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FOSTERING THE HUMAN RIGHTS OF YOUTH IN FOSTER CARE: DEFINING REASONABLE EFFORTS TO IMPROVE CONSEQUENCES OF AGING OUT

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"It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."
—U.S. Supreme Court Associate Justice Wiley Rutledge, in *Prince v. Massachusetts* (1944)[1]

"When you make a decision, you go home. I don't. I live your decisions!"
—L.B., speaking to the juvenile court of Baltimore City (2007)

Introduction

Seventeen-year-old L.B.[2] stood before a juvenile court judge in Baltimore City during one of his child welfare hearings, or permanency hearings. That day, the judge was deciding where and with whom L.B. would live. Frustrated with the child welfare[3] system,

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1 Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

2 L.B.'s story is adapted from an earlier article by the author. *See* Ramesh Kasarabada, *Maryland's Recognition of Children's Human Rights*, Md. Fam. L. Monthly, Nov. 2010, at 4. L.B.'s story has been modified slightly to protect his confidentiality and that of his family.

3 This Article uses *foster care* and *child welfare* interchangeably. The federal definition of "foster care" is

> 24-hour substitute care for children placed away from their parents or guardians and for whom the title IV-E [42 U.S.C. § 670 (1997) *et seq.*of the Social Security Act, as amended] agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are

L.B. loudly reminded the judge that he—and not the professionals making the decisions about his life—experienced the consequences of her decision. L.B. lived in foster care since he was two years old. The state child welfare agency placed him initially in foster homes, but then, as he grew older, mainly in group homes. On the day L.B. made his above-quoted declaration, he returned to Maryland after living for eighteen months in an out-of-state group home. He wanted to live with Ty, his twenty-five-year-old cousin and one of the few family members with whom he had contact. Although Ty was working, had a two-bedroom apartment, and had himself lived in foster care for a time, the state agency argued he could not provide the "structure" of a group home. That structure was three staff persons working in eight-hour shifts in a house with six youth in foster care. L.B. countered that Ty's experiences in foster care and in becoming self-sufficient would help him do the same. The court deferred to the state agency, however, and placed L.B. in a group home. Ty eventually lost contact with L.B., as L.B. was moved from group home to group home. At subsequent permanency hearings, the court found that the state agency made reasonable efforts towards L.B.'s long-term plan in foster care by simply finding a group home in which L.B. would live. The court did not determine the specific services L.B. needed to become self-sufficient, such as what he needed to obtain his high school diploma, employment, or housing. When he exited foster care at age twenty-one,[4] or aged out, L.B. did not have his high school diploma or GED and did not have a job; he did not have a stable home or family support. L.B. became homeless within months of aging out. Within one year of aging out, he was incarcerated for failing to pay restitution for a delinquency charge he had while in foster care. Within two years, L.B. was incarcerated for theft and unlawful possession of firearms.

Every year, tens of thousands of youth[5] leave foster care when

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> made by the State, Tribal or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made.

45 C.F.R. § 1355.20(a) (2013).

[4] Maryland sets the age at which youth age out of foster care at twenty-one. MD. CODE ANN., CTS. & JUD. PROC. § 3-804(b) (West, Westlaw through chapter 1, 4, 9, 40, 41, 44, 45, 48, 49, 62, 67, 68, 72, 88, 90, 95, 127, 146, 233, 241, 246, 254, and 255 of the 2014 reg. sess. of the General Assembly). For the age at which youth will age out of each jurisdiction's foster care system, see *infra* note 29.

[5] In this Article, *youth* refers to those young people between the ages of sixteen and twenty-one years of age.

they reach the maximum age limit to remain in their state's foster care system, or "age out."[6] Like L.B., many grew up in foster care and aged out without having a stable home in which to live, employment, or the skills to be self-sufficient.[7] Youth aging out of foster care experience high rates of homelessness, incarceration, and underemployment; they are likely to become entrenched in poverty.[8] This result is the opposite of what child welfare laws require for youth aging out of foster care.[9] The overarching purpose of child welfare law is that all children in state care be provided permanency.[10] Permanency includes one of the federally defined goals for each child in foster care.[11] Permanency for youth means preparing them to be self-sufficient once they age out.[12] To ensure children have permanency, state courts must find at least annually that state agencies have made "reasonable efforts" towards a child's permanency plan.[13] Federal law does not define reasonable efforts, however,[14] and, as a result, courts find that state agencies make reasonable efforts without ensuring those agencies provide the ser-

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6 *Aging out* of foster care refers to those youth who remain in foster care until the age of majority (or the age at which their specific state ends foster care services to youth) or the age at which the state emancipates them into independent living. Mark E. Courtney, *The Difficult Transition to Adulthood for Foster Youths in the US: Implications for the State as Corporate Parent*, 23 SOC. POL'Y REP., no. 1, 2009, at 3, 3–4, *available at* http://files.eric.ed.gov/fulltext/ED509761.pdf. For a state survey of the "age out" ages in each jurisdiction, see *infra* note 29.

7 *See* Foster Care Independence Act of 1999, Pub. L. 106-169, § 101(a)(4), 113 Stat 1822. *See generally* MARK E. COURTNEY ET AL., CHAPIN HALL AT UNIV. OF CHICAGO, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 23 AND 24 (2010), *available at* http://www.chapinhall.org/sites/default/files/Midwest_Study_Age_23_24.pdf (describing the outcomes of aging out by following a group of former foster youth from age seventeen through twenty-six;. the authors issued several reports when the youth reached certain ages, including twenty-three and twenty-four).

8 COURTNEY ET AL., *supra* note 7.

9 *See* 42 U.S.C. § 675(1)(D), (H) (2012); 45 C.F.R. § 1355.25(c) (2013).

10 *See In re* Yve S., 819 A.2d 1030, 1045 (Md. 2003) (citing *In re* Adoption/Guardianship No. 10941, 642 A.2d 201, 205 (Md. 1994)).

11 The permanency plan may be reunification with a parent or guardian; adoption (with the state filing a petition to terminate parental rights); referral for legal guardianship, including with a relative; or in cases where the state has documented a compelling reason that the aforementioned plans are not in the child's best interests, another planned permanent living arrangement. *See* 42 U.S.C. § 675(5)(C)(i); 45 C.F.R. § 1355.20(a) (defining "permanency hearing" and describing the permanency plans available for a child in foster care).

12 *See* 42 U.S.C. § 675(1)(D) .

13 *Id.* § 671(a)(15); 45 C.F.R. § 1356.21 (b)(2)(i) ("The [state] agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect . . . at least once every twelve months thereafter while the child is in foster care.").

14 Suter v. Artist M., 503 U.S. 347, 360–61 (1992) (holding that Congress did not

vices youth need to be self-sufficient. Moreover, current federal law only requires state agencies to develop a "transition plan" that identifies the youth's needs in housing, education, and employment, within ninety days of the date they will age out.[15] This plan does not require actually providing any specific services the youth needs.[16] Further contributing to the poor consequences of aging out is that a youth's wishes regarding services they need may be reported to the court, but those wishes are subordinate to the state's determination of what is in their best interests. Youth are often passive participants in proceedings meant to protect them, even though youth experience all of the consequences of the decisions. Although this approach to decision-making and service provision may be justified for very young children in foster care, it must change for youth aging out of foster care to ensure they age out safely. L.B.'s statement to the juvenile court is a reminder to all in the child welfare system of this reality.

This Article argues that courts and advocates for youth in foster care should utilize a human rights approach to determining and providing services youth need to age out safely. The "reasonable efforts" requirement in child welfare cases is the best method for incorporating human rights in domestic law and improving the consequences of aging out of foster care because the requirement is part of the regular review of the child's circumstances.[17] What is needed is a definition of "reasonable efforts" for youth that ensures aging out of foster care safely instead of into the poverty, instability, and struggle too many have long experienced. Using internationally-recognized and accepted human rights standards applicable to youth, this Article defines reasonable efforts that state agencies must provide to youth aging out of foster care. The efforts necessary to help youth become self-sufficient must be youth-directed, consistent with the maturity and needs of the specific youth. The approach in this Article requires courts to determine whether state agencies actually provided services to prepare youth

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intend to create a private right of action for the reasonable efforts requirement in federal child welfare law).

15 42 U.S.C. § 675(5)(H).

16 *Id.*

17 42 U.S.C. § 675(5)(B) (requiring a state's "case review system" review the placement, circumstances, and progress towards permanency for a child in foster care at least every six months); *see also id.* § 671(a)(15); 45 C.F.R. § 1356.21 (b)(2)(i) ("The [state] agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect . . . at least once every twelve months thereafter while the child is in foster care.").

for self-sufficiency instead of simply creating a plan that lists the needs of the youth who is aging out.

Part I will describe the consequences of aging out of foster care and will also describe the role of reasonable efforts in enforcing child welfare laws. Part II will describe the three-part human rights approach[18] that defines reasonable efforts for youth aging out. The approach first identifies specific rights as values the world community shares and for which the world community expressed its acceptance through the Convention on the Rights of the Child (CRC),[19] the International Covenant on Civil and Political Rights (ICCPR),[20] and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[21] The approach next incorporates these rights into existing child welfare law using accepted methods of statutory construction to clarify the ambiguity of "reasonable efforts." The approach then advocates utilizing community-based supports for youth as part of the broader children's rights and anti-poverty movements. Part III will explain how courts in other countries have applied human rights of youth in their domestic cases. Part IV will illustrate how this approach would have affected L.B. by providing examples of questions courts should ask at each child welfare hearing for youth, beginning when he or she turns sixteen years old. The Article concludes by advocating that courts incorporate into child welfare laws the internationally-recognized human rights of youth who are aging out of the child welfare system.

I. The Unreasonable Consequences of Aging Out of Foster Care

This section first describes "reasonable efforts" and the ambiguity of the term. It then describes the known consequences of

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18 This framework was articulated by staff at the Maryland Legal Aid Bureau to improve the services it provides to its clients and intended for lawyers and non-lawyers to use. It was developed after the Bureau's "needs assessment" of the communities it serves and in collaboration with legal services advocates nationwide.

19 Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC], *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%201577/v1577.pdf ("For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.").

20 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%20999/v999.pdf.

21 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR], *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%20993/v993.pdf.

aging out of foster care, attributing these consequences to the lack of a clear definition for "reasonable efforts."

A. The Realities of Aging Out of Foster Care

The consequences of aging out are poor and have been for decades.[22] Congress first enacted legislation specifically directed to assist youth aging out of foster care in 1986, after major changes to the federal child welfare law only a few years earlier.[23] Despite the services Congress encouraged, the results remained poor. Therefore, in 1999, Congress passed the Foster Care Independence Act of 1999,[24] in response to findings that the nearly twenty thousand youth who age out of the foster care system annually[25] did so with "high rates of homelessness, non-marital childbearing, poverty, and delinquent or criminal behavior."[26] Youth aging out of foster care also were "frequently the target of crime and physical assaults."[27] For many years, states varied their age-out age between sixteen to twenty-one, with most setting the age at eighteen.[28] Most states now have extended their age of aging out to twenty-one.[29] The results of

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22 *See* Mari Brita Maloney, Note, *Out of the Home onto the Street: Foster Children Discharged into Independent Living*, 14 FORD. URB. L.J. 971 (1985) (describing stories of youth who age out of New York City's foster care system and into homelessness, poverty, and incarceration, while advocating for legislative and programmatic changes to the foster care system that would provide youth more support as they age out).

23 Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272, § 12307(a), 100 Stat. 82.

24 Pub. L. No. 106-169, 113 Stat 1822.

25 *Id.* § 101(a)(3).

26 *Id.* § 101(a)(4).

27 *Id.*

28 At the time of the 1986 legislation, the overwhelming majority of states set the age for leaving the foster care system at eighteen. *See* Maloney, *supra* note 22, at 980 n.81. Approximately one-third of states allowed youth to remain in state care beyond eighteen. *See id.* Still, a number of states—including Colorado, Nebraska, and Mississippi—remarkably required youth to age out when they turned sixteen years old. *Id.*

29 Today, most jurisdictions establish twenty-one as the age at which youth will age out of foster care: Alabama (ALA. CODE § 38-7-2(1) (West, Westlaw through Act 2014-191 of 2014 reg. sess.) (age twenty-one, defining "child" as those under age twenty-one who are still in foster care)); Alaska (ALASKA STAT. § 47.10.080(c) (West, Westlaw through legis. eff. Apr. 17, 2014, passed during the second reg. sess. of the 28th Legislature) (age nineteen, but can extend to age twenty-one with the youth's consent)); Arizona (ARIZ. REV. STAT. ANN. § 8-501(B) (West, Westlaw through legis. eff. Apr. 23, 2014 of the second reg. sess. of the 51st Legislature) (age twenty-one)); California (CAL. WELF. & INST. CODE § 303(a) (West, Westlaw incl. urgency legis. through Ch. 11 of 2014 reg. sess.) (age twenty-one)); Colorado (COLO. REV. STAT. § 19-3-205(2)(a) (West, Westlaw through laws eff. Apr. 11, 2014) (age eighteen, but when youth turns seventeen, the court determines whether he or she is independent or whether it should continue jurisdiction until age twenty-one)); Connecticut (CONN. GEN. STAT. ANN. § 17a-93(a) (West, Westlaw incl. enactments through Public Act 14-1 of the 2014

