

2021

Stealing (Identity) From the Poor,

Sara S. Greene

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>

Recommended Citation

Greene, Sara S., "Stealing (Identity) From the Poor," (2021). *Minnesota Law Review*. 3295.
<https://scholarship.law.umn.edu/mlr/3295>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Article

Stealing (Identity) From the Poor

Sara S. Greene[†]

Introduction	60
I. Risk and Perceived Risk of Data Breach Harms for Low-Income Groups	70
A. Erroneous Assumptions: Bad Credit, Good Protection	73
B. Why Do Identity Thieves Target Identities with Bad Credit?	75
C. Low-Income, High-Vulnerability	77
II. Identity Theft Harms for Low-Income Victims	78
A. Loss of Public Benefits	79
B. Loss or Delay of Tax Refunds	82
C. Difficulties Obtaining Housing	83
D. Difficulties Getting a Job	84
E. Identity Theft Victimization as Catalyst for Downward Financial Trajectory	86
III. Inadequate Existing Remedies	88
A. Courts	89
B. Legislation	92
C. Federal Trade Commission	96
D. Consumer Financial Protection Bureau	97
E. Law Enforcement	98

[†] Professor of Law, Duke Law School. For helpful comments and suggestions at various stages of this project, I thank Kerry Abrams, Stuart Benjamin, Jordan Brensinger, Sam Buell, Guy Charles, Nakita Cuttino, Pamela Foohey, Brandon Garrett, Michele Gilman, Andrew Hammond, Eisha Jain, Maggie Lemos, Sarah Bloom Raskin, Steven Schwarcz, and Chi-Chi Wu. I gratefully acknowledge the Bolch Judicial Institute at Duke University and the Duke Law School Dean's office for funding and Andrew Foster, Charles Holton, Jesse McCoy, and Barak Richman for terrific collaboration. For excellent research assistance and data collection help, I thank Mandy Boltax, Sarah Champion, Nanma Okeani, Emma Ritter, Victoria Rose, Anderson Vereyken, and Katarina Weessies. I also thank all of the extraordinary editors of the *Minnesota Law Review*—particularly Cole Benson, Brandie Burris, Hannah Wiles, Mollie Wagoner, Kerry Gibbons, as well as the MLR staff. Finally, I am profoundly grateful to the respondents in this study for generously sharing their stories. Copyright © 2021 by Sara S. Greene.

F. Bankruptcy, Debt Consolidation, and Debt Settlement	101
IV. Plutocratic Regulation	102
A. Occupational Licensing and Plutocracy	104
B. Bail and Plutocracy	108
V. Race, Plutocracy, and Intersectionality	111
VI. Equitycentric Identity Theft Regime	116
A. Equitycentric Identity Theft Regulation—Existing Programs and Proposals	116
B. Equitycentric Identity Theft Regulation: A Proposal	119
Conclusion	123

INTRODUCTION

In 2017, Equifax announced a major data breach that affected more than half of all Americans.¹ The public and commentators were riveted, and the breach dominated the front page of major newspapers:

“Seriously, Equifax? This Is a Breach No One Should Get Away With”

-*New York Times* (September 8, 2017)²

“Theft of Equifax data could lead to years of grief for home buyers and mortgage applicants”

-*Washington Post* (September 13, 2017)³

“‘We’ve Been Breached’: Inside the Equifax Hack[:] The crisis has sent shock waves through the industry, spooked consumers, and sparked investigations”

-*Wall Street Journal* (September 18, 2017)⁴

Anyone and everyone could be affected. CEOs, Hollywood Stars, politicians—it didn’t matter who you were, the chances your data was

1. AnnaMaria Andriotis, Michael Rapoport & Robert McMillan, *‘We’ve Been Breached’: Inside the Equifax Hack*, WALL ST. J. (Sept. 18, 2017), <https://www.wsj.com/articles/weve-been-breached-inside-the-equifax-hack-1505693318> [<https://perma.cc/MC3U-LRRG>].

2. Farhad Manjoo, *Seriously, Equifax? This Is a Breach No One Should Get Away with*, N.Y. TIMES (Sept. 8, 2017), <https://www.nytimes.com/2017/09/08/technology/seriously-equifax-why-the-credit-agencys-breach-means-regulation-is-needed.html> [<https://perma.cc/H7L6-PFHG>].

3. Kenneth R. Harney, *Theft of Equifax Data Could Lead to Years of Grief for Home Buyers and Mortgage Applicants*, WASH. POST (Sept. 13, 2017), https://www.washingtonpost.com/realestate/theft-of-data-could-lead-to-years-of-grief-for-home-buyers-and-mortgage-applicants/2017/09/12/ed0f66fc-971a-11e7-82e4-f1076f6d6152_story.html [<https://perma.cc/S7AZ-UK93>].

4. Andriotis et al., *supra* note 1.

compromised were almost fifty percent.⁵ There was mass confusion about what to do, what not to do, and how to get help.⁶ Soon, self-help guides to the breach surfaced.⁷ Policymakers called on Equifax to do more to provide protection to those whose data were compromised,⁸ and slowly, protections such as free credit monitoring and credit freezes were offered.⁹

5. See *Nearly Half of U.S. Citizens Hit by Massive Equifax Breach*, 2017 COMPUT. FRAUD & SEC. 1 (noting that the data of almost half of all United States citizens was compromised in the Equifax breach).

6. See Ron Lieber, *Equifax's Instructions Are Confusing. Here's What to Do Now*, N.Y. TIMES (Sept. 8, 2017), <https://www.nytimes.com/2017/09/08/your-money/identity-theft/equifaxs-instructions-are-confusing-heres-what-to-do-now.html> [<https://perma.cc/28AD-UCSJ>] (exemplifying the confusion Equifax users felt using the website); see also Sarah O'Brien, *Equifax Response to Data Breach Leaves Many Consumers Confused*, CNBC (Sept. 8, 2017), <https://www.cnbc.com/2017/09/08/equifax-response-to-data-breach-leaves-many-consumers-confused.html> [<https://perma.cc/UQU6-GUCS>] (explaining that consumers were confused as to whether the breach included their personal data and how to proceed).

7. See, e.g., Ron Lieber, *How to Protect Yourself After the Equifax Breach*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/interactive/2017/your-money/equifax-data-breach-credit.html> [<https://perma.cc/Z4EY-9AP3>] (compiling information on how consumers can protect their credit in one place); Brian Fung, *After the Equifax Breach, Here's How to Freeze Your Credit to Protect Your Identity*, WASH. POST (Sept. 9, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/09/09/after-the-equifax-breach-heres-how-to-freeze-your-credit-to-protect-your-identity> [<https://perma.cc/DY4J-PK9S>] (explaining what a credit freeze entails); Seena Gressin, *The Equifax Data Breach: What to Do*, FED. TRADE COMM'N: CONSUMER INFO. BLOG (Sept. 8, 2017), <https://www.consumer.ftc.gov/blog/2017/09/equifax-data-breach-what-do> [<https://perma.cc/DJ5J-DJTR>] (giving steps to protect against data misuse).

8. See Joshua Barajas, *Lawmakers Are Angry Over Equifax's Massive Data Breach. Where Do We Go from Here?*, PBS: NEWSHOUR (Oct. 6, 2017), <https://www.pbs.org/newshour/politics/lawmakers-angry-equifaxs-massive-data-breach-go> [<https://perma.cc/W3KM-E937>] (discussing how Equifax's former CEO was questioned by lawmakers about the data breach); see also Kevin Freking, *Democrats on House Panel Urge Equifax to Extend Protections*, WASH. POST (Feb. 20, 2018), https://www.washingtonpost.com/business/technology/democrats-on-house-panel-urge-equifax-to-extend-protections/2018/02/20/73e363ac-165c-11e8-930c-45838ad0d77a_story.html [<https://perma.cc/HH34-MP6K>] (discussing how lawmakers urged Equifax to provide additional services such as free credit monitoring for three years).

9. The Federal Trade Commission website details the various options available to consumers who were victims of the Equifax breach. See Robert Schoshinski, *Equifax Data Breach: Pick Free Credit Monitoring*, FED. TRADE COMM'N: CONSUMER INFO BLOG (July 31, 2019), <https://www.consumer.ftc.gov/blog/2019/07/equifax-data-breach-pick-free-credit-monitoring> [<https://perma.cc/JYP5-TXSX>]. Many advocates argue, however, that consumers have not been adequately cared for in the aftermath of the breach. *Who's Keeping Score? Holding Credit Bureaus Accountable and Repairing a Broken System: Hearing Before the H. Comm. on Fin. Servs.*, 116th Cong. 11 (2019)

The Equifax breach was enormous in scope, but it was part of a pattern of increasingly complex and increasingly frequent data breaches each year.¹⁰ These breaches and the associated risk of identity theft have garnered the attention of legal scholars, as well as courts and policymakers.¹¹ Debates rage about how to define a “harm” in breach situations, who has standing to bring suit against breached companies, and what responsibilities accrue to players involved in data breaches.¹² Yet the conversation about data breach harms largely overlooks those most vulnerable to their consequences: those who are low-income.¹³

Most scholarly and public discourse about data breaches assumes that even when low-income individuals are victims, the most damaging harm associated with breaches—identity theft—is *not* a

(statement of Chi Chi Wu, Staff Attorney, National Consumer Law Center) (“And despite much outrage and extensive media coverage, American consumers are nowhere close to being made whole or made safe in the aftermath [of the Equifax breach].”).

10. See generally Victor Reklaitis, *How the Number of Data Breaches Is Soaring— in One Chart*, MARKETWATCH (May 25, 2018), <https://www.marketwatch.com/story/how-the-number-of-data-breaches-is-soaring-in-one-chart-2018-02-26> [<https://perma.cc/UDT7-Y2DR>] (detailing the increase in data breaches each year).

11. See JOSEPHINE WOLFF, *YOU’LL SEE THIS MESSAGE WHEN IT’S TOO LATE: THE LEGAL AND ECONOMIC AFTERMATH OF CYBERSECURITY BREACHES 1* (2018) (discussing the extensive attention data breaches receive by the media and other commentators).

12. See, e.g., Ryan Calo, *Privacy Harm Exceptionalism*, 12 COLO. TECH. L.J. 361, 361–64 (2014) (arguing that the standards courts set for proving privacy violations are too high); M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1131, 1142 (2011) (arguing that privacy harms should be categorized as objective and subjective harms); Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1831 (2010) (advocating that courts should utilize established tort remedies to address unwanted privacy intrusions instead of creating new torts); Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 TEX. L. REV. 737, 739 (2018) (mentioning the debate as to whether data breach cases have sufficient Article III standing and legal harms to recover).

13. See generally *infra* Part III (discussing the inadequacy of current remedies for low-income victims of identity theft).

significant concern.¹⁴ Because low-income¹⁵ individuals are disproportionately likely to have low credit scores, many people believe their credit profiles would not appeal to thieves since their profiles usually are offered credit products with particularly high interest rates.¹⁶

This line of reasoning may appear logical, but existing Department of Justice data¹⁷ show that at least one-third of identity theft

14. In one survey, 73% of the respondents believed that those engaged in identity theft are only interested in stealing the identity of wealthy people. *See* Brady Porche, *Bad Credit? You're Still a Target for Identity Thieves*, CREDITCARDS.COM (July 19, 2017), <https://web.archive.org/web/20170721143847/www.creditcards.com/credit-card-news/bad-credit-identity-theft.php>; Telephone Interview with Sarah Bloom Raskin, Former Member, Bd. of Governors, Fed. Rsrv. Sys., Former U.S. Deputy Sec. of the Treasury (June 17, 2019) (discussing the lack of concern for low-income groups among policy makers who concentrate on data breaches). *But see* Michele Gilman, *Voices of the Poor Must Be Heard in the Data Privacy Debate*, JURIST (May 14, 2019), <https://www.jurist.org/commentary/2019/05/voices-of-the-poor-must-be-heard-in-the-data-privacy-debate> [<https://perma.cc/LC4W-8WT6>] (noting that low-income Americans suffer from privacy harms and advocating that their voices be heard in the privacy debate).

15. In this Article, I use the words low-income and poor interchangeably. Poor describes people with income below the poverty line. Low-income is a broader term that describes people with income near or below the poverty line, and thus I use it more frequently. For further discussion of this issue, see Jennifer Guerra, *Poor v. Low-Income: Does It Matter Which Word We Use?*, STATE OPPORTUNITY (June 10, 2015), <https://stateofopportunity.michiganradio.org/post/poor-vs-low-income-does-it-matter-which-word-we-use> [<https://perma.cc/4XWJ-TK28>].

16. *See Analysis of Differences Between Consumer- and Creditor-Purchased Credit Scores*, CONSUMER FIN. PROT. BUREAU 36 app. fig.9 (Sept. 2012), https://files.consumerfinance.gov/f/201209_Analysis_Differences_Consumer_Credit.pdf [<https://perma.cc/NV3Z-MAB4>] (finding that the median FICO score for consumers in low and moderate-income neighborhood (LMI) zip codes was in the thirty-fourth percentile, while it was in the fifty-second percentile for non-LMI zip codes); *see also* *See I Have Bad Credit . . . Why Would an Identity Thief Bother?!*, IDENTITY THEFT RES. CTR. (Feb. 6, 2017) [hereinafter *I Have Bad Credit*], <https://www.idtheftcenter.org/i-have-bad-creditwhy-would-an-identity-thief-bother> [<https://perma.cc/J8QQ-UMEC>]; *see also* Telephone Interview with Sarah Bloom Raskin, *supra* note 14; Porche, *supra* note 14.

17. Erika Harrell, *Victims of Identity Theft 2018*, U.S. DEP'T JUST. (2021), <https://www.bjs.gov/content/pub/pdf/vit18.pdf> [<https://perma.cc/66YB-C8G5>]. The Department of Justice data are part of a random, well-funded, large sample of the U.S. population. *See id.* at 6 tbl.4. The Identity Theft Supplement (ITS) was administered as a supplement to the Bureau of Justice Statistics's National Crime Victimization Survey (NCVS). *Id.* at 1. From January 1 to June of 2018, 140,000 persons ages sixteen or older in sampled NCVS households received the ITS at the end of the NCVS interview. *Id.* at 19. A total of 102,400 persons of the original NCVS-eligible households completed the ITS questionnaire, a response rate of 72% (which is high for this type of survey). *Id.* A bias analysis was conducted, and the results indicated little or no bias of substantive importance due to non-responses was present. *Id.*

victims live in lower-income households.¹⁸ This presents an interesting puzzle—why would thieves steal low-income identities with low credit scores when identities with higher scores are available? This Article explores this question, showing that thieves likely target low-income individuals because they are less likely to pursue a complaint, and since thieves do not intend to pay back debt accrued, higher interest rates do not deter them.¹⁹ Further, thieves frequently use low-income stolen identities to open credit card accounts, to receive public benefits and health care, to open utility accounts, and to present to authorities when arrested.²⁰ In each case, a thief can do this effectively with a low-credit score identity.²¹

18. See *id.* at 6 tbl.4. Table 4 breaks down identity theft victimization by income level. *Id.* Adding the percent of all victims who come from the two lowest income levels (12.3%+18.6%) yields a result of 30.9%. *Id.* The Pew Research Center defines lower-income households as those making under \$48,500 per year, which tracks closely with the categories from the Department of Justice data that I combined to calculate the percentage of victims of identity theft who are low-income (combining the two lowest income categories to capture all households with incomes under \$50,000). Jesse Bennett, Richard Fry & Rakesh Kochhar, *Are You in the American Middle Class? Find Out with Our Income Calculator*, PEW RSCH. CTR. (July 23, 2020), <https://www.pewresearch.org/fact-tank/2020/07/23/are-you-in-the-american-middle-class> [https://perma.cc/ZQJ6-H96K]. Results from the 2016 Department of Justice Victims of Identity Theft report are similar (33% of all identity theft victims were lower-income), showing that low-income identity theft victimization has been a problem for several years. Erika Harrell, *Victims of Identity Theft 2016*, U.S. DEP'T JUST. 4 tbl.2 (2019), <https://www.bjs.gov/content/pub/pdf/vit16.pdf> [https://perma.cc/7775-XDBT]. In that report, Table 2 breaks down identity theft victimization by income level. *Id.* Adding together the total identity theft victims of all income levels yields a result of 25,952,500 (3,273,300 + 5,315,600 + 4,623,300 + 12,740,300). *Id.* Of these 25,952,500 victims, 8,588,900 (3,273,300 + 5,315,600) come from the two lowest income levels. *Id.* I calculated the percent of total victims that fell in these two lower income levels (8,588,900/25,952,500 x 100) which was 33%.

19. Porche, *supra* note 14 (discussing the misconception that individuals with low-credit scores are not at risk).

20. Off. of Inspector Gen., *Identity Theft: What Can You Do to Protect Yourself?*, NAT'L SCI. FOUND. 1 (2016), https://www.nsf.gov/oig/_pdf/brochures/identitytheft.pdf [https://perma.cc/5CPH-7V5A] (detailing various ways thieves use stolen identities).

21. See generally Louis DeNicola, *How to Apply for a Credit Card with Bad Credit*, EXPERIAN (Apr. 27, 2021), <https://www.experian.com/blogs/ask-experian/how-to-apply-for-a-credit-card-with-bad-credit> [https://perma.cc/V3JW-DE6R] (showing the possible credit card options for applicants with poor credit scores); Chanell Alexander, *5 Best Medical Loans for Bad Credit in 2021*, NERDWALLET (June 2, 2021), <https://www.nerdwallet.com/best/loans/personal-loans/medical-loans-bad-credit> [https://perma.cc/6Q5H-LWCP] (explaining how bad-credit borrowers can qualify for certain medical loans); *How Can I Get Electricity with Bad Credit?*, QUICK ELEC., <https://quickelectricity.com/electricity-plans/bad-credit> [https://perma.cc/GWM2-ESSS] (advertising that electricity services are available to those with bad credit).

Not only is it common for people who are low-income to experience identity theft, but as this Article demonstrates, low-income victims can suffer substantial harm, and the magnitude of the harm is often amplified precisely because of their low-income status.²² Current remedies available to victims of identity theft involve long, complicated processes focusing largely on credit-report repair,²³ or lawsuits seeking monetary damages that take years to resolve.²⁴

But people living on the financial edge cannot weather a lengthy remedial process. For these victims, identity theft can result in job loss, harassing debt collection, loss of health care or other benefits, and wage garnishment.²⁵ Lacking both a financial cushion and social capital, harms from these experiences can be devastating, with cascading problems sending victims swiftly into deep poverty and even homelessness.²⁶ Identity theft, then, can be a hindrance to upward mobility and in fact a catalyst to drive people further into poverty.²⁷ Remedies arriving months or even years later provide little meaningful redress.²⁸ Despite the devastating effects of identity theft on the poor, most current discourse on data breach harms is what I call plutocentric: it primarily reflects the experiences and concerns of higher income groups,²⁹ focusing mostly on refining existing remedies (that do little to help low-income victims).³⁰

This is not to say that scholars have failed to recognize the connection between big data and inequality in general—but current work focuses on the harms that the *legal* acquisition and use of big data can

22. One study that analyzed the 2016 Bureau of Justice Statistics data on identity theft found that low-income individuals are disproportionately likely to experience out-of-pocket losses due to identity theft. Dylan Reynolds, *The Differential Effects of Identity Theft Victimization: How Demographics Predict Suffering Out-Of-Pocket Losses*, SEC. J. 2–3 (2020), <https://link.springer.com/content/pdf/10.1057/s41284-020-00258-y.pdf> [<https://perma.cc/64TN-ANHQ>].

23. KATHERINE PORTER, MODERN CONSUMER LAW 100 (2016) (“Much of the legislative response to the problem of identity theft has focused on credit harms and on the remediation of credit reports as a response.”).

