

# **An Ounce of Prevention: A Foster Youth's Substantive Due Process Right to Proper Preparation for Emancipation**

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## **Introduction**

When Theresa was 11 years old, the San Diego Department of Social Services removed her from her mother's home for neglect.<sup>1</sup> Throughout the next several years, foster home placement changes compelled her to change school districts four times. Consequently, Theresa quickly fell behind in her classes. At age 15, Theresa was arrested for shoplifting a sweater and spent several months in juvenile hall. Upon her return to foster care, she became discouraged and dropped out of high school. With the support of a caring foster care caseworker, Theresa passed the General Educational Development High School Equivalency Exam (GED) at the age of 17. For most youth, turning 18 marks a developmental milestone; for Theresa, it meant being evicted from her foster home. Like many 18-year-olds with no place to live, Theresa slept on friends' couches when she left foster care. Her

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<sup>1</sup> Youth Outreach Project case files, San Diego, Cal. (Aug. 2004). Names are changed to protect client identity.

shoplifting record and lack of transportation prevented Theresa from securing employment.

Finally, her friends' patience wore thin, and Theresa became homeless three months after emancipation from foster care. She went back to her county caseworker to ask for help, and was advised to go to an adult women's shelter.

In the shelter, Theresa quickly spiraled downhill. Several older women in the shelter, who had been homeless for years, offered drugs to Theresa as a way to feel better. Within weeks, Theresa was addicted to crack and living on the streets. She sold her body to pay for drugs, and lost touch with her friends from foster care. Theresa was incarcerated at the age of 19 for prostitution and possession of narcotics. During her time in jail, Theresa realized she had hit rock bottom and needed to change her life.

In an attempt to rehabilitate her life, Theresa sought support from community service providers after her release from jail. She entered a supportive housing program designed to rehabilitate drug offenders. As she recovered from her addiction, Theresa worked to overcome her past, which included sealing her juvenile court record for the misdemeanor shoplifting conviction. A friend advised her to contact the Youth Outreach Project, a program at the Legal Aid Society of San Diego, Inc., that provides free legal services to former foster youth. With the help of an attorney, Theresa received a fee waiver from the court and successfully sealed her juvenile record. As a result, Theresa found minimum-wage employment within walking distance of her supportive housing program, and began the difficult task of building a life in the "real world."

Unfortunately, Theresa's story is a common one.<sup>2</sup> The state, acting as Theresa's legal custodian, failed to prepare her for emancipation from the sheltered world of foster care into adulthood. Suddenly on her own, without the support of her foster care caseworker, dependency attorney, or foster mother, Theresa was overwhelmed with the harsh realities of life after

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<sup>2</sup> Youth Outreach Project case files, San Diego, Cal. (2002-2004).

emancipation. Although the government removed Theresa from her natural home with the promise to take care of her, she ultimately suffered extensive harm as a direct result of the government's failure to prepare her for adulthood.

Academics, lawmakers, and service providers have all recognized the need for extended services to foster youth. To date, however, none have acknowledged the constitutional right of foster youth to be prepared for emancipation while they are still in state care. This article contends foster youth possess a substantive due process right to be free from harm, and this right must include proper preparation for emancipation. It examines the current plight youth face when leaving foster care, and argues that youth who are unprepared for emancipation face substantial harm as they approach the age of 18 and beyond. Although recent federal legislation improved the structure of preparation services for foster youth, further legislative developments are necessary to protect emancipating youth from harm.<sup>3</sup>

Part I of this article considers the current challenges facing youth preparing to leave foster care. Youth are failing to receive adequate preparation services while still in the custody of the government. Consequently, emancipated youth are disproportionately represented in homeless, unemployed, uneducated, and incarcerated populations.<sup>4</sup> Part II examines the specific constitutional rights of youth in foster care. As persons in a custodial relationship with the government, foster youth have a substantive due process right to be free from physical and emotional harm. This protection includes services and training as required to "meet the basic needs" of a child.<sup>5</sup> Emancipation preparation services are required to meet the basic needs of any foster child facing emancipation. Thus, failure to adequately provide such services harms children, in

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<sup>3</sup> See 42 U.S.C. § 677 (Supp. 2002).

<sup>4</sup> See discussion *infra* Part I.A-D.

<sup>5</sup> *Braam v. Washington*, 81 P.3d 851, 857 (Wash. 2003) (substantive due process rights of foster youth include the right to adequate services to meet basic needs of a child); see also *Youngberg v. Romeo*, 457 U.S. 307, 318-19 (1982) (liberty interests of persons in state custody require reasonable training to ensure safety).

violation of their substantive due process rights. Part III criticizes the legislative response to the plight of foster youth. Although federal and state legislative bodies are finally recognizing the importance of services designed to assist youth in the transition to adulthood, states consistently fail to prepare youth for emancipation.<sup>6</sup> Part IV therefore proposes six concrete legislative recommendations, intended to encourage the government to fulfill its due process requirements and adequately prepare foster youth for adulthood. Specifically, the article recommends mandatory Independent Living Program (ILP) services, more efficient ILP services, mandatory legal skills training, expanded housing services, employment subsidies, and state statutory reforms. Part V recognizes the government's responsibility to prepare foster youth for the "real world."

### **I. What Happens to Youth When They Leave Foster Care?**

Youth enter foster care for a multitude of reasons. Some enter the system as babies, while others may have no contact with a government agency until they are teenagers. Some children are "voluntarily" given up to foster care by parents who are unable to take care of them; others enter foster care as a result of the government's decision to remove them "involuntarily" from abusive or neglectful homes. Extensive challenges exist for youth in foster care, including multiple foster home placements and repeated school transfers. In addition, foster youth are more likely to suffer from medical and psychological conditions. One study reported 50.6 percent of foster youth interviewed had been professionally diagnosed with a psychological disorder at some point in their childhood.<sup>7</sup> For many youth, trauma experienced in childhood

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<sup>6</sup> See discussion, *infra* Part III.

<sup>7</sup> CASEY FAMILY PROGRAMS, THE FOSTER CARE ALUMNI STUDIES, ASSESSING THE EFFECTS OF FOSTER CARE: EARLY RESULTS FROM THE CASEY NATIONAL ALUMNI STUDY 19 (2003) available at [www.casey.org](http://www.casey.org) (last visited Mar. 5, 2005). The Casey Alumni Study included 1,609 foster care youth served by Casey Family Programs in 1998.

follows them into adulthood after they emancipate from foster care.

Former foster care youth are an invisible population in America. Unlike other vulnerable populations, former foster youth do not usually self-identify once they have left state care.<sup>8</sup> As a result, emancipated foster youth generally disappear with little fanfare into mainstream society. Without proper preparation for adulthood, however, emancipated foster youth are at high risks for homelessness, lack of education, unemployment, and incarceration.

With some exceptions, most youth who “age out” of foster care do so at age 18.<sup>9</sup> For the general population, the age of 18 represents freedom: the right to vote,<sup>10</sup> to join the military,<sup>11</sup> and to enter into contracts.<sup>12</sup> But for foster youth, turning 18 and leaving foster care brings a new array of challenges. Without proper preparation, including a solid education or vocational plan, emancipation can bring unemployment and poverty. Failing to prepare youth for emancipation *before* the age of 18 results in harm, which often manifests itself *after* a youth has left foster care. Given the high incarceration and homelessness rates of former foster youth,<sup>13</sup> society’s failure to prepare foster youth for the “real world” is creating a new population of young adults in poverty.

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<sup>8</sup> Interview with anonymous ILP service provider in San Diego, Cal. (Jan. 14, 2005).

<sup>9</sup> The age of emancipation differs in some regions. Many states, including Arizona, Colorado, Idaho, Indiana, Kansas, and Washington, D.C., allow foster care youth to remain in the custody of the state until age 21. In California, youth may remain in foster care until age 19 if they are still in high school, and until 21 if they have learning or other disabilities. Telephone interview with Tammy Wilsker, Equal Justice Works Fellow, University of Miami Children & Youth Law Clinic (May 12, 2004).

<sup>10</sup> U.S. CONST. amend. XXVI.

<sup>11</sup> 10 U.S.C. § 505 (2000).

<sup>12</sup> CAL. FAM. CODE § 6502 (West 2004) (establishing age of majority as 18 years old).

<sup>13</sup> See statistical data, *infra* note 23.

### A. Homelessness

Youth leaving foster care go to a wide variety of places. Because foster care payments to foster families and group homes officially end on the day the youth is emancipated, many youth must move out of their foster homes immediately upon turning 18. According to a national foster care alumni study conducted by Casey Family Programs, almost 10 percent of “permanent foster care” youth returned to their birth families immediately upon emancipation.<sup>14</sup> Many youth return home in an attempt to repair the parental bond previously severed by foster care. Although returning to unstable homes can present new conflicts for vulnerable youth, studies have found foster youth who retain connections to their biological families fare better when they enter the “real world.”<sup>15</sup>

Some youth emancipating from foster care may stay a few extra weeks or months with supportive foster families who are willing to keep the youth beyond the final foster care payment. However, the 2003 Casey Alumni Study found that less than five percent of youth extended their stays with foster families.<sup>16</sup> Other options for youth leaving foster care include Job Corps, military service, psychiatric treatment hospitals, or supportive adult living. The great majority of foster youth, however, move directly to “Independent Living” after foster care.<sup>17</sup>

Independent Living holds different meanings for different individuals. For some youth, emancipation provides the opportunity to live in their own apartments without the restrictions of foster parents or group homes. Additionally, Independent Living can be considered a crash course in adulthood: Youth must quickly learn to adapt to the world of

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<sup>14</sup> CASEY FAMILY PROGRAMS, *supra* note 7, at 23.

<sup>15</sup> Mark E. Courtney & Richard P. Barth, *Pathways of Older Adolescents Out of Foster Care: Implications for Independent Living Services*, 41 SOC. WORK 75, 81 (1996).

<sup>16</sup> CASEY FAMILY PROGRAMS, *supra* note 7, at 24.

<sup>17</sup> *Id.* (over 50 percent of youth emancipating from foster care go to Independent Living).

apartment leases, consumer and employment contracts, and other adult responsibilities.

Certainly some high-functioning youth are able to adjust in the “real world.” However, the high learning curve of adulthood can be overwhelming for a foster youth on his or her own for the first time. Failure to secure gainful employment or educational loans can quickly lead to the downward spiral of homelessness.

