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A Clean Slate for Texas Foster Youth: Policy Recommendations on Preventing and Resolving Identity Theft for Youth in Foster Care

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A CLEAN SLATE FOR TEXAS FOSTER YOUTH: POLICY RECOMMENDATIONS ON PREVENTING AND RESOLVING IDENTITY THEFT FOR YOUTH IN FOSTER CARE

Madison Howard Churchman[†]

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I. INTRODUCTION

Throughout the nation, the foster care system is failing to protect our nation’s most vulnerable youth. In 2016, *M.D. v. Abbott* made national headlines and revealed a broken foster care system in Texas that failed to prevent the mistreatment of children. Unsurprisingly, *M.D. v. Abbott* does not explicitly address the issue of identity theft among foster youth because of the multitude of other pressing issues the foster care system presents.¹ This Article fills that void by demonstrating why identity theft among foster youth is a critical issue in need of discussion, resolution, and implementation at the state level.

Every year, hundreds of thousands of children enter the child welfare system and are placed in foster care.² When parents face allegations of abuse, abandonment, or neglect, children frequently enter the foster care system, and the state works towards one of two goals: reunification or termination of parental rights and adoption.³ Reunification involves a strategic plan created by Child Protective Services (“CPS”) and the court where the parents work to demonstrate that they are equipped to parent and care for the child or children.⁴ Terminating parental rights and allowing for adoption is the next step when

1. The lack of attention prolongs the problem, though, and makes writing on the subject particularly difficult because there is a lack of statistical data. One way to begin to seriously address the issue of identity theft is to begin to record and collect data regarding the foster youth in Texas that it impacts. However, existing social science supports the claims made in this Article and demonstrate the negative impact on foster youth.

2. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, CHILDREN’S BUREAU, <http://www.acf.hhs.gov/programs/cb> [<https://perma.cc/2UP7-UG7J>] (last visited Sept. 24, 2017).

3. Larisa Maxwell, Comment, *Fostering Care For All: Towards Meaningful Legislation To Protect LGBTQ Youth In Foster Care*, 1 TEX. A&M L. REV. 209, 212–13 (2013).

4. *Family Reunification: What the Evidence Shows*, U.S. DEP’T OF HEALTH & HUM. SERVS.: CHILD WELFARE INFO. GATEWAY (June 2011), https://www.childwelfare.gov/pubPDFs/family_reunification.pdf#page=2&view=The%20Child%20and%20Family%20Services%20Reviews%20and%20Family%20Reunification [<https://perma.cc/Z67T-2TW5>].

reunification does not work or is not an option.⁵ The process consists of terminating parental rights of both biological parents. Then, the child is hopefully adopted by his or her foster family or by a different family pursuing adoption.

While youth are waiting to be reunified with biological families or adopted, they are typically placed in foster care.⁶ Foster care is defined as “children [living] with relative or nonrelative adults who have been approved by the State, or by an agency licensed by the State, to provide them with shelter and care.”⁷ The child welfare system’s two main goals are to “ensure the safety of children [and] provide for their basic living needs.”⁸ Youth who are not able to be reunified with their biological families and who are not adopted “age out” of the system, meaning that they reach adulthood, exit the child welfare system, and must face the world without a family support system. Teenagers are considered “hard to place” youth and most frequently end up in group homes and age out of the system instead of being adopted.⁹

Many movies over the years, such as “Annie” and “Despicable Me,” have dramatized the plight of the child in foster care. In these movies, the children overcome incredible obstacles to eventually find happy endings with wonderful, caring parents. However, many foster youth never find their Daddy Warbucks or lovable Gru before exiting care.¹⁰ Although foster care and adoption often result in building new families, as a whole, the system has many serious shortcomings that lead to children slipping through the cracks.¹¹ Because of this, society

5. Nationally, fifty-five percent of children in foster care have a case plan goal of reunification; twenty-five percent have a case plan goal of adoption. See *Foster Care Statistics 2015*, U.S. DEP’T OF HEALTH & HUMAN SERVS.: CHILD WELFARE INFORMATION GATEWAY (Mar. 2017), <https://www.childwelfare.gov/pubPDFs/foster.pdf> [<https://perma.cc/Z8H9-J2SV>].

6. Maxwell, *supra* note 3, at 212–13.

7. *Family Foster Care*, U.S. DEP’T OF HEALTH & HUM. SERVS.: CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/outofhome/foster-care/fam-foster/> [<https://perma.cc/9ZDJ-6AP7>] (last visited Sept. 24, 2017).

8. Maxwell, *supra* note 3, at 212.

9. Miriam Aviva Friedland, *Too Close to the Edge: Lesbian, Gay, Bisexual and Transgender Youth in the Child Welfare System*, 3 GEO. J. GENDER & L. 777, 781 (2002).

10. *Children exiting foster care by exit reason*, KIDS COUNT DATA CENTER, <http://datacenter.kidscount.org/data/tables/6277-children-exiting-foster-care-by-exit-reason?loc=1&loct=2#detailed/1/any/false/573,869,36,868,867/2632/13050,13051> [<https://perma.cc/5S82-F3RH>] (last visited Sept. 24, 2017). In 2015 alone, 20,789 youth “emancipated”—or aged out of—the United States foster care system without being adopted. *Id.*

11. See CHILDREN’S BUREAU, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH AND HUMAN SERVS., THE AFCARS REPORT 23 (2016), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport23.pdf> [<https://perma.cc/LJQ4-X2WA>]. In the 2015 fiscal year, 53,549 children in the United States were adopted with public welfare involvement. *Id.* However, 111,820 children were waiting to be adopted as of September 30, 2015. *Id.*

has developed a generally negative view of the child welfare system.¹² The public generally views the foster care system to be flawed.¹³ The Fifth Circuit has recognized that the foster care system in Texas has many flaws, and the system itself must be changed through massive policy and practice reforms.¹⁴

Of the many issues faced by foster youth, one that can be addressed through state-level policy change is identity theft. One such policy change would be to implement a more proactive system to protect youth from identity theft. A federal law mandates that states must implement yearly credit checks for all youth in foster care ages fourteen and older and fix any discrepancies with the youths' credit scores.¹⁵ The statute barely scratches the surface of addressing the identity theft crisis for vulnerable foster care youth.

This Article will compare how Texas and other states implement this federal law differently and then discuss how Texas can improve its flawed system to better protect children negatively affected by identity theft. Section II of this Article will introduce and explain *M.D. v. Abbott* and the changes in Texas foster care on the horizon as a result of this case. Section III will introduce and delve into the issue of identity theft in foster youth as a whole, and it will tell the story of one foster youth who faced the results of identity theft. Finally, the Section breaks down how identity theft occurs and what the lasting effects are. Section III will discuss the federal legislation created as a response. Section III also includes a case study on California's pilot project response that was initiated prior to the federal legislation, and looks into how Texas applies federal legislation and partners it with state legislation. This Section looks at both the strengths and weaknesses of state and federal responses to child identity theft. Section IV will introduce four state-level policy recommendations to assist Texas in resolving identity theft issues for youth in foster care. By implementing a holistic, multi-step approach beginning when the child initially enters foster care, particularly in light of the major foster care reform posed

12. Christina Leber & Craig W. LeCroy, *Public Perception of the Foster Care System: A National Survey*, 34 CHILDREN & YOUTH SERVICES REV. 9 (2012). In a 2012 survey of the public perception of the national foster care system, the following public opinions were observed: A majority of the respondents (89.4%) agreed that changes and improvements need to be made to the foster care system. *Id.* Additionally, a large proportion (78.1%) of respondents reported their belief that foster children get "lost" in the foster care system. *Id.* Respondents also demonstrated concern over the performance of workers within the foster care system. *Id.* Not quite half (44.8% Disagree/Strongly Disagree) disagreed with the statement that children receive satisfactory case management from the workers in the foster care system and a larger percentage (60.1%) disagreed with the statement that people who work within the foster care system have the training and resources they need. *Id.* Despite these critiques, however, most respondents (59.5%) continued to believe that the foster care system protects the children in its care. *Id.*

13. *Id.*

14. *M.D. v. Abbott*, 152 F. Supp. 3d 684, 828 (S.D. Tex. 2015).

