

THE MIDAS TOUCH: ATUAHENE’S “STATEGRAFT” AND UNREGULATED ARTIFICIAL INTELLIGENCE

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INTRODUCTION

Professor Bernadette Atuahene’s article, *A Theory of Stategraft*,

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develops the new theoretical conception of “stategraft.” Professor Atuahene notes that when state agents have engaged in practices of transferring property from persons to the state in violation of the state’s own laws or basic human rights, it sits at the nexus of illegal behavior and revenue-generating activity for the government. Although there are countless instances of “stategraft,” one particularly salient example is when the state uses artificial intelligence to illegally extract resources from people. This Essay will apply stategraft to an algorithm implemented in Michigan that falsely accused recipients of unemployment benefits of fraud and illegally garnished their paychecks and intercepted their IRS tax refunds.

The software, the Michigan Integrated Data Automated System (“MiDAS”), was designed to detect unemployment fraud and automatically charge people with fraud. MiDAS identified at least 37,000 workers as having committed fraud; however, it had a ninety-three percent inaccuracy rate due to faulty algorithms.¹ It would take years for the state to repay Michiganders, and repayment often followed disastrous fallouts due to years of individual attempts to clear records and reclaim money.²

This real-life debacle closely mirrored the cautionary tale learned from the mythology around King Midas. In Nathaniel Hawthorne’s famous retelling,³ King Midas asked the satyr Silenus for a special gift: that everything he touched would be turned to gold. His wish was granted, and within moments he became the richest man in history. But in short order, his greatest wish became his greatest regret. Though his cup turned to gold, so did the liquid within it when it touched his lips. His desire to have unlimited wealth destroyed everything that truly mattered to him: his food, home, and even beloved daughter. Professor Atuahene’s concept of stategraft sums up the reality of a government motivated by a never-ending quest for gains that comes at the detriment of its own laws, its constituents, and its community, all while accountable only to itself.

This Essay examines the MiDAS case study through the lens of stategraft. It will show how Michigan violated procedural due process protections,⁴ and how unfettered use of artificial intelligence can be

¹ *Unemployment Insurance During COVID-19: The CARES Act and the Role of Unemployment Insurance During the Pandemic: Hearing Before the S. Comm. on Fin.*, 116th Cong. 5 (2020) (statement of Michele Evermore, Senior Researcher and Policy Analyst, National Employment Law Project), <https://www.finance.senate.gov/imo/media/doc/09JUN2020EVERMORESTMNT.pdf> [<https://perma.cc/DSG9-W6J7>].

² See *infra* Section I.B.

³ NATHANIEL HAWTHORNE, *The Golden Touch*, in *A WONDER BOOK FOR GIRLS AND BOYS* 35 (1851).

⁴ “No person shall . . . be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.” MICH. CONST. art. I, § 17.

characterized as a corrupt state practice.

I

STATEGRAFT AND THE MIDAS TOUCH

Stategraft captures the corrupt practice of state agents illegally preying on the community to solve their fiscal management issues. Using this framework, it becomes clear that Michigan engaged in stategraft when it implemented the MiDAS software, which was ultimately found to have violated state and federal constitutional due process. This section will outline Professor Atuahene's concept of stategraft and how the MiDAS software serves as an example of stategraft.

A. *Software, Algorithms, and Artificial Intelligence*

Throughout this Essay, the terms “artificial intelligence” (“AI”), “algorithms,” and “software” will be used, and it is important to understand their differences. Software refers to a program that is designed to perform a task.⁵ Algorithms are a set of instructions to accomplish a task.⁶ AI is computer technology that uses algorithms and is programmed to learn to perform a task by imitating human abilities, such as learning, decision-making, image recognition, and language processing.⁷ Examples of AI software are Amazon's Alexa, Netflix recommendations, and driving lane departure sensors.⁸ These are different types of automated decisionmaking systems, and the MiDAS system is defined as a decisionmaking algorithm because of its authority to issue final decisions.⁹

⁵ Watts S. Humphrey, *The Software Engineering Process: Definition and Scope*, 14 ACM SIGSOFT SOFTWARE ENG'G NOTES 82 (1989), <https://dl.acm.org/doi/pdf/10.1145/75111.75122> [<https://perma.cc/7CL7-83W4>]; Dmitry Baraishuk, *What Is Artificial Intelligence? AI vs Traditional Software*, BELITSOFT (Feb. 12, 2021), <https://belitsoft.com/ai-development/artificial-intelligence-vs-conventional-software> [<https://perma.cc/UP6S-2262>].

⁶ See, e.g., Stephen F. DeAngelis, *Artificial Intelligence: How Algorithms Make Systems Smart*, WIRED (Sept. 2014), <https://www.wired.com/insights/2014/09/artificial-intelligence-algorithms-2> [<https://perma.cc/73CE-AP99>].

⁷ See, e.g., Darrell M. West, *What Is Artificial Intelligence?*, BROOKINGS (Oct. 4, 2018), <https://www.brookings.edu/research/what-is-artificial-intelligence> [<https://perma.cc/YE4J-ZFWQ>].

⁸ See, e.g., David Pierce, *This Funky New Lamp Looks Like Tron and Talks Like Alexa*, WIRED (Dec. 7, 2016), <https://www.wired.com/2016/12/funky-new-lamp-looks-like-tron-talks-like-alexa> [<https://perma.cc/T77K-98F8>] (discussing Alexa's use of AI); DeAngelis, *supra* note 6 (mentioning Netflix's use of AI to create viewing recommendations); Sushant Bal, *What is Lane Keeping Assist & How Does It Work?*, CARBIKETECH (Mar. 7, 2022), <https://carbiketech.com/lane-keeping-assist> [<https://perma.cc/PN8T-JX6U>] (discussing AI used for lane departure sensors).

⁹ Doaa Abu Elyounes, “Computer Says No!”: *The Impact of Automation on the Discretionary Power of Public Officers*, 23 VAND. J. ENT. & TECH. L. 451, 455 (2021).

B. The Creation of MiDAS

In a quest to fill the gaping holes in the state budget caused by the Great Recession of 2008,¹⁰ Michigan, as part of its accounting measures, looked to lighten its financial pressures. Updating the unit's technology would be the first order of operation. The Michigan Unemployment Insurance Agency ("Agency") planned to update the thirty-year-old mainframe system that ran on COBOL, a computer coding language developed in the 1950s.¹¹ The information technology legacy system had been used by staffers to administer unemployment claims and check for instances of fraud.¹²

1. Why Did Michigan Implement MiDAS?

There were legitimate concerns proffered for why the unit should convert to an automated decision software: increased efficiency, minimization of costs, and fraud reduction.¹³ After contracting with a group of private tech vendors to design and operate a \$47 million system, MiDAS was implemented in 2013.¹⁴ From October 2013 to August 2015, MiDAS

¹⁰ See SARA WYCOFF MCCAULEY, MICH. STATE UNIV. EXTENSION, MICHIGAN'S POST-RECESSION SPENDING 2 (2018), <https://www.canr.msu.edu/michiganpolicyguide/uploads/files/9-14%20postrecession%20spending-final.pdf> [<https://perma.cc/4FX8-RES7>] (explaining that decreased state revenues from the Great Recession caused subsequent budget cuts).