The proportion of foster youth who become homeless after emancipation is stunning. The Child Welfare League of America reported to Congress in 1999 that 40 percent of persons in federally funded homeless shelters were former foster youth.<sup>18</sup> Indeed, a 2003 study found that 42.2 percent of emancipating foster youth nationwide have spent one or more nights homeless.<sup>19</sup> Shockingly, 22.1 percent of youth were homeless for one or more nights *within a year* after emancipation.<sup>20</sup> Almost one out of five youth (19.4 percent) were homeless for a week or more after leaving foster care.<sup>21</sup>

In California, the statistics are even higher: A 2002 survey of California counties found that more than 65 percent of youth leaving foster care needed some form of shelter.<sup>22</sup>

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<sup>18</sup> *Challenges Confronting Children Aging out of Foster Care: Hearing Before the House Comm. on Ways and Means Subcomm. on Human Resources*, 106th Cong. (Mar. 9, 1999) (statement of Robin Nixon, Director for Youth Services Child Welfare League of America), available at <http://waysandmeans.house.gov/legacy/humres/106cong/3-9-99/3-9nixo.htm> (last visited Mar. 5, 2005) The Child Welfare League is one of the oldest and largest organizations in nation devoted to social policy on behalf of children. See [www.cwla.org](http://www.cwla.org) (last visited Aug. 27, 2004).

<sup>19</sup> CASEY FAMILY PROGRAMS, *supra* note 7, at 25; see also Daniel J. Brannen, *Debunking the Year 18 Myth* (Oct. 2002) available at <http://www.kidsathome.org/year18.html>. It is notoriously difficult to conduct research on former foster youth. Because of the transient nature of life after foster care and youth frustration with anything representing the “system,” emancipated youth often become unavailable for tracking studies.

<sup>20</sup> CASEY FAMILY PROGRAMS, *supra* note 7, at 25.

<sup>21</sup> *Id.*

<sup>22</sup> See CALIFORNIA DEP’T OF SOCIAL SERVICES, INDEPENDENT LIVING PROGRAM POLICY UNIT, CHILD AND YOUTH PERMANENCY BRANCH, REPORT ON THE SURVEY OF THE HOUSING NEEDS OF EMANCIPATED

Homelessness is different for former foster youth than for the general population. Most emancipated youth do not go to public shelters or avail themselves of homeless services; having recently left the confines of foster care, emancipated youth are not eager to stay involved with “the system.”<sup>23</sup> The large majority of homeless former foster youth are “invisible” to the general public; that is, they are “crashing” on a friend’s couch or sleeping in their cars.<sup>24</sup>

Under the McKinney-Vento Homeless Assistance Act,<sup>25</sup> the definition of homeless children and youth includes youth “who lack a fixed, regular, and adequate nighttime residence,”<sup>26</sup> as well as youth “sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason.”<sup>27</sup> Additionally, youth who have “a primary nighttime residence that is a public or private place not designed for, or ordinarily used as, regular sleeping accommodations for human beings,” including cars, parks, public spaces, are considered homeless under the federal definition.<sup>28</sup>

Thus, applying the McKinney-Vento Act, all emancipated foster youth sleeping in cars, crashing on friends’ couches, or sharing unstable homes are, *by definition*, homeless. For any homeless person, lack of housing presents a host of competing problems, including lack of food and adequate medical care. But emancipated youth are already facing an uneven playing field when they leave foster care. Many are truly alone, without support from either birth families or their former foster care community. Homeless

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FOSTER/PROBATION YOUTH 1 (2002). Additionally, in a June 2004 interview with eight former foster youth in San Diego, all eight youth had experienced some form of homelessness in the years after foster care. Interview with members of the National Association of Former Foster Care Youth, in San Diego, Cal. (June 2, 2004).

<sup>23</sup> Interview with anonymous ILP service provider, *supra* note 8.

<sup>24</sup> *Id.*

<sup>25</sup> 42 U.S.C. §§ 11431-11435 (Supp. 2002).

<sup>26</sup> § 11434a(2)(A).

<sup>27</sup> § 11434a(2)(B)(i).

<sup>28</sup> §§ 11434a(2)(B)(ii)-(iii).



emancipated youth must grapple with both the realities of unstable living and the lingering trauma of life in foster care.

Without proper preparation for life in the “real world,” a temporary spell of homelessness can create lifetime problems for an emancipated youth. Association with peers in similar situations can encourage youth to join gangs to find a sense of community. Additionally, as in Theresa’s case, youth frustrated by a lack of resources and educational opportunities may turn to drug use. Either of these options, which may be tempting to a youth facing homelessness, can result in incarceration.

Stable housing is the prerequisite to successful independent living. Unless federal, local, and state governments can increase housing resources for this population, the negative effects of homelessness will continue to cause substantial harm to the lives of emancipated youth.

### *B. Lack of Education*

Education brings empowerment and can open avenues of employment for a youth facing the “real world” on his or her own. However, foster youth are more likely to fail in school than their non-foster care peers. A 2004 survey of 732 youths by the Chapin Hall Center for Children at the University of Chicago found foster youth:

[A]re at a higher risk of being held back a grade, are twice as likely to have been suspended from school, and four times as likely to have been expelled.<sup>29</sup>

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<sup>29</sup> MARK E. COURTNEY, ET AL., CHAPIN HALL CENTER FOR CHILDREN AT THE UNIVERSITY OF CHICAGO, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH 42 (2004). The Chapin Hall Center for Children at the University of Chicago is a research and development center, conducting non-partisan research on children’s issues. See <http://www.about.chapinhall.org/index.html> (last visited Aug. 27, 2004).

Though the surveyed youth were age 17 and mostly in the upper grades of high school, their average reading ability was at the seventh grade level.<sup>30</sup>

Data from prior studies of foster youth in education show equally dismal results. A rare national study of foster care alumni in 1991 found only 54 percent of youth had completed high school.<sup>31</sup> More recently, a May 2002 study of emancipating foster youth in California found only six percent of females and seven percent of males passed the GED exam.<sup>32</sup> For youth emancipating from the probation system, the numbers were slightly higher: Approximately 16 percent of females and 14 percent of males passed the GED exam.<sup>33</sup> Incredibly, these statistics show that incarcerated youth are better prepared for the GED exam than foster care youth. In addition, although 55 percent of emancipated youth attended community college after exiting foster care, only two percent actually earned an Associate of Arts (AA) degree. In contrast, 37 percent of general population students who attend community college complete an AA degree.<sup>34</sup>

Legal problems can also prevent emancipated youth from accessing education. For example, because most foster youths' social security numbers are accessible to many people, identity theft is common. As seen in several Youth Outreach Project cases, a youth applying for financial aid who is a victim of identity theft may be denied the financial ability to go to school.<sup>35</sup>

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<sup>30</sup> *Id.* at 45.

<sup>31</sup> R. Cook, et al, *Executive Summary to A NATIONAL EVALUATION OF TITLE IV-E FOSTER CARE INDEPENDENT LIVING PROGRAMS FOR YOUTH: PHASE 2 FINAL REPORT*, at xiv (Westat 1991).

<sup>32</sup> BARBARA NEEDELL, ET AL., CENTER FOR SOCIAL SERVICES RESEARCH, UNIVERSITY OF CALIFORNIA BERKELEY, *YOUTH EMANCIPATING FROM FOSTER CARE IN CALIFORNIA: FINDINGS USING LINKED ADMINISTRATIVE DATA 57* (May 2002) available at [http://cssr.berkeley.edu/childwelfare/pdfs/youth/ffy\\_entire.pdf](http://cssr.berkeley.edu/childwelfare/pdfs/youth/ffy_entire.pdf) (last visited Mar. 5, 2005).

<sup>33</sup> *Id.* at 58.

<sup>34</sup> *Id.* at 60.

<sup>35</sup> Youth Outreach Project case files, San Diego, Cal. (2002-2004).

The data is clear: The educational and foster care systems are consistently failing to educate youth while they are still in foster care, and the results of these failures follow youth after emancipation. Lack of education, combined with a lack of family support and social connections, relegates a foster youth with no job skills to unemployment or minimum wage jobs. It is hardly surprising, therefore, that 35 percent of emancipated youth received some type of welfare assistance in the year after emancipation.<sup>36</sup> By ignoring the educational dilemmas of youth in foster care, society inhibits their potential for success in the “real world.”

### *C. Lack of Employment*

In addition to stable housing and educational opportunities, stable employment is a crucial component of a youth’s successful transition from foster care. Unfortunately, foster youth are ill-prepared for the challenges of working in the “real world.” In 2002, a study found that no more than 45 percent of youth who aged out of foster care in California, Illinois, and South Carolina were working for income.<sup>37</sup> In 2004, the numbers were lower; one study revealed that only 35.1 percent of youth who aged out of foster care in the Midwest were currently employed.<sup>38</sup> However, even former

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<sup>36</sup> COURTNEY, ET AL., *supra* note 29, at 43.

<sup>37</sup> ROBERT GOERGE, ET AL., CHAPIN HALL CENTER FOR CHILDREN AT THE UNIVERSITY OF CHICAGO, *EMPLOYMENT OUTCOMES FOR YOUTH AGING OUT OF FOSTER CARE* 15 (2003). Of course, some youth may begin working prior to their 18<sup>th</sup> birthday, while they are still in foster care. The Chapin Hall Center for Children found in 2002 that half of youth aging out of foster care in California and Illinois, and two-thirds in South Carolina, worked for pay before turning 18. *Id.* at 11. Learning job skills while in foster care is important; in addition to encouraging responsibility and confidence, California, and South Carolina youth who did not work during their time in foster care had only slightly more than a 50-50 chance of being employed upon exit from foster care. *Id.*

<sup>38</sup> COURTNEY, ET AL., *supra* note 29, at 46.

foster youth who earn income rarely make enough to meet their financial needs.<sup>39</sup>

The high unemployment rate for emancipated youth can be traced to a number of causes. Lack of education, as described above, prevents youth from being able to get stable and higher-paying jobs. Youth without training in résumé preparation, job interviewing, and work skills are at a distinct disadvantage when applying for jobs.<sup>40</sup> For many youth, medical and psychological problems experienced while in foster care were never fully addressed or remedied.<sup>41</sup> Youth who are currently homeless, or who experienced the instability of multiple placements while in foster care, can have difficulty adapting to a steady work environment.

