Fordham Urban Law Journal

Volume 14 | Number 4 Article 6

1986

New York State's Designating Petition Process

Jacob H. Weintraub

Follow this and additional works at: https://ir.lawnet.fordham.edu/ulj

 Part of the Other Law Commons

Recommended Citation

Jacob H. Weintraub, *New York State's Designating Petition Process*, 14 Fordham Urb. L.J. 1011 (1986).
Available at: https://ir.lawnet.fordham.edu/ulj/vol14/iss4/6

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

OUT OF THE HOME ONTO THE STREET: FOSTER CHILDREN DISCHARGED INTO INDEPENDENT LIVING

I. Introduction

Reggie Brown, at age thirteen, entered the foster-care system.[1] "Poor, black and in the system as a result of abuse at home, Reggie's background was that of a typical foster-care child."[2] Upon his eighteenth birthday,[3] he was discharged into "independent living"[4] and "[a]ll he was given . . . was cab fare and directions to the men's shelter."[5] When he arrived at the men's shelter he was told he was "too young,"[6] and his only other alternative was the street.

This scenario—foster children being discharged out of their homes

---

1. Rimer, *From Foster Homes to Life on New York Streets: 3 Case Studies in Failure*, N.Y. Times, July 19, 1985, at B1, col. 1 [hereinafter cited as Rimer]. Children may be placed in foster care voluntarily by their parents, *see* N.Y. Soc. Serv. Law § 384(1)(a) (McKinney 1983 & Supp. 1986); or by a court order issued by a judge. *See* N.Y. Fam. Ct. Act §§ 1052, 1055 (McKinney 1983 & Supp. 1986) (abuse and neglect); *id.* art. 3 (McKinney 1983 & Supp. 1986) (juvenile delinquency); *id.* §§ 753, 754 (McKinney 1983 & Supp. 1986) (person in need of supervision). Foster care has been defined to mean "all activities and functions provided relative to the care of a child away from his home 24 hours per day in a foster family free home or a duly certified or approved foster family boarding home or a duly certified group home, agency boarding home, child care institution, health care facility or any combination thereof." N.Y. Admin. Code tit. 18, § 427.2(a) (1976). For example, in 1985 in New York, "approximately 73% of the children in foster care resided in foster homes, 12% in group homes, and 15% in institutions." Report by New York Task Force on Permanency Planning for Children in Foster Care 6 (Feb. 1986) (available at Fordham Law School Library) [hereinafter cited as New York Task Force Report].

2. Rimer, *supra* note 1, at B2, col. 1 (describing different circumstances of three discharged foster children).

3. For a discussion of the ages at which foster children are discharged from care in each state, see *infra* note 81 and accompanying text.

4. "Independent living" is a term used by foster care administrators to describe the permanency goal of discharging foster children into their own responsibility upon their discharge from the foster care system. *See* N.Y. Admin. Code tit. 18, § 430.12(f) (1976). A foster child is discharged to "independent living" when it is not possible for the child to be discharged to parents or for adoption. *See id.* § 430.12(f) (1976). "The number of children assigned the goal of independent living is staggering—one out of three in foster care in New York City alone." New York Task Force Report, *supra* note 1, at 68.

5. Rimer, *supra* note 1, at B1, col. 1.

6. Roberts, *Court Ruling Hints at Broader Import*, N.Y. Times, July 19, 1985, at B2, col. 1 (discussing impact of *Palmer v. Cuomo* on foster children).

and onto the street—is replayed with intolerable frequency.[7] A child in the state foster care system reaches his or her eighteenth birthday, and having reached the ceiling age at which he or she may remain in the foster care system, the child is forced to leave his or her foster home.[8] The typical foster care statute mandates the expulsion of every eighteen-year-old from foster care.[9] Critically relevant factors, such as emotional stability, maturity, and the ability to seek and maintain gainful employment, are not evaluated before discharging the child to "independent living."[10] Thus, in most instances the states jettison children into urban environments, where these children are unsupervised, uneducated, and wholly incapable of leading a productive and rewarding life.[11] With alarming frequency the children become members of the homeless society.[12] Many turn to prostitution as a means to survive.[13] Use of drugs and all its attendant problems are prevalent among the homeless youth.[14] A statutory system that does not re-

---

7. "Estimates are that more than one-half of the approximately 274,000 children [nationwide] in foster care are teenagers and that the number being discharged at the age of eighteen is increasing and could [in 1984] be as high as 130,000 annually." Demchak, *Services Ordered for Homeless Youth*, 6 YOUTH LAW NEWS 12, 13 (Sept.-Oct. 1985) [hereinafter cited as *Homeless Youth*].

8. *See, e.g.*, Rimer, *supra* note 1, at B1, col. 1.

9. *See infra* note 81 and accompanying text.

10. *See* NEW YORK TASK FORCE REPORT, *supra* note 1, at 55.

11. One example of such a foster child involves a mother who had to put her twelve-year-old son into foster care because she was unable to care for him: "They [social workers] told me they were going to help. . . . All those institutions and he has no high school diploma. Harold was going to see a psychiatrist. He was committed to Bellevue . . . . What's he going to do? How is he going to take care of himself?" Rimer, *supra* note 1, at B2, col. 1. For further examples of discharged foster children who were ill-prepared for independent living, see Palmer v. Cuomo, 503 N.Y.S.2d 20 (N.Y. App. Div. 1st Dep't 1986), in which the court found that "[s]even of the instant ten foster children were discharged, prior to reaching age 21, without adequate preparation for independent living." *Id.* at 21.
age 21, without adequate preparation for independent living." *Id.* at 21.

12. Robert M. Hayes, founder of The Coalition of the Homeless, has discovered in his involvement with New York City's homeless that "[t]he foster-care system, by failing the children, creates a whole new category of homeless people." Rimer, *New York Judge Curbs Discharge of Foster Youths With No Homes*, N.Y. Times, July 18, 1985, at B4, col. 3; *see also infra* note 259.

13. For a discussion of foster children turning to prostitution, see *infra* note 131 and accompanying text.

14. *See The Adoption Assistance and Child Welfare Act and Related Proposals: Hearings on H.R. 2810 Before the Subcomm. on Public Assistance and Income Maintenance of the Comm. on Ways and Means*, 99th Cong., 1st Sess. 1-12 (1985) (testimony of Leonard Bradley, Deputy Commissioner, Tenn. Dep't of Human Servs.) [hereinafter cited as *Hearings on H.R. 2810*]; *see also infra* note 135 and accompanying text.

quire that the states make an informed individualized decision as to whether to release a foster child, and that fails to provide for supervision of the foster child in the post-discharge period, is flawed.[15]

Part II of this Note will survey the history of foster care in the United States,[16] the federal[17] and state[18] statutes, with their underlying policies, and the constitutional law cases[19] that have defined the parameters of the foster child's rights. Parts III, IV and V will discuss the effectiveness of the current foster care system in protecting the foster child's rights.[20]

The Note will examine various legal approaches utilized by plaintiffs in recent foster care cases, including: (1) private actions for negligence;[21] (2) class actions under Social Security statutes based on the fifth and fourteenth amendments to the United States Constitution and dealing specifically with equal protection[22] and due process;[23] and (3) civil rights actions brought under section 1983 of Title 42 of the United States Code.[24]

Finally, the Note proposes that, because of the national nature of this problem,[25] the federal government has an obligation to enact legislation that will require the states: (1) to create transitional programs to teach foster children the necessary skills to live independently;[26] and (2) to extend the age requirement for assistance from eighteen to twenty-one so that the transitional program can have a positive

---

15. *See* NEW YORK TASK FORCE REPORT, *supra* note 1 (describing overburdened foster care system that leaves many 18-year-olds ill-prepared for independent living); *see also infra* notes 36-86 and accompanying text.

16. *See infra* notes 29-51 and accompanying text.

17. *See infra* notes 52-73 and accompanying text.

18. *See infra* notes 74-89 and accompanying text.

19. *See infra* notes 90-122 and accompanying text.

20. *See infra* notes 123-235 and accompanying text.

21. *See infra* notes 209-16 and accompanying text.

22. *See infra* notes 142-97 and accompanying text.

23. *See infra* notes 179-87 and accompanying text.

24. 42 U.S.C. § 1983 (1982); *see infra* notes 198-208 and accompanying text.

25. *See supra* note 7.

26. *See infra* notes 262-69 and accompanying text. For an example of some appropriate transitional programs, see N.Y. ADMIN. CODE tit. 18, § 430.12(f)(2) (1976), in which New York requires that:

> The district shall make plans and take specific actions to provide training for the child in independent living skills such as apartment finding, budgeting, shopping and cooking. In addition, the district shall make plans and take specific actions to ensure training for the child directed toward career objectives, such as training in a marketable skill or trade, counseling around career choices, and assistance in locating or enrolling in appropriate programs.

Id.

effect.[27] The Note concludes that the Stark-Moynihan bill is the appropriate legislation.[28]

II. Bases for Foster Children's Rights

Foster children's rights are based primarily on four aspects of law: common law,[29] federal law,[30] state law,[31] and constitutional law.[32] These four bases will be examined with the goal of constructing a framework from which recent foster care cases can be understood.[33]

A. Common Law

The earliest origins of a foster care system are found in "an ancient custom in Ireland, in which persons put away their children to fosterers."[34] The roots of the foster care system further developed into an indenture system, "where orphans or children of the poor were bound out to a household as a source of cheap labor. In the early [nineteenth] century children were often sent to an almshouse; by the middle of the century they were more often informally 'placed out,' generally in rural areas, often out-of-state. By 1850, private charitable institutions had been created to care for children."[35]

Foster children's legal rights developed from two different common law doctrines: (1) adoption laws;[36] and (2) *parens patriae*.[37] Adoption signifies the means by which a status or legal relationship of parent and child, between persons who are not so related by nature, is established or created.[38] Adoption seeks to provide a child with a per-

---

27. *See infra* notes 242-59 and accompanying text.
28. *See infra* notes 237-86 and accompanying text.
29. *See infra* notes 34-51 and accompanying text.
30. *See infra* notes 52-73 and accompanying text.
31. *See infra* notes 74-89 and accompanying text.
32. *See infra* notes 90-122 and accompanying text.
33. *See infra* notes 142-216 and accompanying text.
34. BLACK'S LAW DICTIONARY 590 (5th ed. 1979). It is ironic to note that in the earliest stages of foster care "fostering was held to be a stronger alliance than blood, and the foster children participated in the fortunes of their foster fathers," *id.*, since today, strong bonds between a foster parent and foster child are a rare occurrence because of the constant influx of foster children in and out of foster homes. *See* NEW YORK TASK FORCE REPORT, *supra* note 1, at iii-iv, stating that "[n]early 60% of the children in foster care in New York City have experienced more than one placement, and about 28% have experienced three or more." *Id.*
35. NEW YORK TASK FORCE REPORT, *supra* note 1, at 17..
36. *See infra* notes 38-43 and accompanying text.
37. *See infra* notes 44-49 and accompanying text.
38. Adoption is defined as a "[l]egal process pursuant to [a] state statute in which a child's legal rights and duties toward his natural parents are terminated and similar rights and duties toward his adoptive parents are substituted. To take into one's

manent living arrangement, while foster care provides a temporary arrangement.[39] No right of adoption existed under the common law of England.[40] It is well documented, however, that the right of adoption was known in the ancient civilizations of Greece and Rome.[41] In the United States,[42] the right to create, by legal proceeding, the relationship of parent and child between persons who are not related, exists only by a statutory provision prescribing the conditions and the procedure by which adoption may be made effective.[43]

Foster care is also partly an offshoot of the state's power of *parens patriae*,[44] the traditional role of the state as sovereign and guardian of persons under legal disability.[45] This doctrine developed its roots from the English common law, under which the King had a royal prerogative to act as guardian to persons with legal disabilities, such as infants, idiots, and lunatics.[46] The doctrine of *parens patriae* dic-

---

family the child of another and give him or her the rights, privileges, and duties of a child and heir." BLACK'S LAW DICTIONARY 45 (5th ed. 1979); *see* Sheffield v. Franklin, 151 Ala. 492, 44 So. 373 (1906); Bailey v. Mars, 138 Conn. 593, 87 A.2d 388 (1952); Bilderback v. Clark, 106 Kan. 737, 189 P. 977 (1920); Martinez v. Gutierrez, 66 S.W.2d 678 (Tex. Civ. App. 1933).

39. *See supra* note 3. Adoption is the goal of the foster care system, *see* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 833 (1977) (holding that New York foster care removal procedures provided due process protection), but since permanent, or long-term placements are more difficult to secure, *id.* at 829 n.23, foster care programs try to provide short-term aid for children through adequate accommodations, in addition to long-term placements. *See id.* at 825.

40. BLACK'S LAW DICTIONARY 45 (5th ed. 1979).

41. *See In re* Kirby's Estate, 145 Misc. 756, 758, 261 N.Y.S. 71, 72 (1932).

42. "A history of substitute care in America usually begins with a description of apprenticeship and binding out of orphaned and abandoned children by the early colonists, and passes through the orphanage and almshouse eras toward the time when free foster family homes . . . became the dominant mode of substitute care." Kadushin, *Child Welfare Strategy in the Coming Years: An Overview*, in CHILD WELFARE STRATEGY IN THE COMING YEARS 54 (1978).

43. For a discussion of the origins of adoption, see *In re* Taggart's Estate, 190 Cal. 493, 213 P. 504 (1923); *In re* Palmer's Adoption, 129 Fla. 630, 176 So. 537 (1937); Betz v. Horr, 276 N.Y. 83, 11 N.E.2d 548 (1937).