24. See, e.g., Sasha Romanosky, David Hoffman & Alessandro Acquisti, *Empirical Analysis of Data Breach Litigation*, 11 J. EMPIRICAL LEGAL STUD. 74, 93 (2014) (detailing the number of federal data breach cases over time); Solove & Citron, *supra* note 12 (highlighting the increase in judicial cases involving data breaches).

25. See *infra* Part II.

26. See *infra* Part II.

27. See *infra* Part II.E.

28. See *infra* Part III.

29. See Porche, *supra* note 14; see also Telephone Interview with Sarah Bloom Raskin, *supra* note 14.

30. See generally Gilman, *supra* note 14 (arguing why it is important to account for low-income perspectives in shaping data privacy laws).

bring to the poor and people of color.³¹ Indeed, there has been extensive and important work focusing on this connection. Books, articles, and empirical studies have documented how corporations, landlords, employers, and others increasingly use personal data that is *legally* collected in ways that disadvantage the poor and people of color through algorithms and data sharing.³² Further, scholars have considered concerns about the lack of privacy that poor people and people of color are afforded when their data is collected and analyzed.³³

These contributions are vital in helping us to understand how increases in using legally obtained big data have hurt already disadvantaged groups. This existing work can and should be used to identify how laws surrounding the collection and use of big data should be changed. However, scholars have largely ignored the other side of the big data problem, in part because of the prevailing, yet erroneous, belief that data breaches do not affect low-income victims.³⁴

Indeed, debates remain largely uninformed³⁵ by detailed analysis of how the use of *illegally* obtained data may uniquely harm low-

31. See *infra* note 32.

32. See generally Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389 (2012) (detailing the ways in which lower-income people are subjected to more privacy intrusions from the federal government and private entities compared to higher-income people); Michele Gilman & Rebecca Green, *The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization*, 42 N.Y.U. REV. L. & SOC. CHANGE 253, 256–80 (2018) (detailing how some marginalized groups such as the homeless, undocumented immigrants, and others suffer by having too little of their data available to mainstream institutions); see also Kenneth P. Brevoort, Philipp Grimm & Michelle Kambara, *Data Point: Credit Invisibles*, CONSUMER FIN. PROT. BUREAU (May 2015), https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf [<https://perma.cc/UP4V-FUF4>] (detailing the problems low-income people experience when they are “credit invisible,” meaning a consumer does not have a credit record with one of the nation-wide credit reporting agencies). To be clear, this Article does not focus on the privacy and surveillance aspects of big data and the law, as important as that perspective is. Instead, this Article fills a gaping hole in the literature by providing a robust account of how the developing law and policy of data breaches, that is the illegal use of another’s name, likeness, or identity, may perpetuate poverty and inequality by largely ignoring the unique harms such breaches bring to people who are low-income. See *infra* Part III.

33. See, e.g., KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017) (analyzing how poor mothers in the United States are not afforded a right to privacy); VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (2018) (explaining how digital data collection and algorithmic decision-making processes disadvantage the poor); CATHY O’NEIL, *WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY* (2016) (explaining how algorithms reinforce discrimination).

34. See *supra* note 14.

35. One study has discussed differences in *perceived* vulnerability to data

income groups, and we lack careful theoretical assessment of the complex relationship between identity theft victimization and wider structures of inequality. This Article fills these significant descriptive, theoretical, and normative gaps in the literature. Without such careful attention to the experiences of low-income victims of identity theft, we will continue to ignore the many ways data breaches may perpetuate and even exacerbate poverty and inequality. This significant aspect of big data's connection to inequality has been ignored for far too long in the academy, particularly in light of the extensive focus on other aspects of big data and how it affects low-income Americans.³⁶

This Article makes several contributions. First, it is the first to my knowledge to employ qualitative empirical methods to answer vital questions about identity theft victimization among the poor.³⁷ Instead of relying on assumptions about how poor people understand and experience identity theft, this Article uses a rigorous qualitative study to utilize their voices and experiences to shape policy and law recommendations.³⁸ Second, through the use of these data, this Article does

breaches across all income groups. See Mary Madden, *Privacy, Security, and Digital Inequality*, DATA & SOC'Y 3 (2017), https://datasociety.net/pubs/prv/DataAndSociety_PrivacySecurityandDigitalInequality.pdf [<https://perma.cc/F3UB-C9XB>] (finding that people in lower-income brackets feel less knowledgeable about how their data is being collected than people in higher-income brackets and are more concerned about the potential for online privacy or security breaches); Mary Madden, *Public Perceptions of Privacy and Security in the Post-Snowden Era*, PEW RSCH. CTR. (Nov. 12, 2014), <https://www.pewresearch.org/internet/2014/11/12/public-privacy-perceptions> [<https://perma.cc/EPU2-MWV5>] (detailing differences in views and concerns about privacy and security of Americans across several demographics, including income level). Further, Michele Gilman has noted some potential problems for low-SES groups when it comes to data breach harms in a short commentary piece. See Gilman, *supra* note 14.

36. To view articles that analyze data privacy's impact on low-income individuals, see *supra* note 32 and accompanying text.

37. The Author is a trained sociologist with extensive experience conducting empirical research projects involving qualitative methods. See, e.g., Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515 (2013) [hereinafter Greene, *Safety Net*] (employing a qualitative research study of 194 recipients of the Earned Income Tax Credit (EITC) to better understand the benefits and shortcomings of the EITC and to propose changes to the program); see also Sara Sternberg Greene, *The Bootstrap Trap*, 67 DUKE L.J. 233, 310 (2017) [hereinafter Greene, *Bootstrap Trap*] (employing a qualitative research study of low-income parents to show how those who have most internalized the self-sufficiency narrative of the U.S. social safety net are also those who are most at risk for financial collapse given the existing design of the safety net).

38. Legal scholars have long utilized in-depth interviews for high-impact studies about questions of law and legal culture. Indeed, the extensive list of such articles and books is too long to document, but some limited examples in a vast field include:

something that existing research has not yet done: it systematically identifies harms suffered by low-income victims of identity theft.³⁹ Without understanding what these harms are, it is difficult to design laws and policies that are responsive to them.

This Article not only identifies these harms, but it also provides an analysis of the current and proposed legal and policy responses to data breach harms, showing how and why they are inadequate to address the problems low-income identity theft victims face.⁴⁰ This Article also highlights how the current landscape of data breach harm regulation may compound disadvantage to those who are low-income and also Black.⁴¹ In other words, consistent with intersectionality

ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (studying ranchers and farmers in rural California and finding that they settle disputes completely ignorant of their legal rights because most people in the area find the costs of learning about the law and submitting to formal resolution procedures to be so high that it is easier to fall back on norms); Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 687–722 (2020) [hereinafter Bell, *Anti-Segregation*] (utilizing interviews from several locations to show how American policing perpetuates residential segregation); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017) [hereinafter Bell, *Legal Estrangement*] (interviewing sixty-four Black residents of Baltimore, Maryland to better understand Black perspectives on police and to develop the theory of legal estrangement); Angela Littwin, *Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers*, 86 TEX. L. REV. 451, 457–64 (2008) (interviewing fifty low-income women about their experiences and preferences for usury regulations, and then using the findings and the suggestions of the women to advocate for modifications to credit cards that could serve the needs of both low-income women and creditors); Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625 (1997) (utilizing interviews with more than twenty borrowers and lenders in various sectors of the economy to better understand how they decide whether to engage in a secured or unsecured transaction).

39. See *infra* Part II.

40. See *infra* Part III.

41. This analysis is based on Kimberlé Crenshaw's concept of intersectionality. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 152, 166–67. Intersectionality refers to overlapping and autonomous systems of discrimination disproportionately affecting marginalized groups. See, e.g., *id.* at 151–52. Crenshaw finds that a “single-axis” approach examining discrimination and race-based disadvantages in three seminal Title VII cases ignores the implications of experiencing both racial and sexual discrimination and the compounded effects of these forms of discrimination. *Id.* at 141–50. Recent scholarship on intersectionality considers the relationship between race and class. See, e.g., Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 318–19 (2014) (stating that mechanisms are targeted by “race, class, gender, and place to exert punitive social control” over systematically oppressed individuals); Tomiko Brown-Nagin, *Race As Identity Caricature: A Local Legal History Lesson in the Saliency of Intra-racial Conflict*, 151 U. PA. L. REV. 1913, 1916–17 (2003)

theory, it shows how those who are both low-income and Black are likely even more disadvantaged under the current regulatory regime.⁴²

Third, the Article makes a significant theoretical contribution by using data breach and identity theft regulation as a case study to develop a broader framing for understanding how the law perpetuates poverty and inequality through plutocentric regulatory regimes.⁴³ When new problems emerge that require legal and policy interventions, laws are often developed considering almost exclusively the needs and experiences of higher-income groups.⁴⁴ Proposed legal and policy remedies rarely consider how problems uniquely affect low-income groups such that these groups might require entirely different modes of help.⁴⁵ In other words, a one-size-fits-all approach is often developed at the expense of people who are low-income. I show how the concept of plutocentric regulation can be applied across a broad spectrum of regulatory problems, providing a framework for better understanding how the development of regulatory laws and policies serves as a mechanism for the reproduction of inequality.⁴⁶

Finally, the Article offers a proposal to disrupt the current path of disjointed remedies for identity theft victims, proposing a federal agency, including field offices in all fifty states, that would provide comprehensive victim services and emergency funds to identity theft victims in need.⁴⁷ The Data Privacy and Identity Recovery Agency

(examining post-Brown integration in Atlanta through a sociolegal lens that argues “scholarship on *Brown*’s implementation is incomplete because it fails to consider intraracial dynamics.” Owing to both class influence and the nature of law, Brown’s “remedy . . . favored the preferences of the [B]lack middle-class leadership and delegitimized the concerns of the [B]lack working poor.”); see also John O. Calmore, *Racialized Space and the Culture of Segregation: “Hewing a Stone of Hope from a Mountain of Despair”*, 143 U. PA. L. REV. 1233, 1249–50 (1995) (discussing the racial segregation of residential communities, the “inner-city ghetto,” and how the “intersection of race and class has been minimized in order to pursue race-neutral, more universalistic social policy” which has hampered civil rights progress); Melvin J. Kelley IV, *Testing One, Two, Three: Detecting and Proving Intersectional Discrimination in Housing Transactions*, 42 HARV. J.L. & GENDER 301, 332–40 (2019) (discussing the connection between intersectionality theory and the proliferation of housing discrimination cases perpetrated towards protected classes of individuals).

42. See *infra* Part V.

43. See *infra* Part IV.

44. See *infra* Part IV.

45. See *infra* Part IV.

46. See *infra* Part IV.

47. See *infra* Part VI.

(DPIRA), would transform the identity theft regulatory regime from plutocentric to what we might call equitycentric.⁴⁸

I. RISK AND PERCEIVED RISK OF DATA BREACH HARMS FOR LOW-INCOME GROUPS

There was a total of 1,244 unique data breaches (reported) in the United States in 2018, exposing more than 446.5 million sensitive records and 1.68 billion non-sensitive records.⁴⁹ The prevailing concern when it comes to data breach harms is identity theft, the appropriation of someone else's identity.⁵⁰ In 2018, 23 million persons, or about

48. See *infra* Part VI.

49. 2018 *End-of-Year Data Breach Report*, IDENTITY THEFT RES. CTR. 11 (2019), https://www.idtheftcenter.org/wp-content/uploads/2019/02/ITRC_2018-End-of-Year-Aftermath_FINAL_V2_combinedWEB.pdf [<https://perma.cc/99GT-CKBR>]. Since only half the data breaches reported to the Identity Theft Resource Center reported the number of records exposed, and the Center does not infer any number of records upon a report, the total number of exposed records likely is significantly greater than the 446.5 million reported. See *id.* at 9 (explaining that the Center refrains from making an “educated guess” when a reporting entity fails to provide the number of records exposed).

50. See PORTER, *supra* note 23.

9% of all U.S. residents ages sixteen or older, were victims of identity theft.⁵¹ The problem is significant, and growing.⁵²

One might think that identity thieves would prefer backgrounds with good to excellent credit. Credit profiles with low credit scores are generally offered credit products with particularly high interest rates,⁵³ while higher credit score profiles are offered a range of higher-quality credit products.⁵⁴ With a plethora of identities to steal, the fact that, according to data collected by the US Department of Justice, at least one-third of all identity theft victims are low-income is a puzzle.⁵⁵

Why would thieves pick low-income identities since these identities often have bad credit, resulting in worse credit products available to such identities? In this Part, I first describe in more detail the erroneous assumption that low-income people are unlikely to be victims of identity theft, and that even if their identities are stolen, the consequences are insignificant because they often already have low credit scores. I show that this assumption is made not just by

51. Harrell, *supra* note 17, at 1. There is great interest in who identity thieves are, yet little data to answer this question. Many thieves target data stored by large companies such as Equifax and credit card companies, and many of the respondents in this study indicated that they believed that was how their data was breached. *See id.* at 8; *see also infra* notes 242–44 and accompanying text. However, there are many different avenues that identity thieves use to obtain protected data, and thieves are sometimes close contacts of victims. *See id.* For example, some studies have shown that foster children (and adults who were foster children) are particularly vulnerable to identity theft because many adults have access to their personal data. *See The Impact of Identity Theft on Foster Youth*, IDENTITY THEFT RES. CTR. 2 (2018), https://www.idtheftcenter.org/wp-content/uploads/2019/01/ITRC_dec18_white-pages-foster-youth_FINAL_web.pdf [<https://perma.cc/8Y3D-XRE8>]. Other research shows that victims of domestic violence are particularly vulnerable to identity theft by their abuser. *Identity Theft and Domestic Violence*, [<https://perma.cc/96PQ-Z6CD>] (explaining that abusers may open new credit cards in the survivors' names); *see also* Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CALIF. L. REV. 951, 954 (2012) (using the term "coerced debt" to describe the nonconsensual credit-related transactions that arise in an abusive relationship). Particularly in low-income communities, some identity theft from known contacts including parents, partners, and friends may stem from desperation to avoid homelessness or hunger. For example, a parent may be unable to obtain a utility account (without a significant deposit) to turn on the electricity in an apartment due to her own bad credit score, so she may use her child's social security number in order to turn the lights on or keep them on. This phenomenon in low-income communities is important and ripe for further study.

52. *See* Harrell, *supra* note 17, at 1 (revealing that around 26 million U.S. residents reported identity theft victimization in 2016).

53. *See I Have Bad Credit*, *supra* note 16.

54. *See id.*

55. Harrell, *supra* note 17, at 6 tbl.4.

policymakers,⁵⁶ but also by people who are low-income and potentially victims of identity theft.

In order to explore how some lower-income people think about their identity theft risk potential, I report the findings from a qualitative study of low-income respondents in Durham, North Carolina.⁵⁷ The fifty interviews for this study were conducted during the summer of 2019 and included respondents who were involved in an eviction diversion program.

In this Part, I specifically report the understandings and thought processes surrounding identity theft risk of the respondents from that sample who had not (to their knowledge) been victims of identity theft at the time of the interview.⁵⁸ I then take on the key puzzling question—why thieves do indeed target bad-credit profiles.⁵⁹ Finally, after arguing that people who are low-income are indeed vulnerable to identity theft, I explain why their personal data are actually particularly at risk for exposure.⁶⁰

56. Telephone Interview with Sarah Bloom Raskin, *supra* note 14 (discussing the lack of concern for low-income groups among policy makers who concentrate on data breaches, in part because they do not think low-income people will be targeted).

57. These qualitative accounts are based on fifty interviews with people who are low-income in Durham, NC during June, July, and August of 2019. Respondents were identified through their involvement with an eviction diversion program for low-income residents of Durham. The initial contact information to enroll the respondents in the study was provided by Legal Aid of North Carolina. This research study was approved by Duke University's Institutional Review Board ("IRB"). The approval required strict confidentiality measures to be taken and all names and identifying information to be changed. Both measures have been taken for the data presented in this Article. Additionally, all data (voice recordings and transcriptions) were securely stored, as required by the IRB. The Author, a sociologist by training, used standard qualitative data analysis software to analyze the data. It is important to note that the Article is not making claims about the prevalence of any experience or understanding of data breaches and identity theft among the low-income population, as qualitative research is not suited to do that. Mario Luis Small, *'How Many Cases Do I Need?': On Science and the Logic of Case Selection in Field-Based Research*, 10 ETHNOGRAPHY 5, 28 (2009) ("Generally, [qualitative] approaches call for logical rather than statistical inference, for case rather than sample-based logic, for saturation rather than representation as the stated aims of research."). Instead, the Article relies on existing *quantitative* data to show that people who are low-income are victims of data breaches and identity theft. It then utilizes original qualitative data obtained by the author to show how people may understand and experience data breaches. For a similar use of qualitative data, see, for example, Bell, *Anti-Segregation*, *supra* note 38, at 658 n.32.

58. See *infra* Part I.A.

59. See *infra* Part I.B.

60. See *infra* Part I.C.

A. ERRONEOUS ASSUMPTIONS: BAD CREDIT, GOOD PROTECTION

The belief that people with bad credit are unlikely to be victims of identity theft is so strong that even high-level policymakers involved in data security work have assumed that identity theft is primarily a problem for higher-income Americans.⁶¹ As articulated above, the assumption is that thieves would avoid bad credit profiles since they have access to good-credit profiles.⁶² This belief prevails across the board, among all consumers and among low-income consumers who themselves have bad credit but have not yet been victimized.⁶³ One survey of consumers found that seventy-two percent of consumers believe that those engaged in identity theft are interested in stealing the identity of wealthy people only.⁶⁴

The data collected for this Article's study are consistent with these larger surveys of consumers.⁶⁵ What is unique about this study's data, however, is that it consists entirely of low-income respondents. And part of what it shows is that the erroneous belief that low credit protects low-income people from the harms of identity theft has permeated the beliefs of low-income people themselves.⁶⁶ They have *also* adopted this erroneous sense of security about their own identities. For example, when asked whether her identity had ever been stolen, Maria, a mother of an eight and ten-year-old, said, "No. God. Take this identity. They'd probably take it and give it back."⁶⁷ Similarly, Kevin, another respondent said, "[Y]ou don't really want my identity. There's [sic] so many other good ones you could take than mine. Take mine, you going to give it right back."⁶⁸ Eleanor bluntly put it, "you have to have money"⁶⁹ to be affected by a data breach (and thus she had never been targeted, she said), and another respondent, Lori, thought that between her lack of savings and low credit score, there was no way she would be victimized.⁷⁰ She joked:

61. See Telephone Interview with Sarah Bloom Raskin, *supra* note 14.

62. See *supra* note 14.

63. See *supra* note 14; *Survey Findings: Are Consumers Making It Easier for Identity Thieves?*, EXPERIAN, <https://www.experian.com/blogs/ask-experian/survey-findings-are-consumers-making-it-easier-for-identity-thieves> [<https://perma.cc/222C-YJJB>] [hereinafter *Survey Findings*] (finding that half of survey respondents view themselves as unlikely identity theft targets due to poor credit).

64. Porche, *supra* note 14.

65. See *infra* notes 67–76 and accompanying text.

66. See *infra* notes 67–76 and accompanying text.

67. Interview with Respondent 19, in Durham, N.C. (June 18, 2019).

68. Interview with Respondent 28, in Durham, N.C. (June 24, 2019).

69. Interview with Respondent 13, in Durham, N.C. (June 11, 2019).

70. Interview with Respondent 9, in Durham, N.C. (June 7, 2019).

No . . . If they did, let me tell you something, I ain't got but .23 [23 cents] in the bank, right?

