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## Essay

# Me, Myself, and My Digital Double: Extending Sara Greene's *Stealing (Identity) From the Poor* to the Challenges of Identity Verification

Michele Estrin Gilman<sup>†</sup>

"In the social jungle of human existence, there is no feeling of being alive without a sense of identity." —Erik Erikson<sup>1</sup>

"We are not hiding who we are. We are who we say we are." —Tricia George, unemployment insurance applicant locked out of the system<sup>2</sup>

### INTRODUCTION

Identity is foundational to human existence. Philosopher John Locke linked identity to consciousness, which "makes every one to be, what he calls self; and thereby distinguishes himself from all other thinking things, in this alone consists personal identity . . ." <sup>3</sup> Psychologist Erik Erikson echoes this conception, defining identity as "the awareness of the fact that there is a self sameness and continuity to the ego's synthesizing methods, the style of one's individuality, and that this coincides with the sameness and continuity of one's meaning for significant others in the immediate community." <sup>4</sup> Given the centrality of identity to the human condition, the theft or denial of identity can be profoundly destabilizing, leading to deprivations of core human rights and psychological distress. These identity-based harms are

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1. ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* 130 (1968).

2. Aldo Svaldi, *Unemployed Coloradans Struggling with Identity Verification: "We Are Who We Say We Are,"* DENVER POST (Apr. 25, 2021), <https://www.denverpost.com/2021/04/25/colorado-unemployment-identity-verification-fraud> [<https://perma.cc/XL3R-YTSG>].

3. JOHN LOCKE, *Of Identity and Diversity, in AN ESSAY CONCERNING HUMAN UNDERSTANDING*, BOOK 2 (Peter H. Nidditch ed., Clarendon Press 1975) (1689).

4. ERIKSON, *supra* note 1, at 50.

heightened in the datafied society, which disassembles identity into millions of data points shared across numerous networks for profit and surveillance. Sara Greene's article, *Stealing (Identity) From the Poor*,<sup>5</sup> brings an economic justice lens to the ways in which data breaches lead to identity theft, with devastating consequences for people experiencing poverty.

Greene's article is timely in ways she could not have envisioned at the start of her project, which blends legal analysis with qualitative interviews. As a result of the pandemic, almost a quarter of Americans lost their jobs and turned to their states' unemployment insurance (UI) systems for economic support.<sup>6</sup> These systems run on automated platforms and churn out algorithmic determinations of eligibility.<sup>7</sup> Criminal syndicates took advantage of the deluge of applications and the digitalization of UI to steal the identity of millions of Americans and file false claims, resulting in at least \$87 billion in fraudulent payments.<sup>8</sup> In response, state labor agencies frantically sought to stanch the flow of stolen funds, and in so doing, imposed a variety of new identity verification requirements on UI claimants and deployed automated fraud detection systems. At the federal level, President Biden issued a statement pledging a coordinated governmental response "to the exploitation of relief programs by criminal syndicates using stolen identities to steal government benefits."<sup>9</sup>

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5. Sara S. Greene, *Stealing (Identity) From the Poor*, 106 MINN. L. REV. 60 (2021).

6. See Cezary Podkul, *How Unemployment Insurance Fraud Exploded During the Pandemic*, PROPUBLICA (July 26, 2021), <https://www.propublica.org/article/how-unemployment-insurance-fraud-exploded-during-the-pandemic> [<https://perma.cc/CKN7-LF5S>]; Andrew Stettner & Elizabeth Pancotti, *1 in 4 Workers Relied on Unemployment Aid During the Pandemic*, THE CENTURY FOUND. (Mar. 17, 2021), <https://tcf.org/content/commentary/1-in-4-workers-relied-on-unemployment-aid-during-the-pandemic/?agreed=1> [<https://perma.cc/NRM2-RFYM>].

7. See *infra* Part III.

8. Podkul, *supra* note 6; see also *FBI Sees Spike in Fraudulent Unemployment Insurance Claims Filed Using Stolen Identities*, FED. BUREAU OF INVESTIGATION (July 6, 2020), <https://www.fbi.gov/news/pressrel/press-releases/fbi-sees-spike-in-fraudulent-unemployment-insurance-claims-filed-using-stolen-identities> [<https://perma.cc/RK66-J6XJ>]; *Unemployment Insurance Fraud*, U.S. DEP'T OF JUST. (Aug. 3, 2021), <https://www.justice.gov/coronavirus/national-unemployment-insurance-fraud-task-force> [<https://perma.cc/7J4-4DFR>].

9. *Statement of President Joe Biden on American Rescue Plan Oversight*, THE WHITE HOUSE (May 17, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/17/statement-of-president-joe-biden-on-american-rescue-plan-oversight/> [<https://perma.cc/KU5D-UCKN>].

Identity verification involves taking the data presented by an individual and comparing it against an existing database.<sup>10</sup> As a result of these automated systems, states wrongfully denied benefits to millions of eligible people—many of whom were themselves victims of identity theft and thus had applications flagged as fraudulent.<sup>11</sup> These workers were denied the very financial support designed to keep them afloat during times of economic calamity. This nationwide fiasco tightened the connection between identity theft and identity verification, demonstrating the perils of the datafication of identity. Both reveal the modern, dual reality of identity, as Mark Poster explains: “Identity fragments into an aspect of consciousness (an awareness of continuity in time and space) and a complex of media content contained in information machines that combine to define an individual.”<sup>12</sup> This latter notion of identity as “exteriorization and materialization”<sup>13</sup> results because “[a]s people go about their daily lives they actively invoke or unknowingly draw upon a host of bureaucratic identity markers, in the process producing yet more information about their behaviours which institutions store, analyse and sell.”<sup>14</sup> This Essay assesses the government’s use of identity verification systems in social services through Greene’s lens of identity theft harms and plutocratic regulation. Identity theft and identity denial are mirror images of the problem of digitized identity systems, and both have outsized impacts on marginalized people.

### I. IDENTITY THEFT

Greene’s article soundly debunks the myth that people experiencing poverty are not victims of identity theft. Conventional wisdom among the public and policymakers is that low-income people are not desirable targets for identity thieves because their credit scores are low. However, as Greene explains, this is simply not true. Identity thieves do not care if they assume high-interest or sub-prime loans in someone else’s name because they have no intention of paying back

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10. See Margaret Hu, *Biometric ID Cybersurveillance*, 88 IND. L.J. 1475, 1491 (2013).

11. See *infra* Part III.

12. Mark Poster, *The Secret Self: The Case of Identity Theft*, 21 CULTURAL STUD. 118, 137 (2006).

13. *Id.* at 119.

14. Jennifer R. Whitson & Kevin D. Haggerty, *Identity Theft and the Care of the Virtual Self*, 37 ECON. & SOC’Y 572, 574 (2008).

lenders.<sup>15</sup> Moreover, an identity as a low-income individual is necessary to steal a variety of public benefits.<sup>16</sup> These criminals act with the further assurance that low-income people are less likely to report these crimes to law enforcement due to distrust or to pursue available civil remedies, which are costly and complex.<sup>17</sup>

In exposing the class dimensions of identity theft, Greene adds heaps of evidence to counter the “dead bodies” problem in privacy law.<sup>18</sup> For years, privacy scholars struggled to explain why privacy matters, given its ephemeral nature. In 2006, Ann Bartow criticized privacy theorists for failing to identify the “dead bodies” left bare by privacy violations, that is, to show how “privacy violations can negatively impact the lives of living, breathing human beings beyond simply provoking feelings of unease.”<sup>19</sup> Since this potent critique, there has been considerable research detailing the many ways in which marginalized people suffer concrete, privacy-related harms in the datafied society.<sup>20</sup> To be sure, every member of society is an unwitting subject of surveillance capitalism, in which personal data is collected, aggregated, and sold across multiple industries and governments.<sup>21</sup> Americans are increasingly aware of this data scraping and report discomfort with the targeting and tailoring of advertising and internet content.<sup>22</sup> As one woman told the Washington Post: “She doesn’t like the way Facebook collects her personal data to target ads, or the kinds of videos YouTube offers to her child, and she suspects that her devices are always listening.”<sup>23</sup> In a nationwide survey, a large

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15. Greene, *supra* note 5, at 75.

16. *Id.* at 75–76.

17. *Id.* at 64.

18. Ann Bartow, *A Feeling of Unease about Privacy Law*, 155 U. PA. L. REV. PENNUMBRA 52, 52 (2006).

19. *Id.*

20. See, e.g., Mary Madden, Michele Gilman, Karen Levy & Alice Marwick, *Privacy, Poverty, and Big Data: A Matrix of Vulnerabilities for Poor Americans*, 95 WASH. U. L. REV. 53 (2017). See generally VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (2018); CATHY O’NEIL, *WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY* (2017); RUHA BENJAMIN, *RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE* (2019); CATHERINE D’IGNAZIO & LAUREN F. KLEIN, *DATA FEMINISM* (2020).

21. See SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* 8–12 (2019).

22. Heather Kelley & Emily Guskin, *Americans Widely Distrust Facebook, TikTok and Instagram With Their Data, Poll Finds*, WASH. POST (Dec. 22, 2021), <https://www.washingtonpost.com/technology/2021/12/22/tech-trust-survey> [<https://perma.cc/98DL-DTYW>].