44. The term *parens patriae* has been translated literally as "parent of the country." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). Furthermore, *parens patriae* has been defined by the courts as the inherent power and authority of a state legislature to provide protection for the person and property of persons *non sui juris*, such as minors, insane persons and incompetent persons. *See* McIntosh v. Dill, 86 Okla. 1, 9, 205 P. 917, 925 (1922); *cert. denied*, 260 U.S. 721 (1922); *see also* Warner Bros. Pictures v. Brodel, 179 P.2d 57, 64 (Cal. Dist. Ct. App. 1947), *superseded*, 31 Cal. 2d 766, 192 P.2d 949, *cert. denied*, 355 U.S. 844 (1948). For a discussion of the state's *parens patriae* power as it relates to "needy" persons, see Note, *Homelessness in a Modern Urban Setting*, 10 FORDHAM URB. L.J. 749 (1981-82) [hereinafter cited as *Homelessness*].

45. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

46. *See supra* note 44 and accompanying text. It is interesting to note the similarities between the policy underlying the *parens patriae* doctrine and another

tates that a state must intervene to protect those who are unable to protect themselves.[47] The doctrine also embraces the situation in which a person could become a danger to himself or others and therefore is in need of protective custody.[48] Thus, in the case of foster care, when an unsupervised foster child could be a danger to himself or to others, the state, under the penumbras of the *parens patriae* doctrine, becomes a legal parent to the foster child.[49]

Since foster children were neither protected by the laws of adoption nor specifically named under the *parens patriae* doctrine, Congress was forced to create a statutory basis.[50] It did so by expanding the social welfare laws of the 1935 Social Security Act.[51]

B. The Origins of Foster Children's Federal Rights

The Social Security Act of 1935 is the foundation of federal rights for foster children.[52] "The Social Security Act of 1935 was part of a broad legislative program to counteract the [D]epression. Congress was deeply concerned with the dire straits in which all needy children in the Nation found themselves."[53] Congress' primary objective in enacting section 402 of the Social Security Act, Aid to Dependent Children,[54] was to provide support for children who did not have a "breadwinner" to provide support.[55] The original Aid to Depend-

---

doctrine with many identical goals: *in loco parentis*. Under the doctrine of *in loco parentis*, "persons and institutions caring for children are said to occupy the legal position of the children's parents, or at least to have a substantial portion of parents' rights and immunities" regarding children. C. ROSE, SOME EMERGING ISSUES IN LEGAL LIABILITY OF CHILDREN'S AGENCIES 5 (1978). Under both doctrines the state is presumed to have a moral and legal obligation to care for its needy persons. Moreover, one author noted that "[m]easures enacted under the parens patriae power are 'parental' in nature rather than criminal and the penalties and stigma of criminal actions do not attach." *Homelessness*, *supra* note 44, at 777-78.

47. *See supra* note 44 and accompanying text.

48. *See infra* notes 152-57 and accompanying text; *see also* Johnson v. State, 18 N.J. 422, 114 A.2d 1 (1955), *cert. denied*, 350 U.S. 942 (1956).

49. *See supra* note 44 and accompanying text.

50. Social Security Act, Act of Aug. 14, 1935, ch. 531, tit. IV § 401, 49 Stat. 627 (codified as amended at 42 U.S.C. §§ 601-676 (1982)).

51. *See generally id.*

52. *See* 42 U.S.C. §§ 601-676 (1982); *see also* King v. Smith, 392 U.S. 309, 327-28 (1968) (Court noted that "[i]n agreement with the President's Committee on Economic Security, the House Committee Report declared, 'the core of any social plan must be the child.' ") (quoting H.R. REP. No. 615, 74th Cong., 1st Sess. 10 (1935)).

53. King v. Smith, 392 U.S. 309, 327 (1968); *see* H.R. REP. No. 615, 74th Cong., 1st Sess. 9-10 (1935) (characterizing children as "the most tragic victims of the depression"); S. REP. No. 628, 74th Cong., 1st Sess. 16-17 n.24 (1935) ("declaring that the 'heart of any program for social security must be the child' ").

54. *See* 42 U.S.C. §§ 601-676 (1982).

55. *See* King v. Smith, 392 U.S. 309, 328 (1968) (Court stated that "AFDC pro-

ent Children (ADC) focused totally on the needy child and did not provide assistance to the family.[56]

The ADC was amended in 1950 so that the payments would include assistance to the relative with whom any dependent child was living.[57] In 1962, the title of the program was changed from ADC to Aid to Families with Dependent Children (AFDC).[58] The new name of the program was consistent with the new emphasis of the program, namely, to provide assistance to a widowed and divorced mother so that she would be released from a wage-earning role and could remain at home to supervise the child's upbringing.[59] Furthermore, in 1961, the AFDC was amended to include foster children, changing its previous policy of assisting only needy children who lived with a parent or a close relative.[60]

Under the AFDC program, the federal government provided matching funds to the states so that the states would distribute these funds to foster care recipients. These funds were available only if a child met two eligibility requirements: (1) the child had to fall within the section 606(a) definition of a dependent child;[61] and (2) the child had to have been removed from his home as a result of a judicial deter-

---

gram was designed to protect . . . [a] 'distinguishable group of children' . . . . [t]his group was composed of children in families without a 'breadwinner,' 'wage earner,' or 'father' ").

56. In Burns v. ALCALA, 420 U.S. 575 (1975), the Supreme Court stated that "[a]s originally enacted in 1935, the Social Security Act made no provision for the needs of the adult taking care of a 'dependent child.' It authorized aid only for the child and offered none to support the mother." *Id.* at 581.

57. *See* Social Security Act Amendment of 1950, ch. 809, Pub. L. No. 734, § 323, 64 Stat. 551 (1950) (current version at 42 U.S.C. §§ 601-676 (1982)).

58. *See* Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 104, 76 Stat. 172, 185 (1962) (current version at 42 U.S.C. §§ 601-676 (1982)). For a discussion of the corresponding legislative history, see 1962 U.S. CODE CONG. & AD. NEWS 1952-56.

59. *See Burns*, 420 U.S. at 582 (discussing President Roosevelt's message to Congress advocating his support of the legislation).

60. *See* 42 U.S.C. § 608 (1982); *see also Burns*, 420 U.S. at 582 n.9.

61. *See* 42 U.S.C. § 606(a) (1982). Section 606(a) defines a "dependent child" as:

> [A] needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home . . . or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) at the option of the State, under the age of nineteen and a full-time student in a secondary school (or in the equivalent level of vocational or technical training), if, before he attains age nineteen, he may reasonably be expected to complete the programs of such secondary school (or such training).

Id.

mination.[62] Moreover, states were required to make foster care payments as a part of their AFDC program.[63]

In 1980, Congress further amended the Social Security Act by enacting the Adoption Assistance and Child Welfare Act of 1980 (Child Welfare Act).[64] The Child Welfare Act created section 672, Federal Payments for Adoption Assistance and Foster Care, that provided to states separate foster care matching funds to distribute to foster care recipients. These funds are distinct from the other AFDC programs.[65] For a foster child to be a recipient under section 672, the child must meet four federal eligibility requirements.[66] First, the child must fall within the definition of a dependent child under section 606(a).[67] Second, the child must be placed in foster care by either: (1) a voluntary placement; or (2) a judicial determination.[68] Third, the child must be placed in a foster home or child-care institution.[69] And finally, such child's placement and care must be a state agency's or a state-approved agency's responsibility.[70]

---

62. *See* 42 U.S.C. § 608 (1982).

63. *See* 42 U.S.C. § 608 (1982), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 1451.

64. *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, §§ 101-310, 94 Stat. 500 (1980) [hereinafter cited as Child Welfare Act]. The goal of the Child Welfare Act was to remove children from temporary foster care into a more permanent adoption relationship. D. MOYNIHAN, FAMILY AND NATION 49 (1986). The Act tried to correct the tendency of foster parents to prefer continued foster care to adoption for economic reasons. *See id.* Frequently, although a bond would develop between a foster parent and child, the foster parent did not consider adopting the child because he or she would lose the foster care payments. *See id.* To remedy this problem, the Child Welfare Act provided that if low-income parents adopted a child that had been placed with them under the Foster Care Program, the federal government would allot funds to the states so that the states could make regular monthly payments to supplement the foster parents' income. *See id.* The Child Welfare Act "represented a small but significant attempt to rationalize the welfare system. And it has worked. From 1977 to 1982, the number of children in foster care declined from 502,000 to 274,000. And in 1984, some 12,000 children received federally mandated adoption assistance." *Id.* at 49.

65. *See* 42 U.S.C. § 672 (1982). The Child Welfare Act corrected some problems in the foster care system. For a discussion of the impact of the Child Welfare Act, see Morain, *Making Foster Care Work*, 4 CAL. LAW. 24 (1984) (addressing "foster care drift," which occurs when children go from one temporary home to another; failure of social service agencies to make adequate plans for individual children; decisions to remove children from their homes based upon subjective rather than objective findings of social workers; lack of funding for programs to preserve or reunite families).

66. *See* 42 U.S.C. § 672 (1982).

67. *See supra* note 61 and accompanying text.

68. *See* 42 U.S.C. § 672 (1982) (providing separate foster care federal funds separate from AFDC federal funds).

69. *See id.*

70. *See id.*

In sum, the Social Security Act and all of its subsequent amendments provide adequate foster care services to many foster children.[71] Nevertheless, foster care services are not perfect, for, as discussed below,[72] a pressing need remains for an amendment that will provide aid to older foster children.[73]

C. Foster Children's Rights Under State Law

State participation in the federal AFDC program is voluntary, but once the state chooses to participate, its AFDC plan must comply with mandatory requirements of the Social Security Act.[74] "One of the statutory requirements is that 'aid to families with dependent children . . . shall be furnished with reasonable promptness to all eligible individuals . . . .' "[75] Moreover, the Supreme Court has held that "a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause."[76]

The AFDC program, thus, is based on a "scheme of cooperative federalism."[77] It is financed largely by the Federal Government, on a matching fund basis, and is administered by the States."[78] Nevertheless, the Supreme Court has stated that "States have considerable latitude in allocating their AFDC resources, since each state is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program."[79] In short, if

---

71. *See supra* notes 52-70 and accompanying text.

72. *See infra* notes 123-35 and accompanying text.

73. *See infra* notes 236-86 and accompanying text.

74. *See* Jefferson v. Hackney, 406 U.S. 535, 541 (1972) (stating proposition that states must comply with federal requirements in order to receive AFDC federal funding); Townsend v. Swank, 404 U.S. 282, 286 (1971) (same proposition); Dandridge v. Williams, 397 U.S. 471, 478 (1970) (same proposition); Rosado v. Wyman, 397 U.S. 397, 408-09 (1970) (same proposition); King v. Smith, 392 U.S. 309, 318-19 (1968) (same proposition).

75. *King*, 392 U.S. at 317.

76. *Townsend*, 404 U.S. at 286.

77. Cooperative federalism has been defined as "[t]he distribution of power between national and local or state governments while each recognizes the powers of the other." BLACK'S LAW DICTIONARY 302 (5th ed. 1979).

78. *King*, 392 U.S. at 316. The formula for AFDC federal funding is codified at 42 U.S.C. § 603 (1982). The formula is complicated because the level of benefits accorded to foster children is within the state's discretion but the federal government's contribution to the states is a varying percentage of the total AFDC expenditures within each state. *See* 42 U.S.C. § 603 (1982).

79. *King*, 392 U.S. at 318-19 (footnote omitted). The Supreme Court, in Dandridge v. Williams, 397 U.S. 471 (1970), suggested that the reason why the federal government allows the states a certain latitude in allocating their AFDC resources is because "Congress was itself cognizant of the limitations on state resources from

a state wishes to receive federal funds for its AFDC program, it must comply with the federal requirements, otherwise it will forfeit its AFDC funds.[80]

A survey of the fifty states shows that the states are not all complying with federally prescribed guidelines on the age a foster child can be discharged.[81]

---

the very outset of the federal welfare program." *Id.* at 478. In *Dandridge*, the Court explained that Congress had expressed its desire to grant states this latitude in distributing AFDC funds by enacting 42 U.S.C. § 601 (1982), which provided that each state should furnish financial assistance and services to its AFDC program "as far as practicable under the conditions in such State . . . ." *Id.*

80. For a discussion of how Arkansas lost its AFDC funds because it did not follow the federal guidelines, see Glaze, *Foster Care Reform: A Model for the Nation*, 20 ARK. LAW., Jan. 1986, at 27. The United States Children's Bureau, in its review of Arkansas' AFDC program, found "that the state failed to provide a means of monitoring the progress made on the child's behalf and determining whether the child was receiving the services specified in his case plan." *Id.* at 30. As a result, Arkansas had to repay the federal government $890,000, the amount in federal funding that Arkansas had previously received for its foster care program. *See id.* at 28.

