

ENDING THE EMANCIPATION NIGHTMARE: REFORMING THE PARADIGM OF EMANCIPATION PREPARATION FOR FOSTER YOUTH IN CALIFORNIA

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I. THE EMANCIPATION NIGHTMARE

As you arrive at Pantages Theater to watch a show or shop at Hollywood and Highland or have dinner at one of the restaurants along Hollywood Boulevard, you may cross paths with Brian or Chato or JJ.¹ These are Los Angeles’ “throwaway kids”—youth who ran away or emancipated from the foster care system and are now living on the streets of Hollywood.² Some, like Brian, have adopted their parents’ destructive addictions.³ Others, like Chato, have kicked the habit, but have difficulty finding employment and getting

1. In June and July of 2006, the Pasadena Weekly ran a four-part series on former foster youth living on the streets of Hollywood. Joe Piasecki, *Throwaway Kids*, PASADENA WKLY., June 22, 2006, available at http://www.pasadenaweekly.com/cms/story/detail/throwaway_kids/3559/ [hereinafter “*Throwaway Kids #1*”] (introducing Brian and JJ); Joe Piasecki, *Fourth of the Series: Throwaway Kids*, PASADENA WKLY., July 13, 2006, available at http://www.pasadenaweekly.com/cms/story/detail/fourth_of_the_series_throwaway_kids/3624/ [hereinafter “*Throwaway Kids #4*”] (introducing Chato).

2. The term “throwaway kids” comes from the Pasadena Weekly series. See *id.*

3. Joe Piasecki, *Family Business*, PASADENA WKLY., June 29, 2006, available at <http://www.pasadenaweekly.com/cms/story/detail/?IssueNum=26&id=3587>.

off the street.⁴ All of them share the pain of a fractured childhood. Some, like Brian, were sexually abused by their foster care parents;⁵ while others, like JJ, moved constantly from group home to group home.⁶ All of them face a bleak future because of the state's failure to properly care for them and prepare them for independence.

Each year, more than 24,000 young people are discharged from foster care⁷ because they are too old to remain under the jurisdiction of the dependency court.⁸ At least one out of six of these "emancipated foster youth"⁹ live in California.¹⁰ These youth face enormous challenges as they transition to adulthood. Unlike their

4. See *Throwaway Kids #4*, *supra* note 1.

5. Piasecki, *Family Business*, *supra* note 3.

6. See *Throwaway Kids #1*, *supra* note 1.

7. "Foster care" is defined according to federal regulations and includes youth living in foster family homes, foster homes of relatives, adoptive placements, and group homes. 42 U.S.C. § 677(a) (2000). Youth in suitable placement at a group home who are under the jurisdiction of the delinquency court also fall under this definition in California. See CAL. DEP'T OF SOC. SERVS., DSS MANUAL OF POLICIES AND PROCEDURES 31-002(8) 11, MANUAL LETTER NO. CWS-93-01 (2004), available at <http://www.dss.cahwnet.gov/ord/entres/getinfo/pdf/cws1.pdf> ("Foster care" means the provision of 24-hour care and supervision to a child who has been placed by a child placing agency, including child welfare services and probation departments...) (emphasis added); L.A. County Dep't of Children & Family Servs., FYI 04-13, Indep. Living Program (ILP) Eligibility Guidelines 1-2 (April 2004), available at <http://dcfs.co.la.ca.us/Policy/FYI/TOCFYI.HTM> (noting that youth in foster/probation care any time between their 16th and 19th birthday and who are not in a detention/locked facility the entire time will be eligible for independent living services). Although youth in the delinquency system may be viewed as more "culpable" for their actions and therefore less deserving of the same rights as "innocent" youth in the dependency system, this dichotomy is false. In reality, the populations are often one and the same. See Becca Dunlap, Notes & Comments, *Dependents Who Become Delinquents: Implementing Dual Jurisdiction in California Under Assembly Bill 129*, 5 WHITTIER J. CHILD & FAM. ADVOC. 507, 511-12 (2006) (discussing overlap between delinquency and dependency systems in California).

8. MARK E. COURTNEY, ET. AL., CHAPIN HALL CENTER FOR CHILDREN, ISSUE BRIEF: WHEN SHOULD THE STATE CEASE PARENTING? EVIDENCE FROM THE MIDWEST STUDY (2007), http://www.chapinhall.org/article_abstract.aspx?ar=1355 (follow "Issue Brief" hyperlink) [hereinafter COURTNEY, ISSUE BRIEF].

9. The phrase "emancipated foster youth" can be confusing. Sometimes, it is used for minors that become independent before they reach the age of majority. See, e.g., 10 WITKIN, SUMMARY OF CALIFORNIA LAW *Parent and Child* §§ 298-306 (14th ed. 2005) (discussing emancipation options before the age of majority). However, for the purposes of this paper, the phrase will refer to youth that have been discharged from foster care because they have reached the age of majority.

10. CHILDREN'S ADVOCACY INST., UNIV. OF SAN DIEGO L. SCH., EXPANDING TRANSITIONAL SERVICES FOR EMANCIPATED FOSTER YOUTH 7 (2007), available at http://www.cachildlaw.org/TransServices/Transitional_Services_for_Emanicipated_Foster_Youth.FinalReport.pdf [hereinafter CAI].

peers who grew up in a stable family, emancipated foster youth lack a safety net: there is no home to return to on college break, or a mom to help pay for gas, or a dad to help fill out financial aid forms.¹¹ Moreover, former foster youth carry the emotional baggage of parental abuse, neglect, or abandonment as well as the harm they suffered from the transience, isolation, and neglect of state care.¹²

Therefore, it is no surprise that emancipated foster youth are less educated,¹³ have worse employment prospects,¹⁴ experience poverty and homelessness at a greater rate,¹⁵ are more susceptible to medical problems and mental disorders,¹⁶ and are more likely to be incarcerated than the general population.¹⁷ In California, 65 percent

11. The state recognizes that emancipated youth need housing assistance, financial help, and educational guidance and has implemented some programs to address these needs. *See infra* Part II.C.1. (describing California's independent living program). *See also* CAI, *supra* note 10, at 11-12, 16-17, 19 (describing housing, education, and independent living programs in California). However, these programs fall far short of replicating the support that parents provide their adult children. *See infra* Part III.B.1.

12. Melinda Atkinson, Note, *Aging Out of Foster Care: Towards a Universal Safety Net for Former Foster Care Youth*, 43 HARV. C.R.-C.L. L. REV. 183, 183-84 (2008) (arguing that "by definition, foster care youths have experienced trauma," and "many of the problems facing former foster care youths stem in part from the treatment they received while in state care").

13. Foster youths are nearly six times more likely than the general population to receive a GED instead of a high school diploma, which is significant because adults with diplomas are 1.7 times as likely as adults with GEDs to earn a 2-year degree, and four times as likely to earn a 4-year degree and have greater earning power. Keely A. Magyar, *Betwixt and Between But Being Booted Nonetheless: A Developmental Perspective on Aging Out of Foster Care*, 79 TEMP. L. REV. 557, 574 (2006). Moreover, one-third of 19 year-old emancipated foster youth who are still in school are working on their high school diploma or GED certificate, compared to 2 percent of the general population. *Id.* at 574. In contrast, 18 percent attend 4-year colleges, compared to 62 percent of the general population. *Id.*

14. Former foster youth are 20 percent less likely to be currently employed than the general population. *Id.* Moreover, 90 percent of 19 year-old emancipated youth earned less than \$10,000 per year even though former foster youth are less likely to be enrolled in school. *Id.* at 574-75.

15. One-third of former foster youth live at or below the poverty level, which is three times the national average. *Id.* at 575. Moreover, they are twice as likely to be evicted or to have trouble paying rent or a utility bill. *Id.*

16. Thirty percent of former foster youth do not have medical insurance and half report problems accessing necessary medical care. *Id.* at 575-76. Over half have mental health problems, compared to 22 percent of the general population. *Id.* at 576. Most likely due to the trauma that they experienced from an early age, former foster youth suffer from Post Traumatic Stress Disorder (PTSD), depression, drug dependence, anxiety, and other mental health disorders at a disproportionate rate. *Id.*

17. More than one quarter of male emancipated foster youth and 10 percent of females were incarcerated within 12-18 months of discharge. *Id.* at 577.

of former foster youth emancipate without a place to live, less than 3 percent go to college, 51 percent are unemployed, and emancipated females are four times more likely to receive public assistance than the general population.¹⁸

Despite the increased awareness of these problems and some legislative action at the federal and state level,¹⁹ foster youth continue to leave care unprepared for independence. This paper argues that deficiencies in the current paradigm for emancipation preparation cause former foster youth to experience substantial harm after they emancipate. It urges California to reform this paradigm to approximate the experiences of non-foster care youth more closely. Part II will provide an overview of the foster care system and critique the current framework for emancipation preparation in California, focusing on the termination of jurisdiction over dependents and the statutory benefits provided through the John H. Chaffee Foster Care Independence Act (FCIA). Part III will make the case for protecting foster youth beyond the age of majority by examining empirical data; social science and neurological research; and parental obligations to adult children in other states. Part IV will make suggestions for reinventing the legal paradigm for emancipation preparation, such as extending jurisdiction, reforming the process of emancipation, and finding a substantive due process right to emancipation preparation. Part V will conclude that emancipation reform is a collective responsibility that must be acted on now.

II. THE CURRENT LEGAL FRAMEWORK FAILS TO PROTECT EMANCIPATED FOSTER YOUTH

Under the current constitutional and statutory scheme, youth in foster care have certain rights and protections that they do not enjoy when they emancipate.²⁰ Specifically, they enjoy a constitutional right to be free from harm because of their custodial relationship

18. CAI, *supra* note 10, at i.

19. See *infra* Part II.C (discussing federal and state programs that provide emancipation benefits and services).

20. UNIV. OF CHI. LAW SCH. FOSTER CARE PROJECT PROTOCOL FOR REFORM, FROM FOSTER CARE TO ADULTHOOD 90 (2008), available at <http://webcast-law.uchicago.edu/pdfs/fostercareprotocol.pdf> [hereinafter UNIV. OF CHI. LAW SCH.].

with the state²¹ and the ability to enforce their statutory rights, including emancipation preparation benefits, through the oversight of the dependency court.²² Although emancipated youth are also eligible for benefits, it is difficult to monitor the provision of services without judicial oversight.²³ Therefore, for all practical purposes, the termination of dependency court jurisdiction signals an abrupt end to emancipation preparation. After providing a brief overview of the child welfare system, this section will examine California's termination statute and its impact on the efficacy of the Foster Care Independence Act's emancipation preparation framework.

A. The Foster Care System: An Overview

To evaluate the current paradigm of emancipation preparation and opportunities for reform, it is necessary to understand the foster care system. California's foster care system is a complex web of federal, state, and county agencies, dependency courts, and private social service agencies.²⁴ It operates on a "state-supervised/ county-administered model," in which counties implement their own child welfare systems according to federal and state laws under the monitoring and policy-making authority of the state.²⁵ A detailed analysis of this intricate and devolved system is beyond the scope of this paper.²⁶ Instead, this section will focus on the basics of the foster care process; foster care funding; and the role of the dependency court.

21. *See infra* Part IV.C.

22. *See infra* Part II.C.2.

23. UNIV. OF CHI. LAW SCH., *supra* note 20, at 90.

24. DIANE F. REED & KATE KARPILOW, CAL. CTR. FOR RESEARCH ON WOMEN & FAMILIES, UNDERSTANDING THE CHILD WELFARE SYSTEM IN CALIFORNIA: A PRIMER FOR SERVICE PROVIDERS AND POLICYMAKERS 3 (2002), available at <http://www.ccrwf.org/publications/ChildWelfarePrimer.pdf>.

25. *Id.* at 5.

