

1-1-2014

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Farah Champagne

American University Washington College of Law

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Recommended Citation

Champagne, Farah. "Providing Proper Preparation: Achieving Economic Self-Sufficiency for Foster Youth." *American University Labor & Employment Law Forum* 4, no. 1 (2014): 2-45.

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PROVIDING PROPER PREPARATION: ACHIEVING ECONOMIC SELF-SUFFICIENCY FOR FOSTER YOUTH

FARRAH CHAMPAGNE¹

PART I: INTRODUCTION

When Sherry T.² was 14 years old, the police removed her from her mother's home. Sherry was in tenth grade at the time, and as a result of her displacement she dropped out of high school. Over the next year and a half, she slept outside, in abandoned homes, and in the homes of strangers. She had no money and no food, and did what she had to do in order to survive. One winter night, she was alone and had nowhere to go. She became so desperate that she caused a ruckus at a shopping center and purposely got arrested just so she would have a warm place to sleep that night. At the time, she did not care whether the police locked her up indefinitely because at least she would have food to eat, a place to sleep, and clothes to wear.

The next morning, she was taken to a homeless shelter where she enrolled in an alternative school. The conditions were so rough at the school that she quit after about two weeks, and decided to take the General Educational Development Test (G.E.D). At the time, she was just fifteen and a half years old. After obtaining her G.E.D., she enrolled in the cosmetology school that was down the street from the transitional

¹ Executive Editor, Labor and Employment Law Forum, Volume 4.1; J.D. Candidate, May 2014, American University Washington College of Law; B.A., Broadcast Journalism, 2007, University of Maryland, College Park. I want to especially thank Professor Susan Bennett for her mentorship, guidance, and invaluable feedback. It was an honor and a privilege to work with you. I am grateful to the editors and staff of the Labor and Employment Law Forum for their thoughtful suggestions. I am especially grateful to my mother, father, grandmother, and grandfather for your encouragement and interest in my work. Most of all, I would like to thank my husband, Maurice, who has been extremely patient, understanding, supportive, and loving throughout our relationship.

² This is not her real name; it has been changed for privacy purposes.

placement she had been moved to. While she was living in the transitional placement, she received very little guidance from the staff members about how to budget, pay bills, or maintain steady employment, and soon after her eighteenth birthday she was forced to move out. She had an extremely difficult time even though she had a job because she did not know how to maintain her housing or employment. After about six months, her landlord told her that she would have to move because she could not pay the rent. Since she did not have enough money saved to get an apartment she became homeless again.

Sherry's story is not uncommon. Many foster youth receive little to no instruction about how to survive in the adult world, and as a result many of them face a losing battle and become homeless adults.³ It is unreasonable to expect youths to attain perfect independence at age eighteen, when the average age of independence in America is twenty-six years of age.⁴ This Comment argues that foster youths have a substantive due process right to receive emancipation preparation services designed to prepare them for independent living and to prevent future homelessness.

This paper consists of nine parts. In Part II, I provide an overview of a foster youth's life after aging out of the foster care system. Part II argues that serious problems occur in the lives of foster youth because they often leave care without having been provided, by their state appointed caregivers, the necessary resources to enable them to succeed. In Part III, I argue that courts should establish a 'right to treatment' for foster youth. Part III also argues that the state is responsible for offering foster youth emancipation preparation services and should be held liable if they fail to do so. In Part IV, I outline the substantive due process rights afforded to foster youth. In Part V, I compare the standard of deliberate indifference to the standard of professional judgment when establishing liability under Section 1983 for a violation of a foster youth's substantive due process rights. In Part V, I argue that the professional judgment standard is more appropriate than the deliberate indifference standard as applied in the foster care context. In Part VI, I highlight the dangers of distinguishing between voluntarily and involuntarily placed foster children as they relate to standards of protection from harm in the eyes of the court. In Part VII, I explain three litigation strategies that foster youth can utilize when bringing causes of action against state actors. Finally, in Part VIII, I provide

³ See Miriam Aroni Krinsky, *A Not So Happy Birthday: The Foster Youth Transition from Adolescence into Adulthood*, 48 Fam. Ct. Rev. 250 (2010) (explaining that former foster youth are expected to become fully self-sufficient by the age of eighteen although the average age of financial independence in the U.S. is twenty-six).

⁴ *Id.* (claiming that when foster youth falter, there is no one there to support them).

recommendations that can be implemented by legislative bodies to better serve the career and personal development needs of foster youth.

PART II: THE PERILS OF UNPREPARED EMANCIPATION

There are five major reasons that youth become involved in the foster care system: neglect or abuse, mental illness in the parent, the child's emotional issues, illness or incapacity of the parent, and family problems.⁵ There are four types of placements for foster youth: basic foster care, therapeutic foster care, institutional care or residential treatment, and psychiatric hospitalization.⁶ Instead of going into a traditional placement, some youth may choose to move in with a relative. Nevertheless, the caregivers at shelters and foster homes often provide foster youth with basic necessities such as food, clothing, and a bed, but they rarely provide the youth with the necessary tools and strategies for adult living.⁷ Once the children reach the age of eighteen, they "age out" of the system and are expected to provide for all of their needs including, rent, food, transportation, clothing, and other living expenses.⁸

According to the United States Adoption and Foster Care Analysis and Reporting System (AFCARS) there were 400,540 children in foster care on September 30, 2011.⁹ AFCARS also reported that 245,260 children exited foster care during fiscal year 2011, and 26,286 were emancipated that year.¹⁰ Many of these youth do not have parents who will offer the support they need to maintain their housing, thus they often become homeless or resort to self-destructive means of survival.

⁵ See Mary Ann Davis, *The Development of Persistent Criminality*, 233 (Joanne Savage eds., 2009)(explaining that vulnerable foster youth sometimes need to be placed out of their homes as a means of protection from their family or caretakers).

⁶ *Id.*

⁷ See May Shin, *A Saving Grace? The Impact of the Fostering Connections to Success and Increasing Adoptions Act on America's Older Foster Youth*, 9 *Hastings Race & Poverty L. J.* 133, 134 (2012)(stating that most children who leave the foster care system are not well prepared to live independently).

⁸ See Davis, *supra* note 4, at 233 (stating that non-foster care youth in the United States are dependent through college)..

⁹ See U.S. Dep't of Health & Hum. Servs., Admin. for Child. & Fams., Admin. on Child., Youth & Fams., Child. Bureau, *The AFCARS Report, Preliminary FY 2011 Estimates as of June 2012*, Rep. 19 (2012) [hereinafter AFCARS Report 19], available at <http://www.acf.hhs.gov/sites/default/files/main/afcarsreport19.pdf>.

¹⁰ *Id.*

Foster youth face significant challenges in their quest to obtain gainful employment when they emancipate from the foster care system. These problems occur because the youth often leave foster care without the necessary resources and skills to enable them to be productive in society.¹¹ The high unemployment rates among foster youth are compounded by problems faced when they attempt to gain adequate education and independent living skills.¹² For example, the average seventeen-year old foster youth reads at a seventh grade level, making it very likely that she will not graduate from high school.¹³ This lack of education can lead to homelessness shortly after aging out of the foster care system. In fact, many emancipated foster youth who have not received adequate emancipation preparation services turn to prostitution, drug dealing, and crimes of desperation just to survive.¹⁴

A. High Unemployment Rates

Many youth who emancipate from the foster care system find themselves unable to perform as productive members of society because they often lack the necessary skills, experience, knowledge and support systems.¹⁵ Without this support, foster youth face enormous economic challenges. The main step toward economic self-sufficiency is obtaining a stable form of employment.¹⁶ Not only do former foster youth have to obtain and retain employment, they also need to pay a security deposit for an apartment, have good credit, obtain furniture, and pay monthly rent. It is not surprising then that many of the eighteen year olds who have been forced into emancipation by the foster care system often lack stable incomes and housing.¹⁷ Statistics show that former foster care youth fair

¹¹ *Id.*

¹² *Id.*

¹³ See Katherine M. Swift, *A Child's Right: What Should the State Be Required to Provide to Teenagers Aging Out of Foster Care?* 15 Wm. & Mary Bill Rts. J. 1205, 1207 (2007) (citing Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Conditions of Youth Preparing to Leave State Care* (2004)).

¹⁴ See Kevin M. Ryan, *Stemming the Tide of Foster Care Runaways: a Due Process Perspective*, 42 Cath. U. L. Rev. 271, 276 - 277 (1993)(stating that many runaways “succumb to a life of chronic indigence, ensnared by long-term homelessness and poverty”).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See e.g. Allison Henig, *Employment Aid for Youth Aging Out of Foster Care: Extending One-Stop Career Centers to Include A Division for Foster Care Youth*, 47

poorly after emancipation in the realm of employment.¹⁸ In addition, youth who are unemployed tend to lack the necessary skills to develop an employment track record, which can lead to them earning a lower living wage over their working lives.¹⁹ A high rate of unemployment in former foster youth negatively affects communities and economic prosperity.²⁰

Foster youth who obtain employment often receive low wages, leaving them below the federal poverty level.²¹ As a result, many rely on public assistance to meet their needs, which is not a cure for the long-term problem.²² If foster youth learn how to become self-sufficient, there would not be as much of a need for government assistance.²³ A national survey revealed that only 38% of former foster youth were employed for one year after leaving the foster care system.²⁴ This survey needs to be viewed by comparing societal norms in the United States where our society does not expect youth to be fully independent at the age of eighteen.²⁵ For example, the United States Census Bureau found that in 2011, 29,641,000 youth who

Fam. Ct. Rev. 570, 572 (2009)(concluding that many youth do not have the knowledge, experience, habits, and relationships that will provide the necessary support for them to be productive members of society).

¹⁸ See Scott Hollander, Jonathan Budd, William A. Petulla, Jennifer A. Staley, *Helping Clients Transition to Independent Living*, 45 Fam. Ct. Rev. 444 (2007); see also Child Welfare League of America, *Child Welfare: Youth After Foster Care*, available at <http://www.cwla.org/programs/fostercare/factsheetafter.htm> (last visited Dec. 14, 2013).

¹⁹ See Dorcas R. Gilmore, *Youth Entrepreneurship Legal Services: A Model for Helping Youths Create Their Own Jobs*, 43 Clearinghouse Rev. J. of Poverty L. & Pol'y 37 (May-June 2009)(claiming that youth unemployment negatively affects society as a whole).

²⁰ *Id.*

²¹ *Id.*

²² See Susan Bennett, *Heartbreak Hotel: The Disharmonious Convergence of Welfare, Housing and Homelessness*, 1 Md. J. Contemp. Legal Issues 27, 34 (1990) (claiming that welfare benefits are a short-term fix for a long-term problem that cannot be simply cured with emergency funding).

²³ See *id.*

²⁴ Child Welfare League of America, *Child Welfare: Youth After Foster Care*, available at <http://www.cwla.org/programs/fostercare/factsheetafter.htm> (last visited Dec. 14, 2013).

²⁵ U.S. Census, Current Population Survey, Young Adults Living At Home: 1960 to Present, tbl. AD-1 (2010), available at <http://www.census.gov/population/socdemo/hh-fam/ad1.xls>.

were between the ages of eighteen and twenty-four were living in households with older adults rather than independently; 58.9% of the males and 50.2% of the females were living with their parents.²⁶ The failure of our society to recognize the economic difficulties facing former foster youth and provide them with proper preparation for emancipation may be part of the cause of the difficulty that foster youth face when they age out of foster care.

B. Low Educational Achievement

The concept of what constitutes a level of education necessary for success in today's competitive world has changed. At one time a high school diploma was enough to guarantee a person's success as an adult, but today it is necessary to obtain some form of post-secondary education. The more education a person obtains, the more financial stability she has.²⁷ Workers today have few job prospects if they only have a high school diploma, and as necessary education levels rise, those who do not keep pace will be left behind. Foster teens are at especially high risk because they cannot depend on family members to support them financially if they cannot obtain employment. In order for a former foster youth to gain employment, she must have academic skills; unfortunately fewer than half of former foster youth have graduated from high school.²⁸

This low educational achievement can partly be attributed to the relocation that happens when youth are placed in foster care. Youth who are placed out of their homes are often deprived of the permanence that would assist them in completing their education. This leads to low graduation rates and places former foster youth at a distinct disadvantage when it comes to employment possibilities.²⁹ The inability to compete with job candidates who have high school diplomas and college degrees leaves many former foster youth out on a limb when it comes to maintaining fully functional independent living.