Not only that, my credit ain't that good. If it get [sic] any worse, honey, I'll be in a zero, you know what I'm saying? What are they going to do? What are they going to? They probably tell me "Girl, you need to get this thing up. Let me help you out."⁷¹

Similarly, Natasha said she will only start worrying about identity theft when her credit score improves: "[Y]ou never know who has your information. And right now my credit score is so poor, I don't really worry about it because I know they're not able to get anything from me now. But my, I should say I become [sic] worried more after my credit is rebuilt."⁷² The theme of low credit score meaning low risk was consistent among most respondents.⁷³ Darrell, a father of two young children, had never been a victim of identity theft but believed that even if he had been, it would not matter because of his low credit score.⁷⁴ He said, "[N]o, I don't think my credit score was good at the time, so it wouldn't have bothered mine."⁷⁵ Mark noted that he was not worried about identity theft because, "What do I have to worry about, how are they going to hurt me? I ain't got nothing, I don't have no car, I don't have anything worth being threatened about . . ."⁷⁶

Rose, a mother of two girls, explained that she was actually hopeful that the Equifax data breach could help her by giving her a reset of sorts on her credit.⁷⁷ She said she had not been a victim but had been "hoping they would go in and just erase everything. Didn't happen. Wishful thinking. So, no."⁷⁸ The majority of respondents in this study expressed a similar sentiment. These findings are consistent with larger surveys that have found consumers believe identity thieves target those who are wealthy and that their own low scores put them at less risk.⁷⁹

71. *Id.*

72. Interview with Respondent 3, in Durham, N.C. (June 4, 2019).

73. See *supra* notes 74–76 and accompanying text.

74. Interview with Respondent 22, Durham, N.C. (June 19, 2019).

75. *Id.*

76. Interview with Respondent 48, in Durham, N.C. (July 18, 2019).

77. Interview with Respondent 36, in Durham, N.C. (June 28, 2019).

78. *Id.*

79. See Porche, *supra* note 14; *Survey Findings*, *supra* note 63 (finding that half of survey respondents view themselves as unlikely identity theft targets due to poor credit). Respondents in this Article's study who did express concern tended to know someone who had suffered as the result of identity theft. As one such respondent Betsy said, "I always worry about that because I have a very close person who is going through identity theft, and they don't know how it got taken from them. And it's been 10 years, and they're still going through it." Interview with Respondent 32, in Durham,

B. WHY DO IDENTITY THIEVES TARGET IDENTITIES WITH BAD CREDIT?

The Department of Justice data that this Article has referred to throughout provides empirical support for the proposition that identity thieves target low-income identities, even though low-income identities often have bad credit attached to them.⁸⁰ However, the puzzle remains—why would thieves target these profiles? It turns out there are several reasons bad credit identities may appeal to bad actors, and experts have weighed in to help explain this phenomenon.⁸¹ Eva Velasquez, president and CEO of the Identity Theft Resources Center said, “[j]ust because your credit score or lack of credit is not useful to you . . . the thief doesn’t care The thief can still get high interest loans. They don’t care that it’s at 22 percent interest—they’ve got their couple of thousand dollars. That’s valuable to them.”⁸²

Velasquez’s point is important. An identity thief does not plan to pay back any money borrowed using someone else’s identity. Therefore, to an identity thief, whether the interest rate on a credit card is five percent, ten percent, or even 200 percent does not matter.⁸³ What matters is getting the use of the credit card for as long as possible.⁸⁴ In other words, identity thieves *plan* to default on the repayment obligations of the credit obtained in their victim’s name, so the repayment terms of that credit are not important to them.⁸⁵

Further, identity thieves frequently use low-income stolen identities not only to open credit card accounts, but also to open utility accounts and present to authorities when arrested.⁸⁶ In both of these cases, it simply may not matter whether the true identity of the victim is one tied to good credit or bad credit. Another potential use of identities is to obtain payday loans, and many payday loans can be

N.C. (June 25, 2019).

80. Harrell, *supra* note 17, at 6 tbl.4 (showing at least one-third of identity theft victims are low-income); *see also* Emily Peiffer, *Busting Credit Myths Can Help Low-Income Americans Strengthen Their Financial Health*, URB. INST.: URB. WIRE (Oct. 1, 2018), <https://www.urban.org/urban-wire/busting-credit-myths-can-help-low-income-americans-strengthen-their-financial-health> [<https://perma.cc/NX2Q-EZPP>] (describing how low-income borrowers often have bad credit).

81. *See* Porche, *supra* note 14.

82. *Id.*

83. *See id.* (explaining that thieves do not care about high interest rates because they default anyway; they only care about obtaining money).

84. *See id.* (arguing that identity thieves prefer inattentive victims because it gives them more time to make use of the fraudulent accounts).

85. *See* PORTER, *supra* note 23.

86. *See* Off. of Inspector Gen., *supra* note 20 (explaining that identity thieves can use stolen information to open phone lines charged to the victim and to give the victim’s name, instead of their own, to police during arrest).

obtained without a credit check, making those an easy source of cash for identity thieves, and once again a case where a victim's credit score does not matter.⁸⁷

Identity thieves also use low-income stolen identities to receive health care or public benefits.⁸⁸ In such cases, sometimes low-income identities are actually the *only* identities that will work.⁸⁹ In the case of health care, it might be easier for the thief to simply receive the health care saying that he will pay out of pocket and would like to be billed, rather than be asked to present a health insurance card on file for the stolen identity that the thief does not have access to.⁹⁰ In the case of public benefits such as the Supplemental Nutrition Assistance Program (SNAP) (commonly referred to as food stamps), or Temporary Assistance for Needy Families (TANF) (commonly referred to as cash welfare), those who are low-income are the only ones who qualify,⁹¹ so a low-income stolen identity is needed to pursue that particular theft.

Another key reason thieves may target low-income identities is that the amount of time they are able to use the stolen identity before being detected and shut down is a vital consideration for their illegal operation.⁹² As will be discussed in Parts II and III, there are many barriers that are particular to people who are low-income that prevent them from recognizing and reporting identity theft. The behavior of identity thieves suggests that they know this and use it to their advantage.⁹³ As one expert said, "If someone's data has to be breached, breach the poor person because there's a lower chance of

87. Porche, *supra* note 14.

88. See PORTER, *supra* note 23 ("Thieves may make other uses of the victim's identity, including . . . obtaining medical care, receiving government benefits, or seeking employment.").

89. See *A Quick Guide to SNAP Eligibility and Benefits*, CTR. ON BUDGET AND POL'Y PRIORITIES (Sept. 1, 2020), <https://www.cbpp.org/research/food-assistance/a-quick-guide-to-snap-eligibility-and-benefits> [<https://perma.cc/BY88-VBQB>] [hereinafter *Quick Guide to SNAP*] (explaining how only low-income individuals qualify for SNAP benefits); MEGAN THOMPSON, SARAH MINTON, CHRISTINE HEFFERNAN & LINDA GIANNARELLI, STATE TANF POLICIES, OPRE REPORT 2018-55, at 3 (2018) (explaining how only low-income families qualify for TANF benefits).

90. *Quick Guide to SNAP*, *supra* note 89.

91. THOMPSON ET AL., *supra* note 89.

92. See Porche, *supra* note 14.

93. See Elizabeth Brico, 'Privacy is Becoming a Luxury': What Data Leaks Are Like for the Poor, VICE NEWS (Mar. 14, 2019), https://www.vice.com/en_us/article/mbz493/privacy-is-becoming-a-luxury-what-data-leaks-are-like-for-the-poor [<https://perma.cc/4ZZ4-2RXP>] (explaining that it can be costly to remedy identity theft and it can be harder for low-income people to pursue complaints).

repercussion . . . It's harder for someone with a lot of stuff going on to pursue a complaint."⁹⁴

C. LOW-INCOME, HIGH-VULNERABILITY

Not only might low-income identities appeal to thieves for the reasons discussed above, but such identities are also uniquely accessible in many cases.⁹⁵ For one, research shows that lower-income people often access the internet from mobile devices.⁹⁶ Mobile devices are less secure than computers and also are vulnerable to data brokers because they offer extensive geo-location tracking once compromised.⁹⁷ Further, while all the data of all Americans is widely dispersed in various databases, low-income Americans have to hand over a vast array of personal information in order to qualify for public benefit programs that provide for basic needs such as housing vouchers, SNAP, TANF, Medicaid, Supplemental Security Income (hereinafter SSI) (commonly referred to as disability), and more.⁹⁸ Social security numbers and cards, birth certificates, employment pay-stubs, and even health records are sometimes requested as part of the application process for these benefits.⁹⁹

Not only is the personal information of many low-income households in the hands of agencies that run social welfare programs, but since these agencies are often underfunded and given limited resources,¹⁰⁰ data security may not be their top priority. Mistakes are common, such as a 2016 incident where the Department of Housing and Urban Development (HUD) accidentally publicized the personal information (including social security numbers) of over 425,000

94. *Id.*

95. *See* Gilman, *supra* note 14.

96. *Id.* (explaining that low-income individuals are at a greater risk for data breaches because they tend to access the Internet via mobile devices, which are less secure than computers).

97. *Id.* (explaining how accessing the Internet via mobile devices may make low-SES groups more vulnerable to data breaches).

98. *See* Brico, *supra* note 93 (“[L]ow-income Americans often find themselves trading personal information for access to benefits ranging from food to housing to childcare.”).

99. *Id.*

100. *See generally* Charlie Osborne, *Lack of Funding Exposes US Federal Agencies to High Data Breach Risks*, ZDNET (Feb. 22, 2018), <https://www.zdnet.com/article/us-suffers-highest-data-breaches-of-government-agencies-worldwide> [<https://perma.cc/T2YM-4EGF>] (explaining how budget cuts prevent federal agencies from protecting themselves against cyberattacks).

public housing clients,¹⁰¹ or a 2018 incident where the files of 75,000 people who were seeking to enroll in the Affordable Care Act were breached.¹⁰² Taken together, the unique circumstances of being low-income in America make such people particularly vulnerable to bad actors seeking to steal identities.

II. IDENTITY THEFT HARMS FOR LOW-INCOME VICTIMS

Having established that people who are low-income are indeed vulnerable to the data breach harm of identity theft, there remains an important question about whether identity theft is actually *harmful* to those who are low-income, given that they often have accompanying low credit scores. As some respondents noted, one could imagine a world in which identity theft had little effect on those with low credit scores because their already low scores prevented them from being offered high quality credit products in the first place.¹⁰³

This Section will show, however, that low-income identity theft victims do indeed suffer significant harm from identity theft.¹⁰⁴ And often, the very fact that victims are low-income compounds the harms they experience.¹⁰⁵ At the outset, it is important to remember identity

101. HUD's Senior Agency Off. for Priv. & HUD Breach Response Team, *HUD Privacy Incident Report*, U.S. DEP'T HOUS. & URB. DEV. 3 (2017), <https://www.hud.gov/sites/documents/PRIVACYINCIDENTRPT011117.PDF> [<https://perma.cc/A9UW-9373>]. Indeed, according to the Identity Theft Resource Center, government/military data breaches accounted for almost 6% of all data breaches in 2020. *See 2019 End-of-Year Data Breach Report*, IDENTITY THEFT RES. CTR. 3 (2020), https://www.idtheftcenter.org/wp-content/uploads/2020/01/01.28.2020_ITRC_2019-End-of-Year-Data-Breach-Report_FINAL_Highres-Appendix.pdf [<https://perma.cc/X64Z-GTPD>].

102. Susan Morse, *CMS Responds to Data Breach Affecting 75,000 in Federal ACA Portal*, HEALTHCARE FIN. (Oct. 22, 2018), <https://www.healthcarefinancenews.com/news/cms-responds-data-breach-affecting-75000-federal-aca-portal> [<https://perma.cc/T85A-S7ML>].

103. *See generally supra* note 16 and accompanying text (explaining that there is a prevailing belief that poor credit profiles are unappealing to identity thieves because they tend to receive lackluster credit products).

104. *See generally* Off. of Inspector Gen., *supra* note 20 (detailing potential harmful uses of stolen personal information by identity thieves).

105. *See* Sarah Dranoff, Catherine Caldwell, Merry O'Brien & Russell Butler, *Identity Theft: A Low-Income Issue*, ABA (Dec. 15, 2014), https://www.americanbar.org/groups/legal_services/publications/dialogue/volume/17/winter-2014/identity-theft-a-low-income-issue [<https://perma.cc/6NCP-Z8CC>] ("Identity theft can be especially devastating for low-income people because it jeopardizes basic income sources and vitally necessary services."); Brico, *supra* note 93 (explaining how low-income victims of identity theft are exposed to the consequences such as job loss and involvement of child protective services because of their socioeconomic status); Reynolds, *supra* note 22.

thieves do more than just obtain credit with stolen identities. They sometimes purchase firearms in someone else's name, obtain medical care in someone else's name (and then default on obligations to pay for the care), receive government benefits in someone else's name, open utility accounts in someone else's name, or seek employment with a faulty identity.¹⁰⁶ Sometimes, thieves commit crimes and use a faulty identity when arrested, thus resulting in a false criminal record for the identity theft victim.¹⁰⁷ The possibilities are endless and hard to track. Yet to date, there has been no rigorous study of what specific harms low-income victims suffer. There has also been no study of the mechanisms by which these harms can exacerbate already fragile financial circumstances, thus causing an overall downward financial trajectory that may at first glance seem disproportionately large to the initial trigger event (the identity theft).

While Part I reported data from the low-income respondents in this study who had *not* identified themselves as victims of identity theft, Part II reports data from respondents who had experienced identity theft. The qualitative data show the wide variation in harms low-income victims of identity theft experience,¹⁰⁸ though of course they cannot speak to the frequency of these harms among a wide population. I provide the first qualitative data-driven study of these harms, highlighting the mechanisms that result in harms of identity theft being amplified for low-income victims.¹⁰⁹

A. LOSS OF PUBLIC BENEFITS

Many respondents discussed the loss of public benefits as a substantial harm they suffered after their identities were stolen. For example, Sheri described how she was “accused of working when I wasn’t working nowhere.”¹¹⁰ She explained

they cut my check off for two months. I didn’t get no assistance because they said I’d been working somewhere in a place where they do exercises at.

... I wasn’t working there. I never worked nowhere like that in my life. I worked out in potato fields and blueberry fields and green fields; but never

106. See PORTER, *supra* note 23.

107. One survey found that 15% of identity theft victims had false criminal records because of crimes committed by identity thieves. Jeff Sovern, *The Jewel of Their Souls: Preventing Identity Theft Through Loss Allocation Rules*, 64 U. PITT. L. REV. 343, 346 (2003).

108. See *infra* Part II.A–E.

109. See *infra* Part II.A–E.

110. Interview with Respondent 31, in Durham, N.C. (June 24, 2019).

in an exercising place. I never worked in a place like that. Never been inside one to tell you the truth.¹¹¹

Many public benefit programs have income thresholds, so (too much) work can negatively affect eligibility.¹¹² Sheri was cut off until she could straighten out the problem: “Yeah, they were using my social security number. That’s how Social Service said I was working and I wasn’t working but they said I was and cut it off.”¹¹³ Social welfare programs such as TANF, SSI, and SNAP can mean the difference between a family going hungry, or not, being able to pay rent, or not, and being able to pay bills on time and thus avoid late fees or even eviction.¹¹⁴ Delays of even a few months can bring havoc to a family’s budget and life. Yet while the system was working itself out and Sheri was trying to prove she did not in fact have the job falsely tied to her social security number, she had no recourse.¹¹⁵

There have been other reports, outside of this study, of struggles to receive benefits due to identity theft. For example, South Brooklyn Legal Services reports that they often see clients whose need-based SSI benefits are at risk because of fraudulent earnings appearing on their records.¹¹⁶ There is no easy process for proving that an SSI recipient did not earn the fraudulent wages that appear in the social security database.¹¹⁷ The process “can be lengthy and challenging, often requiring an administrative hearing in addition to filing identity theft reports and affidavits with other agencies, including the Internal Revenue Service (IRS), FTC, and local police.”¹¹⁸ For people with limited English proficiency, limited computer or phone access, and no legal representation, this process can be prohibitive. And since it is so long, even with legal help the victim must go months without needed SSI income.

111. *Id.*

112. See Sarah Minton & Linda Giannarelli, *Five Things You May Not Know About the US Social Safety Net*, URB. INST. 2 tbl.1 (Feb. 2019), https://www.urban.org/sites/default/files/publication/99674/five_things_you_may_not_know_about_the_us_social_safety_net_1.pdf [<https://perma.cc/SU6Z-7TCH>].

113. Interview with Respondent 31, *supra* note 110.

114. See Dranoff et al., *supra* note 105 (explaining that low-income individuals in particular face severe consequences when their access to needs-based benefits is compromised by identity theft).

115. Interview with Respondent 31, *supra* note 110.

116. See Dranoff et al., *supra* note 105.

117. See *id.* (describing various time-consuming and complicated tasks an identity theft victim may have to complete in order to prove they did not earn the fraudulent wages).

118. *Id.*

Most recently, the COVID-19 pandemic has highlighted the problem of identity thieves seizing on the opportunity to steal identities in order to receive payments from government benefit programs.¹¹⁹ As the federal government in partnership with states increased the amount of money workers could receive in benefits and also the amount of time they could receive them, identity theft ramped up. Reports indicate that the Secret Service confiscated and returned to states around \$2 billion in fraudulently obtained Covid unemployment relief funds.¹²⁰ The Secret Service reports that in some cases criminals stole the identities of people who did indeed qualify for the relief funds, but in other cases they stole identities of people who did not even qualify for unemployment.¹²¹

One of the new unemployment programs, the Pandemic Unemployment Assistance (PUA) program, was created for gig workers and others who don't ordinarily qualify for unemployment benefits.¹²² Since no employer is needed to verify employment status under that program, thieves seized on the relatively easy process of receiving money and targeted that program in particular—there are reports that more than thirty percent of claims under the PUA are incidents of identity theft.¹²³ These reports indicate that thieves went to great lengths to receive fraudulent payments as states attempted to crack down on fraud.¹²⁴ For example, some states require claimants to video chat with an agent in order to verify their identity, but some thieves participated in these video chats using 3D-printed face masks resembling the people whose identity they stole.¹²⁵

The consequences of these fraudsters are of course the worst for the actual victims of identity theft, but many low-income people filing for unemployment benefits who were not direct identity theft victims

119. Scott Zamost, *Secret Service Seizes \$2 Billion in Fraudulent Covid Unemployment Payments, Returns to States*, CNBC (May 12, 2021), <https://www.cnbc.com/2021/05/12/secret-service-seizes-2-billion-in-fraudulent-unemployment-payments-returns-funds-to-states.html> [<https://perma.cc/P5Y7-JMJ7>] (claiming that COVID-19 unemployment assistance payments were “easy prey for fraudsters”).

120. *Id.*

121. *Id.*

122. Olivia Rockeman & Reade Pickert, *The U.S. Unemployment System Is Plagued by \$63 Billion in Fraud and Dysfunction*, BLOOMBERG BUSINESSWEEK (Mar. 23, 2021), <https://www.bloomberg.com/news/articles/2021-03-23/u-s-unemployment-system-plagued-by-massive-fraud-and-dysfunction?sref=hYLkZkjr> [<https://perma.cc/8Z9Q-3KCU>].

123. *Id.*

124. *See id.* (discussing how criminals became more creative in response to state theft prevention).

125. *Id.*

felt the effects of these crimes.¹²⁶ As states fought against the identity thieves, claimants, many of whom needed the unemployment money to cover their basic needs, experienced significant backlogs and delays in getting their money.¹²⁷ *Bloomberg* reported about one couple, independent contractors, who waited over one month to initially collect their benefits. However, it got worse when their account was flagged for potential fraud and further payments were withheld. It took six weeks to resolve this flagging, and in the meantime, the couple was evicted.¹²⁸

B. LOSS OR DELAY OF TAX REFUNDS

Identity thieves also victimize people through the tax system, and the financial repercussions can be immense. Existing research shows that people living on the financial edge depend on their tax refunds to pay outstanding expenses like rent, to buy necessities, and to pay back debt, thus stopping the debt from ballooning out of control with high interest rates and fees.¹²⁹ Indeed, the Earned Income Tax Credit (EITC) is one of the largest antipoverty programs in the United States,¹³⁰ and combined with the low-income portion of the Child Tax Credit, lifted 8.3 million people (including 4.5 million children) out of poverty.¹³¹ Yet there is no speedy remedy when identity thieves strike and put tax refunds at risk.¹³²

Amber, a mother of four, discussed her tax troubles, explaining that “right now I’m waiting, too, because I had someone . . . take my babies without my permission last year.”¹³³ In other words, someone claimed her children as dependents, and thus her tax filing, in which she claimed them as dependents, was denied. Amber stated that she

126. *See id.* (describing how legitimate claims have become mixed up in the rush of fraudulent claims).

