The U.S. Supreme Court’s 2002–2003 Decisions on Federal Court Access
Imagine that you lost your housing and are sleeping in the park. In the middle of the night a police officer wakes you up and tells you that you are under arrest for violating an anti-camping ordinance. You are taken to the county jail, where all your belongings are confiscated. When you are released a few days later, you ask to have your driver’s license returned to you. An officer at the jail tells you that he does not have it. Tough luck.

You head to the local homeless shelter to spend the night. The intake worker tells you that you cannot stay there without some form of photo identification. Your problems compound. You find that without photo identification you cannot get a job, you are told that you may not receive food stamps or Supplemental Security Income (SSI) benefits, and you cannot apply for temporary housing. When you go to your local motor vehicles department to replace your identification card, you find that to obtain a photo identification card you need a birth certificate. To obtain a birth certificate, you need a photo identification. Even if you had your birth certificate, you lack the money to pay for the identification card.

This situation is far too common. Low-income people who do not have photo identification typically encounter at least one of these obstacles. Lacking photo identification has always been a barrier to accessing services, but the security demand for photo identification has increased. The National Law Center on Homelessness and Poverty last year began receiving reports (from service providers, advocates, and homeless persons) of problems from lack of photo identification. In the wake of the terrorist attacks of September 11, 2001, government agencies and law enforcement officers were requiring photo identification to tighten security even when requiring photo identification was unnecessary or unlawful. At the same time
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that accessing services without photo identification has become more difficult, obtaining photo identification has become more onerous, if not impossible, for many low-income people.

Our countrywide survey last February to identify the nature and scope of this problem indicated that people without photo identification encountered myriad obstacles, many of which violated state and federal laws.1

◼ An advocate in Massachusetts wrote that clients without photo identification could not get health insurance, food, supplemental medications, Women, Infants and Children program benefits, and SSI benefits or see doctors.

◼ A shelter employee in Minnesota reported that she had clients whose identification cards were not returned when the clients were released from jail. To get new identification cards, the clients had to request new birth certificates, adding some eight to ten weeks to the six-to-eight-week wait time for the identification card.

◼ An advocate from Illinois said that homeless people often could not keep identification cards once they got them because they had no safe, consistent place to keep them and because homeless people often were robbed.

◼ A caseworker in Minnesota reported that people without photo identification could not get jobs, apartments, sometimes shelter, and even basic services such as food, clothing, and shoes.

Lacking photo identification is not a mere inconvenience; it is a barrier to self-sufficiency. The systems and resources that help move people out of poverty—employers, social service organizations, and government agencies—become inaccessible. Using specific laws, strategies, and models for systemwide solutions, advocates can help people who lack photo identification access services, vindicate their rights, and obtain photo identification.

We focus here on the three most prevalent problems from the survey responses: access to SSI, access to food stamps, and complications with law enforcement.

Supplemental Security Income

Primarily because the Social Security Administration’s internal rules for processing claims conflict with its security guidelines, current policy impedes receiving SSI without photo identification.2

Barriers to Applying for SSI. Identity must be verified in an application for SSI.3 Photo identification is not required.4 A claims representative may use an applicant’s name or social security number to pull up the applicant’s record in the Social Security Administration’s computer system.5

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1The findings of the National Law Center on Homelessness and Poverty’s survey will be available in winter 2004 at www.nlchp.org.

2We focus on identification verification procedures under the Supplemental Security Income (SSI) program. Verification procedures for the Social Security Disability Insurance program are similar. See www.ssa.gov about the eligibility requirements for both programs.

3SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM, SI 00601.062 (2003).

4Id.

5Any person with a social security number should have a record in the Social Security Administration’s computer system.
representative locates the computer record, the representative simply must verify identity to the representative’s satisfaction. If the applicant does not have an identification document, the representative may ask the applicant open-ended questions such as “what is your mother’s maiden name” or “where were you born?” If the applicant’s answers match the data in the administration’s records, the claims representative considers identity sufficiently verified.6

However, the Social Security Administration’s current security guidelines prevent many low-income people from using this procedure. The General Services Administration has a system of security alert levels, designed to guide federal agencies in the development of their internal security policies.7 The levels range from 1 (lowest threat level) to 4 (highest).8 The Social Security Administration adopted the General Services Administration levels, but, like other federal agencies, it may modify security policies and procedures.