¹¹ Robert N. Charette, *Michigan's MiDAS Unemployment System: Algorithm Alchemy Created Lead, Not Gold*, IEEE SPECTRUM (Jan. 24, 2018), <https://spectrum.ieee.org/michigans-midas-unemployment-system-algorithm-alchemy-that-created-lead-not-gold> [<https://perma.cc/YLK6-CM4H>]. COBOL stands for Common Business Oriented Language. Vicki-Lynn Brunskill & Tréa Lavery, *COBOL (Common Business Oriented Language)*, TECHTARGET (Oct. 2021), <https://www.techtarget.com/searchitoperations/definition/COBOL-Common-Business-Oriented-Language> [<https://perma.cc/NK6Z-EA4E>].

¹² Charette, *supra* note 11. This was the latest "advancement" in innovations to address allegations of employment fraud in the state. In 2011, the Michigan legislature eliminated the need for the Unemployment Insurance Agency to obtain a court order before seizing wages, tax refunds, and bank funds from claimants. Ryan Calo & Danielle Keats Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L.J. 797, 827 (2021). Additionally, there was a desire in the tech community to move away from COBOL. In the 1960s, COBOL was designed for business computer programs in industries such as finance and human resources, using English words and phrases that business users would find easier to understand. Brunskill & Lavery, *supra* note 11.

¹³ See generally OFF. OF THE AUDITOR GEN., PERFORMANCE AUDIT REPORT, MICHIGAN INTEGRATED DATA AUTOMATED SYSTEM (MiDAS) 3 (2016), https://www.audgen.michigan.gov/finalpdfs/15_16/r641059315.pdf [<https://perma.cc/PBM9-3NB2>] ("The goals of MiDAS included improved customer service, increased data accuracy, improved data security and privacy, reduced operating costs, increased automation, and improved integration of [Unemployment Insurance Agency] functions."). Migrating COBOL programs off the mainframe can lead to cost savings and generate faster performance, particularly due to the rise of web-based applications. Robert L. Mitchell, *Cobol: Not Dead Yet*, COMPUTERWORLD (Oct. 4, 2006), <https://www.computerworld.com/article/2554103/cobol—not-dead-yet.html?page=2> [<https://perma.cc/6A6J-KN7N>].

¹⁴ Alejandro de la Garza, *States' Automated Systems Are Trapping Citizens in Bureaucratic Nightmares with Their Lives on the Line*, TIME (May 28, 2020), <https://time.com/5840609/algorithm-unemployment> [<https://perma.cc/V35V-2TXB>].

was programmed to find inconsistencies in unemployment compensation records, automatically determine if a claimant committed fraud, and execute collection proceedings, which could include garnishing wages and intercepting tax refunds.¹⁵

And MiDAS seemed to be working exactly as the Agency hoped. The number of fraud cases detected tripled, from 7,164 in 2013 to 25,472 in 2015.¹⁶ And a year before implementing the MiDAS computer system, the Agency laid off a third of its workforce—four hundred full- and part-time employees.¹⁷ There were some issues noted during the process. In 2016, the Michigan Office of the Auditor General recommended that the Agency needed to improve the MiDAS appeals process;¹⁸ and in 2018, this report received national accolades, including the Impact Award from the National Conference of State Legislatures.¹⁹ But the Agency made no changes. Then came the concerns.

Scores of complaints and phone calls that came into the Agency went unanswered, were redirected, or were met with the opaque diagnosis the MiDAS software regurgitated: “overpayment,” with no further description given.²⁰ Compounding this issue, Michigan’s rules assess the penalty at four times the principal owed, with interest charges, making the penalty system one of the harshest in the country.²¹

2. *How MiDAS Worked*

Understanding the technology behind MiDAS explains how the system

¹⁵ *Cahoo v. SAS Inst. Inc.*, No. 17-10657, 2020 U.S. Dist. LEXIS 145817, at *4, *7 (E.D. Mich. Aug. 11, 2020) (summarizing MiDAS uses). *Cahoo v. FAST Enters. LLC*, 528 F. Supp. 3d 719, 750, 752 (E.D. Mich. 2021) (identifying the dates MiDAS went live and when it was shut down).

¹⁶ Ted Roelofs, *Broken: The Human Toll of Michigan’s Unemployment Fraud Saga*, BRIDGE MICHIGAN (Feb. 7, 2017), <https://www.bridgemi.com/michigan-government/broken-human-toll-michigans-unemployment-fraud-saga> [<https://perma.cc/QL6N-8Z9W>]. The algorithm had a look back requirement and detected instances of fraud from 2007. *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 892 (6th Cir. 2019) (“MiDAS searched for discrepancies in the records of individuals who were receiving—or who, in the six years prior to the program’s introduction, had received—unemployment insurance benefits.”).

¹⁷ Roelofs, *supra* note 16.

¹⁸ OFFICE OF THE AUDITOR GENERAL, *supra* note 13, at 22–24.

¹⁹ *Michigan Integrated Data Automated System (MiDAS) and Claimant Services Receives NLPES Award*, MICH. OFF. OF THE AUDITOR GEN. (2018), <https://audgen.michigan.gov/awards/michigan-integrated-data-automated-system-midas-claimant-services> [<https://perma.cc/G5GD-QAH8>]; *see also Reports That Received 2018 NLPES Awards*, NAT’L CONF. OF STATE LEGISLATURES, https://documents.ncsl.org/wwwncsl/LegislativeStaff/NLPES/NLPESawards-ReportsRecognized2018_30717.pdf [<https://perma.cc/GUA5-EN3A>].

²⁰ *See* Roelofs, *supra* note 16 (describing an individual’s frustration regarding the complaint process); *Cahoo*, 912 F.3d at 894 (“[T]he Agency never answered 90% of the calls to its ‘Help Line.’”).

²¹ Roelofs, *supra* note 16.

became unregulated. Management consultant, CSG Government Solutions, and technology vendors, FAST Enterprises LLC and SAS Analytics, played roles in the development and implementation of MiDAS's components.²² The software's input came from several sources, such as a claimant's benefits application, biweekly updates, quarterly wages, and information independently submitted by employers regarding reasons employees were fired.²³ The auto-adjudication process used by MiDAS had a fairly straightforward design. The system searched records of employers and claimants in its database for potential unemployment fraud, then flagged people.²⁴ Next, MiDAS sent questionnaires to an electronic mailbox on the benefits website portal, which recipients may not have had any reason to monitor.²⁵ MiDAS "gave them 10 days to respond, and then sent a letter informing them they had been charged with fraud. After a 30-day appeal period, the system began garnishing wages and tax refunds."²⁶ It started with an automated flagging of a claimant if it detected a discrepancy for potentially fraudulent behavior. This led to the automated generation of questionnaires,²⁷ and answers in the affirmative or failure to respond triggered an automatic determination of fraud that produced an automated generation of notice of fraud determination that culminated with an automated collection activity.²⁸ The Agency later recognized that in most cases from 2013 to 2015, MiDAS ran from start to finish with no human review.²⁹

²² See *Cahoo v. Fast Enters. LLC*, 580 F. Supp. 3d 494, 496 (E.D. Mich. 2022) ("Fact questions also remain regarding FAST's role in developing the unconstitutionally deficient forms as well as whether and how the plaintiffs were affected by them."). SAS argued that its product had no part in adjudicating, denying, or terminating benefits, assessing penalties or restitution, collecting wages, intercepting taxes, or handling mail, phone calls, or appeals. *Cahoo v. SAS Inst. Inc.*, No. 17-10657, 2020 U.S. Dist. LEXIS 145817, at *6 (E.D. Mich. Aug. 11, 2020).