26. For a good overview of the system in California, see *id.* In addition, a recent collection of articles on the child welfare system can be found in the Fall 2007 issue of the University of Michigan Journal of Law Reform, focusing on the following topic: "Looking Ahead to the Next 30 Years of Child Advocacy." *See e.g.*, Donald N. Duquette, *Looking Ahead, the Future of Child Welfare Law*, 41 U. MICH. J. L. REFORM 1 (2007). To view abstracts on the fifteen articles in this issue, see <http://students.law.umich.edu/mjlr/prospectus/currentVolume.html>.

1. *The Foster Care Process*

Most children enter the foster care system when a child welfare agency and dependency court determine that their parents are unable to care for them, usually due to abuse or neglect.²⁷ Sometimes, youth involved in the juvenile delinquency system are placed in foster care if the court finds that returning the child to his or her home would not be in the child's best interest.²⁸ The primary goal of the system is to reunify the child with his or her family.²⁹ Typically, parents have one year to fulfill the requirements of a reunification plan and regain custody of their child.³⁰ During this time, children are placed in the "least restrictive or most family-like setting to meet their needs," which can include a relative or kinship home, a licensed foster family home, a foster family agency certified home, or a group home.³¹ The child is assigned a social worker that provides supervision and case management services.³²

If the court determines that a child cannot safely live with his or her birth parents, it can order another permanency option, such as adoption, legal guardianship, or long-term foster care.³³ Courts can only order long-term foster care as a permanency plan if it rules out every other option.³⁴ Annual permanency reviews are conducted until the dependency case is closed, which occurs when an adoption is finalized, a child is placed in the custody of a legal guardian, or the youth reaches the age of majority and ages out of the system.³⁵

27. See YOUTH LAW CTR., OVERVIEW OF THE FOSTER CARE SYSTEM IN CALIFORNIA 1 (2007), available at <http://www.ylc.org/pdfs/OverviewFosterCareSystem.pdf>; REED & KARPILOW, *supra* note 24, at 13 (defining abuse and neglect).

28. YOUTH LAW CTR., *supra* note 27, at 2.

29. REED & KARPILOW, *supra* note 24, at 13.

30. CAL. WELF. & INST. CODE § 366.21(f) (West 2008). In some cases, parents will be given a six-month extension to fulfill the reunification plan. § 366.21(g)(1).

31. YOUTH LAW CTR., *supra* note 27, at 4 (citing CAL. WELF. & INST. CODE § 16000(a) (West 2004)).

32. *Id.* at 3.

33. *Id.* at 8.

34. *Id.* (citing CAL. WELF. & INST. CODE § 366.3 (West 2004)).

35. REED & KARPILOW, *supra* note 24, at 13.

The vast majority of foster youth are reunified with family, adopted, or placed in the home of a legal guardian,³⁶ only 7 percent age out of care.³⁷ However, these youth are truly the “throwaway kids” of society.³⁸ They are the children who cannot return to their families, have no extended family to take care of them, and were not chosen for adoption or guardianship by foster care families or other non-relatives.³⁹ Most of these children entered foster care as older youth after experiencing substantial harm at the hands of their natural families and spent their teenage years in congregate care.⁴⁰ Clearly, these youth are in need of special attention and resources.

2. Foster Care Funding

Foster care is funded by a combination of federal, state, and county funds.⁴¹ The primary source of federal funding is Title IV-E of the Social Security Act, which provides states with money to care for the children within their custody who meet the eligibility requirements of the former Aid to Families with Dependent Children program—essentially, poor children.⁴² Under this program, states must provide a 20 percent match and counties must provide a 30 percent match.⁴³ If a child is not eligible for federal funding, the state pays 40 percent and the county pays 60 percent.⁴⁴

36. See MARK E. COURTNEY & DARCY HUGHES HEURING, *The Transition to Adulthood for Youth “Aging Out” of the Foster Care System*, in ON YOUR OWN WITHOUT A NET 27, 30 (D. Wayne Osgood, et. al. eds., 2005). Eighty-eight percent of foster youth return to their families, are adopted, or are placed in the home of a legal guardian. *Id.*

37. Although the chances that a youth will emancipate increases with age, only 12 percent of youth who were in care on their sixteenth birthday remained in care until they aged out. *Id.* at 31.

38. See *supra* note 2 and accompanying text.

39. See *supra* note 34 and accompanying text (describing long-term foster care as the least preferable option); CAL. WELF. & INST. CODE §366.3(g) (West 2004).

40. Studies show that emancipated foster youth entered care later and were less likely to live in family-like settings than the general foster care population. COURTNEY & HEURING, *supra* note 36, at 30-31.

41. For a more comprehensive funding breakdown, see REED & KARPILOW, *supra* note 24, at 20-21.

42. 42 U.S.C. § 670-79b (2000).

43. REED & KARPILOW, *supra* note 24, at 20.

44. *Id.* In addition, parents may be billed and are liable for foster care costs if they are able to pay. CAL. WELF. & INST. CODE §§ 903, 903.4 (West 2004).

These funds are used to compensate foster care providers for the cost of housing, feeding, clothing, and otherwise taking care of children in foster care.⁴⁵ The payments vary according to the type and location of placement, the age of the child, and whether the child has any special needs.⁴⁶ For example, a family foster care provider caring for a youth aged fifteen to nineteen receives \$627 per month, while a group home operating at the least restrictive level receives \$1486 per child.⁴⁷ In California, caregivers of foster youth may receive these payments until they graduate from high school or reach their nineteenth birthday, whichever comes first.⁴⁸

3. *The Dependency Court*

The dependency court is a special division of the superior court, which exclusively handles child abuse and neglect cases.⁴⁹ Dependency jurisdiction is triggered when a social worker or police officer files a petition to declare a child a dependent of the court based on evidence of abuse or neglect.⁵⁰ If the court determines that the allegations are justified, it declares the child a dependent and maintains jurisdiction until the child returns to his or her family, is adopted or placed in a legal guardianship, or ages out of the system.⁵¹

Through a series of hearings, the court is responsible for overseeing family reunification plans, determining whether to terminate parental rights, ordering temporary and permanent placements, and holding the child welfare agency accountable for its obligations under the law.⁵² Throughout the court process, all parties

45. YOUTH LAW CTR., *supra* note 27, at 4. An annual clothing allowance is separate from the basic rate. *Id.*

46. *Id.*

47. Cal. Dep't of Soc. Servs., All County Letter No. 08-01, 2, 6 (Jan. 17, 2008), *available at* <http://www.dss.cahwnet.gov/getinfo/acl08/08-01.pdf>.

48. CAL. DEP'T OF SOC. SERVS., DSS MANUAL OF POLICIES AND PROCEDURES § 45-201.11 (2004), *available at* <http://www.dss.cahwnet.gov/ord/entres/getinfo/pdf/eas12b.pdf>.

49. *See* CAL. WELF. & INST. CODE § 300 (West 2004) (discussing jurisdiction of the dependency court).

50. REED & KARPILOW, *supra* note 24, at 15 (explaining the dependency court process). For an excellent overview of the system of dependency hearings, *see id.* at 14 fig.3.

51. *See* YOUTH LAW CTR., *supra* note 27, at 8.

52. *See* REED & KARPILOW, *supra* note 24, at 15; UNIV. OF CHI. LAW SCH., *supra* note 20, at 66.

(child, parent, and child welfare agency) have counsel.⁵³ In addition, the court may provide the child with a Court-Appointed Special Advocate (CASA), a volunteer that helps to represent the best interests of the child.⁵⁴

Congress implemented the current system of comprehensive court monitoring and enforcement in response to poor foster care outcomes.⁵⁵ Court monitoring promotes effective service delivery by imposing planning and implementation deadlines and enforcing case plans.⁵⁶ In particular, courts are required to determine whether “reasonable efforts have been made to finalize the permanency plan that is in effect.”⁵⁷ For youth in long-term foster care placement, this duty involves ensuring that child welfare agencies are preparing youth to live independently.⁵⁸

To help dependency courts in their oversight role in California, the legislature has empowered them with authority over state agencies other than child welfare agencies.⁵⁹ Therefore, if a foster child is not receiving the appropriate educational support required by law or the mental health services for which he or she is eligible, the court can order the responsible agency to provide that particular service.⁶⁰ The court can even join a state agency as a party for failing to meet its obligations to foster youth under the law.⁶¹ Therefore, dependency courts serve an important and powerful accountability role in the foster care system.

53. See YOUTH LAW CTR., *supra* note 27, at 3.

54. See CAL. WELF. & INST. CODE § 102 (West 2004). For a good overview of the CASA program, see UNIV. OF CHI. LAW SCH., *supra* note 20, at 105-06.

55. UNIV. OF CHI. LAW SCH., *supra* note 20, at 66.

56. *Id.*

57. 45 C.F.R. § 1356.21(b)(2)(i) (2006).

58. UNIV. OF CHI. LAW SCH., *supra* note 20, at 67. See also *infra* Part II.B.1 (discussing California’s foster care termination statute).

59. CAL. WELF. & INST. CODE § 362(a) (West 2004). See also UNIV. OF CHI. LAW SCH., *supra* note 20, at 70-71 (construing California’s statute granting dependency courts with statutory authority over other government agencies).

60. See UNIV. OF CHI. LAW SCH., *supra* note 20, at 70-71.

61. CAL. WELF. & INST. CODE § 362(a) (West 2009).

B. California's Foster Care Termination Statute: Aging Out At Eighteen

Dependency courts maintain jurisdiction over youth until the objectives of their permanency plan are achieved.⁶² For the minority of youth whose permanency plan is long-term foster care, termination of jurisdiction typically occurs when they reach the age of majority. However, state foster care termination statutes and discharge processes vary widely.⁶³ On its face, California's statute is relatively protective of a youth's right to emancipation preparation and permits continuing foster care until the age of twenty-one.⁶⁴ However, the legislative intent to "[r]everse a disturbing trend of foster youth being emancipated before they are ready to live independently"⁶⁵ has not been realized due to courts' narrow interpretation of the "best interests of the child" standard and agencies' under-enforcement of the statutory discharge criteria. Part II.B.1 reviews California's foster care termination statute, Part II.B.2 analyzes its interpretation, and Part II.B.3 examines its enforcement.

1. California's "Model" Legislation

Similar to most states, the age of majority in California is eighteen⁶⁶ and termination of jurisdiction is considered when youth reach this age.⁶⁷ However, unlike most states, jurisdiction may be extended until the youth is twenty-one years old⁶⁸ if it is in the "best

62. See YOUTH LAW CTR., *supra* note 27, at 8.

63. Magyar, *supra* note 13, at 564-73 (comparing and contrasting state laws about discharge from foster care).

64. Foster care termination statutes are difficult to find and compare. *Id.* at 566. Therefore, this paper does not attempt to provide a comprehensive comparison of state statutes. Rather, it makes its conclusions by reviewing the literature and noting that California has been lauded for its legislation and generally seems to be viewed as more rights protective than some of the other states. See *id.* at 567 (comparing California's statute, which does not automatically terminate jurisdiction at the age of majority with other states, such as Illinois' statute). However, California lacks the right of re-entry programs that many commentators believe is an important aspect of emancipation preparation. See *infra* Part IV.B.3.

65. *In re Tamika C.*, 32 Cal. Rptr. 3d 597, 603 (Ct. App. 2005).

66. CAL. FAM. CODE § 6500 (West 2004). See also CAI, *supra* note 10, at 7 (majority of states define the age of majority as 18).

67. CAL. WELF. & INST. CODE § 391 (West 2004) (describing hearing to terminate jurisdiction when child has reached the age of majority).