Feb. reg. sess. of Conn. Gen. Assembly) (defining "child" as those younger than age eighteen or under twenty-one if he or she is enrolled in an education, vocation, or job training program)); Delaware (DEL. CODE ANN. tit. 10, § 929(a) (West, Westlaw through through 79 Laws 2014, ch. 21) (age eighteen, but can extend to age twenty-one through motion with the court)); Washington, D.C. (D.C. CODE ANN. § 16-2303 (West, Westlaw through February 21, 2014) (age twenty-one)); Florida (FLA. STAT. ANN. § 39.013(2) (West, Westlaw incl. chapters in effect from the second reg. sess. of 2014 of the 23rd Legislature through March 31, 2014) (age twenty-one, unless the youth elects to leave foster care or does not meet other eligibility requirements); Georgia (GA. CODE ANN. § 15-11-2(10)(c) (West, Westlaw through Acts 343 to 346 and Acts 348 to 357 of the 2014 reg. sess.) (youth can remain in state care until age twenty-two, or twenty-three if he or she is receiving independent living services)); Guam (19 GUAM CODE ANN. § 4202(b) (West, Westlaw through Public Law 31-285) (age eighteen)); Hawaii (HAW. REV. STAT. ANN. § 587A-35 (West, Westlaw with amends. through act 5 of the 2014 reg. sess.) (age nineteen)); Idaho (IDAHO CODE ANN. § 39-1202(3), (9) (West, Westlaw through the 2014 second reg. sess. of the 62d Idaho Legislature) (age eighteen, but age twenty-one if youth is living in a foster home, group home, or transition living arrangement when he or she reaches age eighteen)); Illinois (705 ILL. COMP. STAT. ANN. § 405/2-31(1) (West, Westlaw through P.A. 98-628 of the 2014 reg. sess.) (age nineteen, but can extend to twenty-one if a court determines the youth and public's best interests require continuation of wardship)); Indiana (IND. CODE ANN. § 31-28-5.8-5(a) (West, Westlaw through second reg. sess. of 118th General Assembly, eff. through May 1, 2014) (age eighteen, but can be extended to age twenty if the youth is employed, attending an educational or vocational program, or has a medical condition excusing such a program)); Iowa (IOWA CODE ANN. § 234.1(2) (West, Westlaw incl. immediately eff. legis. signed as of Apr. 11, 2014 from the 2014 reg. sess.) (age nineteen if youth is in educational program)); Kansas (KAN. STAT. ANN. § 38-2203(c) (West, Westlaw through 2013 reg. and special sess.) (age twenty-one)); Kentucky (KY. REV. STAT. § 620.140(1)(d)–(e) (West, Westlaw through the end of the 2013 reg. sess. and the 2013 extraordinary sess.) (age eighteen, but up to twenty-one if youth asks the court for an extension before he or she turns nineteen)); Louisiana (LA. REV. STAT. ANN. § 46:231 (West, Westlaw through the 2013 reg. sess.) (age eighteen, or nineteen if enrolled in school)); Massachusetts (MASS. GEN. LAWS ANN. ch. 119, § 23 (West, Westlaw through ch. 70 of the 2014 second annual sess.) (age eighteen, or nineteen if enrolled in school)); Maine (ME. REV. STAT. tit. 22, § 4037-A(1), (5) (West, Westlaw through ch. 554 of the 2013 second reg. sess. of the 126th Legislature) (age twenty if youth is enrolled in an education or vocation training program, is employed, or has a documented medical condition justifying extended services, but no guardians ad litem during extended-care period)); Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 3-804(b) (West, Westlaw through chapter 1, 4, 9, 40, 41, 44, 45, 48, 49, 62, 67, 68, 72, 88, 90, 95, 127, 146, 233, 241, 246, 254, and 255 of the 2014 reg. sess. of the General Assembly) (age twenty-one, unless court terminates case)); Michigan (MICH. COMP. LAWS ANN. § 722.981-85 (West, Westlaw hrough P.A.2014, Nos. 93, 95–96, 98–100, 102–115, and 117–119 of the 2014 reg. sess. of the 97th Legislature) (age twenty-one)); Minnesota (MINN. STAT. ANN. § 260C.451 (West, Westlaw incl. laws of the 2014 reg. sess. through ch 166, except chs. 149, 152, 157, 161, and 164) (age twenty-one if enrolled in school or employed)); Mississippi (MISS. CODE ANN. § 43-21-105 (West, Westlaw through the 2014 reg. sess.) (age eighteen)); Missouri (MO. ANN. STAT. § 110.04 (12) (West, Westlaw incl. amends. received through Mar. 15, 2014) (defining "juvenile" as those under age twenty-one and within family court jurisdiction)); Montana (MONT. CODE ANN. § 41-3-102(6) (West, Westlaw through the 2013 sess.) (age eighteen)); Nebraska (NEB. REV. STAT. ANN. §§ 43-905, 43-4502 (West, Westlaw through end of 2013 reg. sess.) (age nineteen, but allows youth and former foster youth to receive services until they reach

twenty-one if they are participating in education, vocational, or other independent living services)); Nevada (NEV. REV. STAT. ANN. § 432B.594 (West, Westlaw through the 2013 77th reg. sess. and the 27th special sess. of the Nevada Legislature) (age twenty-one)); New Hampshire (N.H. REV. STAT. ANN. § 169-C:4 (West, Westlaw through ch. 2 of the 2014 reg. sess.) (age eighteen, until he or she completes high school, or otherwise age twenty-one)); New Jersey (N.J. STAT. ANN. § 30:4C-2.3 (West, Westlaw incl. laws eff. through L. 2014, c. 1 and J.R. No. 1) (age twenty-one if youth was receiving foster care services at age sixteen and has not refused or requested services end at age eighteen or after)); New Mexico (N.M. Stat. Ann. § 32A-4-25.3 (West, Westlaw through all 2013 legis.) (age nineteen if the court determines youth's need for transition services prior to age eighteen)); New York (N.Y. FAM. CT. ACT § 1087(a) (McKinney, Westlaw through L. 2014, chs. 1–19 and 50–58) (age twenty-one)); North Carolina (N.C. GEN. STAT. ANN. § 7B-201(a) (West, Westlaw through the end of the 2013 reg. sess. of the General Assembly) (age eighteen or youth is otherwise emancipated, whichever occurs first)); North Dakota (N.D. CENT. CODE ANN. § 27-20-02(4) (West,Westlaw through the 2013 reg. sess. of the 63rd Legislative Assembly) (under age eighteen and unmarried)); Ohio (OHIO REV. CODE ANN. § 2151.81 (West, Westlaw through Files 1 to 94 of the 130th General Assembly (2013–2014)) (age twenty-one for youth who was in temporary or permanent custody of public or private placement agency or in a planned permanent living arrangement through the same agency)); Oklahoma (OKLA. STAT. ANN. tit. 10A, § 1-4-101(2)(a) (West, Westlaw through ch. 23 of the first extraordinary sess. of the 54th Legislature (2013)) (age eighteen)); Oregon (OR. REV. STAT. ANN. § 419B.328 (West, Westlaw incl. emergency legis. through ch. 80 of the 2014 reg. sess.) (age twenty-one for "ward" of the state)); Pennsylvania (42 PA. CONS. STAT. ANN. § 6302 (West, Westlaw through 2014 reg. sess. acts 1–21, 23, 24, 26, 27, and 30) (age twenty-one for youth adjudicated dependent before age eighteen, asked for services to continue, and is in education program, is employed, or has medical condition that prevents either education or employment)); Puerto Rico (P.R. LAWS ANN. tit. 8, § 444(v) (West, Westlaw through Dec, 2011, except for Act No. 136 of the 2010 reg. sess.) (age eighteen as definition of "minor")); Rhode Island (R.I. GEN. LAWS ANN. § 40-11-2(2) (West, Westlaw with amends. through ch. 534 of 2013 reg. sess.) (defining "child" as those under age eighteen)); South Carolina (S.C. CODE ANN. § 63-7-20(3) (West, Westlaw through end of 2013 reg. sess.) (age eighteen as definition of "child")); South Dakota (S.D. CODIFIED LAWS § 26-6-6.1 (West, Westlaw through the 2013 reg. sess.) (age twenty-one, if any child welfare agency determines the youth needs continued services)); Tennesee (TENN. CODE ANN. §§ 37-1-102(4)(G), 37-2-417(b) (West, Westlaw with laws from the 2014 second reg. sess., eff. through Feb. 28, 2014)) (age of majority set at eighteen, but expanded to age twenty-one for youth wishing to receive transition services from the child welfare agency on a voluntary basis only)); Texas (TEX. FAM. CODE ANN. § 263.602 (West, Westlaw through the end of the 2013 third called sess. of the 83d Legislature) (age twenty-one for youth to receive transition services)); Utah (UTAH CODE ANN. § 78A-6-105(6) (West, Westlaw through 2013 second special sess.) (age eighteen as definition of "child")); Vermont (VT. STAT. ANN. tit. 33, § 4904 (West, Westlaw incl. all laws eff. upon passage through No. 95 of the 2013–2014 sess. (2014) of the Vt. General Assembly) (age twenty-two for youth who was in state custody at age eighteen or has spent at least five years in state custody between age ten and eighteen, provided the youth is employed or attending an education or vocational program)); Virgin Islands (V.I. CODE ANN. tit 34, § 104(a) (West, Westlaw through act 7471 of the 2012 reg. sess.) (age eighteen as definition of "child"); Virginia (VA. CODE ANN. § 63.2-905.1 (West, Westlaw through end of 2013 reg. sess. and the end of 2013 special sess., and incl. 2014 reg. sess. chs. 1, 2, 8, 23, 29, 47, and 59) (mandating state agencies to provide independent living services to youth between ages eighteen and twenty-one, where before such provision was only discretionary)); Washington (WASH. REV. CODE ANN.

this extension have been mixed at best with some studies concluding that prolonging a stay in foster care only delayed homelessness and other negative consequences instead of reducing them.[30] In 2011, approximately 26,286 young people aged out of foster care, accounting for eleven percent of the total number of children who left foster care during that same year.[31] Many of these youth found themselves in the same circumstances as their predecessors nearly thirty years ago: at risk for homelessness, incarceration, and continued poverty.[32]

A strong contributor to this instability is that youth in foster care have high rates of school drop-out because they so often change foster placements.[33] Changing foster placements often leads to changing schools, which then negatively affects academic performance and increases the likelihood of dropping out of school.[34] Nearly one in four youth formerly in foster care lack a high school diploma or GED by age twenty-three or twenty-four.[35] One in five young women formerly in foster care do not have a high school diploma or GED by age twenty-one.[36] These poor out-

§ 74.13.031(16) (West, Westlaw incl. 2014 legis. eff. before June 12, 2014, the general eff. date for the 2014 reg. sess.) (age twenty-one for "nonminor dependent" who is receiving extended foster care services under this section)); West Virginia (W. VA. CODE ANN. § 49-2B-2(x) (West, Westlaw incl. laws of the 2014 reg. sess., S.B. 623) (age twenty-one, defining "transitioning adult" as youth found abused and neglected, in state custody at age eighteen, and who enters contract with the state to participate in an educational, training, or treatment program started before age eighteen)); Wisconsin (WIS. STAT. ANN. § 48.355(4) (West, Westlaw through 2013 act 146, published Mar. 28, 2014) (age nineteen if youth was in state custody at age eighteen and enrolled in education or vocational program)); and Wyoming (WYO. STAT. ANN. § 14-3-431(b) (West, Westlaw through the 2013 general sess.) (age twenty-one if youth is participating in transitional services program)).

30 AMY DWORSKY & MARK COURTNEY, CHAPIN HALL AT UNIV. OF CHICAGO & PARTNERS FOR OUR CHILD. AT UNIV. OF WASH., ASSESSING THE IMPACT OF EXTENDING CARE BEYOND 18 ON HOMELESSNESS: EMERGING FINDINGS FROM THE MIDWEST STUDY 1, 1–2 (2010), *available at* http://www.chapinhall.org/sites/default/files/publications/Midwest_IB2_Homelessness.pdf.

31 *See* Courtney, *supra* note 6.

32 *See* Maloney, *supra* note 22, at 972.

33 *See generally* Arthur J. Reynolds et al., *School Mobility and Educational Success: A Research Synthesis and Evidence on Prevention*, INST. CHILD DEV. AT U. MINN. (2009), *available at* http://www.iom.edu/~/media/Files/Activity%20Files/Children/ChildMobility/Reynolds%20Chen%20and%20Herbers.pdf; DAVID KERBOW, CTR. FOR RESEARCH ON THE EDUC. OF STUDENTS PLACED AT RISK, PATTERNS OF URBAN STUDENT MOBILITY AND LOCAL SCHOOL REFORM 20 (1996), *available at* http://www.csos.jhu.edu/crespar/techReports/Report5.pdf (finding children who change schools four or more times by the sixth grade lose approximately one year of educational growth).

34 Arthur J. Reynolds et al., *supra* note 33, at 11.

35 COURTNEY ET AL., s*upra* note 7, at 22.

36 *Id.*

comes in school lead to less secure employment for youth formerly in foster care compared to their peers in the general population.[37] Nearly fifty-two percent of youth formerly in foster care are unemployed.[38] Those who are employed have a mean income of $12,064 compared to $20,349 for their general population peers.[39] Unemployment and underemployment jeopardize youth's access to health care, as well. Only fifty-seven percent of youth formerly in foster care have health insurance compared to seventy-eight percent of their peers in the general population.[40] Fewer than half have dental insurance.[41] Moreover, nearly seventy-seven percent of young women formerly in foster care become pregnant by age twenty-four compared to approximately forty percent of their general population peers.[42] Repeat pregnancies are "more the rule rather than the exception" for young women in and aging out of foster care, according to one researcher, with two-thirds experiencing multiple pregnancies.[43] Equally troubling is that many youth are discharged from foster care because they are "runaways" and state agencies do not know where those children are, let alone whether they are safe. In fiscal year 2011, for example, approximately 1,387 young people were "runaway" discharges from foster care.[44] What becomes of these children is unknown.

Additionally, youth formerly in foster care have higher incidents of involvement in the criminal justice system than their general population counterparts.[45] Incarceration rates of former foster care youth range from eighteen to forty-one percent[46] in some jurisdictions. Incidences of mental health issues and mental illness are also high.[47] They are, unsurprisingly, twice as likely to experi-

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37 *See* ADRIENNE L. FERNANDES, CONG. RESEARCH SERV., RL 34499, YOUTH TRANSITIONING FROM FOSTER CARE: BACKGROUND, FEDERAL PROGRAMS, AND ISSUES FOR CONGRESS (2008). *See also* EMILIE STOLTZFUS, CONG. RESEARCH SERV., RL 34704, CHILD WELFARE: THE FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 2008, at 10 (2008).

38 COURTNEY ET AL., *supra* note 7, at 27.

39 *Id.* at 32.

40 *Id.* at 41–42.

41 *Id.*

42 *Id.* at 49–50.

43 *Id.* at 49.

44 *See* Courtney, *supra* note 6.

45 COURTNEY ET AL., *supra* note 7, at 68.

46 *Youth After Foster Care*, CHILD WELFARE LEAGUE OF AM., http://www.cwla.org/programs/fostercare/factsheetafter.htm# (last visited Nov. 25, 2013) (citing studies of incarceration rates among youth formerly in foster care).

47 PETER J. PECORA ET AL., CASEY FAMILY PROGRAMS, ASSESSING THE EFFECTS OF FOSTER CARE: MENTAL HEALTH OUTCOMES FROM THE CASEY NATIONAL ALUMNI STUDY (2003), *available at* http://www.casey.org/Resources/Publications/pdf/CaseyNa-

ence economic hardships such as difficulty affording rent[48] and paying bills in general. Nearly twenty percent of youth formerly in foster care, or one out of every five, are homeless within one year of leaving foster care.[49] Homelessness does not abate the older they get. By age twenty-four, nearly forty percent of youth formerly in foster care report being homeless or without a stable place to live at least once since leaving foster care.[50] Becoming homeless multiple times is unfortunately common.[51] Many frequently have to move from short-term residence to short-term residence, staying with friends or relatives.[52]

In short, youth aging out are at a significant disadvantage when they leave foster care. To successfully age out means, among other things, having a stable home upon aging out.[53] It means earning a high school diploma or GED, receiving job-training, and having life skills necessary to live independently.[54] Notably, youth who have a close relationship with an adult, particularly a family member, were half as likely to be homeless as those without such support.[55] The reality for most, however, is that few have such support and are left to find their own way for necessary services and assistance.