²³ *Cahoo v. Fast Enters. LLC*, 508 F. Supp. 3d. 138, 145 (E.D. Mich. 2020).

²⁴ Stephanie Wykstra, *Government's Use of Algorithm Serves Up False Fraud Charges*, UNDARK (June 1, 2020), <https://undark.org/2020/06/01/michigan-unemployment-fraud-algorithm> [<https://perma.cc/LAY7-E6NC>] (reporting on Michigan's use of the an allegedly flawed automated system to wrongly charge thousands of people with unemployment fraud).

²⁵ *Id.*; see also *Cahoo v. Fast Enters. LLC*, 508 F. Supp. 3d. at 146 (detailing that MiDAS was set up to review claims from the six previous years, and questionnaires, forms, and orders were sent to people whose benefits had long expired or who had no reason to check the portal used to monitor unemployment benefits).

²⁶ Wykstra, *supra* note 24.

²⁷ The system sent the claimant a multiple-choice questionnaire with the following questions: "Did you intentionally provide false information to obtain benefits you were not entitle[d] to receive?" and "Why did you believe you were entitled to benefits?" *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 893 (6th Cir. 2019) (alteration in original).

²⁸ *Cahoo v. SAS Inst. Inc.*, No. 17-10657, 2020 U.S. Dist. LEXIS 145817, at *4 (E.D. Mich. Aug. 11, 2020).

²⁹ Wykstra, *supra* note 24.

3. *Mistakes in the Designing of MiDAS*

One of MiDAS's design flaws was that its source files were wrong. Corrupt and inaccurate data were used to train the software, and the software was not properly converting data from the legacy system.³⁰ Additionally, MiDAS could not read files scanned into the system, and the "income spreading" formula necessary for calculating unemployment had inaccuracies.³¹

Another design defect was that the software used flawed assumptions and logic. For example, the software used a logic tree that found intentional fraud whenever a claimant chose a particular combination of answers, even if the person indicated that they did not intentionally provide false information.³² These issues are alarming from a coding perspective, but from a legal perspective, the algorithm also had procedural due process violations encoded into the software.³³

The MiDAS fraud questionnaires did not provide adequate notice of the alleged misconduct to plaintiffs and prevented claimants from objecting to the possibility of fraud.³⁴ When claimants received notices about a fraud determination, the information was jumbled. In one example, a claimant received two notices that had the same title and form number, but different content; the notices did not reference each other, and they often had different case numbers.³⁵

"Over a two-year period, the agency charged more than 40,000 people, billing them about five times the original benefits, which included repayment and fines of 400 percent plus interest."³⁶ It was determined that ninety-three percent of the charges were erroneous, and the Agency failed to repay millions of dollars for years.³⁷ People lost homes, job opportunities, and declared bankruptcy, while the state collected funds on the backs of the people due to this unlawful reliance on unregulated and unmonitored AI.³⁸ Many lawsuits attempted to define the harm caused by MiDAS, and the courts generated robust discussion and analysis regarding governmental immunity, takings, and procedural due process, noting the uniqueness of MiDAS's impact on these decisions. Two cases addressing MiDAS proceeded through federal court and the Michigan Supreme Court.

³⁰ Calo & Citron, *supra* note 12, at 828.

³¹ *Id.* Rewriting COBOL projects are described as being "a maintenance nightmare waiting to happen." Mitchell, *supra* note 13.

³² Cahoo v. Fast Enters. LLC, 508 F. Supp. 3d 138, 146–47 (E.D. Mich. 2020).

³³ *See infra* Section I.C.4.

³⁴ Cahoo, 508 F. Supp. 3d at 156.

³⁵ *Id.*

³⁶ Wykstra, *supra* note 24.

³⁷ *Id.*

³⁸ *See infra* Section I.C.4.

4. *Federal and State Courts Address Due Process Violations Coded into MiDAS*

In *Cahoo v. SAS Analytics*, the Sixth Circuit Court of Appeals addressed whether state agents and contractors who designed, implemented, and executed the automated fraud detection system were responsible for the errors that led to the plaintiffs being falsely accused of committing unemployment fraud, subsequently leading to eviction, bankruptcy, and seizure of tax refunds.³⁹ Patti Jo Cahoo, Kristen Mendyk, and Khadija Cole brought suit against the Agency, pertinent employees, and two contractors, CSG Government Solutions, FAST Enterprises LLC, and their employees, who played key roles in the development and implementation of MiDAS.⁴⁰ Because the implementation of MiDAS deprived the plaintiffs of protected property interests without providing adequate pre-deprivation notice, the Court affirmed the denial of qualified immunity for the defendants with respect to plaintiffs' due process claim.⁴¹

In another case, *Bauserman v. Unemployment Insurance Agency*, recipients of unemployment compensation benefits brought a putative class action against the Agency, claiming that their due process rights were violated by the Agency in violation of article 1, section 17 of the Michigan Constitution and that the defendant had also engaged in unlawful collection practices.⁴² The Michigan Supreme Court held that people who have been deprived of a constitutional right may seek redress through the courts, regardless of whether their harm was inflicted pursuant to state custom or policy, as there was no clear language in the Constitution or a legislatively provided remedy.⁴³ Stategraft becomes a useful tool to analyze these two decisions.

C. *Decoding MiDAS Using Stategraft's Guidelines*

Professor Atuahene outlines four inquiries critical to defining an instance of stategraft: who qualifies as a state agent, what counts as a transfer

³⁹ See generally *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887 (6th Cir. 2019).

⁴⁰ *Cahoo v. Fast Enters. LLC*, 580 F. Supp. 3d 494, 494 (E.D. Mich. 2022) (denying motions for reconsideration of a previously denied motion for summary judgment). All three plaintiffs allege they were not notified of their fraud claims until at least one year after the decisions, leading to eviction and bankruptcy. See *Cahoo*, 912 F.3d at 903.

⁴¹ *Cahoo*, 912 F.3d at 900–05.