81. The ages at which foster children are discharged from care range from age sixteen to age twenty-one. *See, e.g.*, ALA. CODE § 38-7-2 (1977) (age 18); ALASKA STAT. § 47.25.410 (1984) (age 18); ARIZ. REV. STAT. ANN. § 8-501(B) (1986) (age 18, but under 21 if in high school or vocational school); ARK. STAT. ANN. § 83-1210 (1985) (age 18); CAL. WELF. & INST. CODE § 11253 (West 1986) (age 18, but 19 if still in high school or vocational school); COLO. REV. STAT. § 26-6-102(4) (1973) (age 16); CONN. GEN. STAT. ANN. § 46b-120 (West 1986) (age 18); DEL. CODE ANN. tit. 31, § 301 (1974) (age 18); D.C. CODE ANN. § 30-401 (1986) (age 18); FLA. STAT. ANN. § 743.07 (West 1986) (age 18); GA. CODE ANN. § 49-5-15 (1986) (age 18); HAWAII REV. STAT. § 577-1 (1976) (age 18); IDAHO CODE § 39-1209 (1985) (age 18); ILL. REV. STAT. ch. 23, § 4-1.1 (1985) (age 18, but under 21 if in high school or vocational school); IND. CODE ANN. § 12-1-10-1 (Burns 1986) (age 18); IOWA CODE § 237.1 (1985) (age 18, but under 21 if in high school or vocational school); KAN. STAT. ANN. § 39-702 (1981) (age 18, but under 21 if in high school or vocational school); KY. REV. STAT. § 208.680 (1982) (age 18); LA. REV. STAT. ANN. § 46.231 (West 1982) (age 18, or 19 if in high school or vocational school); ME. REV. STAT. ANN. tit. 22, § 4064 (1986) (age 18); MD. FAM. LAW CODE ANN. § 5-525 (1984); art. 1, § 24(2) (1981) (age 18); MASS. GEN. LAWS ANN. ch. 119, § 23 (West 1986) (age 18, but under 21 if in high school or vocational school); MICH. COMP. LAWS ANN. § 722.111(K)(ii) (West 1986) (age 18); MINN. STAT. § 260.40 (1982) (age 21); MISS. CODE ANN. § 43-17-3 (1986) (age 16, or 18 if in high school or vocational school); MO. REV. STAT. § 208.040 (1986) (age 18, or 19 if in high school or vocational school); MONT. CODE ANN. § 41-5-103 (1985) (age 18); NEB. REV. STAT. § 71-1901 (1984) (age 16); NEV. REV. STAT. § 424.010 (1985) (age 16); N.H. REV. STAT. ANN. § 170-E-1 (1977) (age 18); N.J. REV. STAT. § 30:4C-2 (1986) (age 18); N.M. STAT. ANN. § 40-7A-3 (1983) (age 18); N.Y. ADMIN. CODE tit. 18, § 430.12(f) (1976) (age 18); N.C. GEN. STAT. § 131-D-10.2 (1981) (age 18); N.D. CENT. CODE § 50-09-01 (1982) (age 21 if living in foster home); OHIO REV. CODE ANN. § 2151.01.1 (Page 1984) (age 18); OKLA. STAT. tit. 10, § 402 (1987) (age 18); OR. REV. STAT. § 418.035 (1985) (age 18, but under 21 if in high school or vocational school); PA. CONS. STAT. ANN. tit. 62, § 2301(g) (Purdon 1968) (age 18); P.R. LAWS ANN. tit. 8, § 68 (1985) (age 18); R.I. GEN. LAWS § 40-12-1 (1984) (age 18); S.C. CODE ANN. § 43-9 (Law. Co-op. 1985) (age 18); S.D. CODIFIED LAWS ANN. § 26-6-6.1 (1984) (age 18, but under 21 if still in high school or vocational school); TENN. CODE ANN.

Nebraska[82] and Nevada[83] have foster care statutes that discharge the foster child at sixteen. These provisions are inconsistent with section 606(a) of the Social Security Act.[84] While Minnesota and North Dakota are the only states that provide assistance to older foster children,[85] at least fifteen other states have acknowledged the necessity of extending their foster-care statutes for as long as the child is in school or in a vocational training program.[86] If other states follow Minnesota's and North Dakota's example and amend their foster-care statutes extending the age of assistance from age eighteen to twenty-one, as a matter of common sense, it will cost them additional funds.[87] Nevertheless, by preparing foster children *now* for independent living and assisting them until they are age twenty-one, states will save money because they will not have to care for them in the *future* in other

---

§§ 37-2-401, 37-1-102(4A) (1986) (age 18, or 19 if in high school or vocational school); TEX. HUM. RES. CODE ANN. § 31.002 (Vernon 1980) (age 18, but under 21 if in high school or vocational school); UTAH CODE ANN. § 55-8a-1 (1986) (age 18); VT. STAT. ANN. tit. 33, § 2752 (1985) (age 18); V.I. CODE ANN. tit. 34, § 104 (1985) (age 18); VA. CODE § 63.1-195 (Supp. 1985) (age 18); WASH. REV. CODE ANN. §§ 74.15.020, 13.40.020(10) (1987) (age 18); W. VA. CODE § 49-1-2 (1986) (age 18); WIS. STAT. ANN. § 48.02 (West 1979) (age 18); WYO. STAT. § 42-1-102 (1986) (age 18, but under 21 if in high school or vocational school).

82. *See* NEB. REV. STAT. § 71-1901 (Supp. 1984) (age 16).

83. NEV. REV. STAT. § 424.010 (1985) (age 16).

84. 42 U.S.C. § 606(a) (1982).

85. MINN. STAT. § 260.40 (1982); N.D. CENT. CODE § 50-09-01(4)(b) (1982). The pertinent part of the Minnesota statute reads: "For purposes of any program for foster children or children under state guardianship for which benefits are made available on June 1, 1973, unless specifically provided therein, the age of majority shall be twenty-one years of age." *Id.* The pertinent part of the North Dakota statute states that a dependent child shall mean any child "[u]nder the age of twenty-one years, who is living in a licensed foster home or in a licensed child-caring or child-placing institution . . . ." *Id.*

86. ARIZ. REV. STAT. ANN. § 8-501(B) (1986); CAL. WELF. & INST. CODE § 11253 (West 1986); ILL. REV. STAT. ch. 23, § 4-1.1 (1985); IOWA CODE § 237.1 (1985); KAN. STAT. ANN. § 39-702 (1981); LA. REV. STAT. ANN. § 46.231 (West 1982); MASS. GEN. LAWS ANN. ch. 119, § 23 (West 1986); MINN. STAT. § 260.40 (1982); MO. REV. STAT. § 208.040 (1986); N.Y. ADMIN. CODE tit. 18, § 430.12(f) (1976); N.D. CENT. CODE § 50-09-01 (1982); OR. REV. STAT. § 418.035 (1985); S.D. CODIFIED LAWS ANN. § 26-6-6.1 (1984); TENN. CODE ANN. §§ 37-20401, 37-1-102(4A) (1986); TEX. HUM. RES. CODE ANN. § 31.002 (Vernon 1980); WYO. STAT. § 42-1-102 (1986).

87. David Tobis, a child welfare specialist, noted that an additional three years of assistance to foster children "could be used to train youths for jobs, help them get housing and prepare them to live on their own, or it could merely increase the number in foster care and postpone homelessness until they turn 21 . . . . The key to the outcome is the priorities for the city and state." Roberts, *Court Ruling Hints at Broader Impact*, N.Y. Times, July 19, 1985, at B2, col. 3.

88. The Coalition of the Homeless (a non-profit New York organization that assists the homeless of New York) estimated that extending foster care from age

welfare programs, or in homeless shelters.[88] Success stories are always much cheaper for a government than are failures.[89]

D. Constitutional Rights of Foster Children

In addition to statutory rights, constitutional rights protect foster children.[90] The United States Supreme Court, in *Planned Parenthood*

---

eighteen to twenty-one would cost the State of New York at least an additional $70 million dollars just to begin implementing the programs. *See* Moses, *Cost Cited in Foster-Care Ruling*, N.Y. Newsday, July 19, 1985, at 2NY. Currently, foster care in New York City costs $335 million per year in city, state and federal funds. *See* Rimer, *New York Judge Curbs Discharge of Foster Youths With No Homes*, N.Y. Times, July 18, 1985, at B4, col. 1. Nevertheless, Mayor Koch has recognized the importance of funding foster care: "I am willing to spend whatever is required within our fiscal constraints to do that which is legal and, when the legal requirements don't go far enough, that which is moral." Roberts, *Court Ruling Hints at Broader Impact*, N.Y. Times, July 19, 1985 at B2, col. 2.

89. For an example of a foster child success story, see Moses, *Once Shut Out by Age, Man Tastes a Victory*, N.Y. Newsday, July 19, 1985, at 2NY. Joseph Morgan, now twenty, was a foster child with no place to go when he was discharged at age eighteen. *Id.* Today, Morgan is going to attend Marist College in Peekskill, N.Y. and aspires to be a social worker. *Id.* He was one of the six plaintiffs who won an extension in foster care assistance in Palmer v. Cuomo, N.Y.L.J., July 25, 1985, at 6, col. 3 (Sup. Ct. N.Y. County 1985), *aff'd as modified*, 503 N.Y.S.2d 20 (N.Y. App. Div. 1st Dep't 1986) (*Palmer* case discussed *infra* notes 142-60 and accompanying text). Although the City spent more money on Morgan originally, it eventually will save money, because it will not have to care for Morgan in a homeless shelter. *See Adoption Assistance and Child Welfare Act: Hearings on S. 1266, S. 1329 Before the Subcomm. on Social Security and Income Maintenance of the Comm. on Finance, United States Senate*, 99th Cong., 1st Sess. 15 (1986) (testimony of Dorcas Hardy, Chief of Health & Human Services' Office of Human Dev./Servs.) [hereinafter cited as *Hearings on S. 1266, S. 1329*]. Even more important, Morgan someday is likely to become a productive young man contributing to the general welfare of society.

90. The two constitutional rights that are most frequently litigated in foster care cases are equal protection, *see infra* notes 93-122 and accompanying text, and due process. *See infra* notes 179-87 and accompanying text. The Supreme Court has recognized that children have special constitutional rights. *See* Ingraham v. Wright, 430 U.S. 651, 674 (1977) (eighth amendment prohibition against cruel and unusual punishment does not apply to disciplinary corporal punishment in schools); Breed v. Jones, 421 U.S. 519, 533-34 (1975) (fifth amendment prohibition against double jeopardy precludes criminal prosecution of juvenile after juvenile court adjudication involving the offense); *see also* Wood v. Strickland, 420 U.S. 308, 322, 326 (1975) (public high school students have substantive and procedural rights while at school, and school board officials who "knowingly" or "unknowingly," violate student's rights may be held liable for their actions); Goss v. Lopez, 419 U.S. 565, 574 (1975) (fourteenth amendment due process clause prohibits suspension of public school students without notice and hearing); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 505-06 (1969) (first amendment protects students' right to wear armbands as passive protest against United States policy in Vietnam); *In re* Gault, 387 U.S. 1, 49 (1966) (fifth amendment privilege against self-incrimination applies in juvenile delinquency proceedings); Gallegos v. Colorado, 370 U.S. 49, 54-55 (1962) (due process provides special protection to juveniles in formal confessions).

v. Danforth,[91] held that age is not the sole prerequisite of constitutional guarantees, for "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[92]

To discuss all of a foster child's constitutional rights would be beyond the scope of this Note. This Note will focus primarily on the right of equal protection guaranteed by the fourteenth amendment[93] because it is the constitutional right that is most fre-

---

A few cases, however, suggest that aid to foster children through the foster care system is not constitutionally protected. *See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 15-18 (1981) (Court stated that no type of welfare benefits is guaranteed by Constitution); O'Connor v. Donaldson, 422 U.S. 563, 573 (1975) (Court similarly stated that there is no constitutional right to treatment of the needy at public expense); *see also* McElrath v. Califano, 615 F.2d 434, 440-41 (7th Cir. 1980) (holding state requirement to disclose social security account number in order to receive AFDC benefits did not violate constitutional "right to privacy" because "[w]elfare benefits are not a fundamental right"); Murrow v. Clifford, 404 F. Supp. 999, 1001 (D.N.J. 1975) (court held that there is no fundamental right to aid families with dependent children).

91. 428 U.S. 52, 75 (1976) (striking down state law requiring minors to obtain parental consent as prerequisite to obtaining abortions, because the law effectively would give parents an absolute veto over minors' decisions).

92. *Id.* at 74. The *Danforth* case is relevant when considering the issue of whether foster children should be denied assistance at age eighteen, regardless of their ability to live productive lives, for in both instances, issues of a child's maturity arise. *See id.* at 74-75. In *Danforth*, the Court held that there must be a state procedure to an *individualized* determination of whether a minor might be sufficiently mature or emancipated to make the decision to undergo an abortion herself. *Id.* at 74-75. Thus, the Court recognized the great importance of an individualized determination of a child's ability to make an adult decision. *See id.* The Court refused to be held to an arbitrary age limit. *See id.* This same rationale can be applied in the case of discharging foster children. An individual analysis of each child's maturity and capability to live independently should be conducted before a foster child is discharged. The Court in *Danforth* indicated that a parent's consent, even if the "parent" is deemed to be the state, as in the case of foster children, cannot override a child's constitutional rights when the child's well-being is at stake. *Id.* at 74-75.

93. U.S. CONST. amend. XIV, § 1. The fourteenth amendment, in the relevant part, reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* The general concept of equal protection implies that all persons shall be treated alike under similar circumstances and conditions, both in privileges conferred and in liabilities imposed. *See generally* J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 521-801 (1986) [hereinafter cited as ROTUNDA]; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 991-1136 (1978) [hereinafter cited as TRIBE]. *See also* Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459 (1937) (stating statutory discrimination between mutual companies and stock companies which write insurance in the state violated equal protection clause); Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299

quently contested in actions brought by foster children.[94] A connecting thread in the different cases that have been brought under an equal protection theory is that some foster children have been treated differently than other foster children and other children who receive federal assistance.[95] One example of this unequal treatment that plaintiffs have offered is the fact that some foster children are given after-care services while others are given "cab fare" and the address of a homeless shelter.[96] Paradoxically, the foster children who need the most after-care assistance are frequently the ones most neglected.[97] This paradox, in which the more severely handicapped are allotted

---

U.S. 183 (1936) (holding no violation of equal protection because statutory classification was reasonable).