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tionalAlumniStudy_MentalHealth.pdf (stating that "the rate of post-traumatic stress disorder (PTSD) among alumni was nearly five times that of the general population and, at 21.5%, exceeded the rates for American war veterans (Vietnam—15%; Afghanistan—6%; and Iraq—12–13%)").

48 Courtney, *supra* note 6, at 9.

49 *Id.* at 6.

50 COURTNEY ET AL., *supra* note 7, at 10.

51 *Id.*

52 Such transient living spaces are described as "precarious" housing because of the high rates of residential mobility. *See* AMY DWORSKY ET AL., MATHEMATICA POLICY RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF POLICY DEV. & RESEARCH, HOUSING FOR YOUTH AGING OUT OF FOSTER CARE: A REVIEW OF THE LITERATURE AND PROGRAM TYPOLOGY 5–7 (2012), *available at* http://www.huduser.org/publications/pdf/HousingFosterCare_LiteratureReview_0412_v2.pdf (listing studies since 1990 that describe the conditions of homelessness, including for those aging out of foster care).

53 PETER J. PECORA ET AL., CASEY FAMILY PROGRAMS, ASSESSING THE EFFECTS OF FOSTER CARE: EARLY RESULTS FROM THE CASEY NATIONAL ALUMNI STUDY 45 (2003), *available at* http://www.casey.org/Resources/Publications/pdf/CaseyNationalAlumniStudy_Summary.pdf.

54 *Id.*

55 DWORSKY ET AL., *supra* note 52, at 7–8.

B. The Role of Reasonable Efforts in the Child Welfare System

i. A Brief History of Reasonable Efforts

The modern American child welfare system is comprised of state systems implementing two federal spending clause acts,[56] specifically the Child Abuse Prevention and Treatment Act (CAPTA)[57] and the Adoption Assistance and Child Welfare Act (AACWA).[58] The purpose of CAPTA was to provide financial assistance for the prevention, identification, and treatment of child abuse and neglect throughout the United States.[59] Among other things, CAPTA established that a child's interests would be represented by an independent guardian *ad litem*.[60] AACWA, on the other hand, was more ambitious. Congress intended AACWA to limit the number of children in a state of "foster care drift" or "foster care limbo," the phenomenon of children moving from foster home to foster home throughout their childhood and literally growing up in foster care without a permanent home.[61] Key to eliminating foster care drift was requiring that state agencies make "reasonable efforts" to prevent removal of the child from the home in order to receive federal funding for foster care programs.[62] The Act also

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56 The origins of the American foster care system are in the Social Security Act of 1935, which Congress enacted to address the economic consequences of the Depression. *See* Maloney, *supra* note 22, at 976. While not solely for children in state care, the Act was concerned with the effect of the economy on children and provided financial assistance for children and not the family. *Id.* at 976–77 (citing *King v. Smith*, 392 U.S. 309, 328 (1968) and *Burns v. Alcala*, 420 U.S. 575, 581–84 (1975), both of which address the history of the Act and its focus on assisting dependent children, including those with their biological family).

57 Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. 93-247, 88 Stat. 4 (1974). CAPTA is currently codified in 42 U.S.C. §§ 5101–19.

58 Adoption Assistance and Child Welfare Act (AACWA) of 1980, Pub. L. No. 96-272, 94 Stat. 500. The Act was codified in scattered sections of Title 42 of the U.S. Code. AACWA provided federal funds for state adoption assistance programs and attempted to strengthen the programs for foster care by requiring states to have a state plan approved by the Secretary of Health and Human Services. Suter v. Artist M., 503 U.S. 347, 350–51 (1992); L.J. v. Wilbon, 633 F.3d 297, 308 (4th Cir. 2011). AACWA's focus was on preserving families and on reunifying them when children are removed from their parents. Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 324 (2005).

59 88 Stat. 4.

60 *Id.* at 4(B)(2)(G). Congress has repeatedly reauthorized CAPTA since its enactment in 1979. *See* JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTION PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 33–34 (Intl. 3d ed. 2006); *id.* at 34 n.13 (noting summary of legislation reauthorizing CAPTA).

61 *See* Bean, *supra* note 58, at 324–25.

62 *See* Adoption Assistance and Child Welfare Act of 1980 § 471(a)(15) (codified at 42 U.S.C. § 671(a)(15)).

conditioned federal funding for foster care programs on a judicial determination that the child's return to the home is "contrary to [his or her] welfare."[63] Congress did not define "reasonable efforts" in the statute, nor did the Secretary of Health and Human Services define the term in subsequent regulations.[64] Nonetheless, the "reasonable efforts" provision is the principal enforcement mechanism for providing services to children and families involved in the foster care system.[65]

In 1997, Congress amended AACWA and passed the Adoption Safe Families Act (ASFA) to provide reasonable efforts towards the permanency plans of youth who, like L.B., remain in foster care.[66] ASFA instituted limits for the reasonable efforts state agencies had to provide to parents for reunification.[67] Important to youth in foster care—and central to this Article—is that ASFA required that state agencies make reasonable efforts to finalize all permanency plans and for all youth in foster care, and not simply prior to removing children from their parents or guardians.[68] Courts could now better ensure that state agencies were actively moving to finalize a permanency plan once a child is in foster care. This requirement is particularly important for those youth who will age out.[69] ASFA requires courts to determine whether state agencies have provided reasonable efforts for each child "at least once every

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63 42 U.S.C. § 672(a)(2)(A)(ii).

64 *See* Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 259, 271–73 (2003).

65 *Id.* at 271–73.

66 Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115. This Act was codified throughout 42 U.S.C. §§ 671–79. Congress passed ASFA because it was concerned that too many children continued in "foster care drift" or "limbo" because state agencies were too often making extraordinary efforts to reunify kids with parents who were unable to provide for their children. *See* Crossley, *supra* note 64, at 261, 278 (discussing how erroneous representations of high profile cases of child maltreatment and death resulted in the belief that state agencies were making "extraordinary efforts" in reunification). State agencies must, as a result, seek to terminate parental rights if the child, or children, remained out of the parents' home for fifteen of the previous twenty-two months from filing the petition to terminate parental rights, unless certain exceptions apply. 42 U.S.C. § 675(5)(E); *In re* James G., 943 A.2d 53, 79 (Md. Ct. Spec. App. 2008) (recognizing the same).

67 Adoption and Safe Families Act § 101(a) (excusing reasonable efforts prior to removal where, among other things, the parent subjects the child, or children, to aggravated abuse); *see also id.* § 103(a) (requiring states to initiate termination of parental rights proceedings, unless the state documents a compelling reason otherwise, where the child is in state care for fifteen of the previous twenty-two months).

68 *Id.* § 101(a) (codified at 42 U.S.C. § 671(a)(15)(C)); *see also* 45 C.F.R. § 1355.21(b)(2)(i) (2013).

69 *Cf.* Adoption and Safe Families Act § 101(a).

twelve months thereafter while the child is in foster care."[70] Congress did not, however, define "reasonable efforts" for a given permanency plan.[71] The porous consequences for youth aging out remained the same. Congress later passed the Fostering Connections to Success and Increasing Adoptions Act (Fostering Connections) to require that state agencies create a transition plan that lists the youth's housing, employment, education, and medical needs.[72] Fostering Connections requires state agencies to develop these transition plans three months before the youth ages out, but does not require that the state agency actually provide services towards each of the areas needed for youth to become self-sufficient.[73] The requirement for reasonable efforts, therefore, remains the primary, albeit under-utilized, enforcement mechanism for providing timely and meaningful services to youth.[74]

1. *Reasonable Efforts as Enforcer of Child Welfare Laws*

The "reasonable efforts" requirement in federal law is the

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70 45 C.F.R. 1356.21(b)(2)(i).

71 *In re James G.*, 943 A.2d at 74.

72 Pub. L. 110-351, 122 Stat. 3949 (2008). Specifically, the Act requires:

> [D]uring the 90-day period immediately prior to the date on which the child will attain 18 years of age, or such greater age as the State may elect under [this section], whether during that period foster care maintenance payments are being made on the child's behalf or the child is receiving benefits or services under section 677 of this title, a caseworker on the staff of the State agency, and, as appropriate, other representatives of the child provide the child with assistance and support in developing a transition plan that is personalized at the direction of the child, includes specific options on housing, health insurance, education, local opportunities for mentors and continuing support services, and work force supports and employment services . . . and is as detailed as the child may elect[.]

42 U.S.C. § 675(5)(H).

73 42 U.S.C. § 675(5)(H). Maryland's high court, the Court of Appeals, recently made this point that the federal law only requires a plan, not transition services. *In re* Ryan W., 76 A.3d 1049, 1056 n.6 (Md. 2013). This case involved the state agency actions as representative payee of social security survivor benefits belonging to a child beneficiary in foster care. *Id.* at 1051. The state agency received federal survivor benefits and automatically applied those payments to the child's cost of foster care without providing notice to the child or his attorney. *Id.* at 1056. The child beneficiary sought relief before the juvenile court that heard his foster care case, which created a constructive trust over the amount the state received, $31,693.50. *Id.* at 1057. The state agency appealed, arguing its use of the funds towards the child's cost of care was authorized by the Social Security Act. *Id.* The child argued, among other things, that the state agency had to use his benefits to prepare him for transitioning from foster care under federal child welfare law. *Id.* The Court of Appeals disagreed with the child and found that federal child welfare laws require only a transition plan and not transition services. *Id.* at 1056 n.6.

74 *See* Crossley, *supra* note 64, at 271–73.

most appropriate method of ensuring youth aging out receive the services they need. The provision is too infrequently used to hold state agencies accountable for providing appropriate services to youth aging out. One reason for this infrequent use of the provision to help youth age out may be the decision in *Suter v. Artist M.*, a case in which the Supreme Court considered whether the reasonable efforts provision could be enforced through a private right of action.[75] *Suter* involved a class action suit brought pursuant to 42 U.S.C. § 1983 by children in Illinois against the Illinois Department of Children and Family Services (DCFS), which investigated allegations of child abuse and neglect as well as provided foster care services for children and families.[76] The plaintiff class alleged that DCFS violated the AACWA by failing to provide reasonable efforts to prevent their removal from their homes and by failing to provide reasonable efforts to facilitate their return to their home, as 42 U.S.C. § 671(a)(15) (the reasonable efforts provision) required.[77] In other words, the class of children alleged they had an individual right for the state to provide reasonable efforts, and, accordingly, they sought declaratory and injunctive relief.[78] In a 7-2 decision, the Supreme Court found that Congress did not intend to create a private right of action and, therefore, held that the reasonable efforts provision was not enforceable through a private right of action.[79] The Court held that because Congress did not define "reasonable efforts" in federal law, it did not intend for plaintiffs to enforce the provision through a private right of action.[80] The Court held other AACWA sections allowed for enforcing the "reasonable efforts" requirement, including the Secretary of Health and Human Services' authority to reduce or eliminate payments to states that do not comply with the requirement.[81] Notably, the Supreme Court cited the ability of juvenile (or other state) courts to determine whether the state agency's actions were reasonable.[82] In

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75 Suter v. Artist M., 503 U.S. 347, 347 (1992).

76 *Id.* at 351.

77 *Id.* at 352.

78 *Id.* at 353. The District Court held that AACWA had an implied cause of action of the sort the class brought and that the class could bring suit under § 1983. *Id.* at 353. It entered an injunction requiring DCFS to assign a caseworker to each child placed into its custody within three business days of the date the juvenile court hears the case. *Id.* at 354. It also required DCFS to reassign a caseworker within three business days of the day a caseworker ends his or her work with the child. *Id.* The Court of Appeals for the Seventh Circuit affirmed. *Id.*

79 *Suter*, 503 U.S. at 360–61, 364.

80 *Id.* at 364–65.

81 *Id.* at 360.

82 *Id.* at 360–61. Congress then amended the Social Security Act to allow a private

doing so, the Supreme Court not only recognized the importance of state courts' authority in child welfare cases, but also provided the way to enforce child welfare laws.

Admittedly, other reforms have improved the child welfare system over the years. Children's lawyers and advocates have successfully pursued § 1983 actions based upon provisions of AACWA.[83] Such actions include claims pursuant to provisions requiring a written description of services a child over age sixteen requires to transition from foster care to independent living.[84] However, § 1983 litigation has been protracted and, in some cases, lasts for decades.[85] While important, such protracted litigation does not timely provide young people, such as L.B., the services they need to age out successfully.[86] Other reform efforts include legislative and programmatic changes.[87] These include, of course, the major fed-

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right of action for some legislation that required state plans to provide efforts as part of that plan. Congress also invalidated the portion of *Suter* that held a provision of the Social Security Act did not create a private right of action if the provision is part of a State plan. *See* 42 U.S.C. § 1320a-2 (2012). The provision states in relevant part:

> In an action brought to enforce a provision of this chapter [of the Social Security Act], such provision is not to be deemed unenforceable because of its inclusion in a section of [the Act] requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.* . . . [T]his section is not intended to alter the holding in *Suter v. Artist M.* that section § 671(a)(15) of this title [section 471(a)(15) of the Act] is not enforceable in a private right of action.

Id. (italicization added). However, Congress explicitly upheld the holding in *Suter*.

83 *See, e.g.*, L.J. v. Massinga, 699 F. Supp. 508, 529 (D. Md. 1988); L.J. v. Wilbon, 633 F.3d 297, 309 (4th Cir. 2011) (citing White v. Chambliss, 112 F.3d 731, 739 n.4 (4th Cir. 1997)). Courts have found that other provisions of case plan requirements in the foster care laws can be enforced through a private action. *See, e.g.*, Kenny A. *ex rel.* Winn v. Perdue, 218 F.R.D. 277, 290 (N.D. Ga. 2003) (alleging § 675(1)(D) provided enforceable rights including for services needed to transition from foster care to independent living).

84 "Case plan" must include "[w]here appropriate, for a child age 16 or over, a written description of the programs and services which will help such child prepare for the transition from foster care to independent living." 42 U.S.C. § 675(1)(D).

85 *See, e.g.*, *Wilbon*, 633 F.3d at 299–304 (describing the long history of litigation against the Baltimore City Department of Social Services for its failure to comply with AACWA. The litigation began in 1984 and resulted in a consent decree in 1991 that required on-going compliance monitoring for more than two decades).

86 *Id.*; *see also* Maloney, *supra* note 22, at 990–1002 (discussing state and federal court litigation aimed at improving foster care outcomes, including *Palmer v. Cuomo*, 121 A.D.2d 194 (1st Dep't 1986)).

87 *See, e.g.*, Alice Bussiere, *Permanency for Older Foster Youth*, 44 FAM. CT. REV. 231 (2006) (advocating that youth in foster care be allowed to be active participants in their care and reviewing California Welfare and Institutions Code § 16501(b)(11) that required children in foster care not leave care without a "lifelong connection to a

eral legislation AACWA, ASFA, and Fostering Connections. Again, while important, the legislative and § 1983 litigation have not resulted in timely enforcement of services for individual youth who are aging out.