⁴² *Bauserman v. Unemployment Ins. Agency*, No. 160813, 2022 Mich. LEXIS 1364, at *1 (July 26, 2022). Grant Bauserman was falsely accused of unemployment fraud, and the Agency intercepted Mr. Bauserman's tax refunds. *Id.* at *3. It was later determined that the adjudication of fraud was incorrect, and the Agency returned all funds that were improperly seized. *Id.* at *3–4. Plaintiff Teddy Broe did not initially protest the penalties the Agency levied against him, explaining that he did not receive notice because the Agency sent communications through the unemployment portal, a system he had not used because he no longer received benefits. *Id.* at *4. All monies taken were returned to Mr. Broe. *Id.*

⁴³ *Id.* at *34–35.

of property from persons, when the state benefits, and whether the state has violated its own laws.⁴⁴

1. *Who Qualifies as a State Agent?*

The Sixth Circuit provides guidance on the issue of who qualifies as state agents concerning the MiDAS software. It is important to note that Atuahene's stategraft is not contingent on the intent of public actors.⁴⁵ The court also noted that though it was a software that was used to make final decisions on the taking of property, the individual defendants were not entitled to qualified immunity with respect to due process claims, as plaintiffs adequately alleged that the defendants violated their right to procedural due process and deprived them of protected property interests.⁴⁶ Additionally, several high-ranking officials of the Agency knew there were "serious problem[s]" with MiDAS and that "the vast majority" of fraud determinations were invalid,⁴⁷ that these issues were "widely-known [sic]" throughout the Agency, and that there was a high error rate.⁴⁷ The Agency's leadership directed and ordered the State Attorney General to continue to counter claimants' protests and appeals, and to oppose attempts by claimants by filing adversary proceedings. When some administrative law judges expressed concerns about the high rates of invalid fraud determinations, they were removed from hearing fraud cases.⁴⁸

People who work for the state indirectly, such as contractors and unofficial intermediaries, were also considered state agents.⁴⁹ The court in *Cahoo* dismissed the claims against several defendants but left two non-state actors as defendants.⁵⁰ It found that CSG and FAST counted as state actors for the purposes of the plaintiffs' § 1983 claims.⁵¹ This aligns directly with Atuahene's assertion that state agents often play a part in stategraft. The

⁴⁴ See Bernadette Atuahene, *A Theory of Stategraft*, 98 N.Y.U. L. REV. 1, 7–8 (2023) (elaborating on stategrafts' definitional elements, demonstrating its conceptual value, and showing how it extends existing discourse on corruption, state crime, and the predatory state).

⁴⁵ See generally Atuahene, *supra* note 44. In *Bauserman v. Unemployment Insurance Agency*, the actors from the Agency were in various departments, making different but similar decisions that ensured the outcome was the unlawful taking. See 503 Mich. 169, 177–78 (2019) (stating plaintiffs' due process allegations against the Agency).

⁴⁶ See *Cahoo*, 912 F.3d at 899–900 ("Plaintiffs must establish three elements: (1) that they have a property interest protected by the Due Process Clause; (2) that they were deprived of this property interest; and (3) that the state did not afford them adequate pre-deprivation procedural rights." (emphasis omitted)).

⁴⁷ *Id.* at 896. The *Cahoo* plaintiffs further alleged that "despite this knowledge, each Individual Agency Defendant did nothing to address MiDAS'[s] obvious inaccuracies and continued to enforce its invalid fraud determinations." *Id.* at 900.

⁴⁸ *Id.* at 896.

⁴⁹ Atuahene, *supra* note 44, at 11.

⁵⁰ *Cahoo v. Fast Enters. LLC*, 580 F. Supp. 3d 494, 497 (E.D. Mich. 2022) (determining that CSG and FAST were state actors for the purposes of the plaintiffs' claims).

⁵¹ *Id.*

Agency leadership used its authority to ensure that the non-state actors of the MiDAS software could keep racking up fines, fees, and funds for the state coffers, without any regulation or oversight.⁵²

2. *What Counts as a Transfer of Property From Persons?*

The court analyzed whether there was a taking of property from plaintiffs after identifying the responsible state actors. The parties in *Bauserman* agreed that the plaintiffs were deprived of their property and agreed that state law required they file a complaint or notice of intent to sue within six months of the deprivation.⁵³ The disputed issue was whether the taking occurred at notice of the fraud determination or when the paychecks were garnished and IRS refunds were intercepted.⁵⁴ In this instance, the court determined the unlawful taking—unlawful because it happened without due process protections—occurred when the plaintiffs were deprived of their property, not at the deprivation of their process.⁵⁵

3. *When Does the State Benefit?*

Establishing element three of stategraft is straightforward in this instance. MiDAS generated \$69 million in fines, from a previous year high of \$3 million.⁵⁶ This amount is sobering to consider, as it was generated from some of the most vulnerable members of the Michigan community. But there are many problems in society that are unfair but not illegal. Professor Atuahene's stategraft analytical framework provides a structure to differentiate between unfairness and illegality.

4. *Has the State Violated Its Own Laws?*

Since 2015, parallel cases have been making their way through federal and state court, with several results addressing the fourth component of

⁵² See Atuahene, *supra* note 44, at 11 (“[T]he actions of non-state actors establish the background conditions enabling state agents to complete the property transfer, although both parties are not deliberate accomplices.”).

⁵³ *Bauserman v. Unemployment Ins. Agency*, 503 Mich. 169, 181, 183–84 (Mich. 2019) (discussing how the parties agreed on the cause of action, but disagreed whether plaintiffs had filed within the six month time limit).

⁵⁴ See *id.* at 190 (noting the Agency's argument that plaintiffs were first deprived of property “when the initial redetermination notices were sent informing plaintiffs of liability or, at the latest, when plaintiffs received the Agency's notices of an intention to intercept their tax refunds or wages” And any claims were time barred after the six months notice).

⁵⁵ See *id.* (concluding that the Agency's notices to plaintiffs “merely apprised plaintiffs of the amount owed to the Agency” and that the notices “did not actually *seize* plaintiffs' property”) (emphasis added).

⁵⁶ Calo & Citron, *supra* note 12, at 828.

stategraft: Did the state violate its own laws?⁵⁷

Stategraft requires that illegality be determined. This is decided by what the law is, who decides illegality, what the obstacles to securing a declaration of illegality are, whether the government has immunity, and what federal or state constitutional protections are afforded to people.⁵⁸ The *Cahoo* and *Bauserman* decisions made it possible to use federal and state due process claims to obtain redress.

In the Michigan case, Bauserman asserted a tort claim challenging the Agency's use of MiDAS to deprive plaintiffs of property without due process of law, and no other adequate remedy existed to vindicate the alleged violation of plaintiffs' rights.⁵⁹ A constitutional-tort action for monetary damages against the state exists except in two circumstances: (1) when the Constitution states another branch of government is responsible for enforcing the constitutional right at issue; or (2) when the Supreme Court considers another branch of government's remedy adequate.⁶⁰ Article 1, section 17 of the Michigan Constitution states that "no person shall be deprived of life, liberty, or property without due process of law."⁶¹ Plaintiffs alleged that the Agency took these actions: "(1) without providing proper notice or hearing, (2) without allowing plaintiffs to present evidence, and (3) by using a computerized system to detect and determine fraud cases that does not comport with due process."⁶² The Court felt that if these allegations were proven, it was sufficient to sustain a constitutional tort claim for a violation of the Due Process Clause of the Michigan Constitution.⁶³ Additionally, the Michigan Constitution did not grant authority to another branch of government, nor did the legislature enact an appropriate law to provide a remedy for violations of this due process right, so neither exception was met.⁶⁴

Although there are few instances of tech-related terms related to the actual MiDAS system in the majority opinion,⁶⁵ the Court noted the Agency's attempt to use an "AI made me do it" defense (related to the

⁵⁷ *E.g.*, *Cahoo v. SAS Analytics, Inc.*, 912 F.3d 887, 896 (6th Cir. 2019) (involving claim that the state violated individuals' state and federal constitutional rights); *Bauserman v. Unemployment Ins. Agency*, No. 160813, 2022 Mich. LEXIS 1364 (Mich. July 26, 2022) (same); *Zynda v. Arwood*, 175 F. Supp. 3d 791, 797–98 (E.D. Mich. 2016) (same).