94. *See infra* notes 105-22 and accompanying text.

95. *See id.*

96. A recent New York Times article compares three foster children who were given very different after-care services upon their discharge. *See* Rimer, *supra* note 1, at B1, col. 1. Reggie Brown was discharged on his 18th birthday and was given cab fare and directions to a men's shelter. *See id.* Harold Fredericks was discharged to a Job Corps training program, and Joseph Morgan was given $500 and discharged to independent living. *See id.* The obvious difference between one child receiving a $5 cab fare and another $500 and a job, illustrates the discrepancy in foster care services and shows that foster children are not given equal attention and care by the foster care system. *See id.*

Moreover, Mark Hardin, the director of the Foster Care Project of the National Legal Resource Center for Child Advocacy and Protection, American Bar Association, stated: "Services are generally unevenly distributed within many States, and a particular type of service may run out in midyear because of inadequate budgeting. Further, no clear agency policy generally exists defining what services are available and under what conditions." *Adoption Assistance and Child Welfare Act: Hearings on S. 1266, S. 1329 Before the Subcomm. on Social Security and Income Maintenance Programs of the Senate Comm. on Finance*, 99th Cong., 1st Sess. 32-33 (1985) (testimony of Mark Hardin, director, Foster Care Project, National Legal Resource Center for Child Advocacy and Protection, American Bar Association).

97. In many instances, it appears that the different levels of assistance to foster children is frequently based on how cooperative they are with their supervisors. *Cf.* NEW YORK TASK FORCE REPORT, *supra* note 1, at 47. Often the "problem children" are the most neglected by the foster care system because they are simply wrenches in the foster care machine, that cause the system to run inefficiently. *See id.* A comparison of Reggie Brown, a foster child who is now in prison after being arrested for burglary and Joseph Morgan, a foster child who is attending Marist College in Poughkeepsie, New York, demonstrates that the foster care system in New York State gives up on the difficult cases and focuses more on helping the possible success stories. *See* Rimer, *supra* note 1, at B1, col. 1. Reggie Brown was shuttled from in and out of foster homes because he had problems following rules. *See id.* at B2. He was eventually discharged after violating a curfew. *See id.* Joseph Morgan, on the other hand, had a stable home with foster parents from infancy to age fifteen. *See id.* Morgan entered the Job Corps when he was discharged from the foster care system and received his high school equivalency certificate. *See id.*

less assistance than others in the same class, has been held to violate the equal protection clause.[98]

Courts analyzing foster children's rights under equal protection claims have adopted a case-by-case approach.[99] This approach is in accordance with the Supreme Court's policy that when analyzing equal protection violations, no one standard will suffice, and that each case must be decided as it arises.[100] In each case, the court must determine if the classification is reasonable and not arbitrary.[101] Furthermore, the classification must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly situated are treated alike.[102]

---

98. In Klosterman v. Cuomo, 126 Misc. 2d 247, 481 N.Y.S.2d 580 (Sup. Ct. N.Y. County 1984) the New York Supreme Court recognized an equal protection violation and granted assistance to the plaintiffs based solely on their need. The plaintiffs in this case had been treated in a state psychiatric hospital and discharged as part of the state's policy to release patients to less restrictive, community-based residences. *See id.* at 251, 481 N.Y.S.2d at 584. Each plaintiff became homeless, and efforts to receive assistance from state and municipal agencies were unavailing or, at best, resulted in only minimal periodic assistance. *See id.*

The plaintiffs asserted a denial of equal protection under the law pursuant to the fourteenth amendment, because other patients similarly situated were provided with the services upon release that the plaintiffs were denied. *See id.* The plaintiffs provided evidence that by virtue of the greater severity of their illnesses they were denied treatment whereas other patients were provided appropriate care and supervision. *See id.* The Supreme Court sustained the action allowing the plaintiffs to establish that governmental officials were not satisfying nondiscretionary obligations to perform certain functions. *See id.*

This paradox, in which the more severely handicapped are allotted, for that reason, less assistance than are others in the same class, has similarly been held violative of the equal protection clause. *See, e.g.*, Lee v. Smith, 43 N.Y.2d 453, 373 N.E.2d 247, 402 N.Y.S.2d 351 (1977) (holding statute unconstitutional which discriminated against aged, disabled and blind), *In re* Patricia A., 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972) (finding statute unconstitutional that discriminated against females without any rationale for age/sex distinction).

99. *See infra* notes 105-22 and accompanying text.

100. *See* Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283, 293, 296 (1898) (holding consitutional classification under Illinois inheritance tax law).

101. *See infra* note 103 and accompanying text.

102. For a complete discussion of equal protection standards of review, see ROTUNDA, *supra* note 93, at 523-801; TRIBE, *supra* note 93, at 991-1136. An equal protection analysis requires "strict scrutiny" of legislative classifications when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. *See* ROTUNDA, *supra* note 93, at 530-31. Suspect classes have been held to include race or national origin, *see* Nyquist v. Mauclet, 432 U.S. 1 (1977), or gender. *See* Califano v. Goldfarb, 430 U.S. 199 (1977). Courts, however, have not held that age is the basis for a suspect classification. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (upholding state statute mandating retirement at age fifty for state uniformed police as rationally related to legitimate state interest). Accordingly, courts will not apply a strict scrutiny standard when reviewing claims of age-based classifications. *See*

The "rationally related" standard of judicial review[103] typically applied in foster children's equal protection claims has been characterized as a pro-state test because it presumes that the classification under attack is constitutional.[104] Consequently, many of the foster child litigants who have brought claims under an equal protection theory have been unsuccessful. In *Dandridge v. Williams*,[105] the appellees, large-family recipients of benefits under the AFDC program, brought an action to enjoin the application of Maryland's maximum grants regulation, which was a ceiling of about $250 per month that was imposed as an AFDC grant regardless of the size of the family and its actual need.[106] The Court held that this state regulation did not violate the equal protection clause.[107] The Court, however, also held that in allocating funds available for AFDC payments, a state may not "impose a regime of invidious discrimination" in violation of the equal protection clause of the fourteenth amendment.[108]

Foster children frequently litigate unsuccessful equal protection claims based on age classifications.[109] In *McClellan v. Shapiro*,[110] a class action was brought by a nineteen-year-old AFDC recipient.[111] McClellan's welfare benefits were terminated by an amendment to the Connecticut State Welfare Statute which defined a "dependent child" as one under the age of nineteen or who had attained the age of nineteen while in full-time attendance in a secondary school.[112] The court held

---

ROTUNDA, *supra* note 93, at 537-38. Furthermore, courts will not utilize a strict scrutiny standard of review carries a presumption of constitutionality, for it reflects the courts' welfare. *See id.* at 524. Thus, for both of these reasons, courts do not apply a standard of strict scrutiny when reviewing foster children's equal protection claims based on age classification. *See supra* notes 105-22 and accompanying text.

Instead, courts apply a standard in which the classification need only be rationally related to a legitimate governmental purpose. *See id.* at 530. The rationally related standard of review carries a presumption of constitutionality, for it reflects the courts' awareness that the drawing of lines that create distinctions, is peculiarly a legislative task and an unavoidable one. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 776 (1977) (holding statute unconstitutional which allowed illegitimate children to inherit by intestacy from their mothers, not from their fathers); McGowan v. Maryland, 366 U.S. 420, 425 (1961) (upholding statutory prohibition of selected activities on Sundays as rationally related to legitimate governmental interest).

103. For a complete discussion of the nature and application of the rational basis standard of review, see ROTUNDA, *supra* note 93, at 530; TRIBE, *supra* note 93, at 994.

104. *See id.*

105. 397 U.S. 471 (1970).

106. *See id.* at 473-75.

107. *See id.* at 473-87.

108. *See id.* at 483.

109. *See infra* notes 110-21 and accompanying text.

110. 315 F. Supp. 484 (D. Conn. 1970).

111. *See id.*

112. *See id.*

that the classification created by the statutory amendment was "rationally related"[113] to the state's proper purpose of encouraging dependent citizens to become self-supporting.[114]

Another case that similarly focused on the arbitrary nature of an age classification was *Ramirez v. Weinberger*.[115] In this case, a mother brought an action seeking student benefits under the AFDC program. The benefits were terminated when her son reached the age of twenty-one. She asserted that the state and federal AFDC statutes requiring the termination of student benefits at age twenty-one denied twenty-one-year-old students equal protection.[116] She argued that similarly situated students who were qualified to claim benefits under the Federal Old-Age, Survivors, and Disability Insurance[117] title to the Social Security Act could claim such benefits until age twenty-two.[118]

The court held that the legislative distinctions "comport[ed] with the constitutional requirements of equal protection and due process of law."[119] Dismissing the case, the court stated that despite certain similarities between the two titles of the Act, their separate and distinct funding methods, eligibility standards, and administration demonstrated that the two programs also differed in many substantive respects.[120] The court thus concluded that the distinct and separate nature of each program adequately justified the challenged age distinction in benefit termination points.[121]

In sum, foster children's equal protection claims have not been successful because courts consistently find that additional, state-imposed requirements, which must be met for foster children to qualify for AFDC funding, are "rationally related" to the governing state statutes.[122] Hence, in order for foster children to bring successful

113. *See supra* notes 102-04 and accompanying text.
114. McClellan v. Shapiro, 315 F. Supp. 484 (D. Conn. 1970).
115. 363 F. Supp. 105 (N.D. Ill. 1973), *aff'd*, 415 U.S. 970 (1974).
116. *Id.* In *Ramirez*, the court emphasized the important point that state and federal statutes that terminate assistance to dependent children discriminate against them because of age, and because they are not students. *See id.* The Social Security Act, 42 U.S.C. §§ 606-676 (1982), and many state statutes extend the age ceiling of assistance to foster children if they are in school or enrolled in a vocational training program. *See supra* note 81 and accompanying text. This requirement appears to violate the equal protection guarantees of those older foster children who either choose not to continue their education, or are not academically inclined. *See supra* notes 108-21 and accompanying text.
117. Federal Old-Age, Survivors, and Disability Insurance Benefits, 42 U.S.C. §§ 401-433 (1982).
118. *Ramirez*, 363 F. Supp. at 108.
119. *See id.*
120. *See id.* at 109-10.
121. *See id.*
122. *See supra* notes 106-21 and accompanying text.

equal protection claims in the future, foster children must show that state requirements which limit assistance to foster children are arbitrary and cannot be "rationally related" to the *true purpose* of foster care statutes—to aid needy children.

III. The Current Problem: Homeless Foster Children

Available statistics do not accurately measure the number of children who are discharged into "independent living" and become homeless.[123] Once they graduate from foster care, the children usually have no further contact with the agency that had been responsible for their welfare.[124] Thus, the absence of contact with the appropriate regulatory agencies precludes the compilation of accurate records that reflect the housing and living situations experienced by recently graduated foster children.[125] Nevertheless, it is safe to state that these graduates encounter the same problems in securing an apartment that all young urban dwellers experience.[126] In point of fact, the graduates are unable to place a security deposit on an apartment;[127] nor can they afford to pay rent.[128] Consequently, if the individual is unable to live with friends or relatives, the street or city shelters are the only alternative.[129]

Street life results in tragic stories.[130] "The Inspector General reports that [twenty-five percent] of the homeless youth engage in illegal activity: 100,000 boys and girls annually turn to prostitution for survival."[131] In a 1985 Child Welfare League of America survey,[132] state officials

123. *See Homeless Youth, supra* note 7, at 13.

124. *See id.*

125. *See id.*

126. *See The Adoption Assistance and Child Welfare Act and Related Proposals: Hearings on H.R. 2810 Before the Subcomm. on Public Assistance and Income Maintenance of the Comm. on Ways and Means*, 99th Cong., 1st Sess. 2-6 (1985) (testimony of Helen Stone, Director of the Institute for Quality Child Welfare Servs.) [hereinafter cited as Stone, *Hearings on H.R. 2810*].

127. *See id.*

128. *See id.*

129. *See* Weber, *Home Sweet Home*, 6 YOUTH LAW NEWS 14-15 (Sept.-Oct. 1985) [hereinafter cited as *Sweet Home*]. *See also* Palmer v. Cuomo, N.Y. L.J., July 25, 1985, at 6, col. 4 (Sup. Ct. N.Y. County 1985), in which Justice Wilks noted that "[i]t is well documented and recognized even with the city agency itself, that the Men's Shelter and its satellites are overcrowded, often dangerous, and 'an inappropriate setting' for young adults." *Id.*

130. For a discussion of the perils of street life experienced daily by three foster children who lived on the streets, see Rimer, *supra* note 1, at B1, col. 1.

131. *See Sweet Home, supra* note 129, at 15.

132. *See The Adoption Assistance and Child Welfare Act and Related Proposals: Hearings on H.R. 2810 Before the Subcomm. on Public Assistance and Income Maintenance of the Comm. on Ways and Means*, 99th Cong., 1st Sess. 1-2 (1985)

described what they believed happened to children eighteen and over who must leave foster care because of the lack of a federal or state subsidy and without adequate preparation for independence. The results showed that, nationwide, foster children have failed to learn the necessary tools that enable a child to make the transition from foster care into independent living and, consequently, are unable to live productive lives.[133]

Foster care children are ending up homeless because they have been discharged prematurely.[134] Challenges of an adult world—securing gainful employment, housing, acting appropriately in the social sphere, narcotics, alcohol, and premarital sex—present a serious threat to the health and welfare of these graduate foster children because they are unprepared to deal with such challenges.[135] In short, these children require a stable, supportive environment in which they can make the transition to adult society—the street is not this type of environment.