Under *Suter*, state courts can (and should) enforce services through findings pursuant to the "reasonable efforts" requirement. While reasonable efforts are undefined, permanency plans must dictate to courts and state agencies the services that are reasonable for youth aging out of foster care.[88] Permanency plans establish the goal towards which the parties work to facilitate the child's safe exit from the foster care system.[89] A permanency plan must be established within twelve months of the child's entering foster care and must be reviewed at least annually thereafter until the youth exits the foster care system.[90] Permanency plans for youth age sixteen and older must list services they need to transition into independence.[91] Therefore, the permanency plan allows courts to specify the services that state agencies must provide children and fami-

committed adult as well as local initiatives throughout California and New York City aimed at the same"); Keely A. Magyar, *Betwixt and Between but Being Booted Nonetheless: A Developmental Perspective on Aging Out of Foster Care*, 79 TEMP. L. REV. 557 (2006) (advocating that federal law subsidize foster care until the youth turns twenty-one and, notably, condition funding for foster care on state laws that accurately utilize research on human development from adolescence to adulthood); Melinda Atkinson, Note, *Aging Out of Foster Care: Towards a Universal Safety Net for Former Foster Care Youth*, 43 HARV. C.R.-C.L. L. REV. 183 (2008) (advocating policy reform that provides a "safety net" for youth aging out of foster care, including providing support beyond age eighteen, housing and financial assistance for students to achieve academic success, universal health care for former youth in foster care until age twenty-four, assistance to obtain part-time employment beginning at age sixteen, less frequent court hearings for transitioning youth in favor of using an ombudsman or social workers specializing in working with older youth, mentoring system in the community, and allowing foster youth to participate and be more directive in the planning for their transition); *see also* Maloney, *supra* note 22.

Commentators in other countries have also advocated that their domestic governments enact legislation to enforce human rights instruments including the Convention on the Rights of the Child. *See, e.g.*, Mitchell Woolf, *Coming of Age? The Principle of "The Best Interests of the Child,"* 2 EUR. HUM. RTS. L. REV. 205, 208 (2003).

88 *See* 42 U.S.C. § 675(5)(C)(i) (listing permanency plans available).

89 *Id.* § 675(5)(C)(i). *See In re* Damon M., 765 A.2d 624, 627–28 (Md. 2001) (stating that the permanency plan establishes the goal towards which all parties in a child welfare case must expend their resources).

90 42 U.S.C. § 675(5)(C).

91 *Id.* Furthermore, state agencies must provide a transition plan to youth who will age out of foster care at the youth's direction in the areas of housing, health insurance, education, mentoring as well as employment supports. *Id.* § 675(5)(H). Additionally, in permanency planning hearings, courts must at least annually, and in an age appropriate manner, consult directly with a child in foster care regarding their hearing. *Id.* § 675(5)(C)(iii).

lies.[92] Courts review the plan at least annually until the child leaves foster care.[93] The review includes determining whether the state agency made reasonable efforts towards that permanency plan.[94] Because federal law requires state court review at least annually of the services state agencies provide youth, the "reasonable efforts" provision is the most effective vehicle to obtain services for youth aging out.

II. THE HUMAN RIGHTS OF YOUTH

Human rights are those freedoms, immunities, and benefits that all human beings may claim in the society in which they live.[95] These rights belong to everyone, including youth in foster care.[96] Human rights can also be described as values shared by the world community.[97] Preparing youth to be self-sufficient is one such value, and the international community has expressed acceptance of this value through the CRC,[98] the ICCPR,[99] and the ICESCR.[100] Each of these conventions must be considered because "youth" as used in this Article includes minors and adults in international law. The CRC addresses the economic, social, and cultural rights of the "child," or one under age eighteen.[101] The ICCPR and the ICESCR address the economic, cultural, and social rights of minors and

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92 *In re Damon M.*, 765 A.2d at 627–28.

93 42 U.S.C. § 675(5)(C)(i).

94 *Id.* § 671(a)(15)(C).

95 Universal Declaration *of* Human Rights, G.A. Res. 217 (III), art. 25(1), U.N. Doc. A/810 (1948); BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "human rights"). *See also* David Sidorsky, *Contemporary Reinterpretation of the Concept of Human Rights*, *in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT 327 (Philip Alston & Henry Steiner ed., 2000) (noting that human rights are those rights that all individuals possess solely by virtue of being human and that no state should deny). Human rights are deemed by many to be inalienable, unalterable, and eternal. Burns Weston, *Human Rights*, *in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT 325 (Philip Alston & Henry Steiner eds., 2d. ed. 2000).

96 *See* Universal Declaration of Human Rights art. 25(1); BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "human rights").

97 *See* Baker v. Canada (Minister of Citizenship and Immigration), 2 S.C.R. 817 (1999), ¶ 73.

98 *See supra* note 19.

99 *See supra* note 20.

100 *See supra* note 21. These are not the only international instruments that affect the rights of the youth who are the subject of this Article. One court has identified more than eighty international instruments in the twentieth century alone that implicate the rights and welfare of children. *See* Judicial Condition and Human Rights of the Child, Advisory Opinion OC-17/2002, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 26 n.19 (Aug. 28, 2002), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_17_ing.pdf.

101 CRC, *supra* note 19, art. 1.

adults. The principles and values embodied in the provisions of these international instruments, much like the U.S. Constitution, preserve human dignity.[102] Human dignity for youth aging out of foster care in the United States and internationally means the shared value of preparing youth for self-sufficiency. This value further requires involving local communities to enforce human rights for youth aging out.[103] Courts can and must use accepted international human rights to read existing national, state, and local laws, including constitutions and statutes.[104] Incorporating human rights into child welfare laws by defining "reasonable efforts" will improve outcomes for youth aging out of foster care.

A. The Shared Human Rights and Values of Youth

The international community has consented to be bound by the values and rights in the CRC, ICCPR, and ICESCR by signing or ratifying[105] the instruments, or applying provisions in members' domestic laws.[106] Signing a convention indicates a country's agree-

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102 *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) (noting that the Constitution "sets forth, and rests upon, innovative principles original to the American experience, such as federalism[,] a proven balance in political mechanisms through separation of powers[,] specific guarantees for the accused in criminal cases[,] and broad provisions to secure individual freedom and preserve human dignity").

103 This Article does not argue that the United States ratify the CRC or any other treaty or convention, although ratifying and passing implementing legislation would further the United States' standing in the international community as protector of human rights.

104 Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2282 (1991).

105 Vienna Convention on the Law of Treaties art. 11, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention], *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%201155/v1155.pdf ("The consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."). The United States, through courts and also the U.S. Department of State, views the Vienna Convention as customary international law and, accordingly, is bound by the Convention. *See* Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 308 (2d Cir. 2000); PETERS, *supra* note 62, at 46 n.42 (listing supporting authority from courts and scholars that the Vienna Convention is a codification of customary international law); Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L. L. 431, 443–44 (2004).

106 *See* Filartiga v. Pena-Irala, 630 F.2d 876, 881–82 n.8 (2d. Cir. 1980) (stating that international human rights instruments, such as the U.N. Charter and the U.N. Declaration of Human Rights, among others, advance principles of human rights upon which all nations agree). The same court previously cited the U.N. Charter and the Charter of the Organization of American States (a non-self-executing agreement) as expressions of binding international legal principles. *See* United States v. Toscanino, 500 F.2d 267, 277 (2d Cir. 1974) (cited with approval in *Filartiga*, 630 F.2d at 881–82 n.9).

ment that the text of the convention is authentic and definitive.[107] By signing a convention, the country assumes the responsibility to not frustrate the object and purpose of that convention.[108] Ratifying a convention means that the state has played a part in negotiating the instrument, has signed it, and will be bound by the convention upon concluding its domestic implementation process.[109] A state party to a convention may make reservations to the instrument that limit the extent to which that state agrees to be bound by its provisions.[110] Reservations, however, cannot be "incompatible with the object and purpose of the treaty."[111] State parties must not frustrate the object and purpose of these instruments.[112]

In the United States, ratification occurs with a vote of two-thirds of the Senate.[113] Furthermore, these conventions are not self-executing in the United States, meaning that Congress must enact legislation implementing the convention into domestic laws.[114] As explained below, the United States has accepted the values in the CRC, ICCPR, and ICESCR as those instruments' provisions apply to preparing youth for self-sufficiency.

i. The Rights and Values in International Instruments

The value of preparing youth aging out of foster care for self-sufficiency is found in the following provisions of the CRC:[115]

- Article 2(1) that requires respecting and ensuring the

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107 MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 20 (3d ed. 1999).

108 Vienna Convention, *supra* note 105, art. 18 (stating that signatories, or those States that only sign a treaty or convention, are obligated to not frustrate the object and purpose of the signed instrument).

109 JANIS, *supra* note 107, at 21.

110 Vienna Convention, *supra* note 105, art. 2(1)(b) (defining "ratification"); *id.* art. 23 (explaining the legal effect of reservations if a state reserves as to the treaty's application to specific parties).

111 *Id.* art. 19(c).

112 *Id.* art. 18.

113 U.S. CONST. art. II § 2 (noting the president has the power to make treaties "provided two-thirds of the Senators present concur").

114 *See* Foster v. Neilson, 27 U.S. 253, 314 (1829) ("Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."). The term "self-executing" was first used in *Bartram v. Robertson*, 122 U.S. 116, 120 (1887). *See also* JANIS, *supra* note 107, at 89 n.9.

115 *See generally* CRC, *supra* note 19.

rights of children irrespective of their race, religion, color, sex, and notably ethnic or social origin, property, or other status;

- Article 3(1) that requires public and/or private social welfare organizations, courts, and administrative authorities to protect the best interests of children;
- Article 4 that requires Parties to undertake, to the maximum extent of available resources, to implement a child's economic, social, and cultural rights;
- Article 6(2) that requires Parties to ensure to the maximum extent possible the child's development;
- Article 12 that requires Parties to consider and give due weight to the views of children capable of forming their own views according to the child's age and maturity;
- Article 20 that requires Parties to provide special care and assistance to those whom the State removes from their homes because the child's best interests required such removal;
- Article 23(1) that requires Parties to provide all children with mental and/or physical disabilities a quality of life that ensures their dignity, promotes self-reliance, and "facilitates the child's active participation in the community";
- Article 25 that requires Parties placing children for their physical or mental protection in state custody to regularly review all of the child's treatment and all circumstances related to that placement;
- Article 26 that establishes the right of a child to social security and obligates states to allow children the opportunity to "full realization" of this right;
- Article 27 that requires Parties to ensure a standard of living the child needs for physical, mental, moral, and social development; the article also requires Parties to take appropriate steps to assist parents and others responsible for the child to implement this standard of living, which includes material assistance and programs for nutrition, clothing, and housing; and
- Article 28 that requires Parties to provide access to education on the basis of capacity, including vocational information and guidance.

The value of preparing youth aging out of foster care for self-

sufficiency is found in the following provisions of the ICCPR:[116]

- Article 2 guaranteeing the right to recourse for violations of rights in the Convention;
- Article 6 guaranteeing the right to life and survival;
- Article 7 guaranteeing freedom from inhuman or degrading treatment;
- Article 18 guaranteeing freedom of thought and conscience; and
- Article 19 guaranteeing freedom of opinion and expression.

The value of preparing youth aging out of foster care for self-sufficiency is found in the following provisions of the ICESCR:[117]

- Article 1 guaranteeing the right of self-determination and the right to freely pursue economic, social, and cultural development;
- Article 2 requiring each Party to "take steps to the maximum of its available resource" to progressively achieve the rights in the Convention;
- Article 6 guaranteeing the right to work;
- Article 9 guaranteeing the right to social security;
- Article 10 guaranteeing special measures to protect children;
- Article 11 guaranteeing the right to an adequate standard of living, including food, clothing, housing, and being free from hunger; and
- Article 12 guaranteeing the highest attainable standard of physical and mental health.

A child in state care due to abuse or neglect by a parent is entitled to decisions made in that child's best interests and decisions that protect the welfare of the child.[118] Protecting the welfare of the child includes, as the child ages, preparing the child to be a self-sufficient adult.[119] The above provisions from the CRC, ICCPR, and ICESCR establish that states must respect and enforce the rights belonging to children in state custody and that the child must be allowed to participate, if not direct, that treatment.[120]

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116 *See generally* ICCPR, *supra* note 20.

117 *See generally* ICESCR, *supra* note 21.

118 CRC, *supra* note 19, art. 3(1); ICCPR, *supra* note 20, art. 6; ICESCR, *supra* note 21, art. 10.

119 CRC, *supra* note 19, arts. 4, 6, 26–27; ICCPR, *supra* note 20, art. 6; ICESCR, *supra* note 21, art. 2, 9, 11–12.

120 *See* Woolf, *supra* note 87, at 208.

These provisions reflect the world community's acceptance of the obligation to affirmatively ensure children can fully exercise their economic, social, and cultural rights. International norms require that older youth in foster care have the right to be prepared to live independently, and international norms also require specific assistance for older youth in foster care to find housing, employment, obtain education, medical care and those other services needed to become self-sufficient. Self-sufficiency means being able to independently meet basic needs such as food, clothing, shelter, and medical care.[121] Self-sufficiency requires, at a minimum, education, employment, and housing. To help a young person realize the shared value of self-sufficiency, those involved in the care of youth must do more than nominally consider their desires or wishes. Administrators and courts must be directed by the young person's desires and wishes in each of the essential self-sufficiency areas.[122] States must maximize their resources to help youth in foster care achieve these objectives *because* they are in state custody and the state is raising the child.[123] The above-listed values are by no means the only values shared by the international community regarding older youth. They are, however, the most relevant to the present discussion on how to improve outcomes for youth aging out of foster care.

ii. The Rights and Values at Work in the United States

As stated above, members of the international community have expressed their acceptance of these values by ratifying treaties or conventions, by signing them, or through their domestic practice.[124] As explained below, the United States has demonstrated its acceptance by both signing these instruments and including related requirements in federal child welfare law.

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121 CRC, *supra* note 19, arts. 26–28; ICCPR, *supra* note 20, arts. 6–7; ICESCR, *supra* note 21, arts. 1–2, 6, 9, 11–12.

122 CRC, *supra* note 19, arts. 2–3, 12; ICCPR, *supra* note 20, art. 2; ICESCR, *supra* note 21, arts. 1–2, 10. Federal law already requires that courts consult "in an age-appropriate manner, with the [youth] regarding the proposed permanency plan or transition plan for the [youth]." 42 U.S.C. § 675(5)(C)(iii) (2012). While federal law does not explicitly require services be child or youth directed, extending federal law to do so is consistent with the trend that child welfare services be directed by the youth.

123 CRC, *supra* note 19, art. 6; ICCPR, *supra* note 20, art. 2; ICESCR, *supra* note 21, arts. 2, 11–12.

124 *See supra* note 106.