23. *Id.*

majority of Americans reported finding these online targeted advertising practices “annoying” and “invasive.”<sup>24</sup>

However, marginalized people suffer tangible harms above and beyond this sense of discomfort. Based on their digital profiles, low-income people are targeted for predatory marketing and subprime financial products.<sup>25</sup> At the same time, algorithmic decision-making systems serve as gatekeepers that can exclude people from mainstream employment, housing, financial, health care, and educational opportunities.<sup>26</sup> Government agencies rely on algorithms to apportion social services, yet these algorithms lack transparency, leaving thousands of people adrift without state support and not knowing why.<sup>27</sup> Marginalized communities are also subject to disproportionately high levels of surveillance in their neighborhoods, workplaces, and schools.<sup>28</sup> To this litany of harms, we can now add Greene’s careful accounting of the injuries of identity theft, which play out with far graver consequences for low-income people. As Greene explains, these victims suffer more than the inconvenience and aggravation of clearing up a credit report, which is the typical consequence for their wealthier counterparts. They can face “job loss, harassing debt collection, loss of health care or other benefits, and wage garnishment.”<sup>29</sup> In turn, this can lead to an economic death spiral which creates a “hindrance to upward mobility and in fact a catalyst to drive people further into poverty.”<sup>30</sup>

Greene’s concept of plutocentric regulation provides a helpful frame for understanding why and how legal solutions to privacy problems are designed for middle-class interests, leaving the poor behind. As she explains, “it is common for the experiences of low-income and underrepresented groups to be disregarded and thus for regulations to focus on protecting prototypical higher income groups.”<sup>31</sup> This frame holds true for privacy law in general. I have previously explored the ways that privacy law is shaped around the concerns of wealthier

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24. *Id.* (finding that 82% of people stated the ads were annoying and 74% considered them invasive).

25. Michele E. Gilman, *Five Privacy Principles (from the GDPR) the United States Should Adopt to Advance Economic Justice*, 52 ARIZ. ST. L.J. 368, 371 (2019).

26. *Id.*

27. *Id.*

28. *Id.* at 394.

29. Greene, *supra* note 5, at 65.

30. *Id.*

31. *Id.* at 103.

Americans at the expense of people experiencing poverty.<sup>32</sup> The genesis of privacy law is “the right to be let alone,” as conceived in 1890 by Samuel Warren and Louis Brandeis, who developed their concept of privacy as a buffer to protect society’s elites from the glare of public scrutiny and media attention.<sup>33</sup> This conception and its manifestation into law does not account for the interrelated relationships between low-income people and the government, which demands access to the homes and bodies of the poor, as well as their personal life histories as a condition of providing economic support.<sup>34</sup> “The idea of being left alone creates a class differential that shelters those who can afford it. The result is that the poor are often subject to humiliating and stigmatizing data collection practices.”<sup>35</sup>

As Greene explores, the class differential that leaves poor people behind in privacy law is likewise found in the legal regime for identity theft. Lawsuits for data breaches provide scant relief to low-income victims because they often do not know the source of their data breach, do not have access to lawyers, and, in any event, courts dismiss most of the lawsuits that are brought due to a lack of concrete harms.<sup>36</sup> Federal legislation designed to put fraud alerts on credit reports and to repair credit do not effectively reach low-income victims who are often not familiar with credit reporting agencies and generally lack knowledge of their legal rights.<sup>37</sup> Further, credit problems are only one of the type of harms impacting low-income victims of identity theft.<sup>38</sup> Another stumbling block to relief is that many companies (and some state laws) require a police report as a precondition to establishing one’s status as an identity theft victim.<sup>39</sup> However, many low-income victims, particularly those who are Black, are reluctant to report to police given the fraught relations and distrust between their communities and law enforcement due to over-policing and mass incarceration policies.<sup>40</sup> And even when victims do report to police, they

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32. Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389 (2012).

33. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

34. Gilman, *supra* note 32, at 1427.

35. *Id.*

36. Greene, *supra* note 5, at 89–91.

37. *Id.* at 92–93.

38. *Id.* at 93.

39. *Id.* at 98–99.

40. *Id.* at 99–100, 112.

are often turned away, as many local police departments do not consider identity theft a criminal matter within their jurisdiction.<sup>41</sup> At the end of the day, even with a lawyer, tools for combatting identity theft are limited, unduly complicated, and time-consuming. People with resources can ride out this process; poor people cannot.

## II. PROOF OF IDENTITY

The harms and mismatched remedies for identity theft are mirrored in identity verification systems, and thus Greene's article can help us understand this widespread, but undertheorized threshold for participating in modern society. Proof of identity is what makes people legible to the state and other entities. In the United States, it is necessary to vote, to work, to obtain housing, to register in school, to travel, to obtain government assistance, to marry, to obtain medical records and certain medicines, to get a vaccine, and to access financial services.<sup>42</sup> Citizens simply "cannot properly exercise a variety of constitutionally protected activities—from marrying to bearing arms to traveling to voting—without possessing and producing identifying documents."<sup>43</sup>

In the modern era, a recognized identity is core to human rights.<sup>44</sup> The 1948 International Declaration of Human Rights sets forth "the right to recognition everywhere as a person before the law"<sup>45</sup> as well as "the right to a nationality."<sup>46</sup> Given that there are over 1.1 billion people in the world today without official identification,<sup>47</sup> in 2015 the United Nations set as one of its Sustainable Development Goals the requirement that states "provide legal identity to all including through birth registration, by 2030."<sup>48</sup> At their best, identification processes can enforce individual rights and expand access to state support.

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41. *Id.* at 100.

42. See Gregory Zlotnick, *Picking the Lock: A Proposal for a Standard Fee Waiver in Texas for Identification Documents*, 22 *THE SCHOLAR* 345, 356–57 (2020); Waldo Jaquith, *Americans Need a Digital Identity System*, *Stat!*, 15 *CMTY. DEV. INNOVATION REV.* 53, 53 (2021), <https://www.frbsf.org/community-development/files/jaquith-americans-need-a-digital-identity-system-stat.pdf> [<https://perma.cc/Y4ER-ZBG9>].

43. Zlotnick, *supra* note 42, at 357–58.

44. ALAN GELB & ANNA DIOFASI METZ, *IDENTIFICATION REVOLUTION: CAN DIGITAL ID BE HARNESSSED FOR DEVELOPMENT?* 2 (2018).

45. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 6 (Dec. 10, 1948).

46. *Id.* art. 15.

47. GELB & METZ, *supra* note 44, at 6.

48. G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development, para. 16.9 (2015).

“They also can help build state capacity to deliver public services and social protection programs more effectively, to manage public spending, and to make public institutions more accountable.”<sup>49</sup> Yet at their worst, they can “exclude poor and vulnerable groups and support institutionalized discrimination; ID systems can also facilitate state and commercial surveillance.”<sup>50</sup>

In the United States, we do not have a national identity card, and there is no single document or standard for establishing identity.<sup>51</sup> Rather, identity is typically established through state-issued driver’s licenses or federally generated documents, such as military IDs, passports, and green cards.<sup>52</sup> However, many poor people do not possess these forms of documentation. Indeed, most identity verification regimes are created with plutocentric assumptions about the ease of proving identity.

This issue has gotten the most attention with regard to voter identification. In states with strict photo ID requirements, voting rates among minorities are lower than in other states, making voter ID a core issue of civil rights.<sup>53</sup> Eleven percent of voters lack photo identification; this gap is higher for minorities and the elderly.<sup>54</sup> For African Americans, the rate is twenty-five percent; for Hispanics it is sixteen percent; for Native Americans it is nineteen percent,<sup>55</sup> and for people over sixty-five it is eighteen percent.<sup>56</sup> Members of these groups face numerous barriers to obtaining photo ID, such as lacking

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49. GELB & METZ, *supra* note 44, at 4.

50. *Id.*

51. *Id.* at 24–25.

52. Jaquith, *supra* note 42.

53. Zoltan Hajnal, Nazita Lajevardi & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363, 368 (2017). The issue has been litigated all the way to the Supreme Court. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 185–204 (2008) (upholding Indiana’s restrictive state voter identification law against an Equal Protection challenge under the Fourteenth Amendment). Additionally, it has been addressed by lower federal courts. *See Veasey v. Abbott*, 830 F.3d 216, 243–65 (5th Cir. 2016) (striking down Texas’s voter identification law as racially discriminatory under Section 2 of the Voting Rights Act).

54. Keesha Gaskins & Sundeep Iyer, *The Challenge of Obtaining Voter Identification*, BRENNAN CTR. FOR JUST. 1 (2012), <https://www.brennancenter.org/our-work/research-reports/challenge-obtaining-voter-identification> [https://perma.cc/9F6A-LJJM].

55. Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression> [https://perma.cc/TR8M-KU44].

56. Gaskins & Iyer, *supra* note 54, at 2.

a vehicle to drive to an ID-issuing office and limited public transportation, particularly in rural areas. They can also confront variable and limited business hours for ID-issuing offices that can conflict with work or child care obligations.<sup>57</sup> For instance, when Alabama sought to close a budget shortfall, the state closed thirty-one driver's license offices, exclusively in poor areas.<sup>58</sup> In addition, while states with restrictive voter ID laws waive the cost of a photo ID for poor and/or elderly citizens, people still must pay for the underlying proof of identification, such as a birth certificate (costs range between fifteen and thirty dollars) or a marriage license for women who changed their surnames (costs range between four and forty dollars).<sup>59</sup> And, in a catch twenty-two, to obtain a copy of a birth certificate, some jurisdictions require photo identification.<sup>60</sup>

People experiencing homelessness or evictions are at high risk of losing existing documentation due to housing instability.<sup>61</sup> Moreover, there are many people who were never issued birth certificates in the first place (typically because they were born at home, and their births were not recorded)<sup>62</sup> or whose birth certificates contain errors on key identifiers.<sup>63</sup> In these circumstances, states require a bevy of alternate official records to establish identity, such as school attendance records or documentation about a spouse—each with its own costs and administrative burdens.<sup>64</sup> For poor people, the process of obtaining

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57. *Id.*

58. Atiba R. Ellis, *Economic Precarity, Race, and Voting Structures*, 104 KY. L.J. 607, 626–27 (2016).

59. Gaskins & Iyer, *supra* note 54, at 14.

60. Zlotnick, *supra* note 42, at 347.

61. Patrick Marion Bradley, *The Invisibles: The Cruel Catch-22 of Being Poor with No ID*, WASH. POST (June 15, 2017), [https://www.washingtonpost.com/lifestyle/magazine/what-happens-to-people-who-cant-prove-who-they-are/2017/06/14/fc0aaca2-4215-11e7-adba-394ee67a7582\\_story.html](https://www.washingtonpost.com/lifestyle/magazine/what-happens-to-people-who-cant-prove-who-they-are/2017/06/14/fc0aaca2-4215-11e7-adba-394ee67a7582_story.html) [https://perma.cc/EB7T-KMJZ].