²⁶ *Id.*

²⁷ See Michele M. Benedetto, *The Key to Successful Independence: State-Funded Post-Secondary Educational Assistance for Emancipated Foster Youth*, 23 St. John's J. Legal Comment. 383, 392 (2008)(stating that two people in a household who earn minimum wage make far less yearly income than the current median, and that those low wages make it nearly impossible to maintain financial independence).

²⁸ See Shin, *supra* note 7, at 139(claiming that low high school graduation rates work against former foster youth, especially when they attempt to compete for jobs against high school and college graduates).

²⁹ See *id.*(claiming that high unemployment rates are worsened by the challenges foster youth face when they attempt to gain education and necessary life skills).

The government has a duty to protect foster youth from harm when they are in the state's custody and this includes properly preparing them for adulthood.³⁰ The state's responsibility to provide emancipation preparation services should include offering foster youth post-secondary educational opportunities. To become fully functioning productive members of society, foster youth must have access to institutions of higher education or vocational programs. This includes state provisions of necessary financial resources.

It is recognized that housing is essential for independent living, but without the means to pay rent, there will be no housing. Foster youth need job skills, and in order to gain job skills, they need education. The problem, however, is that higher education is expensive and former foster youth are unlikely to have the resources to be able to afford college or a vocational training program. Since foster youth cannot count on the support of family members, they should be able to obtain funding from the state, which has been appointed to serve as a parental figure. Foster youth would develop positively if states would strongly support their educational needs.

C. Poverty

Low-wage jobs can lead to poverty; poverty can lead to homelessness. Foster youth do not have a financial support network, unlike the many who have never lived in the foster care system.³¹ Studies show that within a two-year period, 40-50% of former foster youth become homeless.³² There is a strong correlation between foster care and homelessness; a national survey reported that 25% of former foster youth became homeless for at least one night within four years of emancipation.³³ According to another study, 27% of the adult homeless population in New York and Los Angeles were former foster care youth.³⁴ In California, as of April 2011, there were more homeless former foster children than war veterans in the state's

³⁰ *See id.*

³¹ *See id.* at 141.

³² Chapter VI: Life after Foster Care, Juvenile Justice in California Part II: Dependency System, League of Women Voters of Cal. (July 1998), available at <http://www.ca.lwv.org/jjds/chap6.html> (stating that the respondents in his study were not able to buy food or pay bills).

³³ Child Welfare League of America, *Child Welfare: Youth After Foster Care*, available at <http://www.cwla.org/programs/fostercare/factsheetafter.htm> (last visited April 13, 2013)(stating that three in ten homeless adults report that they were former foster care youth).

³⁴ *Id.* (showing that seventy percent of former foster youth wanted to attend college).

homeless shelters.³⁵ Many of these youth became homeless when they “aged out” of the foster care system at the tender age of eighteen.

It is unrealistic to expect youth who have suffered from abuse and neglect to have workable independent living skills at the age of eighteen.³⁶ Independent living skills assist youth in achieving and maintaining economic self-sufficiency, but these skills are not enough to ensure successful emancipation.³⁷ Along with independent living skills, former foster youth need support networks and relationships with family, friends, colleagues, and other adults. Interdependence is what is necessary, and this combination of skills and support networks is what leads to high quality independent living.³⁸ Achieving workable interdependency requires planning for emancipation by assessing and acquiring networks for potential resources including relatives, mentors, members of religious organizations, and foster parents.³⁹ Foster youth need others who can help them advance economically.⁴⁰

Very few of us would allow our eighteen-year-old child to move out of our home with no job, no money, no home, and no life skills. Many of us on the other hand would assist her when the inevitable difficulties of life fell upon her. Yet former foster youth who have often suffered abuse and neglect are abandoned and left to face the harsh realities of adult life without any help.⁴¹ Former foster youth on average earn \$6,000 or less per

³⁵ Amita Sharma, *Many Penniless Foster Kids Call the Streets Home* (KPBS Evening Edition radio broadcast Apr. 6, 2011), available at [http://www.kpbs.org/news/2011/apr/06/many-penniless-former-foster-kids-make-call-street/\(claiming](http://www.kpbs.org/news/2011/apr/06/many-penniless-former-foster-kids-make-call-street/(claiming) that “reform requires influence” and there are very few lobbyists in Sacramento who advocate for foster youth, thus many of them fall through the cracks).

³⁶ UCLA Sch. of Soc. Welfare Ctr. for Child and Family Policy Studies, *AGING OUT OF FOSTER CARE: L.A. County’s Indep. Living Program, Final Report Year 1*, Rep. 3, 22 (1988)(arguing that the notion of independent living for eighteen-year olds is unrealistic).

³⁷ *Id.* (stating that the notion of independent eighteen-year olds is unrealistic, especially for children who have been victims of abuse or neglect or who have spent time in foster care).

³⁸ *Id.* at 23(asserting that concrete skill-building can help achieve interdependence).

³⁹ *Id.* (arguing that the focus should be on interdependence rather than independence).

⁴⁰ See Susan D. Bennett, *Creating A Client Consortium: Building Social Capital, Bridging Structural Holes*, 13 *Clinical L. Rev.* 67, 101 (2006) (asserting that community clients need to build connections within their communities in order to advance economically and socially).

⁴¹ See Krinsky, *supra* note 3, at 251.

year; they lack independent living skills; only one-third have driver's licenses; fewer than half have \$250 in cash; and fewer than a fourth of them have the skills to set up and maintain a household.⁴² When society fails to properly prepare foster youth for emancipation, it creates tragedies in the lives of the youth who then are more likely to become homeless soon after leaving the foster care system. With just a smattering of knowledge about life in the real world, many former foster youth find themselves alone at the tender age of eighteen, desperate for survival.

D. Crimes of Desperation

Foster youth are more likely to engage in criminal activity than youth who were not involved in the system.⁴³ When foster youth “age out” of the system they are at a high risk of becoming involved with crime.⁴⁴ Studies show that foster youth were more likely to report that they damaged property, stole something that was worth more than \$50, participated in a group fight, and pulled a knife or a gun on someone.⁴⁵ This high rate of criminal behavior is of particular concern because of the negative

⁴² See Jose-Luis Mejia, Glenn Eagleson & Justin Slaughter, Honoring Emancipated Youth, Barriers Facing Foster Youth: National and Local Statistics Around Emancipating Foster Youth, <http://yesyous.com/static/files/0266e33d3f546cb5436a10798e657d97/1335227502/FosterYouthStatistics.pdf> (last visited April 13, 2013); see also Peter J. Pecora et al., Improving Family Foster Care: Findings From the Northwest Foster Care Alumni Study (2005), available at http://www.casey.org/Resources/Publications/pdf/ImprovingFamilyFosterCare_FR.pdf. (last visited April 13, 2013); see also Robert M. George et al., University of Chicago, Chapin Hall Center for Children, Employment Outcomes for Youth Aging Out of Foster Care (2002), available at <http://aspe.hhs.gov/hsp/fostercare-agingout02> (last visited April 13, 2013).

⁴³ See Shin, *supra* note 7, at 141(asserting that foster youth are incarcerated more often because “judges perceive their lack of caregiver representation as an indication that the youth[s] are less stable and less supervised than their non-foster peers.”).

⁴⁴ *Id.* (stating that one in four foster youth who age out of foster care will be incarcerated within the first two years of emancipation).

⁴⁵ Offending During Late Adolescence: How Do Youth Aging Out Of Care Compare With Their Peers? Chapin Hall 1, 6 (2007), available at http://www.chapinhall.org/sites/default/files/publications/ChapinHallDocument_0.pdf (last visited April 13, 2013).

correlation between criminal history and obtainment of employment.⁴⁶ Studies show that people who were formerly incarcerated work less and earn less than those who were not incarcerated.⁴⁷ Even when foster youths obtain employment, they often have difficulty retaining the job. Thus, they often elect to earn a considerable amount of their income from outside of the legal economy.⁴⁸ One study showed that former foster youth sometimes resort to illegal means in order to support themselves, including drug dealing and prostitution.⁴⁹

Youth who become homeless or who are at risk of becoming homeless sometimes engage in survival sex, which is the “selling of sex to meet subsistence needs.”⁵⁰ Homeless boys and girls constitute the highest represented population of prostitutes, engaging in survival sex to get shelter, food, drugs, or money.⁵¹ This results in an extremely high rate of HIV infections.⁵² Survival sex is a strategy that is used to maintain economic stability and is often combined with other high-risk behaviors including “substance use, suicide attempts, STDs, pregnancies and criminal behavior.”⁵³ According to a recent study, about 28% of street youth and 10% of shelter youth reported that they had engaged in survival sex. The authors of the study say that it is likely that the subjects “underreported their participation in survival sex, a highly stigmatized behavior.”⁵⁴ The

⁴⁶ Michael G. Vaughn, *Aging Out of Foster Care and Legal Involvement: Toward a Typology of Risk*, 82 Soc. Serv. Rev. 422, Univ. of Chi. Press (2008) (asserting that individuals who were incarcerated in their late teens usually work less and are less likely to get married than those who were not incarcerated).

⁴⁷ *Id.*

⁴⁸ See John Hagan & Bill McCarthy, *On Your Own Without A Net: The Transition To Adulthood For Vulnerable Populations*, 182 (D. Wayne Osgood et al. eds., 2005) (stating that many homeless youth are arrested for requesting spare change or for cleaning vehicle windows for money).

⁴⁹ Chapter VI: Life After Foster Care, *Juvenile Justice in California Part II: Dependency System*, League of Women Voters of Cal. (July 1998), available at <http://www.ca.lwv.org/jjds/chap6.html>.

⁵⁰ Jody M. Greene et al., *Prevalence and Correlates of Survival Sex Among Runaway and Homeless Youth*, *Am. J. of Pub. Health*, 1406, 1406-08 (1999), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1508758/pdf/amjph00009-0102.pdf> (last visited November 22, 2013).

⁵¹ *Id.*

⁵² See Ryan, *supra* note 14, at 277.

⁵³ See Greene, *supra* note 50, at 1406-08.

⁵⁴ *Id.* at 1408.

proportion of homeless and runaway youth who practice survival sex ranges from 10% to 50%.⁵⁵

Youth who are not properly prepared for independent living either become homeless or are at risk of becoming homeless, so they seek others who are in similar situations. This can lead to gang involvement, which can lead to incarceration.⁵⁶ Some girls who do not have the support of family members join gangs and earn their keep by servicing the dominant males in the gang with sex, thus contributing to the “gang economy.”⁵⁷ Disadvantaged former foster youth who are ill prepared for adult living may feel as though they have no choice but to turn to gang affiliation in order to survive. Youths in gangs are often involved in drug trafficking.⁵⁸ For many former foster youth, dealing drugs is a means of survival.

Without proper preparation for emancipation, many former foster youth feel as though they have no other choice but to deal drugs in order to maintain their economic stability.⁵⁹ Studies show that negative outcomes such as these are positively correlated with the lack of stability that many youth experience in foster care situations.⁶⁰ Independent living programs, drop-in centers, and outreach programs may help youth find employment and long-term housing to prevent some of these destructive survival mechanisms.⁶¹

PART III: THE ‘RIGHT TO TREATMENT’ FOR FOSTER YOUTH

Foster youth who age out of the foster care system should have the right to receive services for the maintenance of successful independent living. The failure to provide these services is extremely harmful. This harm does not necessarily show while the youth is in care; it manifests once the youth

⁵⁵ *Id.* at 1406.