15. 42 U.S.C. § 675(5)(I) (Supp. III 2016).

by *M.D. v. Abbott*, Texas will lead the country and serve as an example to other states in resolving this pressing issue. Section V will include conclusions from the content discussed in this Article.

II. *M.D. v. ABBOTT* – TEXAS FOSTER CARE MAKES THE NATIONAL STAGE

This Section will examine the federal court’s conclusion in *M.D. v. Abbott* that discusses how the foster care system in Texas has been broken for decades, and how “[children] . . . almost uniformly leave State custody more damaged than when they entered.”¹⁶ This case addressed the shortcomings in the Texas Department of Family and Protective Services (“DFPS”) system, examining how DFPS treated both the workers and the children. The conclusion of this case laid the groundwork for substantial, potentially extremely costly, future legislation changes that should improve the overall state of the Texas welfare system. In light of this monumental opinion, I will use this case as a reference point to highlight the issue of identity theft in the Texas foster care system.

M.D. v. Abbott is a class action lawsuit brought by minors¹⁷ in Permanent Managing Conservatorship (“PMC”)¹⁸ against DFPS.¹⁹ The foster youth asserted a claim in federal court under 42 U.S.C. § 1983 against Texas state officials for violating their Fourteenth Amendment right to due process, specifically “the right to be reasonably safe from harm while in government custody and the right to receive the most appropriate care, treatment, and services by how the State and its officials manage [DFPS].”²⁰ The court examined foster children’s overall rights to freedom from unreasonable risk of harm, including protection from psychological and physical abuse,²¹ “unreasonable and un-

16. *Abbott*, 152 F. Supp. 3d at 828.

17. *Id.* at 684. Here, the youth in foster care are referred to as minors because the youth in the lawsuit are under eighteen; foster youth can remain in care in some states until age twenty-one or the end of college.

18. *Id.* PMC is a legal term Texas courts use in child custody cases, meaning that the judge has appointed someone to be responsible for a child without formally adopting that child. *You Can Make a Difference in a Child’s Life: Adoption or Permanent Managing Conservatorship*, TEXAS DEP’T OF FAMILY AND PROTECTIVE SERVS., https://www.dfps.state.tx.us/Adoption_and_Foster_Care/About_Adoption/pmc.asp#whatis [<https://perma.cc/63TM-JZCP>] (last visited Sept. 9, 2017). PMC can be given to DFPS or other parties. *Id.*

19. *Abbott*, 152 F. Supp. 3d at 684.

20. *Id.* at 688.

21. *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1156 (D. Haw. 2006); *see also* LaShawn A. v. Dixon, 762 F. Supp. 959, 993 (D.D.C. 1991).

necessary intrusions into their emotional well-being,”²² and generally deteriorating physically or psychologically.²³

This case concluded with the federal court issuing an injunction, which stated that the state of Texas must create and implement new policies and procedures that will further protect Texas’ children in foster care and ensure their protection from unreasonable risk of harm.²⁴ These policies will be established first by appointing a Special Master to assist Texas in implementing the goals listed and addressed throughout the opinion.²⁵ The Special Master is tasked with specifically addressing concerns that the court discussed, but also “recommending any provision beyond the Court’s Goals that are deemed necessary to cure the State’s constitutional violations outlined in this Opinion.”²⁶

Although the court does not specifically address identity theft in foster youth, it is apparent that the court’s overall goal is to address all issues in Texas foster care that violate the constitutional rights to freedom from unreasonable harm or risk of children in care.²⁷ Statistical data demonstrates that foster youth are more likely to experience homelessness or incarceration if their identities are stolen. Homelessness and incarceration almost always lead to psychological harm and put foster youth at risk for physical harm.²⁸ Thus, the constitutional right to overall freedom from unreasonable risk of harm covers the right to be protected from identity theft. The appointed Special Master should address the issue of foster care identity theft and create new policies and procedures to cure the constitutional violation that occurs when foster youth fall victim to identity theft.

III. IDENTITY THEFT IN FOSTER YOUTH: IN GENERAL

Identity theft of youth in foster care has been, and continues to be, a serious issue plaguing the child welfare system in the United States of America. However, it frequently goes unmentioned and unnoticed.²⁹ Many states lack basic research demonstrating how many chil-

22. *Abbott*, 152 F. Supp. 3d at 696 (referring to *Marisol v. Giuliani*, 929 F. Supp. 662, 675 (S.D.N.Y. 1996)); accord *K.H. ex rel. Murphy*, 914 F.2d 846, 848 (7th Cir. 1990) (“The extension to the case in which the plaintiff’s mental health is seriously impaired by deliberate and unjustified state action is straightforward.”).

23. *Murphy*, 914 F.2d at 851 (citing *Youngberg v. Romero*, 457 U.S. 307 (1982)).

24. *Abbott*, 152 F. Supp.3d at 823.

25. *Id.*

26. *Id.* at 826.

27. *Id.* at 823.

28. *See id.*

29. *Preying on the Vulnerable: Foster Youth Face High Risk of Identity Theft*, NBC NEWS (July 21, 2014, 5:11 AM), <https://www.nbcnews.com/feature/in-plain-sight/preying-vulnerable-foster-youth-face-high-risk-identity-theft-n157641> [<https://perma.cc/62UY-4542>]. In a 2011 Pilot Project in California, Department of Children and Family Services (“DCFS”) worked to remedy identity theft for children in Los Angeles County foster youth. This project will be discussed in more detail later, but out of the

dren in foster care have been victims of identity theft. For example, Wisconsin has no data on how many children in foster care have had their identities stolen.³⁰ California, a state that has taken initiative and done research on the subject through the Identity Theft Resource Center in San Diego, discovered that 50 percent of the children in California foster care—84,000 children total—have had their identities stolen. In this state, the average state debt associated with each case of identity theft of a foster youth is over \$12,000.³¹

The theft of a foster child’s identity not only creates lasting effects on their credit, but also on society as a whole:

[E]ducation, employment, housing, health, and credit are intertwined. Because most foster care alumni lack the social and familial safety net their peers with no history of foster care enjoy, a negative outcome in any one of these areas can spiral into a lifetime of poverty. Moreover, the poor outcomes of foster youth are costly to states. One analysis estimated that the cost of each annual cohort of youth aging out of the foster care system is approximately \$5.7 billion; these costs come in the form of lost earnings (and thus lost revenues), criminal justice system expenditures, and unplanned pregnancy expenses such as government cash assistance and health programs.³²

Children have long been viewed as the future of our nation; however, foster youth often fall between the metaphorical “cracks” in the foster care system, both on a federal and state level. These children are unable to afford education or secure housing, and often end up on the streets, relying on welfare, or behind bars. Entering adulthood with a stolen identity seriously disadvantages youth who are entering adulthood with a heightened vulnerability to many factors around them that are out of their control.

A. *Kaylia’s Story*

Kaylia Ervin, a former foster youth and participant of the Congressional Coalition on Adoption Institute Foster Youth Internship program, wrote a report explaining her experiences with identity theft after she aged out of foster care. Kaylia subsequently suggested federal level policy changes based on the Child and Family Services Im-

2,110 foster children submitted to the system to check for identity theft, five percent had credit records matching their personal information. A BETTER START: CLEARING UP CREDIT RECORDS FOR CALIFORNIA FOSTER CHILDREN, CAL. OFF. OF PRIVACY PROT. (Aug. 2011), https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/foster_youth_credit_records.pdf [<https://perma.cc/68C7-6P3B>] [hereinafter A BETTER START].

30. Adam, *Identity Theft is a Serious Issue Facing Foster Youth*, KIDS MATTER INC. (June 14, 2012), <http://www.kidsmatterinc.org/practice-innovation/identity-theft-is-a-serious-issue-facing-foster-youth/> [<https://perma.cc/E4J6-QJZ3>].