62. Leighton Ku & Matt Broaddus, *New Requirement for Birth Certificates of Passports Could Threaten Medicaid Coverage for Vulnerable Beneficiaries: A State-by State Analysis*, CTR. ON BUDGET & POL'Y PRIORITIES 3 (Feb. 17, 2006), <https://www.cbpp.org/sites/default/files/archive/1-5-06health.pdf> [https://perma.cc/W9E9-3N66].

“A particular problem exists for a large number of elderly African Americans because they were born in a time when racial discrimination in hospital admissions, especially in the South, as well as poverty, kept their mothers from giving birth at a hospital. One study estimated that about one in five African Americans born in the 1939–40 period lack a birth certificate because of these problems.”

*Id.*

63. Gaskins & Iyer, *supra* note 54, at 14.

64. *Id.*

identification can take months—a timeline extending far beyond emergency needs—and involve a process that requires time and money to travel to numerous government offices, oftentimes with no success.<sup>65</sup> Not surprisingly, legal services lawyers are deluged with requests from clients needing help establishing their official identity.<sup>66</sup> As the director of the National Law Center on Homelessness and Poverty stated, “Without an ID, basically you don’t exist.”<sup>67</sup> Or, as political scientist James C. Scott reflects, “The categories used by state agents are not merely means to make their environment legible; they are an authoritative tune to which most of the population must dance.”<sup>68</sup>

### III. IDENTITY VERIFICATION

The reality of bureaucratic non-existence came to the fore during the pandemic, particularly for the working poor. As described earlier, the pandemic put intense demand on state unemployment insurance programs, whose automated systems collapsed due to high demand and inadequate staffing.<sup>69</sup> UI benefits are funded by employer-paid taxes and administered by the states, subject to federal oversight.<sup>70</sup> Although state policies vary, UI generally provides for up to twenty-six weeks of benefits, replacing about half of a worker’s previous, regular wages.<sup>71</sup> Pandemic era relief statutes expanded UI eligibility to self-employed people and part-time workers, boosted the amount of benefits, and extended the timeline for relief.<sup>72</sup> However, from the start of the pandemic, many automated UI systems across the country were unable to deliver on the promised relief.<sup>73</sup> For months, the news

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65. Bradley, *supra* note 61.

66. *Id.*

67. *Id.*

68. JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 57 (1998).

69. *See supra* text accompanying notes 6–9.

70. *See* Manuel Alcalá Kovalski & Louise Sheiner, *How Does Unemployment Insurance Work? And How Is It Changing During the Coronavirus Pandemic?*, BROOKINGS (Nov. 3, 2021), <https://www.brookings.edu/blog/up-front/2020/07/20/how-does-unemployment-insurance-work-and-how-is-it-changing-during-the-coronavirus-pandemic> [<https://perma.cc/3GZR-9PQW>].

71. *Id.*

72. *Id.*

73. *Id.*

media was awash with horror stories from applicants struggling to obtain their UI benefits online.<sup>74</sup> The unemployed described UI application websites that froze, crashed, flashed error messages, and went offline at random hours.<sup>75</sup> Thousands of people were locked out of their accounts due to password reset issues and alleged fraud; these frustrated applicants overwhelmed call centers with requests for assistance.<sup>76</sup> One study found that over a third of UI applicants were unable to file a claim and that two out of ten found the systems too complicated to even try.<sup>77</sup>

Criminal syndicates swooped in to take advantage of the new funding streams and the disarray in disbursing funds, stealing at least \$36 billion in false claims.<sup>78</sup> Identity theft, which had not seriously plagued UI programs before, became an urgent problem, and identity verification became the solution. In December 2020, Congress enacted an identity verification requirement for the Pandemic Unemployment Assistance Program (PUA), which covers workers not typically qualified for traditional UI, such as self-employed persons and independent contractors.<sup>79</sup> Many states then expanded such requirements to all UI claims, even those outside PUA. In the wake of the new requirements, many identity theft victims were themselves applying for UI and found themselves locked out of the systems and denied the

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74. See Michele Gilman & Mary Madden, *Digital Barriers to Economic Justice in the Wake of COVID-19*, DATA & SOC'Y 11 (2021), <https://datasociety.net/wp-content/uploads/2021/04/Digital-Barriers-to-Economic-Justice-in-the-Wake-of-COVID-19.pdf> [<https://perma.cc/HY3T-72P6>].

75. *Id.*; Amy Traub, *7 Things We Learned about Unemployment Insurance During the Pandemic*, NAT'L EMP. L. PROJECT 7-8 (2021), <https://s27147.pcdn.co/wp-content/uploads/Seven-Things-We-Learned-from-Pandemic-UI.pdf> [<https://perma.cc/ELL4-BKZ9>].

76. Gilman & Madden, *supra* note 74, at 11.

77. Ben Zipperer & Elise Gould, *Unemployment Filing Failures: New Survey Confirms That Millions of Jobless Were Unable to File an Unemployment Insurance Claim*, ECON. POL'Y INST. (Apr. 28, 2020), <https://www.epi.org/blog/unemployment-filing-failures-new-survey-confirms-that-millions-of-jobless-were-unable-to-file-an-unemployment-insurance-claim> [<https://perma.cc/2WW8-W3DM>].

78. See Podkul, *supra* note 6; Andrew Ackerman & Amara Omeokwe, *Covid-19 Relief Fraud Potentially Totals \$100 Billion, Secret Service Says*, WALL ST. J. (Dec. 22, 2021), <https://www.wsj.com/articles/thefts-of-covid-19-relief-funds-total-at-least-100-billion-secret-service-says-11640202072> [<https://perma.cc/QF9U-2SM6>].

79. 15 U.S.C. § 9021(f) (2021).

relief for which they were eligible.<sup>80</sup> They were “victimized twice.”<sup>81</sup> The resulting harms of identity denial tracked those associated with identity theft victims. Without economic support, eligible claimants suffered evictions, repossessed cars, unpaid bills, disconnected utilities, lack of food, and mental health issues.<sup>82</sup> In short, identity verification has not been working as promised, and millions of Americans remain unable to establish that they are, in fact, themselves. Identity verification may look like a routinized and mundane function; however, “it is through the daily routines of proceduralism and precedent setting that social inequalities, such as those of class and gender, are produced and maintained.”<sup>83</sup> Indeed, society’s most marginalized populations have been disproportionately harmed by identity verification in UI, including people of color, transgender persons, non-citizens (who are eligible for benefits), and people who are limited English proficient.<sup>84</sup> Three primary barriers to identity verification emerged during the pandemic: a lack of design justice, denials of due process, and privatization.

#### A. DESIGN INJUSTICE

First, the automated identity verification systems were not built with the needs and experiences of low-income people in mind. To begin with, the UI platforms were designed with the assumption that

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80. See, e.g., David Wagner, *Unemployment Benefits Frozen Due to Being a Fraud Victim? Here’s What to Do*, LAIST (Oct. 22, 2020), <https://laist.com/news/unemployment-edd-california-pua-fraud-identity-benefits-frozen-restart> [<https://perma.cc/44NU-SMRV>].

81. Memorandum on Identity Verification in UI Systems—Recommendations, National Employment Law Project 1 (Oct. 9, 2021) (on file with author) [hereinafter NELP Memo].

82. See, e.g., Stettner & Pancotti, *supra* note 6 (“[D]elays have not only frustrated claimants, but also they have put the unemployed at risk of hunger and homelessness while they wait.”); Svaldi, *supra* note 2 (discussing how one claimant’s “financial situation [was] deteriorating by the day” and he “can’t afford to fill his truck with gas to go job hunting”); Diane Wilson & Isabella Seman, *Some Unemployed North Carolinians Continue to Go Without Benefits as They Struggle with New Identity Verification Tool ID.me*, ABC NEWS (Apr. 8, 2021), <https://abc11.com/idme-unemployment-id-me-my/10498998> [<https://perma.cc/ZLW6-BHMF>] (describing one individual’s concern that “bills are piling up”).

83. Aradhana Sharma & Akhil Gupta, *Introduction*, in *THE ANTHROPOLOGY OF THE STATE: A READER* 13 (Aradhana Sharma & Akhil Gupta eds. 2006); see also GEOFFREY C. BOWKER & SUSAN LEIGH STAR, *SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES* 19 (1999) (“Politically and socially charged agendas are often first presented as purely technical and they are difficult even to see.”).

