Abraham v. State, 585 P.2d 526, 531 (Alaska 1978) ("It is obvious that one thrust of this constitutional requirement is directed toward the public welfare.").

197. Good v. State, 590 P.2d 420, 424 (Alaska 1979). The court has also recognized that the state has an interest in the rehabilitation of prisoners. *See* Watson v. State, 487 P.3d 568, 572, 576 (Alaska 2021), *reh'g denied* (June 18, 2021).

198. *Good*, 590 P.2d at 422.

199. *Id.* at 425.

200. *Id.* at 424.

201. *See* ALASKA CONST. art. I, § 12.

to rehabilitation. As Alaska courts have recognized, rehabilitation plays an important role protecting the public by preventing future crime.[202] The rights of victims are not incongruent with rehabilitation either—rehabilitation is not necessarily equivalent to leniency. One might even argue that rehabilitation requires some minimum deprivation of liberty to provide sufficient time for change to occur.[203] Further, a victim does not have the right under the Alaska Constitution to determine a sentence, just the right to be heard at sentencing.[204] Restitution from the offender, another right guaranteed to victims by the Alaska Constitution,[205] would certainly not be accomplished expediently from someone who is not rehabilitated. Prison wages in Alaska range from $0.30 to $1.25 an hour,[206] and there are large issues of homelessness among the recently released.[207] One seeking restitution would be unlikely to receive any significant financial compensation absent the ability of an offender to obtain a stable job.[208] Community condemnation, another constitutional goal, may ostensibly seem most at odds with rehabilitation, but in a 1978 case, the supreme court clarified that a similar *Chaney* criterion—the reaffirmation of societal norms—does not permit punishment to be retributive.[209] Indeed, restorative justice practices incorporate community voices in helping an offender understand his breach of social norms.[210]

Thus, the principle of reformation's rehabilitative promise suffuses article I, § 12, even as amended in 1994—bolstering the textual basis for an enforceable right to rehabilitation. An interpretation that precludes offenders from challenging aspects of their sentences impermissibly

202. *See* Abraham v. State, 585 P.2d 526, 531 (Alaska 1978).

203. *See* Edgardo Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation?*, 77 J. CRIM. L. & CRIMINOLOGY 1024–26 (1986) (discussing United States Supreme Court cases holding that stricter penological polices can be justified by the idea of rehabilitation).

204. *See* ALASKA CONST. art. I, § 24.

205. *Id.*

206. *Prison Wages: Appendix*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/reports/wage_policies.html (last visited Apr. 27, 2023).

207. Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/reports/housing.html (last visited Apr. 27, 2023).

208. Still, some victims of crime in Alaska may benefit from the ability to execute on an offender's permanent fund dividend. *See* ALASKA R. CRIM. P. 32.6(f).

209. Smothers v. State, 579 P.2d 1062, 1064 (Alaska 1978) (noting that the trial court apparently expressed uncertainty about whether the criteria was a "disguise for retribution" which would be incompatible with the idea of rehabilitation).

210. *Community Justice: What's in It For You?*, CALIFORNIA COMMUNITY JUSTICE PROJECT, https://www.courts.ca.gov/documents/WhatsInItForMe.pdf (last visited Apr. 27, 2023).

limits its text. Prison conditions litigation has made clear that the constitutional commitment to reformation means inmates have an "enforceable interest" in rehabilitative services.[211] It would be a strange outcome for a prisoner to have a right to rehabilitative services but no hope of ever re-entering society. A method to challenge sentences, like that proposed by Gadson, would address this constitutional gap. If a sentence neglects to sufficiently account for rehabilitation, it could well be unconstitutional.

A fuller commitment to the state Constitution's emphasis on rehabilitation may lead to a finding that other policies are constitutionally deficient, including Alaska's felony disenfranchisement system[212] and the parole board's precipitous drop in discretionary releases.[213] Large-scale violations might even suggest that alternatives to incarceration are required.[214]

If the court declines to adopt a Gadson-*esque* framework, it should, at a minimum, clarify the status of "right to rehabilitation" claims. Clarity has utility—as does focusing attention on what aspects of the criminal justice system deny people a right to rehabilitation and what aspects foster it. Indeed, innovative efforts are occurring in some Alaska prisons, even among high-security inmates.[215] For instance, Spring Creek Correctional Center has developed a "re-entry unit" to help prisoners near the end of their terms of incarceration prepare to reintegrate into life outside prison.[216]

VI. CONCLUSION

Many have argued that state constitutions can play a powerful role in securing individual rights and challenging state policies.[217] They are sites of experimentation, often charting new ways for a government to relate to its people. The Alaska Constitution is no exception. Courts

211. *See* Ferguson v. Dep't of Corr., 816 P.2d 134, 139 (Alaska 1991).

212. *See* JC Croft, *Alaska's Constitution and Felony Disenfranchisement: A Historical and Legal Analysis*, 36 ALASKA L. REV. 133, 153–54 (2019).

213. *See* discussion *supra* pp. 25.

214. As discussed in footnote 61 *supra* in reference to the *Cleary* litigation, Alaska is no stranger to large public rights litigation concerning its criminal justice system.

215. *See* Christopher Poulos, *What I Learned Visiting Alaska's Only Maximum Security Prison*, GUARDIAN (Sept. 3, 2021), https://www.theguardian.com/us-news/2021/sep/03/spring-creek-prison-alaska-reforms (discussing programmatic efforts at the Spring Creek Correctional Institute, a maximum security prison in Seward).

216. *Id.*

217. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 175–77 (2018).

should embrace the unique dictate of the Alaska Constitution: that criminal justice is to be based, in part, on the principle of reformation.

Fortunately for litigants, the Alaska Supreme Court has breathed more life into this provision than other states whose constitutions feature similar verbiage,[218] holding that it creates an enforceable right to rehabilitation in some contexts. Prisoners have existing, viable claims when they are denied access to important rehabilitative programming or experience prison conditions that would undermine their rehabilitation. In a time of pandemic and in a digitizing world, these are important legal pathways for advocates to explore. Litigants may have other claims in this relatively uncharted area, especially in the sentencing context. Fortunately for the court, it has not yet solidly committed itself to one interpretive path for the provision. Much of what little explanation exists is in the form of non-binding concurring opinions. The court retains flexibility for how to approach the future claims, whether through a set of tests to patrol for violations or procedural protections at the sentencing stage. And the court is free to exceed the dictates of the federal Constitution, providing greater protections for people in the criminal justice system.[219]

Rehabilitation matters. Of course it is a difficult, resource-intensive process, and it may not always be successful. But a society that hopes for better—that believes people can be more than they were and affords them the opportunity to change—has greater moral legitimacy than one that forgets about those it locks away. In Alaska, the "principle of reformation"—or right to rehabilitation—opens new legal doors and sets new standards for how we can reimagine success in the criminal justice system.

218. *See supra* Part III.
219. Sutton, *supra* note 217, at 189.