31. *Id.*

32. CHILDREN’S ADVOCACY INSTITUTE & FIRST STAR, THE FLEECING OF FOSTER CHILDREN 4 (2011), http://www.caichildlaw.org/Misc/Fleecing_Report_Final_HR.pdf [<https://perma.cc/NM6E-7JFZ>].

provement and Innovation Act of 2011. In her report, Kaylia tells her story of how in 2009 her biological mother fraudulently used her social security number on an application for an energy utility account.³³ Because she was in the foster care system and, at the time, no one ran checks on a foster youth's credit, she did not discover that her mother had stolen her identity until she aged out of the foster care system several years later.³⁴ The energy account her mother opened in her name was not visible on her credit report until it had already gone to collections.³⁵ When Kaylia attempted to explain to the energy company that at the time the account was opened by her mother she was a fifteen-year-old in the foster care system, the representative of the company told her that she had to fill out a fraud packet and return it to the company.³⁶

A couple weeks later when she received the fraud packet in the mail, it became clear that the first thing she had to do to solve the issues with her credit was to file a police report.³⁷ As many youth in the same situation feel, Kaylia did not want to report her mother and cause her to face legal trouble.³⁸ But, she had aspirations of attending law school in the near future and recognized that she would need student loans to do so.³⁹ She was forced to choose between reporting her mother or not reporting the fraud and waiting more than seven years to reestablish good credit so that she would be eligible for student loans for law school.⁴⁰

Kaylia's plight is not unique for youth in foster care. In 2014, when her report was published, she described the stories of several other youth who experienced the same or similar situation. One of the youngest children who has been subjected to identity theft was a five-month-old. Furthermore, many youth end up struggling with homelessness and living in a car. This was the case with Mercediz Hand, who was unable to rent an apartment because someone used her social security number for a home mortgage and \$3,000 of overdue cell phone bills.⁴¹ The most egregious case of identity theft in foster care to date is that of a sixteen-year-old named Jaleesa Suell, who had \$725,000 of debt potentially linked to eight different people.⁴²

33. Kaylia Ervin, *Stolen Pasts, Corrupted Futures: Preventing Identity Theft for Youth in Foster Care*, in SHAPING TOMORROW WITH TODAY'S MINDS, CONG. COAL. ON ADOPTION INST. 2014 FOSTER YOUTH INTERNSHIP REPORT (2014).

34. *Id.* at 38, 41.

35. *Id.* at 38.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

Many foster youth face the same crippling effects of identity theft that Kaylia did. But, many are not as fortunate as she has been. Kaylia has completed her undergraduate degree and hopes to pursue a law degree. She received a prestigious internship with the Congressional Coalition for Adoption Institute, where she published her report on federal policy recommendations for changes in identity theft. From the work she has done and is planning to do, it is clear that Kaylia has a bright future ahead of her despite the challenges that she faced in foster care. But, not all youth are as fortunate. Statistics say that less than ten percent of foster youth will attend college.⁴³ Kaylia's story serves as a positive outlier example of when identity theft disrupts a foster youth's life, but also serves to point out the necessary changes in policy for youth who are not as fortunate.

B. *How Identity Theft in Foster Youth Occurs*

Sam Cobbs, director of First Place for Youth—a California foster youth organization—emphasizes the reasons that foster youth are such a targeted group for identity theft: “They come into contact with so many group homes and social workers, relatives and foster parents, there’s no shortage of opportunities for people to steal their identities.”⁴⁴ The nature of the foster care system itself places children at risk for identity theft.

43. Sarah Cohn & Rachel Kelly, *Information Packet: Foster Youth Attending College*, NAT'L CTR. FOR CHILD WELFARE EXCELLENCE at the Silberman Sch. of Soc. Work (May 2015), <http://www.nccwe.org/downloads/info-packs/CohnandKelly.pdf> [<https://perma.cc/75ME-YZ37>]. Foster youth have a lower college attendance rate, and a lower rate of success if they do attend college, for several reasons. However, foster youth face many challenges that make it difficult, and sometimes impossible, to consider a college education. *Id.* Some of these burdens include a history of trauma, lack of financial support, academic challenges, lack of preparation, and a culture of low expectations. *Id.* “The child welfare system has traditionally done a poor job of encouraging foster youth to pursue post-secondary education or providing them with information to help them navigate the complex college application process.” Day, et al., *Maximizing Education Opportunities for Youth Aging Out of Foster Care by Engaging Youth Voices in a Partnership for Social Change*, 34(5) CHILD. & YOUTH SERV. REV. 1007 (2012). This helps to explain why many foster youth have difficulty not only going to college, but successfully earning a degree. Statistically speaking, under 10% of foster youth attend college, and an even smaller percentage graduate. Guardian Scholars Program, PROMISES2KIDS, Promises2Kids.org [<https://perma.cc/VU7B-D8U4>] (last visited Oct. 22, 2017). Foster youth who attend college may face additional hurdles while there. One such hurdle is the cost of living. “Youth in foster care cannot succeed academically if they have basic unmet school-related needs.” Day, et al., *Maximizing Education Opportunities for Youth Aging Out of Foster Care by Engaging Youth Voices in a Partnership for Social Change*, 34(5) CHILD. & YOUTH SERV. REV. 1007 (2012). Foster youth may need to take on full-time work to make ends meet. Working 15–20 hours per week can make it very difficult for foster youth to succeed academically and earn a degree. Furthermore, studies suggest that the most pervasive challenge is a lack of supportive relationships with adults in and out of school.

44. *Preying on the Vulnerable: Foster Youth Face High Risk of Identity Theft*, NBC NEWS (July 21, 2014, 5:11 AM), <https://www.nbcnews.com/feature/in-plain-sight/prey->

In a surprising number of cases, biological parents, other family members, or someone else that the youth knows are the individuals who steal the youth's identity.⁴⁵ This situation forces the youth to choose between their own financial wellbeing and their allegiance to a parent, foster parent, friend, or acquaintance.⁴⁶ Identity theft of youth in foster care does not just happen in one specific way, thus there is not one simple solution. Generally, there are three different, unique groups of people who present a threat to foster youth's identity protection.

First, many foster youths' biological parents use the youth's social security number for personal reasons. There are too many reasons why this happens to speculate, but foster youth who have their identities stolen by their biological parents are particularly at risk of the long-term lasting effects because, like Kaylia, they fear getting their parents in legal trouble.⁴⁷ Biological parents have easy access to children's social security numbers and can easily apply for loans, credit cards, and other bills using this number for years before the current law—the Child and Family Services Improvement and Innovation Act of 2011—will bring light to the major issues with the youth's credit.

Second, foster parents can be a potential threat to foster youth's identity security. Many foster youth bounce around from home to home⁴⁸ through no fault of their own, and each home presents another potential identity thief.⁴⁹ Due to the nature of the foster care system, most youths' social security numbers are easily accessible to a large number of people, making identity theft all too common.⁵⁰ This also causes distrust amongst youth because the very people who are entrusted with caring for them and acting as their guardians take advantage of their vulnerable states.

The third category of risk is simply the risk of identity theft faced by every other person in the United States. However, we still must consider this risk because foster youth are more vulnerable to identity

ing-vulnerable-foster-youth-face-high-risk-identity-theft-n157641 [https://perma.cc/E4XH-BJ7X].

45. Lisa Weintraub Schifferle & Maria Del Monaco, *Stolen Future: Foster Youth Identity Theft*, 47 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 407 (2014).