Legal factors can also contribute to unemployment. For example, unless a youth with a juvenile court record is able to seal his/her record, the fact that a youth has a delinquency record can work against him/her in the search for employment.<sup>42</sup> Such was the case of “Jana,” a 20-year-old former foster youth who was arrested at age 17 for petty theft. Although Jana had emancipated from foster care into a stable living environment and was studying for a degree in education, she was denied employment from two child-care agencies because both refused to hire persons with convictions.<sup>43</sup> With the help of an attorney from the Youth

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<sup>39</sup> GOERGE, *supra* note 37, at 18 (mean earnings for California youth in the first quarter after their 18<sup>th</sup> birthday is \$1558.85, or \$6,235.40 per year). According to the 2004 Health and Human Services Poverty Guidelines, the poverty guideline for one person in the United States is \$9,310 per year. See United States Department of Health and Human Services, *The 2004 HHS Poverty Guidelines*, available at <http://aspe.hhs.gov/poverty/04poverty.shtml> (last visited June 25, 2004).

<sup>40</sup> Some foster youth receive such services in Independent Living Skills classes. However, such classes may not be the most effective way to teach skills to this population. See discussion *infra* Part V.B.

<sup>41</sup> CASEY FAMILY PROGRAMS, *supra* note 7, at 24.

<sup>42</sup> Interview with anonymous ILP service provider, *supra* note 8.

<sup>43</sup> Youth Outreach Project case study, San Diego, Cal. (May 2004).

Outreach Project, Jana sealed her juvenile record and obtained employment in an after-school program.<sup>44</sup>

For youth who are able to secure jobs, the workplace can sometimes become a hostile place. Former foster youth, who usually do not have family or community support, can be easily intimidated by employers. Intimidation can take the form of harassment, discrimination, and unpaid wages.<sup>45</sup> These issues affect an individual's ability to retain stable employment, and present major obstacles for former foster youth attempting to become contributing members of society.

#### *D. Crime/Incarceration*

Given the housing, educational, and employment barriers facing foster youth upon emancipation, it is perhaps not surprising that a disproportionate number of former foster youth turn to crime. A 2004 study by the Chapin Hall Center for Children at the University of Chicago found more than half of emancipated foster youth had been arrested, more than one-third spent at least one night at a correctional facility, and one-fifth reported being convicted of a crime.<sup>46</sup>

A clear connection exists between foster care and crime. Although male foster youth are more likely than females to land in the juvenile justice system,<sup>47</sup> over two-fifths of both males and females report a history of perpetrating violence.<sup>48</sup> Without proper support, including rehabilitative counseling, housing, and job training services, youth who

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<sup>44</sup> *Id.* Many youth are not as fortunate, and their juvenile record remains a problem into adulthood. *See, e.g.*, Youth Outreach Project case files, San Diego, Cal. (Aug. 2004).

<sup>45</sup> Youth Outreach Project case files, San Diego, Cal. (Aug. 2004). Harassment, discrimination, and unpaid wages are the three most common and most serious employment law issues faced by YOP clients.

<sup>46</sup> COURTNEY, ET AL., *supra* note 29, at 48.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 50. Additionally, youth who have multiple placements while in foster care are more likely to have a state prison record. NEEDELL, ET AL., *supra* note 32, at 72.

learn violence early in life can find it difficult to manage life on their own.

Those who have juvenile court records, and are on juvenile probation before emancipating, are more likely to enter the state prison system when they leave foster care.<sup>49</sup> Approximately half of emancipated male youth with state prison records committed violent or serious offenses.<sup>50</sup> The statistics are especially revealing for males who were on probation while in foster care: Thirty-two percent of African-American males, 18 percent of white males, and 42 percent of Hispanic males who were on juvenile probation entered the state prison system within seven years of emancipation.<sup>51</sup>

These statistics serve as a distress signal to policymakers and service providers, and are even more disturbing because each of these youth had some contact with county services, through probation or foster care, before becoming adult offenders. In addition, the statistics show youth of color disproportionately commit crime, demonstrating the failure of county services to adequately address the needs of children of color.

Clearly, successful rehabilitation of juvenile offenders must include preparation for life outside of "the system." This preparation should include the sealing of juvenile court records and proper counseling to enable a juvenile to break the pattern of criminal behavior. Without sufficient resources to ensure stable housing, education, and employment for emancipating foster youth, society may ultimately pay the higher costs of incarceration.<sup>52</sup> Indeed, failure to prepare youth

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<sup>49</sup> COURTNEY, ET AL., *supra* note 29 at 76. Indeed, nine percent of African-American males, five percent of white males, and six percent of Hispanic males entered the state prison system within seven years of emancipation from the foster care system.

<sup>50</sup> *Id.* at 71.

<sup>51</sup> *Id.* at 77.

<sup>52</sup> The average cost of incarceration in California, per inmate per year, is \$23,406. San Francisco AIDS Foundation, *Support Proposition 36: Substance Abuse and Crime Prevention Act*, available at <http://www.sfaf.org/policy/prop36.html> (last modified Oct. 2, 2000). In

for adulthood before emancipation can result in substantial emotional and physical harm, for both individuals and the larger community.

### *E. The Youth Outreach Project*

In response to the dire legal needs of foster youth and emancipated foster youth, the Legal Aid Society of San Diego created the Youth Outreach Project (YOP) in 2002.<sup>53</sup> With generous support from the Equal Justice Works foundation and Morrison & Foerster, LLP, the Youth Outreach Project (YOP) was the first program in the nation to provide civil legal services specifically to former foster youth and emancipated youth.<sup>54</sup> Through outreach clinics in drop-in centers, and referrals, YOP is now bringing legal services into the lives of this vulnerable population. In its 24 months of existence, YOP has assisted over 125 clients in San Diego County.<sup>55</sup> The legal needs of the youth vary widely, from major housing and education issues to simple parking ticket disputes.<sup>56</sup> Additionally, many youth are victims of identity theft, often perpetrated by their biological parents.<sup>57</sup> With legal assistance, many of the barriers facing these youth can be remedied.

YOP also focuses on policy issues affecting emancipating foster youth. For example, several YOP clients were unable to seal their juvenile records due to prohibitively expensive court fees.<sup>58</sup> The proper sealing of juvenile records ensures potential employers and most government agencies do not have access to a youth's juvenile record after he or she turns 18. However, a youth must petition the juvenile or

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contrast, providing a rent subsidy of, for example, \$500 per month to a former foster youth would cost taxpayers only \$6,000 per year.

<sup>53</sup> See Dana Littlefield, *Former Foster Children Get Legal Help*, SAN DIEGO UNION TRIB., Dec. 30, 2003, at B1.

<sup>54</sup> *Id.*

<sup>55</sup> Youth Outreach Project case files, San Diego, Cal. (Aug. 2004).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

family court to seal the record, and usually must pay a fee for the court processing.<sup>59</sup> Although most jurisdictions provide a waiver process, San Diego required mandatory fees of up to \$120 to seal a juvenile record.<sup>60</sup>

Recent advocacy by YOP brought this issue to the attention of the Presiding Judge of the Juvenile Court in April 2004, and resulted in the establishment of a fee waiver process for indigent people wishing to seal their juvenile records.<sup>61</sup> The victory was significant; without a fee waiver process, indigent youth would be barred from access to this court service, resulting in yet another barrier to a youth's potential success.

## II. Substantive Due Process Protection for Foster Youth

### A. *The Right to be Free from Harm*

Clearly, the government's failure to prepare a youth for emancipation can cause substantial harm both before and after a youth's exit from foster care. In some cases, harm stemming from lack of emancipation preparation becomes apparent before a foster youth turns 18. For example, a parenting teen's lack of training for adulthood can result in the permanent termination of the youth's parental rights.<sup>62</sup> In other cases, such harm is manifested after the youth has emancipated, as illustrated by statistical outcomes demonstrating foster youths' challenges in the "real world."<sup>63</sup>

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<sup>59</sup> CAL. WELF. & INST. CODE § 903.3 (West 2004).

<sup>60</sup> *Id.*

<sup>61</sup> Memorandum from Dick Rothschild, Western Center on Law and Poverty, Inc., to People Interested in Access to Court Issues (May 2004), available at [www.wclp.org/files/MAIL-22-1.pdf](http://www.wclp.org/files/MAIL-22-1.pdf) (last visited Jan. 10, 2005). See CAL. R. OF CT., R. 985 (revised Jan. 1, 2005) (establishing fee waiver process for indigent applicants).

<sup>62</sup> See, e.g., Youth Outreach Project case files, San Diego, Cal. (Aug. 2004).

<sup>63</sup> Interview with anonymous ILP service provider, *supra* note 8. The concept of liability for delayed manifestation of harm may be analogized to



However, because foster youth are in state custody, the state has a duty to protect them from harm based on the doctrine of substantive due process. In addition to “fair process,” the liberty interest protected by substantive due process “includes more than the absence of physical restraint.”<sup>64</sup> The jurisprudence of substantive due process supports the extension of this protection to emancipation services to properly prepare youth for life after foster care and protect them from harm.

Substantive due process protects individual liberty from government actions regardless of the fairness of the procedures used to implement those actions.<sup>65</sup> For individuals not in government custody, due process provides defensive protection from interference with rights. For the most vulnerable members of society, however, the liberty interests protected under substantive due process can become matters of great importance. When the government assumes responsibility for individuals in custody, such as youth in foster care, it also confers affirmative constitutional protections on these individuals.<sup>66</sup> Therefore, because the law grants additional due process benefits to youth in foster care, the “deprivation of those benefits takes on constitutional dimensions.”<sup>67</sup>

Courts have particularly appreciated the significance of liberty rights for individuals placed into a custodial relationship with the state, including institutionalized and incarcerated individuals. Three Supreme Court decisions are especially relevant in this context.

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violations of school duties. When a school fails to properly teach reading, the failure manifests itself in a child’s inability to read. Although the cause of the problem is the failure to properly educate while the child was in school, the evidence of the problem — the child’s illiteracy — is sometimes not noticed until the child is much older.

<sup>64</sup> *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997).

<sup>65</sup> *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 144 (2d Cir. 1994) (internal quotation and citation omitted).