⁵⁶ Michele Benedetto, *An Ounce of Prevention: A Foster Youth's Substantive Due Process Right to Proper Preparation for Emancipation*, 9 U.C. DAVIS J. JUV. L. & POL'Y 381, 389 (2005).

⁵⁷ See Greene, *supra* note 50, at 1407.

⁵⁸ Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against Terry v. Ohio*, 43 TEX. TECH L. REV. 299, 309 (2010).

⁵⁹ Ted Sampsel-Jones, *Culture and Contempt: The Limitations of Expressive Criminal Law*, 27 SEATTLE U. L. REV. 133, 157-58 (2003).

⁶⁰ Melinda Atkinson, *Aging Out of Foster Care: Towards A Universal Safety Net for Former Foster Care Youth*, 43 HARV. C.R.-C.L. L. REV. 183, 190 (2008).

⁶¹ See Greene, *supra* note 50, 1409.

has left foster care and is living independently. In order to prevent this harm, courts should establish a 'right to treatment' for foster youth.

A. The History of 'Right to Treatment' Theories

Advocates in the mental health field brought national attention to the 'right to treatment.'⁶² Morton Birnbaum advocated for the concept by arguing that people who were institutionalized under *parens patriae* must receive "adequate medical and psychological treatment."⁶³ Birnbaum argued that with a 'right to treatment' legislatures would have to provide appropriate facilities for people in mental institutions.⁶⁴ The 'right to treatment' can be based on the Constitution or on statute. In *Miller v. Overholser*, the court considered the 'right to treatment' from a statutory perspective as it related to the condition for which Miller needed treatment.⁶⁵ The court in that case held that a person who is incarcerated for treatment as a sexual psychopath and had not committed a criminal act, had a right to receive therapeutic treatment related to the reason for his commitment.⁶⁶

If no statutory 'right to treatment' existed, the institutionalized person had to look to the Constitution. The support for the 'right to treatment' in the Constitution was pronounced in *Rouse v. Cameron*. In that 1966 case, the court explained that the purpose of committing people involuntarily to a mental hospital was to treat them for the mental condition that led to the commitment.⁶⁷ Without that treatment, the court said that the hospital would effectively be transformed into a penitentiary where people could be held indefinitely even though they committed no criminal offense.⁶⁸ The court found that failing to provide treatment could violate the confined person's Fourteenth Amendment right to due process of law.⁶⁹ The court explained that confinement without treatment for someone who committed no crime could be considered so "inhumane as to be cruel and unusual punishment," in violation of the Eighth Amendment.⁷⁰

⁶² Mark H. Marshall, *The Right to Treatment for Juveniles in Texas: A Legislative Proposal*, 13 ST. MARY'S L.J. 142, 145 (1981) (citing Morton Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499, 499-505 (1960)).

⁶³ *See id.*

⁶⁴ *Id.*

⁶⁵ *Miller v. Overholser*, 206 F.2d 415, 418-19 (D.C. Cir. 1953).

⁶⁶ *Id.* at 419.

⁶⁷ *Rouse v. Cameron*, 373 F.2d 451, 452 (D.C. Cir. 1966).

⁶⁸ *Id.* at 453.

⁶⁹ *Id.*

⁷⁰ *Id.*

Since this decision, the ‘right to treatment’ has gained a measure of acceptance in lower federal courts.⁷¹ Those courts have held that involuntarily committed individuals have the right to receive rehabilitative treatment under the due process clause of the Fourteenth Amendment, and possibly under the Eighth Amendment.⁷² In *Wyatt v. Stickney*, the court held that patients involuntarily committed to mental institutions for treatment purposes “unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition.”⁷³

B. The Expansion of the ‘Right to Treatment’

The idea of a ‘right to treatment’ for juvenile offenders came about in the late nineteenth century. Those were the early days of the juvenile court movement where progressive reformers envisioned a juvenile correction system that would provide youth with individualized treatment in a separate facility from adults.⁷⁴ Applying the doctrine of *parens patriae*, juvenile courts emphasized rehabilitation, supervision, and treatment rather than punishment. Juvenile hearings were confidential, and children were deemed delinquent rather than guilty of a crime.⁷⁵ Juries and lawyers were not allowed in the proceedings, and dispositions were made by determining the best interest of the child, with a focus on the character and lifestyle of that particular child.⁷⁶

Formal rules were replaced with principles of psychology, and courts would collect personal information about each child in order to analyze, diagnose, and cure them.⁷⁷ In his dissent in *K.H. v. Morgan*, Judge Coffey affirmed his support for the rehabilitative nature of the juvenile justice system. He cited *Nelson v. Heyne’s* holding that juveniles who were removed from their parent’s custody and placed in state custody must be given “appropriate individualized care and treatment.”⁷⁸ Coffey expanded this view of individualized care and treatment by quoting the *Nelson* court:

⁷¹ *Covington v. Harris*, 419 F.2d 617, 624 (D.C. Cir. 1969).

⁷² *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971) *aff’d sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

⁷³ *Stickney*, 325 F. Supp. At 784.

⁷⁴ Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. Rev. 821, 823-825 (1988).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *K.H. v. Morgan*, 914 F.2d 846, 855 (7th Cir. 1990).

In our view the ‘right to treatment’ includes the right to minimum acceptable standards of care and treatment for juveniles and the right to *individualized care and treatment*. Because children differ in their need for rehabilitation, individual need for treatment will differ. When a state *assumes the place of the juvenile's parents, it assumes as well the parental duties, and its treatment of its juveniles should, so far as can be reasonably required, be what proper parental care would provide.*⁷⁹

The courts recognized that children had different needs based on their history, environment, and character. Thus, the courts remained flexible when diagnosing and treating children. This enhanced flexibility meant fewer legal procedures and more leeway with treatment options. This leeway required little accountability, and as a result, many unfortunate occurrences ensued in the lives of the children who were supposed to be receiving rehabilitation. Instead of receiving ‘appropriate individualized care and treatment,’⁸⁰ juveniles received harsh orders of confinement, which resembled strict penal sentences. The inappropriate treatment prompted lawyers and scholars to attack the juvenile court system and the institutional school system where children were being sent for treatment.⁸¹

The Supreme Court’s decision in *In re Gault* transformed the juvenile court to one that was strikingly similar to the adult court. In *Gault*, a fifteen-year old boy was arrested for violating an Arizona law when he used foul language over the telephone.⁸² At an informal hearing he was ‘sentenced’ to confinement in Arizona’s Industrial School for six years.⁸³ His parents filed a petition for his release claiming that their son’s due process rights were violated.⁸⁴ The court concluded that a juvenile court hearing must “measure up to the essentials of due process and fair treatment.”⁸⁵ In an effort to combine rehabilitation with the emerging constitutional doctrines, lawyers developed a constitutionally based ‘right to treatment’ that would apply to juveniles deemed delinquent.

⁷⁹ Nelson v. Heyne, 491 F.2d 352, 360 (7th Cir. 1974) (italics added).

⁸⁰ *Morgan*, 914 F.2d at 855.

⁸¹ Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment?: The Modern Quest for A Historical Promise*, 68 TEMP. L. REV. 1791, 1796 (1995).

⁸² *In re Gault*, 387 U.S. 1, 4, 60 (1967).

⁸³ *Id.* at 60-61.

⁸⁴ *Id.* at 3.

⁸⁵ *Id.* at 30.

C. A Description of the Constitutional Theories

The Fourteenth Amendment Due Process Clause provides two bases for the ‘right to treatment.’ The first is referred to as the *quid pro quo* theory, which was endorsed in *Morales, Nelson, and Sproat*.⁸⁶ This theory requires state actors to provide appropriate treatment in relation to the purpose of a person’s confinement.⁸⁷ For example, if someone is hospitalized for a particular illness, treatment for that specific illness is required.⁸⁸ If the person is not treated for the purpose of his hospitalization, it is equivalent to being locked up in a penitentiary without having committed a criminal offense.⁸⁹ The second Fourteenth Amendment argument is referred to as the *Purpose Theory*. The requirement of this theory is reflected in *Jackson v. Indiana*, a United States Supreme Court case. In that case, the Court held that in order for states to justify restricting a person’s liberty, treatment must be provided such that it “bear[s] some reasonable relation to the purpose for which the individual is committed.”⁹⁰ If no treatment is provided, and the youth has been confined for purposes other than punishment, the confinement would constitute cruel and unusual punishment.⁹¹

The courts differ in the ways in which they embrace the constitutional argument of a ‘right to treatment.’ Courts can apply one of the theories or they can combine them. In *Morgan v. Sproat*, the court embraced both the *quid pro quo* and the *purpose* arguments. There the court explained that the purpose of incarcerating juveniles in a training school was for treatment, and due process required that the programs at the school be related to that purpose.⁹² The court also referred to the *parens patriae*

⁸⁶ See *Morgan v. Sproat*, 432 F. Supp. 1130, 1136 (S.D. Miss. 1977) (stating that denial of due process safeguards is constitutionally impermissible unless the “incarceration of juveniles serves beneficent rather than punitive, purposes”); *Morales v. Turman*, 383 F. Supp. 53, 71 (E.D. Tex. 1974) (asserting that the government must afford *quid pro quo* for eliminating procedural safeguards when confining juveniles only for rehabilitation), rev’d on procedural grounds, 535 F.2d 864 (5th Cir. 1976), aff’d, 430 U.S. 322 (1977) (per curiam); *Nelson v. Heyne*, 355 F. Supp. 451, 458 (N.D. Ind. 1972) (affirming that juveniles are entitled to constitutionally protected procedural safeguards), aff’d, 491 F.2d 352, 359 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

⁸⁷ *Gary W. v. State of La.*, 437 F. Supp. 1209, 1216 (E.D. La. 1976).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

⁹¹ *Id.*

⁹² *Morgan v. Sproat*, 432 F. Supp. 1130, 1136 (S.D. Miss. 1977).

doctrine and explained that the juvenile must be given treatment so that the involuntary commitment did not amount to an “arbitrary exercise of governmental power proscribed by the due process clause.”⁹³

The plaintiffs in the above cases requested extensive relief. The plaintiffs’ testimonies about the dangerous facilities and lack of treatment shocked the judges so much that they issued comprehensive corrective rulings.⁹⁴ The courts enjoined inadequate treatment programs, necessitated student progress reports, and required instruction for corrections officers about how to provide treatment.⁹⁵

The ‘right to treatment’ was a powerful claim employed to improve juvenile facilities until the early 1980’s Supreme Court decision in *Youngberg v. Romeo*. This case limited the ‘right to treatment’ for incarcerated juveniles. In that case, Romeo claimed that he had a right to safety, freedom from restraint, and minimally adequate training. The Court granted his first two claims in non-absolute terms,⁹⁶ and found his third claim troubling.⁹⁷ The court ruled narrowly on the third issue asserting that the State has no constitutional duty to provide substantive services to people in its care.⁹⁸ The Court reasoned that no amount of training would permit his release from the institution and consequently limited his training to coincide with his need for safety and freedom from bodily restraint.⁹⁹

⁹³ *Id.*

⁹⁴ See e.g., *Nelson v. Heyne*, 491 F.2d 352, 354 n.3, 356-57 (7th Cir.) (explaining that staff regularly tranquilized the juveniles and beat them with a thick wooden paddle, which caused bleeding, blistering, and bruising), cert. denied, 417 U.S. 976 (1974); *Morgan*, 432 F. Supp. at 1138 (stating that juveniles were placed in cells that had “no window, furnishings or slab for sleeping,” and the toilet was a “hole in the floor with a flushing mechanism located outside the cell”); *Martarella v. Kelly*, 359 F. Supp. 478, 480 (S.D.N.Y. 1973) (stating that the facility had unusable plumbing, roof leaks, and cracked walls and ceilings); *Inmates of Boys' Training Sch. v. Affleck*, 346 F. Supp. 1354, 1359-60 (D.R.I. 1972) (stating that juveniles did not have ready access to medical care and were never allowed outdoor exercise).