68. § 303 ("court may retain jurisdiction over any person who is found to be a dependent child of the dependency court until the ward or dependent child attains the age of 21 years")

interests of the child.”⁶⁹ California’s statute is heralded as model legislation⁷⁰ because it includes a discharge checklist to help courts assess whether youth are prepared for emancipation.⁷¹ This list includes documentation of case history, acquisition of identification documents, assistance securing housing, health, and employment benefits, help applying to college or vocational school, financial aid assistance, and the development of positive adult relationships.⁷² Moreover, youth attending high school or an equivalent program, who are reasonably expected to complete the program before their nineteenth birthday, are expressly permitted to remain in care until the age of nineteen.⁷³

If a youth reaches the age of majority and is not properly prepared for emancipation, the court can order continuing foster care until the youth is prepared, unless the youth is resistant to services or cannot be located.⁷⁴ Moreover, even if all the statutory requirements are satisfied, courts still have the discretion to continue jurisdiction for “other reasons.”⁷⁵ Therefore, courts have considerable flexibility in extending jurisdiction. Although federal and state foster care funding end by the youth’s nineteenth birthday,⁷⁶ courts can order counties to support youth unprepared for emancipation until their twenty-first birthdays.⁷⁷

(emphasis added). In addition to California, fifteen other states and the District of Columbia extend court jurisdiction for youth until the age of 21. UNIV. OF CHI. LAW SCH., *supra* note 20, at 90.

69. § 391(c) states: “The court may continue jurisdiction if it finds that the county welfare department has not met the [statutory discharge requirements] and that termination of jurisdiction would be harmful to the best interests of the child This section shall not be construed to limit the discretion of the dependency court to continue jurisdiction for other reasons.” CAL. WELF. & INST. CODE § 391(c). Among states that provide foster care beyond the age of majority, the statutory criteria for maintaining jurisdiction vary widely. *See Magyar, supra* note 13, at 567-68, for a list of themes, which include education, consent, availability of funds, transition to independence, and the best interests of the child. *Id.*

70. UNIV. OF CHI. LAW SCH., *supra* note 20, at 48.

71. CAL. WELF. & INST. CODE § 391(b) (West 2004).

72. *Id.*

73. CAL. WELF. & INST. CODE § 11403 (West 2004).

74. CAL. WELF. & INST. CODE § 391(c) (West 2004).

75. *In re Tamika C.*, 32 Cal. Rptr. 3d 597, 605 (Ct. App. 2005) (*construing* § 391(c)).

76. *See supra* note 48 and accompanying text (discussing federal and state foster care payment eligibility).

77. *In re Tamika*, 32 Cal. Rptr. 3d at 601.

2. *The Disintegration of the “Best Interests of the Child” Standard*

According to section 391, the standard for continuing foster care jurisdiction is the “best interests of the child” or “any other reason.”⁷⁸ While this standard appears to be extremely broad, courts have interpreted it very narrowly to mean that jurisdiction may only be extended if there is an “existing and reasonably foreseeable future harm to the welfare of a child.”⁷⁹ For example, a court refused to find that dependents attending college faced foreseeable future harms because they lived in a stable environment and were not at risk of abuse, neglect, or exploitation.⁸⁰ The court characterized the continuation of foster care for college students as “special assistance” and the unwarranted “subsidiz[ing] of higher education”⁸¹—neglecting the reality that it would be in the best interest of the youth to continue providing support until they completed their education.

Moreover, even if there is a risk of current or future harm to the youth, California courts refuse to retain jurisdiction without the youth’s consent.⁸² For example, Holly was a dependent youth who had a serious learning disability, mental health issues, chronic health problems, no source of income, and a demonstrated failure to hold down a job or budget her money.⁸³ Although she graduated from high school, her school counselor expressed concern that she would “end up on the streets when she graduates.”⁸⁴ Despite the obvious need for continued assistance, the court terminated jurisdiction because Holly failed to take advantage of the services offered by the department.⁸⁵ The court inferred that her resistance to services indicated a desire for termination of jurisdiction and reasoned that

78. CAL. WELF. & INST. CODE § 391(b)-(c) (West 2004).

79. *In re Robert L.*, 80 Cal. Rptr. 2d 578, 582 (Ct. App. 1998).

80. *Id.*

81. *Id.* at 583.

82. This is a judicially engrafted requirement. *See infra* note 83-88 and accompanying text. Section 391 gives courts the *discretion*—not the *mandate*—to terminate jurisdiction when the youth refuses services or cannot be found. § 391(c). Courts interpret the refusal of services and running away as the youth’s lack of requisite consent. *See infra* note 85 and accompanying text.

83. *In re Holly*, 128 Cal. Rptr. 2d. 907, 908-10 (Ct. App. 2002).

84. *Id.* at 916.

85. *Id.*

the “best interests of the child” standards requires consideration of the youth’s preferences after he or she reaches the age of majority.⁸⁶ Moreover, the court reasoned that Holly could still receive services through the Independent Living Program (ILP), discussed in the next section.⁸⁷ In practice, the court’s deference to the youth’s preferences completely eclipses the “best interests of the child” standard.⁸⁸

California’s interpretation of its statute can be contrasted with the District of Columbia.⁸⁹ Both statutes allow dependents to remain in foster care until the age of twenty-one.⁹⁰ However, in the District of Columbia, the same “best interests of the child” standard is used regardless of whether the dependent is a minor or an adult.⁹¹ Therefore, a young person’s refusal of services indicates immaturity and a basis for extending jurisdiction, rather than terminating it.⁹² Consequently, the majority of dependents in the District of Columbia that are under foster care jurisdiction when they reach the age of majority remain in care until they turn twenty-one.⁹³

3. *Under-Enforcement of the Statutory Discharge Checklist*

Another reason that California youth emancipate without proper emancipation preparation is that child welfare departments fail to implement the statutory checklist. Many caseworkers and advocates report that they have never seen the checklist implemented.⁹⁴ The recent case of *In re Tamika* provides a glimpse of how child welfare departments handle emancipation.⁹⁵ Tamika C. was a dependent child that had been in foster care since she was eighteen months

86. *Id.*

87. *Id.* at 917.

88. *See id.* at 913-14 (when minors refuse services, the state is “entitled, and perhaps obligated, to override the desires of the juvenile if in the best interests of the child [but when that youth reaches the age of majority the] equation changes drastically”).

89. Magyar, *supra* note 13, at 572.

90. Compare CAL. WELF. & INST. CODE § 303 (West 2004), with D.C. CODE § 16-2303 (West 2004).

91. *In re T.R.J.*, 661 A.2d 1086, 1093-94 (D.C. 1995).

92. *Id.* (maintaining jurisdiction over service-resistant dependent who is over eighteen).

93. Magyar, *supra* note 13, at 572.

94. UNIV. OF CHI. LAW SCH., *supra* note 20, at 49.

95. *In re Tamika C.*, 32 Cal. Rptr. 3d 597 (Ct. App. 2005).

old.⁹⁶ She was a slow learner and had to repeat the second grade, which put her behind schedule to graduate high school.⁹⁷ Although Tamika attended class regularly and was progressing towards graduation, her social worker gave her an ultimatum: graduate a semester early, before she turned nineteen, or face termination immediately.⁹⁸

When Tamika expressed her preference to graduate with her class, the Department of Human Services sought termination, arguing that it did not have the resources to maintain foster care services for Tamika after the age of nineteen.⁹⁹ The dependency court terminated jurisdiction. As the appellate court noted in its opinion reversing termination, the educational assistance required by section 391 is certainly not furthered by “throw[ing] roadblocks in the dependent’s educational goals.”¹⁰⁰ Although the appellate court vindicated Tamika’s rights in this case, it is troubling that the trial court permitted such an egregious departure from the law, and it is likely that many youth are terminated despite child welfare agencies’ non-compliance with the discharge list.¹⁰¹

In summary, California has good law, but inconsistent judicial interpretation and agency implementation. Despite the statutory authority to continue foster care beyond the age of majority, this

96. *Id.* at 599.

97. *Id.* at 599-600.

98. *See id.* at 604.

99. *Id.* at 601-02.

100. *Id.* at 604. The court also expressed concern about the integrity of the checklist form and report in Tamika’s case. For example, the Termination of Jurisdiction form signed by Tamika stated that she had “received the information and services that I initialed above.” *Id.* at 603. However, Tamika did not initial any part of the form, indicating that none of the statutory criteria were met. *Id.* In addition, the form stated that the required six-page checklist report was attached. *Id.* However, this report was not attached and was dated nine days after the form was signed. *Id.* Clearly, the checklist was not taken seriously, even though its implementing form was signed under penalty of perjury by social workers. *See id.*

101. There is no empirical data on this issue. However, in Los Angeles County, home of the largest foster care system in the United States, at least 40 percent of youth that should have a Transitional Independent Living Plan (TILP) to prepare for emancipation do not. Email from Rachel Kleinberg, Equal Justice Works Fellow, Public Counsel Law Center, to Nicole Ochi, author (Apr. 11, 2008, 16:55 PST) (on file with author) [hereinafter Email from Kleinberg – 4/11].

rarely occurs.¹⁰² Youth who overcome adversity to graduate from high school and attend college are denied continued assistance because they are succeeding and not at risk of immediate harm.¹⁰³ Youth who are less able to cope with their circumstances are also denied assistance if they resist services or cannot be located.¹⁰⁴ In practice, courts are only likely to extend foster care jurisdiction to an individual like Tamika—someone who is doing well, but wants and needs some extra help and who has counsel that can articulate her needs.¹⁰⁵ Even then, anecdotal evidence indicates that some courts will still terminate jurisdiction over the youth's objection.¹⁰⁶ Consequently, the vast majority of California youth emancipate at the age of eighteen without proper preparation for independence.¹⁰⁷

C. Foster Care Independence Act: Emancipation Benefits

As the previous section noted, most California youth emancipate when they reach the age of majority, notwithstanding the court's authority to order continuing foster care.¹⁰⁸ The Foster Care Independence Act (FCIA) provides continuing access to services after youth emancipate, but absent the oversight of the dependency court, there is no accountability to ensure that youth receive these services.¹⁰⁹ Although, the dependency court does not always provide accountability,¹¹⁰ it is institutionally suited to oversee and enforce emancipation preparation.¹¹¹ This section will explore FCIA and argue that it is insufficient to meet the needs of emancipated foster

102. See CAI, *supra* note 10, at 9 (it is common practice for jurisdiction to be terminated when the dependent turns eighteen).

103. See discussion of *In re Robert L.*, 80 Cal. Rptr. 2d 578, 582 (Ct. App. 1998), *supra* notes 79-81 and accompanying text.

104. See discussion of *In re Holly*, 128 Cal. Rptr. 2d. 907, 908-10 (Ct. App. 2002), *supra* notes 83-88 and accompanying text.

105. See discussion of *In re Tamika C.*, 32 Cal. Rptr. 3d 597 (Ct. App. 2005), *supra* notes 95-100 and accompanying text.

106. Magyar, *supra* note 13, at 572.

107. *Id.* at 572 (almost nine out of ten California youth emancipate at age eighteen).

108. See *supra* Part II.B.

109. UNIV. OF CHI. LAW SCH., *supra* note 20, at 89.

110. A case in point is the dependency court's failure to enforce county welfare agencies' discharge checklist obligations. See *supra* Part II.B.3.

111. UNIV. OF CHI. LAW SCH., *supra* note 20, at 65-69.

youth due to procedural and resource deficiencies. Part II.C.1 will review FCIA framework and its implementation in California. Part II.C.2 will analyze the lack of accountability for service delivery after youth emancipate, and II.C.3 will point out the problem of inadequate appropriations.