<sup>66</sup> See *Youngberg v. Romeo*, 457 U.S. 307, 318-19 (1982).

<sup>67</sup> *LaShawn A. v. Dixon*, 762 F. Supp. 959, 993 (1991).

In *Estelle v. Gamble*,<sup>68</sup> the Supreme Court held states are required under the Eighth Amendment's cruel and unusual punishment clause<sup>69</sup> to provide medical care to incarcerated prisoners. The plaintiff in *Estelle*, J.W. Gamble, was a prisoner with serious medical problems, including back pain and high blood pressure.<sup>70</sup> Prison guards repeatedly denied his request to see a doctor.<sup>71</sup> Gamble filed a complaint pursuant to 42 U.S.C. § 1983, alleging prison officials subjected him to cruel and unusual punishment in violation of the Eighth Amendment.<sup>72</sup> The District Court dismissed Gamble's complaint for failure to state a claim upon which relief could be granted.<sup>73</sup> The Court of Appeals reversed the lower court and remanded the case, ordering reinstatement of the complaint.<sup>74</sup> In considering Gamble's Eighth Amendment claim, the Supreme Court held prison officials' deliberate indifference to a prisoner's serious injury or illness is a violation of the Eighth Amendment's cruel and unusual punishment clause.<sup>75</sup> Because custodial prisoners must rely on prison officials to treat medical needs, the Court held government officials may be held liable for failure to provide such care.<sup>76</sup>

The Court applied a similar analysis, though a different legal standard, to the context of involuntarily committed individuals in *Youngberg v. Romeo*.<sup>77</sup> Nicholas Romeo, a

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<sup>68</sup> 429 U.S. 97 (1976).

<sup>69</sup> U.S. CONST. amend. VIII.

<sup>70</sup> *Estelle*, 429 U.S. at 101.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 98.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 104-05.

<sup>76</sup> *Id.*

<sup>77</sup> 457 U.S. 307 (1982). The *Estelle* Court applied a deliberate indifference standard to determine liability for violations of due process. However, the *Estelle* Court's analysis was grounded in the Eighth Amendment's prohibition against cruel and unusual punishment. In *Youngberg*, the Court applied a more demanding professional judgment standard for involuntarily committed individuals. A thorough discussion of this issue can be found in Brendan Kearse, *Abused Again: Competing Constitutional*

mentally retarded individual, was involuntarily committed to a Pennsylvania state institution. While in state custody, Romeo suffered numerous injuries as a result of his own violence and actions of the other residents.<sup>78</sup> Romeo's mother became concerned and brought suit in federal court, alleging state officials knew, or should have known, her son was suffering injuries but "failed to institute appropriate preventive procedures, thus violating [Romeo's] rights under the Eighth and Fourteenth Amendments."<sup>79</sup> After the filing of the complaint, Romeo was transferred to the hospital to treat a broken arm. In the hospital ward and by order of a doctor, he was physically restrained during the day to protect himself and other patients. By agreement of the parties involved in the litigation, Romeo remained in the hospital and did not return to the institution. A second amended complaint was subsequently filed, alleging the state was failing to provide Romeo with "appropriate treatment or programs for his mental retardation."<sup>80</sup>

During an eight-day trial, a federal jury was instructed on the defendant's Eighth Amendment rights. The jury was instructed that only if they found the defendants:

[D]eliberately indifferent to the serious medical and psychological needs of the defendant could they find that his Eighth and Fourteenth Amendment rights had been violated.<sup>81</sup>

The jury ultimately returned a verdict for the defendants.<sup>82</sup>

The Court of Appeals reversed and remanded for a new trial. The Court of Appeals held the Eighth Amendment was not the appropriate source for the determination of rights of involuntarily committed persons. Rather, according to the court, the Fourteenth Amendment was more appropriate

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*Standards for the State's Duty to Protect Foster Children*, 29 COLUM. J.L. & SOC. PROBS. 385 (1992).

<sup>78</sup> *Youngberg*, 457 U.S. at 309.

<sup>79</sup> *Id.* at 310.

<sup>80</sup> *Id.* at 311.

<sup>81</sup> *Id.* at 312 (internal citations omitted).

<sup>82</sup> *Id.*

because the involuntarily committed “retain liberty interests in freedom of movement and in personal security.”<sup>83</sup> The Supreme Court granted certiorari to consider the substantive rights of involuntarily committed mentally retarded persons under the Fourteenth Amendment.<sup>84</sup> While determining that committed persons possessed constitutionally protected liberty interests under the Fourteenth Amendment due process clause, the Court found these interests require government to “provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint.”<sup>85</sup> With this decision, the Court established a minimum level of affirmative state duties toward individuals held in civil state custody. As mandated by substantive due process, these duties include such training as required to assure a committed individual’s safety.<sup>86</sup> Although the Court emphasized courts must show deference to “qualified professionals” in determining exactly what constitutes “reasonable” training,<sup>87</sup> the constitutional liberty interest in such training or services is essential to preventing individual harm.

Seven years after *Youngberg* was decided, the Supreme Court considered a third case regarding the substantive due process rights of individuals in state custody, *DeShaney v. Winnebago County Dept of Social Servs.*<sup>88</sup> Joshua DeShaney, a young child, lived with his physically

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<sup>83</sup> *Id.* at 312-13.

<sup>84</sup> *Youngberg*, 457 U.S. at 314.

<sup>85</sup> *Id.* at 319.

<sup>86</sup> *Id.* at 324. In his concurrence, Justice Blackmun noted the recognized liberty interest of committed persons includes such training as required to “prevent unreasonable losses of additional liberty as a result of his confinement.” *Id.* at 327. For example, if a person entered a state institution with certain self-care skills, but then lost those skills “because of the State’s unreasonable refusal to provide him training,” the person may allege a “loss of liberty quite distinct from — and as serious as — the loss of safety and freedom from unreasonable restraints.” *Id.* In this way, the ability to take care of oneself is just as essential as one’s safety. This is especially true in the context of former foster youth. Without basic life skills, emancipated foster youth face impossible challenges in the “real world.”

<sup>87</sup> *Id.* at 322.

<sup>88</sup> 489 U.S. 189 (1989).

abusive father, who beat him on numerous occasions. Although the county Department of Social Services was aware of Joshua's violent home life and took "various steps to protect him," they did not act to remove Joshua from his father's custody.<sup>89</sup> Indeed, although the Department was notified repeatedly by hospital emergency room staff that Joshua was being treated for suspected child abuse, the county did not take action. Ultimately, after a series of beatings, Joshua's father beat him severely and caused permanent brain damage, rendering Joshua "profoundly retarded."<sup>90</sup>

Joshua's mother and guardian ad litem filed suit on his behalf against the county, the Department of Social Services, and several of its employees. The suit, brought under 42 U.S.C. § 1983, alleged the state's failure to intervene to protect Joshua "against a risk of violence at his father's hands of which they knew or should have known"<sup>91</sup> violated Joshua's Fourteenth Amendment right to liberty and due process of law.

The District Court granted summary judgment for the state defendants. The Court of Appeals affirmed the dismissal, finding the due process clause of the Fourteenth Amendment does not require a state or local government entity to protect citizens from "private violence, or other mishaps not attributable to the conduct of its employees."<sup>92</sup>

The Supreme Court, in a six-to-three decision, affirmed the lower courts' decision.<sup>93</sup> The Court held the state does not have a Fourteenth Amendment duty to protect a child who has been in the parent's custody at all times.<sup>94</sup> However, the Court recognized that "in certain limited circumstances the Constitution imposed upon the State affirmative duties of care and protection with respect to particular individuals."<sup>95</sup> In addition, the Court also noted the possibility that due process

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<sup>89</sup> *Id.* at 189.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 193.

<sup>92</sup> *Id.* at 194.

<sup>93</sup> *Id.* at 190.

<sup>94</sup> *DeShaney*, 489 U.S. at 201.

<sup>95</sup> *Id.* at 198.

rights could exist in the context of foster care. In a famed footnote, the Court suggested that:

[H]ad the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.<sup>96</sup>

By analogizing the situations of foster youth with those of voluntarily institutionalized persons, the Court recognized in dicta that the government creates a special custodial relationship when it removes children from their natural parents to place them in foster care.<sup>97</sup> Because foster youth enter into a custodial relationship with the government, they are deserving of the same protection and state duties mandated by *Youngberg*.<sup>98</sup>

Much like *Youngberg*'s plaintiff, foster children are placed "in a custodial environment, and ...[are] unable to seek alternative living arrangements."<sup>99</sup> When the state accepts a child into foster care, it assumes responsibility for the safety of the child.<sup>100</sup> In addition, youth in foster care lose the freedom

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<sup>96</sup> *Id.* at 201 n.9.

<sup>97</sup> *Id.* The Court noted the findings of several Courts of Appeals that foster youth, as persons in state custody, have a Due Process right to be protected from harm. *See, e.g., Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134, 141-42 (2d Cir. 1987).

<sup>98</sup> *DeShaney*, 489 U.S. at 201 n.9. *See Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993); *see also Doe*, 649 F.2d at 141 ("When individuals are placed in custody or under the care of the government, their governmental custodians are sometimes charged with affirmative duties, the nonfeasance of which may violate the constitution.").

<sup>99</sup> *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987), cert. denied, 489 U.S. 1065 (1989).

<sup>100</sup> *See D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1372 (3d Cir. 1991); *K.H. v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990); *see also DeShaney*, 489 U.S. at 200 (once a person is in state custody, state has constitutional "duty to assume some responsibility for [the person's] safety and general well-being").

and ability to make choices for themselves, and must rely on the state for basic survival.<sup>101</sup>

The Supreme Court has not yet extended the due process rights defined by *Youngberg* to foster youth. However, since *DeShaney*, numerous circuit courts have held that children placed in foster care have a liberty interest to be free from harm, giving the state a duty to protect them from such harm.<sup>102</sup> These cases reflect a nationwide trend of federal courts expanding the substantive due process rights of foster youth to be free from harm while in the care of the state.<sup>103</sup>

State courts are also recognizing the significance of substantive due process rights for foster youth. In *Braam v. State of Washington*,<sup>104</sup> a class action lawsuit brought against the Washington Department of Social and Health Services on behalf of youth in foster care, the Supreme Court of Washington noted that its decision to uphold foster children's substantive due process right was consistent with "the weight of authority among our sister courts."<sup>105</sup> American courts are clearly moving toward the expansion of substantive due process rights for this population.