⁹⁵ *Morgan*, 432 F. Supp. At 1148 (enjoining defendant from continuing to operate inadequate treatment program and ordering defendant to submit a plan outlining student’s progress); *Martarella*, 359 F. Supp. at 483 (finding that the court has the authority to determine which standards of care must be met for cases involving institutional inmates); *Inmates of Boys' Training Sch.*, 346 F. Supp. at 1374.

⁹⁶ *Youngberg v. Romeo*, 457 U.S. 307, 319–20 (1982).

⁹⁷ *Id.* at 316.

⁹⁸ *Id.* at 317.

⁹⁹ *Id.* at 317–318.

D. Applying the ‘Right to Treatment’ to Foster Youth under Youngberg

Although *Youngberg*¹⁰⁰ limited the ‘right to treatment’ for individuals in institutions, the right, albeit a narrow one, can be applied effectively to assist foster youth who are reaching the age of emancipation. The Court’s holding in *Youngberg* guaranteed institutionalized people the right to training for safety and freedom from bodily restraint.¹⁰¹ This right could be extended to foster youth preparing for emancipation. Foster youth who are preparing to emancipate from state custody need training to ensure their personal safety and bodily freedom in the adult world. Necessary training that should be required for foster youth as it concerns their safety and freedom when they are emancipating from foster care includes instruction regarding (1) life skills, (2) housing maintenance, (3) budgeting, (4) obtaining and maintaining employment, (5) obtaining medical coverage, and (6) securing community resources and permanent networks.

Without this essential preparation for adulthood from the state actors responsible for their care, foster youth suffer tremendous harm. Some of the harms suffered include adult homelessness, unemployment, low educational achievement, and crimes of desperation. Crimes of desperation often lead people into situations that compromise their “safety,” which can also lead to the “bodily restraint” and loss of freedom that comes from being locked up in a jail cell. These situations are harmful and preventable if the state actors who are responsible for the care of foster youth would provide them with necessary tools for economic self-sufficiency.

The similarities between Romeo’s situation and the plight of foster care youth are striking. The Supreme Court stated in *Youngberg*:

It is not feasible . . . to define or identify the type of training that may be required in every case. A court properly may start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy, in terms more familiar to courts, may be stated as that training which is reasonable in light of identifiable liberty interests and the circumstances of the case.¹⁰²

A foster youth who is leaving state custody has a liberty interest in safety and freedom similar to the way that Romeo in *Youngberg* did. At least one court has recognized the connection between Romeo and foster youth. In *Marisol A. v. Giuliani*, the Second Circuit extended the reasoning in

¹⁰⁰ *Id.* at 317.

¹⁰¹ *Id.* at 319.

¹⁰² *Id.* n.25.

Youngberg to children in foster care.¹⁰³ The court in that case agreed with the court in *Doe v. New York City Department of Social Services*, that “[w]hen 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.”¹⁰⁴ The *Marisol* court held that the children stated a sufficient Fourteenth Amendment claim for the “defendants’ failure to provide reasonable services and placements that protect [the foster children’s] right of association with their biological family members.”¹⁰⁵

E. Teenagers in Foster Care Should Have a ‘Right to Treatment’

Teenagers may have acquired the necessary skills to avoid physical harm while they are in foster care, but they need special training in order to avoid harm after they emancipate from the system.¹⁰⁶ Documents sent to Congress indicate that foster youth who age out of the system experience “high rates of homelessness, non-marital childbearing, poverty, and delinquent or criminal behavior; they are also frequently the target of crime and physical assaults.”¹⁰⁷ The Foster Care Independence Act recommends that state and local governments offer extensive financial assistance, and programs for education, training, and employment to foster youth who are preparing for emancipation.¹⁰⁸

When teenagers emancipate from the foster care system, they often lose contact with their state-appointed caregivers. Keeping track of youth after they emancipate would require an inordinate amount of time, money, and effort. This fact necessitates that state actors provide foster youth with workable life skills so they can succeed in adulthood. When foster youth succeed after emancipation, society benefits. Training for adulthood could help former foster youth stay off public assistance and out of prison or other state-sponsored institutions. Instead of turning to crime for economic support, emancipated foster youth will be more likely to get a legal job, go to college, and be productive members of society.

¹⁰³ *Marisol A. v. Giuliani*, 929 F.Supp. 662, 675 (S.D.N.Y. 1996), *aff’d sub nom.*, *Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997).

¹⁰⁴ *Doe v. New York City Dep’t. of Soc. Servs.*, 649 F.2d 134, 141 (2d Cir. 1981).

¹⁰⁵ *Marisol A. by Forbes v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996) *aff’d sub nom.* *Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997).

¹⁰⁶ *See Foster Care Independence Act of 1999*, Pub. L. No. 106-169, § 101, 113 Stat. 1822, 1823 (1999) (codified in scattered sections of 42 U.S.C. 677).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

Some may argue that extending the ‘right to treatment’ to foster youth would bring about more financial constraints and disincentivize social workers from removing children from dangerous situations. The problem, however, does not lie in the extra responsibility that comes from parenting the youth. The court in *K.H.* asserted that the problem lies in the limited supply of financial resources in the child welfare system.¹⁰⁹ The lack of financial resources may provide some insight into why courts do not recognize the affirmative right of treatment for foster youth, but do recognize a right for freedom from harm. Providing services can be extremely costly; refraining from harm is free.

PART IV: THE EVOLUTION OF FOSTER YOUTH’S SUBSTANTIVE DUE PROCESS RIGHT OF FREEDOM FROM HARM

Foster youth who age out of the foster care system face serious difficulties and States should provide services for these youth so they can become self-sufficient adults. When a youth is in foster care, the state assumes a parental role. The state actors should be required by law to protect foster children from harm by providing treatment in the form of services to prepare the youth for adulthood. These services should include the provision of access to support systems and educational and employment opportunities so that foster youth can acquire the tools they need to succeed in their transition to independent living.

A. The Right to Be Free From Harm in Prisons and Mental Health Facilities

In *DeShaney v. Winnebago County Department of Social Services*, the Court analogized the rights of abused and neglected children to the rights of prisoners and mentally retarded persons.¹¹⁰ The Supreme Court initially recognized that prisoners had a right to humane conditions and adequate medical treatment in *Estelle v. Gamble*.¹¹¹ Later, the Supreme Court in *Youngberg v. Romeo* recognized that mental health patients have a right to freedom from harm.¹¹² These two cases serve as the foundation for the constitutional right to safety while in state custody. Under Section 1983,

¹⁰⁹ See *K.H. v. Morgan*, 914 F.2d 846, 853 (7th Cir. 1990).

¹¹⁰ *Id.*

¹¹¹ See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

¹¹² *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982).

this right can be used to enforce an affirmative duty on state actors to ensure that those who are in state custody are safe from harm.¹¹³

In *Estelle v. Gamble*, the Supreme Court stated that prisoners are entitled to medical care under the Eighth Amendment's cruel and unusual punishment clause.¹¹⁴ The plaintiff, a prisoner, had serious medical problems including a back injury. When he asked to see a doctor, prison personnel denied him access to services. Gamble brought a civil rights action under 42 U.S.C. § 1983, alleging that the prison personnel subjected him to cruel and unusual punishment, thus violating his Eighth Amendment rights. The Supreme Court held that deliberate indifference to a prisoner's serious injuries constitutes cruel and unusual punishment. The court concluded that deliberate indifference to the serious medical needs of prisoners constituted an "unnecessary and wanton infliction of pain."¹¹⁵ The Court stated that in this case however, there was not deliberate indifference because medical personnel treated Gamble seventeen times within three months.¹¹⁶

In *Youngberg*, the Supreme Court found that committed persons "possessed constitutionally protected liberty interests under the Fourteenth Amendment."¹¹⁷ In this case, a mentally retarded person who was involuntarily committed to a mental institution suffered many injuries because of his actions and the actions of other residents.¹¹⁸ The court explained that when a person is institutionalized there is a duty "to provide certain services and care does exist, although even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities."¹¹⁹ The Court also said that the patient had a due process right to "reasonably safe conditions of confinement."¹²⁰ The Court reasoned that, "if it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the

¹¹³ See Carolina D. Watts, "Indifferent (Towards) Indifference:" *Post-DeShaney* Accountability for Social Services Agencies When A Child Is Injured or Killed Under Their Protective Watch, 30 Pepp. L. Rev. 125, 133 (2002).

¹¹⁴ See *Gamble*, 429 U.S. at 104.

¹¹⁵ *Id.* at 104 (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

¹¹⁶ *Id.* at 106-08.

¹¹⁷ *Youngberg*, 457 U.S. at 309.

¹¹⁸ *Id.* at 309-12.

¹¹⁹ *Id.* at 317.

¹²⁰ *Id.* at 307.

involuntarily committed — who may not be punished at all — in unsafe conditions.”¹²¹

B. A Child’s Right to Safety: Pre-DeShaney

In *Doe v. New York City Department of Social Services*, a foster child filed a civil rights action against the New York Department of Social Services for failing to supervise her in her foster care placement.¹²² The court held that a defendant may be liable under Section 1983 if the agency knew of an injury, risk, or specific duty, and exhibited deliberate indifference. In addition, the failure to perform the duty or ameliorate the risk must have been the proximate cause of the deprivation of the plaintiff’s rights.¹²³

In *Taylor v. Ledbetter*, the court found that state actors must take affirmative action to “ensure the well being and promote the welfare of children in foster care.”¹²⁴ When an official is charged with failing to exercise an affirmative duty, a Section 1983 action can arise if two requirements are satisfied.¹²⁵ First, the failure to act must have been the substantial factor that led to the violation of the liberty or property interest.¹²⁶ Second, the responsible official must have displayed deliberate indifference.¹²⁷ The court relied on *Youngberg* and *Estelle* when it stated that the Fourteenth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹²⁸ The court reasoned that society has been outraged at the mistreatment that defenseless children have faced, and acknowledged that “it is time that the law give to these defenseless children at least the same protection afforded adults who are imprisoned as a result of their own misdeeds.”¹²⁹

¹²¹ *Id.* at 315–16.

¹²² *See Doe v. New York City Dept. of Soc. Services*, 649 F.2d 134 (2d Cir. 1981).

¹²³ *Id.* at 145.

¹²⁴ *Taylor v. Ledbetter*, 818 F.2d 791, 799 (11th Cir. 1987).

¹²⁵ *Id.* at 794.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 797 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

¹²⁹ *Id.*

C. The Supreme Court Limits the Protection of Children: The DeShaney Case

Joshua DeShaney lived with an abusive father who beat him often.¹³⁰ The Department of Social Services was aware of the abuse and took “various steps to protect him,” but it let him stay with his father.¹³¹ Joshua’s father eventually beat him so severely that he suffered permanent brain damage, leaving him severely retarded.¹³² Joshua’s mother filed suit against the county and the Department of Social Services.¹³³ The Supreme Court held that the state did not have a Fourteenth Amendment duty to protect a child who was not in its custody, but who had been with his parent the whole time.¹³⁴ The Court did recognize, however, that “in certain limited circumstances the Constitution imposed upon the State affirmative duties of care and protection with respect to particular individuals.”¹³⁵

Several Courts of Appeals have held that if States fail to protect foster children from mistreatment they may be liable under the Due Process Clause.¹³⁶ In footnote nine, the Court stated, “had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.”¹³⁷

D. The Lower Courts’ Post-DeShaney Interpretations

Lower courts generally interpret the Supreme Court’s decision in *DeShaney* to mean that while youth are in the foster care system, they have a substantive due process right to be free from harm.¹³⁸ In *Nicini v. Morra*, Tony Nicini had been abused by his parents and had attempted suicide.¹³⁹ After his release from John F. Kennedy’s Crisis Center he went to live with

¹³⁰ *DeShaney v. Winnebago County Dep’t. of Soc. Servs.*, 489 U.S. 189, 191–93 (1989).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 201.

¹³⁵ *Id.* at 198.

¹³⁶ See *Meador v. Cabinet for Human Res.*, 902 F.2d 474 (6th Cir. 1990); *Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000); *Braam v. Washington*, 81 P.3d 851, 857 (Wash. 2003).