1. *Legal Framework*

Title IV-E of the Social Security Act provides funding to states to deliver foster care and independent living programs.¹¹² Congress first recognized the need to provide emancipation benefits to older foster care youth in 1986 when it passed the Independent Living Initiative (ILI), which appropriated \$45 million each year to states for independent living services.¹¹³ The ILI is notable because it was the first effort on a national scale to recognize the importance of helping youth transition from foster care to independence, but it was inadequate because it did not provide funding for youth who had already emancipated and prohibited the use of funds for housing.¹¹⁴ Consequently, many youth emancipated into homelessness, unemployment, and welfare dependency.¹¹⁵

In response to these problems, Congress replaced the ILI in 1999 with the John H. Chaffee Foster Care Independence Act (FCIA).¹¹⁶ FCIA doubled the funding available for Independent Living Program (ILP) services, extended eligibility for services to former foster youth up to twenty-one years of age, and allowed up to 30 percent of the block grant to be used by the States for housing.¹¹⁷ In passing this legislation, Congress recognized that the government has a responsibility to prepare youth in foster care for adulthood and to provide continued guidance and support after they turn eighteen

112. 42 U.S.C. § 670 (2000).

113. Jill K. Jensen, Notes and Comments, *Fostering Interdependence: A Family-Centered Approach to Help Youth Aging Out of Foster Care*, 3 WHITTIER J. CHILD & FAM. ADVOC. 329, 331-332 (2004) (discussing the ILI).

114. CAI, *supra* note 10, at 4.

115. *Id.*

116. 42 U.S.C. § 677(a) (2000).

117. *Id.*

years old.¹¹⁸ Therefore, in addition to identifying and providing self-sufficiency services to youth likely to remain in foster care until eighteen years of age, FCIA is designed to “provide financial, housing, counseling, employment, education, and other appropriate support and services to former foster care recipients between 18 and 21 years of age to complement their own efforts to achieve self-sufficiency....”¹¹⁹

Like other federal block grant programs, states must apply for funds by submitting a written plan that conforms to certain statutory requirements.¹²⁰ Under FCIA, state plans must (a) design and deliver programs to achieve the purposes of the section; (b) ensure that all political subdivisions in the State are served by the program, though not necessarily in a uniform manner; (c) ensure that programs serve children of various ages and at various stages of achieving independence; (d) involve public and private sectors in helping adolescents in foster care achieve independence; (e) use objective criteria for determining eligibility for benefits and services under the programs and for ensuring fair and equitable treatment of benefits; and (f) cooperate in national evaluations of the effects of the programs in achieving the purposes of the section.¹²¹ These broad requirements give states considerable flexibility in designing ILP plans,¹²² which results in wide disparities of services, funding, and eligibility requirements among states.¹²³

118. See 145 CONG. REC. H4968-69 (daily ed. June 25, 1999) (statements of Rep. Lofgren, Rep. Stearns & Rep. Morella).

119. 42 U.S.C. § 677(a)(5) (2000).

120. § 677(b)(2).

121. *Id.*

122. Sylvia Junn & Jennifer Rodriguez, *Out on Their Own: California's Foster Youth and the Inequalities of the Independent Living Program*, 6 U.C. DAVIS J. JUV. L. & POL'Y 189, 193 (2002).

123. Atkinson, *supra* note 12, at 197. For example, the amount of funding available per youth varies from \$500 to \$2,300, depending on the state in which a child lives. GOV'T ACCOUNTABILITY OFFICE, FOSTER YOUTH: HHS ACTION COULD IMPROVE COORDINATION OF SERVICES AND MONITORING OF STATES' INDEPENDENT LIVING PROGRAMS 4 (2004), available at <http://www.gao.gov/new.items/d0525.pdf> [hereinafter GAO REPORT].

California has the largest ILP in the country.¹²⁴ In California, each county develops and administers its own program.¹²⁵ However, the California Department of Social Services oversees, evaluates, and promulgates regulations to implement the ILP throughout the state.¹²⁶ According to these regulations, ILP services are available to youth who are sixteen years of age or older, until their twenty-first birthday.¹²⁷ To be eligible, youth must have been in foster care or living with a dependency court-ordered relative caregiver and in receipt of Kinship Guardianship Assistance Payments (Kin-GAP) anytime from their sixteenth to nineteenth birthdays.¹²⁸ The definition of “foster care” includes youth living in foster family homes, foster homes of relatives, adoptive placements, and group homes.¹²⁹

Common ILP services include Independent Living classes, transportation assistance (bus passes or tokens, driver’s training, car insurance), housing rental deposits and fees, work-related equipment and supplies (clothing vouchers, assistance purchasing equipment), education-related equipment and supplies (education vouchers, book vouchers), and referrals to housing, mentoring programs, medical

124. California received approximately \$8.5 million for its ILP program, which is more than twice as much funding as New York received, the second largest ILP program. GOV’T ACCOUNTABILITY OFFICE, CHILD WELFARE: HHS ACTIONS WOULD HELP STATES PREPARE YOUTH IN THE FOSTER CARE SYSTEM FOR INDEPENDENT LIVING 25 (2007), *available at* <http://www.gao.gov/new.items/d071097t.pdf>. California supplements its ILP with “Emancipated Youth Stipends” (EYS). CAL. WELF. & INST. CODE § 10609.3(e)(1) (West 2004). To qualify for this stipend, youth must be eligible for the ILP, have emancipated from foster care to live on his or her own, and be approved by the county. *Id.* The stipends may fund various special needs that emancipated youth have, including: transportation, work required costs (uniforms, professional clothing), contracted services costs (educational planning, life skills training), health service costs for youth and their dependent children, housing assistance costs (food, rent, moving expenses), and aftercare costs (crisis counseling, vocational training, assistance with college fees). Cal. Dep’t of Soc. Servs., All County Letter No. 00-84, 2 (Dec. 19, 2000), *available at* <http://www.dss.cahwnet.gov/getinfo/acl00/pdf/00-84.PDF>. In addition, both the state and the counties have dedicated funding for transitional housing programs for current or former foster youth. CAL. WELF. & INST. CODE § 11403.2 (West 2004).

125. CAL. WELF. & INST. CODE § 10609.4(c) (West 2004).

126. § 10609.4.

127. CAL. DEP’T OF SOC. SERVS., DSS MANUAL OF POLICIES AND PROCEDURES § 31-525.3 (2004), *available at* <http://www.dss.cahwnet.gov/ord/entres/getinfo/pdf/cws4.pdf> [hereinafter MPP 31-525].

128. *Id.*

129. 45 C.F.R. § 1355.20(a) (1996).

facilities, and other community services.¹³⁰ In addition to these more traditional services, California recently passed A.B. 408, a unique law that promotes strong relationships with adults, participation in structured extra-curricular and social activities, and the development of decision-making skills.¹³¹ These relational supports and interpersonal experiences are crucial for a youth's development and successful transition to adulthood.¹³²

A.B. 408 requires social workers to identify "important individuals" in each youth's life and to help maintain these relationships as part of the youth's permanency planning process.¹³³ In addition, A.B. 408 requires child welfare agencies to allow youth to participate in "age-appropriate extracurricular, enrichment, and social activities"¹³⁴ and bolsters a child's right to know about and participate in hearings.¹³⁵ The dependency court is responsible for ensuring compliance with these obligations and may issue orders to facilitate the development of positive adult relationships, as mandated by A.B. 408.¹³⁶

Traditional services and benefits, as well as the new emancipation preparation requirements under A.B. 408, are distributed according to the Transitional Independent Living Plan (TILP), a written service delivery plan that identifies the youth's goals and the services needed to achieve them.¹³⁷ The social worker

130. See 42 U.S.C. § 677(a), (i) (2000); CAL. WELF. & INST. CODE § 10609.3(e) (West 2004).

131. See 2003 Cal. Legis. Serv. Ch. 813 (A.B. 408) (codified in scattered sections of CAL. WELF. & INST. CODE). For an in-depth discussion of A.B. 408, see Alice Bussiere, *Permanence for Older Foster Youth*, 44 FAM. CT. REV. 231, 234-35 (2006); CHILDREN'S LAW CTR. OF L.A., PROMOTING PERMANENCE FOR FOSTER YOUTH, http://www.clcla.org/Images/pdfs/pdfs_train_statelaw/AB%20408%20Permanence.pdf.

132. UNIV. OF CHI. LAW SCH., *supra* note 20, at 7.

133. Bussiere, *supra* note 131, at 234.

134. CAL. WELF. & INST. CODE § 362.05 (West 2004).

135. § 349.

136. Bussiere, *supra* note 131, at 234.

137. CAL. DEP'T OF SOC. SERVS., DSS MANUAL OF POLICIES AND PROCEDURES 31-236(a) (2004), <http://www.dss.cahwnet.gov/ord/entres/getinfo/pdf/cws2.pdf> [hereinafter MPP 31-236]. When a youth in placement is fifteen and a half years old, the county social worker or probation officer is required to work with the youth to create a TILP. MPP 31-525, *supra* note 127, at 31-525.75. The TILP is created using an approved assessment tool and describes the youth's current level of functioning; emancipation goals, which include educational attainment, life skills, development of a mentoring relationship, receipt of important documents, and access to mental health services, employment, and housing; the programs and services needed to attain the goals

or probation officer must update the TILP annually, or more often if requested by the youth.¹³⁸ The social worker or probation officer is also responsible for ensuring that ILP services are provided as identified in the TILP prior to emancipation.¹³⁹ After a youth emancipates, responsibility for delivery of ILP services shifts to ILP coordinators who are required to provide individualized ILP services to all eligible youth and ensure the fair and equitable treatment of every participant.¹⁴⁰

2. *The Accountability Problem*

The regulations do not make any explicit differentiation in the availability of services for emancipated youth.¹⁴¹ However, in practice, emancipated youth tend to experience a drastic change in their access to ILP benefits.¹⁴² The simple explanation is that youth in care have an assigned social worker or probation officer that is mandated to help them identify and achieve their independent living goals.¹⁴³ Once they leave care, youth have no assigned caseworker to

(including, but not limited to ILP services); and the individuals helping the youth to attain the goals. MPP 31-236, at 31-236(a).

138. MPP 31-236, *supra* note 137, at 31-236(b).

139. *Id.* at 31-236(g)(2). When a youth is physically or mentally unable to benefit from the program or if the youth declines to participate, ILP participation may be deferred. *Id.* at 31-236(g)(3). However, a redetermination of deferment must be made every six months and documented in the TILP. *Id.* Therefore, it is possible for youth to emancipate without obtaining all the necessary services.

140. MPP 31-525, *supra* note 127, at 31-525.7. It is important to note that ILP Coordinators are responsible for ensuring delivery of services to all eligible youth, but have a specific mandate to reach out and provide ILP services to emancipated youth and others who are out of care. *Id.* at 31-525.75.

141. The regulations do contain some implied distinctions between emancipating and emancipated youth. For example, the social worker or probation officer is mandated to update the TILP at least annually, but the regulations do not impose any similar obligation on ILP Coordinators. MPP 31-236, *supra* note 137, at 31-236(b). Clearly, this indicates that the cases of emancipated youth will not be managed as carefully as those of youth in care.

142. While 40-60 percent of youth still in care have a TILP in Los Angeles County, *none* of the emancipated youth have one. See Email from Kleinberg – 4/11, *supra* note 101. The lack of a TILP can have serious consequences for youth because it defines the youth's entitlement to benefits. See MPP 31-236, *supra* note 137, at 31-236(a); MPP 31-525, *supra* note 127, at 31-525.7. Without a TILP, service providers have no obligation to provide particular ILP services to youth, rendering the program functionally ineffective.