Since it is established precedent that foster youth have a constitutional right to be free from harm, the question becomes "not whether they are entitled to protection from harm, but rather, how broad that protection must be."<sup>106</sup> Clearly, courts require the right to adequate food, clothing, and medical attention for custodial persons.<sup>107</sup> Also implicit in this substantive due process protection is the "right to be free

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<sup>101</sup> *Norfleet*, 989 F.2d at 293.

<sup>102</sup> See *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2001) (en banc); *Meador v. Cabinet for Human Res.*, 902 F.2d 474 (6th Cir. 1990); *Murphy*, 914 F.2d at 846; *Norfleet*, 989 F.2d 289; *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 993 (10th Cir. 1992); *Roska v. Peterson*, 304 F.3d 982, 994 (10th Cir. 2002); *Taylor ex rel. Walker*, 818 F.2d at 794.

<sup>103</sup> See, e.g., *Nicini*, 212 F.3d at 807 ("After *DeShaney*, many of our sister courts of appeals held that foster children have a due process right to be free from harm at the hands of state-regulated foster parents").

<sup>104</sup> *Braam v. Washington*, 81 P.3d 851 (Wash. 2003).

<sup>105</sup> *Id.* at 856.

<sup>106</sup> *Marisol A. v. Guiliani*, 929 F. Supp. 662, 675 (1996).

<sup>107</sup> *Id.*; see also *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982).

from unreasonable risk of harm, including a risk flowing from the lack of basic services, and a right to reasonable safety.”<sup>108</sup> This is especially true because foster youth rely on the state for protection from harm.<sup>109</sup>

Courts have further defined this protection to include the freedom from “unreasonable and unnecessary intrusions upon their physical and emotional well-being.”<sup>110</sup> Significantly, this right goes beyond mere protection from physical harm and encompasses protection from psychological and emotional harm.<sup>111</sup> Because children in foster care are in a developmental time of life, emotional and psychological injuries can “cause more lasting damage than many strictly physical injuries.”<sup>112</sup> This is especially true for youth preparing to emancipate from foster care. Notwithstanding the possibilities of physical harm, failure to adequately prepare youth for adulthood creates emotional harm. Along with long-term effects of emotional injuries suffered while in foster care, the fear and frustration felt by many emancipating youth as they transition to adulthood can cause depression and other mental illnesses.<sup>113</sup>

In addition to basic protection from physical and emotional harm, courts have also recognized affirmative state duties, such as a foster youth’s right to appropriate placement

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<sup>108</sup> *Braam*, 81 P.3d at 857.

<sup>109</sup> *LaShawn A. v. Dixon*, 762 F. Supp. 959, 993 (1991).

<sup>110</sup> *B.H. v. Johnson*, 715 F. Supp. 1387, 1396 (N.D. Ill. 1989).

<sup>111</sup> *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1989) (holding that the due process clause of the Fourteenth Amendment protects aspects of emotional well-being); *Marisol A.*, 929 F. Supp. at 675; *see also LaShawn A.*, 762 F. Supp. at 992-93; *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1009-10 (N.D. Ill. 1989) (“the fact that the plaintiff’s injuries are psychological rather than physical is of no moment.”); *Doe v. New York City Dep’t of Social Servs.*, 670 F. Supp. 1145, 1175-76 (S.D.N.Y. 1987); *Ashleigh Danielle v. Adiazola*, 284 F. Supp. 2d 1368 (2003).

<sup>112</sup> *B.H.*, 715 F. Supp. at 1395.

<sup>113</sup> A 2004 study found “foster youth suffer from more mental health problems than the general population.” COURTNEY, ET AL., *supra* note 29, at 31. These youth are at elevated risk of developing Post-Traumatic Stress Disorder and substance use disorders. The risks are especially high for youth transitioning from foster care into Independent Living. *Id.*



and case planning.<sup>114</sup> A foster child's recognizable liberty interest additionally requires the custodial state to provide training as necessary to prevent the occurrence of harm to a child. Such training should be designed to include "adequate services to meet the basic needs of the child."<sup>115</sup>

The U.S. District Court for the District of Columbia considered the specific nature of services to be provided in *LaShawn A. v. Dixon*.<sup>116</sup> Plaintiffs filed a class action lawsuit on behalf of foster care children and children who were not yet in the system but were "known to the department because of the reported abuse or neglect."<sup>117</sup> The complaint alleged both statutory and constitutional violations in the administration of the foster care system in Washington, D.C.<sup>118</sup> At the conclusion of a two-week trial, with substantial testimonial evidence of the system's failures, the court held the government was liable under both state and federal law.<sup>119</sup>

The court found the rights of foster children to be analogous to the rights of the involuntarily committed, such as the plaintiff in *Youngberg*. The court further noted that:

[W]hether plaintiffs have a liberty interest in any specific services is a ... difficult question, analogous to the question of training addressed by the Supreme Court in *Youngberg*.<sup>120</sup>

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<sup>114</sup> *LaShawn A.*, 762 F. Supp. at 993; *Palmer v. Cuomo*, 503 N.Y.S. 2d 20, 21 (1986) (state has a state statutory duty to provide aid to youth in foster care). Courts have found various due process obligations on the part of states to assist foster youth in the exercise of their constitutional rights, including the right to family association. *See, e.g., Aristotle P.*, 721 F. Supp. 1002.

<sup>115</sup> *Braam v. Washington*, 81 P.3d. 851, 857 (Wash. 2003).; *see also Youngberg*, 457 U.S. 307, 318-19 (1982) (state must provide "minimally adequate or reasonable training to ensure safety."); Kevin M. Ryan, *Stemming the Tide of Foster Care Runaways: a Due Process Perspective*, 42 CATH. U. L. REV. 271, 308 (1993).

<sup>116</sup> 762 F. Supp. 959 (1991), *aff'd*, 144 F.3d 847 (1998).

<sup>117</sup> *Id.* at 960.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 961.

<sup>120</sup> *Id.* at 993.

The court emphasized:

[I]t is important to keep in mind that plaintiffs did not come into the District's care by choice ... . They are children and rely on the District to protect them from harm and ensure their well-being.<sup>121</sup>

The court held:

[T]o the extent that certain services, such as appropriate placements and case planning, are essential to preventing harm to the children in the District's custody ... children have a constitutional liberty interest in those services.<sup>122</sup>

Following this reasoning, children in foster care have a constitutional liberty interest in any service or training essential to preventing harm. When the state fails to prepare foster youth for life after emancipation, youth overwhelmingly suffer from both physical and emotional harm.<sup>123</sup> Emancipation services are therefore necessary for a state to meet the "basic needs" of a foster youth and to protect that youth from harm, both before and after they enter the "real world."

### *B. The Voluntary or Involuntary Distinction*

Recent court decisions have distinguished the rights of foster youth based on voluntary or involuntary placement into foster care. Circuit courts considering the issue have generally found that substantive due process rights attach to involuntarily placed foster children because the state is responsible for removing the child from the home.<sup>124</sup> In turn,

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<sup>121</sup> *Id.*

<sup>122</sup> *LaShawn A.*, 762 F. Supp. at 993.

<sup>123</sup> See discussion, *infra* Part I.

<sup>124</sup> See *Yvonne L.*, 959 F.2d 883, 891; *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 796 (11th Cir. 1987), cert. denied, 489 U.S. 1065 (1989)

lower courts faced with the subject have restricted their discussion of substantive due process rights, applying the right to be free from harm only to youth *involuntarily* placed into foster care.<sup>125</sup> For example, the Eleventh Circuit analogized the situation of involuntarily placed foster youth to involuntarily committed individuals, noting:

In both cases, the state involuntarily placed the person in a custodial environment, and in both cases, the person is unable to seek alternative living arrangements.<sup>126</sup>

Though this analogy is valid, it needlessly excludes voluntarily placed foster children from the protections of due process.

Such restrictive reasoning in this context has a dangerous effect on due process jurisprudence. Although courts are moving toward expansion of substantive due process protection to include services for foster youth, courts seem to be unnecessarily withholding such protection from a significant proportion of foster care youth. Essentially, children who are forcibly removed from their parents by the state will have due process protections, while children who were “given up” to foster care would not.<sup>127</sup> In effect, these recent court decisions are creating two parallel foster care systems: one with constitutional protections for “involuntarily” placed children, and one without such protections for children whose parents “voluntarily” placed

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(children involuntarily placed in foster care are situated similarly to a prisoner involuntarily placed in an institution); *K.H. v. Morgan*, 914 F.2d 846, 848-49 (7th Cir. 1990).

<sup>125</sup> See *Ashleigh Danielle v. Adiazola*, 284 F. Supp. 2d 1368, 1375 (S.D. Fla. 2003); *Baby Neal v. Casey*, 821 F. Supp. 320, 334-35 (E.D. Penn 1993); *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1009 (N.D. Ill 1989).

<sup>126</sup> *Taylor ex rel. Walker*, 818 F.2d at 795.

<sup>127</sup> See *McMahon v. Tompkins County*, No. 95-CV-1134, 1998 WL 187421, at \*3 (N.D.N.Y. Apr. 14, 1998).

them in state custody. This distinction is arbitrary, and its result is “neither acceptable nor constitutionally sound.”<sup>128</sup>

Moreover, faced with the difficulties of poverty, parents are often forced to transfer children into foster care because of circumstances beyond their control. As the Supreme Court recognized in 1977, “[t]he poor have little choice but to submit to state-supervised child care when family crises strike.”<sup>129</sup> Some struggling parents may believe that transferring custody to the foster care system will result in improved living situations for their children; if such children were not entitled to the full spectrum of constitutional rights, parents would have an incentive to keep children in troubled homes until the state finally intervened. Such a result benefits neither the state nor the child and family. Courts weighing such issues must consider the full effects of denying substantive due process rights to individuals equally in state custody. The substantive due process rights of foster youth must include adequate services, regardless of how they came to be in the care of the state. Because exposing a foster youth to “an unreasonable risk of harm violates the due process clause,” states have an affirmative constitutional duty to provide services designed to prepare a youth for life after foster care.<sup>130</sup>

### III. Duty of Government

Emancipating inadequately prepared foster youth into the “real world” causes substantial harm, and the state therefore has a duty to ensure youth are ready for

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<sup>128</sup> *Id.*; see also *Meador v. Cabinet for Human Res.*, 902 F.2d 474 (6th Cir. 1990) (court held that the due process right to be free from harm extends to plaintiff foster children, who were “relinquished” into foster care by their grandfather).