127. *Id.* (detailing the story of Terri Ashman and her husband).

128. *Id.*

129. Greene, *Safety Net*, *supra* note 37, at 523 (detailing how low-SES parents use their tax refunds to pay off credit card debt and past rent and utility bills).

130. *See Earned Income Tax Credit & Other Refundable Credits*, INTERNAL REVENUE SERV. (Jan. 19, 2021), <https://www.eitc.irs.gov/eitc-central/about-eitc/about-eitc> [<https://perma.cc/5C3E-XBLT>] (“The earned income tax credit, EITC, is the federal government’s largest benefit for workers.”).

131. Arloc Sherman, *Census: Programs Eyed for Cuts Keep Millions from Poverty*, CTR. ON BUDGET & POL’Y PRIORITIES: OFF THE CHARTS (Sept. 12, 2018), <https://www.cbpp.org/blog/census-programs-eyed-for-cuts-keep-millions-from-poverty> [<https://perma.cc/6HEU-T2CU>].

132. *See Dranoff et al.*, *supra* note 105 (explaining how the process to rectify identity theft is lengthy and challenging).

133. Interview with Respondent 29, in Durham, N.C. (June 25, 2019).

“had to file an amendment. Somebody stole my information, and all type of stuff.”¹³⁴ Amber noted that because she sees a tax-preparer, she thinks the issues have been resolved, yet resolved still means waiting: “I’m waiting now for my money.”¹³⁵ Amber did everything right according to the protocol she was provided. She noted that she was told by the IRS that despite putting “a lock on my baby’s Social Security . . . peoples still manage to get around that stuff.”¹³⁶ And now Amber, who depends on her tax return to stay afloat, must wait for the bureaucracy to resolve the problems the identity thief caused.

Another respondent discussed a similar and equally frustrating experience with taxes. Latoya explained, “they used my social, and my address, and some other stuff for their taxes Yeah, I was claimed as a dependent on some random person’s taxes So that was a whole thing. Yeah, it was a whole thing.”¹³⁷ Latoya contacted the Social Security Administration in order to try to prove her identity, but as she said, “I was going back and forth, emails with the IRS. It was a whole mess of stuff.”¹³⁸ She was trying to file her own taxes, and the IRS had to deduce who she actually was. As she said, “Yeah. It was pretty wild, pretty crazy. It was honestly, I’m glad you’ve never experienced that. That was very, very, very annoying.”¹³⁹ The IRS held her tax return until the identity matter was cleared up, even though she was “needing that money.”¹⁴⁰ As she explained

they held it. They didn’t give it to me until, I had to wait two or three months, just because we were going back and forth about the fact that I was really me, and the person that they were trying to pay out was kind of battling with them, too. Because I think they were going back and forth between us, to verify things. They would ask me a set of questions, and then I would just wait for a response. It would just be them asking for more information. I’m like, “So, when am I going to get my tax return, because I was kind of needing that money.” They were like, “As soon as we’re able to verify this and that.”¹⁴¹

C. DIFFICULTIES OBTAINING HOUSING

Amber, whom we met above discussing her tax troubles, also struggled to get housing due to her identity theft victimization.¹⁴² The

134. *Id.*

135. *Id.*

136. *Id.*

137. Interview with Respondent 17, in Durham, N.C. (June 14, 2019).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Interview with Respondent 29, *supra* note 133.

person who had stolen Amber's social security number "rented a whole lot of apartments and stuff."¹⁴³ Amber said when she was first looking for an apartment in Durham, "I couldn't even get an apartment because I had to go around to every place that this person went to rent from, so they can see who I was, it wasn't me."¹⁴⁴ She said she went downtown to the small claims court, and "they gave me a piece of paper to go take to every [landlord] . . ."¹⁴⁵ It was a lot of time and effort for Amber to clear her record, but she was motivated to get it done so she spent time and energy going to each landlord so they would clear her identity from the problematic records they had on file.¹⁴⁶ As she said, "boom, boom, boom. Clear it out, done deal."¹⁴⁷ Finally, Amber was able to get an apartment after months of effort, but as she said, "They had me messed up . . . You feel me, . . . my credit, everything. Yeah. Yeah, they was [sic] renting furniture, doing all types of stuff."¹⁴⁸

Other respondents discussed similar difficulties, since landlords almost always perform credit and background checks as part of their screening process.¹⁴⁹ When rental units have multiple applicants, the landlords have no incentive to allow any given applicant to clear up false information that shows up on her credit report. Further, the timing of leaving and getting new rental housing is often tight, and inaccurate information can leave people in a tight spot, and possibly even homeless.¹⁵⁰

D. DIFFICULTIES GETTING A JOB

Obtaining a job, a bedrock of financial security, can be put at risk when a job applicant is a victim of identity theft.¹⁵¹ Employers regularly conduct background checks on applicants,¹⁵² and false information can be devastating to applications, moving them from the "yes"

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *See id.* ("[Landlords] do credit checks. They have to credit check all of that. All this [i.e. rental activity from the identity thief] popped up.").

150. *See supra* notes 142–148.

151. *See infra* notes 152–57 and accompanying text.

152. According to one recent study, nearly 96% of employers conduct at least one type of background check on employees. Thomas Ahearn, *Survey Finds 96 Percent of Employers Conduct Background Screening*, ESR: NEWS BLOG (Aug. 3, 2017), <https://www.esrcheck.com/wordpress/2017/08/03/survey-finds-96-percent-of-employers-conduct-background-screening> [https://perma.cc/DW96-QYW9].

pile to the “no” pile almost immediately.¹⁵³ Liz, a mother of three young sons, explained that someone had used her social security number to rent an apartment and get a job, but that she “didn’t know until I just had to do a background check for a job that I’m about to be working.”¹⁵⁴ She seemed overwhelmed by the victimization, and said “Yeah, all that stuff. I’m like, I don’t know what’s wrong. That’s a process that I’m going to have to start trying to figure out . . .”¹⁵⁵ She noted that it took her so long to find out because “I don’t deal with anything with credit . . . I think it’s there from 2015.”¹⁵⁶ (The interview was conducted in the summer of 2019, so four years later). In Liz’s case she had not yet found out whether the negative credit repercussions of the identity theft would affect her ability to obtain the job.¹⁵⁷ However, her experience shows how easy it is for identity theft victimization to go unnoticed by low-income individuals for many years, until it suddenly becomes a barrier to positive economic mobility.

Sometimes, identity theft does not directly threaten getting a job, but the harms can threaten keeping or being able to accept certain jobs.¹⁵⁸ For example, for people living in areas with sparse or non-existent public transportation systems, a new job in a different part of town can mean a new need for a driver’s license. Yet sometimes it is exactly when people are trying to obtain a driver’s license that they find out they were a victim of identity theft. This can sometimes cause delays, and these delays can in turn cost someone a job if they do not have a reliable way to get to the job before their license comes through.

153. Megan Cerullo, *What Everyone Should Know About Employer Background Checks*, CBS NEWS (June 28, 2019), <https://www.cbsnews.com/news/what-job-candidates-should-know-about-employer-background-checks> [<https://perma.cc/BJP2-P5LQ>] (claiming that applicants are sometimes denied employment because of faulty information).

154. Interview with Respondent 25, in Durham, N.C. (June 21, 2019).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Attention Identity Theft Victims: Identity Theft Could Negatively Impact Your Job Opportunities*, ID WATCHDOG, <https://www.idwatchdog.com/education/identity-theft-impact-job-opportunities> [<https://perma.cc/3AW8-V9N7>] (claiming that victims have reported losing job opportunities and current employment because of issues related to identity theft).

E. IDENTITY THEFT VICTIMIZATION AS CATALYST FOR DOWNWARD FINANCIAL TRAJECTORY

A common theme among respondents who had experienced identity theft was the long and difficult road to clearing their name, and the associated long-term financial impacts that resulted, in some cases, in a downward financial spiral.¹⁵⁹ While identity theft is not a financial shock that most scholars of financial volatility consider, it behaves in much the same way as other more commonly acknowledged shocks such as health problems, job loss, and divorce.¹⁶⁰ The initial shock event is devastating, and the initial event results in a spiral of other negative financial events that can take years to recover from, if recovery is possible at all.¹⁶¹

Chandra's experience highlighted these issues.¹⁶² She had her identity stolen when she was 19, and someone "got a house mortgage in Virginia in my name. It was a mess."¹⁶³ Chandra said she had to go to Virginia to try to clear things up, but that "literally as soon as I walked into the office, they were like 'no.'"¹⁶⁴ She was showed paperwork and told that a woman opened a loan on the house, and that the house was eventually foreclosed on.¹⁶⁵ Chandra went on to say:

So all of that was on my credit. I couldn't figure out why was I . . . Why could I not get my credit score [up]? Somebody had a \$1500 water bill was just bad. It's so hard proving that you didn't do it. So I had to end up paying a \$1500 water bill for me to even get service at one of my houses.¹⁶⁶

And when asked if she ever got the money back, she said, "No. The city done kept that. Even if I showed police reports and documents saying, 'hey, this is the result of somebody using my name.' No, they kept the money, still kept billing me."¹⁶⁷ As the conversation went on,

159. See *supra* notes 154–157 and accompanying text.

160. See Mary J. Bane & David T. Ellwood, *Slipping into and out of Poverty: The Dynamics of Spells*, 21 J. HUM. RES. 1, 13–17 (1986) (discussing trigger events that result in people moving in and out of poverty); Signe-Mary McKernan & Caroline Ratcliffe, *Events That Trigger Poverty Entries and Exits*, 86 SOC. SCI. Q. 1146, 1167 (2005) (concluding that changes in household composition, employment, and disability entitlements were important trigger events for people moving in and out of poverty). For a discussion of the effects of multiple trigger events on poverty persistence, see Ann Huff Stevens, *Climbing out of Poverty, Falling Back in: Measuring the Persistence of Poverty over Multiple Spells*, 34 J. HUM. RES. 557 (1999).

161. See *supra* notes 137–141 and accompanying text.

162. See Interview with Respondent 46, in Durham, N.C. (July 17, 2019).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

Chandra also noted she is *still* dealing with the identity theft victimization:

Even now, I'm still kind of catching stuff that was back then. The light bill company called me from like a year ago and said I had an account open. I was like, "What?" They were trying to put the past due balance from that bill on my bill. I was like, "No, no, no, no, I've never stayed there." They were like, "Well, it was in your name." So I had to go down and do a police report for that so they'd waive it off. It was just mess after mess.¹⁶⁸

Not only did Chandra have to devote hours of her life to cleaning up the "mess," year after year, including a trip to Virginia, but her credit score suffered.¹⁶⁹ She ended up paying money she did not owe because she needed to get water service at her house, and that could not wait for her to complete the arduous process of proving she did not owe the faulty \$1500.00 charge someone else accrued in her name.¹⁷⁰ She also struggled to get electricity in an apartment due to the identity theft.¹⁷¹ Chandra's desire to climb out of poverty was made almost impossible by this victimization, which haunted her even years later.

Kevin's experience further demonstrates how identity theft victimization can serve as a shock that results in long term negative financial and life course consequences, including loss of housing.¹⁷² Kevin, who had been evicted, associates the beginning of his struggles to pay rent with his victimization.¹⁷³ Someone stole Kevin's identity and managed to get a debit card in his name, giving them access to his bank account.¹⁷⁴ Kevin found out when he went out to lunch, "swipe[d] it [his debit card] for \$7.00, and it declined it, and I know I had \$700.00, \$800.00 in my account."¹⁷⁵ Kevin said he "called them right away, and zero dollars."¹⁷⁶ Kevin explained:

So, I had to dispute those charges, and really, that's kind of what put me behind when I was with the public housing in that bad neighborhood because I got hit for \$700. It set me . . . I had to dispute those charges. I had to go file a police report, and it took a long time. Even with the apartment complex knowing this, they still was just like ["too bad"].¹⁷⁷

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. See Interview with Respondent 28, *supra* note 68.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

While Kevin eventually got his money back, as he said “too little, too late. I had to spend that money that I got back, I gave it to [the] Rent Man.”¹⁷⁸ As the next Part will explore, “too little, too late,” is a common problem for low-income identity theft victims when it comes to existing remedies.

III. INADEQUATE EXISTING REMEDIES

Those who are victims of identity theft, no matter their income, are not afforded a straight-forward path to reclaim their identity.¹⁷⁹ Existing remedies are piecemeal and confusing.¹⁸⁰ This Part details the existing mish-mosh of inadequate remedies available, while highlighting how these remedies are disproportionately difficult for low-income victims to access and activate. In some cases, the remedies may not even be remedies at all for low-income victims.¹⁸¹

Existing regulations focused on identity theft have for the most part tackled only one specific problem of identity theft: identity thieves using the identity of their victim to obtain credit in the victim’s name and then defaulting on the repayment obligations.¹⁸² Indeed, it is this problem of credit harms that centers both the regulatory regime surrounding identity theft and the public dialogue.¹⁸³ However, even with this focus on credit harms, there is no prevailing regime under which data breach harms are enforced.¹⁸⁴

In the discussion below, I weave in scholarly discourse about various remedies when it exists. However, scholarly attention to these matters is limited. More work has focused on data collection privacy on the front end (how companies and other agencies collect data, what types of security measures they should take to protect it, and what are and are not appropriate uses of the data),¹⁸⁵ but there is surprisingly

178. *Id.*

179. *See supra* notes 23–24 and accompanying text.

180. *See generally infra* Part III.C (discussing how low-income victims of identity theft might have trouble navigating self-help websites).

181. *See infra* Part III.B (analyzing how current federal legislation provides ineffective remedies to low-income victims of identity theft).

182. *See* PORTER, *supra* note 23.

183. *See id.* (noting that the majority of the legislative responses to the problem of identity theft have “focused on credit harms and on the remediation of credit reports as a response”).

184. *See* STEPHEN P. MULLIGAN, WILSON C. FREEMAN & CHRIS D. LINEBAUGH, CONG. RSCH. SERV., R45631, DATA PROTECTION LAW: AN OVERVIEW 2 (2019) (claiming that federal legal approaches to data security and privacy lack uniformity).

185. *See, e.g., supra* notes 32–33.

little specific discourse on the existing remedies (or proposals for new remedies) once a breach occurs.

A. COURTS

The vast majority of the scholarly and theoretical work on data breaches focuses on lawsuits.¹⁸⁶ Courts are used as a means of redress when plaintiffs bring a cause of action against the company or entity that suffered the data breach.¹⁸⁷ One important study by Romanosky, Hoffman, and Acquisti focused on the types of data breach cases that are actually litigated and what the outcome patterns are.¹⁸⁸ As a general matter, the authors found a tremendous range of actions brought, including both statutory causes of action and common-law claims (tort and breach of contract).¹⁸⁹ Between 2004 and 2014, of the 230 data breach lawsuits studied, plaintiffs brought more than eighty-six different causes of action.¹⁹⁰ The study found that plaintiffs are most likely to seek relief for the following: actual loss from identity theft (e.g. financial or medical fraud), emotional distress, cost of preventing future losses (e.g., credit monitoring and identity theft insurance), and the increased risk of future harm.¹⁹¹

Several of the findings from the Romanosky, Hoffman, and Acquisti study are relevant to understanding why those who are low-income are generally left out of the data breach conversation. First, Romanosky, Hoffman, and Acquisti found that the lawsuits filed are usually private class actions.¹⁹² In order to bring a private class action, victims need to know the exact data breach from which their data was compromised.¹⁹³ Yet the low-income respondents interviewed for this study often did not know how their data had been compromised.¹⁹⁴ Additionally, in order to bring a class action lawsuit, a victim must initiate the claim with a lawyer—which past research shows is

186. See *supra* note 24 (providing references to such studies).

187. See Romanosky et al., *supra* note 24, at 75.

188. *Id.* at 76.

189. *Id.*

190. *Id.* at 100.

191. *Id.* at 76.

192. *Id.* Though the authors found that most lawsuits were initiated through private class actions, they noted that some were brought by the Federal Trade Commission (FTC) or state attorney generals. *Id.*

193. *Id.* at 83–84.

194. See, e.g., Interview with Respondent 28, *supra* note 68.

unlikely for low-income individuals¹⁹⁵—or respond to a class action notice from a lawyer.

Romanosky, Hoffman, and Acquisti also found that in data breach lawsuits, the defendants are most often “large firms such as banks, medical/insurance entities, retailers, or other private businesses.”¹⁹⁶ Yet as discussed in Part I, low-income groups are particularly vulnerable to data breaches because their personal data is stored with so many (often underfunded) federal, state, and local agencies that administer public welfare programs.¹⁹⁷ Finally, the study found that most of the cases brought are settled or dismissed “either as a matter of law, or because the plaintiff was unable to demonstrate actual harm.”¹⁹⁸ Thus, even if initiated, the majority of lawsuits are unsuccessful for victims.

Scholars have become interested in the difficulties of bringing a successful lawsuit (for any identity theft victim).¹⁹⁹ Indeed, Daniel Solove and Danielle Citron take up the issue of failed lawsuits by proposing a theory of data breach harms that includes risk and anxiety.²⁰⁰ Solove and Citron consider cases where plaintiffs seek redress for data breaches caused by inadequate data security measures—cases where there is evidence that the defendants did not use reasonable care in securing the plaintiff’s data.²⁰¹ Through careful case analysis, they show that most of these cases get bogged down by issues of harm—even if defendants were egregiously at fault in failing to secure data after many warnings.²⁰² If plaintiffs cannot show actual harm, their lawsuit will fail.²⁰³ And, they note, there has been no consistent judicial approach to data-breach harms.²⁰⁴ Instead, in the majority of cases, a plaintiff’s “increased risk of financial injury and [the] anxiety”

195. See Consortium on Legal Servs. & the Pub., *Am. Bar Ass’n, Legal Needs and Civil Justice: A Survey of Americans* 9 (1994), https://www.wisbar.org/aboutus/membership/Documents/WisTAFApp_J_ABA_Legal_need_study.pdf [<https://perma.cc/M9SM-ZTRN>] (finding that among people who are low-income, 47% were experiencing one or more civil legal needs but only a quarter of those sought legal advice); Sara S. Greene, *Race, Class and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1312 (2016) (determining that only 9% of Black respondents and 40% of [W]hite respondents would consider seeking legal advice in a hypothetical civil dispute).

196. Romanosky et al., *supra* note 24, at 76.

197. See *supra* notes 98–102 and accompanying text.

198. Romanosky et al., *supra* note 24, at 76.

199. See, e.g., Solove & Citron, *supra* note 12.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

surrounding this increased risk is not sufficient to meet the standards of a harm, and thus is deemed an unsuccessful claim.²⁰⁵

Solove and Citron argue that “anxiety and risk, together and alone, deserve recognition as compensable harms,” and the article makes a compelling case for this stance.²⁰⁶ This is vital scholarship on identity theft case law. Though recent caselaw from the Supreme Court suggests an interpretation inconsistent with that argued for by Solove and Citron,²⁰⁷ adoption of their proposal would make a significant difference for victims of identity theft who are aware they were victims of a data breach, who understand their potential risk for identity theft given the breach, and who have money to spend so they can take action against companies with inadequate data security measures.