84. NELP Memo, *supra* note 81, at 1.

applicants have a desktop or laptop, they speak English, they are literate, and they have a high degree of digital literacy. These assumptions are not true for many populations who became unemployed during the pandemic, particularly those that were low-income, elderly, disabled, and non-English speaking.<sup>85</sup> The digital divide posed a problem. Many low-income people access the internet via smartphones, and yet the UI platforms often lack full accessibility to all their features via smartphones.<sup>86</sup> Moreover, certain smartphones used primarily by low-income people were not compatible with the platforms at all, such as prepaid phones or phones manufactured by non-major vendors.<sup>87</sup> Some people lacked access to a smartphone of any sort. Due to a persistent digital divide, twenty percent of American adults do not have a smartphone, and twenty-five percent do not have home broadband<sup>88</sup>—and low-income Americans and racial minorities are disproportionately disconnected.<sup>89</sup> For claimants who tried to borrow computers from friends, relatives, or to use public computers, they often

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85. See Ryan Burke, Mikey Dickerson, Lauren Lockwood, Tara McGuiness, Marina Nitze, Ayushi Roy, & Emily Wright-Moore, *A Playbook for Improving Unemployment Insurance Delivery*, NEW AM. ch. 6 (June 22, 2021), <https://www.improveunemployment.com/experience> [<https://perma.cc/UZ8Y-YHW3>]; Rebecca Dixon, *From Disrepair to Transformation: How to Revive Unemployment Insurance Information Technology & Infrastructure*, NAT'L EMP. L. PROJECT 3, 8 (July 15, 2020), <https://s27147.pcdn.co/wp-content/uploads/Testimony-Disrepair-Transformation-Revive-Unemployment-Information-Technology-Infrastructure.pdf> [<https://perma.cc/M2EZ-GPHC>].

86. Julia Simon-Mishel, Maurice Emsellem, Michele Evermore, Ellen Leclere, Andrew Stettner, & Martha Coven, *Centering Workers: How to Modernize Unemployment Insurance Technology*, THE CENTURY FOUND. 7 (Sept. 17, 2020), [https://s27147.pcdn.co/wp-content/uploads/UI-mod-report\\_FINAL.pdf](https://s27147.pcdn.co/wp-content/uploads/UI-mod-report_FINAL.pdf) [<https://perma.cc/WFS3-LB3K>] (“Twenty-five percent of Latinx and 23 percent of Black adults, compared to just 12 percent of white adults, are entirely smartphone dependent and do not use broadband at home.”).

87. See *ID.me Presents Barriers for Low Income People Seeking Unemployment Insurance and Other Government Benefits*, CMTY. LEGAL SERVS. OF PHILA. 3 (Nov. 2021) [hereinafter *ID.me Barriers*] <https://clsphila.org/wp-content/uploads/2021/11/IDme-issue-brief-final-11-2-2021.pdf> [<https://perma.cc/FN22-446R>].

88. Andrew Perrin, *Mobile Technology and Home Broadband 2021*, PEW RSCH. CTR. (June 3, 2021), <https://www.pewresearch.org/internet/2021/06/03/mobile-technology-and-home-broadband-2021> [<https://perma.cc/C66J-KJBX>].

89. Emily A. Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, PEW RSCH. CTR. (June 22, 2021), <https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption> [<https://perma.cc/RPF5-EDMF>]; Sara Atske & Andrew Perrin, *Home Broadband Adoption, Computer Ownership Vary by Race, Ethnicity in the U.S.*, PEW RSCH. CTR. (July 16, 2021), <https://www.pewresearch.org/fact-tank/2021/07/16/home-broadband-adoption-computer-ownership-vary-by-race-ethnicity-in-the-u-s> [<https://perma.cc/9R7J-925E>].

found it impossible to satisfy the multi-factor authentication that would allow them to download the agency's application to another person's device.<sup>90</sup> Further, jumping on someone's else's device inherently involves giving up one's privacy in personal data.

Even with access to a computer and broadband, some claimants, particularly senior citizens and non-English speaking people, lacked the digital literacy to comply with complex and technical uploading instructions.<sup>91</sup> Instructions were often overly technical. For instance, users in Philadelphia were told: "When you have set up MFA in your ID.me account, you begin the sign-in process with your email address and password, then you will also enter additional credentials—often, a verification code, which has been sent to a trusted device, sometimes via a trusted phone number."<sup>92</sup> This terminology is not accessible to people with low digital literacy or non-English speakers.<sup>93</sup>

In Maryland, instructions were downright conflicting. The on-screen identity verification instructions told claimants on the one hand to crop images (a skill many claimants lack), and on the other hand that all four sides of a document must be submitted.<sup>94</sup> Across the country, disabled applicants struggled to navigate web-based systems whose design and instructions failed to accommodate physical or visual impairments.<sup>95</sup> In short, from state to state, claimants could not establish their identities. As a result of these design injustices, thou-

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90. *ID.me Barriers*, *supra* note 87, at 1–2.

91. *Id.* at 1; Simon-Mishel et al., *supra* note 86, at 2 (arguing that states made a mistake in "failing to involve their customers—workers and employers—at critical junctures" and "this led to systems touted as convenient and accessible, but which claimants often found challenging and unintuitive").

92. *ID.me Barriers*, *supra* note 87, at 5.

93. Twenty-four percent of American adults score at the lowest level of documentary literacy, "meaning that they could not read a package well enough to determine the correct dosage of medicine to give a child." Whitson & Haggerty, *supra* note 14, at 589.

94. *Maryland's BEACON Unemployment Insurance Application Webpage*, MD. DEP'T OF LAB., <https://beacon.labor.md.gov> [<https://perma.cc/HVJ6-UK49>].

95. See Katelyn Cioffi & Victoria Adelmant, *The IRS's Abandoned Facial Recognition Is Just the Tip of a Harmful Biometric Iceberg*, SLATE (Feb. 14, 2022), <https://slate.com/technology/2022/02/irs-facial-recognition-biometrics-harm.html> [<https://perma.cc/GP5D-D646>]; Michael McLaughlin & Daniel Castro, *Most State Employment Websites Fail Mobile and Accessibility Tests*, INFO. TECH. & INNOVATION FOUND., (Apr. 15, 2020), <https://itif.org/publications/2020/04/15/most-state-unemployment-websites-fail-mobile-and-accessibility-tests> [<https://perma.cc/M7KG-CPW7>].

sands of people gave up on the process in frustration, forgoing financial assistance intended to help them weather the pandemic.<sup>96</sup> This is a problem that extends far beyond UI programs; as Matthew Hull states, “[p]oor and uneducated people unable to master the conventions of bureaucratic documentation or recruit for themselves a capable agent remain excluded even from programs aimed to help them.”<sup>97</sup>

Two specific identity verification methods appeared to have particularly inequitable impacts on poor people and minorities. Some states (and several federal agencies) rely on knowledge-based verification for remote identity proofing in which an applicant is asked multiple choice questions based on their credit history in order to verify their identity.<sup>98</sup> Yet this method is easy for identity thieves to satisfy given the extensive data breaches at credit bureaus and reams of personal data available on the dark web.<sup>99</sup> Moreover, it does not work for people who are credit invisible, that is, the eleven percent of Americans—or twenty-six million people—who have no credit history or profile because they do not engage with mainstream financial institutions.<sup>100</sup> People who are credit invisible are disproportionately Black and Hispanic and live in low-income neighborhoods.<sup>101</sup>

Second, verification systems that rely on facial recognition technology (FRT) were failing to recognize thousands of people—an entirely foreseeable problem in light of extensive research on the biased outcomes of these biometric systems. Facial recognition technologies are being adopted in a range of settings, from law enforcement to air travel to retail stores and more.<sup>102</sup> In a landmark study, Joy Buolomwini and Timnit Gebru found the least accuracy in FRT for Black women, who faced much higher error rates than lighter-skin males,

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96. *ID.me Barriers*, *supra* note 87, at 4.

97. Matthew S. Hull, *Documents and Bureaucracy*, 41 ANN. REV. OF ANTHROPOLOGY 251, 258–59 (2012).

98. *Data Protection: Federal Agencies Need to Strengthen Online Identity Verification Processes*, U.S. GOV'T ACCOUNTABILITY OFF. (May 17, 2019) [hereinafter *Data Protection*] <https://www.gao.gov/products/gao-19-288> [<https://perma.cc/45EP-UEUL>]; Jennifer Wagner & Genevieve Gaudet, *Removing Barriers to Access from Remote Identity Proofing*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 22, 2020), <https://www.cbpp.org/research/health/removing-barriers-to-access-from-remote-identity-proofing> [<https://perma.cc/CY6X-BRB5>].

99. *Data Protection*, *supra* note 98.

100. *Who Are the Credit Invisibles?*, CONSUMER PROT. FIN. BUREAU 2 (2016), [https://files.consumerfinance.gov/f/documents/201612\\_cfpb\\_credit\\_invisible\\_policy\\_report.pdf](https://files.consumerfinance.gov/f/documents/201612_cfpb_credit_invisible_policy_report.pdf) [<https://perma.cc/RMY5-NSK4>].

101. *Id.* at 3–4.

102. See Lindsey Barrett, *Ban Facial Recognition Technologies for Children—and for Everyone Else*, 26 B.U. J. SCI. & TECH. L. 223, 233–37 (2020).

and similar findings of algorithmic bias have emerged in other studies.<sup>103</sup> Given these biases, numerous jurisdictions have outlawed FRT for certain law enforcement purposes, and several Big Tech companies discontinued or put freezes on the law enforcement use of their tools.<sup>104</sup> However, FRT is expanding in the context of government programs, including UI.<sup>105</sup> The issue of bias is concerning given that people of color suffered the higher rates of job loss, yet lower rates of UI receipt than White workers.<sup>106</sup>

ID.me is a private vendor that at least twenty-seven states contract with for UI identity verification, as well as ten federal agencies.<sup>107</sup>

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103. Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 *PROC. OF MACHINE LEARNING RSCH.* 1 (2015); see also Patrick Grother, Mei Ngan, & Kayee Hanaoka, *Face Recognition Vendor Test (FRVT)*, NAT'L INST. OF STANDARDS & TECH. (Sept. 2019), <https://www.govinfo.gov/content/pkg/GOVPUB-C13-a4a30985dc259996c42d67593fec5166/pdf/GOVPUB-C13-a4a30985dc259996c42d67593fec5166.pdf> [<https://perma.cc/2T2Q-U7XJ>]; Jacob Snow, *Amazon's Face Recognition Falsely Matched 28 Members of Congress with Mugshots*, ACLU (July 26, 2018), <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28> [<https://perma.cc/6G62-9ZR7>] (“In a test the ACLU recently conducted of the facial recognition tool, called ‘Rekognition,’ the software incorrectly matched 28 members of Congress, identifying them as other people who have been arrested for a crime. . . . The false matches were disproportionately people of color . . .”).