IV. Current Litigation Strategies

There is little evidence that any of the foster care statutory reforms of the past five years have improved foster children's lives.[136] Hence, plaintiffs have sought to vindicate the rights (common law, federal, state, and constitutional) of the foster child in the courts.[137]

(testimony of Leonard Bradley, Deputy Commissioner Tennessee Dep't of Human Servs.) [hereinafter cited as Bradley, *Hearings on H.R. 2810*]. The Child Welfare League of America conducted a state-by-state survey to record the available services offered to foster children upon their being discharged to make the transition into independent living easier. *See id.* The state agencies in charge of the foster care system in each state were asked to describe what they believed happened to children who are eighteen years of age and who must leave foster care. *See id.*

133. *See* Bradley, *Hearings on H.R. 2810*, *supra* note 132, at 1-2 and accompanying text. The results of the survey illuminated the depth of this tragic situation: "From Iowa: [reports indicated that] [s]ome exist on marginal jobs; others move in with others; some girls move into prostitution." *Id.* at 5. The Department of Social Services in Tennessee reported that "[foster children] do not complete their education, [they] become involved in the criminal justice system, [they] become pregnant at an early age (usually out-of-wedlock) and [they] do not find gainful employment." *Id.* California officials noted that "[e]ither they live on their own, [or] enter the mental health system which provides half-way houses, or they disappear from sight." *Id.* Finally, in Illinois it was reported that "many become 'street kids.' They have a difficult time establishing independence and frequently join the service or apply for public assistance." *Id.*

134. *See* Stone, *Hearings on H.R. 2810*, *supra* note 123, at 6.

135. *Cf. id.* at 3.

136. *See* Rimer, *New York Judge Curbs Discharge of Foster Youths With No Homes*, N.Y. Times, July 18, 1985, at B4, col. 6; *see also supra* notes 123-35 and accompanying text.

137. *See infra* notes 142-216 and accompanying text.

Foster care plaintiffs currently utilize three principal litigation strategies: (1) class actions based upon alleged statutory violations under federal and state Social Security statutes;[138] (2) section 1983 actions based upon alleged violations of federal Social Security rights;[139] and (3) private common law actions based upon alleged negligence and tort violations.[140] This Section will analyze these strategies and the legal theories advanced in the actions. Part V will then describe how these approaches are inadequate in protecting the rights of foster children.[141]

A. Class Actions Under Social Security Statutes

The most common type of foster care litigation today is the class action.[142] The class that has been the most successful in protecting foster children's rights is the class in *Palmer v. Cuomo*.[143] In

---

138. *See infra* notes 142-97 and accompanying text.

139. *See infra* notes 198-208 and accompanying text.

140. *See infra* notes 209-16 and accompanying text.

141. *See infra* notes 217-35 and accompanying text.

142. Class actions are a "means for vindicating the legal rights of large groups of litigants." *See* J. LANDERS & J. MARTIN, CIVIL PROCEDURE 510 (1981). Rule 23 of the Federal Rules of Civil Procedure provides as follows:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23. Plaintiffs must further meet the requirements of at least one of the subdivisions of Rule 23(b). *Id.*

Under Rule 23(b)(1) the prosecution of separate actions by or against individual members of the class would create a risk of:

> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests . . . .

FED. R. CIV. P. 23.

Rule 23(b)(2) reads as follows: "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ." FED. R. CIV. P. 23(b)(2).

Rule 23(b)(3) reads as follows: "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3).

143. Palmer v. Cuomo, N.Y.L.J., July 25, 1985, at 6, col. 3. (Sup. Ct. N.Y. County 1985), *aff'd as modified*, 503 N.Y.S.2d 20 (N.Y. App. Div. 1st Dep't 1986).

Palmer v. Cuomo,[144] the plaintiffs were six foster care recipients between the ages of eighteen and twenty-one who had been discharged from their foster care placements to "independent living,"[145] and three recipients currently placed in foster care group homes who expected to be discharged in the near future.[146] The plaintiffs sought to obtain a preliminary injunction, in order to prevent defendants from: (1) failing or refusing to supervise these discharged plaintiffs; and (2) removing the plaintiffs from their placements until the defendants prepared individual discharge plans for the plaintiffs in accordance with the New York Social Services Law and state regulations.[147]

The defendants argued that providing additional services to children who have been discharged from foster care would "burden the agency financially, jeopardizing its ability to properly care for the children presently in foster care."[148] Justice Elliot J. Wilk, New York Supreme Court, Special Term, did not agree with the defendants' economic rationale, and instead, the court ruled that by state law, foster care agencies "must prepare the child for independent living by providing training in skills such as apartment finding, budgeting, shopping, and cooking. Finally, the child must receive career counseling and training in a marketable skill or trade."[149] Moreover, the court stated that "[s]aving money is not a proper justification for the denial of assistance to the needy,"[150] a ruling for which there is substantial Supreme Court precedent.[151]

The court granted the plaintiffs' motion for a preliminary injunction and held that New York State and City Social Service officials had failed to discharge their duties under state law to supervise youth

144. *See Palmer*, N.Y.L.J., July 25, 1985, at 6, col. 3.

145. *See id.* For a discussion of independent living, see *supra* note 4 and accompanying text.

146. *See Palmer*, N.Y.L.J., July 25, 1985, at 6, col. 3 (Sup. Ct. N.Y. County 1985), *aff'd as modified*, 503 N.Y.S.2d 20 (N.Y. App. Div. 1st Dep't 1986).

147. *See id.* A party seeking a preliminary injunction must demonstrate: (1) a likelihood of success on the merits; (2) irreparable harm; and (3) a favorable balancing of the equities. *See* D. DOBBS, REMEDIES 108-09 (1973).

148. Palmer v. Cuomo, N.Y.L.J., July 25, 1985, at 6, col. 4 (Sup. Ct. N.Y. County 1985), *aff'd as modified*, 503 N.Y.S.2d 20 (N.Y. App. Div. 1st Dep't 1986).

149. *See Palmer*, N.Y.L.J., July 25, 1985, at 6, col. 3.

150. *Id.* at 6, col. 4.

151. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that absent compelling justification, family could not be denied welfare aid constituting basis for family members' ability to obtain means of survival solely because family was member of class that could not satisfy one-year residency requirement); *see also* Craig v. Boren, 429 U.S. 190 (1976) (Court held that saving of welfare costs cannot justify an otherwise invidious class classification); Lee v. Smith, 43 N.Y.2d 453, 373 N.E.2d 247, 402 N.Y.S.2d 351 (1977) (saving of money not proper justification for denial of assistance to the needy).

in foster care until they reach the age of twenty-one and to prepare these youths to live independently.[152] Justice Wilk stated in his opinion that all of the three requirements[153] for a preliminary injunction had been met by the plaintiffs,[154] and concluded that the "balance of equities"[155] clearly lay with the plaintiffs, especially "[c]onsidering the current circumstances of the plaintiffs, their lack of resources and alternatives."[156] Accordingly, the Supreme Court, Special Term, held that New York City and other municipalities are obligated to provide supervision under the foster care program for young persons through age twenty-one.[157]

The Supreme Court, Appellate Division, affirmed the Special Term's major finding that attending to the needs of foster children and "reasonably preparing" them after they left foster care was a governmental obligation.[158] Nevertheless, it did modify the lower court's holding that the City and State Social Service Agencies were jointly responsible: "We modify only to the extent of enjoining the City to perform its pre-discharge preparatory obligations and its post-discharge supervisory responsibilities, and directing the State to promulgate regulations governing the statutory obligation to supervise."[159] Although *Palmer v. Cuomo* primarily involved a consideration of the

---

152. *See* Palmer v. Cuomo, N.Y.L.J., July 25, 1985, at 6, col. 3 (Sup. Ct. N.Y. County 1985), *aff'd as modified*, 503 N.Y.S.2d 20 (N.Y. App. Div. 1st Dep't 1986).

153. *See supra* note 147 and accompanying text.

154. *See* Palmer v. Cuomo, N.Y.L.J., July 25, 1985, at 6, col. 3 (Sup. Ct. N.Y. County 1985), *aff'd as modified*, 503 N.Y.S.2d 20 (N.Y. App. Div. 1st Dep't 1986). Justice Wilk stated that the necessary requirements for a preliminary injunction had been met by the plaintiffs:

> Not only have they [plaintiffs] demonstrated a likelihood of success by dramatizing defendants' failure to comply with applicable provisions of the (SSL) and the regulations, but they have ably documented the consequences of defendants' actions on their lives. Homelessness itself constitutes irreparable injury.

Id. (citing Williams v. Barry, 490 F. Supp. 941 (D.D.C. 1980), *modified on other grounds*, 708 F.2d 789 (D.C. Cir. 1983); Bryant Ave. Tenants' Ass'n v. Koch, N.Y.L.J., Apr., 1985, at 14, col. 4 (Sup. Ct. N.Y. County 1985); Callahan v. Carey, N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (Sup. Ct. N.Y. County 1976).

155. In balancing equities, a court usually considers the benefits and costs of adopting both the plaintiff's and the defendant's positions. *See* D. DOBBS, REMEDIES 55-56, 108 (1973). A court will also weigh the consequences that each potential outcome will have on society. *See id.* The claimant with the most positive combination of factors will often be the winning party. *See id.*

156. Palmer v. Cuomo, N.Y.L.J., July 25, 1985, at 6, col. 4 (Sup. Ct. N.Y. County 1985), *aff'd as modified*, 503 N.Y.S.2d 20 (N.Y. App. Div. 1st Dep't 1986).

157. *See id.*

158. See Palmer v. Cuomo, 503 N.Y.S.2d 20 (N.Y. App. Div. 1st Dep't 1986).

159. *Id.* at 22.

New York State Social Services Law,[160] the case is not unrelated to other cases brought throughout the United States on behalf of foster children.[161]

Another case that illustrates the complexity of foster care litigation is *G.L. v. Zumwalt*.[162] In *Zumwalt*, the plaintiffs brought a class action against the Missouri Division of Family Services, on behalf of the children in foster care in the Kansas City, Missouri area.[163] The plaintiffs argued that their rights to be protected from harm, secured by the United States Constitution and by Title IV of the Social Security Act, had been violated by the practices and policies of the defendants.[164] The district court approved a consent decree[165] providing for, *inter alia*, licensing of foster homes,[166] mandatory training of foster parents,[167] proper matching of foster children with foster parents,[168] prohibition on the use of improper punishment of foster children,[169] investigation of and response to suspected incidents of abuse and neglect or unsuitable care,[170] elimination of overcrowding,[171] rate of reimbursement, and caseload size.[172] The plaintiffs' claims for damages in this case were dismissed by consent of the parties.[173] The consent decree set forth in *Zumwalt* became a guideline for later courts to follow.[174]

One court that followed the court's example in *Zumwalt* was the United States District Court for the District of New Mexico, in

160. *See* N.Y. SOC. SERV. LAW §§ 20(3), 398(6)(h) (McKinney 1983); *see also* N.Y. ADMIN. CODE tit. 18, §§ 430.12(f), 430.13 (1976).

161. The plaintiffs in *Palmer* asserted many claims not discussed in this section of the Note, such as the violation of constitutional rights based upon the fifth and fourteenth amendments' guarantee of equal protection and due process, and the deprivation of plaintiff's civil rights in violation of 42 U.S.C. § 1983. Since these claims were not ruled on by the New York Supreme Court, nor by the New York Supreme Court, Appellate Division, they will be discussed in later sections of this Note. *See supra* notes 93-122 and accompanying text, *infra* notes 179-87, 198-208 and accompanying text.

162. 564 F. Supp. 1030 (W.D. Mo. 1983).

163. *See id.*

164. *See id.*

165. A consent decree is a stipulation between the parties, subject to approval by court, that the parties' final agreement will constitute the final judgment. BLACK'S LAW DICTIONARY 370 (5th ed. 1979).

166. *See* G.L. v. Zumwalt, 564 F. Supp. 1030, 1031-32 (W.D. Mo. 1983).

167. *See id.* at 1033.

168. *See id.* at 1033-34.

169. *See id.* at 1035.

170. *See id.* at 1035-36.

171. *See id.* at 1036.

172. *See id.*

173. *See id.* at 1043.

174. *See, e.g.*, Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983); Joseph A. v. New Mexico Dep't of Human Servs., 575 F. Supp. 346 (D.N.M. 1982).

Joseph A. v. New Mexico Department of Human Services.[175] The plaintiffs, children currently in the custody of the New Mexico Department of Human Services, alleged that there was no procedure for development of a permanent plan for the transition of the children to permanent homes.[176] The defendant, the Department of Human Services, moved to dismiss the action, arguing that: (1) "there [was] no constitutional or statutory right to a permanent, stable, adoptive home"; and (2) the eleventh amendment barred the claims for damages.[177]

On September 23, 1983, the court approved a consent decree in a state-wide class action that sought to establish that foster children have a right to a permanent, stable home.[178] A significant point that Judge Burciaga considered was whether foster children might have a constitutionally protected due process[179] right based upon property interests arising from their entitlements under the federal statutes, such as the Adoption Assistance and Child Welfare Act of 1980.[180] The court noted that the Supreme Court has recognized a wide variety of property interests that are within the safeguards of due process.[181] Property interests, the court stated, "are not created by the Constitution, but rather 'are defined by existing rules or understandings that

---

175. 575 F. Supp. 346 (D.N.M. 1982).