<sup>129</sup> *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 834 (1977); Ryan, *supra* note 115, at n.176 (noting that studies suggest that some social workers are inclined to favor continued placement in foster care with a “higher-status” family over reunification with a child’s low-income natural family).

<sup>130</sup> *Braam v. Washington*, 81 P.3d. 851, 857 (Wash. 2003).

emancipation. Fortunately, both state and federal governments recently recognized this duty and passed legislation benefiting former foster youth. While this legislation provides an excellent starting point for change, it falls short of truly improving the perilous situations of youth living on the edge.

#### A. *Legislative Response: The Chafee Act*

Confronted with extensive evidence of the plight of former foster youth, the federal government created the Foster Care Independence Act of 1999.<sup>131</sup> Former President Clinton signed the act into law on December 14, 1999, and the law was deemed a “great victory” for former foster youth.<sup>132</sup> The Act (Chafee Act) established the John H. Chafee Foster Care Independence Program, named in honor of the late Sen. Chafee (R-RI), who originally sponsored the legislation.<sup>133</sup>

The Chafee Act brought needed improvements to Independent Living Programs (ILP) for foster youth and emancipated youth.<sup>134</sup> The purpose of the Act was to provide States with “flexible funding” to “enable programs to be designed and conducted” to assist former foster youth.<sup>135</sup> This flexibility was intended to allow states to serve children of various ages and at various stages of independence, including those under age 16.<sup>136</sup> States are also allowed to serve children and young adults in different parts of the state differently, and

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<sup>131</sup> 42 U.S.C. §677(a) (Supp. 2002).

<sup>132</sup> Raudi P. Guinn, *Passage of the Foster Care Independence Act of 1999: A Pivotal Step on Behalf of Youth Aging Out of Foster Care and Into a Life of Poverty*, 7 GEO J. ON POVERTY L. & POL’Y, 403, 409 (2000).

<sup>133</sup> *Id.*

<sup>134</sup> Independent Living Programs are designed to train youth for adult life. Though the programs vary by state and county, most programs include training (such as budgeting classes, résumé workshops, and interview skills) and access to specialized caseworkers for assistance.

<sup>135</sup> § 677 (a).

<sup>136</sup> § 677(b)(2)(C).

can use a variety of providers and contractors to deliver independent living services.<sup>137</sup>

In addition to emphasizing state flexibility, the Chafee Act establishes accountability for states as they implement Independent Living Programs. The Chafee Act requires the Secretary of State to develop outcome measures to be used to assess the performance of states.<sup>138</sup> Thus, as the federal government monitors the provision of services to former foster youth, states may be held accountable when they violate the due process rights of youth by failing to prepare them for emancipation.

Significantly, the Chafee Act doubled federal funding for the Independent Living Program, from \$70 million to \$140 million per year.<sup>139</sup> Funding is initially distributed based on the proportion of the national foster care population residing in each state, and states must provide a 20 percent match.<sup>140</sup> If a state fails to spend its federal allotment, other states may request access to those funds.<sup>141</sup>

The law recognizes the unique situation of youth aged 18 to 21, who have emancipated from foster care but are not yet fully self-sufficient. The Chafee Act calls for states to use some portion of their funds to provide a range of services and support for these aftercare youth.<sup>142</sup> Each state is required to implement Independent Living Programs to “ensure that all

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<sup>137</sup> § 677(b)(2)(D) (states should involve the public and private sectors); *see also* § 677(f)(1); Press Release, Child Welfare League of America, Foster Care Independence Act of 1999 (Nov. 23, 1999), *available at* <http://www.cwla.org/advocacy/indlivhr3443.htm> (last visited June 25, 2004).

<sup>138</sup> § 677(f)(1)(A). The Chafee Act specifies these measures should include educational attainment, high school diploma, employment, avoidance of dependency, homelessness, nonmarital childbirth, incarceration, and high risk behaviors. *Id.*

<sup>139</sup> Press Release, *supra* note 137.

<sup>140</sup> *Independent Living Fiscal Allocations*, Administration of Children and Families Policy Manual 3.3B, *available at* [http://www.acf.hhs.gov/programs/cb/laws/cwpm/policy\\_dsp\\_pf.jsp?id=3](http://www.acf.hhs.gov/programs/cb/laws/cwpm/policy_dsp_pf.jsp?id=3) (last visited Sept. 16, 2004).

<sup>141</sup> *Id.*

<sup>142</sup> § 677(a)(5) (Supp. 2002).

political subdivisions in the State are served by the program, though not necessarily in a uniform manner.”<sup>143</sup> States may use 30 percent of their ILP funds to provide room and board to emancipated youth until age 21, and states may also choose to extend Medicaid to this population.<sup>144</sup> These services also include participation in ILP programs, educational scholarships, and transitional housing opportunities.<sup>145</sup> In addition, with the passage of the Promoting Safe and Stable Families Legislation of 2001, former foster youth may receive educational and training vouchers up to \$5,000 per year for post-secondary education and vocational training.<sup>146</sup>

### *B. The Practical Problem: Delivery of Services*

The Chafee Act represents a promising legislative start to remedying the situation of emancipated youth. However, unless states effectively implement the Chafee Act, the due process rights of foster youth to proper preparation training may be violated. Indeed, several issues with the legislation have arisen since its 1999 enactment.

First, although states must provide comprehensive reports to the federal government outlining their Chafee plan and its implementation,<sup>147</sup> advocates are concerned that self-reporting states are not always truthful about the level of

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<sup>143</sup> § 677(b)(2)(B); see also Sylvia Junn & Jennifer Rodriguez, *Out on Their Own: California's Foster Youth & the Inequalities of the Indep. Living Program*, 6 UC DAVIS J. JUV. L. & POL'Y 189, 193 (2002).

<sup>144</sup> § 677(b)(3)(B). California chose to exercise this option and provides its state Medicaid program, titled “Medi-Cal,” to emancipated foster youth until age 21. Technically, the transfer should happen automatically when the youth emancipates. However, several youth have come to Youth Outreach Project clinics specifically because their Medi-Cal has been cut off. In most cases, the client’s Medi-Cal was either not transferred properly or was discontinued due to clerical errors.

<sup>145</sup> §§ 677(a)(1)-(6).

<sup>146</sup> § 677(i); see also National Resource Center for Youth Development, *State by State Fact Pages: California*, available at <http://www.nrcys.ou.edu/NRCYD/etv.htm> (last visited May 2, 2004).

<sup>147</sup> § 677(2).

services detailed in such reports.<sup>148</sup> For example, caseworkers who are required to secure housing before a youth emancipates should ensure the youth are actually housed before they leave. Simply providing youth with a list of homeless shelters, as is the practice in some California counties, is hardly sufficient.<sup>149</sup> In fact, providing a list of shelters to a foster youth could rise to the level of a due process violation; a youth would presumably be required to be homeless, and thus not properly prepared for emancipation, to access such shelters.

Second, state flexibility under the Chafee Act enables each state to distribute Chafee funds to counties or political subdivisions at its discretion. In California, for example, the California Department of Social Services distributes Chafee funds to each county to operate their own ILP.<sup>150</sup> Although each of the 58 counties in California offers some sort of Independent Living services to foster youth,<sup>151</sup> less than 50 percent of eligible foster youth actually receive ILP funding.<sup>152</sup> Counties may choose to contract such services to a separate service provider, such as a nonprofit.<sup>153</sup> As a result, the efficacy of ILPs and their success rate with youth varies from state to state, and even county to county.

This delegation of services presents numerous issues. Lack of uniformity between counties results in disparate

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<sup>148</sup> Interview with Tammy Wilsker, *supra* note 9.

<sup>149</sup> Interview with anonymous ILP service provider, San Diego, Cal. (May 12, 2004).

<sup>150</sup> California Dep't of Soc. Servs., Indep. Living Program, All-County Information Notice No. I-40-98, at 1 (July 22, 1998), in CALIFORNIA STATE OFFICE OF THE OMBUDSMAN FOR FOSTER CARE, FOSTER CARE INFORMATION RESOURCES 10 (Oct. 2001), available at <http://www.dss.cahwnet.gov/getinfo/acin98/I-40-98.PDF> (last visited June 25, 2004).

<sup>151</sup> Junn & Rodriguez, *supra* note 143, at 195, citing LITTLE HOOVER COMMISSION, NOW IN OUR HANDS: CARING FOR CALIFORNIA'S ABUSED AND NEGLECTED CHILDREN (Report No. 152) iii (1999), available at <http://www.lhc.ca.gov/lhcdireport152.html> (last visited May 8, 2004).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*; see also Junn & Rodriguez, *supra* note 143, at 194. For example, in San Diego County, ILP services are contracted out to three different nonprofits, each serving a specific region of the county.



treatment of foster and emancipated youth depending on their county of residence. Service and benefit discrepancies between counties and states can be detrimental to youth, particularly when they move to less generous counties after emancipation. For example, although some Florida counties provide high school graduation expenses to former foster youth, other counties do not.<sup>154</sup> In Los Angeles County in 2002, foster youth received “the most generous ILP benefits in the State,” including free laptop computers upon completion of an ILP program and scholarships for college.<sup>155</sup> However, participants in neighboring Riverside County received only a small monetary bonus upon graduation from high school.<sup>156</sup> Essentially, a youth’s county or state of residence determines the amount of resources offered to them, and thus their potential for success.

However, the Chafee bill was specifically designed to provide such flexibility to states; to some extent, discrepancy in services is a natural byproduct of flexibility and is to be expected. Also, freedom to experiment encourages states and counties to offer creative services to youth. Service providers can thus determine the most effective way to prepare youth for emancipation, and can share such knowledge with other regions. In this way, the flexibility of the Chafee Act promotes communication between service providers of various regions. However, as detailed below, additional legislative steps are required to ensure that the Chafee Act sufficiently prepares youth for the “real world.”

#### IV. Recommendations

The precarious situation of foster youth preparing for emancipation clearly requires legal action. Litigation is certainly a viable option, particularly a lawsuit filed on behalf

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<sup>154</sup> Email from Tammy Wilsker, Equal Justice Works Fellow, University of Miami Children & Youth Law Clinic (Aug. 31, 2004, 16:56 PST) (on file with author).