143. MPP 31-525, *supra* note 127, at 31-525.6.

help them.¹⁴⁴ Although emancipated youth can request assistance from ILP Coordinators, very few are available, and they do not provide case management assistance.¹⁴⁵ Moreover, emancipated youth cannot rely on the court review process to ensure that they receive the benefits to which they are entitled.¹⁴⁶

Congress recognized that judicial oversight of child welfare agencies was necessary when it enacted the Adoption Assistance and Child Welfare Act (AACWA), which created the current system of court monitoring for youth in care.¹⁴⁷ There is no reason to suppose that similar oversight is not necessary to ensure the provision of services when youth emancipate.¹⁴⁸ In fact, oversight is arguably more necessary because ILP regulations are extraordinarily vague, creating a considerable risk of arbitrary distribution.¹⁴⁹

State regulations do not stipulate when a youth is eligible for specific benefits, nor does it provide an appeals process when requested benefits are denied.¹⁵⁰ Although caseworkers are supposed to provide all the services specified in the TILP, many ILP eligible youth in California do not have a TILP.¹⁵¹ Of those who do have a TILP, few have a plan that reflects their current needs or a specific plan to help them achieve their goals. For example, one youth's

144. Compare *id.* at 31-525.6, with *id.* at 31-525.7 (social workers or probation officers are mandated to ensure that youth have access to core ILP services while ILP Coordinators are not under the same obligation).

145. For example, in Los Angeles County, twenty YDS Coordinators (equivalent to ILP Coordinators) are responsible for confirming eligibility for ILP, maintaining data collection systems, referring youth to service providers, and otherwise distributing benefits to thousands of transitioning youth. LOS ANGELES DEP'T OF CHILDREN & FAMILY SERVS., YOUTH DEVELOPMENT: SERVICES FOR TRANSITION AGE YOUTH, PROCEDURAL GUIDE 0100-535.30 (2007), <http://dcfs.co.la.ca.us/policy/hndbook%20cws/0100/default.htm#Out> (follow 535.30 hyperlink) [hereinafter PROCEDURAL GUIDE 0100-535.30]. Rough estimates indicate that the ratio of ILP Coordinators to eligible youth in Los Angeles County is 1:232, while a social worker has an average caseload of 1:30. Email from Kleinberg – 4/11, *supra* note 101. This outrageous ratio precludes most ILP Coordinators from providing any meaningful case management assistance.

146. UNIV. OF CHI. LAW SCH., *supra* note 20, at 89.

147. *Id.* at 66. Congress replaced AACWA with the Adoption and Safe Families Act of 1997, which increased court's oversight role. *Id.*

148. *See id.* at 67.

149. *See* Email from Kleinberg – 4/11, *supra* note 101 (regulations require youth to receive benefits, but the precise entitlement is unclear).

150. *Id.*

151. *See supra* note 101 and accompanying text.

TILP included “referral to ILP Services” three times under the category of “planned services” and failed to include any specific services.¹⁵² Without any guidelines on providing specific benefits, a vague TILP allows ILP Coordinators to distribute benefits at their whim.

3. *The Resource Problem*

In addition to FCIA’s accountability deficiencies, it is also deficient because it does not provide adequate funding for emancipated youth. Despite increased funding, the appropriation for emancipation preparation is still a fraction of what youth receive when they are in care and less than 5 percent of what parents spend on their adult children.¹⁵³ When foster youth emancipate, the financial support that they receive is drastically reduced. For example, the average emancipated youth receives \$1,424 per year for room and board, which is less than what that the federal government *alone* spends on a dependent in a *single month*.¹⁵⁴ This abrupt and drastic reduction in funding upon a youth’s eighteenth birthday is unrealistic and sets youth up for failure. Continuing court jurisdiction and eligibility for federal and state foster care payments could ease this transition. For example, foster care payments could be gradually reduced over time and the court could maintain jurisdiction over these funds.¹⁵⁵

In summary, FCIA is a vast improvement from its predecessor and has highlighted the plight of youth that age out of the system.¹⁵⁶ Moreover, California’s developmental perspective on emancipation preparation, as reflected in A.B. 408’s emphasis on lifelong connections with adults, participation in structured activities, and

152. Confidential Transitional Independent Living Plan (Aug. 17, 2006) (on file with Public Counsel) (blank form available at http://www.ilponline.org/images/834/TILP_0702_2.pdf).

153. D. Wayne Osgood, et. al., *Introduction: Why Focus on the Transition to Adulthood for Vulnerable Populations?*, in *ON YOUR OWN WITHOUT A NET* 1, 6 (D. Wayne Osgood, et. al. eds., 2005).

154. Magyar, *supra* note 13, at 563.

155. *See infra* Part IV.B.1 (discussing the Transition Guardian Plan, which takes this approach).

156. For example, many of the studies and articles used in this paper were commissioned after FCIA was enacted.

youth-centered proceedings, is worth applauding.¹⁵⁷ Nevertheless, there are still numerous problems with the current framework for emancipation benefits. First, there is no system of accountability to ensure that youth obtain benefits after they are terminated from dependency court jurisdiction.¹⁵⁸ Second, the appropriation for FCIA is woefully inadequate and fails to approach any kind of parity with the amount that parents spend on their adult children or the amount that youth receive while in care.¹⁵⁹ Extending dependency court jurisdiction and foster care eligibility could provide a solution to these deficiencies in FCIA, as discussed in the next section.

III. THE CASE FOR PROTECTING FOSTER YOUTH BEYOND THE AGE OF MAJORITY

As discussed in the previous section, emancipation preparation is drastically reduced when youth emancipate, which occurs at the age of eighteen for the vast majority of California youth. Both the federal and state legislatures have recognized the need for emancipation preparation beyond the age of majority,¹⁶⁰ but the reality is that most youth are abandoned on their eighteenth birthdays.¹⁶¹ This section will argue that California has a duty to provide emancipation preparation beyond the age of majority in practice, as well as in theory. Part III.A will examine empirical data, which demonstrates that youth who remain in care have significantly better outcomes than those who emancipate at eighteen. Part III.B will explore the coming of age process and identify the degree of support that natural parents provide their adult children. Part III.C will focus on the legal duties imposed on natural parents and legal guardians to care for their adult children in California and other states.

157. *See supra* notes 131-36 and accompanying text (discussing A.B. 408).

158. *See supra* Part II.C.2.

159. *See supra* Part II.C.3.

160. To receive FCIA funding, states *must* certify that they will provide assistance and services to children that have left foster care because they attained eighteen years of age, but have not attained twenty-one years of age. 42 U.S.C. 677(b)(3)(A) (2000). Moreover, state eligibility for transitional housing extends to age twenty-four. CAL. WELF. & INST. CODE § 11403.2 (West 2004).

161. *See supra* Part II.

A. Empirical Data: Remaining in Care Leads to Better Outcomes

The empirical data on emancipating foster youth is scarce. The Chapin Hall Midwest Study is the “only large-scale longitudinal examination of the transition to adulthood for foster youth who came of age after the passage of the Foster Care Independence Act of 1999.”¹⁶² This study followed foster youth in Illinois, Iowa, and Wisconsin until they turned twenty-one.¹⁶³ Participants were interviewed three times: first, when they were seventeen or eighteen and still under the jurisdiction of the child welfare agency; second, when they were nineteen and some had emancipated, while others remained in care; and third, when they were twenty-one and all had emancipated.¹⁶⁴ According to this study, extending foster care jurisdiction beyond age eighteen promotes the pursuit of higher education and, to a more limited extent, may increase earnings.¹⁶⁵ Most concretely, continuing jurisdiction ensures the delivery of services that FCIA and corresponding state legislation was designed to provide.¹⁶⁶

Generally, former foster youth have lower educational attainment than non-foster youth. They are more than twice as likely to lack a high school diploma or GED and almost half as likely to

162. MARK E. COURTNEY, ET. AL., CHAPIN HALL CENTER FOR CHILDREN, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 19 – EXECUTIVE SUMMARY 2 (2005), http://www.chapinhall.org/article_abstract.aspx?ar=1355 (follow “Executive Summary: Outcomes at Age 19” hyperlink) [hereinafter OUTCOMES AT 19]. Another study of foster youth outcomes is the Casey National Alumni Study. CASEY FAMILY PROGRAMS, ASSESSING THE EFFECTS OF FOSTER CARE: EARLY RESULTS FROM THE CASEY NATIONAL ALUMNI STUDY (2003), http://www.casey.org/NR/rdonlyres/CEFBB1B6-7ED1-440D-925A-E5BAF602294D/302/casey_alumni_studies_report.pdf [hereinafter CASEY NATIONAL ALUMNI STUDY]. However, this study focuses on youth that emancipated before Congress enacted FCIA and does not provide the same longitudinal analysis of the same participants as the Midwest study. *Id.* at 12 (data collected from youth who emancipated between 1960 and 1998).

163. OUTCOMES AT 19, *supra* note 162, at 3.

164. *See id.* at 3; MARK E. COURTNEY, ET. AL., CHAPIN HALL CENTER FOR CHILDREN, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 21 – EXECUTIVE SUMMARY 3 (2007), http://www.chapinhall.org/article_abstract.aspx?ar=1355 (click on “Executive Summary: Outcomes at Age 21” hyperlink) [hereinafter OUTCOMES AT 21] (indicating that all youth were out of care at 21).

165. *See* COURTNEY, ISSUE BRIEF, *supra* note 8, at 2.

166. *Id.*

complete any college.¹⁶⁷ However, among former foster youth, those who remained in care after their eighteenth birthday had significantly better educational outcomes. For example, youth in care were more than three times as likely to be enrolled in a two or four-year college at the age of nineteen and four times more likely to attend college.¹⁶⁸

Former foster youth also tend to have greater unemployment rates, earn less money, and experience more economic hardships than their non-foster care counterparts. For example, 50 percent of twenty-one year old former foster youth were employed, compared to 64 percent of non-foster care youth, even though non-foster care youth attended college at a higher rate, making them *less likely* to be working.¹⁶⁹ Moreover, median earnings of former foster youth are just \$5,450 per year, which is 40 percent less than non-foster care youth.¹⁷⁰ Consequently former foster youth experience economic hardships, such as the inability to pay rent and bills, at a significantly higher rate than non-foster care youth.¹⁷¹ At age twenty-one, foster youth who remained in care earned nearly \$1,000 more per year than youth who did not remain in care.¹⁷² This differential is likely to increase over time because youth in care are more likely to attend college, which increases their earning potential.

In addition to improving educational and economic outcomes for youth, continuing foster care also substantially increases the likelihood that youth will receive Independent Living Services after the age of majority. For example, youth in care are nearly twice as likely to receive financial management and education services and more than twice as likely to receive housing services as youth who left care at the age of majority.¹⁷³ Increased access to housing is particularly important for former foster youth because they tend to experience homelessness at high rates.¹⁷⁴ For example, 18percent of

167. *Id.* at 4.

168. *Id.*

169. OUTCOMES AT 21, *supra* note 164, at 5.

170. *Id.* at 6.

171. *Id.*

172. COURTNEY, ISSUE BRIEF, *supra* note 8, at 5 tbl. 2.

173. *Id.* at 7 fig.4.

174. *See generally* Atkinson, *supra* note 12, at 188-90. For a discussion on the housing problems that California youth face specifically, see CAI, *supra* note 10, at 11-14.

twenty-one year olds have been homeless as least once since emancipating and more than half of these have been homeless more than once.¹⁷⁵

Surprisingly, two-thirds of youth who had the option of remaining in foster care beyond their eighteenth birthday chose to stay in care until their twentieth birthday, and in many cases, did not emancipate until twenty-one.¹⁷⁶ These statistics challenge the common notion that foster youth would not choose to remain in care if given the option, particularly if they understood the additional benefits available to them and were able to terminate jurisdiction when they wanted.¹⁷⁷ The Midwest Study provides strong empirical support for the argument that foster care should be meaningfully extended in California. Although this study was limited to a few states,¹⁷⁸ the developmental literature indicates that its results may be replicated in other states because continuing foster care more closely approximates the developmental trajectory of contemporary youth.¹⁷⁹

B. Developmental Realities: The Long, Winding Path to Adulthood¹⁸⁰

The developmental literature suggests that the contemporary transition from adolescence to adulthood is a gradual and intermittent process of alternately trying out independence and seeking the refuge and resources of family.¹⁸¹ The current paradigm of emancipation preparation does not recognize this reality.¹⁸² Instead, it stubbornly adheres to an outdated understanding of adulthood, in which graduation from high school at age eighteen automatically leads to getting a job, moving out, getting married, and having children.¹⁸³

175. OUTCOMES AT 21, *supra* note 164, at 3.

176. COURTNEY, ISSUE BRIEF, *supra* note 8, at 3.

177. *See id.* Cf. CAI, *supra* note 10, at 24-25 (survey of 91 current and former California foster youth indicates that they believe extended foster care or transition services is a good idea).