1. *Signing and Ratification Expresses Acceptance of the Values*

Regarding the CRC, one hundred and forty countries have signed this document and have thereby shown their acceptance of the values expressed in it.[125] One hundred ninety-three countries have ratified the CRC.[126] No other human rights treaty has been implemented faster than the CRC.[127] The United States signed the CRC on February 16, 1995, but has not yet ratified it.[128] Given the obligations of a signatory to a treaty, the international community, including the United States, has accepted the values expressed in the CRC.

Regarding the ICCPR, one hundred and sixty-seven countries have shown their acceptance of the values expressed in the ICCPR by ratifying the document.[129] Another seventy-four are signatories to the ICCPR.[130] The United States signed the ICCPR on October 5, 1977 and ratified it on June 8, 1992.[131] The ICCPR is not a self-executing instrument in the United States and requires Congress to enact legislation to fully implement it into domestic law.[132] Nonetheless, the United States has agreed to not frustrate the object and purpose of the ICCPR.[133] The United States has accepted the values expressed in the ICCPR.

Regarding the ICESCR, one hundred and sixty countries have demonstrated their acceptance of the provisions and values in the ICESCR by ratification.[134] Another seventy countries have demonstrated their acceptance of the values in the ICESCR's provisions by

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125 *See Convention on the Rights of the Child*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en (last visited Nov. 25, 2013) (official treaty status page). *See also* PETERS, *supra* note 60, at 45, 75 (citing CYNTHIA PRICE COHEN, CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW, at ii (Howard A. Davidson ed., 1990) (noting that the CRC broke records for gaining the highest number of signatories on the day it opened for signature)).

126 *See Convention on the Rights of the Child*, *supra* note 125.

127 PETERS, *supra* note 60, at 45, 75.

128 *See Convention on the Rights of the Child*, *supra* note 125.

129 *See International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Nov. 25, 2013) (official treaty status page).

130 *Id.*

131 *Id.*

132 *Id.* (Declaration 1 of the United States regarding the ICCPR.); Foster v. Neilson, 27 U.S. 253, 314 (1829) (explaining the meaning of non-self-executing treaties and conventions).

133 Vienna Convention, *supra* note 105, art. 18.

134 *See International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Nov. 25, 2013) (official treaty status page).

signing.[135] The United States signed the ICESCR on October 5, 1977, but has not ratified it.[136] Furthermore, unless the United States ratifies the ICESCR as a self-executing instrument, Congress would have to enact implementing legislation to give full effect to the ICESCR domestically.[137] As a signatory to the ICESCR, however, the United States accepts the values expressed in the ICESCR and has agreed to not frustrate the object and purpose of its provisions.[138] Therefore, the United States has accepted the values expressed in the ICESCR.

2. *The United States' Acceptance of International Values*

The clearest expression of the United States' acceptance of the international rights and values of ensuring youth become self-sufficient is in child welfare laws. Congress amended AACWA in 1986 to specifically address the needs of older youth in foster care.[139] States that created programs to prepare youth for self-sufficiency received additional federal funding.[140] Congress intended for youth in foster care to receive services to help them age out safely.[141] This amendment was a response to the concern, even at

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135 *Id.*

136 *Id.*

137 *See Foster*, 27 U.S. at 314 (describing non-self-executing nature of most international instruments in domestic law).

138 Vienna Convention, *supra* note 105, art. 18.

139 Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 12307(a), 100 Stat. 82 (1986). This amendment added § 477 to Title IV-E of AACWA and provided funding for states for the express purpose of helping young people in foster care who have reached age sixteen transition into independent living.

140 *Id.* (amending § 477(d)). The amendment specifically allowed funding for programs that

> (1) enabled participants to seek a high school diploma or its equivalent or to take part in appropriate vocational training;
> (2) provided training in daily living skills, budgeting, locating and maintaining housing, and career planning;
> (3) provided for individual and group counseling;
> (4) integrated and coordinated services otherwise available to participants;
> (5) established outreach programs designed to attract individuals who are eligible to participate in the program;
> (6) provided each participant a written transitional independent living plan which shall be based on an assessment of his needs, and which shall be incorporated into his case plan, as described in section 475(1); and
> (7) provided participants with other services and assistance designed to improve their transition to independent living.

Id.

141 The amendment only provided additional funds for independent living services only for fiscal years 1987 and 1988. *See id.* § 12307(a) (amending § 477(a)).

that time, that older youth in foster care simply were not receiving needed services to age out safely.[142] However, Congress did not mandate providing these services to all youth aging out. Regarding aging out, the case plans for transition aged youth required only "a written description of the programs and services which will help such child prepare for the transition from foster care to independent living."[143] Congress included "transitional independent living" as one of purposes of AACWA in addition to providing foster care and adoption assistance.[144] There was, however, no enforcement mechanism for this requirement.

More than a decade later, Congress reaffirmed its commitment to the value of preparing youth for self-sufficiency by enacting the Foster Care Independence Act.[145] The Act created the Foster Care Independence Program and directed state and local governments to provide youth aging out of foster care programs for education, training, employment, and financial support.[146] Youth in foster care were to begin receiving these services "several years before high school graduation and continuing, as needed, until the young adults emancipated from foster care establish independence or reach 21 years of age."[147] States were "to supplement, and not supplant, any other funds" available for the same general purposes regarding foster care in the state.[148]

In 2002, Congress continued its commitment to prepare youth for self-sufficiency by adding the Educational and Training Vouchers Program (ETV) to the Independence Program.[149] The ETV program provided post-secondary education and training vouchers to youth likely to remain in foster care until age eighteen to assist them with their transition out of foster care.[150] The ETV Program provided vouchers for up to $5000 annually[151] for eligible youth in foster care.[152] It also gave states the option of allowing youth partic-

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142 *See* Maloney, *supra* note 22 (describing the poor consequences of those aging out of foster care and into homelessness, unemployment, and incarceration).

143 Pub. L. No. 99-272, § 12307(b).

144 *Id.* § 12307(d).

145 Foster Care Independence Act of 1991, Pub. L. No. 106-169, §§ 101(b), 1305, 113 Stat. 1824 (2002) (codified in 42 U.S.C. § 677 (2012)).

146 *Id.* § 101(a)(5).

147 *Id.*

148 *Id.* § 101(b).

149 Promoting Safe and Stable Families Amendments of 2001, Pub. L. 107-133, §§ 201(b), 202, 115 Stat. 2413 (2002) (codified in 42 U.S.C. § 677(d),(i)).

150 *See generally id.* § 201(b).

151 *Id.* § 201(b) (codified in 42 U.S.C. § 677(i)(4)(B)).

152 The program also provided funds to those adopted from foster care after age sixteen years. *Id.* (codified in 42 U.S.C. § 677(i)(2)).

ipating in the program on their twenty-first birthday to continue participating until they turned twenty-three years old, as long as they were enrolled in a postsecondary education or training program.[153] States varied in their use of funds under the Independence Act, including the number of eligible youth served and the quality of services they provided.[154] A survey of child welfare directors reported gaps in the quality of services independent living programs provide to young people in the areas of mental health services, mentoring, securing safe and suitable housing, and engaging the youth themselves to participate in such programs.[155] Child welfare directors reported the same "gaps" in services for years.[156] This continued gap led to the latest amendment to the federal law to improve the ability of older youth to age out safely.

In 2008, Congress passed the Fostering Connections to Success and Increasing Adoptions Act to improve outcomes for youth aging out of foster care because the evidence showed those youth needed more help than what they were receiving.[157] Fostering Connections provides funds to states so they can improve outcomes for children in foster care.[158] The Act's required individualized plan is laudable because it specifically addresses housing, education, insurance, employment, and other services the youth needs to become self-sufficient.[159] State agencies must develop this transition plan at the direction of the child.[160] But this case plan requirement applies only ninety days before the young person ages out.[161] The effect of Fostering Connections is unknown given it only recently went into

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153 *Id.* (codified in 42 U.S.C. § 677(i)(3)). The ETV Program also authorized an additional $60 million for post secondary educational and training vouchers so youth aging out of foster care can develop the skills necessary to lead "independent and productive lives." *Id.* § 201(d).

154 *Child Welfare: HHS Actions Would Help States Prepare Youth in the Foster Care System for Independent Living: Hearing Before the Subcomm. on Income Security and Family Support of the H. Comm. on Ways and Means*, 110th Cong. 23 (2007) (statement of Cornelia M. Ashby, Dir. Educ., Workforce & Income Sec. Issues), *available at* http://www.gao.gov/assets/120/117294.pdf.

155 *Id.* at 14–15.

156 *Id.* at 14 n.15 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, HEHS-00-13, FOSTER CARE: EFFECTIVENESS OF INDEPENDENT LIVING SERVICES UNKNOWN (1999), which found independent living programs fell short in areas including employment, daily living skills, and housing services)

157 *See* Pub. L. No. 110-351, 122 Stat. 3949 (2008).

158 The Act also provides funding for youth age sixteen and older who are placed into guardianship or adoption. *Id.* § 201, 122 Stat. at 3951–58.

159 *Id.* § 202 (codified as 42 U.S.C. § 675(5)(H)).

160 *Id.*

161 *Id. See also supra* text accompanying note 73.

effect.[162] At the very least, it reinforces the value of making youth self-sufficient and is a positive step in meeting that commitment to that value. However, Fostering Connections is limited because it only requires state agencies to develop a "plan," not necessarily provide services.[163] Also, state agencies only need to develop this plan three months before the youth ages out, which in many cases is not enough time to age out safely. Youth aging out must be able to enforce services written in any plan. Reasonable efforts must include providing timely services the youth needs for self-sufficiency, meaning housing, education, employment, and medical care, not simply a written description of those needs.

B. Incorporating Human Rights into Child Welfare Law

The human rights belonging to youth are part of existing child welfare laws with some rights more explicitly in the law than others. The "best interest of the child" standard in decisions regarding children in state custody is an example of an internationally accepted principle that is also part of domestic law. Similarly, the child-directed service provision is appropriate because the youth aging out often have the maturity to make decisions regarding their needs in becoming self-sufficient.[164] Furthermore, the *Charming Betsy*[165] canon of statutory construction allows human rights to resolve the ambiguity in federal law regarding the definition of reasonable efforts for youth aging out of foster care.[166] Fi-

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162 *See generally* May Shin, Note, *A Saving Grace? The Impact of the Fostering Connections to Success and Increasing Adoptions Act on America's Older Foster Youth*, 9 HASTINGS RACE & POVERTY L.J. 133, 160–62 (2012) (noting the differences between states in implementing Fostering Connections). One effect has been that several states have amended their laws to allow youth to remain in state care until at least age twenty-one. See *supra* note 29 for a listing, by jurisdiction, of the age at which services to youth in foster care terminate.

163 *See In re* Ryan W., 76 A.3d 1049 (Md. 2013). *See also supra* note 73 for a discussion of this case.

164 *See* Planned Parenthood v. Danforth, 428 U.S. 52, 72 (1976) (holding that girls of sufficient maturity may determine for themselves whether to obtain an abortion). Currently, courts must, at a minimum, consult with all children regarding their permanency plans and the transition plans established for them. 42 U.S.C. § 675(5)(C)(iii) (2012).

165 *See infra* Section II.B.2.

166 Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804) (holding that whenever possible, an act of Congress must be read to not violate international law); *see also* Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001) (interpreting immigration detention statute to include a "reasonable time limitation" 90-days relying in part on *Charming Betsy* rule of statutory construction, because indefinite detention is against international norms); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987). While the cannon is framed in the negative, i.e., Congressional action should not be read inconsistently with interna-

nally, the Supreme Court's use of international law in interpreting the rights of individuals provides more support for using human rights to define ambiguous domestic law. In short, advocates for youth in foster care, as well as decision-makers in the child welfare system, have ample legal support to enforce the right of youth in foster care to be self-sufficient.

i. Defining Reasonable Efforts For Youth Aging Out

Youth *should have* a right to self-sufficiency for their well-being and for the well-being of society, as the Supreme Court has suggested.[167] When the state affirmatively assumes custody of a child in foster care, it owes a duty to protect that child.[168] In *DeShaney vs. Winnebago County Department of Social Services*, the Supreme Court held that a state taking a child into its custody through the child welfare laws has a "duty to assume some responsibility for his [or her] safety and general well-being."[169] This duty has led to explicit recognition of the procedural due process rights of youth in foster care from the state agency[170] and substantive due process to protec-

tional law, the conclusion that Congressional action must be read consistently with international law is implied. *But see* Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1151–52 (7th Cir. 2001).

167 Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

168 *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989); *see* Youngberg v. Romeo, 457 U.S. 307, 324 (1982).

169 *DeShaney*, 489 U.S. at 199–200. In *DeShaney*, the mother of four-year-old Joshua, who was beaten into a coma by his father, sued the local social services agency that was responsible for carrying out child protective services in her area. *Id.* at 193. In the fourteen months before the last beating that put Joshua into a coma, the local department documented repeated instances of physical injuries Joshua suffered while in his father's custody. *Id.* at 192–93. The caseworker assigned to Joshua's family recorded her suspicions that someone in the DeShaney household was physically abusing Joshua, but the caseworker did not seek his removal from his home. *Id.* at 192–93. Joshua's father beat him so badly that he fell into a life-threatening coma that required emergency brain surgery. *Id.* The surgery revealed a number of hemorrhages that indicated Joshua was the victim of repeated traumatic brain injuries over a long period of time. *Id.* Joshua did not die, but he was expected to spend the rest of his life in a facility for those with profound mental disabilities. *DeShaney*, 489 U.S. 192–93. Joshua's mother sued, alleging that the local department's officials deprived Joshua of liberty without due process of law under the Fourteenth Amendment by not protecting him when they knew he was at risk of serious injury. *Id.* The District Court granted the state's motion for summary judgment, and the 7th Circuit Court of Appeals affirmed the dismissal. *Id.* The Supreme Court affirmed and held that a state does not owe a duty to protect its citizens from private violence, and that its failure to do so does not violate the Due Process Clause. *Id.* at 197.

170 *See In re* Ryan W., 76 A.3d 1049, 1069–70 (Md. 2013) (finding that a child in foster care has the due process right to notice from a state foster care agency acting as the child's representative payee for his social security survivor benefits—the notice is of the agency's appointment as representative payee and its receipt of benefits).

tion while in foster care.[171] Furthermore, the state must not only provide those in state custody adequate food, shelter, clothing, and medical care, but also training to help the person meet these needs.[172] The Court has explained that "[w]hen a person is . . . wholly dependent on the State[,] . . . a duty to provide certain services and care does exist."[173] Youth in foster care, because they are in state custody, certainly depend on the state to meet their basic needs for food, shelter, clothing, and medical care.[174] For those aging out, the state's obligation to prepare them to live independently (as demonstrated through child welfare laws and case law) requires providing services to ensure they have food, housing, clothing, education, and employment.[175] As the Maryland Court of Appeals has explained, youth in state care have "a right to reasonable stability in their lives."[176] When reunification, adoption, and guardianship are no longer permanency options, stability for that youth means self-sufficiency and preparation for living independently. Allowing youth to direct the services or types of services he or she receives is essential to ensuring that the youth will become

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171 *See, e.g.*, Doe v. South Carolina Dep't of Soc. Servs., 597 F.3d 163, 176 (4th Cir. 2010). This case established for the first time in the Fourth Circuit that "when a state involuntarily removes a child from her home, thereby taking the child into its custody and care, the state has taken an affirmative act to restrain the child's liberty, triggering the protections of the Due Process clause and imposing 'some responsibility for [the child's] safety and general well-being.'" *Id.* at 175 (citing *DeShaney*, 489 U.S. at 200) (alterations in original). The Fourth Circuit also recognized the following federal circuits that had previously held that children in foster care had substantive due process rights to protection from harm in foster care: the Sixth Circuit in *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990); the Seventh Circuit in *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) and in *Hutchinson ex rel. Baker v. Spink*, 126 F.3d 895, 900 (7th Cir. 1997); the Tenth Circuit in *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992); the Eighth Circuit in *Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993); and the Third Circuit in *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000).