<sup>155</sup> Junn & Rodriguez, *supra* note 143, at 196.

<sup>156</sup> *Id.*

of youth in foster care who recognize they will not be adequately prepared for emancipation based on services provided. Youth could argue inadequate services violates their substantive due process right to be free from harm, and could point to the outcomes of former foster youth who were in similar situations to their own as evidence of the failure of such services.

However, the government has already recognized its duty to provide services, and the Congress made an attempt to fulfill that duty through the Chafee Act. Concrete legislative changes would therefore be the most effective and speedy way to institute true improvements in emancipation services, and protect youth from harm.<sup>157</sup> Six specific steps would be especially beneficial, and would assist the government in fulfilling its due process obligations to foster youth.

#### A. *Mandatory Independent Living Program Services*

Independent living services are currently voluntary for youth in foster care or “aftercare” youth, those who have left the system but are not yet 21 years old.<sup>158</sup> As a result, though, some youth derive great benefits from ILP services, youth can choose to have no preparation services before they emancipate. Given the high rates of poverty and incarceration for emancipated youth, foster care youth should not be allowed to opt out of preparation for adulthood.

Requiring a base level of mandatory services for dependent youth would ensure each youth is properly screened

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<sup>157</sup> Legislative improvements can also benefit other custodial populations, including former prisoners as they are released into mainstream society. For example, the U.S. House of Representatives is currently considering a bill designed to address the needs of ex-offenders as they reenter communities after incarceration. *See* Press Release, Legal Action Center 1 (June 23, 2004), *available at* [www.hirenetwork.org/pdfs/pr\\_reen1\\_finaljune04.pdf](http://www.hirenetwork.org/pdfs/pr_reen1_finaljune04.pdf). The bill, titled the “Second Chance Act,” would provide grants to States and local areas to provide drug and mental health treatment, education and job training, and housing assistance to these individuals as they leave state custody.

<sup>158</sup> Interview with anonymous ILP service provider, *supra* note 8.

and provided services *before* moving into the “real world.” Additionally, mandating ILP services at an early age, such as 12 or 13, would encourage youth to begin thinking about post-emancipation plans before they reach the current ILP age of 16.<sup>159</sup>

Admittedly, mandatory ILP services may produce a backlash, particularly among young people who do not wish to have any more contact than necessary with “the system.” However, the likelihood of screening youth in trouble and providing services to them before they leave the system, outweighs any potential backlash.

Although some consequence may be necessary for failure to cooperate with ILP, punishing youth who do not attend ILP services would be contrary to the spirit of the Chafee legislation. This problem may be avoided by mandating a very minimum level of mandatory services, which need not rise to the level of weekly classes. Required services could consist only of quarterly meetings with caseworkers.

Naturally, adding mandatory preparation services for every youth in foster care will substantially increase foster care costs. However, as demonstrated by the statistics above, the costs incurred by society’s failure to prepare youth greatly outweigh the costs of additional programs. For example, the financial expenditures required to incarcerate one individual, or to provide extended shelter for a homeless individual, are much more costly than case management or ILP classes.<sup>160</sup> To

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<sup>159</sup> *Id.* Though some counties offer ILP services to foster youth as young as 14, San Diego County begins ILP services at age 16. Interview with anonymous ILP service provider, *supra* note 8.

<sup>160</sup> The typical cost of an ILP class in San Diego County is slightly more than \$200, depending on how many youth attend. Teachers’ salaries and administrative costs add up to approximately \$50-\$60 per class. Each youth in attendance receives a \$10 stipend; classes usually have approximately 15 youth attending, for a total of \$150 in stipends. Email from anonymous ILP service provider, San Diego, Cal., to author (Aug. 24, 2004, 3:18 PST) (on file with author). In comparison, the cost of one year of incarceration in California is \$23,406. San Francisco AIDS Foundation, *supra* note 53.

avoid these greater social costs, Congress should act to require a specific minimum level of ILP services for every foster youth preparing for emancipation.

### *B. More Efficient Independent Living Services*

Even youth receiving only a minimum level of ILP services should be prepared for adulthood. However, many youth involved with ILP emancipate without sufficient skills for the “real world,” in part due to inefficient or irrelevant training. For example, ILP classes on budgeting and résumé writing may not be effective for a youth teetering on the brink of homelessness. State legislatures and Congress should focus their resources on ensuring ILP funds are spent in the most beneficial way possible for foster youth.

Some jurisdictions, including Miami, Fla., offer virtually no independent living services to youth aged 13 to 18.<sup>161</sup> This fact is troubling, especially given the Chafee Act’s (and Florida state law’s) directive to prepare foster youth for adulthood.<sup>162</sup> Five years after enacting the Chafee Act, lawmakers should require more outcome data and information about the success or failure of individual state programs. Such analysis would enable service providers to design more efficient Independent Living services.

Former foster youth themselves recognize the limitations of relying on classes as the primary way to teach basic life skills. Though emancipated foster youth in San Diego County appreciate the commitment of caseworkers and ILP teachers, many youth believe “the classes need to be different.”<sup>163</sup> Members of the National Association of Former

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<sup>161</sup> Email from Tammy Wilsker, Equal Justice Works Fellow, University of Miami Children & Youth Law Clinic, (Aug. 31, 2004, 16:56 PST) (on file with author).

<sup>162</sup> FLA. STAT. ch. § 409.1451 (1)(a) (2004) states the Department of Children and Family services “shall administer a system of independent living services.”

<sup>163</sup> Interview with members of the National Association of Former Foster Care Youth, *supra* note 22.

Foster Care Youth in San Diego,<sup>164</sup> recommend the program “needs to be more hands-on information ... kids need to do more realistic things, like cooking and laundry.”<sup>165</sup> The youth were also concerned that incentives to attend class, such as the \$10 class attendance payment in San Diego, results in non-motivated youth attending classes simply for financial reward.<sup>166</sup>

From the caseworker perspective, even unmotivated youth can learn *something* once they are actually in the classroom. Caseworkers also recognize the value of a support system for foster youth and emancipated youth beyond schools and foster homes; for many youth, ILP classes provide the only mechanism for supervised peer support.<sup>167</sup> However, emancipated youth themselves commented on the fact that “some kids go [to ILP classes just] to hit on girls.”<sup>168</sup> The youth were also concerned about the difficulty of teaching real-life skills in a classroom setting because:

[F]oster youth should be prepared, but not just in the classroom... foster parents have responsibilities [to prepare youth], and group homes have responsibilities.<sup>169</sup>

The youth interviewed agreed that such money could be better spent on housing or employment programs for former foster youth.<sup>170</sup> Such programs could be tailored to meet the needs of individual children, creating more effective wraparound services.

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<sup>164</sup> The National Association of Former Foster Care Youth is an organization of youth in San Diego aged 18-26, all of whom emancipated from foster care at the age of 18. The group offers peer mentoring to youth struggling with the transition from foster care to adulthood, and works to raise awareness of the issues facing emancipated youth.

<sup>165</sup> Interview with members of the National Association of Former Foster Care Youth, *supra* note 22.

<sup>166</sup> Interview with anonymous ILP service provider, *supra* note 8.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Interview with members of the National Association of Former Foster Care Youth, *supra* note 22.

Although some additional costs might be incurred initially to streamline services, making programs more efficient would not necessarily require more funding. For example, changing the focus of ILP classes could be accomplished easily by ILP teachers, particularly with input from youth themselves. Alternatively, eliminating classes completely in favor of more individualized housing or employment programs would simply require a redirection of funds. Because Congress already deemed ILP services a priority in the Chafee Act,<sup>171</sup> increasing the efficiency of these services would further congressional intent.

### C. Mandatory Legal Skills Training

In addition to life skills training, foster youth should be educated about basic legal skills required to properly function in society. These skills include how to negotiate a contract (including automobile, cell phone, and employment contracts), the essentials of landlord/tenant law (including signing a lease), and how to ensure a good credit rating. Failure to teach these skills to foster youth has significant repercussions, as seen by attorneys working directly with this population.<sup>172</sup>

For example, a youth's failure to fully comprehend a cell phone contract before signing it can result in overpayments and improper charges. In one case handled by YOP, a youth agreed to a cell phone store's \$500 cancellation charge, in addition to the cell phone company's regular cancellation charge of \$175.<sup>173</sup> When the youth lost her job and was unable to afford the cell phone bill and cancelled the phone, she could not pay the resulting \$675 charge. The bill eventually went to collections and had a negative impact on her credit report.<sup>174</sup> As the youth herself reported, proper understanding of basic contract principles would have

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<sup>171</sup> 42 U.S.C. § 677(a)(5) (Supp. 2004).

<sup>172</sup> See, e.g., Youth Outreach Project case files, San Diego, Cal. (Aug. 2004).

<sup>173</sup> Youth Outreach Project case files, San Diego, Cal. (Aug. 2004).

<sup>174</sup> *Id.*

prevented her from signing this contract.<sup>175</sup> Ultimately, attorneys in YOP advocated on her behalf and her credit report was cleared.<sup>176</sup>

Legal skills are especially important for youth entering the workplace. Knowing that foster youth lack the sophistication of experienced workers, employers may take advantage of former foster youth employees. When YOP began in 2002, attorneys were shocked at the number of clients with meritorious wage claim cases and unemployment claim cases.<sup>177</sup> YOP brought several wage claims and unemployment compensation claims from 2002 to 2004.<sup>178</sup> In each of these cases, an attorney's advocacy successfully secured monetary judgments on behalf of former foster youth clients.<sup>179</sup> The pattern of employers taking advantage of young employees with no family or social support became apparent. With legal knowledge, youth would be better able to protect themselves against illegal actions of employers.

Some might argue legal skills are not required for basic levels of success in the "real world"; after all, many functioning adults do not have access to lawyers or legal services. However, these skills are particularly important for foster youth. As a vulnerable population, one relatively small legal issue can quickly become a significant barrier to success. For example, "Joe" came to a YOP clinic with a simple identity theft problem.<sup>180</sup> When he was 14 years old, Joe's grandfather used his social security number to obtain a fraudulent credit card. With this credit card, Joe's grandfather purchased a car in Joe's name. Joe did not have any knowledge of the car until he turned 18 and applied for financial aid to attend college. With a \$14,000 bill outstanding on his credit, Joe was denied financial aid. Without any legal knowledge, Joe felt college was now an impossibility, and he worked in minimum wage food service jobs for two years.