178. COURTNEY, ISSUE BRIEF, *supra* note 8, at 9 (discussing limitations of the study).

179. *See* Magyar, *supra* note 13, at 579; UNIV. OF CHI. LAW SCH., *supra* note 20, at 1.

180. "Developmental Realities" refers to psychological, sociological, and neurological research about human development.

181. *See* Osgood, et al., *supra* note 153, at 4; UNIV. OF CHI. LAW SCH., *supra* note 20, at 8.

182. UNIV. OF CHI. LAW SCH., *supra* note 20, at 11.

183. *See id.*; Osgood, et al., *supra* note 153, at 5.

Today, most young adults continue their education and delay the other “milestones of adulthood” until much later in life.¹⁸⁴ This lengthening of adulthood is due to sociological changes, such as the educational expectations of the labor market and the changing cultural mores that arose from the sexual revolution of the 1960’s.¹⁸⁵

Moreover, the definition of adulthood itself is changing. Some developmental researchers have suggested that “cognitive maturity, emotional maturity, and ethics or compliance with social expectations are more appropriate markers of adulthood than the five life events that have long been understood to mark the boundary lines between adolescence and adulthood.”¹⁸⁶ In fact, youth are more likely to mention accepting responsibility, making independent decisions, and becoming financially independent as indicators of adulthood than the traditional criteria.¹⁸⁷ The changing scholarly and social definitions of adulthood are further evidence that the transition to adulthood is not a bright line, but a process.

This section examines the developmental realities in contemporary American society. Part III.B.1 focuses on the extent and scope of family support that the average young adult receives. Part III.b.ii focuses on the sociological aspect of development by examining the dependent status of youth over the age of eighteen in various aspects of society. Part III.B.3 focuses on neurological research about brain development, which indicates that the brain does not fully mature until well into young adulthood.

1. *Family Support for Adult Children: Economic Realities*

For the typical American adolescent coming of age in the twenty-first century, his or her eighteenth birthday does signal a transition to greater independence. However, this time is not an abrupt plunge into the abyss of adulthood, but a period of “semi-autonomy during which youth move away from full dependence...

184. UNIV. OF CHI. LAW SCH., *supra* note 20, at 11.

185. Osgood, et al., *supra* note 153, at 5 (explaining that the 1960’s signaled a change in attitudes about women’s work and family roles and by the 1970’s, a high school education was not sufficient to ensure a well-paying job).

186. Magyar, *supra* note 13, at 591-92.

187. *Id.* at 593-94.

[and] gradually ... take on adult responsibilities.”¹⁸⁸ During this time of transition, families provide significant assistance. For example, many parents continue to support their children economically as they pursue higher education by providing housing and food, paying for bills, and helping with tuition.¹⁸⁹ Equally important, families provide social and emotional support, motivation, and guidance about careers, finances, housing, and healthcare.¹⁹⁰ On average, parents spend a total of approximately \$38,000 on their adult children between the ages of eighteen and thirty-four and an average of 367 hours per year in time assistance.¹⁹¹ Former foster youth only receive a fraction of this amount when they emancipate.¹⁹²

2. Normative View of Adulthood: Sociological Realities

As the preceding section illustrates, the reality is that many parents support their children well into adulthood. As a society, we collectively recognize this continued dependence.¹⁹³ For example, our tax laws allow parents to claim their children as dependents until the age of twenty-four, provided they are students, live at home, and rely on their parents for financial support.¹⁹⁴ Students’ federal financial aid forms require disclosure of parent earnings and assets for most college-bound eighteen-year-olds, conveying the expectancy that parents will contribute towards their adult child’s continuing education.¹⁹⁵ Similarly, many private health insurance plans cover adult children while they attend school until a certain age limit, typically in the mid-twenties.¹⁹⁶

188. Osgood, et al., *supra* note 153, at 11.

189. *Id.*

190. *Id.*

191. *Id.* at 12.

192. See COURTNEY & HEURING, *supra* note 36, at 54; CAI, *supra* note 10, at 24 (former foster youth receive less than 5 percent of adult support as the average adult child).

193. UNIV. OF CHI. LAW SCH., *supra* note 20, at 11-12.

194. *Id.* at 12.

195. U.S. Dep’t of Educ. Fed. Student Aid, 2008-2009 FAFSA on the Web Worksheet Section 3, <http://www.fafsa.ed.gov/fafsaws89bw.pdf> (requiring applicant to fill out parent asset section if they are not married, do not have any children or other dependents, are not in the military, were not wards of the court, and whose parents are still alive).

196. See, e.g., Prudential Ins. Co. of Am., Inc. v. Super. Ct., 119 Cal. Rptr. 2d 823, 826 (Ct. App. 2002) (insurance coverage action over provision that extended medical coverage to

A corollary normative understanding of continued dependence is that eighteen-year-olds have not achieved complete maturity. For example, every state increased the minimum drinking age to twenty-one in response to developmental literature and data indicating that adolescents are less able to handle the effects of alcohol than their young adult counterparts.¹⁹⁷ Another common example is the minimum age to rent a car. Although California's statute regulating vehicle rental agreements does not specify a minimum age,¹⁹⁸ many car rental companies impose a minimum driver age limit that is considerably higher than eighteen.¹⁹⁹ In *Lazar v. Hertz Corp.*, a California appellate court held that this practice was lawful.²⁰⁰ Although the court did not come to its conclusion by explicitly reasoning that adolescent and young adult drivers are less mature than older drivers,²⁰¹ the companies likely promulgated their policies for precisely this reason. After all, there does not seem to be any other logical reason to deny *licensed* young adults the privilege of renting a vehicle.²⁰² These examples indicate that there is a pervasive sociological understanding that adolescents do not achieve complete maturation until they are well into their twenties.

3. Brain Development: Scientific Realities

Recent neurological research forms the basis for the sociological shift discussed in the previous section. Scientists disagree on the exact age that signals complete brain maturation, ranging from the

insured's adult dependents aged nineteen to twenty-four who were enrolled full-time as a student).

197. UNIV. OF CHI. LAW SCH., *supra* note 20, at 16.

198. CAL. CIV. CODE § 1936 (West 2004).

199. *See Lazar v. Hertz Corp.*, 82 Cal. Rptr. 2d 368, 371 (Ct. App. 1999) (plaintiff filed class action complaint against Hertz, Budget, National, and Alamo—nearly all the major rental car corporations—for refusing to rent automobiles to licensed drivers ages under the age of twenty-five).

200. *Id.*

201. Plaintiff brought a challenge to these minimum age limit policies under the Unruh Act, which prohibits arbitrary discrimination by businesses on the basis of certain classifications, such as age. *Id.* at 373. The court reasoned that the state statute regulating car rental agreements, which permitted companies to set a minimum age limit of their choice, barred an Unruh claim. *Id.* at 375.

202. Respondents' Brief at 3, *Lazar v. Hertz Corp.*, 82 Cal. Rptr. 2d 368 (Ct. App. 1997) (Nos. A080439 & A080767).

early twenties to the mid-twenties, but a consensus agrees that the “age of ‘biological maturity’ is older than eighteen.”²⁰³ In particular, there are two neurological processes that continue well into young adulthood: myelination and synaptic pruning.²⁰⁴ Myelination affects the areas of the brain that “control[s] impulses, planning, thinking abstractly, organizing concepts, and weighing the consequences of one’s actions,” all of which are critical to living independently.²⁰⁵ In addition, synaptic pruning promotes physical and mental agility and facilitates complex thought and movement processes.²⁰⁶ Adolescents are not only economically and sociologically unprepared for adulthood when they turn eighteen, but they are also biologically unprepared. Full development of the brain is essential to successful independent living, and emancipation policies should reflect this reality.²⁰⁷

The foregoing sections demonstrate a truth that is self-evident to anyone who has benefited from their parents’ support, wisdom, and guidance: the development process is a long and winding road. When Congress enacted the National Minimum Drinking Age Act of 1984, they acted in response to developmental literature and data that indicated eighteen year olds were not sufficiently mature to handle the effects of alcohol.²⁰⁸ This same rationale should extend to foster care in California because foster youth do not have the developmental capacity to live entirely independently when they turn eighteen.²⁰⁹

C. The State as Parent: The Duty to Provide Care Beyond the Age of Majority

As a policy matter, extending foster care improves outcomes for emancipated youth and is arguably the best approximation of the

203. Magyar, *supra* note 13, at 585.

204. *Id.* at 581-85.

205. *Id.* at 582.

206. *Id.* at 585.

207. *See id.* at 598 (“The federal government’s failure to subsidize foster care for most eighteen year olds and for all young people over eighteen overestimates the maturity, resources, and abilities of emerging adults.”).

208. UNIV. OF CHI. LAW SCH., *supra* note 20, at 16.

209. *Id.*

natural transition from adolescence to adulthood.²¹⁰ However, as a legal matter, it is less clear whether the state has a duty to provide extended care. This section will explore whether the state should take on commensurate responsibility for a youth's successful transition to adulthood as a natural parent. Additionally, this section will evaluate the duties of natural parents to their adult children in California and other jurisdictions.

1. *The State as Parent: A Justified Responsibility*

When the government removes a child from his or her home, the state takes over the parental responsibilities, including preparation for independence.²¹¹ However, the state's main goal is reunifying a child with his or her family or finding a permanent placement.²¹² Usually, youth who age out of foster care at age eighteen entered care as teenagers, rather than babies or children.²¹³ Consequently, some argue that the state should not be responsible for the poor outcomes of emancipated foster youth because many of their problems were caused by extended abuse before they became dependents.²¹⁴ In other words, these children would have been homeless, poor, unhealthy, and uneducated regardless of the state's intervention.

It is certainly true that foster youth are disadvantaged and face bleaker prospects due to their life experiences of poverty, abuse, and neglect.²¹⁵ Yet, it is also true in many cases that state care exacerbates the problems that youth bring with them.²¹⁶ In particular,

210. A large caveat is necessary. Foster care is a poor substitute for a parent and continuing foster care is an equally poor substitute for the natural family supports in the transition process to adulthood. However, as between no responsibility and continued responsibility, extended foster care is more representative of the natural transition. Moreover, programmatic changes in the foster care system geared towards older youth can improve the transition and make it less bureaucratic. *See infra* Part IV.B.

211. COURTNEY & HEURING, *supra* note 36, at 28.

212. *Id.*

213. *Id.* at 30 (only 10 percent of youth who age out of foster care entered as pre-teens, which is classified as twelve or younger).

214. *Id.* at 31.

215. *Id.* at 44-45.

216. *See id.* at 45. Clearly, the child welfare system has saved many children from their harmful home environments. *Id.* It is not the intention of this author or this paper to detract from the important work of child welfare or to suggest that abused and neglected children should be

multiple placements, failure to address educational needs, and insufficient medical care impede youth's healthy development and progress towards self-sufficiency.²¹⁷ Therefore, in many cases, the state *is* at least partly responsible for the youth's poor adult outcomes. Moreover, even if the state did not harm older foster youth by their acts or omissions, the common torts panacea applies: as between two innocents, the one who is best able to avoid the harm should pay.²¹⁸ As between the state and an abused and neglected teenager, the state is best able to avoid the harm of improper emancipation and should take the steps necessary to help these troubled youth achieve independence. As a final note, no natural parent has the option of choosing the characteristics of their child. In particular, parents of children with disabilities are not responsible for their children's disabilities, but nonetheless have a duty to care for them.²¹⁹ The state should owe no less a duty when it takes on its parental obligations after youth have been severely harmed by their natural parents.