¹³⁷ See *DeShaney*, 489 U.S. at 191 n.9.

¹³⁸ *Id.*

¹³⁹ *Nicini*, 212 F.3d at 801.

an unofficial foster family during which time he was under the supervision of the state.¹⁴⁰ He subsequently ran away from the home alleging that the foster father, Edward Morra, had given him alcohol and drugs and had sexually assaulted him. Investigation into the foster father's past revealed that he had been previously convicted for corrupting a minor and for distributing controlled substances to a minor.¹⁴¹ Nicini filed suit under 42 U.S.C. § 1983¹⁴² and state tort law against Frank Cyrus, the caseworker with the New Jersey Department of Human Services, Division of Youth and Family Services.¹⁴³ The court held that just as the state had an affirmative duty to provide for the needs of prisoners, it had the same duty to foster children because the situations are analogous.¹⁴⁴ The court explained, "when the state places a child in state-regulated foster care, the state has entered into a special relationship with that child, which imposes upon it certain affirmative duties. The failure to perform such duties can give rise, under sufficiently culpable circumstances, to liability under section 1983."¹⁴⁵

In *Meador v. Cabinet for Human Resources*, a civil rights action was filed on behalf of foster children who were allegedly abused while in foster care.¹⁴⁶ The Sixth Circuit held "that due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes."¹⁴⁷ Several other courts recognize that right as well, including *Taylor v. Ledbetter*, a pre-*DeShaney* case. In that case, a foster child filed suit against Georgia state and county officials for abuse suffered at the hands of a foster parent.¹⁴⁸ Through her guardian, the child filed suit pursuant to 42 U.S.C. § 1983, alleging that the state and county officials were grossly negligent and indifferent to her welfare.¹⁴⁹ The court held that a child who had been placed in a foster home involuntarily was in a similar situation to a prisoner and a child locked up in a mental facility.¹⁵⁰ Thus,

¹⁴⁰ *Id.* at 808–09.

¹⁴¹ *Id.* at 804.

¹⁴² Civil Rights Act of 1964, Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1979) (codified as 42 U.S.C. § 1983).

¹⁴³ 212 F.3d 798, 800 (3d Cir. 2000).

¹⁴⁴ *Id.* at 808.

¹⁴⁵ *Id.*

¹⁴⁶ 902 F.2d 474, (6th Cir. 1990).

¹⁴⁷ *Id.* at 476.

¹⁴⁸ *Taylor v. Ledbetter*, 818 F.2d 791, 792 (11th Cir. 1987).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

the foster child could file suit under section 1983 for violation of her Fourteenth Amendment rights.¹⁵¹

In *Braam v. Washington*, the Supreme Court of Washington held that upholding the due process rights of foster youth was in line with “the weight of authority among our sister courts.”¹⁵² Foster care is a form of state custody and foster care workers can be held liable for denying a foster youth his right to safety if the child is harmed because of the denial.¹⁵³ The courts have found that the right exists and they are willing to hold state actors liable for violating that right.¹⁵⁴ This is important in the protection of foster youth, but the rights of children who are not in custody are still in question.¹⁵⁵

PART V: CONFLICTING STANDARDS: “DELIBERATE INDIFFERENCE” OR “PROFESSIONAL JUDGMENT”

There are two competing standards that the courts use when determining the liability of state actors who fail to comply with their obligations to foster youth. The standards originate from the Supreme Court cases *Estelle v. Gamble* and *Youngberg v. Romeo*. The *Estelle* standard requires a stricter level of proof than the *Youngberg* standard although some courts have stated that the standards are so similar that either could apply in any situation.¹⁵⁶ The result of these competing standards, and no Supreme Court ruling on the subject, is a circuit split regarding which standard of care applies to foster youth – the standard that applies to prisoners or the standard that applies to institutionalized mental patients.

The Supreme Court in *DeShaney v. Winnebago County Department of Social Services* found that the situation of foster youth is “sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.”¹⁵⁷ The duty to protect prisoners is governed by the standard known as “deliberate indifference”. The duty of care for institutionalized mental patients is the “professional judgment” standard. The *DeShaney* Court, having decided that foster youth are in state custody, did not give clear guidance as to which standard of care applied: “deliberate indifference” or “professional judgment.”¹⁵⁸

¹⁵¹ *Id.* at 797.

¹⁵² *Braam v. Washington*, 81 P.3d 851, 857 (Wash. 2003).

¹⁵³ *See Swift, supra* note 12, at 1209.

¹⁵⁴ *See Watts, supra* note 110, at 140.

¹⁵⁵ *Id.*

¹⁵⁶ *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992).

¹⁵⁷ *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189 (1989).

¹⁵⁸ *Id.*

The standard that courts apply is critical because depending on which standard is applied, there could be no right for foster youth to live in safe conditions or to receive emancipation preparation services. On one hand, foster youth may have a minimal level of safety and treatment guaranteed by the Constitution if they reside in a circuit that finds that foster youth are more analogous to prisoners. On the other hand, foster youth may have a higher level of safety and treatment guaranteed by the Constitution if they reside in a circuit that analogizes foster youth to institutionalized mental patients. This conflict occurs because *Estelle* was an Eighth Amendment case about a prisoner who had to show that the state had the requisite mens rea of intent.¹⁵⁹ If this standard is applied to foster youth, the court will require that the child show a highly culpable state of mind, which would lead to the provision of a very low level of protection for foster youth. In contrast, the *Youngberg* court, when deciding a case about an institutionalized person, analyzed the case under the Fourteenth Amendment, which set the state of mind requirement much lower.¹⁶⁰ This created a much stronger duty for the protection of foster children.

A. The Deliberate Indifference Standard: Estelle v. Gamble

Deliberate indifference is the standard of liability under the Eighth Amendment for state actors exercising custody over prisoners under Section 1983.¹⁶¹ In *Estelle v. Gamble*, the Court established the deliberate indifference standard for state actors who were responsible for attending to the medical needs of prisoners.¹⁶² The Court explained that deliberate indifference is manifested by intentional denial or delayed access to medical care or intentional interference with treatment.¹⁶³ The Court also said that there is a right of action against prison doctors under Section 1983 for deliberate indifference to a prisoner's serious illness or injury.¹⁶⁴ In *Doe*, the Second Circuit found deliberate indifference on the part of the Bureau.¹⁶⁵ The court stated that the agency could be held liable under Section 1983 for failing to report suspected child abuse to authorities after being informed by school authorities.¹⁶⁶ The court reasoned that liability could be based on an inference "from a pattern of omissions revealing

¹⁵⁹ *Estelle v. Gamble*, 429 U.S. 97 (1976).

¹⁶⁰ *Youngberg v. Romeo*, 457 U.S. 307, 318-19 (1982).

¹⁶¹ *Estelle*, 429 U.S. at 105; *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987); *Thelma D. v. Bd. of Educ. of St. Louis*, 669 F. Supp. 947, 949 (E.D. Mo. 1987).

¹⁶² *Estelle*, 429 U.S. at 104.

¹⁶³ *Id.* at 104-05.

¹⁶⁴ *Id.* at 105.

¹⁶⁵ *Doe v. N.Y.C. Dept. of Soc. Servs.*, 709 F.2d 782, 791 (2d Cir. 1983).

¹⁶⁶ *Id.*

deliberate inattention to specific duties imposed for the purpose of safeguarding plaintiffs from abuse.”¹⁶⁷

In *Farmer v. Brennan*, a transsexual prisoner brought a suit against prison officials for placing him in general population.¹⁶⁸ The prisoner claimed that the officials showed “deliberate indifference,” by failing to keep him safe from other inmates.¹⁶⁹ The Supreme Court relied on the opinion in *Estelle* and held that a prison official could not be held liable for placing a prisoner in general population unless the official knew of and disregarded “an excessive risk to inmate health or safety.”¹⁷⁰ The Court concluded that, “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”¹⁷¹ The Court further explained that the Eighth Amendment does not forbid cruel and unusual “conditions,” just cruel and unusual “punishments.”¹⁷² This high standard of proof allows for a significant amount of abuse when it comes to preventing harm in prisons.

Many of the circuit courts that rely on *Estelle* for foster care issues set a similarly high standard of proof for state actors who are charged with caring for foster youth.¹⁷³ For example, in *Taylor*, the deliberate indifference standard was applied to determine whether state actors could be liable for harm.¹⁷⁴ The court stated that meeting the standard would be arduous. The court explained that in order to successfully recover under Section 1983 from state actors, a foster child “will be faced with the difficult problem of showing actual knowledge of abuse or that agency personnel deliberately failed to learn what was occurring in the foster home.”¹⁷⁵ Nonetheless, several circuit courts follow the standards laid out in *Doe* and *Taylor* when applying the deliberate indifference standard.¹⁷⁶

¹⁶⁷ *Id.*

¹⁶⁸ *Farmer v. Brennan*, 511 U.S. 825 (1994).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 837.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Nicini v. Morra*, 212 F.3d 798, 810-11(3d Cir. 2000); *Norfleet v. Ark. Dept. of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993); *Taylor v. Ledbetter*, 818 F.2d 791, 796 (11th Cir. 1987); *N.Y.C. Dept. of Soc. Servs.*, 649 F.2d at 145.

¹⁷⁴ *Taylor*, 818 F.2d at 793.

¹⁷⁵ *Id.* at 796.

¹⁷⁶ *Norfleet*, 989 F.2d at 292; *K.H. v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990).

B. The Professional Judgment Standard: Youngberg v. Romeo

In *Youngberg*, the Court established that state actors who cared for mental health facility patients must exercise professional judgment.¹⁷⁷ The Court distinguished patients in mental facilities from prisoners by stating, “persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.”¹⁷⁸ The Court did not specify which actions were acceptable or unacceptable, but it did state that the Due Process Clause of the Fourteenth Amendment standard is lower than the “compelling” or “substantial” necessity tests.¹⁷⁹ The Court applied a reasonableness test to determine whether the state actor exercised professional judgment and emphasized that, “courts must show deference to the judgment exercised by a qualified professional.”¹⁸⁰

The Court in *Youngberg* held valid a caseworker’s appropriate professional judgment, which meant that caseworkers are not responsible for decisions that may turn out poorly, just those where they did not exercise professional judgment.¹⁸¹ The Court added:

In determining what is “reasonable”-in this and in any case presenting a claim for training by a State-we emphasize that courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized.¹⁸²

The Court here emphasized that judges are not the ones to determine the standards that should apply in the context of care. Instead, the language

¹⁷⁷ *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982).

¹⁷⁸ *Id.* at 321-22.

¹⁷⁹ *Id.* at 322. *See also Romeo*, 644 F.2d at 175, vacated, 457 U.S. 307 (1982) (explaining that the substantial necessity standard provides protection for institutionalized persons “from attack unless some substantial necessity justifies the lack of protection.” The compelling necessity standard ensures that institutionalized residents are “left unrestrained unless some compelling necessity justifies their restraint.” These standards provide a way for the court and jury “to distinguish between isolated incidents and inadvertent accidents, on the one hand, and persistent disregard of patients’ needs, on the other.”).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 323.

¹⁸² *Youngberg*, 457 U.S. at 322.

suggests that qualified professionals are to establish the required level of care. A judge, according to *Youngberg*, can find that a worker failed to exercise professional judgment, the standards of which were set by the state. In applying that standard, the act of conducting oneself poorly alone can be used as a determination of failure to use professional judgment.¹⁸³ Although the standards are not explicit, the courts do provide some guidance.

The courts subsequent to the *Youngberg* decision typically apply a four-part test to determine whether the state actor failed to exercise professional judgment. The plaintiff must show that: (1) the state actor failed to exercise professional judgment; (2) the state actor did not supervise to a reasonable degree; (3) the harm was reasonably foreseeable; and (4) there was a causal link between the injury and the failure to supervise.¹⁸⁴ For example, in *Wendy H. v. City of Philadelphia*, the court held that the city worker who was responsible for supervising the foster youth did not exercise professional judgment when she failed to (1) visit the youth every six months; (2) monitor school performance; (3) read and evaluate psychiatric evaluations; and (4) maintain contact with the foster family.¹⁸⁵

C. Applying the Professional Judgment Standard to Foster Youth

Youngberg established the substantive due process right of safety and freedom from bodily restraint for institutionalized mental patients.¹⁸⁶ This right should be extended to foster youth. Foster youth have a right to treatment and safety and the circuit split regarding the current standards of care endangers them. Foster youth who are preparing to emancipate from the system need training for adulthood in order to avoid harms such as homelessness, poverty, and incarceration. The Supreme Court should resolve the circuit split so that the professional judgment standard will be applied consistently in the context of foster care.