104. See generally Peter N.K. Schuetz, *Fly in the Face of Bias: Algorithmic Bias in Law Enforcement's Facial Recognition Technology and the Need for an Adaptive Legal Framework*, 39 *J. L. & INEQ.* 221 (2021).

105. See, e.g., *Facial Recognition Technology: Current and Planned Uses by Federal Agencies*, U.S. GOV'T ACCOUNTABILITY OFF. (Aug. 24, 2021), <https://www.gao.gov/assets/gao-21-526.pdf> [<https://perma.cc/VD8X-LLWV>].

106. See *Management Report: Preliminary Information on Potential Racial and Ethnic Disparities in the Receipt of Unemployment Insurance Benefits During the COVID-19 Pandemic*, U.S. GOV'T ACCOUNTABILITY OFF. (Jun. 17, 2021), <https://www.gao.gov/products/gao-21-599r> [<https://perma.cc/K8U6-S8EW>] (“Census Bureau survey data indicates that 80% of White applicants reported receiving benefits, as compared to 73% of Black applicants.”); Monée Fields-White, Vivian Graubard, Alberto Rodríguez, Nikki Zeichner, & Cassandra Robertson, *Unpacking Inequities in Unemployment Insurance*, *NEW AM.* (Sept. 17, 2020), <https://www.newamerica.org/pit/reports/unpacking-inequities-unemployment-insurance/introduction> [<https://perma.cc/QN6K-T6FK>].

107. See Rachel Metz, *Want Your Unemployment Benefits? You May Have to Submit to Facial Recognition First*, *CNN BUS.* (July 23, 2021), <https://www.cnn.com/2021/07/23/tech/idme-unemployment-facial-recognition/index.html> [<https://perma.cc/WS2P-SBWM>]; see also Mia Sato, *The Pandemic Is Testing the Limits of Face Recognition*, *MIT TECH REV.* (Sept. 28, 2021), <https://www.technologyreview.com/2021/09/28/1036279/pandemic-unemployment-government-face-recognition> [<https://perma.cc/9X4Q-4DP9>]; Drew Harwell, *IRS Abandons Facial Recognition Plan After Firestorm of Criticism*, *WASH. POST* (Feb. 7, 2022), <https://www.washingtonpost.com/technology/2022/02/07/irs-idme-face-scans> [<https://perma.cc/UT4A-BMNV>].

Over seventy-three million Americans have accessed the service.<sup>108</sup> Their FRT compares a photo ID with a video selfie that an applicant takes on their phone and uploads to ID.me.<sup>109</sup> Almost immediately after ID.me was rolled out for UI, claimants began reporting difficulty with the technology, taking to Twitter and online message boards to vent their frustrations.<sup>110</sup> The technology failed to recognize many people, who then complained of waiting for days and weeks to reach a human “referee.”<sup>111</sup> One frustrated applicant stated that ID.me rejected his video selfie, “didn’t give us a reason, just rejected it. It rejected it three times, and then it locked me out of the system.”<sup>112</sup> He could not reach the company for several weeks until his tweets caught the company’s attention.<sup>113</sup>

In November 2021, the IRS announced that taxpayers would need to use ID.me to access their tax records and online services. A furious backlash ensued (that was missing with respect to the low-wage workers who were forced to use ID.me to access UI).<sup>114</sup> Lawmakers on both sides of the aisle opposed the plan, demanding that IRS abandon the use of facial recognition technology.<sup>115</sup> In February 2022, the IRS announced it would no longer require ID.me for identity verification.<sup>116</sup> Shortly thereafter, ID.me stated that its existing users across

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108. Harwell, *supra* note 107.

109. Metz, *supra* note 107.

110. See Andrew Kenney, *No Internet, No Unemployment: Solving This ID.me Glitch Took Two Months and a Journey Across the Rural Front Range*, CPR NEWS (July 7, 2021), <https://www.cpr.org/2021/07/07/colorado-unemployment-idme-glitch-internet-access> [<https://perma.cc/X69A-9QQQ>]; Bree Guy, *Nevadans Seeking Unemployment Benefits Report ID.me Issues Around the Valley*, KTNV LAS VEGAS (Aug. 18, 2021), <https://www.ktnv.com/news/detr-id-me-issues-around-the-valley> [<https://perma.cc/EPV8-62TC>]; Jennifer Lewke, *News10NBC Investigates: Many Struggle to Get Through ID.me Process*, NEWS10NBC (Sept. 16, 2021), <https://www.whec.com/news/many-struggle-to-get-through-idme-process/6240392> [<https://perma.cc/44FF-QFC5>].

111. Todd Feathers, *Facial Recognition Failures Are Locking People Out of Unemployment Systems*, VICE (June 18, 2021), <https://www.vice.com/en/article/5dbywn/facial-recognition-failures-are-locking-people-out-of-unemployment-systems> [<https://perma.cc/9D5D-BDBY>].

112. *Id.*

113. *Id.*

114. Drew Harwell, *Private Contractor to Drop Facial Recognition Requirement for All State and Federal Agencies After Backlash Over IRS Plan*, WASH. POST (Feb. 9, 2022), <https://www.washingtonpost.com/technology/2022/02/09/irs-idme-facial-recognition-login> [<https://perma.cc/79MN-QJ3M>].

115. *Id.*

116. *Id.*

its many platforms could delete their selfies and photo data.<sup>117</sup> It also proclaimed that it would make facial recognition on its platforms optional and that users would be able to use video chat instead.<sup>118</sup> Critics countered that this option was unsatisfactory both due to its track record of unacceptable delays and given that many people would be misled into thinking their biometric data was being held securely by a government agency.<sup>119</sup>

Identity verification software has become more than a tool for assessing eligibility; it has become the definition of eligibility. This is contrary to the remedial purpose of UI benefits and many other government services. As one legal services provider aptly summarized, “[t]he issue is whether the person is who they say they are, not whether they can produce perfect identity verification paperwork or successfully use a complex computer app.”<sup>120</sup>

#### B. DUE PROCESS

The second major barrier to accurate and timely identity verification was a lack of due process for claimants, exacerbated by the automation of these systems. Under the Constitution, citizens are entitled to notice and a hearing before they are denied public benefits. Indeed, the United States Department of Labor, in an advisory to state workforce agencies, reiterated that claimants accused of fraud were entitled to due process rights, including “clear instructions” setting forth how claimants can meet identity verification requirements.<sup>121</sup> The notice must include the types of documentation accepted by the agency, instructions on where and how to send the information and an explanation of the consequences for failure to respond timely.<sup>122</sup> Claimants are also entitled to a written determination of eligibility.<sup>123</sup>

Despite these requirements, grounded in decades of legal precedent, claimants across the country found their claims denied, had their accounts frozen, or faced wrongful accusations of fraud—all without

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117. *Id.*

118. *Id.*

119. *Id.* (quoting Evan Greer, director of a digital rights advocacy group, who stated “biometrics have no place being used by agencies that provide people with basic services”).

120. *ID.me Barriers*, *supra* note 87, at 5.

121. Suzan G. Levine, *Unemployment Insurance Program Letter No. 16-21*, U.S. DEPT OF LABOR 7 (Apr. 13, 2021), [https://wdr.doleta.gov/directives/attach/UIPL/UIPL\\_16-21.pdf](https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-21.pdf) [<https://perma.cc/245L-L5Y3>].

122. *Id.*

123. *Id.*

an explanation or opportunity for a hearing.<sup>124</sup> Certain design features were destined to ensnare millions of innocent people. For instance, a fraud alert can result when several applications use the same address, even though this is common for multi-generational families (a category that grew during the housing crunch precipitated by the pandemic) and people in congregate housing settings, such as homeless shelters.<sup>125</sup> Systems also commonly reject ethnic names, including those “that don’t follow the traditional American convention of ‘First, Middle, Last’ or that include characters outside the English alphabet, leading names to be misprinted on social security cards or the same name appearing differently on a credit card and a school ID.”<sup>126</sup>

As of December 2021, at least a dozen class actions were pending nationwide alleging violations of due process associated with unwarranted delays and denials in receiving benefits.<sup>127</sup> In Maryland, a class of claimants alleged in federal court that the UI “system has failed completely: either their claims for benefits have languished for months or their benefits have been suddenly cut off for similar periods without notice or explanation.”<sup>128</sup> Many of these delays and denials were linked to suspected fraud and the failure of the state’s automated system to accept proof of identity.<sup>129</sup> Further, thousands of people received state demands to repay the state for benefits already received (called an overpayment), also without notice of the basis of the overpayment or an opportunity to contest it.<sup>130</sup> Many overpayment claims were linked to alleged fraud and identity verification failures.<sup>131</sup>

The experience of one of the named Maryland plaintiffs in the class action is representative of the due process violations faced by thousands of claimants. The claimant is a grandmother and former non-profit case manager for people with disabilities who lost her job in February 2021.<sup>132</sup> A month after submitting her application and still

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124. NELP Memo, *supra* note 81, at 3–4.

125. Fields-White et al., *supra* note 106.

126. *Id.*

127. Ovetta Wiggins, *Jobless Workers in Maryland Wage Another Legal Battle over Unemployment Benefits*, WASH. POST (Dec. 23, 2021), <https://www.washingtonpost.com/dc-md-va/2021/12/23/maryland-unemployment-lawsuit> [<https://perma.cc/8T36-5MTD>].