⁵⁸ *See* Atuahene, *supra* note 44, at 17 (describing stategraft's four queries to determine whether the state has violated its own laws).

⁵⁹ *See* *Bauserman*, 2022 Mich. LEXIS 1364, at *1 (finding monetary damages are available as remedies to constitutional tort cases).

⁶⁰ *Id.* at *31.

⁶¹ MICH. CONST. art. I, § 17.

⁶² *Bauserman*, 2022 Mich. LEXIS 1364, at *35.

⁶³ *See id.* at *29–30.

⁶⁴ *See id.*

⁶⁵ For instance, the word "automated" appears four times (twice in the body of the text and twice in a footnote), and "computerized" appears once. *Id.* at *2, *20, *35.

custom and policy of the Agency) was irrelevant, as the due process violations were embedded in the code.⁶⁶

In the *Cahoo* parallel case that progressed through the Sixth Circuit, in plaintiffs' § 1983 action, they alleged that MiDAS's erroneous fraud determinations had deprived them of protected property interests without providing adequate notice before deprivation.⁶⁷ The Court ruled that the defendants were properly denied qualified immunity, as the plaintiffs adequately alleged that defendants deprived them of their clearly established protected property interests without sufficient process.⁶⁸

Plaintiffs must establish three elements to state their procedural due process claim: (1) that they have a property interest protected by the due process clause; (2) that they have been deprived of this property interest; and (3) that the state has not granted them adequate procedural rights before deprivation.⁶⁹ The court ruled that plaintiffs adequately alleged that the defendants violated their right to procedural due process under the Fourteenth Amendment of the United States Constitution.⁷⁰ Additionally, the recipients of unemployment compensation have a constitutionally protected property interest in unemployment benefits.⁷¹

What stands out from these decisions is how they align with statecraft's determination of illegality. Under *Atuahene*'s statecraft framework, a formal declaration of illegality is not necessary to claim statecraft, but it would be a bonus, as judicial decisions reflect society's values.⁷² Even before the *Bauserman* and *Cahoo* rulings were released, legal analysts declared that what happened to the citizens of Michigan was a clear violation of due process, either because of lack of notice or the deprivation of property.⁷³

MiDAS serves as a cautionary tale: technology, automated decision systems, and AI are not magic solutions that state agencies can sprinkle on problems. And unregulated AI will continue to evolve in ways that harm citizens if there is no human and legal oversight. States that have rushed to incorporate AI applications have failed to carry out due diligence, as is

⁶⁶ See *id.* at *33–34, *35 n.13 (noting it was not the Court's "role to place guardrails on constitutional rights based on judicial policy preferences.").

⁶⁷ See *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 892 (6th Cir. 2019).

⁶⁸ *Id.* at 901–02.

⁶⁹ *Id.* at 900.

⁷⁰ *Id.* at 899 ("The Fourteenth Amendment provides that no state shall deprive any person of life, liberty, or property, without due process of law.") (quotation marks omitted).

⁷¹ *Id.* at 900.

⁷² See *Atuahene*, *supra* note 44, at 18 (identifying two factors for determining illegality as (1) whether or not legal analysts can make an informal yet credible claim of illegality, and (2) whether or not there has been a formal declaration of illegality).

⁷³ E.g., Elyounes, *supra* note 9, at 507–08; Calo & Citron, *supra* note 12, at 824; Kate Crawford & Jason Schultz, *AI Systems as State Actors*, 119 COLUM. L. REV. 1941, 1950–51 (2019); see also Sarah Valentine, *Impoverished Algorithms: Misguided Governments, Flawed Technologies, and Social Control*, 46 FORDHAM URB. L.J. 364, 413 (2019) (discussing success of due process claims against governmental use of decisionmaking technology).

evident by the instances of unjust and unlawful treatment by AI.⁷⁴ They must do the arduous work of implementing technology in a way that can pass constitutional scrutiny, ensuring due process for all.⁷⁵

II

UNFETTERED AI IS A CORRUPT STATE PRACTICE

Automated decision systems like MiDAS can be corrupt for three reasons: (1) the ease with which constitutional violations can be built into code; (2) the possibility of unfettered proliferation of continued racial disparities; (3) and state officials' willful ignorance about the impact of AI. But there are steps governments and systems can take to mitigate the harm caused by rogue AI.

A. Coding Constitutional Violations

Statecraft focuses on illegality, making judicial and legislative inattentiveness to unregulated AI most worrying. Professor Atuahene's work invokes the more profound role and purpose of law, which is to "reflect the collective morality as it has been determined through the democratic process."⁷⁶ Illegality, as she defines it, shows that there is a shared collective agreement on the standards the community will uphold. The state of Michigan has rightly noted that its actions violated the collective morality of its community and issued a restitution for the constitutional violation.⁷⁷ But

⁷⁴ See Hum. Rts. Council, Rep. on the Right to Privacy in the Digital Age, U.N. Doc. A/HRC/48/31, at 12–13 (2021) ("States and businesses should ensure that comprehensive human rights due diligence is conducted when AI systems are acquired, developed, deployed, and operated.").

⁷⁵ See Zach Schiller, *Testimony Before the Unemployment Compensation Modernization & Improvement Council*, POL'Y MATTERS OHIO (Feb. 25, 2021), <https://www.policymattersohio.org/files/research/022521testimonytoucmmodernizationcommittee.pdf> [<https://perma.cc/5LQU-TD85>] (recommending vetting process before adopting new IT system for Ohio's unemployment compensation in order to provide better access for users and avoid discriminatory impacts); see also Avigdor Zonnenshain & Ron S. Kenett, *Quality 4.0—The Challenging Future of Quality Engineering*, 32 QUALITY ENG'G 614, 616 (2020) (offering future directions for quality and reliability engineering that are created for the fourth industrial revolution "fueled by data from sensors and internet of things ('IoT') devices and powered by increasing computer power"). Traditional and AI software developers may not be aware of how legal protections can change, depending on the facts. See generally Tariq Aziz Rao, Sadia Tariq & Ehsan ul Haq, *Quality Assurance of Web-Based Applications*, INT'L J. MULTIDISCIPLINARY SCIS. & ENG'G, Feb. 2018, at 1 (urging quality assurance teams to go beyond conventional testing methods and institute more rigorous testing for web-based applications).