172 *Youngberg*, 457 U.S. at 324.

173 *Id.* at 317.

174 *See id.* at 315, 324 (cited with approval in *DeShaney*, 489 U.S. at 199).

175 *See supra* Part II.A.1–2.

176 *In re* Adoption/Guardianship of Rashawn H. and Tyrese H., 402 Md. 477, 501 (2007). This case concerned a petition to terminate the parental rights of parent and whether the services the state agency provided to the parent were adequate to preserve the parent-child relationship. The high court of Maryland held that the services the state agency provided the parents were inadequate. The court reasoned that parents involved with the child welfare system need help in maintaining family stability. Parents needed services in the following areas to become stable: housing, employment, medical, and mental health services. *Id.* at 500. Youth aging out of foster care need meaningful services in those same areas in order to become self-sufficient and stable.

self-sufficient.[177]

In *Planned Parenthood v. Danforth*, the Supreme Court found that a minor with sufficient maturity may make medical decisions for herself, including determining whether she should have an abortion.[178] It explained that a minor has a constitutional right to make certain decisions for him- or herself, such as medical decisions.[179] Decisions regarding pregnancy affect the young woman in such a unique and personal manner that she has the right to determine whether to continue the pregnancy.[180] Minors of sufficient maturity can make that medical decision for themselves.[181] Similarly, youth of sufficient maturity and youth over age eighteen must be allowed to direct services offered in housing, education, and employment because of the personal nature of the consequences to that youth.[182] The youth would be better served by directing the services they need after discussing their needs with the state court and other decision makers. Such a deliberative process that includes the youth minimizes concerns adults may have with youth-directed service provision.

Furthermore, the "reasonable efforts" analysis in cases involving youth aging out requires identifying the specific services state agencies provide youth to help them become self-sufficient.[183] One state court has said of reasonable efforts regarding services state agencies must provide (albeit in the context of services to parents):

> Implicit in [the reasonable efforts] requirement is that a reasonable level of those services, designed to address both the root causes and the effect of the problem, must be offered—educational services, vocational training, assistance in finding suitable housing and employment, teaching basic parental and daily living skills, therapy to deal with illnesses, disorders, addictions,

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177 *See generally* Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

178 *Id.* at 74–75.

179 *Id.* at 74 ("Constitutional 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.")

180 *Id.*

181 *Id.* The Court in *Danforth* stated that not all minors of any age and maturity may consent to terminating their pregnancy. *Id.* at 75. Thus, an exception may have to be made for youth with severe mental illness or developmental disabilities. This exception should only be utilized, however, based upon a judicial determination that the youth is unable to make such decisions. The judicial determination would follow an evidentiary hearing where the youth's representative can provide and refute evidence regarding his or her client.

182 *See* Maloney, *supra* note 22, at 983 n.92.

183 The provisions of the international conventions that support a child's right to become self-sufficient are: CRC, *supra* note 19, arts. 26–28; ICCPR, *supra* note 20, arts. 6–7; ICESCR, *supra* note 21, arts. 1–2, 6, 9, 11, 12.

> and other disabilities suffered by the parent or the child, counseling designed to restore or strengthen bonding between parent and child, as relevant.[184]

Educational services, vocational training, housing assistance, and medical care are among those services that are necessary for all parents whose children have been removed from them.[185] Applying the importance of these services, the Maryland intermediate appellate court held in *In re James G.* that a single employment referral a case worker made to a father in support of the plan for reunification with his son was insufficient to find that a state agency made reasonable efforts.[186] In that case, the juvenile court found that the local department made reasonable efforts for monitoring the father's employment.[187] The appellate court found these efforts were not reasonable because the state agency did not verify that the referral was appropriate for the father's individual needs and did not make any other affirmative effort to help him obtain employment.[188] Reasonable efforts must be tailored to the specific needs of the person involved, whether a parent or child in state custody.[189] In *In re Tiffany B.*, the Tennessee appellate court found that the state agency did not provide reasonable efforts to parents who were addicted to crack, homeless, unemployed, and facing criminal charges.[190] In so finding, the court stated:

> While the Department's efforts to assist parents need not be "herculean," the Department must do more than simply provide the parents with a list of service providers and then leave the parents to obtain services on their own. The Department's employees must bring their education and training to bear to assist the parents in a reasonable way to address the conditions that required removing their children from their custody and to complete the tasks imposed on them in the permanency

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184 *In re* Adoption/Guardianship of Rashawn H. and Tyrese H., 402 Md. 477, 500 (2007).

185 *Id.*

186 *In re* James G., 178 Md. App. 543, 550–51(Md. Ct. Spec. App. 2008).

187 *Id.* at 591.

188 *Id.* at 592.

189 *In re* Adoption/Guardianship Nos. J9610436 & J9711031, 796 A.2d 778, 798 (Md. 2002). This case involved the reasonable efforts a state agency provided to a cognitively impaired father. He also had a limited ability to read. *Id.* at 789. The Court held that the state agency did not make reasonable efforts towards reunification where it referred him to parenting classes and to a domestic violence class, and to drug and alcohol evaluations. *Id.* at 787. The state agency offered "untailored" services to the father and should have provided timely and a sufficiently extensive array of programs to assist the father with his individual needs. *Id.*

190 *In re* Tiffany B., 228 S.W.3d 148, 160 (Tenn. Ct. App. 2007).

plan.[191]

The Court stated that the Department simply cannot expect parents with these particular needs to navigate and initiate efforts on their own.[192] Services must go beyond simply scheduling meetings and appointments,[193] or providing a list of services. Services must be individualized to be reasonable and must be directed by the youth's needs and wishes in housing, employment, education, and becoming self-sufficient.[194] Educational services, vocational training, housing assistance, and medical care are services that promote stability. These services are necessary in order for youth to successfully transition into adulthood. States must expend resources to provide youth in foster care services towards these objectives *precisely because* they are in state custody.[195]

ii. Charming Betsy and Child Welfare

Over one hundred years ago, the Supreme Court stated unequivocally that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[196] International law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[197] As Chief Justice Marshall explained, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[198] Human rights norms can define "reasonable efforts" under the *Charming Betsy* canon of statutory construction.[199] Under the *Charming Betsy* canon, courts can read federal child welfare laws consistent with international norms, or vice

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191 *Id.* at 158 (internal citations omitted).

192 *Id.* at 160.

193 *In re* Welfare of J.A., 377 N.W. 2d 69, 73 (Minn. Ct. App. 1985).

194 *See* CRC, *supra* note 20, arts. 2–3, 12; ICCPR, *supra* note 21, art. 2; ICESCR, *supra* note 21, arts. 1–2, 10.

195 CRC, *supra* note 19, art. 6; ICCPR, *supra* note 20, art. 2; ICESCR, *supra* note 21, arts. 2, 11, 12; *see also*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989); *cf.* Youngberg v. Romeo, 457 U.S. 307, 324 (1982).

196 The Paquete Habana, 175 U.S. 677, 700 (1900).

197 Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d. Cir. 1980) (citing United States v. Smith, 18 U.S. 153, 160–61 (1820); Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 295 (E.D. Pa. 1963)). *See also* STAT. OF INT'L CT. OF JUSTICE (1945), *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&.

198 Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804); *see also* Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1151–52 (7th Cir. 2001).

199 *Sampson*, 250 F.3d at 1153–55.

versa.[200] In other words, international law can be read into ambiguous federal laws.[201] This canon does not allow a cause of action based upon provisions of the CRC, ICCPR, or ICESCR, in part because of their non-self-executing character.[202] However, that the CRC, ICCPR, and ICCPR are not self-executing does not end of the inquiry of a state's obligations under that treaty or convention.[203] These international instruments can define the otherwise ambiguous "reasonable efforts" provision of domestic child welfare law.

The use of the *Charming Betsy* cannon when interpreting the Constitution and statues, while subject to debate, is not uncommon.[204] Some commentators advocate for broad use of the *Charming Betsy* canon in statutory construction,[205] others call for its limited use,[206] while others call for its elimination altogether.[207] The place for the *Charming Betsy* canon when interpreting child welfare laws is to use international norms to clarify and define "reasonable efforts," an otherwise vague term in federal child welfare law. While the Supreme Court provided state courts considerable latitude in defining "reasonable efforts" on a case-by-case basis, clarifying the factors that courts must consider in that analysis does not

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200 *Id.*

201 *See* Serra v. Lapin, 600 F.3d 1191, 1199 (9th Cir. 2010) (finding the *Charming Betsy* canon did not apply because statute regarding inmate pay was not ambiguous); Brilmayer, *supra* note 104, at 2282.

202 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 734–35 (2004) (finding that although the United States ratified the ICCPR and therefore is bound by it under international law, one cannot bring a claim to enforce its provisions in federal courts); *Serra*, 600 F.3d at 1196–97.

203 *See Filartiga*, 630 F.2d at 881–82.

204 *See generally* Ingrid Brunk Wuerth, *Authorization for the Use of Force, International Law, and the* Charming Betsy *Canon*, 46 B.C. L. REV 293 (2005) (arguing for application of the *Charming Betsy* canon when Congress provides a general authorization for the president to use force). Specifically, Professor Wuerth discusses the Supreme Court's use of international law when it considered general authorizations in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), arguing that under the *Charming Betsy* cannon "courts should presume that general authorizations for the use of force do not empower the President to violate international law." *Id.* at 293.

205 *See generally* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990) (arguing that the *Charming Betsy* canon, under Supreme Court precedent, requires using international law to read federal law).

206 *See generally* Curtis Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998) (rejecting the "internationalist conception" of the *Charming Betsy* canon that posits that international law supplements domestic law, calling instead for a more limited use of the canon based on separation of powers).

207 *See generally* Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185 (1993) (arguing for eliminating the *Charming Betsy* canon).

restrict the case-specific analysis. International courts have applied a similar principle in construing their statutes.[208] Given that Congress has long stated the importance of preparing older youth for self-sufficiency and the persistently porous results of states' attempts to meet that objective, using international human rights law to aid in interpreting and enforcing domestic child welfare law is both appropriate and necessary.

iii. The Supreme Court's Acceptance of International Law

Nearly a half-century ago, Justice Fortas stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[209] The Supreme Court has accordingly held that children have enforceable rights.[210] These include the right of children to protest,[211] due process protections for education,[212] to counsel in delinquency proceedings,[213] and potentially the right to special education under federal law independent of a parent.[214] Furthermore, the Supreme Court has long utilized international law, including conventions and the practice of other countries, to inform its interpretations of the Constitution.[215] The Court has also

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208 *See, e.g.*, Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 Can.

209 *In re* Gault, 387 U.S. 1, 13 (1967).

210 *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (affirming the right of children to be free from compulsory flag salutes in school); *In re Gault*, 387 U.S. at 41 (affirming that children have the right to an attorney in delinquency proceedings).

211 Tinker vs. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969) (holding that a student had the right to wear an armband as a sign of protest to war).

212 Goss v. Lopez, 419 U.S. 565, 573 (1975) (holding that children have a property interest in education such that the state may not deprive them of education, either through expulsion or suspension, without first providing due process protections; the Court did not define the amount of process that was due in all school discipline cases, but nonetheless affirmed that schools must provide students notice and an opportunity to be heard before depriving them of education).

213 *In re Gault*, 387 U.S. at 36–37.

214 Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 528 (2007).

215 *See* Trop v. Dulles, 356 U.S. 86, 102 n.35 (1958) (finding unconstitutional a federal statute authorizing denationalization of a person convicted of desertion by military court martial, finding that statelessness is a "condition deplored in the international community of democracies"); *see also* Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (finding unconstitutional statutes authorizing the death penalty for the crime of rape where the victim did not die, noting that "it is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty" in this case); Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982) (noting that felony murder has been abolished in England and India, restricted in Canada, and is "unknown in continental Europe"); Thompson v. Oklahoma, 487 U.S. 815, 830 n.31 (1988); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (noting "within the world community, the imposition of the death penalty for crimes committed by

utilized international law when interpreting statutes.[216] The Court's jurisprudence primarily determines whether international law confirms its conclusions.[217] International law does not control outcomes regarding domestic law, but it "does provide respected and significant confirmation for [the Court's] conclusions."[218] Furthermore, the Supreme Court has not specifically invoked the *Charming Betsy* canon when applying international law, but it has nonetheless applied it.[219] The Supreme Court has utilized international law, without specifically referencing the *Charming Betsy* canon, to confirm its analysis of the Constitution.[220] It has nonetheless applied international law. Utilizing international law as an aid in interpreting statutes is especially appropriate when an act of Congress is ambiguous.[221] The one certainty with regard to "reasonable efforts" is that the term is uncertain. Preparing youth

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mentally retarded offenders is overwhelmingly disapproved"); Roper v. Simmons, 543 U.S. 551, 568 (2005) (state may not execute youth for crimes committed before they reach eighteen years of age); Graham v. Florida, 560 U.S. 48, 82 (2010) (prohibiting life without parole sentences for non-homicide crimes committed by juveniles); Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) (prohibiting mandatory life without parole for crimes committed before age eighteen).

216 *See* Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804); Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001).

217 *Graham*, 560 U.S. at 80 (citing *Roper*, 543 U.S. at 572) ("The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual. In that inquiry, 'the overwhelming weight of international opinion against' life without parole for nonhomicide offenses committed by juveniles 'provide[s] respected and significant confirmation for our own conclusions.'"). Subsequently in *Miller*, the Supreme Court struck down the sentence of mandatory life without parole for a juvenile convicted of murder. The majority did not rely upon international norms for its holding, but cited with approval its holdings and rationales in *Roper* and *Graham* that referenced international norms that, to use Justice Kennedy's words, confirmed the Court's holdings. 132 S. Ct. at 2469.