46. *Id.*

47. *Id.*

48. Sara Blomeling DeRoo, *Why Do Kids "Bounce" in Foster Care?*, BETHANY CHRISTIAN SERVS. (June 7, 2016), <https://www.bethany.org/blog/why-do-kids-bounce-in-foster-care> [https://perma.cc/38XH-AQT9]. Bethany Christian Services wrote an interesting article on the "bouncing around" of foster youth where they state that "every time a child moves—from original home to foster home, and every subsequent foster home or placement—is the emotional equivalent of your house burning down and losing everything When we talk about a child 'bouncing' anywhere from 2–27 times, they suffer unimaginable loss each time." *Id.*

49. Schifferle, *supra* note 45.

50. Michele Benedetto, *An Ounce of Prevention: A Foster Youth's Substantive Due Process Right to Proper Preparation for Emancipation*, 9 U.C. DAVIS J. JUV. L. & POL'Y 381, 390 (2005).

theft than the general population because they typically do not have families and support systems to assist them in solving the aftermath of their identities being stolen.⁵¹

C. *Lasting Effects of Identity Theft on Foster Care Youth*

When youth age out of foster care without joining a family system through adoption, they already face unique challenges.⁵² Most importantly, these youth cannot rely on their parent or parents for assistance paying for expenses like school or housing. With the added problem of identity theft, foster youth often have little to no options for a successful start of adulthood. Children in foster care already lack the support of their biological families, so they should not also lack the support of the child welfare system that exists solely to meet their needs.

1. Educational Impacts

Common consequences foster youth face when their identities are stolen include being turned down for financial aid when applying to go to school, applying for a loan, or applying for somewhere to live.⁵³ When universities turn down foster youth aging out of care for financial aid, they typically cannot attend school at all.⁵⁴ When foster youth cannot go to school, they more frequently cannot land steady work and will often be forced to live “paycheck to paycheck with no way out, as minimum-wage jobs often perpetuate poverty.”⁵⁵ Then, youth who are working low-wage jobs are unable to save money to allow themselves to attend higher education because they are barely able to pay the bills and make ends meet.⁵⁶ This is a vicious cycle.

2. Incarceration

Often, youth in these situations are pushed to commit crimes out of necessity or just out of desperation. National data on foster care youth who become incarcerated after aging out of the foster care system is

51. It should also be noted that the general population may not all have support systems or families, so foster youth—particularly youth aging out of care—join in this general group. It is true not everyone has a support system, and many children grow up and have to make their own way in the world. But, this Article does not address that and is focused on these foster youths and their particular needs. Research and help for those children is a great place for additional scholarship, and this Article recognizes many children have at least some emotional, financial support system. The Author recognizes some families are more supportive, but the crucial point is focusing on these youths alone who do not have support. Thus, it is crucial to catch identity theft early in order to get it cleaned up before they age out of care.

52. Ervin, *supra* note 33.

53. Benedetto, *supra* note 50, at 390.

54. *Id.*

55. Ervin, *supra* note 33.

56. *Id.*

minimal. However, in a Midwest Study, 30% of twenty-one year old youths who aged out of foster care (at eighteen) reported an arrest, 15% reported a conviction of a crime, and 29% reported actual incarceration.⁵⁷ Young men had higher levels of involvement with the criminal justice system—mainly drug-related and violent crimes—but young women were more frequently involved in property and violent crimes.⁵⁸ Interestingly, a sizeable percentage of involvement with the criminal justice system by these young adults resulted from probation violations or traffic offenses.⁵⁹

Incarceration is often related to extreme poverty. The average incarcerated person does not even have a high school diploma, making their average income lower than the general population; in 2014, “incarcerated people had a median annual income of \$19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages.”⁶⁰ When foster youth exit care, they typically lack financial support from family and are no longer fully cared for through governmental funding. Although efforts have been made by the government to provide housing assistance and other funding to help youth exiting foster care, these efforts have not addressed foster youth who age out of care with detrimental effects on their credit still being resolved. Naturally, this makes youth even more impoverished and can lead to these youth ending up incarcerated.

3. Homelessness

Homelessness is a sad reality for many foster youth, particularly for foster youth who have aged out of the system with ravaged credit from identity theft. Foster youth aging out of care already are among the United States’ populations at the highest risk for homelessness. A study from 1990–2011 showed that 11% to 36% of youths aging out of foster care were homeless during their transition from care to adulthood, versus 4% of the nationally representative sample of people age eighteen to twenty-six.⁶¹ The average foster youth exiting care struggles with homelessness, but these struggles, coupled with the struggles of recovering from identity theft, make acquiring housing nearly im-

57. MARK COURTNEY, AMY DWORSKY, GRETCHEN RUTH CUSICK, JUDY HAVLICEK, ALFRED PEREZ & TOM KELLER, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: *OUTCOMES AT AGE 21* 12 (2007), http://www.chapinhall.org/sites/default/files/ChapinHallDocument_1.pdf [https://perma.cc/DS7Y-P3YG].

58. *Id.*

59. *Id.*

60. Press Release, Bernadette Rabuy & Daniel Kopf, Prison Policy Initiative, Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [https://perma.cc/8XXS-MSQK].

61. Amy Dworsky, Laura Napolitano, & Mark Courtney, *Homelessness During the Transition From Foster Care to Adulthood*, 103 AM. J. PUB. HEALTH S318 (Dec. 2013).

possible. Typically, these youth cannot afford an apartment and often resort to living on the streets, in shelters, or in their cars.

4. Suicide

The most concerning statistic suggests that foster youth who face this type of situation are more likely to commit suicide. Most youth who commit suicide suffer from mental illness, like depression, or substance abuse disorder.⁶² Because youth in foster care have a higher chance of having a substance abuse or suffering from a mental illness than non-foster care youth, foster care youth also have a higher chance of seriously considering or attempting suicide than their non-foster care peers: two and a half times to four times more likely, respectively.⁶³ The nature of placement in foster care relating to trauma, abuse, and neglect by family members already heightens the risk of suicide for foster youth. On top of this effect, adverse childhood experiences, including but not exclusive to emotional, sexual, or physical abuse, make the risk of a youth in foster care attempting suicide two to five times more likely.⁶⁴ Although identity theft is not listed as an adverse experience directly and, as previously mentioned, data is lacking in the area, it is reasonable to presume that the aforementioned effects on youth resulting from identity theft (such as homelessness and incarceration) are adverse experiences that increase the likelihood of considering and attempting suicide.

Similarly, foster youth face separation from family and inconsistency in their day to day lives, particularly once they age out of care and are facing the world alone:

[A]most all children in foster care, whether or not they come from families who have abused or neglected them, experience a deep sense of loss and sometimes shame when placed in foster care. In addition to losing their families, frequent moves mean that they often lose their other natural support systems, including their friends, school, and neighbors. They may find themselves in a completely new environment with few established supports. These experiences of loss, isolation, and lack of social support are all risk factors for suicide.⁶⁵

62. *Foster Care Providers: Helping Youth at Risk for Suicide*, SUICIDE PREVENTION RES. CTR. (2014), <http://www.sprc.org/sites/default/files/resource-program/Fostercare.pdf> [https://perma.cc/VWU6-REGY].

63. *Id.* (citing Daniel Pilowsky & Li-Pzy Wu, *Psychiatric Symptoms and Substance Use Disorders in a Nationally Representative Sample of American Adolescents Involved with Foster Care*, 38(4) J. ADOLESCENT HEALTH, 351–58 (2006)).

64. *Id.* (citing Shanta Dube, et al., *Childhood Abuse, Household Dysfunction, and the Risk of Attempted Suicide Throughout the Life Span: Findings from the Adverse Childhood Experiences Study*, 286(24) J. AM. MED. ASS'N 3089–96 (Dec. 26, 2001)).

65. *Id.*

5. Financial Impacts—Turning to Public Assistance

In a national survey of foster youth aging out of care, 32% of the sample members reported receiving some kind of public assistance, including Food Stamps, Aid to Families with Dependent Children, Temporary Assistance to Needy Families, Supplemental Security income, and/or housing assistance.⁶⁶ When foster youth age out of care and must become self-sufficient adults, many turn to public assistance, which increases the public tax burden. Identity theft compounds these initial difficulties and makes foster youth rely on public assistance even more.