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Youth Outreach Project case files, San Diego, Cal. (Aug. 2004).

<sup>180</sup> *Id.*

With the help of YOP attorneys, Joe learned how to clear his credit and subsequently applied successfully for financial aid.<sup>181</sup> He is now attending college.

With the help of the private bar and legal service organizations, mandatory legal skills could be taught to foster youth at no additional financial cost. In YOP's experience, many private attorneys are eager to share their knowledge with foster youth, through workshops, seminars, and individual mentoring. Connecting foster youth to volunteer attorneys is logistically simple, and can result in significant benefits for emancipating youth.

#### *D. Expanded Housing Services*

Theoretically, foster youth should not be emancipated from foster care unless they have a known stable living arrangement. The Chafee Act currently allows up to 30 percent of all ILP funds to be used to support housing for former foster youth.<sup>182</sup> However, given the prevalence of homelessness among this population, a higher minimum standard of housing support must be instituted by the federal government.

To adequately support housing, Congress will likely need to raise the current 30 percent cap on housing funds in the Chafee Act. One potential objection to this action would be the importance of other areas of training for foster youth, such as employment skills or education training. However, housing must be a priority; without stable housing, most youth are unable to achieve stability in other areas, including work and school. Additionally, as mentioned above, society will ultimately pay financial costs in the form of shelters or incarceration for youth who emancipate into homelessness.

The government should therefore ensure each foster youth has some sort of housing for the first 12 months after emancipation. This initial housing should span the spectrum of

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<sup>181</sup> *Id.*

<sup>182</sup> 42 U.S.C. § 677(b)(3)(B) (Supp. 2002).



housing needs for this population, including emergency shelters specifically for former foster youth (to prevent their association with the adult homeless population), and transitional living places for more independent youth.

In New York City, a model program called “The Chelsea Foyer” provides a supportive housing-based job training program for 40 young adults.<sup>183</sup> The 18 to 24 month individualized program includes a congregate living setting, onsite case management, and connections to job training and placement, education, and life-skills development resources.<sup>184</sup> This type of wraparound service model, offering personalized assistance to help youth achieve the “independent living and employment skills necessary to obtain affordable housing,” could be successful throughout the country.<sup>185</sup> Though the financial cost of providing such services to a large population of former foster youth would likely be substantial, the potential for youth to be successful in all areas of life would ultimately reduce social costs.

Housing support could also take the form of housing vouchers for former foster youth. For example, a pilot program providing county-funded housing vouchers to former foster youth has been very successful in San Diego County.<sup>186</sup>

Emancipated foster youth who are employed may be eligible for the “HOME” program, which requires a youth to pay for rent with 30 percent of his/her income with San Diego County paying the remainder.<sup>187</sup> Admittedly, the program has shortcomings. Though the program has a high success rate, it only serves high-functioning youth who are nearly

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<sup>183</sup> Good Shepard Services, *Residential Services*, available at [http://www.goodshepherds.org/sub-programs\\_services/ps-residential\\_services.html](http://www.goodshepherds.org/sub-programs_services/ps-residential_services.html) (last visited Sept. 15, 2004).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* A similar supportive housing program is also being offered through the First Place Fund for Youth, a nonprofit in Oakland, Cal. See First Place Fund for Youth, Supportive Housing Program, available at <http://www.firstplacefund.org/programs/shp-main.html> (last visited Sept. 16, 2004).

<sup>186</sup> Interview with anonymous ILP service provider, *supra* note 8.

<sup>187</sup> *Id.*

independent already.<sup>188</sup> Additionally, the program's long waiting list has made it impracticable for many youth leaving foster care.<sup>189</sup> However, even with these issues, the HOME program represents a creative response to the housing crisis of former foster youth.

### *E. Employment Subsidies*

In addition to safe housing, stable employment is a major obstacle for many former foster youth, who do not have the interview skills or job experience to be competitive in today's job market. Providing partial monetary subsidies to employers hiring former foster youth in entry-level positions would promote the employability of this population. In many cases, once a youth has secured his/her first entry-level job, stable employment becomes a less intimidating goal.<sup>190</sup>

Employment subsidies are especially plausible due to Congress' recent focus on educational and vocational scholarships. In 2001, Congress added a sixth purpose to the Chafee Bill providing for educational vouchers for former foster youth.<sup>191</sup> Congress clearly recognizes the need for foster youth to obtain needed skills to become competitive job-seekers. Employment subsidies are a natural next step, enabling emancipated youth who obtained job skills to utilize these skills in a "real world" work environment.<sup>192</sup>

The subsidies may take a variety of forms, including provision of a monetary bonus or tax credit for employers hiring former foster youth. Some might contend subsidies "brand" youth in the working world, implying that employees identified as former foster youth might be subject to

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Interview with anonymous former foster youth, San Diego, Cal. (Sept. 16, 2004).

<sup>191</sup> 42 U.S.C. § 677(i) (Supp. 2002).

<sup>192</sup> Similar subsidies already exist for welfare recipients, in the form of subsidy grants and tax credits for employers who hire welfare recipients. *See id.* § 601(a); 26 U.S.C. § 51(a) (2000).

discrimination in the workplace. However, the possibility of discrimination is not enough to outweigh the benefits of real work experience. Additionally, with training in basic legal skills, youth would be able to properly report such discrimination. Opponents might further argue that youth will become dependent on subsidies and will not learn how to find work in the “real world” without assistance. To prevent this situation, subsidies may be offered to youth on a one-time basis, simply to enable youth to “get their foot in the door” of the working world. In addition to providing youth with much-needed work experience, federal or state employment subsidies for this population would send a message to the general public: We must all work together to integrate former foster youth into mainstream society.

#### *F. State Statutory Reforms*

In addition to federal legislative reforms, states also play an important role in improving the lives of former foster youth. State statutes governing the emancipation of foster youth provide an opportunity for expanded emancipation services. For example, Florida Statute section 409.1451, passed in 2004, is designed to implement Chafee Act funds more effectively.<sup>193</sup> The law specifically provides for aftercare support services for young adults formerly in foster care, including but not limited to (a) mentoring/tutoring, (b) mental health services and substance abuse counseling, (c) life skills classes (including credit management and preventive health services), (d) parenting classes, (e) job skills training, (f) counselor consultations, and (g) temporary financial assistance.<sup>194</sup> The law also enables foster youth as young as 13 to be eligible for similar services, called “preindependent living services.”<sup>195</sup> Additionally, the Florida legislature gave power to the judiciary to ensure compliance with the statute. If the court determines a county department has not complied

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<sup>193</sup> FLA. STAT. ch. § 409.1451 (2004).

<sup>194</sup> §§ 409.1451(5) (a)1a-g.

<sup>195</sup> §§ 409.1451(4)(a)1-2.

with its obligations to provide ILS services to an individual child, the court “shall give the department 30 days within which to comply and, on failure to comply ... the department may be held in contempt.”<sup>196</sup> Thus, counties will be held accountable to the court for failure to provide services to foster youth and former foster youth. The law has been criticized for taking money away from youth because counties required to pay penalties will have less funds for direct foster youth services.<sup>197</sup> Even with this criticism, the law reflects the favorable intent of Florida’s legislature to strengthen the delivery of ILP services.

In New York, state law defines a foster child as a person (i) under the age of 18; or (ii) between the ages of 18 and 21 but consented to remain in foster care past his/her 19<sup>th</sup> birthday, and (a) is a student at a school, college, or university; (b) is attending a vocational or technical training course; (c) lacks the *skills or ability to live independently*.<sup>198</sup> With this definition, foster youth may remain in the system until they are actually prepared for independent living. This type of statute should be adopted in other jurisdictions to ensure youth emancipating from foster care are actually able to live self-sufficiently.

In California, Welfare & Institutions Code section 391 states the court may retain jurisdiction over a foster child unless the government has provided the child with specific documentation, assistance in securing housing and employment, assistance in applying for college or a vocational training program, and assistance in maintaining important relationships with the child.<sup>199</sup> However, in some counties, simply providing brochures to a foster child regarding employment, housing or education constitutes “assistance.”<sup>200</sup>

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<sup>196</sup> § 39.701(8)(c).

<sup>197</sup> Telephone interview with anonymous child welfare advocate (Sept. 9, 2004).

<sup>198</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 427.2 (1) (2004) (emphasis added).

<sup>199</sup> CAL. WELF. & INST. CODE §§ 391(b)-(c) (West Supp. 2005).

<sup>200</sup> Email from Robert Fellmeth, Director, Children’s Advocacy Institute, to author (July 19, 2004, 17:45 PST) (on file with author).

Clearly, this minimal action does not ensure the emancipated youth is successful in those areas.

Advocates are therefore working to specify a standard for assistance before a youth leaves juvenile court jurisdiction. Prof. Robert Fellmeth at the Children's Advocacy Institute in San Diego is working to define exactly what the court must do to fulfill this statutory section before emancipating a foster youth.<sup>201</sup> He argues the statutory intent requires youth be provided with education, health, housing, and employment arrangements to allow independent living.<sup>202</sup> Few counties are currently complying with this interpretation.<sup>203</sup> The fact state legislatures are increasingly recognizing the need for more effective Independent Living Services is promising, but states must now take further steps to ensure the proper implementation of such statutes.

## V. Conclusion

As shown in the case of Theresa, youth preparing to emancipate from foster care face extensive challenges in the transition to adulthood. Because foster youth are in state custody, they possess a Fourteenth Amendment substantive due process right to government protection from harm. However, to adequately protect children, this right must include proper emancipation services and training for adulthood. Sadly, it is not only foster youth who are harmed by our failure to prepare them properly for emancipation. Society also pays a price for the poverty of former foster youth through incarceration costs, homelessness and shelter costs, and crime. Children in foster care still have a chance, but it is the government's responsibility to ensure their preparation for the "real world."

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<sup>201</sup> The Children's Advocacy Institute is an academic center and statewide advocacy group based at the University of San Diego. More information is available at [www.caichildlaw.org](http://www.caichildlaw.org).

<sup>202</sup> Email from Robert Fellmeth, *supra* note 200.

<sup>203</sup> *Id.*