⁷⁶ Atuahene, *supra* note 44, at 23.

⁷⁷ The Michigan Court of Claims approved a settlement on January 19, 2023 and payments will go out between August and September of 2023. Rose White, *Michigan to Start Paying Out \$20M Unemployment Fraud Settlement in August*, MICHIGANLIVE, (Feb. 3, 2023), <https://www.mlive.com/public-interest/2023/01/michigan-to-start-paying-out-20m-unemployment-fraud-settlement-in-august.html> [<https://perma.cc/86SM-YC2N>] ("Bauserman v.

MiDAS being found to violate due process does not go far enough in addressing the imbalance of power between the state and its citizens, particularly those who have been regularly deprived of their rights and dignity.

Published in October 2022, the Biden Administration's Blueprint for an AI Bill of Rights⁷⁸ looks to directly address unregulated AI.⁷⁹ The Blueprint lays out several important principles, including protection from unsafe and ineffective systems, algorithmic discrimination protections, data privacy, notice and explanations about the use of automated systems, and the essentiality of access to human decisionmakers.⁸⁰ Legislation has not yet been proposed, but the White House provided a list of actions agencies are taking guided by these principles.⁸¹ These are ambitious aims, but achievable ones.

As governments increasingly use technology to replace human decisionmakers, it is essential that due process enforcement keeps pace with these advancements. We should ask why it was so *hard* for claimants to be heard and why it was so *easy* for the Agency to ignore the growing cries of frustration, looking towards how racism underlies the power imbalance between the state and its citizens.

B. Potential for Racial Discrimination

Statecraft helps demystify the ideology that allows state predation. In part, the state's police power allows it to implement unjust property transfers. The police power is the authority of state governments to enact and enforce

Unemployment alleged the agency violated due process rights by intercepting tax refunds, garnishing wages, and forcing claimants to repay benefits.").

⁷⁸ See OFF. OF SCI. & TECH. POL'Y, BLUEPRINT FOR AN AI BILL OF RIGHTS: MAKING AUTOMATED SYSTEMS WORK FOR THE AMERICAN PEOPLE (Oct. 2022) [hereinafter BLUEPRINT], <https://www.whitehouse.gov/ostp/ai-bill-of-rights> [<https://perma.cc/GK4M-TG56>]. On the day of its release, Office of Science and Technology Policy Deputy Director for Science and Society Dr. Alondra Nelson said that "[t]he *Blueprint for an AI Bill of Rights* is for... every person whose life has been altered by unaccountable algorithms." Press Release, Off. of Sci. & Tech. Pol'y, Fact Sheet: Biden-Harris Administration Announces Key Actions to Advance Tech Accountability and Protect the Rights of the American Public (Oct. 4, 2022), <https://www.whitehouse.gov/ostp/news-updates/2022/10/04/fact-sheet-biden-harris-administration-announces-key-actions-to-advance-tech-accountability-and-protect-the-rights-of-the-american-public> [<https://perma.cc/T388-Y774>]; see also Julia Angwin, *The Seven-Year Struggle to Hold an Out-of-Control Algorithm to Account*, THE MARKUP: HELLO WORLD (Oct. 8, 2022), <https://themarkup.org/newsletter/hello-world/the-seven-year-struggle-to-hold-an-out-of-control-algorithm-to-account> [<https://perma.cc/XG3A-7NQT>] (discussing how the Blueprint for an AI Bill of Rights connects to MiDAS).

⁷⁹ See Rob Pegoraro, *White House AI Bill of Rights Looks to Rein in 'Unaccountable' Algorithms* PCMag (Oct. 4, 2022), <https://www.pcmag.com/news/white-house-ai-bill-of-rights-looks-to-rein-in-unaccountable-algorithms> [<https://perma.cc/8EUC-9V8X>] (connecting principles in the Blueprint to Isaac Asimov's *Three Laws of Robotics* and noting the impotence of the Blueprint without legislative action).

⁸⁰ BLUEPRINT, *supra* note 78, at 5–7.

⁸¹ See *id.* at 21–22.

laws to protect public health, safety, and general welfare.⁸² The state institutes and enforces community norms, including how to regard the ‘moral failures’ of certain citizens. These efforts across the United States to root out ‘fraud’ are based on racist tropes and ideologies.⁸³ Allegations of crime and voter fraud are often linked to outcomes that directly disenfranchise the Black community and other vulnerable populations.⁸⁴ Negative beliefs about beneficiaries of welfare programs have led to an unbalanced system of surveillance and control.⁸⁵ These stereotypes are fueling efforts to turn to technology to ‘root out’ fraud allegations against economically vulnerable populations.⁸⁶ When algorithms are used as the solution to rapidly sweep through susceptible populations, these communities are left economically devastated and without recourse or access to the state assistance they need.⁸⁷

In order to understand the disparities built into the unemployment system, it is important to first understand the guidelines for receiving unemployment insurance benefits. Employees receive benefits in the form

⁸² *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (“The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals....”).

⁸³ See Bryce Covert, *The Myth of the Welfare Queen*, NEW REPUBLIC (July 2, 2019), <https://newrepublic.com/article/154404/myth-welfare-queen> [<https://perma.cc/2W6K-869A>].

⁸⁴ See, e.g., Wayne Washington, *Voter Intimidation? Black Voters Over-Represented Among Those Arrested So Far for Election Crimes*, PALM BEACH POST (Oct. 10, 2022, 5:00 AM), <https://www.palmbeachpost.com/story/news/2022/10/10/black-voters-over-represented-among-those-arrested-election-crimes/10436294002/> [<https://perma.cc/XW38-4EPJ>]; see also All Things Considered, *How Election Fraud Claims May Disenfranchise Black Voters*, NPR (Jan. 4, 2021, 3:41 PM), <https://www.npr.org/2021/01/04/953314483/how-election-fraud-claims-may-disenfranchise-black-voters> [<https://perma.cc/VKE5-MQQ8>] (predicting this exact result as laws combatting alleged voter fraud began to be enacted following 2020 election).

⁸⁵ See Bobby Harrison, *Leaders Have Been Obsessed with Preventing Welfare Fraud Among Poor; Not So Much Among Wealthy*, MISS. TODAY (Aug. 21, 2022), <https://mississippitoday.org/2022/08/21/welfare-fraud-mississippi-history> [<https://perma.cc/2JX3-DBUY>].