176. *See id.* at 349.

177. *See id.* at 350.

178. *See id.* at 354-55.

179. The constitutional guarantee of due process is protected by relevant clauses in both the fifth and fourteenth amendments to the United States Constitution. The fifth amendment states: "No person shall be . . . deprived of life, liberty, or property, without due process of law," U.S. CONST. amend. V, and the fourteenth amendment states: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

The due process protection applies to children as well as adults. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *In re* Gault, 387 U.S. 1 (1966). Indeed, Justice Douglas, in Haley v. Ohio, 332 U.S. 596 (1948), stated that "[n]either man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." *Id.* at 601. In Rochin v. California, 342 U.S. 165 (1952), the Court explained that the purpose underlying the principle of due process originated to prevent the denial of fundamental fairness that "shocks the conscience . . . and offend a 'sense of justice.' " *Id.* at 172-73.

180. *See Joseph A.*, 575 F. Supp. at 351; *see also supra* notes 79-88 and accompanying text.

181. *See* 575 F. Supp. at 351; *see also* Board of Regents v. Roth, 408 U.S. 564 (1972) (holding that public employment may not be denied without due process when a person has a legitimate claim of entitlement to such employment); *cf.* Perry v. Sindermann, 408 U.S. 593 (1972) (teacher's continued employment at state university pursuant to implied tenure is not protected by due process); Goldberg v. Kelly, 397 U.S. 254 (1970) (government may not deprive person of certain government benefits which have been accorded by law, without granting due process).

stem from an independent source such as state-laws, rules, or understandings that secure certain benefits and that support claims of entitlement to those benefits.' "[182] The court did not ultimately decide if the plaintiffs had successfully met their burden of showing that their property interest had been violated, but ruled that the court must allow the plaintiffs an opportunity to prove this entitlement.[183]

Furthermore, the court noted that a violation of due process may also be analyzed as a denial of a "liberty interest."[184] As long as the foster children's liberty interests were created by a specific state or federal law, or the interests had been found to be implicit in the Constitution because they were "essential to the orderly pursuit of happiness by free men,"[185] then they would have a successful due process ac-

---

182. *Joseph A.*, 575 F. Supp. at 351 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). In *Roth*, the Court noted that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it." *Id.* at 577. Moreover, the Court in *Roth* found no independent source of a property interest, such as past custom, as there was in Perry v. Sindermann, 408 U.S. 593, 602-03 (1972) (requiring officials to grant respondent's request for a hearing explaining why he was not granted tenure). *Id.* at 578 n.16.

A past custom does exist in the case of older foster children, and thus supports a claim of a due process violation based upon property interests. *See* 42 U.S.C. § 606 (1982). In fact, before the 1981 amendment to 42 U.S.C. § 606, Pub. L. No. 97-35, § 2311, the past custom was to aid foster children until age twenty-one. *See* 42 U.S.C. § 606, Pub. L. No. 88-641 (1964 amend.). Older foster children have more than an abstract need, and in fact, have a property interest. *See* 575 F. Supp. at 351.

183. *See Joseph A.*, 575 F. Supp. at 351.

184. *See id.* at 351-52. The Supreme Court has defined "liberty" and "property" within the meaning of the due process guarantee as "broad and majestic terms . . . 'purposely left to gather meaning from experience.' " Board of Regents v. Roth, 408 U.S. 564, 571 (1972) (quoting National Ins. Co. v. Tidewater Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

Moreover, the Court has said that a "liberty interest":

> [D]enotes not merely freedom from bodily restraint but also the right of an . . . individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923). This all-encompassing definition of a liberty interest appears to include older foster children who were discharged into independent living: these children are prevented from establishing a home and engaging in common occupations in life, because they have not had adequate preparation by the foster care system. Thus, older foster children have been denied their basic liberty interests. *Cf.* notes 185-87 and accompanying text.

185. Meyer v. Nebraska, 262 U.S. 390 (1923) (due process protects parents' liberty interest to have their child speak a foreign language). For a discussion of other types of constitutionally protected liberty interests, see Lau v. Nichols, 414 U.S. 563 (1974) (due process protects student's liberty interest in public education); Perry v. Sindermann, 408 U.S. 593 (1972) (due process protects person's liberty interest in reputation).

tion.[186] The court emphasized this point by noting that "[i]n a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."[187]

In *Joseph A.*, the court examined additional constitutional arguments.[188] The plaintiffs claimed that they had an inherent constitutional liberty interest in a permanent, stable adoptive home.[189] The court held that "there is no case law even suggesting that these children are somehow entitled, as a matter of constitutional law, to enjoy the benefits of a foster or adoptive family."[190] The court based its conclusion on the fact that this case is not the type of case in which the court is intruding into the sphere of family integrity[191] that the Constitution has been held to protect.[192] The court concluded that the plaintiffs could obtain injunctive and declaratory relief for violations of Titles IV and XX of the Social Security Act,[193] and the plaintiffs could recover monetary relief for the denial of rights under section 1983.[194] The court noted, however, that under the eleventh amendment,[195] both the Department and the individual defendants in their official capacities were immune from a suit for damages.[196]

In short, the consent decree issued in *Joseph A.* set forth a detailed scheme that restructured the foster care sytem in New Mexico.[197] *Joseph*

---

186. *See Joseph A.*, 575 F. Supp. at 352.

187. *Id.* at 351 (quoting Board of Regents v. Roth, 408 U.S. 564, 572 (1972)).

188. *See infra* notes 189-196 and accompanying text.

189. *See* 575 F. Supp. at 351-52.

190. *Id.* at 352.

191. *Id.* Traditionally, courts have tried to remain distant from domestic matters. *See* Roe v. Wade, 410 U.S. 113, 152-53 (1973). Family integrity refers to parents' right to raise and discipline their children as they see fit. *See e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Courts usually will not interfere unless it is in the "best interests of the child." *See* W. PROSSER & W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS 908 (5th ed. 1984). Moreover, the Supreme Court has recognized a "private realm of family life which the state cannot enter" without compelling justification. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (guardian was denied the right to direct her ward to distribute religious literature in violation of state law forbidding child labor). For a complete discussion of family privacy, see ROTUNDA, *supra* note 93, at 684-94; TRIBE, *supra* note 93, at 985-90.

192. *See Joseph A.*, 575 F. Supp. at 351-62. *But cf.* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977) (holding New York State's procedure for removal of children from foster homes did not violate due process); Wisconsin v. Yoder, 406 U.S. 205 (1922) (state sought to abridge parental rights in controlling child's upbringing).

193. *See Joseph A.*, 575 F. Supp. at 353.

194. *See id.*

195. *See infra* notes 223-24 and accompanying text.

196. *See* 575 F. Supp. at 353; *infra* notes 223-32 and accompanying text.

197. The consent decree in *Joseph A.* included the following requirements:

1. permanent plans must be developed for foster children within six months after the child enters care;

A. is thus a significant case in the field of foster care litigation, because it opened the doors to many new litigation theories that provided opportunities for foster children to bring successful actions.

B. Section 1983 as a Vehicle to Vindicate Substantive Rights of Foster Children

Section 1983 derives from section one of the Civil Rights Act of 1871, which provided a cause of action for deprivation of constitutional rights.[198] Since rights under federal statutory law (including the Social Security Act) are enforceable under section 1983,[199] recent foster care litigants have utilized section 1983 against states for noncompliance with obligations under Title IV-E of the Social Security Act.

---

2. "permanent foster care" must be eliminated as a category of permanent plans considered appropriate;
3. case plans must include highly specific recommendations and timetables;
4. caseloads must be limited to no more than 20 cases per worker;
5. child welfare workers and supervisors must meet more stringent qualifications;
6. extensive training programs must be provided child welfare workers and supervisors;
7. detailed guidelines for enhancing childrens' opportunities for adoption must be followed;
8. detailed computerized information and tracking system must be implemented; and
9. citizen review boards must be found to monitor the progress of foster children and have access to their case files.

575 F. Supp. at 354-64.

198. 42 U.S.C. § 1983 (1982). This section states:

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

Id.

199. *See* Maine v. Thiboutot, 448 U.S. 1 (1980). In *Maine*, the respondents alleged that the State of Maine and its Commissioner of Human Resources violated § 1983 of the United States Code by depriving the respondents of welfare benefits to which they were entitled under the Federal Social Security Act, 42 U.S.C. § 602(a)(7) (1982). 448 U.S. at 3. The Court held that a § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law. *See id.* at 4 (citing Rosado v. Wyman, 397 U.S. 397, 402 (1970), *rev'd on other grounds*, Hagans v. Lavine, 415 U.S. 528, 535 (1974) (holding that "suits in federal courts under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating states")); *see also* Quern v. Mandley, 436 U.S. 725, 729 (1978); Var Lare v. Hurley, 421 U.S. 338 (1975); Townsend v. Swank, 404 U.S. 282 (1971); King v. Smith, 392 U.S. 309, 311 (1968).

A case in point, *Lynch v. Dukakis*,[200] heavily relied upon section 1983 as a mechanism to vindicate the violation of constitutional rights. The class action was brought by all the children under the jurisdiction of Massachusetts' foster family home care system, and their natural parents and foster parents.[201] The plaintiffs sought relief with respect to the failure of the Department of Social Services to comply with the requirements set forth in Title IV-E of the Social Security Act.[202] The United States District Court for the District of Massachusetts issued a preliminary injunction[203] requiring the Department to take various steps to effect compliance with the Act.[204]

On appeal "[a]ppellants contend[ed] that Congress intended . . . section 671(b), which authorizes the Secretary to withhold or reduce federal funding under Title IV-E when a state does not comply with federal law, to be the sole remedy for violations of Title IV-E, to the exclusion of section 1983 actions."[205] The court, after considering Supreme Court precedent and the legislative history, found that "nothing in the language or structure of Title IV-E suggests that Congress meant section 671(b) to be an exclusive remedy, and appellants have shown us nothing in its legislative history or in the case law that would lead us to a different conclusion."[206] Furthermore, the court noted that although many state laws require state compliance with federal statutory requirements, often the practice is to deprive children of their federally guaranteed rights. In such cases of de facto discrimination, the court ruled that section 1983 is available as a remedy.[207] Accordingly, Senior Circuit Judge McGowan affirmed the

200. 719 F.2d 504 (1st Cir. 1983).

201. *See id.*

202. *See id.* The court in *Lynch* stated that actions taken by the Department of Social Services constitute "actions taken under the color of state law." *Id.* at 511-12. The phrase action taken under the color of state law has been defined as the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. . . ." United States v. Classic, 313 U.S. 299, 325-26 (1941) (*cited with approval in* Screws v. United States, 325 U.S. 91 (1945)).

203. For a discussion of the requirements of a preliminary injunction, see *supra* note 147 and accompanying text.

204. *Lynch*, 719 F.2d at 514. The specific relief ordered by the district court in granting the preliminary injunction provided that unless the Department of Social Services was willing to forego federal funding for its foster care and child welfare programs, it must: (1) reduce caseloads to no more than 20 per worker, or fewer if necessary, to enable workers to meet their responsibilities, *see id.* at 506; (2) provide each child with a detailed case plan, *see id.*; (3) periodically review each child's status in foster care, *see id.*; (4) assign each case, *i.e.*, deliver the file to a specific social worker within 24 hours of its receipt by the Department of Social Services. *See id.*

205. *See id.* at 510.

206. *Id.* at 512.

207. *See id.* at 511; *see also* Monroe v. Pape, 365 U.S. 167 (1961), *overruled on*

district court, holding that "to the extent that Title IV-E confers rights on individuals, section 1983 is available to remedy violations of those rights."[208]

C. Common Law Negligence Suits for Vindication of Foster Care Abuse

Attorneys have likewise brought common law negligence suits in attempts to redress foster care abuses. In *In re P.*,[209] the American Civil Liberties Union (ACLU) sued the Jefferson County Department for Human Resources in Kentucky, on behalf of a "brother and sister who had drifted in foster care for eighteen months after a court had terminated their ties to their parents."[210] The plaintiffs predicated their action on common law negligence standards, and drew analogies to statutes that impose an affirmative duty on parents to care for their children.[211] The case resulted in a consent decree in which the County officials agreed to develop permanency plans for all foster children and to adhere to firm timetables for reviewing and carrying out the plans.[212]

In *Roberta Fields v. County of Alameda*,[213] a foster child (Roberta Fields) received a large settlement from Alameda County for abuses that she suffered during her long years in foster care.[214] Similarly, her action was based on a negligence action supposedly symptomatic of a general pattern of neglect by social workers.[215] In sum, common law negligence cases can be successful for foster children, when courts are willing to find that state officials have violated their duties of care and supervision toward these needy children.[216]

---

other grounds, Monell v. Department of Social Servs., 436 U.S. 658, 690-91 (1978) (Supreme Court similarly recognized this discriminatory state practice and stated that one purpose for enacting section 1983 "was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice").

208. *Lynch*, 719 F.2d at 512.

209. *In re* P., No. 78J04583, slip op. (Ky. 1983) (*cited in* Morain, *Making Foster Care Work*, 4 CAL. LAW. 24 (1984)).

210. *Id.*

211. For a complete discussion of parental duties under common law negligence theories, see W. PROSSER & W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS 907-09 (5th ed. 1984).

212. *In re* P., No. 78J04583, slip op. (Ky. 1983) (*cited in* Morain, *Making Foster Care Work*, 4 CAL. LAW. 24 (1984)).