218 *Roper*, 543 U.S. at 578. Speaking to sovereignty and federalism concerns, the Court held that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Id.*

219 *See* Lawrence v. Texas, 539 U.S. 558, 572–73 (2003) (citing to opinion of the European Court of Human Rights that invalidated the laws of Northern Ireland banning "consensual homosexual conduct" as well as report from a committee in the British Parliament that recommended repealing laws banning consensual homosexual conduct); *see also* Grutter v. Bollinger, 539 U.S. 306, 344–46 (2003) (Ginsburg, J., concurring) (noting that the Court's observation that race-conscious programs must have an ending is consistent with international law).

220 *See* cases cited *supra* note 215.

221 *See* Serra v. Lapin, 600 F.3d at 1199 (9th Cir. 2010); Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 295 (E.D. Pa. 1963). *See also* STAT. OF INT'L CT. OF JUSTICE arts. 38, 59 (1945), *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&.

for independence is a value that is certain in the United States and in the world community.[222] Therefore, human rights necessary for self-sufficiency can and should be used to clarify ambiguous federal and state child welfare provisions in the United States.[223]

In *Atkins v. Virginia*, the Court cited the growing international consensus against executing people with intellectual disabilities when it struck down that practice as a violation of the Eighth Amendment.[224] The Court looks to and considers international norms particularly as it relates to the treatment of youth. In *Roper v. Simmons*, the Court considered whether a state may execute an older youth convicted of first-degree murder.[225] The Court reviewed the practice of executing juveniles internationally, as well as the CRC's provisions against executing juveniles.[226] While not striking down the juvenile death penalty because of international norms or instruments, the Court's consideration of international norms suggests its approval of the practice when analyzing the Constitution. The Court continued its consideration of international norms again in *Graham v. Florida* when it invoked the CRC in striking down the sentence of life without parole as a sentence for a juvenile convicted of murder.[227] Again, the Court continued what it described as its "longstanding practice in noting the global consensus against" life without parole for juveniles.[228] In noting this global consensus, the Court cited to the CRC's prohibition of the sentence and acceptance of the instrument by the world community.[229]

Similarly, other U.S. courts have used international norms to interpret federal statutes.[230] In *Beharry v. Reno*, the district court

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222 *See* Youngberg v. Romeo, 457 U.S. 307, 324 (1982); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199 (1989).

223 *See* Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804); Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

224 Atkins v. Virginia, 536 U.S. 304, 316–17 n.21 (2002).

225 Roper v. Simmons, 543 U.S. 551, 575–79 (2005) (noting that the United States was at the time one of the few countries that executed juveniles and referencing the CRC's prohibition of executing juveniles).

226 *Id.*

227 Graham v. Florida, 560 U.S. 48, 79–80 (2010).

228 *Id.* at 79.

229 *Id.* at 80.

230 *See* Brilmayer, *supra* note 104, at 2296; *see also* Harold Kongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (arguing that federal courts regularly incorporate international norms into federal law, as has been their long-standing practice, responding to Curtis A. Bradley and Jack Goldsmith, *Customary International Law as Federal Common Law: a Critique of the Modern Position*, 110 HARV. L. REV. 815 (1999)).

held that provisions of the CRC were customary international law and, as such, required the Immigration and Naturalization Service to provide the petitioner a hearing to determine the impact of his deportation on his child.[231] While this case has been questioned,[232] other courts have suggested that the *Charming Betsy* canon may be appropriate where the law is ambiguous.[233] Admittedly, using international norms as an interpretive tool, including the use of the *Charming Betsy* canon, is not accepted by all.[234] Nonetheless, the use of international norms and law to interpret the Constitution and federal statutes has been utilized by U.S. courts, including the Supreme Court. Using international norms to interpret statutes is appropriate in circumstances in which they are consistent with federal law and when they clarify ambiguity in federal law. The ambiguity of "reasonable efforts" in federal child welfare law combined with the shared value of preparing youth for self-sufficiency is an appropriate opportunity for utilizing international law. Using international law to define "reasonable efforts" for youth aging out is especially appropriate because doing so can improve outcomes for youth aging out.

C. The Need to Utilize Community Resources

Improving outcomes for youth aging out of foster care also requires utilizing resources in the youth's local community to break the cycle of poverty in which many find themselves. Foster care is meant to be temporary, but, as noted above, many youth remain in foster care (rather than reuniting with their families of origin or being adopted) until they age out. And for many who remain in foster care until aging out, poverty becomes their permanent placement.[235] Youth aging out often remain in the same communities from which the state initially removed them. Courts and advocates, therefore, must better utilize community resources to help youth in the child welfare system integrate into their commu-

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231 183 F. Supp. 2d 584, 604–05 (E.D.N.Y. 2002).

232 Beharry v. Ashcroft, 329 F.3d 51, 63 (2d. Cir. 2003) (reversing *Beharry* on other grounds, but noting that its decision to do so is not an endorsement of that court's analysis and application of international law); *see also* Oliva v. U.S. Dep't of Justice, 433 F.3d 229, 234 (2d Cir. 2005) (disapproving of *Beharry*).

233 Guaylupo-Moya v. Gonzales, 423 F.3d 121, 135 (2005) (rejecting the *Beharry v. Reno* analysis because Congress' intent and language in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 was clear and, therefore, the court should not have utilized international law in its analysis).

234 *E.g.,* Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1151–52 (7th Cir. 2001).

235 *See cf.* COURTNEY ET AL., *supra* note 7, at 32.

nity. Utilizing human rights of youth aging out is an assertion of the dignity of the individual youth. Dignity requires considering persons the youth may consider a resource for them, but who state agencies may otherwise overlook. Federal law recognizes the importance of connecting those aging out of foster care to another person.[236] Identifying community members as a source of support (emotionally and otherwise) as well as a resource for services is necessary to help young people maintain themselves in the community through a means other than state agencies.

When the United States endeavored upon the "War on Poverty," it infused funds and professionals into low-income communities in order to eliminate poverty. Almost immediately, community members and leaders cautioned against the use of this "military-like" strategy to overcome the complex issue of poverty. Edgar Cahn and Jean Camper Cahn were two of many who explained the need for a community-centered approach to overcome poverty.[237] They agreed that the influx of outside funds and outsiders may be useful in addressing the complexity that is poverty.[238] However, they argued that providing services to those in low-income communities in and of itself would be insufficient to overcome the problem without utilizing the skills and assets of the members of the community.[239] They referred to this as utilizing a civilian perspective (as opposed to the military-like "War on Poverty") that recognized the "dignity and worth" of the people in the communities to be "served."[240] Stringent "comprehensive action programs" that are devised by those in the dominant social, political, education, and economic institutions lack essential information about the effectiveness of the programs devised.[241] Those in the dominant institutions of a given system do not directly experience how these programs work and, therefore, are limited in fully appreciating the effectiveness and limitations of the problem. Or, as L.B. reminded the court, "you make your decision and go home . . . I live your decisions." Communities and community members have skills, abilities, and resources too often overlooked by those in the dominant

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236 *See, e.g.*, 42 U.S.C. § 677(a)(4) (2012) (stating that one purpose of the independent living program is to provide youth emotional support as they age out, and this support is to come from mentors and encouraging "interactions with dedicated adults").

237 Edgar Cahn & Jean Camper Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1317 (1964).

238 *Id.* at 1318.

239 *Id.*

240 *Id.* at 1330.

241 *Id.*

institutions.[242]

Applied to all youth in foster care, but particularly those who will remain in state care until they age out, advocates and courts must be directed as much as possible by the skills, abilities, resources, and wishes of each individual youth. The resources include family and community resources that may not have been ideal for the individual youth when he or she was younger, but now pose less harm (if any) to the youth. Youth in state care must be placed in the most family-like environment, or least restrictive setting.[243] Children removed from their parents' home must be placed near their homes to the extent possible.[244] If children are placed far from home, then the state must explain the reasons for doing so.[245] Having community support is essential for youth to navigate through society including working with landlords, housing searches, employment searches, and other such needs.[246] Such family and community resources require state-support where possible. Mentoring and similar community social supports are slowly but surely becoming part of programs that providing independent living programs.[247] Courts must look to these programs to assist with the transition to independent living, but not exclusively. They must look to family and non-family members who can be a support for the youth aging out of foster care. To this end, federal law prioritizes family placement. Some states expand the definition of a "relative" to be one with whom the child has a close relationship but is a blood relative.[248] Such an expanded definition is an appro-

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242 *See generally* JOHN MCKNIGHT, THE CARELESS SOCIETY: COMMUNITY AND ITS COUNTERFEITS (1995); GERALD LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992).

243 42 U.S.C. § 675(5)(A) (2012).

244 *Id.*

245 *Id.*

246 DWORSKY ET AL., *supra* note 52, at 11.

247 *Id.* at 25.

248 MD. CODE REGS. 07.02.29.02(B)(11) (2013). The regulation defines "relative" as:

> an adult who is at least 21 years old, or is at least 18 years old and married to an adult who is at least 21 years old, and who is:
>
> (a) Related by blood, marriage or adoption within the fifth degree of consanguinity or affinity as set forth in the Estates and Trusts Article, §1-203, Annotated Code of Maryland; or
>
> (b) An individual who makes up the family support system, including:
>
> (i) Adults related beyond the fifth degree of consanguinity or affinity;
>
> (ii) Godparents;
>
> (iii) Friends of the family; or
>
> (iv) Other adults who have a strong familial bond with the child.

Id.

priate legal basis for courts and advocates to better utilize community members in improving outcomes for youth aging out.

For any reform of the child welfare system to be effective, and not continue the porous consequences of the previous decades, decision-makers in that system, but particularly courts, must incorporate the community into young people's lives. The consequence of not doing so is to leave young people more susceptible to victimization, poverty, and incarceration.[249]

III. Applying Human Rights to the Treatment of Youth in State Care

A. How Courts Abroad Have Enforced Human Rights of Youth

The objective of protecting children through international instruments is the "harmonious development of their personality and the enjoyment of their recognized rights."[250] To this end, the "best interests of the child" standard, which is used in all child welfare related proceedings,[251] is intended to protect the dignity of the child by fostering his or her development.[252] Courts and tribunals abroad have applied human rights values, rights, and instruments as an aid to interpreting domestic laws and other international treaties.

In the *Street Children Case*, the Inter-American Court of Human Rights (IACHR) applied the values and rights expressed in the CRC and ICCPR to determine that Guatemala violated its obligations under the American Convention on Human Rights by its treatment of children living on its streets.[253] The IACHR interprets

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[249] *See generally supra* Part I.A.

[250] Judicial Condition and Human Rights of the Child, *supra* note 100, ¶ 53.

[251] *See* CRC art. 3; 42 U.S.C. § 675(5) (2012) (requiring that the states' "case review system" has a plan to ensure that the child's placement is consistent with their best interests and that the child's permanency plan be consistent with his or her best interests).

[252] Judicial Condition and Human Rights of the Child, *supra* note 100, ¶¶ 53, 56.

[253] Villagran Morales et al. v. Guatemala (*Street Children Case*), Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 2 (Nov. 19, 1999), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.pdf. This case was submitted to the Court by the Inter-American Commission on Human Rights from a petition filed by the Secretariat of the Organization of American States. *Id.* ¶ 1. The Commission is responsible for promoting respect for and defending human rights primarily in the Americas. Organization of American States, American Convention on Human Rights (ACHR) art. 41, Nov. 22, 1969, 1144 U.N.T.S. 144, *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf. To this end, the Commission appears in all cases before the IACHR. *Id.* art. 57. It also submits cases to the IACHR for interpretation and enforcement of human rights. *Id.* art. 61.

and applies the American Convention on Human Rights. The Court found that Guatemala tortured, persecuted, and engaged in systemic aggression against five people, three of whom were minors (under age eighteen).[254] The IACHR also addressed the right of children to adequate support and treatment by the state. Specifically, it applied the child's rights under CRC Articles 2 (nondiscrimination), 3 (protection by those legally responsible for him or her), 6 (right to life), 20 (special protection to those living outside of his or her family), 27 (standard of living for development), and 37 (freedom from torture and right to humane treatment) to define the "measures of protection" in Article 19 of the American Convention.[255] The CRC applied because it was part of the international body of law that protects children and that should, therefore, be utilized in interpreting provisions of other instruments, in this case Article 19 of American Convention.[256] Furthermore, for all of the victims, the Court applied the ICCPR's protection against arbitrary deprivation of life in determining that Guatemala violated Article 4 of the American Convention.[257] Importantly, the IACHR found that the right to life includes the right to not be prevented from accessing services and conditions that lead to "a dignified existence."[258] States have an affirmative obligation to create conditions to ensure the right to life is not violated, particularly for young people.[259] The IACHR held that Guatemala violated its obligations to protect children living on the street and provide them an adequate standard of living.[260]

In *Baker v. Canada*, the Supreme Court of Canada reversed the decision of an administrative hearing officer's decision to deport an "illegal immigrant" (Ms. Baker) because the officer did not consider the best interests of Ms. Baker's children as the CRC required.[261] Canada ratified the CRC, but it was not a self-executing instrument. The Canadian Parliament had not implemented the

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254 *Street Children Case*, *supra* note 253, ¶ 198.

255 *Id.* ¶ 196.

256 ACHR art. 19 ("Every minor child has the right to the measures of protection required by his condition to be part of his family, society, and the state.").

257 *Id.* art. 4 ("Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.").

258 *Street Children Case*, *supra* note 253, ¶ 144; *see also id.* Joint Concurring Op. of Cançado Trindade & Abreu-Burelli, JJ., ¶¶ 2, 4–8 (describing the positive obligation of states to ensure children have conditions of a life with dignity)).

259 *See id.* ¶ 196 (lead opinion).

260 *Id.* ¶ 198.

261 Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, ¶ 73 (Can.).

CRC into domestic law.[262] The Court, however, held that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."[263] The Court justified its application of the CRC into domestic law in part because courts in other countries have similarly utilized international law to inform constructions of domestic statutes.[264] As a result, the Supreme Court held that the hearing officer had to utilize international law because of the importance of protecting children in Canada.[265]

Similarly, English courts have applied the CRC's provisions to explain, clarify, and reaffirm provisions of the European Convention on Human Rights.[266] English courts have used the CRC to clarify ambiguities in domestic law relating to children.[267] England, like Canada, ratified the CRC but has not incorporated it specifically into its domestic laws.[268] Nonetheless, their use of the CRC and other international instruments as a tool in interpreting international and domestic laws indicate England's acceptance of its obligations to protect the rights of children, including those in state care.[269] These rights include a child's economic, social, and cultural rights.[270] Courts in India also apply international law as part of Indian domestic law unless the two directly conflict and cannot be reconciled with each other.[271] Thus, courts abroad enforce the

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262 *Id.* ¶ 69.

263 *Id.* ¶ 70.

264 *Id.* (citing *Tavita v Minister of Immigration*, [1999] 2 NZLR 257, 266 (CA), and *Vishaka v Rajasthan*, (1997) 3 S.C.R. 361, 367 (India), as two "common law countries" that have used international law as an aid to interpret their domestic laws).

265 *Id.* ¶ 73.

266 *See* Woolf, *supra* note 87, at 215 (citing R. (on the application of The Howard League for Penal Reform) v. Secretary of State for the Home Department, [2002] EWHC (Admin) 2497, ¶ 51 (Eng.)).