But for many low-income victims, the definition of harm used in data breach cases is essentially irrelevant. The victim-respondents in this study were overwhelmingly unaware that they were victims of identity theft until they had *already* experienced a harm from the victimization.²⁰⁸ And the majority of respondents were generally unaware of large data breaches.²⁰⁹ For example—more than half of the respondents had not heard about the 2017 Equifax data breach, even though it had affected more than half of all Americans.²¹⁰ When one respondent, Robert, was asked about the Equifax breach, he said, “[i]f I did [hear about it], I didn’t focus on it because I had too much else going, so I don’t recall.”²¹¹ And when asked if he thought he was

205. *Id.*

206. *Id.* at 744.

207. In *TransUnion LLC v. Ramirez*, the Supreme Court found that consumers in a class-action lawsuit involving erroneous information on credit reports generated by a credit-reporting agency do not have a right to sue the company if a risk to reputational harm does not actually materialize from the mistake. 141 S. Ct. 2190, 2211 (2021). This ruling has implications for data-breach cases, where exposure of personal information may not actually materialize into fraud or identity theft. See John C. Cleary, Mark A. Olthoff & Michael Waters, *Landmark Ruling in TransUnion v. Ramirez: For Damages Suits “Risk of Future Harm” Is No Longer Concrete Harm to Support Article III Standing in Federal Court*, NAT’L L. REV., <https://www.natlawreview.com/article/landmark-ruling-transunion-v-ramirez-damages-suits-risk-future-harm-no-longer> [<https://perma.cc/2TB6-3NQR>]. The ruling for the most part shuts down the potential for courts to find that consumers who experience data exposure, but not actual material fraud or identity theft associated with the exposure, have standing). *Id.*

208. See, e.g., Interview with Respondent 29, *supra* note 133.

209. See, e.g., Interview with Respondent 38, in Durham, N.C. (July 2, 2019).

210. See, e.g., *id.*

211. *Id.*

affected by it, understandably he said “I have no idea.”²¹² Another respondent said “I don’t know a thing about that.”²¹³

Ultimately, for most low-income victims of identity theft, court cases require too much information and money to initiate²¹⁴ and take too long to resolve to actually provide effective relief from such victimization.²¹⁵

B. LEGISLATION

Federal legislation that focuses on data breaches is relatively sparse, but in recent years it has been augmented to provide more protections to identity theft victims.²¹⁶ The Fair and Accurate Credit Transactions Act (FACTA), which amended the Fair Credit Reporting Act (FCRA), created laws that help victims of identity theft prevent or reduce harms to their credit.²¹⁷ The Act requires credit reporting agencies to have “one-call” procedures for consumers to verify their identities and request a fraud alert be put on their file for ninety days.²¹⁸ Further, in cases where the consumer provides an official report of identity theft from law enforcement, the consumer can request an extended fraud alert of seven years.²¹⁹ That consumer is also eligible to receive two free credit reports within twelve months from each of the three major credit reporting bureaus.²²⁰ Credit reporting

212. *Id.*

213. Interview with Respondent 47, in Durham, N.C. (July 17, 2019).

214. Recent scholarship by Andrew Hammond has documented how difficult it is for poor litigants in federal court to even get the courts to waive filing fees through *in forma pauperis* filings. See Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1485 (2019). Further, a recent study of *in forma pauperis* filings found significant inconsistencies in how judges rule on these cases, indicating that even those who need such a designation in order to access federal court may not be granted it. Adam R. Pah, David L. Schwartz, Sarath Sanga, Zachary D. Clopton, Peter DiCola, Rachel Davis Mersey, Charlotte S. Alexander, Kristian J. Hammond & Luis A. Nunes Amaral, *How to Build a More Open Justice System*, 369 SCI. 134, 136 (2020).

215. See Hammond, *supra* note 214, at 1483 (discussing how cumbersome procedural requirements disproportionately impact poor litigants).

216. See PORTER, *supra* note 23.

217. Fair and Accurate Credit Transactions Act of 2003, 15 U.S.C. §§ 1681–1681x; *Fair and Accurate Credit Transactions Act of 2003*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement/statutes/fair-accurate-credit-transactions-act-2003> [<https://perma.cc/KSZ7-TTW7>].

218. 15 U.S.C. § 1681s-2(a)(5)(A).

219. *Id.* § 1681c-1(i)(5).

220. *What to Know About Credit Freezes and Fraud Alerts*, FED. TRADE COMM’N: CONSUMER INFO., <https://www.consumer.ftc.gov/articles/0279-extended-fraud-alerts-and-credit-freezes> [<https://perma.cc/V4NT-NS5R>].

agencies are required to report these fraud alerts to creditors and others who seek the consumer's credit report.²²¹

This legislative provision fails low-income victims in two distinct ways. First, it assumes that victims know what credit reporting agencies are. In this study, about a quarter of respondents were not familiar with Equifax (one of three major credit reporting agencies in the United States), indicating that this assumption might be presumptuous.²²² In order to take advantage of the FCRA, victims must know to contact credit reporting agencies, and also know their rights under the FCRA.²²³ For those struggling to pay rent and bills, this information might be elusive. Second, the protection only helps with credit report problems. While negative credit report history is certainly one consequence for low-income victims of identity theft, for many victims there are other harms that cause immediate financial difficulties, as discussed in Part II.²²⁴

There are also provisions in place to help victims of identity theft repair their credit.²²⁵ If consumers provide proof of identity as well as a copy of an identity theft report, they can request that a credit reporting agency block any information in the consumer's file that the consumer reports was the result of an identity theft.²²⁶ Once this request is made, the credit reporting agency must, in a timely manner, notify the furnisher of the information that it may be the result of identity theft.²²⁷ However, the requirements on the furnisher are relatively limited.²²⁸ Once again, this rule provides some protection to those who are aware it exists, know how to activate it, and experienced a harm that was specific to their credit report. But as discussed in Part II, many low-income victims of identity theft are unaware of available protections, unaware how to activate protections, and suffer harms from identity theft that are not always credit report harms (such as issues around tax returns, public benefits, and so on).²²⁹

Further, some federal legislation is aimed at preventing harms in the first place.²³⁰ For example, Congress passed the Cybersecurity

221. 15 U.S.C. § 1681c-1.

222. *See, e.g.*, Interview with Respondent 47, *supra* note 213.

223. *See* 15 U.S.C. § 1681c-1(i)(5).

224. *See, e.g.*, Interview with Respondent 28, *supra* note 68.

225. 15 U.S.C. § 1681c-2.

226. *Id.* § 1681c-2(a).

227. *Id.* § 1681c-2(b).

228. *See id.*

229. *See, e.g.*, Interview with Respondent 28, *supra* note 68.

230. *See* Cybersecurity Information Share Act, 6 U.S.C. §§ 1501–1510.

Information Share Act (CISA) in 2015.²³¹ The CISA does not mandate any affirmative action on the part of companies, but what it does do is attempt to protect companies from being held liable “for sharing threat information that may aid others’ defense efforts.”²³² The idea is that companies will be more likely to share threat information if they are protected from potential legal actions resulting from their decision to share such information.²³³ While this marginally may reduce the number of low-income victims of identity theft, it does nothing for those who do become victims.

At the state level, as of 2018, all U.S. states and Washington D.C. had passed legislation that required companies to inform consumers when their data is breached.²³⁴ The protections offered by each state law unsurprisingly vary tremendously, with different rules, standards, definitions, and general requirements.²³⁵ Most states require notification if a data breach included peoples’ names as well as another aspect of their identity such as login details/passwords, financial information, or social security numbers.²³⁶ Further, most states only require notification on one data point if financial information or password information was compromised, and the exceptions to notification requirements are many and varied.²³⁷ Notably, even though many legislative proposals have been circulated in the U.S. Senate for consumer notification requirements surrounding data breaches, thus far none of the bills have passed.²³⁸

Making consumers aware of data breaches is certainly an important first step in preventing identity theft, particularly if the consumer is able to activate a protection based on the information.²³⁹ Indeed, research has shown that such disclosure laws can reduce

231. *Id.*

232. WOLFF, *supra* note 11, at 260.

233. *Id.*

234. See Drew Mitnick, *No More Waiting: It’s Time for a Federal Data Breach Law in the U.S.*, ACCESS NOW (Apr. 10, 2018), <https://www.accessnow.org/no-more-waiting-its-time-for-a-federal-data-breach-law-in-the-u-s> [<https://perma.cc/A88Q-98GM>].

235. *Id.*

236. *Id.*

237. *Id.*

238. Jeffrey Atteberry, *A Survey of Proposed Federal Privacy Legislation and the Year Ahead*, LAW.COM: CORP. COUNS. (Feb. 4, 2019), <https://www.law.com/corpcounsel/2019/02/04/a-survey-of-proposed-federal-privacy-legislation-and-the-year-ahead> [<https://perma.cc/XVQ2-PBWD>].

239. See Sasha Romanosky, Rahul Telang & Alessandro Acquisti, *Do Data Breach Disclosure Laws Reduce Identity Theft?*, 30 J. POL’Y ANALYSIS & MGMT. 256, 280–81 (2011).

identity theft by over six percent.²⁴⁰ However, since people who are low-income may believe they are not potential victims of identity theft (as discussed in Part I.A), the warning may be largely ignored by this group.²⁴¹

Further, for those who are overwhelmed trying to pay bills and stay afloat, sometimes such warnings get lost in the shuffle. As Steven, a respondent in this study reported, he missed out on credit protections after a security breach and suffered the consequences.²⁴² Steven explained that someone “turned lights on in a random place somewhere in Dominion, North Carolina” and that he didn’t “know where that’s at.”²⁴³ When asked how someone might have gotten his information, Steven said that he was

pretty sure it was either Target or Lowe’s. What was it two years ago, I think, when Lowe’s and Target had that big thing where they took a lot of people’s information that were using the debit cards. That’s how they were getting it. It was on the news and everything. Well, I was one of those victims.²⁴⁴

Even though Steven was a victim, he explained that he “didn’t know it at the time because I was so young.”²⁴⁵ He contrasted himself to his aunt, also a victim, explaining

So they gave her a whole free year of protection, identity theft protection and all of that. She called in and told them and everything. They were like, “oh yeah, we’re sorry.” But I was so young, I didn’t even know. So by the time I even figured that was what it was, they were like, “oh yeah we’re not doing that anymore.”²⁴⁶

There is also potential for misinformation and misunderstanding when companies notify data breach victims. For example, Elaine said she had heard about the Equifax data breach but was not concerned because

well they promised me that if anybody tried to do anything else, they would notify me. So I’m trusting, and it actually happened a couple of times last year different . . . companies that said their data had been breached, and they brought in a company to kind of watch over those suspected accounts, and they would notify me, red flag, or something.²⁴⁷

Elaine did not seem to understand that she had to sign up for these services, so she was waiting in vain for a notification that would never come, even if her information was further compromised.

240. *Id.*

241. *See, e.g.*, Interview with Respondent 19, *supra* note 67.

242. *See* Interview with Respondent 16, in Durham, N.C. (June 14, 2019).

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. Interview with Respondent 13, *supra* note 69.

C. Federal Trade Commission

The Federal Trade Commission (FTC) takes a primary role in determining when a company has failed in its duty to secure consumer data.²⁴⁸ The FTC took on this role in part because of the absence of any other enforcement mechanism against companies whose questionable data security practices were putting consumers at risk.²⁴⁹ Indeed, as Josephine Wolff has said, the FTC thus “has extended its broad consumer protection mission to become the de facto regulator of many issues related to digital privacy and security.”²⁵⁰ The FTC draws its enforcement authority over data security from the Gramm-Leach Bliley Act.²⁵¹ The FTC also brings claims against companies using its enforcement and regulating power detailed in Section 5 of the FTC Act.²⁵² The Section prohibits “unfair” or “deceptive” acts or practices (UDAP)—of which data security or privacy breaches may be a violation.²⁵³ The FTC has pursued many different types of UDAP claims against companies, including “allegations that companies inappropriately collected or disclosed private consumer information, did not secure sensitive personal information, made false privacy certification claims, or allowed franchisees to take webcam pictures of consumers in their homes.”²⁵⁴

Solove and Hartzog argue that the FTC has become the “broadest and most influential regulating force on information privacy in the United States—more so than nearly any privacy statute or common law tort.”²⁵⁵ They note that despite over a decade of enforcement, the vast majority of FTC privacy cases have resulted in settlements.²⁵⁶ Thus, there is “no meaningful body of judicial decisions to show for it.”²⁵⁷ However, companies look to the existing settlement agreements to guide their privacy policies.²⁵⁸ Large scale claims against breached companies and settlements for consumer victims may do some work

248. See WOLFF, *supra* note 11, at 50.

249. *Id.*

250. *Id.*

251. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 15 U.S.C.).

252. Federal Trade Commission Act, 15 U.S.C. § 45.

253. *Id.*

254. Jonathan G. Cedarbaum & Elijah Alper, *The Consumer Financial Protection Bureau as a Privacy & Data Security Regulator*, 17 FINTECH L. REP. 3, 56 (2014).

255. Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 585 (2014).

256. See *id.* at 583.

257. *Id.*

258. *Id.*

to encourage companies to increase security protections and may provide consumers with some compensation for their trouble, but post-breach actions provide little meaningful redress—it is too little, too late, for most low-income victims.²⁵⁹

The FTC also serves as a clearinghouse of sorts for identity theft complaints.²⁶⁰ It encourages victims of identity theft to report the theft on an FTC sponsored website, www.identitytheft.gov.²⁶¹ The website says that it will then lead consumers through a recovery plan which includes pre-populated letters, a checklist for the plan, and other organizational tools.²⁶² This type of self-help program may provide some relief to low-income victims. However, the resources are not well advertised—evidenced by the fact that not one respondent in this study discussed the FTC as a potential resource. Additionally, the tools the FTC provides appear potentially difficult to navigate and understand for those not well-versed in credit related matters.

D. CONSUMER FINANCIAL PROTECTION BUREAU

The Consumer Financial Protection Bureau (CFPB) has taken limited steps to enter the privacy and data security fray.²⁶³ For example, following a major breach of Target's data in 2014, the CFPB posted a blog post noting four steps for consumers to take if their credit or debit card information was stolen, and then also more general information about how to respond to data breaches.²⁶⁴ However, the CFPB website does not feature identity theft as a main issue.²⁶⁵ Instead, a consumer first has to click on "Fraud and Scams," and then click on links that either say "Understand identity theft" or "Identity theft."²⁶⁶ Under the "Understand identity theft" link there is very limited advice: consumers are told to read statements and flag charges they do not recognize.²⁶⁷ Consumers are also told that they are entitled to free

259. To revisit the multitude of problems that low-income victims of identity theft face, see *supra* Part II.

260. See *Report Identity Theft and Get a Plan*, FED. TRADE COMM'N, www.identitytheft.gov [<https://perma.cc/P3P2-JKTG>].

261. *Id.*

262. *Id.*

263. Cedarbaum & Alper, *supra* note 254, at 2–3.

264. *Id.*

265. See *Fraud and Scams*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/consumer-tools/fraud> [<https://perma.cc/M7KE-LSXH>].

266. *Id.*

267. *How Can I Spot Identity Theft?*, CONSUMER FIN. PROT. BUREAU (June 1, 2017), <https://www.consumerfinance.gov/ask-cfpb/how-can-i-spot-identity-theft-en-1359> [<https://perma.cc/2UWR-R2B4>].

credit reports, the link to request such reports is provided, and there is limited guidance about what to look for on the reports.²⁶⁸ Further, consumers are alerted to the fact that they can submit a complaint if there is a credit report issue.²⁶⁹ The other link on identity theft simply defines identity theft as “when someone steals your identity to commit fraud” and then links to the FTC’s website and notes the FTC provides information about “preventing and responding to identity theft.”²⁷⁰ Ultimately, the resources provided by the CFPB provide little helpful information and certainly no real recourse for identity theft victims.

E. LAW ENFORCEMENT

Advice about whether to contact the police and file a report varies considerably when it comes to identity theft. Articles on websites like *CreditCards.com*,²⁷¹ *The Balance*,²⁷² and even *RamseySolutions.com*²⁷³ encourage consumers to file police reports. However, as noted above, the FTC website says in most cases it is *not* necessary to contact the police, and “[b]y reducing the need for police reports, IdentityTheft.gov helps you get started on your recovery quickly, and helps free local police to focus on public safety.”²⁷⁴ Yet a booklet from

268. *Id.*

269. *Id.*

270. *Fraud and Scams Key Terms*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/consumer-tools/fraud/answers/key-terms/#identity-theft> [<https://perma.cc/K28X-M2ZZ>].

271. See Julie Sherrier, *How to Report and Protect Yourself from Credit Card Fraud and Identity Theft*, CREDITCARDS.COM (June 6, 2018), <https://web.archive.org/web/20200930091436/https://www.creditcards.com/credit-card-news/privacy-security-suite-tips> (“You should file a report with your local police station. Keep a copy of the report for proof of the crime. It can help you deal with creditors and file Identity Theft Reports.”).

272. See Jake Stroup, *Reporting Identity Theft to the Police*, BALANCE (Sept. 21, 2020), <https://web.archive.org/web/20201024213657/https://www.thebalance.com/reporting-identity-theft-to-the-police-1947664> (“No matter what type of identity theft it is, the first step in the recovery process is to obtain a police report.”).

273. See *What to Do if Your Identity Is Stolen*, RAMSEY SOLS. (Aug. 3, 2021), <https://www.ramseysolutions.com/insurance/stolen-identity-what-to-do> [<https://perma.cc/S2KL-HLQL>] (“Since it is a crime to steal someone’s personal identity and use it to commit a fraudulent act, you should file a police report Filing a police report can help support your claim when you’re dealing with any incoming collection calls wanting you to pay accounts that were opened in your name.”).

274. Seena Gressin, *Most ID Theft Victims Don’t Need a Police Report*, FED. TRADE COMM’N: CONSUMER INFO. BLOG (Apr. 27, 2017), <https://www.consumer.ftc.gov/blog/2017/04/most-id-theft-victims-dont-need-police-report> [<https://perma.cc/R9HK-5PXC>].

the FTC notes that some companies may require a police report in order to resolve an identity theft dispute, and the FTC states in that case the consumer *should* file a police report.²⁷⁵

Of the identity theft victims who report the crime to the FTC (presumably already a very selective group), only about a quarter also report the crime to the police.²⁷⁶ And police departments often turn people away, telling them that these crimes are not in their domain.²⁷⁷ The FBI, another organization some might turn to for help, rarely investigates small-time, identity theft crimes.²⁷⁸

Resources provided by local police departments for victims of identity theft also vary considerably. The Durham, North Carolina police website, where the respondents in this study lived, links to a few resources (the FTC site, for example) and then simply states that it is the Fraud Unit that investigates identity theft (and a range of other crimes).²⁷⁹ In contrast, the New York City police department website links directly to a flyer that provides information both about how to prevent identity theft and what to do if one is a victim (which includes a number of self-help steps).²⁸⁰

Even if it is helpful, many low-income victims of identity theft may be reluctant to file a police report.²⁸¹ As discussed in more detail in Part V, research shows that people who are low-income are

275. See *Identity Theft: A Recovery Plan*, FED. TRADE COMM'N 7 (2018), https://www.consumer.ftc.gov/articles/501a-identity-theft-a-recovery-plan_2018.pdf [<https://perma.cc/SNQ4-DEGG>].

276. See *Consumer Sentinel Network Data Book for January–December 2016*, FED. TRADE COMM'N 3 (2017), https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2016/csn_cy-2016_data_book.pdf [<https://perma.cc/PL6R-CCYJ>] (revealing that 27% of the identity-theft complainants to the FTC from 2013 to 2016 also contacted law enforcement).

277. See Nick Selby, *Local Police Don't Go After Most Cybercriminals. We Need Better Training.*, WASH. POST: POSTEVERYTHING (Apr. 21, 2017), <https://www.washingtonpost.com/posteverything/wp/2017/04/21/local-police-dont-go-after-most-cybercriminals-we-need-better-training> [<https://perma.cc/5NRN-33H2>] (finding that American police receive little training in investigating and prosecuting cyber-crimes and defer to the FBI on such matters).