Before September 11, 2001, Social Security Administration field offices operated at the lowest level of security. Visitors at stand-alone field offices were not required to present proof of identity.9 However, the events of September 11 resulted in the issuance of a level-3 security alert for all Social Security Administration facilities.10 This requires all visitors at Social Security Administration offices to “present a state license or other comparable valid identification.”11 Our survey found that this security policy was being enforced in field offices around the country and that people eligible for SSI but without identification could not enter a field office to apply.12

The security of federal employees and federal property is a good government priority. However, an identification check is not necessary if people are screened for hazardous items. An internal security policy should not trump the right of individual clients to apply for benefits. Advocates must make this point to the staff at Social Security Administration field offices because clients have no administrative or judicial appeal rights until an application is filed.

To ensure that field offices accept SSI applications from people who cannot show proof of identity, we recommend that advocates

- alert a supervisor at the Social Security Administration office to the problem (the supervisor may not be aware of the problem since staff never see those people who are turned away at the entrance);
- ask the field office to accept as sufficient proof of identity a letter from a service provider stating the name of the applicant and the fact that the service provider is working with the applicant;

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6SOC. SEC. ADMIN., supra note 3. For further discussion of how to document identity in SSI cases, see Jeremy Rosen et al., Food Stamp and SSI Benefits: Removing Access Barriers for Homeless People, 34 CLEARINGHOUSE REV. 679–96 (Mar.–Apr. 2001).

7Memorandum from Andria Childs, Associate Commissioner for Facilities Management, Social Security Administration, to All Assistant Regional Commissioners for Management and Operations Support 1 (Sept. 18, 2001) (on file with Sara Simon Tompkins) [hereinafter Childs Memorandum].

8Id.

9Id.


11Childs Memorandum, supra note 7, at 4, 6.

12The National Law Center on Homelessness and Poverty (1411 K St. NW, Suite 1400, Washington, DC 20005; 202.638.2535) is examining legal and policy strategies to change this security policy. For additional information, contact our office.
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- ask (because a letter can take time to prepare) the Social Security Administration to accept a recently dated medical record showing the names of the applicant and the medical provider (this strategy has worked at field offices where it has been proposed);13

- contact (if the preceding is unsuccessful) the Social Security Administration homelessness work group and National Law Center on Homelessness and Poverty14 (the work group has convinced several field offices to adopt this policy); and

- work with the local field office on having SSI applications accepted outside of the Social Security Administration office (e.g., administration staff could come periodically to a shelter or other service provider to take applications or train service provider staff to take applications; by common practice field offices are willing to make such arrangements; service providers must take the initiative).

Barriers to Attending an Administrative Hearing. Claimants without identification typically are unable to attend their own hearings. Social Security Administration hearings are held at an Office of Hearings and Appeals. As at field offices, hearing offices are subject to General Services Administration level-3 security alert, which requires verification of identification.15

Unlike most administration field offices, hearing offices usually are located inside federal buildings, where security is handled by the Federal Protective Service, a division of the U.S. Department of Homeland Security.16

Because hearing office staff have no control over Federal Protective Service operations, advocates face challenges in having the protective service accommodate persons without valid photo identification. However, Social Security Administration regulations provide for a change in hearing location.

If a client’s hearing is scheduled in a federal building or other location that the client may not enter, the advocate can object to the hearing location and ask that it be changed.17 The objection need not be in writing, but a written objection best preserves a record of the request.18 The objection letter must justify the change of location and recommend an alternative location.19

If the advocate must make an objection and there is no time to write a letter, the advocate can call the judge or the judge’s assistant or, if this is not successful, can appear at the scheduled hearing without the client and request that the hearing be rescheduled at a different location.