That standard can be applied to protect the constitutional rights of foster youth, while recognizing the interests of the state. In keeping the interests of the state and foster youth in mind, foster youth have a constitutional right to adequate care and treatment. State actors must determine the individual needs of the youth in their care and take appropriate action in response to those needs. Once the state actors have taken actions they deem appropriate, those actions should be scrutinized to determine whether they are Constitutional. State actors should be held liable if their conduct constitutes a substantial departure from the accepted guidelines of

¹⁸³ See *Jordan v. City of Philadelphia*, 66 F. Supp. 2d 638, 646 (E.D. Pa. 1999).

¹⁸⁴ *Taahira W. v. Travis*, 908 F. Supp. 533, 540 (N.D. Ill. 1995).

¹⁸⁵ 849 F. Supp. 367, 375 (E.D. Pa. 1994).

¹⁸⁶ *Youngberg*, 457 U.S. at 309.

professional judgment. The professional judgment standard clearly distinguishes between conduct that is acceptable and conduct that is in violation of minimum requirements of conduct. This standard effectively balances the constitutional rights of foster youth against the state's legitimate interests.

D. Strengthening Youngberg: Foster Children Are Not Like Prisoners

The plaintiff in *Estelle v. Gamble* was a prisoner in a state correctional facility;¹⁸⁷ the plaintiff in *Youngberg v. Romeo* was a mentally retarded man committed to an institution by his mother who could no longer care for him.¹⁸⁸ Both of these men were involuntarily committed to state custody, but Gamble voluntarily committed a criminal act and was sentenced to prison.¹⁸⁹ Romeo was mentally retarded and had no control over himself or his actions; he had the mental acuity of an 18-month-old child.¹⁹⁰

Older children fall somewhere between the *Gamble/Romeo* spectrum as it concerns being responsible for their actions. Parents, however, can overpower their children and subject them to situations that are beyond the child's control. For example, a parent can send a child to a foster home or an institution against the child's will and there is nothing that the child can do to prevent the situation from occurring. The child, then, is not responsible for the placement, nor can she be held responsible for her parent's decision to hand her over to the state.

Children are innocent and different from prisoners in several ways. First, a child is not responsible for a parent's decision to commit her to foster care. Second, if the parent committed the child to foster care because of the child's behavioral problems, the child is still innocent because of her status as a child. In addition, children are not held accountable for their actions in the same way that adults are. Courts treat juvenile offenders much differently than adult offenders.¹⁹¹ The innocence of a child is similar to the innocence of the mentally retarded man in *Youngberg* who could not control his behavior. The standard for judging children should account for "children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'"¹⁹² State actors deemed responsible for the care of foster youth should be held to the professional judgment

¹⁸⁷ *Estelle v. Gamble*, 429 U.S. 97, 98 (1976).

¹⁸⁸ *Youngberg*, 457 U.S. at 309.

¹⁸⁹ *Estelle*, 429 U.S. at 98.

¹⁹⁰ *Youngberg*, 457 U.S. at 309.

¹⁹¹ See *In re Gault*, 387 U.S. 1, 14-16 (1966) (discussing the history and theory behind the Juvenile Court movement).

¹⁹² *Bellotti*, 443 U.S. at 635.

standard laid out by the *Youngberg* court because children are more like the helpless man in *Youngberg* than the prisoner in *Estelle*.

PART VI: PROTECTING CHILDREN VOLUNTARILY PLACED IN FOSTER CARE

The connection between prisoners, mentally retarded patients, and foster care youth is that most of them were involuntarily placed in the state's care. The Fourth Circuit Court of Appeals made it clear that unless a person is involuntarily placed in state care, he does not have a substantive due process right to safety.¹⁹³ In *Milburn v. Anne Arundel County Department of Social Services*, Charles Milburn's parents placed him in foster care when he was almost two years old.¹⁹⁴ When it had been found that the foster care parents had abused Charles, the biological father filed suit.¹⁹⁵ The court relied on the facts in *DeShaney* and held that the foster parents were not state actors because the State had not removed the child and placed him in a foster home. The parents had given him up voluntarily.¹⁹⁶ In *Jordan v. Tennessee*, the parents of a severely mentally retarded boy placed him in a residential facility.¹⁹⁷ One evening, the boy wandered out of a propped-open door and fell into a pond on the grounds of the facility and drowned.¹⁹⁸ The court held that without affirmative action by the state to restrict the liberty of an individual by involuntarily committing him to a mental institution, there is no constitutional duty to provide for the safety of that person.¹⁹⁹ The district court in this case also maintained that *DeShaney* determined the outcome.

It is particularly dangerous to distinguish between voluntarily and involuntarily placed foster children because there are many children who are placed into care by their parents.²⁰⁰ This voluntary/involuntary standard means a large population of foster children is not entitled to a right of safety in foster care settings.²⁰¹ When a child is placed in state care it is not voluntary because the child is not choosing to be committed; the parent makes the decision. In *Youngberg*, the mother of a mentally retarded man

¹⁹³ *Milburn v. Anne Arundel County Dep't of Soc. Servs.*, 871 F.2d 474, 476 (4th Cir. 1989), cert. denied, 493 U.S. 850 (1989).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 475.

¹⁹⁶ *Id.* at 476.

¹⁹⁷ *Jordan*, 738 F. Supp. at 260.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 260.

²⁰⁰ See *Ryan*, *supra* note 13, at 301.

²⁰¹ *Id.*

named Nicholas Romeo placed him in an institution.²⁰² Romeo did not have control over his institutionalization, and neither did Charles Milburn have control over his commitment to the foster care system.²⁰³ The voluntariness standard in the foster care context means that a child could be placed in the system against his will, but if his parents committed him it would be considered voluntary in the law's eyes.²⁰⁴

There has been at least one federal appellate court that has seemingly rejected the voluntariness test when considering a foster child's substantive due process right to safety.²⁰⁵ In *Meador*, the court noted that the parents had abandoned their three children who were subsequently placed in a foster care home by their grandfather. While the girls were in the foster care home they were sexually abused.²⁰⁶ Without discussing the voluntariness standard, the Sixth Circuit held "that due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes." This holding is sound because in application foster parents should be held to the same standard of care as biological parents and should provide a safe environment regardless of whether the child was placed voluntarily or involuntarily.²⁰⁷

Many federal courts have adopted the view as well and look suspiciously at the voluntariness standard in the case of persons who have been admitted to state institutions. Those courts assert that voluntarily placed individuals do not have a lesser right to safety than those who were involuntarily committed to mental institutions. For example, in *Kolpak v. Bell* the court held that persons placed in a mental institution whether voluntarily or involuntarily were constitutionally entitled to safety.²⁰⁸ The court in *Seide v. Prevost* concluded that the voluntary/involuntary classification that would guarantee liberty interests to those committed to state institutions involuntarily, but would deny the same liberty to those who were voluntarily committed, would not withstand the strict scrutiny requirement of the equal protection clause.²⁰⁹ The court said that regardless of voluntary or involuntary commitment, the State may not deprive any

²⁰² *Youngberg*, 457 U.S. at 318-19.

²⁰³ *See Ryan*, *supra* note 13, at 301.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 304.

²⁰⁶ *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990); *see also Ryan*, *supra* note 13, at 304.

²⁰⁷ *See Ryan*, *supra* note 13, at 305.

²⁰⁸ 619 F. Supp. 359, 378 (N.D. Ill. 1985); *see also Naughton v. Bevilacqua*, 458 F. Supp. 610, 617 (D.R.I. 1978) *aff'd*, 605 F.2d 586 (1st Cir. 1979).

²⁰⁹ 536 F. Supp. 1121, 1136 (S.D.N.Y. 1982).

citizen of “any rights, privileges, or immunities secured by the Constitution.”²¹⁰

There are definite distinctions between mentally retarded persons and foster children, but one federal court has embraced this view as it relates to foster care. In *Wilder v. City of New York*, Mr. Wilder was a foster child and ward of the City. The court asserted that although he was not committed to an institution involuntarily, he was unable to make certain decisions for himself and “could have looked only to the City to ensure that protection.” The court stated, “[an] individual's liberty is not less worthy of protection merely because he has consented to be placed in a situation of confinement.”²¹¹ Although there are differences between mentally retarded adults and foster children, both classes should have constitutionally protected liberty interests regardless of the type of consent.

Unless the Supreme Court recognizes that the voluntary/involuntary distinction presents dangers to due process, a significant number of foster children are at risk. Children who are removed from their parents' custody by the state will be protected under the Due Process Clause, but those given up voluntarily will not. Some parents realize that they cannot effectively take care of their children and believe that the only way that they can improve their children's life is to turn them over to the state. If parents know that their children are not protected from harm under the Constitution, they may keep them in an unsafe situation. Courts need to consider the effects of granting the constitutional right to safety to some and not others in state custodial care.

Foster youth should have a substantive due process right to services whether they entered the system voluntarily or involuntarily. The Court in *Braam* words it nicely when it concludes that “at its core, foster children have a substantive due process right to be free from unreasonable risk of harm, including a risk flowing from the lack of basic services, and a right to reasonable safety.”²¹²

PART VII: LITIGATION STRATEGIES

A.42 U.S.C. § 1983: A Right of Action

Foster youth are relatively helpless because of their reliance on state appointed caregivers for protection. If a staff member or foster parent harms them, there is little they can do to remove themselves from the situation. There are also no reliable legal remedies with which they can

²¹⁰ See Civil Rights Act of 1964, Pub. L. -No. 96-170, § 1, 93 Stat. 1284 (1979) (codified as 42 U.S.C. § 1983); see also Seide, 536 F. Supp. at 1136.

²¹¹ 568 F. Supp. 1132, 1137 (E.D.N.Y. 1983).

²¹² *Braam*, 150 Wash. 2d at 699.

seek relief.²¹³ Foster youth have filed state tort law actions and federal statutory claims under Section 1983, but these claims are largely unsuccessful.²¹⁴ Federal claims under Section 1983 for a violation of a foster youth's substantive due process rights have proven to be more successful for those who have suffered harm while in foster care.²¹⁵

1. History of the Civil Rights Act

The Civil Rights Act of 1871 was enacted in order to enforce the Fourteenth Amendment against "state or local officials who violated the 'rights, privileges, or immunities' of persons in the United States."²¹⁶ Section 1 of the Act, which was later codified as 42 U.S.C. § 1983, allows private citizens to file suit against state actors for violating their federal and Constitutional rights.²¹⁷ Section 1983 of the Civil Rights Act is often used to hold public agencies and employees liable for harm caused to foster children in their care.²¹⁸ The relevant part of the statute states:

Every person who, under color of law of any statute, ordinance, regulation, custom or usage ... subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action, suit in equity, or other proper proceeding for redress.²¹⁹

2. Section 1983 for Substantive Due Process Violations

Generally, state law and federal statutory claims are unsuccessful. However, foster youth can file claims concerning a violation of their

²¹³ Sharon Balmer, *From Poverty to Abuse and Back Again: The Failure of the Legal and Social Services Communities to Protect Foster Children*, 32 *Fordham Urb. L.J.* 935, 940 (2005).

²¹⁴ *Suter v. Artist M*, 503 U.S. 347 (1992); *Foster Children v. Bush*, 329 F.3d 1255, 1274 (11th Cir. 2003).

²¹⁵ See *Balmer*, *supra* note 211, at 940.

²¹⁶ Civil Rights Act of 1964, Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1979) (codified as 42 U.S.C. § 1983).