IV. LEGISLATIVE RESPONSES TO IDENTITY THEFT IN FOSTER YOUTH

A. *The Child and Family Services Improvement and Innovation Act of 2011*

Following in the footsteps of California, Colorado, Connecticut, Illinois, Texas, and the District of Columbia—states that all passed legislation prior to or during 2006 regarding the crisis of identity theft in foster care youth—Congress recognized there was a national problem and began drafting legislation that would work to protect them from being victims of identity theft.⁶⁷ Congress enacted the Child and Family Services Improvement and Innovation Act of 2011 (“the Act”) to address multiple issues currently facing foster care youth around the United States, including the problem of identity theft in youth in foster care.⁶⁸

In a house committee report, the Committee on Ways and Means described their goal in passing the law:

To combat identity theft involving foster youth, the legislation expects States to obtain a free credit report for older youth in care, to share that with the youth, and to assist the youth in resolving any inaccuracies in his or her credit report, which if unresolved would hinder his or her successful transition to adulthood.⁶⁹

In passing this law, Congress attempted a solution to the identity theft problem by creating a duty for the states to respond individually.

The Act requires each state’s respective child welfare agency to conduct credit checks on foster youth who are sixteen years of age or

66. Mark Courtney, Irving Piliavin, Andrew Grogan-Kaylor, & Ande Nesmith, *Foster Youth Transitions to Adulthood: A Longitudinal View of Youth Leaving Care*, CHILD WELFARE (Nov.–Dec. 2001).

67. Heather Morton, *Identity Theft Strikes Young*, ST. LEGISLATURES MAGAZINE (May 22, 2014), <http://www.ncsl.org/research/civil-and-criminal-justice/identity-theft-strikes-young.aspx> [https://perma.cc/3ADS-RLZA].

68. Margaret Riley, *Financial Challenges Facing Youth in Transition: What Advocates Should Know*, 33 CHILD L. PRAC. 33, 38 (2014).

69. Child & Family Servs. Improvement & Innovation Act, H.R. Rep. No. 112-210, at 25 (2011).

older. Once the credit report is conducted, the state is then responsible for assisting foster youth in addressing and resolving discrepancies.⁷⁰ The Act does not require the state to actually resolve fraud for the youth, but instead requires the state to delegate resolution duties to credit recovery organizations and programs.⁷¹ Although each state's child welfare system is a little different in name, make-up, and programs, all systems function to accomplish the same goal: protect and meet the needs of the nation's most vulnerable children.

In 2014, Congress amended the Act to require credit reports for all children fourteen years of age and older.⁷² This was a governmental realization of and response to the fact that many youth were still being affected by childhood identity theft.⁷³ Congress attempted to address the issue again by lowering the threshold age of mandatory credit checks for foster youth to age fourteen instead of sixteen.⁷⁴ But this still did not resolve the problem for many youth in foster care because it still emphasizes reaction and resolution after the fact instead of prevention, which is the more productive solution. The law does not specify how each state must address the issue, but instead gives a general mandate directing states to ensure that each foster youth "receives assistance (including, when feasible, from any court-appointed advocate for the child) in interpreting and resolving any inaccuracies in the [credit] report."⁷⁵ This allows each state to freely interpret its exact responsibilities, so nonprofits often step in and take on the task of assisting in clearing the fraudulent credit activity associated with foster youth's social security numbers. This next Section will look further into how one particular state took action before this federal law was passed, and attempted to rid foster youth of this crippling problem.

B. *A Case Study: California*

Identity theft in foster youth is not an issue unique to Texas. Many states have faced the issue of how to help youth in their managing conservatorship with credit related problems that stem from identify theft. California is among the most progressive states in attempting to address and solve identity theft for foster youth. This Section presents a case study of California's response to identity theft, and discusses the strengths and weaknesses of their approach. The case study allows for a comparison of how Texas has addressed the issue thus far, and leads to potential policy recommendations for the much-needed

70. Child & Family Servs. Improvement & Innovation Act, § 106(b)(3), 125 STAT. 369, 112-34 (2011) (current version at 42 U.S.C.S. § 675(5)(I) (LEXIS through Pub. L. No. 115-51)).

71. *Id.*

72. 42 U.S.C. § 675(5)(I) (LEXIS through Pub. L. No. 115-51).

73. *Id.*

74. *Id.*

75. § 675(5)(I) (LEXIS through Pub. L. No. 115-51).

changes for the Texas legislature to make regarding identity theft in foster youth.

California is one of the first states to recognize the major disadvantages that foster youth face from all angles and adopt a groundbreaking approach to solve foster youth identity theft. In 2006, the California legislature passed a law aimed at assisting foster children with identity theft.⁷⁶ This law mandates county welfare departments to pull credit reports—“pursuant to the free annual disclosure provision of the federal Fair Credit Reporting Act”—for each youth in foster care, beginning at age sixteen, to check for identity theft.⁷⁷ In cases where identity theft has occurred, the county departments are required to refer youth to approved “counseling organizations” that provide services to identity theft victims.⁷⁸

The state ran into several issues with implementing the law due to processes required in the statute paired with low county funding.⁷⁹ California published a report on their pilot project response to identity theft in 2011, and at that time legislation that would correct some of the problems in California Welfare and Institutions Code Section 10618.6 was still pending.⁸⁰ The legislation was amended in California Senate June 7, 2011 and the California Assembly March 31, 2011, during the 2011–2012 session.⁸¹

76. If there is a disclosure for the youth, and if the consumer disclosure reveals any negative items, or any evidence that some form of identity theft has occurred, the county welfare department shall refer the youth to an approved counseling organization that provides services to victims of identity theft. The State Department of Social Services, in consultation with the County Welfare Directors Association, consumer credit reporting agencies, and other relevant stakeholders, shall develop a list of approved organizations to which youth may be referred for assistance in responding to an instance of suspected identity theft. Nothing in this section shall be construed to require the county welfare department to request more than one consumer disclosure on behalf of a youth in care, or to take steps beyond referring the youth to an approved organization. CAL. WELF. & INST. CODE § 10618.6 (West 2016) (prior to 2011 amendment), 2006 Cal. Legis. Serv. 387 (West).

77. A BETTER START, *supra* note 29, at 3.

78. *Id.*

79. *Id.*

80. See generally A BETTER START, *supra* note 29; see also *supra* text accompanying note 76.

81. CAL. WELF. & INST. CODE § 10618.6 (West 2011). *The people of the State of California do enact as follows:* SECTION 1. Section 10618.6 of the Welfare and Institutions Code is amended to read: 10618.6. In the year that a youth in a foster care placement reaches his or her 16th birthday, the county welfare department or the State Department of Social Services shall request a consumer disclosure from each of the national consumer credit reporting agencies, pursuant to the free annual disclosure provision of the federal Fair Credit Reporting Act (15 U.S.C. Sec. 1681 et seq.), on the youth’s behalf, notwithstanding any other law, to ascertain whether or not identity theft may have occurred. Notwithstanding Section 827, Section 10850, or any other provision of law, both the county welfare department and the State Department of Social Services are authorized under this section to make the request on a foster youth’s behalf. If the State Department of Social Services submits the request, the department shall use the most efficient means possible, such as via a batch process

In 2010, one year before the Act passed in the United States Congress, Los Angeles County implemented a pilot partnership program between its Department of Family and Children's Services and the state's Department of Consumer Affairs with the objective of clearing the credit of all foster youth affected by identity theft. After the passage of the 2006 law, this was one of the first efforts in the country moving towards ensuring that not a single child in foster care ages out of foster care with bad credit weighing against them.⁸²

California faced credit report request processing issues and lack of funding when implementing their law.⁸³ The main problem was that the process by which adults request credit reports is not the same for minors.⁸⁴ The process for an adult to request a credit report is fairly simple and involves ordering a free annual credit report from a national credit reporting agency ("CRA")—TransUnion, Experian, or Equifax—online or by telephone.⁸⁵ Adults are required to provide personal identification information to pull their credit reports, including SSN, birth date, and residential addresses for a number of years, and then the automated system asks questions to verify the consumer's identity.⁸⁶ If the answers are wrong and do not match the credit file, the automated system will not give the consumer the report, in an attempt to prevent identity theft and fraud.⁸⁷

For minors, the automated system very rarely provides a credit report.⁸⁸ Credit reporting agencies "do not knowingly create records on minors, since minors cannot legally enter into contracts for credit."⁸⁹

using lists of youth turning 16 years of age, on a quarterly or semiannual basis, rather than via individual manual requests. If a consumer disclosure for the youth exists and if the consumer disclosure reveals any negative items, or any evidence that some form of identity theft may have occurred, the State Department of Social Services or the county welfare department, acting on behalf of the foster youth, may refer the matter to a governmental agency or nonprofit organization that provides information and assistance to victims of identity theft. The governmental agency or nonprofit organization may take remedial action on behalf of the foster youth to clear his or her credit record and report the results of the action to the county welfare department. The Office of Privacy Protection, in consultation with the State Department of Social Services, the County Welfare Directors Association, consumer credit reporting agencies, and other relevant stakeholders, shall develop a list of governmental agencies and nonprofit organizations to which these matters may be referred for assistance in responding to an instance of suspected identity theft. *This section shall not be construed to require the county welfare department or the State Department of Social Services to make more than one request for a consumer disclosure on behalf of a youth in care, or to take steps beyond referring the matter to a governmental agency or nonprofit organization.* *Id.*

82. A BETTER START, *supra* note 29.

83. *Id.* at 3.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 4.