213. Roberta Fields v. County of Alameda, No. C-81-4164, slip op. (N.D. Cal. 1984) (*cited in* Morain, *Making Foster Care Work*, 4 CAL. LAW. 24 (1984)).

214. *See id.*

215. *See id.*

216. Nevertheless, there is an obstacle to successful foster care suits against state officials—the sovereign immunity defense. *See supra* notes 223-32 and accompanying text.

V. The Inadequacies of Current Litigation Strategies to Remedy the Problem

It is evident, after surveying the current litigation strategies[217] applied by foster care plaintiffs, that these approaches have been successful only to the extent that they have helped a limited number of plaintiffs. Each of these strategies is inadequate because it fails to correct the current problem: foster children increasingly being discharged without adequate preparation and ending up homeless.[218]

First, the one case in which a court has taken adequate steps to prevent the homelessness of discharged foster children, *Palmer v. Cuomo*,[219] is a New York State case and consequently has no precedential weight for foster children in other states.

Second, although class action suits may result in consent decrees,[220] forcing state officials to comply with specific requirements, they are problematic because they raise federalism issues by limiting a state's choice of approaches for compliance with federal law.[221] Furthermore, a "catch-22" arises when courts create broad and general consent decrees in order to prevent trampling upon a state's prerogative in structuring its own statutes. On the one hand, a vague outline of requirements that a state must follow will protect against federalism problems; on the other hand, it also permits the states to avoid making drastic changes in their policies toward foster children. As a result, consent decrees may result in a "slap on the state's hand," rather than any constructive changes. In addition, states frequently take their time determining how to accommodate their policies to the court's orders. Therefore, while they prepare plans to comply with the re-

---

217. *See supra* notes 142-216 and accompanying text.

218. *See* Rimer, *supra* note 1, at B1, col. 1.

219. *See* Palmer v. Cuomo, N.Y.L.J., July 25, 1985, at 6, col. 3 (Sup. Ct. N.Y. County 1985), *aff'd as modified*, 503 N.Y.S.2d 20 (N.Y. App. Div. 1st Dep't 1986).

220. *See supra* notes 142-97 and accompanying text.

221. In Rosado v. Wyman, 397 U.S. 397 (1970), the Supreme Court set out the appropriate remedy for violations of rights secured by federal spending. *See id.* The Court stated that in such cases, the district court should announce what is necessary to comply with the federal program, and then allow an appropriate period of time for the state to decide whether it preferred to forego federal funds. *See id.* at 408. If the state decides to retain funding it must propose a plan for achieving compliance which would then be subject to court approval. *Id.* at 408-09. *But see* Lynch v. Dukakis, 719 F.2d 504, 513 (1982) (court noted that these federalism issues "do not raise concerns as troubling as a district court's 'managing [a mental institution] or deciding in the first instance, which patients should remain [in the mental institution] and which should be removed' ") (quoting Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981)).

quired standards, foster children are growing up and moving onto the streets.[222]

Third, the eleventh amendment's sovereign immunity defense,[223] which protects the states and state officials from suits by private parties, is a sizable obstacle to successful section 1983 actions brought by foster care plaintiffs.[224] For example, in *Joseph A. v. New Mexico Department of Human Services*, the court held that the Department and the individual defendants in their official capacities were immune from a suit for damages.[225]

In addition to the "absolute immunity"[226] for states and state officials discussed above, foster care plaintiffs must also contend with the "good faith defense"[227] that can be affirmatively pleaded by government defendants.[228] The "good faith defense" is a qualified immunity based on a recent case, *Harlow v. Fitzgerald*.[229] In *Harlow*, the Supreme Court held that "government officials performing discretionary[230] functions, generally are shielded from liability for civil

---

222. Barbara L. Emmeroth, the research director of the Citizens Committee for Children, spoke about New York City's foster care system: "The city has been fairly responsive, but like anything else it takes too long. . . . And when you're talking about a child's life, you can't wait. They grow up." Roberts, *Court Ruling Hints at Broader Impact*, N.Y. Times, July 19, 1985, at B2, col. 3.

223. U.S. CONST. amend. XI provides, in relevant part: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." *Id.*

224. The eleventh amendment applies not only to a federal suit by a citizen of one state against another state, but also to a suit brought in federal court by a citizen of the defendant state. Hans v. Louisiana, 134 U.S. 1, 21 (1890); *accord* Edelman v. Jordan, 415 U.S. 651, 662-63 (1974) (holding eleventh amendment bars retroactive payment of benefits). The eleventh amendment also applies to suits against state agencies or state officials whenever "the state is the real, substantial party in interest. . . ." Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945).

225. *See Joseph A.*, 575 F. Supp. at 353.

226. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court stated that an absolute immunity applies to "officials whose special functions or constitutional status requires complete protection from suit . . . ." 457 U.S. 800, 807 (1982).

227. *See* Jensen v. Conrad, 747 F.2d 185, 195 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985). In *Jensen*, a § 1983 action against state and county agencies on behalf of foster children who died from brutal beatings by their foster parents, the court held that the county employees were entitled to a good faith immunity because the law was not clear whether these children had a constitutional right of affirmative protection. 747 F.2d at 194-95.

228. *See* Gomez v. Toledo, 446 U.S. 635, 640 (1980) (holding burden on defendant to plead good faith as an affirmative defense to § 1983 claim).

229. *See Harlow*, 457 U.S. 800 (1982).

230. To determine what a discretionary function is, see RESTATEMENT (SECOND) OF TORTS § 895d (1979). The factors listed therein at comment f include:

damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[231]

This good faith defense has a particularly strong impact on foster care cases, because of the discretionary nature of the work. Even though federal and state statutes set forth requirements that guide government agencies in the creation and operation of foster care systems,[232] an individualized determination concerning the care provided to a particular child is a subjective decision that often falls within the discretionary category.

Fourth, in individual private negligence actions, sovereign immunity defenses will similarly be problematic.[233] Furthermore, private actions are judicially uneconomical and are very expensive and time-consuming for the plaintiffs.[234] In short, litigation has proved inadequate; this is a federal problem requiring a federal remedy—federal legislation.[235]

---

(1) The nature and importance of the function that the officer is performing.

(2) The extent to which passing judgment on the exercise of discretion by the officer will amount necessarily to passing judgment by the court on the conduct of a coordinate branch of government.

(3) The extent to which the imposition of liability would impair the free exercise of his discretion by the officer.

(4) The extent to which the ultimate financial responsibility will fall on the officer.

(5) The likelihood that harm will result to members of the public if the action is taken.

(6) The nature and seriousness of the type of harm that may be produced.

(7) The availability to the injured party of other remedies and other forms of relief.

Id. comment f.

231. *Harlow*, 457 U.S. at 818.

232. *See supra* notes 52-80 and accompanying text.

233. *See supra* notes 223-26 and accompanying text. *But see* National Bank of S.D. v. Leir, 325 N.W.2d 845 (S.D. 1982). In *Leir*, the court held that a suit brought by a guardian on behalf of minors against social workers who were allegedly negligent in their placement and supervision of the minors in a foster home was not barred by sovereign immunity as an action against the state. *Id.* at 847-48. The court in *Leir* noted that the duty performed by the social worker in the case, was ministerial in nature and not discretionary, and thus the social workers were not protected by sovereign immunity. *Id.* at 848-50; *see* Bartels v. Westchester, 76 A.D.2d 517, 429 N.Y.S.2d 906 (2d Dep't 1980) (holding that the actions of county employees in failing to supervise foster child are ministerial in nature).

234. *Cf.* Pruitt v. Allied Chemical Corp., 85 F.R.D. 100, 115 (1980) (discussing time and expense saved when plaintiffs bring class actions).

235. *See infra* notes 236-86 and accompanying text.

VI. Proposal: Stark-Moynihan Bill

This Note maintains that federal legislation is needed to remedy the current problem of graduates of foster care programs entering the ranks of the homeless.[236] The legislation best suited to this goal is H.R. 2810 and S. 1329 (the Stark-Moynihan bill).[237] The Stark-

---

236. *See supra* notes 217-35 and accompanying text.

237. H.R. 2810, 99th Cong., 1st Sess., 1 (June 19, 1985). The proposed bill reads as follows:

> To amend part E of title IV of the Social Security Act to make necessary improvements in the foster care and adoption assistance program with the objective of assuring that such program will more realistically and more effectively meet the needs of the children involved, and for other purposes.
>
> TITLE I—PROVISIONS RELATING TO OLDER FOSTER CHILDREN
>
> SEC. 101. ELIGIBILITY OF OLDER CHILDREN FOR FOSTER CARE MAINTENANCE PAYMENTS.
>
> Section 472(a) [42 U.S.C. § 672(a)] of the Social Security Act is amended by adding at the end thereof (after and below paragraph (4)) the following new sentence: "In applying clause (2)(B) of section 406(a) [42 U.S.C. § 606(a)] for purposes of determining under this section whether a child would meet the requirements of such section 406(a) [42 U.S.C. § 606(a)] but for his removal from the home of a relative, the term 'twenty-one' shall be substituted for the term 'nineteen' in such clause, and everything before 'under' and after 'technical training') in such clause shall be disregarded."
>
> SEC. 102. TRANSITIONAL INDEPENDENT LIVING PROGRAMS FOR OLDER FOSTER CHILDREN.
>
> (a) IMPOSITION OF PLAN REQUIREMENT.—Section 471(a) [42 U.S.C. § 671(a)] of the Social Security Act is amended—(1) by striking out "and" at the end of paragraph (16); (2) by striking out the period at the end of paragraph (17) and inserting "in lieu thereof"; "and"; and (3) by adding at the end thereof the following new paragraph: "(18) effective October 1, 1987, provides a transitional independent living program for older foster children in accordance with section 477 [74 U.S.C. § 677]."
>
> (b) DESCRIPTION OF PROGRAM.—Part E of title IV of the Social Security Act is further amended by adding at the end thereof the following new section:
>
> "TRANSITIONAL INDEPENDENT LIVING PROGRAMS FOR OLDER FOSTER CHILDREN
>
> "SEC. 477.(a) [42 U.S.C. § 677] Each State may establish at any time on or after the effective date of this section (and must establish no later than October 1, 1987) a transitional independent living program for children with respect to whom foster care maintenance payments are being made by the State under this part and who have attained age 16, providing under such program for the establishment for each such child of an individualized transitional independent living plan (which shall be based on an individualized assessment of the child's need, set forth in writing, and incorporated into the child's case plan as described in section 475(1)) [42 U.S.C. § 675(1)] with the objective, during at least the last year in which the child is eligible for such payments, of helping the child prepare to

Moynihan bill originated as two identical bills, which were proposed by Representative Fortney H. Stark (D. Cal.) of the House of Representatives' Ways and Means Committee and Senator Daniel Patrick Moynihan (D. N.Y.) of the United States Senate's Committee on Finance.[238] The Stark-Moynihan bill is designed to improve the foster care and adoption assistance program, by attempting to ensure that the program will more realistically and more effectively meet the needs of the children involved.[239] The two sections of the bill that specifically address the problem of older foster children becoming homeless, sections 101 and 102, will be the focus of discussion in this Note.[240]

Section 101 of the Stark-Moynihan bill amends section 606(a) of the Social Security Act, which defines a dependent child.[241] The Stark-Moynihan bill redefines "dependent child" by raising the age limit from eighteen to twenty-one when a foster care dependent is a student in secondary school or vocational training school.[242] A statutory

---

live an independent life and of otherwise aiding in the adjustments which may be necessary in the child's transition to independent living.

"(b) The transitional independent living plan established for a child under subsection (a)—"(1) may include training in daily living skills, budgeting, the location and maintenance of housing, career planning, and such other aspects of independent living as may be of potential difficulty for the child, and may also include appropriate academic and vocational counseling and such additional activities as the State, under regulations of the Secretary, may determine to be appropriate and effective; and

"(2) shall be carried out in such manner, and in accordance with such minimum requirements and specifications, as the Secretary shall prescribe.

"(c) The Secretary shall develop and disseminate to the States and to providers of child welfare services, no later than April 1, 1986, information and recommendations with respect to current and developing transitional independent living programs and plans for older foster children which might provide constructive guidance or serve as models for other States in the establishment of their programs and plans under this section.

"(d) Expenses incurred by a State agency in establishing and conducting transitional independent living plans for older foster children under this section shall be considered, for purposes of section 474(a)(3) [42 U.S.C. § 674(a)(3)], to be expenses described in subparagraph (B) of such section which are necessary for the proper and efficient administration of the State plan approved under this part."

Id. at 1-5.

238. *See id.*

239. *See id.*

240. *See id.*; *see also infra* notes 241-69 and accompanying text.

241. *See* 42 U.S.C. § 606(a) (1982). For a discussion of the legislative intent underlying the definition of a dependent child, see *supra* notes 53-64, 70 and accompanying text.