The administrative law judge is not required to grant a change of location but will if the judge finds good cause.20 In finding good cause, the judge must consider such factors as “[t]he reason for requesting the change, the facts supporting it, and the impact of the proposed change on the efficient administration of the hearing process.”21 The advocate must convince the judge that the claimant’s testimony is indispensable and that the claimant cannot attend

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13This policy has been effective at field offices in Baltimore due to an agreement between the Social Security Administration and the Baltimore Health Care for the Homeless Program. For more information, contact the National Law Center on Homelessness and Poverty, supra note 12.

14Contact the Social Security Administration homelessness work group at homelessness@ssa.gov.

15See generally Childs Memorandum, supra note 7; Memorandum No. AM-02034, supra note 10.

16For more information about the role of the Federal Protective Service, see www.dhs.gov/dhspublic/display?theme=72.


18Id. § 416.1436(b).

19Id.

20Id.

21Id. § 416.1436(d).
the hearing as scheduled. Even if the judge denies the request, the judge may be able to arrange with the Federal Protective Service for the claimant to enter the Office of Hearings and Appeals.

**Food Stamps**

The National Law Center on Homelessness and Poverty survey revealed that food stamp eligibility workers routinely tell applicants that they need photo identification to apply for food stamps. Many service providers also mistakenly believe that there is such a requirement.

Photo identification is not necessary to apply for or receive food stamps. Denying someone food stamps solely for lack of photo identification is unlawful. The food stamp regulations are very clear on this point. The regulations provide: “Identity may be verified through readily available documentary evidence, or if this is unavailable, through a collateral contact. . . . Any documents which reasonably establish the applicant’s identity must be accepted, and no requirement for a specific document, such as a birth certificate, may be imposed.”

A food stamp applicant may verify identity through documentary evidence (e.g., voter registration card, wage stub, birth certificate, and health benefits identification card) or through a collateral contact (“an oral confirmation of a household’s circumstances by a person outside the household”). A collateral contact may be in person or by telephone and may be someone from a social service agency, an employer, a landlord, or a neighbor. The contact vouches for the identity of the applicant.

Advocates can help clients without photo identification receive food stamps in several ways:

- Inform clients and local service providers that food stamp applicants may, and indeed have the right to, apply for food stamps without photo identification—in particular, that if applicants lack documentary evidence, they may use a collateral contact;
- Challenge food stamp denials based solely on lack of photo identification. Generally the client’s eligibility worker or the worker’s supervisor rectifies the problem if an advocate brings the wrongful denial to the worker or supervisor’s attention. If this fails, the advocate must seek a fair hearing.
- Look for officewide, citywide, or countywide problems. Often the problem is not an isolated eligibility worker. Track the number of clients who are told that they need photo identification to apply. Look for patterns. If problems appear to be recurring, meet with food stamp administrators in the relevant area. Bring to the meeting documented cases of food stamp denials for lack of photo identification and the relevant state and federal regulations. Be prepared to make concrete requests, such as better staff training on identity verification requirements or issuance of a policy memorandum on photo identification.
- Assist clients in obtaining identification, which helps them access many other resources as well. (See “Obtaining Photo Identification” below.)

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23id. § 273.2(f)(1)(vii), (4)(i).

24Food stamp program staff who answer the phones or screen applicants also tell applicants that they need photo identification. E.g., the National Law Center on Homelessness and Poverty asked every local food stamp office in two counties in Maryland whether applicants needed photo identification. Each said that a photo identification was, without exception, absolutely mandatory. The center worked with those counties to resolve the problem.
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Problems with Law Enforcement

Many respondents to the survey indicated that homeless people in their localities were frequently arrested for not having a form of identification. In some cases law enforcement officials destroyed or lost the identification cards of those arrested. Other low-income people without identification encounter similar difficulties. Even post–September 11, people have constitutional protection from harassment relating to identification.

Failure to Present Identification.

Whether a person may be arrested for failing to present identification depends on such factors as whether police officers have reasonable suspicion of criminal activity, which local statutes and case law are applicable, and whether a person intentionally withholds identification or simply does not possess it.

The Fourth Amendment protects a person’s right to disregard police questioning when approached by an officer during a consensual encounter. Without reasonable suspicion of criminal activity, a police officer may approach a person for questioning; however, that person is free to “disregard the police and go about his business.”