²¹⁷ Eric P. Gifford, *42 U.S.C. § 1983 and Social Worker Immunity: A Cause of Action Denied*, 26 *Tex. Tech L. Rev.* 1013, 1015 (1995).

²¹⁸ *Id.*

²¹⁹ Section 1 of the Civil Rights Act, 42 U.S.C. § 1983.

constitutional rights under Section 1983.²²⁰ The statute serves to protect individuals from state infringement on their individual rights.²²¹ The Fourteenth Amendment provides in pertinent part:

No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²²²

This Amendment was created so that people could assert Fourteenth Amendment claims against the government for violating their civil rights.²²³ The Fourteenth Amendment creates no new substantive due process rights, but people can recover if established rights have been violated.²²⁴ In order to bring a Section 1983 action, the plaintiff must show that the defendant was a person (this includes state actors), and that the defendant's act caused a person to be subjected to the "deprivation of any federally protected rights, privileges, or immunities."²²⁵

To overcome any defenses of qualified immunity that the government may put forth, the plaintiff must show that the constitutional right was clearly established when the event occurred.²²⁶ With the number of foster youth who are harmed in the foster care system, the courts must establish a consistent, workable standard for their care. This new standard should address the youth's needs and state actors must be held accountable if they fail to live up to the standard.

B. Class Action Lawsuits Under the Social Security Act

One of the most common litigation strategies for large groups of foster youth is the class action. In *Palmer v. Cuomo*, foster children in New York, some of whom had emancipated from the foster care system and were living independently as well as some who were homeless, brought an action to enjoin the city and state to provide adequate pre-discharge preparatory plans and to properly supervise the children who had emancipated to independent living.²²⁷ The Supreme Court, Appellate

²²⁰ See *Gifford*, *supra* note 215, at 1014.

²²¹ See *id.*

²²² U.S. Const. amend. XIV, § 1.

²²³ See *Gifford*, *supra* note 211, at 1015.

²²⁴ *Id.*

²²⁵ Civil Rights Act of 1964, Pub. L. No. 96-170, § 1, 93, Stat. 1284 (1979) (codified as 42 U.S.C. § 1983).

²²⁶ See *Gifford*, *supra* note 211, at 1016.

²²⁷ 121 A.D.2d 194, 503 N.Y.S.2d 20, 21 (1st Dep't 1986).

Division, held that the city had a statutory duty to perform its pre-discharge preparatory obligations and its post-discharge supervisory responsibilities.²²⁸ The court concluded that the City of New York is required to provide independent living skills training prior to discharging the children.²²⁹ The court asserted that the city had the responsibility to “ensure training related to career objectives, including obtaining marketable skills or trades, career counseling, and assistance in enrolling in employment programs . . . until the child is discharged.”²³⁰ The court found that there was no indication that the foster children received the required training and assistance.²³¹

The many complexities of foster care litigation are highlighted in *G.L. v. Zumwalt*. In that case, foster children in Missouri brought an action against the defendants for violating their right to be free from harm, which is guaranteed by the Fourteenth Amendment and Title IV of the Social Security Act.²³² The Jackson County Office of the Missouri Division of Family Services denied that it violated the children’s rights.²³³ The district court approved a consent decree entered into by the parties that provided that foster children would be guaranteed to receive essential services to treat psychological, emotional and intellectual problems.²³⁴ The decree also guaranteed to each child a permanency plan, which would determine whether the child would reunite with her parents, get adopted, or emancipate.²³⁵ The defendants were ordered to pay the plaintiff’s attorney’s fees in the amount of \$40,000, but the parties agreed to withdraw the plaintiff’s claims for damages.²³⁶

The court in *Wolfe v. New Mexico Department of Human Services* also approved a consent decree requiring the Department and its top officials to fulfill certain requirements.²³⁷ In that case, children in state custody filed suit against the New Mexico Department of Human Services and other

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² 564 F. Supp. 1030, 1031 (W.D. Mo. 1983) (explaining that federal foster care maintenance payments, adoption assistance, and child welfare services are administered in accordance with the regulations in 45 C.F.R. §§ 1355.10, 1356.10, and 1357.10).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 1039.

²³⁶ *Id.* at 1043.

²³⁷ *Joseph A. v. New Mexico Dept. of Human Services*, 575 F. Supp. 346, 348 (D.N.M. 1982) vacated, 69 F.3d 1081 (10th Cir. 1995).

state officials for failing to develop permanency plans.²³⁸ The Department moved to dismiss the case for failure to state a claim and filed a motion for summary judgment.²³⁹ The court approved a consent decree and noted that a violation of liberty interests could be analyzed under due process.²⁴⁰ The court said liberty denotes freedom from bodily restraint, the right to enter into a contract, to right to engage in an occupation, to acquire knowledge, to marry, to establish a home and raise children, to worship God as you please, and to enjoy recognized privileges.²⁴¹

The liberty interests must have been created by a specific state or federal law, or be implicit in the Constitution. The court concluded that the plaintiffs could obtain relief for violations of Title IV and XX of the Social Security Act, and that the plaintiffs could also recover monetary relief for denial of their civil rights from the “defendants in their individual capacities.”²⁴² The court noted, however, that under the Eleventh Amendment, the Department and the officials in their official capacities were immune from suit to the extent that the complaint stated a claim for money damages.²⁴³ The consent decree was issued, detailing a plan to restructure the foster care system in New Mexico.²⁴⁴ This case opened many doors to foster youth, and provided them with future opportunities for successful litigation.

C. Common Law Tort Claims

Common law tort claims are commonly advanced by foster youth against foster care agencies when attempting to recover for abuse and neglect while

²³⁸ *Id.*

²³⁹ *Id.* at 348 (moving to dismiss for failure to state a claim).

²⁴⁰ *Id.* at 350 (recognizing liberty interests cannot be abridged without due process).

²⁴¹ *Id.* at 351 (“The Supreme Court has discussed constitutional ‘liberty’ many times, but has never attempted to define it with exactness. But the Court has said that ‘[without] doubt it denotes not merely freedom from bodily restraint but also the right of an individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.’”).

²⁴² *Id.* at 353 (holding plaintiffs were denied rights guaranteed by Titles IV and XX of the Social Security Act and granting plaintiffs’ claims against natural defendants in their individual capacities).

²⁴³ *Id.* at 353 (barring claims for money damages against the Department and natural defendants in their official capacities).

²⁴⁴ *Id.* at 354 (“The Secretary of the New Mexico Human Services Department has acknowledged that children in the custody of the Human Services Department have rights fair, reasonable, and timely decision-making with regard to access to adoption, and to fair, reasonable and adequate procedures and practices necessary to insure access to permanent adoptive homes. . . .”).

in the state's custody. The claim is usually directed against the agency or an employee of the agency under the principle of vicarious liability.²⁴⁵ The common law tort claim is negligence, which is asserted for the purposes of recovering from the agency. The elements of negligence, such that a cause of action may be stated are duty, breach, causation, and harm.²⁴⁶

A cause of action based on negligence asserts that the agency has "a duty, or obligation recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks."²⁴⁷ The duty that the foster care agency has is in the form of *parens patriae*²⁴⁸ because the agency has taken on the responsibility of caring for the foster child in situations where the child's natural parent cannot or will not.

Establishing that the agency breached a duty is more difficult. The plaintiff must show that the person failed to conform to a required standard.²⁴⁹ In order to prove causation, the plaintiff must show that there was a "reasonably close causal connection between the conduct and the resulting injury."²⁵⁰ This is commonly known as "proximate cause," and is also comprised of causation in fact.²⁵¹ Finally, the plaintiff must show that there was "actual loss or damage."²⁵² If actual loss or damage cannot be shown, damages will not be awarded.²⁵³

Proving all of these elements is difficult and can significantly limit the number of actions brought against foster care agencies. Governmental immunity may also make a claim difficult because it can completely bar the tort claim.²⁵⁴ In *County of Los Angeles v. Superior Court (In re Terrell R.)*, the court explained that the social workers were immune to the lawsuits

²⁴⁵ Vicarious liability means that as a result of some relationship between A and B, the negligence of A will be charged against B even though B played no part in it or encouraged it. B may have even done everything he could to prevent the negligence. W. Page Keeton et al., *Prosser & Keeton on Torts* § 69 (5th ed. 1984). In the foster care context A would be the employee and B the foster care agency. If the employee (A) commits a tort against a foster child, the agency (B) would be held liable.

²⁴⁶ *Id.* at § 30 (describing the elements of a negligence claim).

²⁴⁷ *Id.* at § 30 (describing the duty element of a negligence claim).

²⁴⁸ *See Kent v. United States*, 383 U.S. 541, 554-55 (1966) (explaining that state actors are supposed to exercise parental care over children in their custody).

²⁴⁹ *See Keeton*, *supra* note 243, § 30 (describing the breach element of a negligence claim).

²⁵⁰ *Id.* at § 30 (describing the causation element of a negligence claim).

²⁵¹ *Id.* at § 30 (explaining causation includes proximate cause and cause-in-fact).

²⁵² *Id.* at § 30 (describing the harm element of a negligence claim).

²⁵³ *Id.* at § 30 (explaining where no loss has occurred, damages cannot be recovered in a negligence claim).

²⁵⁴ *Id.*

brought by the foster children who were injured while in foster care.²⁵⁵ The court reasoned that the social worker did not have a mandatory duty to supervise and the foster care statute was designed to preserve families, not to prevent abuse.²⁵⁶

Several courts have held that when state actors place a child in foster care they are entitled to governmental immunity even if the placement is done negligently, because the act of making serious personal judgments constitutes a discretionary act.²⁵⁷ In *Brantley v. Department of Human Resources*, biological parents of a two-year-old who drowned while in foster care brought a negligence action against the Department of Human Resources. The State agreed to waive its sovereign immunity under the Georgia Tort Claims Act (GTCA) subject to the discretionary function exception. Under this function, the state is not liable for “[t]he exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved is abused.”²⁵⁸

The court held that deciding to leave a two-year-old unattended in a swimming pool was an insufficient basis on which to invoke the exception. The court reasoned that the decision to leave the child unattended was not the type of governmental decision that should be protected from judicial review. This case highlights the fact that not all state actors are immune from actions brought by youth in their care. New York’s Court of Appeals follows this standard as well, and allows foster youth to plead common law

²⁵⁵ *Cnty. of L.A. v. Superior Court*, 125 Cal. Rptr. 2d 637, 640 (Ct. App. 2002) (holding social workers immune from lawsuits by foster children injured during their time in foster care).

²⁵⁶ *Id.* at 646 (“This legislative preference for placement in the home of a relative is merely a legislative goal or policy that must be implemented by the County in the exercise of its judgment as to an appropriate foster care placement; it does not create a mandatory duty . . . In addition, the purpose of the statute is to preserve the family relationship, not to prevent sexual abuse.”)

²⁵⁷ E.g., *Jackson v. Dep’t of Human Res.*, 497 S.E.2d 58, 59 (Ga. Ct. App. 1998) (holding that a public officer who places a child in foster care is entitled to governmental immunity under the Georgia Tort Claims Act because he is “exercising discretion in the performance of his official duties”); *Gloria G. v. State Dep’t of Soc. Rehab. Servs.*, 833 P.2d 979, 987-88 (Kan. 1992) (holding that the complex judgments made by the government and its agents “rank high on the continuum of discretion and should not be subject to hindsight scrutiny by courts”); *Williams v. Horton*, 437 N.W.2d 18, 21 (Mich. Ct. App. 1989) (holding that a caseworker had immunity under the Michigan Tort Claims Act because the placement was discretionary because it required a high degree of personal judgment).

²⁵⁸ Ga. Code Ann. § 50-21-24(2) (West 2013). The GTCA defines a “discretionary function or duty” as “a function or duty requiring a state officer or employee to exercise his or her policy judgment in choosing among alternate courses of action based upon a consideration of social, political, or economic factors.”

tort negligence claims against child welfare officials without being barred by governmental immunity.²⁵⁹ Not all states, however, waive tort immunity, so a foster youth's ability to assert a tort claim will depend on where she lives.