⁸⁶ See Mark Robert Rank, Lawrence M. Eppard & Heather E. Bullock, *Welfare Fraud Is Actually Rare, No Matter What the Myths and Stereotypes Say*, SALON (Apr. 4, 2021), <https://www.salon.com/2021/04/04/welfare-fraud-is-actually-rare-no-matter-what-the-myths-and-stereotypes-say> [<https://perma.cc/84TP-6YDF>] (describing the use of fingerprinting technology to prevent alleged welfare fraud); *Image of ‘Typical’ Welfare Recipient Linked With Racial Stereotypes*, ASS’N FOR PSYCH. SCI. (Dec. 13, 2016), <https://www.psychologicalscience.org/news/releases/image-of-typical-welfare-recipient-linked-with-racial-stereotypes.html> [<https://perma.cc/EG9R-ZZB2>] (connecting mental associations about stereotypical welfare recipient to decisionmaking over welfare programs); MONÉE FIELDS-WHITE, VIVIAN GRAUBARD, ALBERTO RODRÍGUEZ ÁLVAREZ, NIKKI ZEICHNER & CASSANDRA ROBERTSON, NEW AM., “*People Don’t Want to Work*” and Other Myths about UI, in UNPACKING INEQUITIES IN UNEMPLOYMENT INSURANCE 22 (2020), <https://www.newamerica.org/pit/reports/unpacking-inequities-unemployment-insurance> [<https://perma.cc/8K82-5V28>] (debunking myths about unemployment insurance eligibility and recipients that have led to conservative efforts to cut funding for unemployment and discouraged workers from applying for benefits).

⁸⁷ See *How Algorithms Intended to Root Out Welfare Fraud Often Punish the Poor*, PBS (Feb. 17, 2020), <https://www.pbs.org/newshour/economy/column-how-algorithms-to-root-out-welfare-fraud-often-punish-the-poor> [<https://perma.cc/6EY5-RFHK>].

of perks or compensation provided in addition to their base salaries and wages, and for many people, a benefit package is a critical part of evaluating whether they should accept a job.⁸⁸ One type of federally required employee benefit is that employers pay state and federal taxes towards unemployment insurance.⁸⁹ Unemployment insurance is a program financed by federal and state payroll taxes, and workers must complete many steps to be eligible for this benefit if they become unemployed.⁹⁰ As unemployment insurance is a benefit workers have earned from previous employment, any use of the benefit has been rightfully earned. But in analyzing who is unemployed versus who is applying for benefits, the jurisdictions that have less generous benefits, and the amount of benefits distributed, racial disparities abound.⁹¹

Unemployment disparity continues in Detroit, Michigan today. In 2021, Detroit residents without four-year college degrees, people of color, and low-wage earners were more likely to be unemployed than other residents. Black and Latino Detroit residents were nearly four times as likely to be unemployed as white Detroit residents.⁹²

The racial disparities that have long plagued the United States are now exacerbated by even benign instances of technological neglect. The implementation of MiDAS wreaked havoc in the lives of thousands of Michiganders, and all it took was a few errant code lines in MiDAS and a lack of human oversight. Some have argued that the financial damages are

⁸⁸ Elizabeth Walker, *What are Employee Benefits?*, PEOPLEKEEP, (Oct. 17, 2022), <https://www.peoplekeep.com/blog/what-are-employee-benefits> [<https://perma.cc/782P-Z46Z>].

⁸⁹ *Id.*

⁹⁰ SOC. SEC. ADMIN., *SOCIAL SECURITY PROGRAMS IN THE UNITED STATES* 33–35 (1997). To receive benefits, a worker must have worked a certain amount of time and earned a certain amount of money during a specified base period, and must be currently available for and able to work. *Id.* at 27–29. The amount of weekly benefits a worker can receive while unemployed varies according to the benefit formula used by each state and the amount of the worker's past earnings. *Id.* at 30–31.

⁹¹ See Kathryn A. Edwards, *The Racial Disparity in Unemployment Benefits*, RAND CORP. (July 15, 2020), <https://www.rand.org/blog/2020/07/the-racial-disparity-in-unemployment-benefits.html> [<https://perma.cc/L9WR-HB24>]. Additionally, white Americans' negative attitudes about unemployment benefits are directly tied to racial stereotypes about Black Americans. See Ashley Jardina, *Why People Love 'Assistance to the Poor' But Hate 'Welfare'*, TALK POVERTY (Jan. 29, 2018), <https://talkpoverty.org/2018/01/29/people-love-assistance-poor-hate-welfare> [<https://perma.cc/ZF9G-GNEY>].

⁹² Lauren Slagter, *Uneven Recovery: Detroit Unemployment Rate Sits at 20%*, UNIV. OF MICH. (Feb. 3, 2022), <https://news.umich.edu/detroit-unemployment-rate-sits-at-20> [<https://perma.cc/9BEL-X85R>]. The fact that this was during the height of the COVID-19 pandemic that disproportionately led to the deaths of Black Americans, Latinos, and Native Americans—and has left many unable to work because of long COVID—magnifies the disparity. See generally Lola Fadulu, *Experts Warn of Racial Disparities in the Diagnosis and Treatment of Long Covid.*, N.Y. TIMES (Mar. 29, 2022), <https://www.nytimes.com/2022/03/29/health/long-covid-black.html> [<https://perma.cc/QR6T-YAM2>]; L'Oreal Thompson Payton, *The Black Community Was Hit Hardest by the Initial COVID Wave. Now It's Struggling with Long COVID.*, FORTUNE WELL (Aug. 10, 2022), <https://fortune.com/well/2022/08/10/long-covid-impacting-black-americans> [<https://perma.cc/53LN-TTAX>].

estimated at over \$100 million,⁹³ but the human toll is unquantifiable. Over time, these types of corrupt actions by the state have a disproportionate impact on Black communities and other systemically excluded populations. These unlawful takings have long been implemented to further disenfranchise the most marginalized members of society.⁹⁴ The widespread publicity of the legal decisions related to MiDAS in Michigan has had an important ripple effect. States recognize that they must try to mitigate algorithmic bias before implementation, rather than dealing with the problem after the fact. Though citizens are still calling for full restitution, the public nature of the debacle led to updated state legislation and other efforts across the country to directly mitigate algorithmic bias before implementation instead of dealing with it *ex post*. Because administrative agencies, such as unemployment agencies, operate to serve the public, trust violations are particularly egregious. When reliance on faulty AI dispossesses citizens of their rightfully earned funds, the entire purpose of administrative agencies is undermined.⁹⁵

⁹³ Charette, *supra* note 11. Jack Lessenberry, *State Unemployment Computer Had Anything but the Golden Touch*, TRAVERSE CITY REC. EAGLE, (Dec. 31, 2017), https://www.record-eagle.com/opinion/columns/jack-lessenberry-state-unemployment-computer-had-anything-but-the-golden/article_c03418a5-41a3-5b87-9663-9d4cfc42591c.html [https://perma.cc/VB9N-7HS3]. It is believed that at least 11,000 Michiganders filed for bankruptcy because of wrongful fraud determinations. Angwin, *supra* note 77.