A police officer may not arrest a person for failing to present identification on request if the officer does not have reasonable suspicion that the person is involved in criminal activity. Such an arrest would violate the Fourth Amendment.

Constitutional rights shift when an officer has reasonable suspicion. The U.S. Supreme Court has declined to determine whether an arrest for failure to present identification violates a person’s Fourth Amendment rights where an officer has reasonable suspicion to approach a person for investigation. However, several federal appeals courts have dealt with this issue.

In the Sixth and Tenth Circuits, plaintiffs arrested for refusing to present identification were unsuccessful in challenging state statutes that authorized their arrests or police actions when the officers had reasonable suspicion to approach plaintiffs for investigation. The courts found that a right to refuse to present identification during a lawful investigation based on reasonable suspicion was not clearly established law.

A police officer does not have qualified immunity from liability in a suit if the court finds that the officer violated a person’s constitutional right and that the violation was clearly established law at the time of the violation. If plaintiffs are unable to overcome qualified immunity when suing a police officer, they have no recourse for arrests for refusal to present identification. State statutes or local ordinances that prohibit the obstruction of the lawful execution of a

25Florida v. Bostick, 501 U.S. 429, 434 (1991). A consensual encounter occurs when a police officer without having reasonable suspicion approaches a person for questioning. The officer may ask the person to consent to police questioning. However, the person is not required to consent to the inquiry or to answer any questions.

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28Id. at 53.

29Reasonable suspicion has come to mean “specific and articulable” facts to back up a suspicion that someone is involved in criminal activity. Terry v. Ohio, 392 U.S. 1, 21 (1968) (Clearinghouse No. 972). E.g., in Brown v. Texas, the U.S. Supreme Court found that the officers’ mere observation of the appellant in an alley in a neighborhood frequented by drug users was not basis enough to suspect the appellant of engaging in criminal activity. Brown, 443 U.S. at 362, 363.


31See Risbridger v. Connelly, 275 F.3d 565 (6th Cir. 2002); Oliver v. Woods, 209 F.3d 1179 (10th Cir. 2000). See also Tom v. Voida, 963 F.2d 952 (7th Cir. 1992); Gainor v. Rogers, 973 F.2d 1379 (8th Cir. 1992).

32Risbridger, 275 F.3d at 572; Gainor, 973 F.2d at 1386 n.10; Oliver, 209 F.3d at 1190; Tom, 963 F.2d at 959 n.8.

legal process by a public officer may authorize arrest for refusal to present identification. The same is true of statutes that prohibit concealing one’s identity if one is lawfully detained by an officer.

In contrast, the Ninth Circuit ruled that an arrest for refusing to present identification on less than probable cause violated the Fourth Amendment. In Carey v. Nevada Gaming Control Board the Ninth Circuit found unconstitutional a pair of Nevada statutes requiring persons stopped for suspicion of criminal behavior to present identification to the extent that the statutes were used to arrest people for refusing to identify themselves. A New York court found that refusing to present identification did not amount to obstructing the performance of a police officer’s duties. In jurisdictions such as these, failing to present identification may not serve as the sole justification for arrest.

Current case law does not offer much guidance in distinguishing between a refusal to present identification and the inability to do so. Whether one may be arrested for failing to have identification depends on the law in the jurisdiction.

Many of the relevant statutes relied on to arrest people for refusing to present identification prohibit the intentional concealment of identity or the intentional obstruction of a legal process. For example, according to a New Mexico law that makes concealing identity a petty misdemeanor, “concealing identity consists of concealing one’s true name or identity, or disguising oneself with intent to obstruct the due execution of the law.” A Minnesota statute provides that “whoever intentionally” obstructs legal process may be sentenced to jail. In jurisdictions like these, one should not be arrested for failure to present identification if the failure is not intentional—merely that one does not own identification. If the courts in a jurisdiction do not consider failure to present identification an obstruction of the legal duties of a public officer, one should not be arrested for failure, regardless of intent, to present identification.

In sum, many factors must be taken into account to determine whether a person without identification may be arrested for refusal to present it. A person does not need to comply with a request for identification when a police officer approaches if the officer has no reasonable suspicion of criminal activity. Because a person may have difficulty knowing or predicting whether an officer has reasonable suspicion, a person is risking arrest when refusing to present identification.