89. *Id.*

So, every credit record pertaining to a minor is the result of fraud or error.⁹⁰ Because the credit records that do exist for minors were created by the person who committed the identity theft or fraud, the child (or the child's parent or proxy) is unlikely to be able to provide the identifying information for the automated system. So, adults pulling reports for minors are advised by the California Office of Privacy Protection to make manual requests for verification of presence or absence of credit records for a particular child. Pulling a minor's credit report requires filling out paper forms and sending them in, with identifying information such as a social security card or birth certificate, to all three major CRAs.⁹¹ Because of this challenge for minors in the credit reporting process, the California county foster care programs would have had to use the manual process for each individual child over sixteen (before the amended law, that is).⁹² In 2010–2011, there were somewhere between four and five thousand sixteen-year-olds in the California state foster care system.⁹³ Thus, the challenge before them was to create a procedure for making bulk credit check requests in a secure, automated way.⁹⁴

The other problem California faced with the original 2006 statute was the false assumption that “counseling organizations” would provide free services to the foster youth who have been victims of identity theft.⁹⁵ The legislative history of the original law demonstrates that legislators were under the impression that nonprofits and consumer credit counseling agencies would provide the services to foster youth for no cost.⁹⁶ However, these agencies actually gave “debt collection consolidation services to debtors, for which they are paid by the consumer or by the creditors.”⁹⁷ According to the pilot project, the work to clear credit records of fraud and errors would probably be too difficult for sixteen-year-olds in foster care to resolve, even given resources and written instructions.⁹⁸ The California legislature then was tasked with finding a solution for this major issue with the original law, and the pilot project recommended tasking someone with doing the job of contacting creditors and debt collectors both by letter and telephone, and acting as the go-between for the foster youth and the credit reporting agencies.⁹⁹

90. *Id.* There are few exceptions to this, according to the California Pilot Project. *Id.*

91. A BETTER START, *supra* note 29.

92. *Id.* at 4.

93. *Id.*

94. *Id.*

95. *Id.*

96. See S. Appropriations Comm. AB 2985, 2006 Leg. Sess. (Cal. 2006), www.leginfo.ca.gov/pub/05-06/bill/asm/ab_2951-3000/ab_2985_cfa_20060809_112312_sen_comm.html [<https://perma.cc/MZU7-B4MX>].

97. A BETTER START, *supra* note 29, at 4.

98. *Id.*

99. *Id.* at 4–5.

The pilot project in California set five major goals to accomplish the main objective of clearing foster youths' credit records of fraud and identity theft:

1. *Data Transmission*: Determine the feasibility of periodic bulk electronic submission of requests for credit reports and of secure data transmission procedures between the different parties.
2. *Remediation*: Identify organizations that can do the work of remediating problems found and determine the feasibility of clearing records without a police report.
3. *Suppression*: Determine the feasibility of "suppressing" the identities of the children whose records have been cleared to prevent new records from being attached to them while they are minors.¹⁰⁰
4. *Incidence*: Obtain an indication of the incidence and nature of identity theft and of fraudulent and erroneous information in foster children's credit records.
5. *Future*: Encourage the CRAs to develop easier to use procedures for checking children's credit records.

The pilot project was successful in clearing all the fraudulent records associated with the foster youth's credit reports.¹⁰¹ Some of the credit records were opened in error, but most cases were identity theft.¹⁰² The standard for removing inconsistencies from credit records of minors is different than that of adults: adults must prove fraud by getting a police report of identity theft, whereas minors (or their parents or guardians) must prove that the identity associated with the credit record is that of a minor who, by law, cannot enter into contracts and thus cannot be responsible for credit contracts.¹⁰³ When California officials were clearing the records of L.A. foster youth, they were dealing with minors.

The process for clearing the credit records of minors began by remediating 104 accounts. California officials initially contacted the privacy, compliance, or legal offices of whatever creditor was involved in the account that was opened.¹⁰⁴ As many of the creditors were unaware of the newer law, they explained the law and the pilot project and asked for contact information for someone who could assist in the understanding, correction, and clearing of the foster youths' records.¹⁰⁵ Similarly, pilot project officials requested the California Association of Collectors to do the same, and the Association agreed

100. *Id.* at 5–6.

101. *Id.* at 12.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

to assist in issues that came up with debt collectors around the nation.¹⁰⁶

The next step was sending letters to creditors and collectors who were attempting to collect the debts associated with the foster youths' fraudulent credit records.¹⁰⁷ The letters informed the respective parties about the new California statute and that the children they were representing were "minors in foster care of the L.A. County Department of Children and Family Services."¹⁰⁸ The letters requested the respective parties do the following:

1. "Close the named account[;]"¹⁰⁹
2. "Absolve the named child of all charges[;]"¹¹⁰
3. Report the changes to the credit reporting agencies; and
4. Send the California Pilot Project staff a response letter confirming that the preceding actions were taken.¹¹¹

In most cases, follow-up phone calls were necessary.¹¹²

At the end, the credit reporting agencies ran new checks on the youth to ensure that the accounts were removed.¹¹³ The information on the final, cleared reports for the youth was received digitally, not as individual paper credit reports for each youth, to facilitate data analysis and efficient communication with creditors and collectors.¹¹⁴

This is not an efficient or adequate solution for our nation's foster youth.

C. *Texas's Approach*

This Section of the Article will discuss Texas's application of the federal law, The Child and Family Services Improvement and Innovation Act of 2011 ("The Act"). Because the statute assigns duties to the states to run credit reports and respond to issues, this section will examine how the Texas state government and legislature currently execute these duties.

In 2014, Texas responded to the child identity theft crisis by creating legislation that allows preemptive credit freezes.¹¹⁵ Forty-nine states and the District of Columbia have passed laws allowing general consumers to put security freezes on their respective credit reports, which limits reporting agencies from giving full reports or any information from their credit reports away without permission from the consumers

106. *Id.*

107. *Id.* at 13.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. A BETTER START, *supra* note 29.

115. TEX. BUS. & COM. CODE § 20.25 (West 2014).

themselves.¹¹⁶ These “security freezes” serve to help prevent identity thieves’ ability to open new accounts with the consumers’ confidential personal information.

Since this tool has become so popular with adult consumers and has assisted in preventing so many cases of identity theft, state legislators are beginning to pivot the tool towards a new audience: children. By 2014, thirteen states had expanded the laws regarding “security freezes” to permit parents or guardians placement of security freezes on children’s credit reports to prevent this extremely vulnerable population from being victims of identity theft.¹¹⁷ Other states have considered and applied this new tool for protecting children since the initial passage of the security freeze laws.

Senator Jane Nelson, a Texas state senator, sponsored the Texas legislation that places freezes on children’s credit accounts, stating, “This crime can have a devastating effect on an individual’s personal finances, and we should ensure that our young people can begin their adult lives with a clean financial slate. By allowing parents to place a ‘Do Not Enter’ sign on their child’s credit record, this legislation will help protect young Texans from identity theft.”¹¹⁸ This legislation was not directed solely at Texas foster youth, but has the potential to help prevent many foster youth from being victimized if DFPS or their guardians place a security freeze on their credit reports.