128. Complaint at 2, *Gorres v. Robinson*, No. 1:21CV03029 (D. Md. Nov. 24, 2021), ECF No. 1.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* paras. 47–48.

not receiving benefits, she was locked out of her account with no explanation.<sup>133</sup> Repeated attempts to reach a human representative left her on hold for hours.<sup>134</sup> Five months later, she finally received instructions to upload her identification information,<sup>135</sup> but she was unable to do so because her account remained frozen,<sup>136</sup> apparently due to suspected fraud. Despite numerous, subsequent communications with the state agency via an online chat function, by email, by phone, and in-person appointments, she remained locked out of her account, without benefits, and without a written determination of eligibility.<sup>137</sup> As of November 2021, she remained in limbo.<sup>138</sup> She had not found another job and turned to food stamps to feed her family.<sup>139</sup> The financial stress caused her panic attacks and sleeplessness, requiring medication.<sup>140</sup>

Despite the DOL requirement that states clearly set forth their identity verification requirements,<sup>141</sup> the acceptable forms of documentation remain unclear, leaving unfettered discretion in the hands of low-level bureaucrats and/or system designers. The federal government has not issued uniform standards for identity verification in UI, nor have state legislatures or agencies done so. As the National Employment Law Project concluded, “[w]ith limited guidance from [the federal government], individual states were left to implement these requirements on their own.”<sup>142</sup> Without legislative or notice and comment processes, designed to enhance democratic accountability and provide for public input, state agencies were making it up as they went along. One contractor revealed that “nobody has a definition of ‘fraud,’ or any clear cut process or guidelines to follow and that workers believe they will be personally punished if any claim they work on is later found to be fraudulent.”<sup>143</sup>

Across the country, identity verification standards change often, without notice to claimants, and the standards continue to lack

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133. *Id.* paras. 49–50.

134. *Id.* para 51.

135. *Id.* para. 53.

136. *Id.* para. 53.

137. *Id.* para. 55.

138. *Id.* para. 56.

139. *Id.* para. 57.

140. *Id.*

141. Levine, *supra* note 121, at 4.

142. NELP Memo, *supra* note 81, at 1.

143. Fields-White et al., *supra* note 106.

specificity.<sup>144</sup> Written denials are vague, often telling claimants nothing more than that they failed “to comply with Agency procedures,” and making it impossible to contest the finding or to bring a claim into compliance.<sup>145</sup> A search of Maryland’s entire website for UI turned up no guidance whatsoever on how to satisfy identity verification requirements, including a twenty-five page User Guide to the state’s automated system and a thirty-three page guide entitled “UI in Maryland.”<sup>146</sup> And yet, legal services attorneys represented clients whose identity documents were denied because they were expired (which may limit lawful authority to drive but has no bearing on a person’s identity), they were not in color, all four corners were not apparent, both sides of the document were not provided, the document had frayed edges, or the document was too old—such as a fifty-year-old person’s fifty-year-old, but perfectly legible, social security card.<sup>147</sup> The lack of clear standards is particularly difficult when it comes to alternative documentation for people who do not have photo IDs or otherwise cannot satisfy online verification methods.<sup>148</sup> Inconsistent and variable instructions make it hard for these people—often among society’s most vulnerable—to comply with automated ID verification systems.

### C. PRIVATIZATION

Third, the states’ outsourcing of identity verification to third-party vendors lacked transparency and blurred lines of accountability. In 2021, over half of the states contracted with private companies to handle identify verification.<sup>149</sup> The main player is ID.me,<sup>150</sup> used in at

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144. NELP Memo, *supra* note 81, at 3.

145. *Id.*

146. *BEACON 2.0 Claimant User Guide*, MD. DEP’T OF LAB. (Oct. 13, 2020), <https://www.dllr.state.md.us/employment/uibeaconclaimantguide.pdf> [<https://perma.cc/CJ7R-GCXA>]; *Unemployment Insurance in Maryland: A Guide to Reemployment*, MD. DEP’T OF LAB., <https://www.dllr.state.md.us/employment/clmtguide/uiclmtmpamphlet.pdf> [<https://perma.cc/E7ET-NQLN>].

147. Telephone Interview with Cornelia Bright Gordon, Dir. of Advoc. for Admin. L., Md. Legal Aid (Oct. 29, 2021).

148. NELP Memo, *supra* note 81, at 2.

149. Paresh Dave, *Factbox: States Using ID.me, Rival Identity Check Tools for Jobless Claims*, REUTERS (July 22, 2021), <https://www.reuters.com/business/states-using-idme-rival-identity-check-tools-jobless-claims-2021-07-22> [<https://perma.cc/Q3UZ-WEYP>].

150. *What Is ID.me’s Role in Unemployment Insurance?*, ID.ME, <https://help.id.me/hc/en-us/articles/360054015553-What-is-ID-me-s-role-in-unemployment-insurance-> [<https://perma.cc/X393-6Q3L>].

least twenty-seven states.<sup>151</sup> As noted earlier, ID.me's system rejected many eligible claimants, who could not meet the system's requirements and then struggled to reach a human "referee," which is the supposed backup method for establishing identity.<sup>152</sup> ID.me responded to media stories about the difficulties by claiming that user error was responsible.<sup>153</sup> Blaming users for the failures of a technology that was not designed to meet their needs is entirely consistent with the neoliberal thrust of the current social welfare state, or "the idea that public sector institutions should be driven by market-like mechanisms, free choice, flexibility and continuous processes of organizational self-optimization."<sup>154</sup> For their part, citizens "have increasingly been framed as self-sufficient, active and responsible individuals who not only *can* but *must* take on responsibilities and risks previously handled by collective state institutions."<sup>155</sup> Privatization puts a buffer between citizens and state services, thus raising concerns about accountability, or "being answerable to authority that can mandate desirable conduct and sanction conduct that breaches identified obligations. In a democracy, the ultimate authority should be the general population . . ."<sup>156</sup> It is essential that the public have means to ensure that private contractors are carrying out their public purposes fairly and effectively.

The deployment of ID.me and similar products is part of a larger trend of privatization in social services.<sup>157</sup> Privatization generally involves the government contracting out a formerly public function to private entity.<sup>158</sup> Privatization proponents claim that private companies can deliver services with greater efficiency and innovation than government, and at a lower cost due to competition, freedom from red tape, and fewer restriction on managing employees.<sup>159</sup> Opponents counter that privatization lessens governmental accountability, which

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151. See Dave, *supra* note 149. Federal agencies using ID.me include the Department of Veterans Affairs, the Social Security Administration, and the Internal Revenue Services. See also Metz, *supra* note 107.

152. See *supra* notes 107–112 and accompanying text.

153. See Feathers, *supra* note 111.

154. Jannick Schou & Morten Hjelholt, *Digital State Spaces: State Rescaling and Advanced Digitalization*, 7 TERRITORY, POL., GOVERNANCE 438, 445 (2019).

155. *Id.*

156. Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1260 (2003).

157. See Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569, 581 (2001); Nestor M. Davidson, *Relational Contracts in the Privatization of Social Welfare: The Case of Housing*, 24 YALE L. & POL'Y REV. 263, 267 (2006).

158. Gilman, *supra* note 157, at 591–93.

159. *Id.* at 596.

is of particular concern when dealing with marginalized persons who have less political influence to demand program changes.<sup>160</sup> Critics also query whether privatization delivers the promised cost savings and point to the ways in which large corporations mirror the bureaucratic structures of government.<sup>161</sup> Despite these differences, both sides of this debate share some common ground:

First, that policymaking should remain in the control of politically accountable government authorities; second, that the primary purpose of privatization is to achieve greater efficiency; and third, that this efficiency gain depends on the claim that private contractors are competitive entities in a competitive environment.<sup>162</sup>

The privatization of identity verification is failing these parameters.

First, the federal and state failures to define with specificity the acceptable forms of identification, especially with regard to alternative forms of identification, left this foundational question within the hands of private contractors. This also allowed for lower standards for data security, because private vendors do not have to follow the strict data security standards required of government agencies that handle personal data.<sup>163</sup>

Second, it is not clear that a private vendor can handle identity verification more efficiently than government, especially considering that much of the data used by private vendors originated in government databases.<sup>164</sup> As one commentator notes, “government’s providing data to the private sector and then buying them back again is clearly extremely inefficient.”<sup>165</sup> Moreover, citizens must establish their identity for a variety of programs, each of which has its own standards and technology.<sup>166</sup> This duplication “leaves governments paying multiple competing vendors for duplicate records, it leaves people with multiple accounts with different vendors, and it leaves applicants puzzled about why they can validate their identity for one public service but not another.”<sup>167</sup> Further, underinvestment in staff is plaguing the UI system, including the identity verification components. Part of the UI system collapse during the pandemic is directly

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160. *Id.* at 597.

161. *Id.* at 596.

162. Edward Rubin, *The Possibilities and Limitations of Privatization*, 123 HARV. L. REV. 890, 893 (2010).

163. Jaquith, *supra* note 42, at 56.

164. *Id.* at 55.

165. *Id.* at 56.

166. *Id.* at 57.

167. *Id.*

traceable to the downsizing of staff over the last decade.<sup>168</sup> For instance, in some states, including Pennsylvania and Georgia, there are half as many UI employees as there were during the Great Recession.<sup>169</sup> The turn to automation is an attempt to get more for less, but it has only proved the necessity of keeping humans in the loop. As Michael Reisch states, with regard to social services privatization, most of the efficiencies “have occurred by lowering workers’ wages and benefits, reducing services, diminishing the quality of staff development and training programs, imposing fees on clients, and focusing service provision on new, less difficult, and more affluent service consumers.”<sup>170</sup>

Third, there is a limited market among identity verification vendors. Right now, it appears that the dominant players providing identification services to government agencies are ID.me and LexisNexis. The failures of ID.me have already been discussed.<sup>171</sup> When the Social Security Administration (SSA) hired LexisNexis to determine whether recipients of needs-based benefits owned unreported and thus disqualifying real property, false accusations soared.<sup>172</sup> An investigation found that LexisNexis’s use of name-matching to link claimant identities to property records was sloppy and inaccurate. By using first and last names only, the algorithm disproportionately impacted people of color, who are more likely to have similar names.<sup>173</sup> For instance, the Census shows that one quarter of the Hispanic population shares twenty-six surnames.<sup>174</sup> Further, LexisNexis claimed it did not have to meet the accuracy standards of consumer reporting agencies under the Fair Credit Reporting Act (FCRA), and SSA used this disavowal to

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168. Mar Hicks, *Built to Last*, LOGIC (Aug. 31, 2020), <https://logicmag.io/care/built-to-last> [<https://perma.cc/G5LM-FGC9>].