If a police officer does have reasonable suspicion, local or state statutes and case law come into play. With many cities criminalizing the public performance of life-sustaining activities, additional problems arise for people without identification. If sleeping or sitting in certain public spaces is illegal, police offi-
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cers have more reasons to suspect people of committing crimes, and this may diminish their rights during interactions with police.

The language of local statutes regulating the presentation of identification during lawful investigations and the obstruction of legal processes can be a guide to whether failure to present identification must be intentional to result in arrest.42 Case law of the jurisdiction can clarify whether failure or refusal to present identification may be considered grounds for arrest or an obstruction of the legal duties of a public officer.

If Law Enforcement Destroys or Loses Identification Documents. A seizure of property in violation of the Fourth Amendment occurs when "there is some meaningful interference with an individual's possessory interests in that property" by unreasonable governmental action.43 If a person's private property is taken for public use by a state entity, the Fifth Amendment requires that the person be reimbursed the full monetary value of the property taken.44

The court in Pottinger v. City of Miami found that the police practice of seizing and destroying or failing to return personal property of homeless people in Miami amounted to a violation of their constitutional rights under the Fourth and Fifth Amendments.45 The police practice violated the Fourth Amendment because it interfered with homeless people's possessory interests in their property and had more than a "de minimis impact" on those property interests.46 The court found that the seizure and destruction of property violated plaintiffs' Fifth Amendment rights since such practice amounted to a taking of private property without just compensation.47

Avoiding Problems with Law Enforcement. One way to help clients deal with identification issues is to educate them on their rights when encountering law enforcement. Although it may not always stop an officer from violating a person's rights, knowledge of the legal parameters surrounding police encounters can help people navigate those encounters and alert providers of legal services to persistent problem encounters with police.

Training for police officers can help the police know the legal parameters of their actions as well as alert them to difficulties that homeless people have in obtaining photo identification. The advocate may be able to work with the police to find alternative ways for people to identify themselves during an investigation. Training for law enforcement officials can also prevent the loss and destruction of identification.

Another way to help protect clients' civil rights is to combat measures that criminalize the performance of life-sustaining activities in public. Such measures pose problems for people without identification and may be unconstitutional.

Obtaining Photo Identification

Obtaining photo identification is difficult. One must understand a state's numerous requirements for getting identification. One must possess and be able to present the necessary documents. Many people, particularly people who are homeless or

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42A statute that requires identification of oneself to police during a lawful investigation but does not adequately define what constitutes sufficient identification may violate the due process clause of the Fourteenth Amendment. See Kolender v. Lawson, 461 U.S. 352, 361 (1983).

43United States v. Jacobsen, 466 U.S. 109, 113 (1984). When considering the reasonableness of a governmental action, the court balances the nature and quality of intrusion on a person's property rights with the governmental interest used to justify the intrusion. Id. at 125.


46Id. at 1571.

47Id. at 1570 n. 30. The court noted that the state did not have to use the property in order for it to be considered taken under the Fifth Amendment.
fleeing domestic violence, do not have the requisite documents. Many people cannot afford the fee for a photo identification card.

For example, Virginia’s Department of Motor Vehicles Web site indicates that, “as a result of an ongoing review of agency practices and the events of September 11, [the Department of Motor Vehicles] has tightened the requirements for obtaining Virginia driver’s licenses and identification cards.” Virginia has tightened the requirements so much that many residents find it impossible to get identification cards. To obtain a photo identification card in Virginia, you usually must present a birth certificate. However, to receive a copy of your birth certificate, you must have some type of photo identification. In order to obtain a driver’s license in Virginia, you need proof of your social security number. But to get a replacement social security card, you must prove identity, usually with a photo identification card. And you must prove residency, which homeless people, almost by definition, cannot.

Advocates can help clients thus caught in a vicious circle by helping them gather all the necessary documentation before they go to the department of motor vehicles. In states that require proof of residency to apply for identification, advocates can allow homeless persons to use their organization’s address or find an organization that will allow clients to use its address. Many homeless shelters may write letters of residency for their clients. The letter verifies that a client is living there. Departments of motor vehicles often accept such letters as proof of residence.