267 *Id.* at n.58 (citing *Ex parte Venables* [1998] A.C. 406 at 499).

268 *Id.* at 219.

269 *Id.*; *see also Street Children Case*, *supra* note 253, ¶ 183 n.32.

270 Woolf, *supra* note 88, at 219. Furthermore, youth with disabilities who are in state care may have additional rights under international law to independent living. *See generally* Camilla Parker, *The UN Convention on the Rights of Persons with Disabilities: A New Right to Independent Living?*, 4 EUR. HUM. RTS. L. REV. 508 (2008).

271 *See* JANIS, *supra* note 107, at 107 (citing R.C. HINGORANI, MODERN INTERNATIONAL LAW 30 (1979)). On the application of international law in Australia, see Michael Kirby, *The Role of International Standards in Australian Courts*, *in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1015 (Henry J. Steiner & Philip Alston eds., 2000) (noting the application of the Banglore Principles that courts may utilize international law to determine the domestic law where there is ambiguity in domestic statutes or common law). On the use of international human rights law by Japanese courts, see *id.* at 1006–08; *see also* YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS LAW AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW 288–306 (1998).

human rights of youth, particularly in regard to the obligation of states to provide for the development and self-sufficiency of youth.

B. Revisiting L.B.'s Preparation for Self-Sufficiency

Applying the human rights expressed in the CRC, ICCPR, and ICESCR to domestic foster care hearings would require state courts to begin addressing housing, education, work force supports, and local community resources when a youth turns sixteen and his or her case plan requires planning for independence.[272] The court's and state agency's provision of services must be consistent with the youth's maturity and ability to make decisions.[273] In L.B.'s case, the court would have asked the following inquiries at every hearing starting when he turned sixteen until he aged out:

1. *Housing*:[274] Here, the state agency would produce a specific plan for L.B. to obtain independent housing well before he ages out of foster care.[275] The plan would include how L.B. would afford rent, utilities, and living expenses for a one-year lease. The court would consider evidence of referrals the state agency made for housing that L.B. could afford. The housing options could range from apartments to rooms in a house. L.B. could have looked to his cousin Ty, for example, as someone with whom he could live;
2. *Education*:[276] Here, the state agency would identify the ser-

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272 42 U.S.C. § 675(1)(D) (2012). *Cf.* 42 U.S.C. § 675(5)(H).

273 *See* Planned Parenthood v. Danforth, 428 U.S. 52, 74–75 (1976).

274 Convention on the Rights of the Child (CRC), *supra* note 19, art. 2(1) (non-discrimination); *id.* art. 4 (maximize resources to implement youth's economic rights among others); *id.* art. 6(2) (maximize to the extent possible youth's development); *id.* art. 26 (right to full realization of social security); *id.* art. 27 (standard of living for youth's physical, mental, moral, and social development); International Covenant on Civil and Political Rights (ICCPR), *supra* note 20, art. 6 (right to life and survival); *id.* art. 7 (from inhuman and degrading treatment); International Covenant on Economic, Social, and Cultural Rights (ICESCR), *supra* note 21, art. 1 (right to self-determination and to pursue economic, social, and cultural development); *id.* art. 2 (requiring states to maximize resources to achieve the rights in the Convention); *id.* art. 9 (right to social security); *id.* art. 11 (embodying the right to adequate standard of living that includes food, clothing, housing, and freedom from hunger); *id.* art. 12 (right to the highest attainable standard of physical and mental health).

275 In Maryland, that age is twenty-one. MD. CODE ANN., CTS. & JUD. PROC. § 3-804 (West, Westlaw through chapter 1, 4, 9, 40, 41, 44, 45, 48, 49, 62, 67, 68, 72, 88, 90, 95, 127, 146, 233, 241, 246, 254, and 255 of the 2014 reg. sess. of the General Assembly) (establishing the jurisdiction of the juvenile court in foster care proceedings as twenty-one).

276 CRC, *supra* note 19, art. 2(1) (non-discrimination); *id.* art. 4 (maximize resources to implement youth's economic rights among others); *id.* art. 6(2) (maximize

vices L.B. needs to obtain, at the very least, his high school diploma or GED. It would identify his education goals and the services he needs to achieve these objectives (such as tutoring or college visits). L.B. and the state agency would provide his current education status (grade, progress towards graduation, etc.). L.B. was planning to earn his GED because he struggled in a conventional academic setting. The court would determine whether he needed additional help to study for and pass the GED exam. It would ensure payment for the exam, if needed.

When he attended school, L.B. received special education services.[277] In such a case, advocates and the court would have to identify the nature of the disability, the services he received through his IEP, and, given his age, consider the transition services he received through his individualized education program (IEP).[278] For students with disabilities, state child welfare agencies have an opportunity to coordinate services for older youth to prepare them for independent living;[279]

3. *Medical Care*:[280] The state agency would provide informa-

to the extent possible the youth's development); *id.* art. 12 (give weight to youth's views); *id.* art. 26 (right to full realization of social security); *id.* art. 27 (standard of living for the youth's physical, mental, moral, and social development); *id.* art. 28 (provide access to education, including vocational information, based upon capacity of the youth); ICCPR, *supra* note 20, art. 6 (right to life and survival); and ICESCR, *supra* note 22, art. 1 (right to self-determination and to pursue economic, social, and cultural development); *id.* art. 2 (requiring states to maximize resources to achieve the rights in the Convention); *id.* art. 9 (right to social security), and 12 (right to the highest attainable standard of physical and mental health).

277 *See* Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(1) (2012) (requiring all local education agencies receiving federal funds to provide a free and appropriate public education to eligible students with disabilities that is individualized to meet the student's specific learning needs).

278 *See* 34 C.F.R. §§ 300.120–24 (2013) (describing the IEP and its components).

279 For all students eligible for special education services who are sixteen years old and older (and in some circumstances younger), the local education agency must provide transition services that will prepare the student for life after graduation. *See id.* Transition services are a coordinated set of activities based on the student's needs, abilities, and desires that will prepare the student for post-secondary education, vocational training, independent living, and/or community involvement. *Id.* § 300.43.

280 CRC, *supra* note 19, art. 2(1) (non-discrimination); *id.* art. 4 (maximize resources to implement youth's economic, social, and cultural rights); *id.* art. 6(2) (maximize to the extent possible the youth's development); *id.* art. 12 (give weight to youth's views); *id.* art. 26 (right to full realization of social security); *id.* art. 27 (standard of living for the youth's physical, mental, and social development); ICCPR, *supra* note 21, art. 6 (right to life and survival); *id.* art. 7 (freedom from inhuman and degrading treatment); ICESCR, *supra* note 22, art. 1 (right to self-determination and to pursue economic, social, and cultural development); *id.* art. 2 (requiring states to

tion on L.B.'s medical needs, including dates of physical exams. It would identify any medical issues, both chronic and acute, he has and the manner in which he would meet those needs. This information would also include information on L.B.'s dental care. The state agency would also ensure L.B. had therapeutic or mental health care as appropriate. It would identify the specific manner by which the state will provide for L.B.'s needs in each of these areas. As he gets older, the state agency would provide, or help L.B. devise a method of obtaining, health care after he aged out. Upon aging out, the state agency would provide L.B. with all of his medical records;

4. *Employment*:[281] Here, the state agency would develop with L.B. his long-term and short-term employment objectives. Based on his strengths and skills, the state agency would help L.B. identify jobs to which he can apply, help him apply for the jobs, including resume writing or completing the application, and with interviewing skills. The agency would provide a job coach to help L.B with the day-to-day aspects of working; and
5. *Life Skills*:[282] Here, the state agency would explain whether

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maximize resources to achieve the rights in the Convention); *id.* art. 9 (right to social security); *id.* art. 11 (right to adequate standard of living including freedom from hunger); *id.* art. 12 (right to the highest attainable standard of physical and mental health).

[281] CRC, *supra* note 19, art. 2(1) (non-discrimination); *id.* art. 4 (maximize resources to implement youth's economic, social, and cultural rights), 6(2) (maximize to the extent possible the youth's development); *id.* art. 12 (give weight to youth's views); *id.* art. 26 (right to full realization of social security); *id.* art. 27 (standard of living for the youth's physical, mental, and social development); *id.* art. 28 (right to education and vocational information); ICCPR, *supra* note 20, art. 6 (right to life and survival); *id.* art. 7 (freedom from inhuman and degrading treatment); ICESCR, *supra* note 21, art. 1 (right to self-determination and to pursue economic, social, and cultural development); *id.* art. 2 (requiring states to maximize resources to achieve the rights in the Convention); *id.* art. 6 (right to work); *id.* art. 9 (right to social security); *id.* art. 11 (right to adequate standard of living including freedom from hunger); *id.* art. 12 (right to the highest attainable standard of physical and mental health).

[282] CRC, *supra* note 19, art. 2(1) (non-discrimination); *id.* art. 3(1) (requiring social welfare organizations, courts, and administrative authorities to protect the youth's best interests); *id.* art. 4 (maximize resources to implement youth's economic, social, and cultural rights); *id.* art. 6(2) (maximize to the extent possible the youth's development); *id.* art. 12 (give weight to youth's views); *id.* art. 20 (special protection to those states remove from their homes to protect the youth's best interests); *id.* art. 26 (right to full realization of social security); *id.* art. 27 (standard of living for the youth's physical, mental, and social development); ICCPR, *supra* note 20, art. 6 (right to life and survival); *id.* art. 18 (freedom of thought and conscience); *id.* art. 19 (freedom of opinion and expression); and ICESCR, *supra* note 21, art. 1 (right to self-determination and to pursue economic, social, and cultural development); *id.* art. 2 (requiring

> L.B. had the day-to-day life skills needed to live independently. It would provide evidence of the same through, for example, producing a realistic budget it helped him develop. It would help L.B. establish and maintain both a savings and checking account. It would ensure that L.B. knows and understands the bills for which he is responsible and that he has means to meet those obligations, including through employment and education funding. The state agency would also provide continuing education on retirement planning.

If youth aging out of foster care are to be self-sufficient, then states must provide them the services they need to live independently. States owe this obligation to all youth *precisely because* they are in state custody.[283] Youth aging out need assistance in obtaining housing, appropriate educational services, medical care, employment, and life skills if they are to be self-sufficient. At a minimum, courts must require state agencies to produce evidence of their efforts in the aforementioned areas at each permanency review hearing beginning when the youth turns age sixteen. Moreover, courts must direct state agencies to refer each individual youth to appropriate community members to develop the skills necessary to live independently.[284] For example, if L.B. had been provided a mentor through a particular non-profit or state agency, or someone he may have known through a religious institution[285] who was supportive of him and could guide him after he ages out. Ty could have been that adult support, as could other relatives or members of the community L.B. trusted.

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states to maximize resources to achieve the rights in the Convention); *id.* art. 12 (right to the highest attainable standard of physical and mental health).

283 *See generally* CRC, *supra* note 19, art. 6; ICCPR, *supra* note 20, art. 2; ICESCR, *supra* note 21, arts. 2, 11–12; *see also* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989).

284 CRC, *supra* note 19, art. 2(1) (non-discrimination); *id.* art. 4 (maximize the youth's economic, social, and cultural rights); *id.* art. 6(2) (ensure the youth's development); *id.* art. 27 (providing a standard of living for the youth's physical, mental, and social development, and requiring states to help parents and those responsible for caring for the youth's standard of living); ICCPR, *supra* note 20, art. 6 (right to life and survival); *id.* art. 7 (freedom from inhuman and degrading treatment); ICESCR, *supra* note 21, art. 1 (right to self-determination and to pursue economic, social, and cultural development); *id.* art. 2 (requiring states to maximize resources to achieve the rights in the Convention); *id.* art. 9 (right to social security); *id.* art. 11 (right to adequate standard of living including freedom from hunger); *id.* art. 12 (right to the highest attainable standard of physical and mental health).

285 Religious institutions in a local community could be a resource to assist L.B., or any other youth in foster care. For that matter, anyone who has a positive relationship with young people can be a resource for that young person.

Had the state court made these inquiries at each of L.B.'s permanency hearings beginning when he turned sixteen, then it could have timely required the state agency to provide the services L.B. needed to become self-sufficient. The court would have understood that Ty could have provided better support for L.B. than would staff persons at his latest group home. The court could have placed L.B. with Ty and ordered the state agency to provide them assistance to maintain that placement, which would likely cost less than group care. Enforcing L.B.'s human rights through the existing child welfare laws would likely have led to more stability for him than what he actually had when he aged out. Courts' obligation to ensure youth receive these services is clear. Using human rights to define reasonable efforts for youth aging out is the legal mechanism to uphold the obligation to provide permanency that states promise children when removing them from their homes.

Conclusion

Older youth in foster care need help transitioning out of foster care. Many youth transition from foster care into instability, incarceration, unemployment, and homelessness. They become entrenched in poverty. State and federal efforts to combat these outcomes, although well-intentioned, have been ineffective. In order to meaningfully address the problems facing youth aging out of foster care, courts must enforce youth's right to self-sufficiency. Courts must enforce the human rights of young people through a clearer, more particularized, and more expansive understanding of the reasonable efforts provision of child welfare laws. By recognizing that the human rights and human dignity for aging out youth means being in a stable home, with stable and adequate employment to provide for basic needs, courts have the means of identifying efforts that are reasonable for youth transitioning from foster care. The Supreme Court's practice and the *Charming Betsy* canon of statutory construction provide the legal basis for implementing and enforcing human rights. Doing so would have allowed L.B. to remain with family members, could have helped him begin planning for life after foster care in a timely manner, and likely would have led to his safe transition into independence when he aged out. Instead, L.B. aged out of foster care and into instability.

As the Supreme Court has stated, "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those

same rights within our own heritage of freedom."[286] Applying human rights will not solve all of the problems associated with child welfare or poverty.[287] By recognizing the human rights of youth to become self-sufficient, however, those involved in implementing child welfare laws will be closer to improving outcomes for those aging out. The most effective way to implement the human rights of youth aging out is through the reasonable efforts provision of child welfare laws. Youth aging out of foster care need reasonable efforts in their transition to independence. The CRC, ICCPR, and ICESCR establish the human rights of youth to housing, employment, education, and medical care, among others. Courts must enforce these rights in order to meet the goal of federal child welfare law: becoming self-sufficient adults. By incorporating human rights into domestic child welfare laws, we can bridge the gap between the promise of Justice Rutledge's declaration and the realities about which L.B. reminded the court nearly seventy years later. Youth aging out of foster care deserve no less than the dignity of being self-sufficient members of society.[288]

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286 Roper v. Simmons, 543 U.S. 551, 554 (2005).

287 *See* Martin Guggenheim, *Ratify the U.N. Convention on the Rights of the Child, But Don't Expect Miracles*, 20 EMORY INT'L L. REV. 43 (2006).

288 *See* Prince v. Massachusetts, 321 U.S. 158, 165–66 (1944).