2. *Parental Duties*

As discussed above, the law should impose the same parental obligations on the state as it does on natural parents. However, in California, this is not a remedy because the law fails to recognize the dependence of adult children on their parents like many of its sister states. In California, parents are obligated to support their adult children under two circumstances.²²⁰ First, there is a legal obligation to support one's child until he or she graduates high school or turns nineteen, whichever comes first.²²¹ Second, parents have a duty to support adult children who are "incapacitated from earning a living

left with parents who do not take care of them. However, it is important to remember that some youth do suffer tremendous harm as a result of their treatment in the foster care system. This is not acceptable.

217. *Id.*

218. *See, e.g.,* Note, *Liability of Agent Upon Disaffirmance of Executed Contract by Infant Principal*, 44 *YALE L.J.* 1240, 1240 (1935).

219. *See* CAL. FAM. CODE § 3910(a) (West 2004) (duty of parents to support incapacitated youth).

220. *See generally* CAL. PRAC. GUIDE FAM. L. Ch. 6-A (West 2008).

221. *See* CAL. FAM. CODE § 3901(A) (West 2004).

and without sufficient means.”²²² Courts have construed this obligation narrowly and refuse to extend it to adult children attending college who need financial assistance from their parents.²²³ Therefore, the state only imposes an obligation on parents to support adult children if they have a mental or physical disability that precludes them from working and places them in danger of becoming wards of the state.²²⁴

The state’s foster care obligations already mirror California’s parental obligations.²²⁵ The problem is that neither goes far enough. In particular, it is problematic that neither parents nor the state have an obligation to support their adult child’s pursuit of higher education. In today’s technological labor force, a college degree is analogous to what a high school diploma signified a few generations ago—it is a ticket to economic independence and provides the financial capacity to form one’s own family.²²⁶

The majority of states allow one parent to receive child support from another parent even after their child reaches the age of majority.²²⁷ Most of these states consider a youth to be dependent if he or she is enrolled in post-secondary education until a certain age, ranging from twenty-one to twenty-three.²²⁸ California should follow the weight of authority in other states and require parents to support their children through college. If California imposes this obligation on parents, it will not be able to escape its responsibility to foster youth.²²⁹

222. See § 3910.

223. *Jones v. Jones*, 225 Cal. Rptr. 95, 98 (Ct. App. 1986).

224. CAL. PRAC. GUIDE FAM. L., *supra* note 220, at 6:53-6:54. Although a disproportionate number of former foster youth experience mental illness, it is important to avoid the *carte blanche* categorization of foster youth as disabled. *Cf.* UNIV. OF CHI. LAW SCH., *supra* note 20, at 21-22.

225. For example, foster youth are permitted to remain in care until their nineteenth birthday if they are enrolled full-time in high school. CAL. WELF. & INST. CODE § 11403 (West 2004). However, continuing jurisdiction is not permitted beyond nineteen to pay for college expenses. *In re Robert L.*, 80 Cal. Rptr. 2d 578, 583 (Ct. App. 1998).

226. UNIV. OF CHI. LAW SCH., *supra* note 20, at 24-25.

227. *Id.* at 16.

228. *Id.*

229. If California extended child support obligations to cover adult children attending college, it would probably be limited by the means of the parent, similar to the parents’ obligation to provide support to an incapacitated adult child. See CAL. FAM. CODE § 3910 (West 2004) (stating that the parents’ obligation is limited by their “extent of ability”). The state will likely

As the “parent” of foster youth, the state has an obligation to prepare them for independence and support them in the difficult transition from adolescence to adulthood. Although California law lags behind other states in its recognition of the ongoing process of development,²³⁰ there seems to be a normative acquiescence to the reality that adolescents remain dependent on their parents well into adulthood.²³¹ As the Midwest Study indicates, one of the best ways to provide foster youth with necessary supports during the transition is to extend foster care until the age of twenty-one or later.²³² The good news for California is that we already have a statute that permits courts to continue dependency court jurisdiction until the youth turns twenty-one.²³³ The challenge is extending foster care in practice, as well as theory. The next section will provide some practical and multi-disciplinary approaches to achieving this goal.

IV. REINVENTING EMANCIPATION PREPARATION: SUGGESTIONS FOR CHANGE

Like any complex social problem, reforming the paradigm of emancipation preparation will require more than one tactic. It will require greater resources, more accountability for the distribution of benefits, programmatic changes, and a normative shift that compels people to view foster youth as equally deserving of a successful future as their own children. To achieve these ends, this paper proposes a three-pronged strategy. First, legislation is needed to increase funding for older foster youth and to guarantee that youth are permitted to remain under foster care jurisdiction until they complete college. Second, the discharge process must approximate the natural transition to adulthood more closely. Third, norm shifting

argue that it does not have the means to support foster youth throughout college. However, unlike a low-income parent that has no resources to offer its child, the State of California has plenty of resources; it is just a matter of how it chooses to use them. See Matthew Benjamin, *The National Barometer: For Better or Worse, California's Economy Can Set the Country's Pace*, U.S. NEWS & WORLD REPORT, Oct. 12, 2003, available at <http://www.usnews.com/usnews/news/articles/031020/20econ.htm> (California accounts for an eighth of the U.S. economy and is the fifth largest economy in the world).

230. See *supra* Part III.C.2.

231. See *supra* Part III.B.2.

232. See *supra* Part III.A.

233. See *supra* Part II.B.2.

can be fueled by a lawsuit against the State of California, arguing for a substantive due process right to emancipation preparation. Each of these strategies is developed in more detail below.

A. Extending Jurisdiction: The Fostering Connections to Success and Increasing Adoptions Act

The main argument in this paper has been that extending foster care jurisdiction is necessary to provide accountability for the emancipation preparation process. Although the court review system is far from perfect, it will provide greater procedural safeguards than currently exist.²³⁴ Although California permits extended foster care until the age of twenty-one, the narrow interpretation of the “best interests of the child” standard and the lack of funding for foster youth older than nineteen preclude this from becoming a common practice.²³⁵ Recently, Congress enacted HR 6893: the Fostering Connections to Success and Increasing Adoptions Act.²³⁶ As a result, states now have the option of receiving federal funding to provide foster care benefits to youth who meet certain conditions²³⁷ until the age of twenty-one.²³⁸ This new legislation creates an unprecedented moment of opportunity to reform the emancipation paradigm. Currently, legislation is pending before the California Assembly to exercise its option to extend foster care payments under these conditions.²³⁹ It is imperative that this option be exercised and those appropriate programmatic reforms accompany these funds.

234. *See supra* Part II.C.2.

235. *See supra* Part II.B.

236. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified in scattered sections of 42 U.S.C.).

237. These conditions include youth completing secondary education or enrolled in college or vocational school; youth participating in an employment program; youth employed for at least eighty hours per month; or youth unable to conduct the activities described above due to a medical condition. 42 U.S.C. § 675(8) (will go into effect in 2010).

238. *Id.*

239. A.B. 12, 2009-10 Legis. Sess. (Cal. 2009) (referred to Comm. on Human Servs., Feb. 5, 2009).

B. Programmatic Reform: Making the Discharge Process Parallel a Natural Transition to Adulthood

In addition to extending foster care jurisdiction and funding, it is important to reform the way that emancipation preparation is approached. In general, the court's interaction with youth and the distribution of benefits should more closely approximate the experience of transitioning youth in the general population.²⁴⁰ Clearly, this does not mean a continuation of paternalistic control over every aspect of an emancipated youth's life. However, it also does not mean the arbitrary distribution of benefits by changing caseworkers that do not have a relationship with the youth. Rather, an effective emancipation strategy should be flexible and provide hard and soft supports by an adult who has a long-standing relationship with the youth and genuinely cares about his or her well-being. Moreover, it should provide the youth with opportunities to assert his or her autonomy and experiment with independence, while still maintaining the option of returning "home." This section will explore three models of change that can work together to provide foster youth with the closest approximation of a natural transition to independence. These models include the Transition Guardian Model, proposed by the Children's Advocacy Institute; dependency hearings, utilized by the Dependency Court of Cook County; and the right of re-entry, recently implemented in New York.

1. The Transition Guardian Model

The Transition Guardian Model, proposed by the Children's Advocacy Institute (CAI), parallels the financial and emotional support that natural children receive from their parents.²⁴¹ Under this model, the court will appoint a transition guardian while the youth is still in care (between the youth's sixteenth and eighteenth birthdays), who will be responsible for helping the youth move towards independence over five years by administering state-funded vouchers

240. UNIV. OF CHI. LAW SCH., *supra* note 20, at 1.

241. CAI, *supra* note 10, at 23-24.

according to the youth's individual needs.²⁴² The transition guardian should be someone with a prior relationship with the youth, such as a foster care parent, relative, CASA,²⁴³ or other advocate.²⁴⁴ The court will maintain jurisdiction over the guardianship and the vouchers and keep abreast of the youth's status through six-month progress reports on an "independence plan," which the youth will negotiate with his or her guardian and social worker.²⁴⁵ The amount of the vouchers will roughly equal the median amount that parents spend on their adult children and will decrease over time as the youth gains increasing independence.²⁴⁶

This plan is ideal because it provides youth leeway to experiment with their independence while receiving the continuing support and assistance of a caring adult. The guardian can use the vouchers to pay rent, tuition, bills, groceries, or anything else that the guardian and youth agree is appropriate. This sort of negotiation occurs all the time between a child and his or her parents. More importantly, the guardian can provide the advice, guidance, motivation, and love that no ILP class or benefit can replicate.

The court will provide accountability for the funding and ensure that the relationship between the guardian and the youth remains healthy and in the best interests of the child.²⁴⁷ The Children's Advocacy Institute conducted a cost-benefit analysis of this plan and found that there is a benefit-cost ratio of nearly three to one.²⁴⁸ Although this program would require significant initial outlay, enactment of the foster care payments available through the recently enacted Fostering Connections to Success and Increasing Adoptions

242. CAI, *supra* note 10, at 24. A.B. 408, which requires the early identification of adults that are important to youth in foster care, will complement this program. *See supra* note 130-35 and accompanying text.

243. *See supra* note 53 and accompanying text.

244. CAI, *supra* note 10, at 24.

245. *Id.*

246. *Id.* For example, youth would receive a monthly stipend of \$850 in the first year, \$765 in the second year, and so on. *Id.* at 30.

247. *Id.* at 24.

248. *Id.* at 31.

Act could provide a much-needed influx of resources to jump-start such a program.²⁴⁹

2. Benchmark Hearings

To increase the effectiveness of the Transition Guardian Model, California should also consider implementing some best practices used in other states. The Dependency Court of Cook County uses special hearings for older foster youth called “benchmark hearings,” during which a specially appointed judge directly communicates with the youth to create a plan for the future.²⁵⁰ Although no study has documented the effect of these hearings on youth outcomes, findings in the Midwest Study indicate that youth who participated were more likely to choose to remain in the system past the age of majority and ultimately experienced better transitions.²⁵¹

The value of these hearings in conjunction with the Transition Guardian Model is to provide youth with a forum for self-advocacy, including advocating for the guardian of their choice.²⁵² Additionally, older youth will benefit from having a separate judge and a separate docket because the hearings will be better tailored to their specific needs.²⁵³ As a result, they are more likely to view the court’s jurisdiction as a benefit rather than a hindrance and will opt to participate in the Transition Guardian Plan.²⁵⁴

3. The Right of Re-entry

Inevitably, some youth will choose to leave foster care as soon as they are able. This is similar to non-foster care youth who choose

249. The Foster Care Continuing Opportunities Act would authorize Title IV-E funding. To use this funding for an innovative purpose, such as the Transition Guardian Plan, California would need to get a waiver. *Id.* at 32. California has already obtained a waiver to allow youth who return home or move into permanent family settings to benefit from FCIA funds. *Id.* Considering the significant economic benefits of this plan, it is likely that a waiver would issue.