278. See *id.* (arguing that FBI cyber investigators are overworked, causing them to focus on the most serious crimes).

279. *Criminal Investigation Division*, CITY OF DURHAM, <https://durhamnc.gov/215/Criminal-Investigation-Division> [<https://perma.cc/46BX-SKUY>].

280. Crime Prevention Section & Detective Bureau Special Frauds Squad, *What You Need to Know About ... Identity Theft*, N.Y.C. POLICE DEP'T 2, http://www.nyc.gov/html/nypd/downloads/pdf/crime_prevention/Identity_Theft.pdf [<https://perma.cc/2LHE-DV8F>].

281. See *infra* Part V.

disproportionately Black,²⁸² and people who are Black are generally more inclined to avoid the police.²⁸³

But even in cases where people who are low-income do report their identity theft victimization to the police, problems abound. First, as a U.S. Department of Justice publication notes, “several factors have made it difficult for victims to obtain police reports.”²⁸⁴ The factors identified include: (1) “Identity theft is often imbedded within other crimes and is not recorded separately;”²⁸⁵ (2) “there may be cross-jurisdictional confusion about who is responsible for recording a crime that originated in one place but may have spread over multiple jurisdictions;”²⁸⁶ and finally (3) “[t]here is also a misperception among some law enforcement officials that identity theft is not a crime but a matter for enforcement through the civil justice system.”²⁸⁷ Other problems include victims lacking information about how to best communicate with law enforcement and law enforcement lacking training and resources to assist victims of identity theft.²⁸⁸

Even in cases where low-income victims do successfully report identity theft crimes to either the police or FBI and receive an official report, the report is unlikely to help the victim solve their immediate financial problems.²⁸⁹ The report may be helpful to the victim in resolving long term problems related to the identity theft, or in rare cases a law enforcement agency may investigate and possibly

282. Michael B. Sauter, *Faces of Poverty: What Racial, Social Groups Are More Likely to Experience It?*, USA TODAY (Oct. 10, 2018), <https://www.usatoday.com/story/money/economy/2018/10/10/faces-poverty-social-racial-factors/37977173> [<https://perma.cc/UNH9-PD77>] (“While the poverty rate for [W]hite Americans is around 10 percent, it is roughly double for [B]lack and Hispanic Americans, and it is 25 percent for American Indians.”).

283. Black Americans and “residents of predominantly African American neighborhoods” believe the police untrustworthy and illegitimate at greater rates than their [W]hite counterparts. Bell, *Legal Estrangement*, *supra* note 38, at 2059. Only 18% of Blacks have “some” or “a lot” of confidence in the police, whereas 68% of White Americans hold this view. Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 SOC. RSCH. 445, 456 (2006); *see also infra* Part V.

284. *Expanding Services to Reach Victims of Identity Theft and Financial Fraud*, OFF. FOR VICTIMS OF CRIME (Oct. 2010) [hereinafter *Expanding Services*], https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/ID_theft/pfv.html [<https://perma.cc/S496-YVRL>].

285. *Id.*

286. *Id.*

287. *Id.*

288. *See id.*

289. *See id.*

prosecute the crime.²⁹⁰ However, the victim is still left to pick up the pieces of the financial fall-out from the victimization alone.

F. BANKRUPTCY, DEBT CONSOLIDATION, AND DEBT SETTLEMENT

Some victims of identity theft may simply throw up their hands at actually achieving a formal solution that absolves them of the ills created by their stolen identity. In these cases, there are several predatory companies and even lawyers waiting in the shadows, preying on the very vulnerabilities that they know the current regulatory system creates by leaving members of low-income groups without a remedy.²⁹¹

For example, some consumer bankruptcy lawyers advertise bankruptcy as a solution to identity theft.²⁹² One website proclaims, “In a way, filing for bankruptcy gives you back your identity after it was stolen by wiping the slate clean and letting you resume control of your financial situation.”²⁹³ Further, the website fear-mongers, noting:

As a victim of identity theft, there’s a good chance you’re dealing with debt collectors and your credit has taken a significant hit. This can happen even if you file a police report and go through all of the necessary actions to inform creditors of the problem. If law enforcement never catches the person who committed the crime, it can be difficult to convince creditors that a crime took place, which leaves you with a difficult choice. You didn’t accumulate the debts in question, but they’re linked to your identity and there are very few options available for repairing the problems caused by the crime.²⁹⁴

In moments of financial desperation, being told there might be a way out, with no mention of the many costly consequences of filing for

290. *See id.*

291. *See infra* notes 292–95 and accompanying text.

292. *See Bankruptcy and Identity Theft: What You Need to Know*, LAW OFFS. ROBERT M. GELLER (Jan. 25, 2019) [hereinafter *Bankruptcy and Identity Theft*], <https://www.attorneyfortampabay.com/blog/bankruptcy-and-identity-theft-what-you-need-to-know> [<https://perma.cc/P4YM-ZVL6>]; *see also Identity Theft & Bankruptcy*, SAN DIEGO BANKR. ATT’Y, <https://www.sandiego-bankruptcyattorney.com/practice-areas/bankruptcy-basics/identity-theft-bankruptcy> [<https://perma.cc/WB28-SQYQ>] (advertising bankruptcy as a potentially positive solution to identity theft).

293. *Bankruptcy and Identity Theft*, *supra* note 292.

294. *Id.*

bankruptcy,²⁹⁵ not to mention the expense itself of filing,²⁹⁶ victims of identity theft may move ahead with the bankruptcy filing. Victims may also succumb to a similar temptation to engage with debt consolidation or debt settlement services, both of which are often predatory and leave consumers worse off with more debt and lower credit scores.²⁹⁷

There is room for such predatory behavior because the current regime leaves low-income victims of identity theft with little recourse and thus in states of desperation.²⁹⁸ A fix is needed—one that provides quick help and a clear (non-predatory) path towards a remedy for identity theft victims.

IV. PLUTOCENTRIC REGULATION

The blinders that prevent the existing regulatory regime from protecting low-income victims of identity theft are nothing new. We see such blinders across a wide swath of regulatory regimes in the United States.²⁹⁹ This Article unpacks the problems surrounding data

295. In Chapter 7 bankruptcy cases, debtors are often required to surrender assets. See Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795, 796 (2009). Further, research shows that after bankruptcy, many families still struggle to achieve financial stability. See Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 70 (2006) (analyzing outcomes for Chapter 7 consumer bankruptcy filers one year after bankruptcy and finding many families still struggle to pay bills and are in economic situations as bad as or worse than they were in pre-bankruptcy). The majority of Chapter 13 filers do not end up achieving bankruptcy discharge, and thus, filers spend money on filing for bankruptcy but are left without debt relief. See Sara S. Greene, Parina Patel & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1032 (2017) (describing how only about one-third of Chapter 13 bankruptcy filers receive a discharge, while the other two-thirds of filers spend money on court fees and attorney fees while not receiving the benefits of a discharge) [hereinafter Green et al., *Cracking the Code*]; see also Paige M. Skiba, Dalié Jiménez, Michelle M. Miller, Pamela Foohey & Sara S. Greene, *Bankruptcy Courts Ill-Prepared for Tsunami of People Going Broke from Coronavirus Shutdown*, CONVERSATION (May 13, 2020), <https://theconversation.com/bankruptcy-courts-ill-prepared-for-tsunami-of-people-going-broke-from-coronavirus-shutdown-137571> [<https://perma.cc/5RAG-XQS8>] (describing the costs bankruptcy filers face including social stigma, lower credit, and lower future earnings).

296. Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 219, 229 (2018) (noting that attorney fees for bankruptcy average \$1,225 to \$3,442).

297. See Greene, *Bootstrap Trap*, *supra* note 37, at 275–78 (describing the predatory nature of some debt settlement and debt consolidation companies and the consequences for those who engage their services).

298. See *supra* Part III.A–E.

299. See *infra* Part III.A–E.

breach and identity theft regulation, but we can undertake this exercise for numerous regulatory regimes³⁰⁰—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. I call this plutocentric regulation. If we evaluate regulatory regimes from a plutocentric vantage point, we can better understand what changes might be warranted to protect some of the most vulnerable people in the United States.³⁰¹

At the outset, it is important to note that there are of course regulatory developments that focus almost solely on people who are low-income because the laws are designed either exclusively or almost exclusively for the poor. For example, the development of a regulatory regime surrounding the Supplemental Nutrition Assistance Program (SNAP) or the Earned Income Tax Credit (EITC) focuses on people who are low-income because it is solely people in those groups who receive SNAP and the EITC.³⁰² But it is not those regimes with which I am concerned. Instead, my point is that when regulatory regimes involve issues that affect all income groups, the unique needs of people who are low-income are often under-studied, under-analyzed, and sometimes outright disregarded. Indeed, the status quo is to consider the needs of upper middle to high-income groups without considering the unique circumstances of low-income groups.

Below, I discuss regulatory regimes in two distinct contexts—occupational licensing and bail.³⁰³ It is surprising, perhaps, to talk about

300. See *infra* Part III.A-E.

301. See *infra* Part VI (arguing for an identity theft regime that can benefit low-income victims).

302. For SNAP benefits, households must meet both the gross and net income tests, at 130% and 100% the Federal Poverty Level respectively. *SNAP Eligibility*, U.S. DEP'T AGRIC. (Oct. 1, 2019), <https://web.archive.org/web/20191001072954/https://www.fns.usda.gov/snap/recipient/eligibility>. In 2019, for a household of three the monthly net income limit was \$1,778, increasing by \$369 per month for each additional household member. *Id.* tbl.1. For the EITC, the 2019 earnings cutoff for working families fell between \$41,100 to \$56,000, depending on marital status and number of children. *Policy Basics: The Earned Income Tax Credit*, CTR. BUDGET & POL'Y PRIORITIES (Dec. 10, 2019), <https://www.cbpp.org/research/federal-tax/policy-basics-the-earned-income-tax-credit> [<https://perma.cc/N9X3-6645>]. Designating that the EITC applies exclusively to low-income individuals, the IRS has stated, "The Earned Income Tax Credit (EITC) is a tax credit for people who work but *do not earn high incomes*." Internal Revenue Serv., *EITC Eligibility Rules for 2009 Tax Year Outlined*, DAILY CITIZEN-NEWS (Oct. 18, 2014) (emphasis added), https://www.dailycitizen.news/news/local_news/eitc-eligibility-rules-for-2009-tax-year-outlined/article_6f1176a6-1a02-5c2e-a4ef-32cc21fdadb24.html [<https://perma.cc/A6E4-5W7Z>].

303. For a discussion of occupational licensing, see *supra* Part III.A. For a discussion on bail, see *supra* Part III.B.

occupational licensing and bail in this Article about identity theft. On the surface, bail, occupational licensing, and identity theft could not be more different. Indeed, I do not know of any legal scholarship that addresses all three issues in one paper. Yet, as I show below, they are connected because of how their regulatory regimes disproportionately burden low-income and marginalized groups—all examples of plutocentric regulation at work. The discussion below is meant to show how identity theft is not alone—in many disparate areas, regulatory regimes are designed without the needs or lives of low-income Americans in mind.³⁰⁴ Ultimately, then, low-income Americans are disproportionately burdened, and it is only when we begin to analyze these regimes through this plutocentric lens can we redesign such regimes in such a way that they do not perpetuate inequality.

A. OCCUPATIONAL LICENSING AND PLUTOCENTRISM

Occupational licensing laws require government permission to work and get paid in a specified field.³⁰⁵ Requirements such as general education benchmarks, benchmarks focused on education in a certain field, residency and citizenship requirements, specific score benchmarks on field specific tests, and letters from current field practitioners attesting to factors such as moral character are common.³⁰⁶ There are also usually fees associated with applying and maintaining an operating license once the initial requirements are met.³⁰⁷

Notably, the number of professions requiring occupational licenses has increased significantly since the 1950s,³⁰⁸ and today

304. In addition to this Part, see *infra* Part IV.B.

305. See Dick M. Carpenter II, Lisa Knepper, Angela C. Erickson & John K. Ross, *License to Work: A National Study of Burdens from Occupational Licensing*, INST. JUST. 4 (2012), <http://ij.org/wp-content/uploads/2015/04/licensetowork1.pdf> [<https://perma.cc/HV4D-EV6F>]; Morris M. Kleiner, *Reforming Occupational Licensing Policies*, HAMILTON PROJECT 5 (2015), https://www.brookings.edu/wp-content/uploads/2016/06/THP_KleinerDiscPaper_final.pdf [<https://perma.cc/4RXV-86QA>].

306. See Carpenter et al., *supra* note 305, at 7; MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 8 (2006). In a poll that asked workers what requirements were needed to achieve their licenses or certifications, over three-quarters said that a high school diploma was necessary, almost half said a college degree was required, and almost 90% said they needed to pass an exam. Kleiner, *supra* note 305, at 8. Several also reported that it was necessary to keep up with continuing education and internships. *Id.*

307. See Carpenter et al., *supra* note 305, at 6.

308. U.S. DEP'T TREASURY OFF. ECON. POL'Y, COUNCIL ECON. ADVISERS & U.S. DEP'T LAB., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 20 (2015) [hereinafter OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS]. At that time, only about one in twenty workers, or 4.5%, required licenses. KLEINER, *supra* note 306, at 1 (2006).

almost one in three workers, or about twenty-nine percent, are required to have an occupational license.³⁰⁹ Most (at least two-thirds) of this rise comes from an increase in the number of professions that require a license, rather than a growth in the number of positions available within already licensed professions.³¹⁰

There are various policy justifications for occupational licensing laws, most of which focus on protecting the health and safety of consumers and ensuring a high-quality product or service.³¹¹ Some of these justifications appear valid on first glance. But when state variation in employment license requirements is considered, it becomes clear that something else is going on beyond consumer protection concerns. And that something else involves low-income and marginalized groups being left out and disadvantaged.

As I have discussed in prior work, there is wide state-level variation in what occupations must be licensed and what the particular licensing requirements are, including how many days of training are required.³¹² There are also occupations that require a license in only a few states, but in those states where a license is required, the burdens are significant. For example, to become an interior designer in states that require a license, a national exam must be passed, an average of \$364 in fees must be paid, and an average of 2,200 days, or six years, must be devoted to a combination of education and apprenticeship.³¹³ Yet, a license to be an interior designer is only required in three states and Washington, DC.³¹⁴ So in forty-seven states, no regulation is needed on interior designers. But in three states and Washington, DC, there are significant regulatory barriers to becoming an interior designer.³¹⁵

So what does this mean for the theory of plutocentric regulation? First, studies have found that licensing laws can reduce economic growth and limit job opportunities, particularly for people who are

309. KLEINER, *supra* note 306.

310. See OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS, *supra* note 308, at 20.

311. See KLEINER, *supra* note 306, at 8 (“The average quality of service provided increases as less-competent providers of the service are prevented from entering the occupation.”); Kleiner, *supra* note 305, at 5.

312. See Sara S. Greene, *A Theory of Poverty: Legal Immobility*, 96 WASH. U. L. REV. 753, 777 (2019) (discussing widespread state variation in occupational licensing laws); KLEINER, *supra* note 306, at 10–11.

313. Carpenter et al., *supra* note 305, at 14.

314. *Id.* at 16.

315. *Id.*

low-income.³¹⁶ Thus, not surprisingly, the additional hurdles licensing requires may drive lower-income people “into lower-paying but more-accessible jobs.”³¹⁷ These findings are consistent with what one might expect—actual licensing fees can be expensive and beyond the reach of those living paycheck to paycheck or at a deficit. Additionally, since many occupational licenses require trade-school courses, one must have money to spend on these courses and the time to take them.³¹⁸ If one already is working full time in order to stay afloat financially, finding time to take such courses and fund them may be unrealistic.

Yet despite the disproportionate burden occupational licensing laws present for people who are low-income and the potential of these laws to prevent upward mobility for low-income workers, for the most part the discussion surrounding the rise in occupational licensing has focused not on how these laws disproportionately burden low-income groups, but instead on how the licensing of a profession may affect consumers (as a whole), versus the occupation’s practitioners.³¹⁹

Why? First and foremost, the occupational licensing debate is influenced by groups who are invested in expanding occupational licensing.³²⁰ Licensing is thought to benefit professions because it can help the profession gain greater legitimacy, cultural authority, and income.³²¹ Thus, those already in a trade or industry might support licensing because it reduces the number of competitors in their industry/trade, which in turn allows existing practitioners to charge higher prices for their services and to ensure that they maintain their business.³²² Some also argue that licensing is a net positive for society at

316. Kleiner, *supra* note 305, at 6.

317. *Id.*; see also Carpenter et al., *supra* note 305, at 25.

318. Edward Rodrigue & Richard V. Reeves, *Four Ways Occupational Licensing Damages Social Mobility*, BROOKINGS INST.: SOC. MOBILITY MEMOS (Feb. 24, 2016), <https://www.brookings.edu/blog/social-mobility-memos/2016/02/24/four-ways-occupational-licensing-damages-social-mobility> [<https://perma.cc/EL67-KNQC>].

319. See, e.g., Jacob Caldwell, Josh T. Smith & Vidalia Cornwall, *How Does Occupational Licensing Affect U.S. Consumers and Workers?*, CTR. GROWTH & OPPORTUNITY (Dec. 20, 2018), <https://www.thecgo.org/research/how-does-occupational-licensing-affect-u-s-consumers-and-workers> [<https://perma.cc/Y8CD-LNGF>].

320. See Paul Starr, *Professionalization and Public Health: Historical Legacies, Continuing Dilemmas*, 15 J. PUB. HEALTH MGMT. & PRAC. S26–S27 (2009) [hereinafter Starr, *Professionalism and Public Health*]; PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 103–04 (1982).

321. See Starr, *Professionalization and Public Health*, *supra* note 320, at S27–S28.

322. Simon Rottenberg, *The Economics of Occupational Licensing*, in ASPECTS OF LABOR ECONOMICS 3, 13–19 (Nat’l Bureau of Econ. Rsch. ed., 1962).

large because it may result in increased quality and public safety,³²³ though there is evidence to the contrary.³²⁴ Consumer groups on the other hand, have argued that licensing reduces competition and thus increases prices for consumers.³²⁵

But those groups are the main players in the debate. Concerns about disproportionately negative effects on low-income groups are at the margins, if considered at all.³²⁶ The plutocentric nature of the regulatory regime and the discourse surrounding the regime could not be clearer: two sides of the issue are considered, but neither side takes into account the unique concerns of low-income workers.³²⁷ Indeed, effects on low-income workers are generally ignored or are an afterthought.³²⁸ Instead, the focus tends to be on the relative political influence of producer/industry groups versus consumer groups.³²⁹ The bottom line ends up focusing on the fact that producer/industry groups are also thought to be more politically influential than consumer groups, and thus advocacy groups for a given occupation tend to have an easy time getting licensing legislation through, even in cases where there are consumer groups advocating against the provision.³³⁰ Similar to identity theft, this is a case where existing legal and regulatory regimes disproportionately harm the poor, yet the needs of the poor are simply not part of the conversation and are not given consideration even when reform is on the table.

323. OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS, *supra* note 308, at 22.

324. *See* Greene, *supra* note 312, at 776–77 (questioning health and safety motivations where standards vary widely between states and professions, exemplified by athletic trainers receiving over a thousand more training days for licensure in Michigan than emergency medical technicians).

325. *See id.* at 778 (noting that licensing requirements can lead to a net regressive result for lower-income consumers due to higher costs and reduced access to services).

326. *See id.* at 795 (claiming that the effects of increased occupational licensing requirements on the poor have been ignored).

327. *See id.*

328. *Id.*

329. OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS, *supra* note 308, at 22 (discussing consumers' and practitioners' ability to influence occupational licensing policy).

330. *See id.* (claiming that empirical studies show that a licensed profession's political influence is one of the most vital factors in determining a state's regulation of that occupation).