Advocates can look for community resources to help clients obtain the documentation for identification and pay the fee. In Houston, for example, a non-profit organization, Operation ID, helps clients who lack photo identification.

If a client lacks any sort of identifying information, advocates can consider innovative ways of proving a client’s identity. For example, some departments of motor vehicles accept the client’s old school records as proof of identity. Some clients who have lost their identification cards or birth certificates have accessed other social service organizations, and these organizations may have copies of identification cards or other identifying information.

Advocates can meet with officials at departments of motor vehicles about barriers to clients obtaining identification cards and the consequences of not having them and can suggest alternative ways of verifying identity and residency.

Breaking Systemwide Identification Barriers

One way to break systemwide photo identification barriers is to devise ways that agencies and institutions can verify identity short of mandating photo identification. For example, “logical verification” (proposed by the National Consumer Law Center and others) may be used in the banking and consumer context. Logical verification uses information that a bank already has about a person from that person’s credit report or some other database to verify identity. A consumer attempting to open a bank account may be asked to name the bank at which the consumer had a car loan or to name the city where the consumer last lived. Logical verification protects

48 See www.dmv.state.va.us/webdoc/general/news/newlaws02.asp.
49 Id.
50 See www.ssa.gov/online/ss-5.pdf.
51 Virginia requires that applicants for a photo identification card present one proof of residency and a piece of mail postmarked by the U.S. Postal Service. Virginia’s policy is to issue identification cards to homeless persons only if they have both a letter from a shelter and a piece of mail addressed to them at the shelter. Virginia does not issue cards to people who live on the streets and cannot prove residency. Telephone Interview with Virginia Department of Motor Vehicles Executive Office (Aug. 19, 2003).
52 For more information on logical verification, see www.nclc.org. The Social Security Administration verifies information in essentially the same way. See this article’s “Supplemental Security Income” section.
against identity theft because the bank or other institution asks about not readily available personal information and yet allows the client to utilize the banking system without requiring excessive documentation.

A nonprofit shelter in Mobile, Alabama, issues its own photo identification cards by using a digital camera, a business card template on the Publisher program, and a laminator. The shelter began issuing the cards so that guests could identify themselves when picking up mail, phone messages, or laundry. The card is now accepted by institutions such as the local bank and the department of motor vehicles. Many shelters and social service organizations issue similar types of identification cards. Advocates can encourage governments and institutions to recognize and authorize these types of cards, perhaps even using a state-supervised process.

State and local governments can devise strategies to help citizens obtain identification. Mississippi issues photo identification cards to homeless people after they get an “affidavit of residency” from any state highway patrol or department of motor vehicles office. The affidavit may substitute for a lease, mortgage document, or piece of mail.

**Outlook on Verifying Identity**

Photo identification issues reach beyond our topics here. Identity verification is central to many facets of daily life including immigration, banking, and the criminal justice system. Identity fraud is one of the fastest-growing crimes in the country. The events of September 11 stirred public concern over identity verification and identity theft.

In response to concerns that false identification can be a tool of terrorists, the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) directs the U.S. Department of the Treasury to issue regulations on the minimum standards that financial institutions must follow in verifying the identity of their customers. The final regulations have been controversial. Some leaders in Congress urged very restrictive identity verification requirements that would not permit the use at financial institutions of such identification cards as the matricula consular issued by the Mexican consulate. The final regulations allow for the use of foreign identification cards, but the controversy may point to where identity verification regulations are headed.

Policymakers in a post-September 11 environment may be pressured to tighten identity verification requirements and increase the use of photo identification for accessing services. While public safety and national security are obvious priorities, policymakers should exercise caution in drawing up any policies that purport to protect security while unduly burdening disadvantaged people. We must develop ways to protect national security that do not prevent low-income people without photo identification from utilizing the resources that help move them out of poverty. Otherwise, they too become victims of terrorism.

**Authors’ Acknowledgment**

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54 See GEN. ACCOUNTING OFFICE, IDENTITY THEFT—GREATER AWARENESS AND USE OF EXISTING DATA ARE NEEDED 1 (2002).