As previously mentioned in the Article, identity theft not only impacts a youth’s credit, but also takes up a great amount of time and energy to resolve, thus touching every area of the victim’s life. For example, foster alumnus Brittany Marston experienced three whole years of writing letters, calling many people, and threatening to take legal action to get the credit card charges and piled up fees she found on her credit report that came to light when she turned eighteen.¹¹⁹

The story of Suamhirs Rivera drives home the idea that the process of resolving credit fraud needs to be sped up. Rivera aged out of foster care at eighteen, and soon after discovered that, while in state care, someone using his identity charged more than \$75,000 on his credit. It took Rivera four years to resolve only \$35,000 of the fraud from his personal credit record.¹²⁰ In 2014, after three more years, he still had two pending lawsuits wherein he was charged with fraud because someone stole his identity.¹²¹ When Rivera was interviewed for an article that came out in 2014, he was still working tirelessly to clear the

116. Heather Morton, *Identity Theft Strikes Young*, STATE LEGISLATURES MAGAZINE (May 22, 2014), <http://www.ncsl.org/research/civil-and-criminal-justice/identity-theft-strikes-young.aspx> [<https://perma.cc/K7WY-8M3Z>].

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

\$40,000 that still remained on his credit.¹²² He poignantly stated, “It has been difficult to resolve my credit problems, especially because I have no support from anyone—no family in the United States and no one to back me up. Young people should know about bad credit long before they leave care.”

Luckily for foster youth such as Rivera, Congress passed the Act. This legislation was a result of policy makers recognizing the fact that children in foster care need extra help from the government to look into their credit reports and determine if their personal information has been stolen and misused.¹²³ D.C. Council member Tommy Wells pointed out, however, that “unfortunately, identity theft among foster youth usually isn’t discovered until after they have aged out of the foster care system and have lost the resources and support needed to fix the problems.”¹²⁴ According to Council Member Wells, “For these youth, adulthood will begin with credit histories that are tarnished through no fault of their own.”¹²⁵

V. PROPOSED CHANGE

This Section will discuss state level changes that can help proactively prevent identity theft of youth in foster care. Identity theft is not an issue that can be solved completely by a single step approach because several different groups victimize youth. In addition, this section will address ways to protect youth from specific groups and in general. The following Subsections lay out a multi-step approach to prevent and address foster youth identity theft.

A. *Step One: Mandatory Credit Check Upon Entry into Foster Care*

First, the Texas legislature should create policy that makes annual credit checks mandatory not only for foster youth who are age fourteen and over, but for every child entering the foster care system. Data shows that identity thieves target young children due to the long amount of time before anyone will find out about the crime.¹²⁶ Thus, children as young as five months old have had their identities stolen.¹²⁷

The time that it takes to solve the issue coupled with the lack of a support system—because many youth have already aged out of foster care or are about to by the time the issues come about—seriously dis-

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Kristina Horton Flaherty, *Another Challenge for Foster Children – Identity Theft*, CAL. B.J. (Oct. 2011), <http://www.calbarjournal.com/October2011/TopHeadlines/TH4.aspx> [https://perma.cc/7XV2-UA44].

127. *Id.*

advantage this vulnerable population. No child should be considered lower priority because of his or her age, and the earlier that identity theft is caught, the easier it will be to solve the issue for foster youth. If the inaccuracies in their credit reports can be addressed and solved while they remain in care and have some sort of support system, whether that be foster family, group home, or foster care workers, the foster youth will likely have a better chance of success in the future.

Using the automated system (that has already been created by the main credit reporting agencies) to run these credit checks will not add a considerable burden to the already overburdened DFPS social workers. Many opponents argue that adding more work for overburdened social workers will make a solution impossible. However, with the changes already on the horizon in Texas due to the overburdening of social workers resulting in unconstitutional care of the children in DFPS care discussed in *M.D. v. Abbott*, change is obviously necessary, and that change should include change in staffing in DFPS.

The automated system already created by the main credit reporting agencies is a simple fix to a complicated problem. The earlier we can catch identity theft of foster youth, the easier the fix will be for every other involved party, including banks, debt collectors, nonprofits who help resolve credit inconsistencies for the youth, and the youth themselves.

Once mandatory credit checks are performed on all foster youth, they should also have credit freezes placed on their credit reports. The credit freeze, by nature, will inform the credit reporting agencies that they should not give out these youth's information without express permission from the youth themselves, because they are in foster care.

1. Using HIPPA to the Foster Youth's Advantage

There are possible changes to the Health Insurance Portability and Accountability Act ("HIPPA") that could enhance protection of foster youth's identities within the system itself and thus assist in prevention. Because every individual social worker, group home employee, and foster parent has access to the foster youth's most intimate personal information, a privacy protecting code could be created under HIPPA or a similar law that would prevent unnecessary sharing of the foster youth's social security number and other private data. Such a code could prevent identity theft by social workers, group home employees, or foster parents.

The foster youth's identity could be coded using a system unique to Texas Department of Family and Protective Services, so that no outside parties could easily access the information. This could enhance the state's ability to prevent foster families, group home employees, and social workers themselves from taking the youth's identities, but

would not successfully address outside parties, such as biological parents or others, stealing foster youth's identities.

B. *Step Two: Resolve Inconsistencies on Existing Credit Records and Open Credit Records Where They Do Not Exist*

As noted in the California Pilot Project, credit reports for minor children are the result of fraud or error.¹²⁸ After DFPS requests a credit report through a CRA for a youth entering care, one of two things will occur: (1) they will receive a fraudulent or erroneous record, or (2) no record will be found.

Under the federal statute, when a credit record for a youth is found, DFPS is required to resolve any inconsistencies. This is currently done through partnership with nonprofit agencies. However, as seen in California, many of these agencies do not actually complete this for free, so the current system is too expensive. Thus, the state should create positions within DFPS that specifically have the task of working with the appropriate parties to resolve inconsistencies on foster youth's credit records.¹²⁹ This would be a part of the staffing reorganization effort mentioned earlier in this section.

When no credit record is found, this Article proposes that DFPS be required to act as a managing conservator or guardian and immediately open a credit record with the CRAs for the child, and place a preemptive freeze on the account, as is permitted by current Texas law.¹³⁰ Preemptive freezes are discussed further in the next subsection.

1. Eliminate Requirement for Foster Youth to Report Identity Theft

Identity theft should be automatically detected, reported, and prosecuted by the State, instead of the burden being on aged-out foster youth to report the fraud themselves. Foster youth should not have to complete a long and drawn out process because this will likely deter them from successfully solving the issue. There are two paths a youth can take to solve the credit issue, and one of them involves reporting the perpetrator of the identity theft. In many cases, the perpetrator is a family member or previous foster parent. Foster youth should not be put in a situation where they have to decide between moving forward and reporting the person and being stuck with bad credit.

Instead of requiring the foster youth to self-report the identity theft when he or she in fact knows the person who used his or her social security number, there should be a mandatory reporting requirement

128. A BETTER START, *supra* note 29, at 12.

129. Note: The front-end expense versus cost saving benefit will be discussed in Subsection E of this Section.

130. TEX. BUS. & COM. CODE § 20.25 (West 2014).

for police or DFPS. Under this requirement, DFPS or local police would be the required parties that must complete the fraud report for the youth, relieving the foster youth of the weight of reporting a family member or friend.

Although foster youth might not come forward and admit that a family member stole their identity, for the youth that know but are reluctant to report, this takes the option of not reporting away from them and puts it on the adults who are tasked with keeping them safe. If the youth does not have to decide whether to report, DFPS or police will systematically resolve the cases that fall into this category. This would decrease the number of cases that go unreported because foster youth fear repercussions from their family members.

2. Debt Forgiveness for Foster Youth and Transfer of Burden to Creditors and Banks

Foster youth should have debts related to identity theft forgiven, and banks or debt collectors (whichever one is attempting to collect the respective foster youth's debts) should be tasked with pursuing the identity thieves for repayment.¹³¹ The problem will not be completely solved until there is timely and complete clearance of foster youths' bad credit associated with an identity thief.