250. UNIV. OF CHI. LAW SCH., *supra* note 20, at 83.

251. *Id.* at 85.

252. *Id.* at 83 (describing the importance of youth participation and the court’s recognition of the youth’s increasing maturity).

253. *Id.*

254. *Id.* (discussing how the seriousness of the discussion between the judge and the youth minimizes concerns that the continuing involvement of the dependency court will comprise the youth’s experience of independence).

to leave home as soon as they turn eighteen.²⁵⁵ However, these youth can usually return home when they face difficulties, unlike foster youth who do not have the opportunity to return to care when they discover that independent living is more challenging than they thought.²⁵⁶ To address the needs of youth in these situations, California should recognize a right to re-entry.²⁵⁷ New York recently implemented a model for re-entry that involves a trial discharge.²⁵⁸ Under this model, a youth is not “in foster care,” but is still subject to the continuing jurisdiction of the dependency court and elects the services he or she would like to receive, if any.²⁵⁹ The court can return the youth to care if certain triggering conditions, like homelessness, occur.²⁶⁰ Additionally, the youth can elect to re-enter foster care or continue in the trial discharge phase until the age of twenty-one.²⁶¹

This type of program can be an effective complement to the Transition Guardian Model. For youth who are unable to handle the independence afforded under the Transition Guardian Model, it would enable the state to place the youth back into care for a period of time. For example, this program will allow the state to take a more active role in the youth’s life if the youth squanders the voucher money and the relationship with his or her guardian deteriorates, resulting in the youth becoming homeless. Additionally, this program will enable youth who initially reject the Transition Guardian plan to utilize it at a later stage of their transition.

The combination of the Transition Guardian Plan, benchmark hearings, and a trial discharge program will maximize the effectiveness of increased funding for transition-age youth. More importantly, it will ensure that the most vulnerable young adults in our state have a real opportunity to overcome the adversity of their

255. *Id.* at 97.

256. *Id.*

257. *Id.*

258. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(f)(4) (West 2009).

259. UNIV. OF CHI. LAW SCH., *supra* note 20, at 99.

260. *Id.*

261. *Id.*

past and successfully transition to adulthood. However, these policy changes will only occur if there is a normative shift. This shift is a process that is already occurring and evidence of its progress can be seen in greater media and scholarly interest in emancipated foster youth and proposals for increased funding. One way to continue shifting our cultural norms is to urge courts to acknowledge that foster youth have a right to proper emancipation preparation under the Constitution, which is the ultimate measure of our cultural values. The next section discusses the viability of this argument.

C. A Substantive Due Process Right to Emancipation Preparation

Courts have declined to interpret the Constitution as granting positive rights on individuals.²⁶² Rather, the Constitution has been construed as a negative document that limits the government's power to infringe on individual rights.²⁶³ However, when the state assumes custody of an individual, courts have used the doctrine of substantive due process to impute an affirmative duty of care.²⁶⁴ For example, in *Youngberg v. Romeo*, the Supreme Court held that the state has a duty to provide "minimally adequate or reasonable training" necessary to protect involuntarily committed mentally retarded patients from harm.²⁶⁵ Similarly, in *Deshaney v. Winnebago County Department of Social Services*, the Supreme Court noted in dicta that states may owe foster children affirmative duties of care.²⁶⁶

Although the Supreme Court has not had the opportunity to revisit the question of a state's affirmative obligations to foster youth, the weight of authority among lower federal courts and state courts recognizes that foster youth have a substantive due process right to be free from harm.²⁶⁷ This right encompasses freedom from

262. See *Deshaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989).

263. *Id.* at 195.

264. See 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, 397 (2005) (citing *Youngberg v. Romeo*, 457 U.S. 307, 318-19 (1982)).

265. *Youngberg*, 457 U.S. at 319.

266. *Deshaney*, 485 U.S. at 201 n.9.

267. *Braam v. State*, 81 P.3d 851, 856-57 (Wash. 2003) (collecting cases recognizing that foster children have substantive due process rights). Neither the Ninth Circuit nor any California

physical and emotional harm, and requires states to “provide conditions free of unreasonable risk of danger, harm, or pain, and must include adequate services to meet the basic needs of the child.”²⁶⁸

Under this constitutional framework, courts have heard cases involving the number of times foster children are moved while in the state’s care,²⁶⁹ the sexual assault of a youth while living in a group home,²⁷⁰ the physical and sexual abuse of a child placed in numerous foster care homes,²⁷¹ and systemic deficiencies, such as staff shortages, excessive caseloads, failure to create a tracking system, and inefficient use of resources.²⁷² However, no court has ever considered whether deficiencies in emancipation preparation violate a dependent or former dependent’s substantive due process rights.

Advocates argue that such an extension is warranted, given the undeniable physical and emotional harm that former foster youth experience when they emancipate and the government’s failure to provide them with adequate preparation.²⁷³ Following the reasoning in *Youngberg* that wards of the state have a right to training that will protect them from harm, the argument can be made that foster youth have a right to adequate emancipation preparation that will protect them from the harms of homelessness, poverty, inadequate medical care, untreated mental illness, welfare dependency, teen pregnancy, and the lack of an education.²⁷⁴

court has had the opportunity to consider this issue. However, considering the considerable weight of authority, these courts would likely find a substantive due process right.

268. *Id.* at 857.

269. *Id.* at 851 (remanded due to improper jury instructions).

270. *Yvonne L. v. N.M. Dep’t of Human Servs.*, 959 F.2d 883 (10th Cir. 1992) (remanded for determination of whether state knew or suspected that the group home posed a danger to plaintiff).

271. *K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (welfare workers not entitled to qualified immunity from liability for placing child in custody of foster parent that state knew or suspected to be a child abuser).

272. *Lashawn A. v. Dixon*, 762 F. Supp. 959 (D.D.C. 1991) (severe systemic deficiencies violated foster children’s constitutional rights).

273. See generally Katherine M. Swift, *A Child’s Right: What Should the State Be Required to Provide to Teenagers Aging Out of Care?*, 15 WM. & MARY BILL RTS. J. 1205 (2007). See also Benedetto, *supra* note 264, at 406; *supra* Part I (describing the experience of former foster youth and California’s inadequate response).

274. Nevertheless, courts may be resistant to recognizing a constitutional claim for harm suffered after care due to *Deshaney*’s refusal to protect youth from private harms. *Deshaney*, 489

The more difficult issue is whether California has shirked its duty to provide youth with adequate emancipation preparation. There is considerable controversy about the appropriate standard of culpability.²⁷⁵ Some courts have applied the deliberate indifference standard that is used in the prisoner context to ascertain whether a violation has occurred.²⁷⁶ However, most courts that have specifically addressed this issue apply the professional judgment standard set forth in *Youngberg*, reasoning that the state has a greater duty to protect “innocents” than it does prisoners.²⁷⁷ According to this standard, the state has a duty to provide a level of care that is commensurate with “accepted professional standards.”²⁷⁸ To establish the appropriate professional standard, parties can admit evidence of accreditation standards and actual professional standards in the locality, as well as other areas.²⁷⁹ However, evidence of aspirational standards is generally not permitted.²⁸⁰

Under the *Youngberg* principle, California has arguably failed to act in accordance with its own professional standards. For example, the standard for continuing foster care jurisdiction under section 391 is the “best interests of the child.”²⁸¹ However, California continues to discharge youth when they are not prepared for emancipation, which is clearly not in their best interests.²⁸² The practices of other states, such as Illinois and the District of Columbia, which extend foster care for all youth until the age of twenty-one, strengthens this argument.²⁸³ Moreover, evidence of effective program models in

U.S. at 195. In *Deshaney*, the plaintiff was a child that received numerous beatings from his father, which eventually left him retarded. *Id.* at 191. Although the child welfare agency knew about the abuse and took steps to protect the child, it did not remove him from his father’s custody. *Id.* The Supreme Court refused to find liability despite the agency’s knowledge of the abuse because the child was not within its care, and therefore it had no duty to protect him. *Id.* at 200-01.

275. *See id.* at 199 n.5, 211 (discussing the “deliberate indifference” and “professional judgment” standards). *See also* Swift, *supra* note 273, at 1216-21 (same).

276. *See, e.g.,* Nicini v. Morra, 212 F. 3d 798, 810 (3d Cir. 2000).

277. Braam v. State, 81 P.3d 851, 858-59 (Wash. 2003).

278. *Id.* at 860.

279. *Id.* at 861.

280. *Id.* (e.g., Child Welfare League of America’s Standards).

281. *See supra* Part II.B.

282. *Id.*

283. *See supra* Part II.B.3 (discussing Washington D.C.) and Part III.A (discussing Illinois).

other states, such as the benchmark hearings in Illinois and the trial discharge plan in New York, may indicate that California is failing to act commensurate with accepted professional standards.²⁸⁴ As more states adopt these approaches, the case against California will grow stronger.

Ultimately, the court is not institutionally positioned to demand a state to implement a particular program.²⁸⁵ Rather, it is suited to point out violations of the law and to leave the policy details to the legislature.²⁸⁶ Therefore, while a case cannot force California to adopt any of the proposals detailed above, it can move the Legislature's hand and produce a normative shift that recognizes proper emancipation preparation as a worthy goal deserving of adequate resources.²⁸⁷ As *Brown v. Board of Education*²⁸⁸ led to the dismantling of the Jim Crow system and a tremendous shift in our cultural values,²⁸⁹ perhaps a case on behalf of foster youth can move us to care for them as they deserve and as our Constitution requires.

V. CONCLUSION: OUR CHILDREN

Emancipated foster youth, such as Brian Chato and JJ,²⁹⁰ are one of the most vulnerable populations in our society. They have experienced abuse and neglect at the hands of their natural parents, instability and institutionalization at the hands of the state, and abandonment by all of us when they eventually emancipate into adulthood. Despite increased awareness of the problems that youth experience when they emancipate and efforts at the federal and state level to provide additional support, former foster youth remain vulnerable because they are asked to become independent before

284. See *supra* Part IV.B.2-3.

285. See, e.g., Richard Dougherty, *Originalism and Precedent: Principles and Practices in the Application of Stare Decisis*, 6 AVE MARIA L. REV. 155, 172-173 (2007) (the proper role of the court is to remain out of policy-making).

286. *Id.* (the court is supposed to give effect to the will of the law, which involves finding and remedying violations).

287. See generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (discussing the normative function of law).

288. 347 U.S. 483 (1954).

289. Dennis J. Hutchinson, *Perspectives on Brown*, 8 GREEN BAG 2D 43 (2004) (discussing the impact of *Brown* on society).

290. See *supra* notes 1-6 and accompanying text.

they are ready. Extending dependency court jurisdiction, increasing the investment in emancipation preparation, and reforming the discharge process are necessary to provide emancipated foster youth the same opportunities for success as their peers who naturally and gradually transition to adulthood. Although the state can never replace the love and support of a parent, we can do better than shoving our most troubled children out of the “house” on their eighteenth birthday and changing the locks. The enactment of the Fostering Connections to Success and Increasing Adoptions Act provides a unique opportunity to reconceptualize and reform California’s emancipation preparation system. We have a collective responsibility to ensure that California exercises its option to extend foster care payments and to use this new influx of funds to create a developmental paradigm of emancipation preparation that provides youth the same opportunities as their peers.