Tort claims are asserted for foster children based on actions of abuse or neglect. This theory will likely prove inadequate in litigation for foster youth who want to bring an action for a failure to receive services to prepare them for adulthood. It will be extremely difficult to prove that the failure to provide the services was the proximate cause of the harm suffered after the youth left foster care. The foster youth will have to prove that the cause of his or her homelessness, incarceration, unemployment, or low educational achievement was due to the state failing to provide services to prepare him or her for emancipation.

A dangerous road lies ahead for foster youth who are not adequately prepared by the state actors responsible for protecting them from harm, and it requires legal action. The case law establishes that foster youth have a constitutional right to treatment and safety while they are in state custody. Foster youth can file: (1) a civil rights claim under Section 1983 for a substantive due process violation, (2) a class action lawsuit under the Social Security Act, or (3) a common law tort claim, if they do not receive proper emancipation preparation training and aftercare services.²⁶⁰ To strengthen their case, plaintiffs could show that there are former foster youth who are destitute as a result of state actors who failed to properly prepare them for independent living.²⁶¹ In addition, plaintiffs could strengthen their case by proving that previous foster children suffered harm

²⁵⁹ *Mark G. v. Sabol*, 717 N.E.2d 1067, 1072 (N.Y. 1999) ("Section 419's legislative history . . . reveals that it was intended to provide immunity only with respect to civil or criminal liability that would *otherwise result* from acts taken by persons, officials, or institutions in a good faith effort to comply with specific provisions of the Social Services Law . . . There is no indication that section 419 was intended to apply to failures to provide services required by the Social Services Law.").

²⁶⁰ *Palmer*, 503 N.Y.S.2d at 21 (granting plaintiffs preliminary injunction enjoining defendants from discharging plaintiffs from foster care until (1) a discharge plan had been adopted for plaintiffs pursuant to Social Service Law; (2) plaintiffs were given reasonable preparation for discharge including career counseling, training in a marketable trade, and skills for independent living; and (3) plaintiffs were given reasonable notice of their discharge, directing defendants to provide supervision of each plaintiff until he is 21 years old, ensuring plaintiffs' basic needs are met, including appropriate housing outside of the New York City municipal shelter system).

²⁶¹ *Id.* at 21-22 (showing seven foster children discharged prior to the age of 21, without adequate preparation for independent living and given no opportunity to contest the discharge led to their destitution).

because state actors failed to contact them for supervisory meetings after discharge.²⁶²

PART VIII: RECOMMENDATIONS

Youth who emancipate from the foster care system are less likely to have a high school diploma, go to college or vocational school, or make enough money to support themselves.²⁶³ After leaving the foster care system, many foster youth flounder. A recent study conducted by Fostering Careers, found that nearly half of former foster youth in their twenties were unemployed at any given time.²⁶⁴ This makes it more likely that they will become homeless, dependent on welfare, or incarcerated.²⁶⁵

The courts realize that they have a duty to prepare foster youth in state custody for emancipation, and have ruled in favor of foster youth to help ensure that they are adequately prepared for emancipation. There are five recommended steps that would assist the state actors in fulfilling their duty to foster youth, thus providing adequate emancipation preparation. These recommendations are achievable and will work to improve the foster care system so that it can more effectively support foster youth's career goals and personal development.

A. Independent Living Programs

States should create programs that are aimed to (1) provide referrals to service agencies; (2) develop interventions for foster youth; (3) provide professional development services to staff members; and (4) build partnerships with employers.²⁶⁶ The programs would work to serve a distinct population of disconnected youth.²⁶⁷ New York City has two programs that provide for the needs of foster youth: The Academy and the

²⁶² *Id.* at 22 (showing inadequacies, such as failure to contact or offer assistance or supervision following discharge from foster care led to foster children's' destitution).

²⁶³ Alice Bussiere, Jennifer Pokempner & Jennifer Troia, *Adolescents, the Foster Care System, and the Transition to Adulthood: What Legal Aid Lawyers Need to Know*, 39 Clearinghouse Rev. J. of Poverty L. & Pol'y 159, 159 (July-Aug. 2005) (discussing the challenges faced by youth who emancipate from foster care).

²⁶⁴ Tom Hilliard, *Foster Youth and the Workforce: Next Steps*, Center for an Urban Future 1, 3 (2013), http://nycfuture.org/pdf/Foster_Youth_and_the_Workforce.pdf (stating foster youths' unemployment is a key reason for their poor adult outcomes).

²⁶⁵ *Id.* at 3 (stating foster youths' unemployment makes them more likely to succumb to homelessness, welfare dependence, or incarceration).

²⁶⁶ See Hilliard, *supra* note 262, at 4 (discussing the City of New York's responsibility to provide adequate programs to prepare foster youth for employment after they are discharged).

²⁶⁷ *Id.* at 4 (stating New York City's Office of Youth Development should not limit itself to serving foster youth, but should serve a designated population rather than the broad population of disconnected youth).

Next Generation Center have developed strategies to help foster youth who face employment barriers.²⁶⁸ The programs are not identical, but they both provide a variety of services for foster youth that will help bridge any gaps they may have in their approach to adulthood.²⁶⁹

B. Collect Data and Report Outcomes

In formulating a plan to evaluate programs, assess costs, and target resources for foster youth, data collection is essential.²⁷⁰ There are two methods of data collection that can be useful: point-in-time data, which is collected annually; and administrative data, which is collected regularly by different organizations and then aggregated into a system.²⁷¹ This data can be used to measure former foster youth's performance after emancipation, and to ensure that the proper tools are being implemented.²⁷² The results generated by the reports can be used to build support for plans to provide more efficient resources for foster youth.²⁷³ Progress can be measured by identifying goals, collecting data, and monitoring progress.²⁷⁴ If leaders in the community can see the outcomes, they will be better able to make informed decisions about whether to invest in a program.²⁷⁵ Without this type of data, it will be hard to determine which services are effective and which need improvement.

C. Independent Living Committees

Life after emancipation for foster youth can be frightening especially if the youth have no support systems. The formation of an independent living committee, a group of people who work together to aid foster youth in their

²⁶⁸ *Id.* at 5 (citing the Academy and The Next Generation Center as New York City's most promising breakthrough in serving high-needs foster youth).

²⁶⁹ *Id.* at 5 (providing services including education, preparation for work, and job search).

²⁷⁰ Mary Cunningham, Sharon McDonald & Norm Suchar, *Homelessness In America, Volume 3: Solutions to Homelessness*, 10 (Robert Hartmann McNamara eds., 2008) (stating careful examination of data can lead to shifts in how communities respond to homelessness).

²⁷¹ *Id.* at 10-11 (discussing the different, but complementary methods communities use to collect data).

²⁷² *Id.* at 11 (describing how communities use collected data to develop plans for ending homelessness).

²⁷³ *Id.* (stating results generated by data collection build support for plans enacted to end homelessness).

²⁷⁴ *Id.* ("Promising communities are able to demonstrate progress because they identify performance measures, collect data, and continually monitor progress.")

²⁷⁵ *Id.* (tracking outcomes allows leaders to make informed decisions regarding continued investment in new strategies or exploration of other interventions).

transition to adulthood, could help youth if the members work to build awareness among the foster youth and the community about independent living services.²⁷⁶ KidsVoice is a Pennsylvania legal services organization that has developed a model program. It represents about 5,000 foster teens each year, helping them with their transition to independent living.²⁷⁷ There are three components to this program: education and training, a special teen unit that provides advocacy for individuals, and a resource fair that promotes awareness among foster teens and service providers.²⁷⁸

KidsVoice provides training for advocates, which includes client interviews, an overview of the relevant law, statistics about youth who age out, and suggestions for improved advocacy.²⁷⁹ Members of independent living committees train kids on how to advocate strategically regarding housing, mental health, medical coverage, education, employment, community resources, living skills, and permanent networks.²⁸⁰ KidsVoice also created a special teen advocacy unit that helps teens by: (1) visiting them in an environment that is convenient for them; (2) negotiating for resources for them; (3) preparing them for court; and (4) counseling them about available services.²⁸¹

D. Post-Secondary Educational Assistance

States are obligated to provide foster youth with proper preparation for emancipation. That should include the implementation of a program to offer financial assistance for educational pursuits. States could determine how the funding would be implemented, but should provide tuition and fee waivers for wards of the court.²⁸² In addition, living expense subsidies should be provided for full-time students. The waivers should cover youth until the age of twenty-four, to give some leeway for foster youth who were

²⁷⁶ See *Hollander, supra* note 18, at 447 (describing the services and resources provided by an Independent Living Committee in Pennsylvania).

²⁷⁷ *Id.* at 444 (recognizing KidsVoice as an organization that works to help foster youth who age out of the system to successfully transition to adulthood).

²⁷⁸ *Id.* at 447 (describing the components of the Independent Living Committee program used to assist foster youth).

²⁷⁹ *Id.* (training for KidsVoice staff designed to assist staff in advocating for teen clients both in and out of court).

²⁸⁰ *Id.* at 447-48 (targeting areas of concern in advocating for clients approaching their eighteenth birthday).

²⁸¹ *Id.* at 448 (advocating for almost 200 teen clients in one of the most economically disadvantaged areas of Allegheny County, the Monongahela Valley).

²⁸² See *Benedetto, supra* note 27, at 407 (explaining states that do not currently offer an education assistance program should consider implementing such a program adopting certain aspects of the Massachusetts model).

not able to gain access to college immediately after high school.²⁸³ Foster youth could contribute to their education by paying for a portion of the tuition, the funding of which could be obtained if the youth participates in work-study.²⁸⁴ As the former foster youth gains valuable education, she will be better able to maintain economic stability, which will decrease government costs.

E. Employer Partnerships and Subsidies

Finding employment is particularly difficult for foster youth because they do not have job experience or interviewing skills. To help, caseworkers can form a partnership with employment agencies in order to gather information regarding job openings. The employment agency could communicate with specific employers and provide incentives for hiring foster youth in the form of employment subsidies.²⁸⁵ The subsidies would work by providing a monetary benefit to employers for hiring foster youth.²⁸⁶

Opponents of this suggestion argue that foster youth may grow to depend on the subsidies and have a difficult time finding work on their own. In order to prevent this from occurring, the subsidies could be provided on a limited basis. The subsidies will not only provide foster youth with a “foot in the door,” but they will also send a message to the public that it is important to involve foster youth in the workforce.

PART IX: CONCLUSION

Foster youth in state custody have a Fourteenth Amendment substantive due process right to treatment and a right to be free from harm, which includes the provision of pre-emancipation preparation and after care services. The right to treatment and safety should be expressed in the form of training, which should include access to support systems and educational and employment opportunities. Foster youth should have these rights regardless of whether they are in the state’s custody voluntarily or involuntarily. In addition, foster youth are not like prisoners and should not be treated as such. The courts should apply the professional judgment

²⁸³ *Id.* at 407 (describing important aspects of a Former Foster Youth Education Assistance Program).

²⁸⁴ *Id.* at 408 (explaining the importance of work-study in a Former Foster Youth Education Assistance Program because it places former foster youth students on equal footing with their fellow students and allows former foster youth to obtain work experience and professional contacts).

²⁸⁵ *See Benedetto, supra* note 56, at 422.

²⁸⁶ *See id.*

standard rather than the deliberate indifference standard when determining liability of state actors who have failed in their obligations to care for the needs of the youth they serve. Furthermore, the Supreme Court should clearly establish these rights and standards so they are specific to foster youth.

The high rates of unemployment, low educational achievement, poverty, and criminal activity that pervade the lives of foster youth after they age out of foster care are often caused by a lack of preparation for emancipation, which the state is obligated to provide. The failure to provide these services causes harm, and while the harm does not necessarily manifest while the youth is in foster care, it exhibits once the youth has left the system. Failing to provide foster youth with the necessary skills for independent living creates lasting harm, and it is imperative that the courts work to prevent the harm by requiring that state actors provide emancipation preparation training for foster youth.