Lenique Carter, a California foster youth, lived in financial limbo for over one year while waiting for her credit to be cleared. Unable to move forward with her life due to debilitating finances, she was unable to be a productive member of society in the way she desired. For youth who have already been extremely disadvantaged due to no fault of their own, the solution to an identity theft crisis should include more work on the side of the government and involved businesses and less of a burden on the already overburdened foster youth.

Banks should be required to do their due diligence even more when giving lines of credit to attempt to prevent fraud. Instead of informing foster youth that they must solve credit issues resulting from identity theft, banks, lenders, etc., should be held responsible for giving loans or lines of credit to people who used a social security number fraudulently. Although there will likely always be someone who cheats the system and convincingly uses someone else's information, banks should bear the burden of working harder and being more proactive to prevent this from happening to one of the nation's most vulnerable populations.

If the burden of forgiving debts and pursuing identity thieves for repayment of debts falls on banks (or debt collectors they employ) instead of the foster youth, the banks will be pressured to take more

131. The Author recognizes that this proposal seems extremely costly. But, the effects of this proposal will be economical in the long term, which will be addressed later.

proactive measures to prevent identity theft from occurring in the first place. Placing the duty on banks, which have the means and ability to both solve and prevent identity theft, will help prevent foster youth from facing the permanent and debilitating impacts of negative credit.

C. *Step Three: Place Preemptive Freezes*

The third proposed step is to place preemptive freezes on the credit records of all foster youth. The preemptive freeze informs the CRAs that this person is a minor, and no account can be opened in his or her name.¹³² In the case of existing credit records where identity theft or error occurred, after the inconsistencies are resolved, a preemptive freeze should be placed on the account. In the case of credit records opened by DFPS for foster youth, the preemptive freeze should be placed immediately after the account is opened. This acts as a preventive measure for foster youth who have thus far avoided identity theft.

D. *Step Four: Add Removal of Freeze into Exiting Care Procedures*

If the child is reunified with his or her parents, the parents should have the burden of proof to show the court that any identity theft that did occur was not a result of the parents' actions. Upon presenting evidence that any resulting identity theft was not done by the parents, the parents will have the option of requesting that DFPS remove the preemptive freeze. This will prevent parents who personally stole their child's identity from having access to their child's credit information.

If parental rights are terminated, DFPS retains the ability to keep the preemptive freeze on the child's credit record until the child (1) is adopted, (2) turns 18, or (3) the child demonstrates a need to open an account. When the child is adopted, the adoptive parent(s) shall petition the court in the adoption proceedings to have DFPS remove the preemptive freeze. When the child turns 18, even if he or she remains in care until age 21, DFPS should remove the preemptive freeze from the child's credit record. If the child demonstrates a need to open an account before the age of 18 (for school, personal usage, housing, etc.), the child may petition the court to have DFPS remove the preemptive freeze.

It is important that the implementation of this preemptive freeze removal process does not infringe on parents' fundamental rights to raise their children in the way that they choose. Thus, parents should only have to prove that they did not steal their children's identities based on preponderance of the evidence. Because of the added responsibilities for the courts, this process must also be streamlined and worked into existing proceedings, such as termination or adoption proceedings, so as not to create a completely separate proceeding.

132. A BETTER START, *supra* note 29, at 12.

E. *Addressing the Added Cost and Labor*

The court in *M.D. v. Abbott* recognized the difficulties Texas faces in controlling core functions in the middle of administrative constraints, yet stated that the “burden on the [foster youth and foster care providers] from continued unconstitutional harm far outweighs any administrative hardship Texas will face in correcting its foster care system.”¹³³ As Texas cares for children in a foster care system, Texas still is obligated under the United States Constitution to comply with the Fourteenth Amendment.¹³⁴ According to the court, funding has never been a problem for DFPS as the Texas Legislature is very responsive to DFPS’s financial needs.¹³⁵ So, even though budgetary constraints do not excuse violating the Constitution, Texas has not demonstrated the existence of budget constraints for DFPS in the first place.¹³⁶

The injunctive relief called for in *M.D. v. Abbott* necessitates added spending on DFPS, but the opinion does not address the potential cost savings from making positive changes in foster care policy. As discussed previously in this Article, foster youth who age out of care often end up homeless, incarcerated, and relying on public assistance, which adds costs to taxpayers as youth exit foster care. If Texas adds preventative measures on the front end, even though it will add costs initially, it will prevent tax payers from spending more money on foster youth in the future. Because the court in *M.D. v. Abbott* demonstrated that there is no shortage of funds provided by the Texas Legislature for DFPS spending, taxpayers may actually pay less to support youth in crisis when they are exiting foster care than they will pay up front in taxes towards the DFPS budget.¹³⁷

F. *Proposed Policy*

The following is the proposed policy for the previously discussed multi-step plan:

- I. Upon entry into the Texas foster care system, each child under the responsibility of the state shall receive, at no cost, a copy of any consumer credit report (as defined in section 603(d) of the Fair Credit Reporting Act) pertaining to the child each year until the child is discharged from care.

133. *M.D. v. Abbott*, 152 F. Supp. 3d 684, 822–23 (S.D. Tex. 2015).

134. *Id.* at 822.

135. *Id.*

136. *Id.* at 822–23.

137. *Id.* at 822–23. The court stated, in its opinion, that DFPS does not have budgetary constraints permitting constitutional violations against the involved parties. *Id.* at 822 (“It is worth noting that funding is not a problem for DFPS. The Texas Legislature has been responsive to DFPS’s needs.”).

- a. If a credit record is located for the child, the child will receive assistance in interpreting and resolving all inaccuracies in the report. Then, DFPS will place a preemptive freeze on the child's credit record with the credit reporting agencies, removable only by the party that placed the freeze. If a credit record is not located, DFPS will create a credit record for that child and place a preemptive freeze on the new credit record with the credit reporting agencies, removable only by the party that placed the freeze.
 - i. If the child is reunified with his or her parent(s), the parent(s) will have the burden of proof to show the court that any identity theft that did occur was not a result of the parent(s)'s actions. Upon presenting evidence that any resulting identity theft was not done by the parent(s), the parent(s) will have the option of requesting that DFPS remove the preemptive freeze.
 1. The burden of proof for the parent(s) is preponderance of the evidence.
 - ii. If parental rights are terminated, DFPS retains the ability to keep the preemptive freeze on the child's credit record until the child (1) is adopted, (2) turns 18, or (3) the child demonstrates a need to open an account.
 1. When the child is adopted, the adoptive parent(s) shall petition the court in the adoption proceedings to have DFPS remove the preemptive freeze.
 2. When the child turns 18, even if he or she remains in care until age 21, DFPS shall remove the preemptive freeze from the child's credit record.
 3. If the child demonstrates a need to open an account before the age of 18 (for school, personal usage, housing, etc.), the child may petition the court to have DFPS remove the preemptive freeze.

VI. CONCLUSION

Foster youth face many struggles that many people in the general population do not, so both federal and state governments should seek to earnestly protect the interests of these extremely vulnerable children. Every child entering the foster care system has already faced some sort of breakdown in the family unit. The child welfare system has one overall goal: work for the best interests of the children. Some states accomplish this goal better than others, but every state has areas where it can improve, to better serve the vulnerable children in its care.

In Texas, the child welfare system has a long way to go. The Southern District of Texas has held that our system is broken and is not serving any of the parties it aims to serve. This is a problem. Although the system overall has many broken parts, the only way it is possible to rebuild it is one step at a time. As the court identifies in the *M.D. v. Abbott* opinion, there are many problems with foster care in Texas that time and study are needed to address, but identity theft can be addressed in the way suggested in this Article. One way to start better serving our foster youth is by proactively protecting them from identity theft. Solutions such as the ones discussed in this Article address the problem preventatively instead of reactively. When we, as a state, work to prevent youth in foster care from experiencing unnecessary hardships such as identity theft and the resulting ravaged credit, it demonstrates to these youth that their success is everyone's success.