242. H.R. 2810, 99th Cong., 1st Sess. §§ 101, 102, 103 (June 19, 1985).

scheme that discharges foster care children at age twenty-one rather than age eighteen is superior for a variety of reasons. First, an age limit of twenty-one comports with recent case law. In *Palmer v. Cuomo*,[243] the Supreme Court of New York, Appellate Division, held that New York Social Services Law required "supervision" for foster children until they reach age twenty-one.[244] And in *Montgomery v. Blum*,[245] the court in effect held that artificial age requirements must be ignored when they will have a negative effect on the children they are meant to help.[246] In *Montgomery*,[247] the dependent child applied for benefits for the first time at age nineteen.[248] The state denied the benefits because she had never received benefits before age eighteen.[249] The court held that the state's action was "clearly arbitrary and capricious and an abuse of discretion."[250]

Second, an age limit of twenty-one comports with the legislative history supporting the Social Security Act. For example, the Senate Report No. 1517[251] to the 1964 Amendment to the Social Security Act, which discusses the age limit for benefits to foster children, demonstrates that Congress was opposed to an arbitrary age limit.[252] The Senate Report stated that "[t]he assumption that children are no longer dependent upon attaining age [eighteen] is not valid as applied to children still attending school. Moreover, the present sharp cut-off at age [eighteen] may have the effect of forcing just those children to leave school who are most in need of a high school education or vocational training if they are to become self-sufficient and stay off the welfare rolls."[253]

Furthermore, the fact that Congress has repeatedly amended and experimented with the age limits[254] shows that Congress is not com-

---

243. *See* 503 N.Y.S.2d 20 (N.Y. App. Div. 1st Dep't 1986). For a complete discussion of *Palmer*, see *supra* notes 143-61 and accompanying text.

244. *See id.*

245. *See* 112 Misc. 2d 190, 446 N.Y.S.2d 897 (Sup. Ct. Erie County 1982).

246. *See id.* at 193, 446 N.Y.S.2d at 899.

247. *See id.*

248. *See id.*

249. *See id.*

250. *Id.*

251. *See* S. REP. No. 1517, 88th Cong., 2d Sess. 3925, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 3925.

252. *Id.*

253. *Id.*

254. The relevant statutes, 42 U.S.C. §§ 600-76 (1982), have been amended several times. *See* Townsend v. Swank, 404 U.S. 282, 288-89 (1971) (discussing varying age limitations that Congress has applied to foster children assistance programs). In 1939, Congress amended the Social Security Act to extend aid to foster children between the ages of sixteen and seventeen regularly attending school. *See id.* at 288. Congress

mitted to any particular age. Rather, it reflects Congress' constant struggle to choose an age that will best achieve the paramount goal of foster care assistance—to protect the needy child.[255]

In addition, an age limit of twenty-one is compatible with two sections of the Social Security Act that grant assistance to needy children until they reach the age of twenty-one or twenty-two. These sections are: (1) section 606(e)(1),[256] which provides for emergency assistance to AFDC dependent children until age twenty-one; and (2) section 401,[257] the Old-Age Survivors and Disability Insurance, which provides funds until age twenty-two.

These two sections, like foster care legislation, share the common goal of preventing the destitution of needy children.[258] Because of this common goal, and because the Social Security Act should be comprehensive and consistent, the age limits for foster care payments and the age requirements in the emergency assistance and the Old-Age Survivors Insurance and Disability sections should be harmonious.

Moreover, an age limit of twenty-one for foster care payments will allow more time to prepare children for the transition into independent living—particularly those who entered foster care at sixteen or seventeen after already experiencing life on the streets.[259] As a matter of common sense, a three-year extension of foster care supervision will allow an eighteen-year-old to gain experience and maturity which will enhance his or her transition into independent living.

---

extended in 1956 benefits to all dependent foster children between the ages of sixteen and seventeen. *See id.* In 1964, Congress again amended the Social Security Act to extend benefits to foster children between the ages of eighteen and twenty-one if they were in high school or vocational school. *See id.*

255. *See* King v. Smith, 392 U.S. 309, 325 (1968).

256. *See* 42 U.S.C. § 606(c)(1) (1982).

257. *See* 42 U.S.C. § 402(d)(g) (1982).

258. *See* 42 U.S.C. § 606(e)(1) (1982); *id.* § 401 (1982); *see also* Townsend v. Swank, 404 U.S. 282, 290 (1971) (discussing related purposes of Old Age Survivors and Disability Insurance provisions and AFDC program).

259. To a certain extent, the proposed bill is based upon the findings of an independent study being performed by Helen Stone, director of the Institute for Quality Child Welfare Services, a collaboration between Child Welfare League of America, Inc., and the School of Social Services at Fordham University. In her testimony before the Subcommittee on Public Assistance and Income Maintenance of the Senate Committee on Ways and Means, Ms. Stone reported that foster children are appearing "in runaway and homeless youth programs and other crisis intervention programs in increasing numbers." *See* Stone, *Hearings on H.R. 2810*, *supra* note 126, at 2. She attributes the increase "at least in part to a greater emphasis being placed on providing foster family care as the 'least restrictive alternative' for status offenders, [and] an increase in the number of dependent adolescents due to unmarried pregnancy, and the large number of youth who simply grew up in the system because no permanent plans were made for them at an earlier age." *Id.* at 2-3.

260. *See* H.R. 2810, 99th Cong., 1st Sess. § 102, 3-5 (June 19, 1985).

261. *See* 42 U.S.C. § 671(a) (1982).

Section 102 of the Stark-Moynihan bill adds subection (18)[260] to section 671(a) of the Social Security Act.[261] Section 671(a) sets forth the conditions with which states must comply in order to receive federal funds;[262] subsection (18) would mandate that states create independent living programs in accord with specific standards articulated in a second new section, section 677.[263] Section 677 outlines programs that state independent living programs must include, such as: (1) training in budgeting; (2) locating housing; and (3) career planning.[264] Most important, section 677 orders states to establish an individualized transitional independent living plan for each child.[265] The bill's strategy of focusing on the needs of each individual child is consistent with Supreme Court precedent.[266] In fact, the Supreme Court in *Planned Parenthood v. Danforth*[267] and *Akron v. Akron Center for Reproductive Health, Inc.*[268] held statutes unconstitutional that failed to provide for an individualized determination of a child's maturity.[269]

It is true that Congress passed a diminished form of section 102 of the Stark-Moynihan bill when it enacted section 12307 (Independent Living Initiatives) of the Consolidated Omnibus Budget Reconciliation Act of 1985.[270] This bill, however, does not sufficiently remedy the current problems of foster children. First, section 12307 requires states to create independent living programs for foster children only between the ages of sixteen and eighteen.[271] As discussed above, independent living programs that end at age eighteen are unsatisfactory because they prematurely terminate assistance to needy children. Moreover, section 12307 is impotent: first, it merely *suggests* that states may include programs, such as individual case plans, instead of mandating that states comply with the specific requirements.[272] Even

---

262. *See id.*

263. *See* H.R. 2810, 99th Cong., 1st Sess. § 102, 3-5 (June 19, 1985). Although § 677 of the Social Security Act has been enacted by the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 12307, 100 Stat. 294 (1986), the Stark-Moynihan bill proposed a different version of § 677, and for the purposes of this Note, it will continue to be called § 677. *See* H.R. 2810, 99th Cong., 1st Sess. § 102, 3-5 (June 19, 1985). For a discussion of § 677 enacted by Pub. L. No. 99-272, see *infra* notes 270-73 and accompanying text.

264. *See* H.R. 2810, 99th Cong., 1st Sess. § 102, 3-5 (June 19, 1985).

265. *See id.*

266. *See supra* note 92 and accompanying text; *infra* notes 267-68 and accompanying text.

267. *See* 428 U.S. 52, 72-75 (1976) (striking down state law requiring minors to obtain parental consent as prerequisite to abortion).

268. *See* 462 U.S. 416, 439-42 (1983) (holding unconstitutional state abortion statute that did not provide for individualized determination of child's maturity).

269. *See* 428 U.S. 52 (1976).

270. *See* Pub. L. No. 99-272, § 12307, 100 Stat. 294 (1985).

271. *See id.*

272. *See id.*

worse, it qualifies state compliance as "subject to the availability of funds."[273] Thus, section 12307 leaves too much to the discretion of the states, and therefore allows the states to circumvent their responsibilities to foster children while simultaneously perpetuating the sovereign immunity obstacle.

Opponents of the Stark-Moynihan bill focus on the costs of the proposed bill,[274] while ignoring the necessity of assisting older foster children. Instead, opponents support two bills proposed by the Department of Health and Human Services and favored by the Reagan administration, H.R. 2894 and S. 1266, (the HHS bill).[275] The HHS bill would put a permanent ceiling on Federal Foster Care expenditures, thereby turning foster care into a block grant eliminating the individual entitlement to care for poor children, without the assurance of adequate federal funding for service alternatives.[276] In addition, the HHS bill offers an incentive to the states to discharge foster children as quickly as possible.[277] This incentive consists of a $3,000 "bonus" for each child that the states are able to discharge from foster care, when that child has remained in the foster care system for more than two years.[278]

Critics of the HHS bill maintain that it is an incentive for states to "dump long-term foster care children out of the system to earn this bonus."[279] Indeed, the HHS bill is concerned primarily with a reduced budget and not the welfare of foster children.[280] Such a posi-

---

273. *See id.*

274. Dorcas Hardy, Chief of Health & Human Services' Office of Human Development Services, noted that H.R. 2810 would allot funds out of Title IV-E administrative costs, and she emphasized that under current law, costs have "multiplied more than 4½ times—from $32 million in [fiscal year] 1981 to $147 million in [fiscal year] 1984." *Adoption Assistance and Child Welfare Act: Hearings on S. 1266, S. 1329 Before the Subcomm. on Social Security and Income Maintenance of the Comm. on Finance, United States Senate*, 99th Cong., 1st Sess. 20 (1986) (testimony of Dorcas Hardy, Chief of Health & Human Services' Office of Human Dev./Servs.) [hereinafter cited as *Hearings on S. 1266, S. 1329*].

275. H.R. 2894, 99th Cong., 1st Sess. (1985); *see also* 11 CHILD PROTECTION REPORT 3 (Sept. 27, 1985).

276. *Hearings on S. 1266, S. 1329, supra* note 274, at 21-23. In 1981, the Reagan administration first tried to fold foster care funds into a block grant for social services to be given to each state, leaving the state to decide how to spend the money. *See* D. MOYNIHAN, FAMILY AND NATION 49 (1986). Senator Moynihan notes: "In principle this [block-grant] was good federalism, but welfare policies are an exception to this principle. Some states had adoption assistance; others hadn't and never would have had until the federal government subsidized it." *Id.* at 50. This measure passed in the Senate but was dropped in the Conference Committee with the House. *Id.* at 50-51.

277. *Hearings on S. 1266, S. 1329, supra* note 274, at 13.

278. *See id.*

279. *See Hearings on S. 1266, S. 1329, supra* note 274, at 31.

280. The position advocated by Dorcas Hardy and the bill H.R. 2894 is consistent

tion is hardly consistent with the legislative history or the case law.[281] As the United States Supreme Court has unequivocally asserted, "[s]aving money is not a proper justification for the denial of assistance to the needy."[282]

Admittedly, the Stark-Moynihan bill is not free of problems. Overall, however, the bill's weakness is that it does not go far enough to protect foster children.

First, the bill merely suggests possible programs, such as budgeting, career planning, and locating housing, for a state to include in its independent living programs.[283] To be effective, the bill should command the states to implement specific programs. Second, the incentive the bill provides—matching federal funds—is too weak. Instead, the bill should emulate the 1986 Federal Highway Fund Act,[284] which revokes federal funding for state highways from any state that refuses to raise its drinking age to twenty-one.[285] The penalty of losing federal funds from another source of federal funding would create a much more effective incentive.[286]

In sum, despite minor shortcomings, the Stark-Moynihan bill re-

---

with several recent Reagan administration actions. *See* Fuerbringer, *Homeless Are Not Duty of U.S., Reagan Aide Says*, N.Y. Times, Feb. 19, 1986, at A18, col. 1. The Reagan administration in its 1978 budget proposed the elimination of $70 million for the homeless that had been in the 1986 budget of the Federal Emergency Management Agency. *See id.* at col. 3. Moreover, the director of the Office of Management and Budget, James C. Miller, in testimony before the House and Budget Committee said, "we believe the homeless are not a federal responsibility but a state and local responsibility." *Id.* at cols. 2-3. H.R. 2894 illustrates another example of the administration's naive attitude about the causes of homelessness which was first apparent in President Reagan's statement in January, 1984 when he thought most of the homeless people sleeping on grates in cities were doing so by "choice." *See id.* at col. 4.

281. *See supra* notes 52-73, 90-122 and accompanying text.

282. Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (holding state statute prohibiting welfare benefits to residents of less than one year violated equal protection).

283. *See* H.R. 2810, 99th Cong., 1st Sess. § 101, 2-3 (June 19, 1985).

284. *See* Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 4101, 100 Stat. 112 (1986).

285. *See id.* at § 4104, 100 Stat. at 114.

286. For example, the results of the federal government's imposition of penalties on states by taking state highway funds pledged to the states by the federal government complied with the federal statute. Moreover, the federal government's indirect effort to raise state minimum drinking ages has been very successful, because by January of 1985, 24 states had enacted legislation making the minimum drinking age 21. NEWSWEEK, Dec. 23, 1985, at 7. As of September, 1985, 13 more states enacted laws raising the legal drinking age. *See id.* As of December, 1985, every state either had a minimum drinking age of 21 or was changing the age to 21 during the next year, except for Colorado, Idaho, Iowa, Louisiana, Minnesota, Montana, Ohio, South Dakota, West Virginia, Wisconsin and Wyoming. *See id.*

mains the best remedy for foster children who, upon automatic discharge at age eighteen, become homeless.

VII. Conclusion

The current problem in the foster care system is that it allows states to discharge eighteen-year-olds who are ill-prepared for independent living. As a result, these foster children become homeless. Current litigation strategies have failed to remedy the problem. The Stark-Moynihan bill will help alleviate the syndrome of sending foster children out of their homes and onto the streets.

Mari Brita Maloney