B. BAIL AND PLUTOCRACY

The regulatory regime of bail disproportionately burdens low-income and marginalized groups—particularly the recent increase in the use and average amount of bail.³³¹

First, a brief background: Between 1990 and 2009, the percent of defendants assigned bail rose from fifty-three percent to seventy-two percent, as the average bail amount increased by forty-six percent to \$61,000.00.³³² Yet the median income in the United States was \$61,937.00 in 2018.³³³ Thus, for many individuals who are low-income and detained, bail is set to be more than a year of their entire income.³³⁴

As such, what may appear to be relatively low bail can impose financial hardship for low-income defendants.³³⁵ For example, in 2010, eighty percent of New York City defendants “could not make bail at amounts less than \$500.”³³⁶ In fact, most defendants “unable to meet bail fall within the poorest third of society.”³³⁷ People in jail have a median income of \$15,109.00 prior to incarceration; for Black men, Black women, and Hispanic women, pre-incarceration median income fell below the poverty line.³³⁸

Posting bail may deplete the funds of low-income defendants and their families and friends—the same funds “needed to pay rent, buy groceries, and cover other bills.”³³⁹ Those unable to post bail face

331. See COUNCIL ECON. ADVISERS, EXEC. OFF. OF THE PRESIDENT, FINES FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 6 (2015).

332. *Id.*

333. Gloria G. Guzman, *Household Income: 2018*, U.S. CENSUS BUREAU 2 (2019), <https://www.census.gov/content/dam/Census/library/publications/2019/acs/acsbr18-01.pdf> [<https://perma.cc/59LQ-3DHZ>].

334. See Ariana K. Connelly & Nadin R. Linthorst, *The Constitutionality of Setting Bail Without Regard to Income: Securing Justice or Social Injustice?*, 10 ALA. C.R. & C.L.L. REV. 115, 142 (2019) (stating that arrestees are often left with little choice other than to remain incarcerated or plead guilty).

335. COUNCIL ECON. ADVISERS, EXEC. OFF. OF THE PRESIDENT, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 49 (2016).

336. *Id.*

337. Bernadette Rabuy & Daniel Kopf, *Detaining the Poor*, PRISON POL’Y INITIATIVE 2 (2016), <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf> [<https://perma.cc/HLF4-9K8P>].

338. *Id.*

339. Melissa Neal, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail*, JUST. POL’Y INST. 13 (2012), <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf> [<https://perma.cc/RQ36-EKYB>].

different ramifications.³⁴⁰ While in pretrial detention, they “may lose their jobs, default on vehicles, lose their homes, get behind on child support payments, lose custody of dependent children, and more.”³⁴¹ These realities can increase the pressure for defendants to accept plea bargains to avoid spending more time in jail.³⁴² Pretrial detainment also comes with hidden costs.³⁴³ Pretrial detainees experience a “41% increase in the amount of nonbail court fees owed.”³⁴⁴ Thus, the bail system “acts as a sort of regressive taxation,” forcing defendants unable to pay bail to “pay a larger portion of the court’s expenses.”³⁴⁵

And the negative consequences for low-income defendants keep on going.³⁴⁶ Pretrial incarceration also affects trial outcome.³⁴⁷ One study found that “pretrial detention leads to a 13% increase in the likelihood of being convicted.”³⁴⁸ Furthermore, “pretrial detention leads to a 42% increase in the length of the incarceration sentence.”³⁴⁹ Such situations are not uncommon. Seventy percent of those in American jails are being held pretrial.³⁵⁰ And, seventy-five percent of these detainees “remain in jail simply because the money bond was set in an amount they cannot afford to pay.”³⁵¹ Money bail becomes a “*sub rosa* form of preventive detention for the poor and nonviolent.”³⁵² It is notable that this situation continues despite the Constitution explicitly forbidding “excessive bail.”³⁵³ However, “excessive” does not necessarily mean “unaffordable.”³⁵⁴ Instead, the Supreme Court has held that “excessive” only includes bail set “‘higher than an amount reasonably calculated’ to ensure the defendant’s presence at trial.”³⁵⁵ Judges

340. *See id.*

341. *Id.*

342. *See id.*

343. Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 511 (2018).

344. *Id.*

345. *Id.* at 513.

346. *Id.* at 511.

347. *Id.*

348. *Id.*

349. *Id.*

350. Rabuy & Kopf, *supra* note 337, at 1.

351. Cynthia E. Jones, “Give Us Free”: Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919, 935 (2013).

352. *Id.*

353. U.S. CONST. amend. VIII.

354. *See* Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1110 (2019).

355. *Id.*

thus have “broad discretion” in setting bail tempered only by the state’s goals, not the defendant’s financial situation.³⁵⁶

Unlike the identity theft and occupational licensing regulatory regimes, there has been some work that has identified the disproportionate impact bail regimes have on low-income defendants and some movement for change.³⁵⁷ Indeed, recent cases have challenged existing pre-trial detention and bail-related practices.³⁵⁸ The remedies in these cases have focused on procedural changes, like “requiring trial judges to render individualized, case-specific findings” rather than relying on set standards.³⁵⁹ However, concern exists that these remedies may still enable race- and income-based disparities.³⁶⁰ The current regulatory regime surrounding bail is plutocratic. For-profit insurance companies profit from the increased use of bail,³⁶¹ and higher-income defendants are more able to find ways to meet bail requirements.³⁶² But for people who are low-income, the regulatory regime disproportionately burdens them, effecting their long-term financial trajectory.³⁶³

In all three cases—identity theft, occupational licensing, and bail—there are established law and regulations that on their face are class neutral.³⁶⁴ Yet a careful analysis of how these established rules

356. *Id.*

357. Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397, 403 (2019) (citing a Texas case that ruled a defendant’s due process rights had been violated after she received a trial that lasted less than thirty seconds and a \$500 bail charge she could not pay).

358. *See id.* at 425 (“The Fifth Circuit recently ruled in *ODonnell v. Harris County* that the cash bail system in Harris County, Texas, violated the due process clause, because it adopted a ‘flawed procedural framework’ . . . based on arbitrary and wealth-based criteria.”).

359. *Id.* at 426.

360. *Id.*

361. For a detailed description of the use of bail bonds as a way of profiting off of the current bail system at the expense of people who are low-income, see Gillian B. White, *Who Really Makes Money off of Bail Bonds?*, ATLANTIC (May 12, 2017), <https://www.theatlantic.com/business/archive/2017/05/bail-bonds/526542> [<https://perma.cc/W695-J496>].

362. *See Neal, supra* note 339, at 14 (discussing specific, high-income defendants who had great resources).

363. *See White, supra* note 361 (“In addition to losing money they’ve put down, bail bonds also often leave families paying loan installments and fees even after a case is resolved . . .”).

364. *See generally Identity Theft*, U.S. DEP’T JUST. (Nov. 16, 2020), <https://www.justice.gov/criminal-fraud/identity-theft/identity-theft-and-identity-fraud> [<https://perma.cc/L59X-7UCB>] (providing information about identity theft laws); *Occupational Licensing Legislation Database*, NAT’L CONF. STATE LEGISLATURES (Jun. 19,

work on the ground shows that they do not, in fact, function neutrally. Instead, in practice, they disproportionately disadvantage those who are low-income—they are plutocentric. These are just three examples of a much larger problem, as this analysis can be applied to numerous similar regimes.³⁶⁵ Yet in many cases, as demonstrated in this Article, policymakers have not adequately addressed plutocentrism, which in turn ultimately results in the law perpetuating poverty and inequality.³⁶⁶

V. RACE, PLUTOCENTRISM, AND INTERSECTIONALITY

When considering plutocentric regulatory regimes, it is imperative to note that any discussion of plutocentrism necessarily invokes a discussion of race. In most cases, the concept of intersectionality is at play.³⁶⁷ Intersectionality refers to the phenomenon where a person is a member of two marginalized groups and the effects of disadvantage (or discrimination) that both of these groups experience separately will be compounded for that individual.³⁶⁸ In the case of data breaches and identity theft, there are several avenues through which the harm for people who are low-income and also people of color, particularly those who are Black, might be further exacerbated.

One example of such cumulative disadvantage is the necessity, at times, to report identity theft victimization to the police to fully resolve claims with certain companies and agencies.³⁶⁹ If victims do not trust the police, they might be less likely to reach out to them.³⁷⁰ As

2020), <https://www.ncsl.org/research/labor-and-employment/occupational-licensing636476435.aspx> [<https://perma.cc/VEF4-MFPS>] (providing a database for laws on occupational licensing by state); *United States Bail Laws*, ABOUTBAIL, <https://www.aboutbail.com/pages/bail-laws> [<https://perma.cc/689L-LF5A>] (providing a database for state bail laws).

365. See, e.g., Emmanuel Martinez & Lauren Kirchner, *The Secret Bias Hidden in Mortgage-Approval Algorithms*, U.S. NEWS & WORLD REP. <https://www.usnews.com/news/us/articles/2021-08-25/the-secret-bias-hidden-in-mortgage-approval-algorithms> (last visited Oct. 13, 2021) (examining how modern-day mortgage approval programs tend to favor credit variables established, high-income Whites have access to over variables low-income and Black applicants rate well in).

366. See, e.g., *supra* Part IV.A (discussing how the occupational licensing regime has failed to account for the interests of low-income individuals).

367. See *infra* notes 368–376 and accompanying text.

368. See Crenshaw, *supra* note 41, at 152, 166–67; see also *supra* note 41 and accompanying text.

369. See *Identity Theft: A Recovery Plan*, *supra* note 275 (recommending a police report be filed when one's identity has been stolen).

370. Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2433 (2017) (discussing a survey of Philadelphia men and finding that less than 10% would call the police).

Eric Uslaner has said, “[r]ace is *the* life experience that has the biggest impact on trust.”³⁷¹ Indeed, American attitudes toward legal institutions vary sharply along racial lines.³⁷² A growing body of data reveals that confidence and trust in law enforcement and other legal institutions is far lower among Black Americans than Whites, and lowest yet among Black Americans who are low-income, or who live in high-poverty or predominantly Black neighborhoods.³⁷³ Far greater percentages of Black than White individuals view police as illegitimate and untrustworthy.³⁷⁴ This disaffection fosters tendencies towards police avoidance which underlie the widespread reluctance in Black communities to proactively seek police aid.³⁷⁵

These differences in attitudes towards law enforcement are not surprising because empirical evidence consistently demonstrates that law enforcement personnel engage in racial profiling and stereotyping³⁷⁶ and disproportionately subject Black and low-income communities to proactive policing practices, including heightened criminal surveillance, stop-and-frisks, and traffic stops.³⁷⁷ Yet, officers

371. Sandra Susan Smith, *Race and Trust*, 36 ANN. REV. SOCIO. 453, 454 (2010) (quoting ERIC M. USLANER, *THE MORAL FOUNDATIONS OF TRUST* 91 (2002)).

372. See, e.g., Bell, *Legal Estrangement*, *supra* note 38, at 2059 (“Ample empirical evidence supports the idea that African Americans . . . are more likely than [W]hites to view the police as illegitimate and untrustworthy, along several axes.”); Greene, *supra* note 195, at 1276 (“Research shows that [B]lacks are significantly less likely to trust than [W]hites”); Tracey Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651, 653 (2009) (“It is not news to say that police agencies across this country have had more difficulty in achieving high levels of trust and positive engagement with African-Americans . . . as compared to other racial groups.”).

373. Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931 (2019); Huq, *supra* note 370; Osagie K. Obasogie & Zachary Newman, *Constitutional Interpretation Without Judges: Police Violence, Excessive Force, and Remaking the Fourth Amendment*, 105 VA. L. REV. 425 (2019).

374. See Bell, *Legal Estrangement*, *supra* note 38, at 2059.

375. See Huq, *supra* note 370, at 2433 (“For instance, a recent qualitative study of young men living in three high-crime neighborhoods in Philadelphia found that less than ten percent were willing to call the police”); Fields, *supra* note 373, at 970 (“Problems of over- and under-enforcement can help explain why [W]hite individuals may utilize 911 more frequently than [B]lack individuals to report nonemergencies.”); Greene, *supra* note 195, at 1279–80 (discussing how generalized distrust among the Black community has led to an individualistic approach to solving conflicts).

376. See Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 80 (2019) (citing numerous empirical sources showing that Black men are more likely to be stopped and/or killed by police than White men).

377. See Bell, *Legal Estrangement*, *supra* note 38, at 2060–61 (highlighting scholarship that shows stop-and-frisk tactics led to higher incarceration of Black men even though there was not necessarily an increase in actual crime); Monica C. Bell, *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 LAW & SOC’Y

responding to requests for police assistance via 911 calls are significantly slower to respond when such calls come from Black and other minority neighborhoods.³⁷⁸ This dichotomous reality of police abandonment and overactivity in Black communities further shapes the perception that law enforcement merely “operates to protect the advantaged,”³⁷⁹ and explains why “feelings of distrust and fear of the police have become cultural norms” in Black communities.³⁸⁰

This “cultural norm” of distrust discourages Black Americans from proactively seeking police aid.³⁸¹ Indeed, “[w]hen police are perceived as endorsing excessive force against racial minorities, members of that minority population tend to become more reluctant to seek police aid.”³⁸² Evidence shows that officers are more likely to view Black than White individuals with suspicion simply “for exercising constitutional rights such as asking questions, refusing consent to enter or search premises, or asking officers to leave.”³⁸³ For instance, in one case in Ferguson, Missouri, an assault victim called police to report domestic violence.³⁸⁴ The police arrived after the abuser had already left, but then proceeded to arrest the *victim* for a “permit violation” after concluding the abuser lived with the woman but was not

REV. 314, 318 (2016) (“In the early and mid-twentieth century, widely accepted, disproportionate police harshness in predominantly [B]lack communities contributed to [B]lacks’ greater likelihood of being arrested, charged, and sentenced more severely for crimes than [W]hites.”); Huq, *supra* note 370, at 2414 (showing that advocates of stop-and-frisk openly recognize that minority communities will be affected disproportionately by the policies’ implementation); Meares, *supra* note 372, at 654 (“No one is surprised to learn that [B]lack men have long faced a higher arrest probability than [W]hite men.”); L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO STATE J. CRIM. L. 73, 87 (2017) (“Empirical evidence consistently demonstrates that Black individuals bear the brunt of stops and frisks and other similar investigatory proactive policing practices.”).

378. See Huq, *supra* note 370, at 2425 (“In Chicago, for example, African-American and Hispanic neighborhoods are subject to SQF [stop and frisk] on the one hand, but on the other hand experience substantially longer delays than non-minority neighborhoods when seeking police aid via 911 calls.”).

379. See Bell, *Legal Estrangement*, *supra* note 38, at 2071 (quoting TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 108–09 (2002)).

380. See Mikah K. Thompson, *A Culture of Silence: Exploring the Impact of the Historically Contentious Relationship Between African-Americans and the Police*, 85 UMKC L. REV. 697, 698 (2017).

381. See Huq, *supra* note 370, at 2433.

382. *Id.* at 2434.

383. Fields, *supra* note 373, at 970.

384. See Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1421 (2016).

listed on her “occupancy permit.”³⁸⁵ Because police suspicion in low-income communities threatens not only criminalization, but also the risk of losing life-sustaining benefits, child custody, and shelter,³⁸⁶ there exists a “powerful disincentive for [B]lack people to call the police in almost any situation except when their lives depend on it.”³⁸⁷

Accordingly, even when police avoidance imposes high costs, Black individuals will go to great lengths to avoid contact with law enforcement altogether.³⁸⁸ Because Black people are both routinely “excluded from police resources” and fear repercussions even from voluntary police interactions, they are more inclined to avoid police altogether and instead pursue “self-help” options for protection or redress.³⁸⁹ Consequently, any remedy that requires Black individuals to proactively seek law enforcement assistance is likely to be burdensome and ineffectual.

This cumulative disadvantage will also be present for remedies that involve pursuing legal cases against companies whose data breaches prompted the identity theft or cases against the identity thieves themselves. Indeed, the reaction to law enforcement aligns with general practices of legal institutional avoidance among Black individuals.³⁹⁰ My previous work found that past perceptions of, and cumulative negative experiences with, public institutions (including the criminal justice system), disinclined Black respondents from seeking formal legal assistance.³⁹¹ Just as low-income and Black individuals are more inclined to distrust and consequently avoid police, here Black, more than White, respondents distrusted legal institutions and preferred to take no action or rely on self-help rather than seek institutional assistance—even when failure to do so would increase their financial and emotional harm.³⁹² Thus, bringing legal cases against

385. *Id.*

386. See Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1503 (2020) (“Pretrial detentions then often lead to severe collateral consequences, including loss of employment, housing, or child custody.”).

387. See Fields, *supra* note 373, at 970 (quoting Vesla Mae Weaver, *Why White People Keep Calling the Cops on Black Americans*, VOX (May 29, 2018), <https://www.vox.com/first-person/2018/5/17/17362100/starbucks-racial-profiling-yale-airbnb-911>, [https://perma.cc/J6UD-L3SD]).

388. Huq, *supra* note 370, at 2434–35.

389. Bell, *Legal Estrangement*, *supra* note 38, at 2054.

390. Greene, *supra* note 195, at 1268 (discussing the generalized distrust Black Americans have for other people, especially legal institutions).

391. *Id.* at 1315.

392. *Id.*

companies who were breached is particularly unlikely to be a meaningful or likely recourse for Black low-income victims of identity theft.

The examples of intersectionality resulting in increased burden for low-income minority victims of identity theft are abundant.³⁹³ Yet another example involves bankruptcy. As discussed earlier, for all low-income victims of identity theft, filing for bankruptcy is unlikely to be a useful remedy to cure the financial ills the identity theft brought to the victim.³⁹⁴ Yet the temptation to file can be great, especially due to effective advertising by bankruptcy lawyers.³⁹⁵

For Black low-income victims of identity theft, the negative consequences of filing for bankruptcy are disproportionately high.³⁹⁶ Existing research suggests that outcomes in bankruptcy are worse for Black Americans than White Americans, even when controlling for socioeconomic status.³⁹⁷ Black Americans are more likely to be steered into filing for Chapter 13 bankruptcy, even in cases where Chapter 7 bankruptcy is more appropriate given their debt and finance profile.³⁹⁸ Yet once in Chapter 13, Black Americans are significantly less likely to get a discharge; without a discharge, a filer gets none of the benefits of being free from debt but has lost the money spent on court-filing and lawyer fees.³⁹⁹

393. Elizabeth Kneebone & Richard V. Reeves, *The Intersection of Race, Place, and Multidimensional Poverty*, BROOKINGS (Apr. 21, 2016), <https://www.brookings.edu/research/the-intersection-of-race-place-and-multidimensional-poverty> [<https://perma.cc/NYZ9-GNGB>] (discussing the increase in burdens faced by those most intersectionally disadvantaged).

394. See *supra* notes 295–296 and accompanying text.

395. See *supra* notes 291–293 and accompanying text.

396. See Jean Braucher, Dov Cohen & Robert M. Lawless, *Race Disparity in Bankruptcy Chapter Choice and the Role of Debtors' Attorneys*, 20 AM. BANKR. INST. L. REV. 611, 616 (2012) (explaining that, while accounting for various socioeconomic variables, Black Americans face worse bankruptcy outcomes than [W]hite Americans); Greene et al., *Cracking the Code*, *supra* note 295 at 1086 (providing an in-depth empirical analysis and showing that “a [B]lack debtor is 17% less likely to receive a discharge in chapter 13 than a non-[B]lack person”).

397. See Braucher et al., *supra* note 396.

398. *Id.* at 615 (showing that 54.7% of Black households file for Chapter 13 bankruptcy over Chapter 7 while all other race households file for Chapter 13 bankruptcy less than 30% of the time); A. Mechele Dickerson, *Racial Steering in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 623, 625–26 (2012) (“[B]lack couples in Study 2 were placed in chapter 13 more frequently (47%) than [W]hite couples (36%) or non-raced couples (32%).”).