169. Jed Pressgrove, *Staffing Issues Complicate Unemployment Agency Tech Woes*, GOVERNING (May 26, 2020), <https://www.governing.com/work/Staffing-Issues-Complicate-Unemployment-Agency-Tech-Woes.html> [<https://perma.cc/YK5F-KP7B>].

170. Michael Reisch, *United States: Social Welfare Policy and Privatization in Post-Industrial Society*, in *THE WELFARE STATE IN POST-INDUSTRIAL SOCIETY: A GLOBAL PERSPECTIVE* 253, 259 (Jason L. Powell & Jon Hendricks eds. 2009).

171. See *supra* text accompanying notes 149–151.

172. Sarah Mancini, Kate Lang, & Chi Chi Wu, *Mismatched and Mistaken: How the Use of an Inaccurate Private Database Results in SSI Recipients Unjustly Losing Benefits*, NAT’L CONSUMER L. CTR. 3 (2021), [https://www.nclc.org/images/pdf/credit\\_reports/RptMismatchedFINAL041421.pdf](https://www.nclc.org/images/pdf/credit_reports/RptMismatchedFINAL041421.pdf) [<https://perma.cc/7VSH-59EV>].

173. *Id.* at 3–4.

174. *Id.* at 21.

deny claimants the opportunity to contest the findings.<sup>175</sup> The outsourcing of eligibility determinations allowed the government to freeride on the private vendor's self-serving determination that it did not have to comply with governing law, resulting in due process violations.

#### IV. THE FUTURE OF IDENTITY VERIFICATION

The identity verification failures in UI systems during the pandemic are a harbinger of the future, in which increasing numbers of private and governmental agencies are turning to automated systems to establish that they are serving the proper people. This is an entirely legitimate as well as necessary goal, indeed, "large-scale systems of social assistance require working civil registration."<sup>176</sup> However, as the UI experience shows, it is not easily achieved without attention to issues of equity. The current focus on efficiency and cost-savings in identity verification systems is a form of plutocratic regulation, as defined by Greene, in which the needs of the more affluent are satisfied, while a sizable minority—mostly from politically disenfranchised communities—is left behind.<sup>177</sup> At bottom, identity verification is a powerful tool of social control that can be liberating or oppressive, depending on its social context and the manner of its deployment.<sup>178</sup>

History is littered with examples in which identity was used to subjugate people, and even to carry out genocide.<sup>179</sup> In their study of classification systems, Geoffrey Bowker and Susan Leigh Star examine how the government of apartheid-era South Africa relied on identity passbooks to control and limit the movements and opportunities of people deemed non-white.<sup>180</sup> Passbooks were "a compilation of documents attesting to birth, education, employment history, marriage, and other life events," that allowed for "comprehensive surveillance of their actions" by the state.<sup>181</sup> Classification as Black determined

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175. *Id.* at 3, 28–35.

176. REGISTRATION AND RECOGNITION: DOCUMENTING THE PERSON IN WORLD HISTORY 11 (Keith Breckenridge & Simon Szreter eds. 2012).

177. Greene, *supra* note 5, at 65.

178. Whether registration systems are empowering to individuals "or alternatively, disempowering and controlling them . . . is a historically contingent matter, related to many diverse influences." REGISTRATION AND RECOGNITION, *supra* note 176, at 22.

179. *Id.* at 13 ("For social historians who have confronted registration directly as a tool of segregation, it is the meticulous administrative arrangements of twentieth-century genocide that have loomed ominously in the analytical background.").

180. BOWKER & STAR, *supra* note 83, at 198.

181. *Id.*

where one could live, work, and be, as well as the denial of a multitude of civil and political rights.<sup>182</sup> As a result, many people sought to be classified as white, and the process of seeking reclassification led “to thousands of ironic and tragic cases where classification and reclassification separated families, disrupted biographies, and damaged individuals beyond repair.”<sup>183</sup> Another horrific example of identity classification occurred in World War II, where, under Nazi occupation, the city of Amsterdam produced a map and list of residents that allowed the Nazis to round up and deport 65,000 members of the city’s Jewish population.<sup>184</sup>

In the United States, we have our own sordid history, for instance, requiring identification documents of free Blacks in the antebellum South, and Chinese immigrants in the 1890s.<sup>185</sup> Today, the United States requires noncitizens to carry identification, and law enforcement agents can demand papers from people that appear foreign-born and are within one hundred miles of a border town.<sup>186</sup> Jordan Weinburg highlights the social control purposes of these identity verification requirements: “All of these groups have been perceived as including members who were subversive, encroaching, or illegal, but who would be too hard to identify and classify without the aid of forced identification.”<sup>187</sup>

In contrast to these oppressive effects, the advent of the Social Security Number (SSN) in 1935, as part of the New Deal, came to be seen as a marker of inclusion and, as Sarah Igo writes, a “positive identification with one’s status as a known citizen.”<sup>188</sup> The federal government created the system of giving each citizen a nine-digit number in order to link workers to their government-funded retirement accounts, a new form of financial security in a time of economic upheaval.<sup>189</sup> At their inception, SSNs were not without controversy because of the specter that they could serve as a tool for totalitarianism.<sup>190</sup> However, SSNs ultimately gained widespread acceptance because the public saw them as a “route to privilege rather

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182. *Id.* at 218.

183. *Id.*

184. SCOTT, *supra* note 68, at 260.

185. Jonathan Weinberg, *Proving Identity*, 44 PEPP. L. REV. 731, 733 (2017).

186. *Id.* at 734.

187. *Id.*

188. SARAH E. IGO, *THE KNOWN CITIZEN: A HISTORY OF PRIVACY IN MODERN AMERICA* 65 (2018).

189. *Id.*

190. *Id.*

than privation”<sup>191</sup> and a “bargain struck between citizens and the state.”<sup>192</sup> A social security number is the closest Americans have to a national identification marker,<sup>193</sup> and its uses have extended far beyond linking workers to their retirement accounts.<sup>194</sup> It is used by numerous federal and state agencies, as well as private entities, such as banks, credit reporting agencies, and health care providers.<sup>195</sup> The number serves as a data backbone for many identity management systems, such as E-Verify, which is used by employers to confirm the citizenship status of workers.<sup>196</sup> However, Americans are not required to carry Social Security cards, and the cards themselves have no photos or biometric information, limiting their efficacy as a standalone identity verification tool.<sup>197</sup>

Automated identity verification systems in UI currently occupy an uneasy space between these oppressive and empowering extremes—they are wrapped in the rhetoric of ease and efficiency but are having exclusionary effects for millions of Americans. Why would states adopt identity verification processes that routinely fail their citizens? In some instances, these appear to have been intentional choices, as a means for saving money by churning people with little political capital out of the system. For instance, in Florida, the state was processing only ten to fifteen percent of UI applications during the peak of pandemic-related unemployment.<sup>198</sup> An aide to Governor Ron DeSantis admitted that the prior administration of Governor Rick Scott designed the UI system to “make it harder for people to get benefits” and to keep unemployment numbers low in order “to give the governor something to brag about.”<sup>199</sup>

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191. *Id.* at 63.

192. *Id.* at 83.

193. All legal residents in the United States receive a SSN at birth. Weinberg, *supra* note 185, at 787; *see also* Hu, *supra* note 10, at 1517 (“[E]xperts have observed that the Social Security Number has morphed into a universal de facto national ID number.”).

194. Hu, *supra* note 10, at 1517.

195. Weinberg, *supra* note 185, at 787–88.

196. Hu, *supra* note 10, at 1517.

197. Weinberg, *supra* note 185, at 795.

198. Patricia Mazzei & Sabrina Tavernise, ‘Florida Is a Terrible State to Be an Unemployed Person’, N.Y. TIMES (Apr. 24, 2020), <https://www.nytimes.com/2020/04/23/us/florida-coronavirus-unemployment.html> [<https://perma.cc/A2X5-WUVK>].

199. *See* Anna Palmer & Jake Sherman, *POLITICO Playbook: The Coronavirus Show vs. the Reality*, POLITICO (Apr. 3, 2020), <https://www.politico.com/newsletters/playbook/2020/04/03/the-coronavirus-show-vs-the-reality-488792> [<https://perma.cc/LLX5-X8A4>].