399. See Greene et al., *Cracking the Code* *supra* note 295, at 1060–62 (“[O]ur data show that [B]lacks also are less likely to get a discharge in chapter 13 than filers with no [B]lack adults in the household.”).

Ultimately, as these examples show, any consideration of plutocratic laws and regulations will also have to consider the White centric nature of these laws and regulations. When designing equitycentric regimes, these racial disparities must be taken into account.

VI. EQUITYCENTRIC IDENTITY THEFT REGIME

This Part explores how an equitycentric regulatory regime might be constructed. The first step toward designing such a regime is to evaluate existing regimes to determine if they are (or might be) plutocratic, similar to the analysis of identity theft laws in this Article.⁴⁰⁰ Once potential areas of concern are noted, what is often missing from discourse surrounding change are proposals that come from the ground up—that consider the voices of the very people the proposals are trying to help. Policymakers often rely on big data economic analyses,⁴⁰¹ which are of course are helpful, but they do not fully allow policymakers to consider and understand the needs, values, perceptions, and experiences of those who will be affected by the regime shift. In this Part, I amplify the voices of low-income victims (and potential victims) of identity theft in order to consider what an equitycentric approach might look like. I first discuss existing proposals for innovation and then propose a comprehensive plan aimed at aiding low-income identity theft victims.

A. EQUITYCENTRIC IDENTITY THEFT REGULATION—EXISTING PROGRAMS AND PROPOSALS

There are several existing proposals aimed at reforming the regulatory response to data breaches and the resulting harm of identity theft.⁴⁰² One line of reform proposals focuses on cracking down on criminals who engage in breaching data and stealing identities.⁴⁰³ If

400. See *supra* Part III (criticizing the current identity theft regime).

401. *New Series Published to Support the Use of Qualitative Research in Decision-Making*, WORLD HEALTH ORG. (Jan. 25, 2018), <https://www.who.int/reproductivehealth/topics/monitoring/qualitative-research-decision-making/en> [<https://perma.cc/8V3Y-87TV>] (expressing the need to take qualitative data into account when making decisions).

402. See *infra* notes 403–406 and accompanying text.

403. For example, the Attorney General has recently directed the Department of Justice to put more manpower into cracking down on cybercriminals taking advantage of the COVID-19 pandemic to engage in identity theft (among other fraud and scams). Haley Samsel, *Attorney General Directs Department of Justice to Crack Down on Coronavirus Scammers, Cyber Criminals*, SEC. TODAY (Mar. 18, 2020), <https://securitytoday.com/articles/2020/03/18/attorney-general-directs-department-of-justice-to-crack-down-on-coronavirus-scammers.aspx> [<https://perma.cc/JYU2->

we better track these criminals and/or have stricter consequences when they are caught, the incidence of such crimes will likely go down. However, even with measures to try to stop attackers, “a government cannot reach every attacker who targets its citizens.”⁴⁰⁴ And if thieves know they are being targeted by law enforcement, they may be even more likely to target low-income victims because such victims tend to be less likely to report crimes, as discussed in Part I.B.⁴⁰⁵

Other proposed measures focus on requiring companies that are generally targeted in cyberattacks, which often lead to identity theft, to enhance preventative measures that may reduce the number of identity theft victims.⁴⁰⁶ These measures often fall into three separate categories: (1) Ex-ante safety regulation/preemptive defense controls; (2) Ex-post liability; and (3) Information reporting or disclosure.⁴⁰⁷ Ex-ante safety regulation/preemptive defense controls include things like encrypting sensitive data, constructing a firewall, and requiring password length and complexity.⁴⁰⁸ Ex-post liability measures require the defender of data to make some sort of effort to avoid specific types of damages, including data theft, however, the specific measures required are not usually articulated.⁴⁰⁹ Reporting and disclosure requirements focus on what types of security-related information defenders have to reveal, and to whom.⁴¹⁰ All three categories of measures may help reduce the number of victims of identity theft—but they certainly won’t stop it from happening at all. There will continue to be victims of identity theft, including low-income victims, and these proposals will do little to increase the resources and remedies available to these victims.

Another interesting idea that has been floated to help identity theft victims is data breach insurance.⁴¹¹ This idea is still in its early stages, in part, because insurance companies are seeking to learn

YFJJ]; WOLFF, *supra* note 11, at 244–48 (summarizing several different cybersecurity policies that are aimed at attackers).

404. WOLFF, *supra* note 11, at 246.

405. See Porche, *supra* note 14 (showing data breach concern is often concentrated on the wealthy).

406. WOLFF, *supra* note 11, at 264–65 (explaining that a series of roundtables in 2012 and 2013 led by the Department of Homeland Security had a major theme of requiring security incident data repositories).

407. *Id.* at 249–59 (describing these three types of requirements on defenders and their relative advantages and disadvantages).

408. *Id.* at 249.

409. *Id.*

410. *Id.*

411. *Id.* at 264–65.

more about the type of risks they should insure, how vulnerable potential company clients are, and what type of safeguards they should require companies to have in place in order to qualify for insurance.⁴¹² Theoretically, if companies were covered by data breach insurance, the protections on the other end of a breach provided to consumers would be more straightforward and easier to obtain because the insurance company would dole them out. The idea is that there would be a procedure in place. However, insurance companies are incentivized to provide minimal reimbursements, and thus they often create roadblocks to successful claims.⁴¹³ Looking at the problems low-income clients suffer at the hands of the auto insurance industry and the health care insurance industry may be instructive.⁴¹⁴ Health and auto insurance companies often deny valid claims, delay claim payments, and increase premium payments for those with low credit scores.⁴¹⁵

Identity theft insurance for consumers is also a potentially innovative remedy for identity theft victims.⁴¹⁶ Most major identity theft protection services offer this type of insurance, which covers out-of-pocket expenses that are associated with reclaiming one's identity.⁴¹⁷ These expenses typically include things like postage, photocopying, notary costs, and the like.⁴¹⁸ However, for the most part, current products on the market do not cover any stolen money or financial loss resulting from the theft.⁴¹⁹ These insurance programs of course include deductibles and exclusions.⁴²⁰ There is great potential in this idea, but the current limited nature of the coverage make them ineffective as a means of protecting low-income identity theft victims. A variation on

412. *Id.* at 249–65 (detailing the measures policy makers have and can impose on targeted data holders).

413. See *Tricks of the Trade: How Insurance Companies Deny, Delay, Confuse, and Refuse*, AM. ASS'N JUST. 2 (2008), https://abelllaw.typepad.com/abell_law_blog/files/tricks_of_the_trade_how_insurance_companies_deny_delay_confuse_refuse.pdf [<https://perma.cc/FE9E-235M>] (reporting on insurance company practices of denying valid claims, delaying claim payments, and increasing premium price for consumers with low credit scores).

414. See *id.*

415. *Id.*

416. *What to Know About Identity Theft*, FED. TRADE COMM'N (March 2021), <https://www.consumer.ftc.gov/articles/what-know-about-identity-theft> [<https://perma.cc/JS7U-HP9C>].

417. *Id.*

418. *Id.*

419. *Id.* (“Identity theft insurance generally won’t reimburse you for money stolen or financial loss resulting from the theft.”).

420. See *id.*

this model that includes a public/private partnership might be warranted, however.

B. EQUITYCENTRIC IDENTITY THEFT REGULATION: A PROPOSAL

In order to develop a program that is equitycentric, we need to consider the experiences of the respondents in this study.⁴²¹ Two significant needs emerge when we do. First, low-income victims of identity theft need fast recourse. They do not have the savings to pay debts, fees, and other penalties from charges they did not initiate. Without such relief, identity theft can quickly cascade into true financial ruin including eviction, foreclosure, job loss, and hunger. It can take years to recover from such an experience, if recovery is even possible at all. Second, low-income victims of identity theft need an advocate to help them navigate the complex system of rules and procedures created by a mish-mosh of state and federal laws that allows them a road, albeit a long road, to recovery. Navigating the existing system is complex for *all* victims of identity theft, which is why those with resources may hire a lawyer or other advocate to help them. Indeed, lawyers advertising themselves as identity theft specialists are ubiquitous.⁴²² So, a new equitycentric system would either streamline the process for recovery or provide victims with advocates, or both.

In order to streamline the process and responsibility, I propose a new, federal, Data Privacy and Identity Recovery Agency (DPIRA). This agency would be in-part modeled on the new state agency that was created in California, after the passage of Proposition 24 in 2020.⁴²³ As part of the sweeping changes that will be enacted based on Proposition 24, the Consumer Personal Information Law and Agency Initiative, a new state agency called the California Privacy Protection Agency was created and charged with enforcing California's data privacy laws.⁴²⁴ The agency, the first state agency in the country devoted fully to privacy issues, has a dedicated funding stream in order to have the resources necessary to enforce those laws.⁴²⁵

421. To analyze the various interviews, see *supra* Part II.

422. See, e.g., *Find an Identity Theft Lawyer*, AVVO, <https://www.avvo.com/identity-theft-lawyer.html> [<https://perma.cc/2C7G-2U4F>]; *Top Identity Theft Lawyers Near You*, LAWINFO, <https://attorneys.lawinfo.com/identity-theft> [<https://perma.cc/HKY4-B4VK>].

423. Dustin Gardiner & Shwanika Narayan, *California's Proposition 24 on Consumer Privacy Passes*, S.F. CHRON. (Nov. 6, 2020), <https://www.sfchronicle.com/politics/article/California-s-Proposition-24-which-would-expand-15699663.php> [<https://perma.cc/NP6M-QXES>].

424. *Id.*

425. *Id.*

The federal agency I propose will have a more expansive mandate, however, to address not just data security and privacy but also to address the back end of the problem—identity theft victimization. DPIRA would enforce both federal privacy law aimed at companies and other agencies, and laws related to identity theft, including a more robust remedy regime for victims. The agency would have field offices in all fifty states, and the field offices would be primarily tasked with the identity theft protection work, while the federal agency office in Washington, DC would focus primarily on enforcing data privacy laws.

The state offices would build programs modeled in part on those established through a now defunct grant program that the U.S. Department of Justice's Office of Victims of Crime awarded.⁴²⁶ The program awarded grants to organizations that were charged with expanding "existing services to victims [of identity theft] and strengthen law enforcement's response across the Nation."⁴²⁷ The Director of the grant program noted that its creation was based on the problem that, "Although identity theft and financial fraud are on the rise, victims are not yet in the mainstream of VOCA [Victims of Crime Act]-funded victim assistance programs, nor have they traditionally been a priority for law enforcement, whose cooperation with victims reporting the crime is essential before legal remedies can be put into action."⁴²⁸ While not all of the grants awarded were given to organizations that specifically serve low-income groups, the design of many of the grantee programs focused on the harms that are particularly acute for low-income victims.⁴²⁹

First, like Department of Justice grant funded organizations, the state DPIRA field offices would establish victim service providers, something not currently available to identity theft victims. As the grant project stated, "Until a network of law enforcement agencies, government agencies, and businesses come together to establish the processes necessary to consistently mitigate more complex cases, it will be necessary for well-trained victim advocates to be available for victims."⁴³⁰ The advocates, the report notes, "must be knowledgeable in all areas of identity theft and have significant resources made

426. *Id.*

427. *See Expanding Services, supra* note 284.

428. *Id.*

429. *Id.* One of the grantees was a Legal Services Organization, which does indeed focus solely on serving low-income clients. *Id.*

430. *Id.*

available to them in order to correctly defuse these complex cases . . . [and] follow up with victims over extended periods of time.”⁴³¹

The DPIRA victim service providers would be case workers who were charged with advocating for their clients to regain their identity as quickly as possible. They would be trained in navigating the complex system of laws and regulations aimed at helping people reestablish their identities and remove false information. They would also be authorized to provide emergency funding and other resources to victims in the meantime. The idea is that the unit would provide an ample supply of trained and specialized advocates available to help victims navigate reclaiming their identities by erasing fraudulent debts, criminal records, and public benefit accounts. Further, each unit would include several specialized attorneys who would be on hand to assist with legal matters that may arise in each case.⁴³²

The victim service providers would be open to victims at all income levels. But the victim funds that the advocates in these units would have access to would be open only to victims in need (defined as those living at 200 percent of the poverty line, but subject to change after analysis and based on funds available). These funds would allow those in need to quickly receive money to pay immediate expenses associated with their victimization. The process for receiving such funds would be a simple and short intake with fast and streamlined confirmation processes. Victims would then be able to use this money to ensure that they are not subject to a cascade of negative financial events stemming from the identity theft.

One concern about such a program might be that people could pretend to be victims in order to access the emergency money—essentially that people would commit fraud in order to access the victim funds. Fraud is often brought up as a concern about a host of public welfare programs, yet existing research shows that across a wide range of welfare programs rates of fraud are very low.⁴³³ Often,

431. *Id.*

432. Many legal aid organizations have units that provide advice for fraud victims, including victims of identity theft, but the vast majority of the help victims receive is direction to self-help materials. Deborah L. Rhode, Kevin Eaton & Anna Porto, *Access to Justice Through Limited Legal Assistance*, 16 NW. J. HUM. RTS. 1, 2, 5–6 (2018) (highlighting that court-based self-help centers advise over 3.7 million people a year).

433. See, e.g., Eric Schnurer, *Just How Wrong Is Conventional Wisdom About Government Fraud?*, ATLANTIC (Aug. 15, 2013), <https://www.theatlantic.com/politics/archive/2013/08/just-how-wrong-is-conventional-wisdom-about-government-fraud/278690> [<https://perma.cc/46S4-ANWL>] (discussing research that shows that fraud rates for a variety of programs, from SNAP (food stamps) to Medicare, are very low, and when there is fraud, it is usually by managers rather than recipients); Sara S.

concerns about fraud are raised as a basis for not providing the poor with help that they need.⁴³⁴ In the case of DPIRA victim funds, advocates would be trained to identify markers of identity theft, and a short intake procedure would be established to help prevent fraud. However, the red tape for receiving funds from this program would need to be minimal in order for it to serve its intended purpose—getting people money fast in order to avoid a cascade of negative financial events stemming from their victimization.

State DPIRA offices would also have a unit devoted to community education, both about steps people can take before they are victims to protect themselves and about the victim services DPIRA offers. This outreach program would focus particularly on reaching communities of color and low-income communities. The DPIRA units would partner with social workers, churches and other religious organizations, schools, and other community organizations to disperse information about the availability of help and to make sure the messaging is clear that DPIRA offices are there to serve and aid victims, not scrutinize them. Mechanisms would be put into place to ensure a client-centric approach.

Funding DPIRA might be difficult. One potential solution to this concern is to create a fund (that would be used in part to pay for DPIRA) that businesses who have been subject to data breaches contribute to as part of data privacy judgements against them. The criteria for the amount of penalty contribution might depend on a combination of the size of the business or agency breached, how egregious the breach was regarding security measures or lack thereof, and the magnitude of the breach.

Creating new agencies is not only expensive but can be administratively difficult. However, the existing data and privacy issues that our country faces will continue to expand. They are already so complex and multi-faceted that I believe they warrant a new agency.

Greene, *The Failed Reform, Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers*, 89 AM. BANKR. L.J. 241, 242–43 (2015) (discussing long-standing concerns that consumers are abusing the consumer bankruptcy system and laws enacted to curb such abuse, despite empirical research showing there is little abuse of the system). For an extensive discussion of the history of (false) claims of fraud being used to target welfare programs and their recipients, see Greene, *Bootstrap Trap*, *supra* note 37.

434. See Greene, *supra* note 433, at 247–48 (2017) (“Public commentary on this issue [of children being born outside of marriage] largely blamed welfare for this upward trend, reasoning that mothers were choosing to receive welfare rather than choosing to have a husband. Even though no mainstream social science study supported this conclusion, welfare critics capitalized on this suggestion and sold it to the public.”).

Indeed, as this Article shows, no existing agency has taken full control of privacy and data issues in part because these matters do not clearly fall within the powers of existing agencies. However, if the political or administrative barriers to creating a new agency are too great, these same ideas could be implemented through the creation of a new bureau in either the CFPB or the FTC. In this case, the bureau might limit itself to issues of identity theft, rather than take on privacy and regulation issues more generally, such as the regulation of privacy laws related to consumer data. If the bureau implemented the measures I suggest, such an approach would still achieve many of the necessary goals to help low-income victims of identity theft avoid financial ruin. Indeed, there would be some benefit to DPIRA simply being a new unit of the CFPB since the CFPB already has supervision authority over many of the companies involved (credit bureaus, banks, mortgage servicers, etc.).

CONCLUSION

In a society that increasingly relies on technological advances to store data,⁴³⁵ make payments,⁴³⁶ and even track individuals to help curb health crises such as the COVID-19 pandemic,⁴³⁷ turning over data to be stored is increasingly a necessity for financial citizenship in the United States. Cybercriminals know this, and they will continue to work to outsmart even the most sophisticated systems that attempt to block them. Thus, while attempts to stop identity thieves before they can strike are important, we also need tools to help those who

435. See *Digital Data Storage Outlook 2020*, SPECTRA 30 (2020), https://spectralogic.com/wp-content/uploads/digital_data_storage_outlook_2020.pdf [<https://perma.cc/XS5Y-PKPC>]; Joy Tan, *Cloud Computing Is Crucial to the Future of Our Societies—Here's Why*, FORBES (Feb. 25, 2018), <https://www.forbes.com/sites/joytan/2018/02/25/cloud-computing-is-the-foundation-of-tomorrows-intelligent-world> [<https://perma.cc/3JNX-MANR>] (emphasizing four ways cloud storage will affect lives in the future).

436. See Morton Bech & Jenny Hancock, *Innovations in Payments*, BIS Q. REV. 21, 21, 34 (2020); Matt High, *How Is Innovation and Technology Changing Payments?*, FINTECH MAG. (June 5, 2020), <https://web.archive.org/web/20210128033559/https://www.fintechmagazine.com/venture-capital/how-innovation-and-technology-changing-payments>.

437. See Patrick Howell O'Neill, Tate Ryan-Mosley & Bobbie Johnson, *A Flood of Coronavirus Apps Are Tracking Us. Now It's Time to Keep Track of Them.*, MIT TECH. REV. (May 7, 2020), <https://www.technologyreview.com/2020/05/07/1000961/launching-mittr-covid-tracing-tracker> [<https://perma.cc/TD6X-EQEQ>]; Joanna Stern, *Curbing Coronavirus with a Contact-Tracing App? It's Not So Simple.*, WALL ST. J. (May 9, 2020), <https://www.wsj.com/articles/curbing-coronavirus-with-a-contact-tracing-app-its-not-so-simple-11588996809?st=t6ntrlvfm69cz2s> [<https://perma.cc/C5DF-8H3X>].

will inevitably be victims of identity theft. At present, despite the increasing risk of victimization, there has been little acknowledgement of, or effort to curb, the profound financial crises that awaits many low-income victims of identity theft. Victims are left in a confusing system with few remedies that actually help them, and a mind-boggling number of steps and outreaches necessary to begin to recover their financial health. It is usually too little, too late.

While there is a robust national conversation about cybersecurity, data breaches, and identity theft, for the most part we are leaving low-income groups out of the conversation. The plutocratic nature of the existing regime, and even the laws and policies that are being introduced and discussed as potential “improvements,” is not acknowledged.⁴³⁸ This blind eye towards the needs of low-income victims, and the even more disproportionate impact on people who are both low-income and Black, happens far too often. More needs to be done to identify these systemic failures and improve upon them.

Identity theft is a good place to start. But plutocracy is not limited to identity theft. As reformers begin to tackle the inequalities inherent in the structures of our society, it is vital they analyze existing legal and regulatory regimes in a wide range of areas through a lens of plutocracy. All too often the voices of people who are disadvantaged are either ignored or not even surveyed, so laws that appear neutral are assumed to be just that. But by understanding the experiences of the disadvantaged, we can better implement needed changes to reduce inequality and implement more just regulatory and legal regimes.

438. See *supra* Part III.