Even states that did not intend to cut the UI rolls nevertheless made conscious decisions about how to design their automated systems and the levels of staffing support for the systems. As public policy professors Pamela Herd and Don Moynihan conclude, the adoption of administrative burdens is a choice, including the decision to rely extensively on automation.<sup>200</sup> Numerous studies show that increased automation leads to fewer UI applications and lower levels of approved applications.<sup>201</sup> This is “bureaucratic disenfranchisement” in action, or the placing of procedural barriers, such as complex and ill-defined identity verification requirements, in the way of claimants to discourage them from applying, and if they survive the application gauntlet, to increase the numbers of denials.<sup>202</sup> At the end of the day, identity verification is a form of social control. Matthew Hull explains, “Bureaucracies . . . exercise their control through the uncertainty, ambiguity, and fear created by leaving people and things undocumented or by routinely disputing the validity of documents.”<sup>203</sup>

This raises the questions of how to adopt identity verification processes that serve, rather than subjugate, citizens. Worker advocacy groups highlight a variety of remedies for the current UI failures involving identity verification, including mandating that states adopt the identity verification standards from the National Institute of Standards and Technology (NIST); providing in-person, government-run identity verification options at multiple, convenient locations; accepting expired driver’s licenses; designing platforms for smartphone compatibility; allowing a variety of alternative identification documents; prohibiting knowledge based verification; ensuring language access on UI platforms; and prohibiting private vendors to render final eligibility decisions.<sup>204</sup> States should also engage in regular au-

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200. Pamela Herd & Donald Moynihan, *Administrative Burdens in the Time of Covid-19*, 36 INST. FOR RSCH. ON POVERTY FOCUS 4, 9 (2020), <https://www.irp.wisc.edu/wp-content/uploads/2020/10/Focus-36-3b.pdf> [<https://perma.cc/2VDT-CSU2>].

201. See Simon-Mishel et al., *supra* note 86, at 36–37; Burke et al., *supra* note 85, ch. 13; George Wentworth, *Closing Doors on the Unemployed: Why Most Jobless Workers Are Not Receiving Unemployment Insurance and What States Can Do About It*, NAT’L EMP. L. PROJECT 21 (Dec. 2017), [https://s27147.pcdn.co/wp-content/uploads/Closing-Doors-on-the-Unemployed12\\_19\\_17-1.pdf](https://s27147.pcdn.co/wp-content/uploads/Closing-Doors-on-the-Unemployed12_19_17-1.pdf) [<https://perma.cc/LDD6-UAZW>].

202. See Susan D. Bennett, “No Relief but Upon the Term of Coming into the House”—Controlled Spaces, Invisible Disenfranchisements, and Homelessness in an Urban Shelter System, 104 YALE L.J. 2157, 2159 (1995).

203. Hull, *supra* note 97, at 258.

204. See NELP Memo, *supra* note 81, at 6; see also Dixon, *supra* note 85, at 9–10. See generally Burke et al., *supra* note 85.

ding and public reporting of identification verification statistics, including not only suspected and confirmed cases of fraud, the mode of verification used, and the methods used for investigation, but also the numbers of claimants who were accused of fraud, who appeal the determinations and the outcomes of appeals, who start but fail to complete applications, and who are eligible but never apply.<sup>205</sup>

Another proposal is to build out identity verification services from existing federal databases. Technologist Waldo Jaquith proposes either Login.gov, a product of the General Services Administration that is NIST-compliant and provides a single sign-on that can be used across federal government agencies, or the Federal Data Services Hub, which is part of the Centers for Medicare and Medicaid Services and combines government and commercial data sources to verify identity for individuals applying for health insurance under Obamacare.<sup>206</sup> He states,

By integrating and expanding access to the existing federal services offered by Login.gov and the Federal DSH, individuals would no longer need to maintain a series of accounts for each separate agency or government service and could instead create a single government login that unites all of their interactions with government."<sup>207</sup>

Expanding either of these tools would require a commitment to data security and data privacy controls.

Despite an American cultural aversion to a national identity system,<sup>208</sup> we are likely headed to a uniform identity management system, whether it happens in one fell swoop via legislation or incrementally through linkages among existing and expanding databases. Margaret Hu explains that traditional forms of bureaucratic surveillance, such as Social Security Cards and driver's licenses, are likely going to combined with geolocation tracking (through RFID) and biometric forms of identity, such as fingerprints, iris scans, and DNA, thus facilitating a convergence of "cybersurveillance-body tracking and

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205. In some states, labor agencies are required to do regular reporting and/or have a public dashboard listing various metrics related to the processing of UI claims. *See, e.g.*, WASH. REV. CODE § 50.12.370 (2021) (requiring quarterly reporting and a dashboard). These requirements could mandate public reporting of data related to identity verification, as well as data related to ease and rates of claimant access.

206. Jaquith, *supra* note 42, at 57–58.

207. *Id.*

208. A. Michael Froomkin, *Identity Cards and Identity Romanticism*, in LESSONS FROM THE IDENTITY TRAIL: ANONYMITY, PRIVACY AND IDENTITY IN A NETWORKED SOCIETY 245 (Ian Kerr, Valerie Steeves, & Carole Lucock eds. 2009).

dataveillance-biographical tracking.”<sup>209</sup> Indeed, in recent years, numerous federal bills have been proposed to create high-tech, digital forms of identity in the name of national security and border control.<sup>210</sup>

Regardless of how identity verification unfolds, either segmented in multiple programs or unified under the auspices of the federal government, identity verification in social welfare systems requires much closer attention to issues of equity and privacy. As researcher Emnet Tafesse states, “What we need is a way to think about data-driven identification practices of the digital welfare state as a resource to enact belonging, rather than a technology for individuating and targeting.”<sup>211</sup> Currently, identity verification systems are designed around a presumption of fraud, despite the fact that most cases of so-called fraud are the result of innocent mistakes by caseworkers and claimants due to complex program requirements.<sup>212</sup> Instead of fraud-first design, which stigmatizes and harms social welfare recipients, principles of user-centered design justice could improve identity verification systems dramatically. Design justice is “a framework for analysis of how design distributes benefits and burdens between various groups of people.”<sup>213</sup> As Sasha Costanza-Chock explains, input from and accountability to impacted communities is essential to design justice.<sup>214</sup> One of the principles of the design justice network, an organization of designers, artists, technologists, and community organizers, is that “everyone is an expert based on their own lived experience, and that we all have unique and brilliant contributions to bring to a design process.”<sup>215</sup> The rollout of identity verification in UI systems was contrary to these principles; it was top-down, it did not involve impacted communities or other stakeholders, and it did not seek to “sustain,

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209. Hu, *supra* note 10, at 1480–81.

210. *Id.* at 1483.

211. Emnet Tafesse, *Between Belonging and Individuating: Data, Identification, Diaspora*, DATA & SOC’Y: POINTS (Dec. 8 2020), <https://points.datasociety.net/between-belonging-and-individuating-data-identification-diaspora-9fcdf010e0ce> [<https://perma.cc/WFQ9-ZKFM>].

212. See *Unpacking Inequities*, *supra* note 106, at 15–16.

213. SASHA COSTANZA-CHOCK, DESIGN JUSTICE: COMMUNITY-LED PRACTICES TO BUILD THE WORLDS WE NEED at 23 (2020) (ebook).

214. *Id.* at 25, 99.

215. *Design Justice Network Principles*, DESIGN JUST. NETWORK, <https://designjustice.org/read-the-principles> [<https://perma.cc/3WZU-5RTL>].

heal and empower” communities.<sup>216</sup> Greater consultation with stakeholders would have avoided many of the design failures that claimants faced.

To enhance legal remedies, Greene’s identity theft proposal could be expanded to include people trying to obtain identity documentation and those denied by and locked out of identity verification systems. Greene suggests a federally funded agency that awards grants to local entities that can provide quick legal services to identity theft victims.<sup>217</sup> The localized approach and expanded funding would be a welcome improvement for victims of identity theft and identity denial. At the same time, we need to be wary of putting the entire burden on individuals to police their own identities while letting the entities that profit from surveillance capitalism off the hook. Greene’s proposal somewhat risks further individualizing a structural problem. As Jennifer Whitson and Kevin Haggerty explain, identity theft laws put the onus on individuals to manage their own risk.<sup>218</sup> While affluent people have the aptitude and resources for self-management, including the ability to “purchase shredders, secure computers and even invest in identity theft insurance,” many less wealthy people lack this awareness or capacity.<sup>219</sup>

“Disconnected from the flows of informational capitalism, consigned to peripheral economic sectors and often struggling simply to make ends meet in the face of overwhelming family and workplace responsibilities, large segments of Western societies are self-evidently disadvantaged in their abilities to manage their virtual identity and rectify problems when they arise.”<sup>220</sup>

Having a lawyer does not solve this gross imbalance. The truth is that even with two decades of consumer law experience, I can struggle to assist victims of identity theft because the underlying laws have few teeth, while available procedures are time-consuming and Kafkaesque in nature. As consumer advocate Chi Chi Wu explains, “The credit bureaus’ loose matching procedures contribute to the problem of identity theft, and their data breaches give thieves the tools needed to commit fraud.”<sup>221</sup> And yet when “consumers try to fix the aftereffects of identity theft, furnishers often fail to believe them and the

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216. *Id.*

217. Greene, *supra* note 5, at 119–22.

218. Whitson & Haggerty, *supra* note 14, at 588.

219. *Id.*

220. *Id.* at 589.

221. Chi Chi Wu, *Consumer Credit Reporting: Assessing Accuracy and Compliance*, NAT’L CONSUMER L. CTR. 14 (May 26, 2021), [https://www.nclc.org/images/pdf/credit\\_reports/Testimony\\_HFSC\\_OI\\_credit\\_reporting.pdf](https://www.nclc.org/images/pdf/credit_reports/Testimony_HFSC_OI_credit_reporting.pdf) [<https://perma.cc/8B3V-RDQH>].

credit bureaus take the furnishers' side."<sup>222</sup> In short, the individualistic measures that shape identity theft and denial "are themselves part of a political strategy whereby institutions are divesting themselves of responsibility for the full social and economic costs of the risks that they have produced."<sup>223</sup> It is clear that identity theft and identity denials require stronger, underlying substantive legal rights and duties that shift responsibility to the private and governmental entities that profit from and rely upon consumer data. With enforceable standards and shared responsibility, the localized and well-funded network of legal services lawyers envisioned by Greene will be able to truly advocate for clients victimized by identity theft and identity denials.

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222. *Id.*

223. Whitson & Haggerty, *supra* note 14, at 591.