⁹⁴ Black workers and other communities of color are more harshly impacted by unemployment than white populations. In 2011, the average length of unemployment for Black and Asian American workers was 27.7 weeks compared to white workers at 19.7 weeks. *Michigan Unemployment Claims Processing: Hearing Before the Michigan Legislature Joint Select Committee on the COVID-19 Pandemic* (Mich. 2020) (statement of Michele Evermore, Senior Researcher and Policy Analyst, National Employment Law Project), <https://www.nelp.org/publication/nelp-testimony-michele-evermore-michigan-unemployment-claims-processing> [https://perma.cc/D28M-5FQ3]. In 2019, the unemployment rates in the predominantly Black cities of Detroit and Flint, Michigan were 17.4% and over 25%, respectively. Andre M. Perry, *Black Workers Are Being Left Behind by Full Employment*, BROOKINGS (June 26, 2019), <https://www.brookings.edu/blog/the-avenue/2019/06/26/black-workers-are-being-left-behind-by-full-employment> [https://perma.cc/B59A-AK8G]. Technology is further expanding that gap. Having MiDAS sweep for claimants all the way back to 2007—the peak of the Great Recession, when Michigan’s unemployment rate hit unprecedented numbers—is particularly cruel. See Paul Egan, *‘No Remedy’ for Unemployed Falsely Accused by Michigan’s Fraud System*, DET. FREE PRESS (Jan. 10, 2017), <https://www.freep.com/story/news/local/241ichigan/2017/01/09/unemployment-insurance-claims-fraud/96338462/> [https://perma.cc/3CAH-WPGQ].

⁹⁵ See generally Calo & Citron, *supra* note 12 (questioning the expertise of administrative agencies and urging that they only adopt new technology when it enhances rather than undermines their legitimacy); see also Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249 (2008) (questioning the traditional dichotomy between adjudication and rulemaking in administrative law and the applicability of *Mathews v. Eldridge* cost-benefit analysis for due process when technology is involved). Others have also noted that AI is in place to further the widening economic disparities in the United States. See, e.g., Steve Lohr, *Economists Pin More Blame on Tech for Rising Inequality*, N.Y. TIMES (Jan. 20, 2022), <https://www.nytimes.com/2022/01/11/technology/income-inequality-technology.html>

C. Willful Ignorance About the Impact of AI by State Officials

Stategraft highlights that the decision to use automated systems to cut costs, increase revenues, and balance budgets often comes at the expense of civil liberties. When stategraft is exacerbated by artificial intelligence and the state's response is to emphatically defend unlawful actions, additional cracks form in society's trust in our democratic institutions. As an example, in *Scott v. Department of Labor and Economic Opportunity/Unemployment Insurance Agency*, the court ruled for the plaintiffs partly because of the Agency's track record of fraud decisions. The court found that the Agency's failing practices and procedures with MiDAS were so fraught that not even its attempts to defend its mailing system could be considered dependable.⁹⁶ If this faith in democracy is shaken enough, citizens will fall through those cracks into alternative forms of community self-regulation, putting them further at odds with the rule of law.⁹⁷

Releasing products into the public square that have not been properly tested or are inaccurate is not just gross negligence; it is unjust. Government immunity clauses allow government actors to be shielded from lawsuits, which lets them get away with negligently managing technology. Claims by tech vendors and non-governmental actors that they do not know how their systems are implemented or that their work does not affect the final product should be seen as willful ignorance and should not shield them from liability. All data points and decision trees used affect the outcome.⁹⁸

AI makes decisions at the speed of light and behind a wall of code. Going forward, violations of procedural due process should be foreseeable under Michigan's Unemployment Statutes based on the interconnected complexity underlying learning algorithms and software development.⁹⁹ In

[<https://perma.cc/76NL-LXDG>] (describing study finding that over half of the wealth gap increase in recent decades can be attributed to automation of jobs formerly done by humans).

⁹⁶ *Scott v. Dep't of Lab. & Econ. Opportunity*, No. 350690, 2022 WL 730791, at *6 (Mich. Ct. App. Mar. 10, 2022) (“[W]e are not inclined to rely on the Agency’s practices and policies as proof that the determinations were sent.”); *see also* de La Garza, *supra* note 14 (outlining several examples across the United States of jurisdictions attempting to untangle from public disappointment, lawsuits, and a lack of recourse for those affected).

⁹⁷ *See* Atuahene, *supra* note 44, at 26–31, 30 n.127 (describing how corruption impairs the rule of law, leading to civil unrest).

⁹⁸ *See* Cahoo v. FAST Enters. LLC, 528 F. Supp. 3d 719, 737 (E.D. Mich. 2021) (finding that FAST had a role in instituting and maintaining potentially problematic policies). In 2020, a partner at FAST Enterprises said that MiDAS was working exactly as the state intended it to, and it was not the role nor responsibility of an IT vendor to interpret the law. de la Garza, *supra* note 14. The court provides guidance to product development teams, alerting them that they can no longer point the blame towards the state and they have a role in ensuring their IT product does not violate constitutional protections. Software developers need to know the legal consequences of their code and products.

⁹⁹ *Cahoo v. FAST Enters. LLC*, 508 F. Supp. 3d 138, 161 (E.D. Mich. 2020) (“This case is complex and, like MiDAS itself, involves many moving pieces and individualized considerations that are outcome determinative.”).

2022, the Michigan legislature refined the statutory language to reflect the temporal issues noted by the Michigan Supreme Court.¹⁰⁰ It will take some time to see if these changes are beneficial to potential plaintiffs.

D. Debugging Rogue AI Systems Used by the Public Sectors

Software created for government purposes should use standardized processes based on proactive monitoring, observability tools, and customer feedback help to identify potential problems. One way to do this is to prioritize the code used for testing, so fewer bugs will make it to the final product.¹⁰¹ The technology used by the government, whether traditional or AI, should be developed with a mission-critical mindset, since the government is responsible for the safety and wellbeing of its citizens.¹⁰²

If courts decide that there are AI-related due process violations, citizens can act. In October 2022, less than three months after the *Bauserman* court ruled that governments can be held liable for violating constitutional rights, Michigan reached a \$20 million settlement with the class-action plaintiffs.¹⁰³ And the *Bauserman* ruling is already having far reaching impacts in Michigan in regard to understandings of due process and the right to sue the government.¹⁰⁴

Additionally, governments should have interdisciplinary panels vet

¹⁰⁰ MICH. COMP. LAWS §§ 600.6431(1), (4), (5) (2020). The statute was revised in 2020 so that a claim may not be brought against the State except by the claimant, within one year after the claim has accrued. Additionally, if the claim is for property damage or personal injuries, the claim or notice must be filed within six months after the event that gives rise to the claim, with the exception that these periods of limitations would not apply to compensation claims under the Wrongful Imprisonment Compensation Act. *Id.*

¹⁰¹ George Lawton, *9 Techniques for Fixing Bugs in Production*, TECH TARGET (Feb. 18, 2021), <https://www.techtargget.com/searchsoftwarequality/tip/9-techniques-for-fixing-bugs-in-production> [<https://perma.cc/CCY8-LPND>]. A different method is to use chaos engineering, which argues that to test software most effectively, the system needs to be fully implemented. *Id.* Another way is the "move fast and break things" model—to release a product with known imperfections so that the company can stay ahead of competitors. *Id.*

¹⁰² *Id.*

¹⁰³ Press Release, Mich. Dep't of Att'y Gen., State of Michigan Announces Settlement of Civil Rights Class Action Alleging False Accusations of Unemployment Fraud (Oct. 20, 2022), <https://www.michigan.gov/ag/news/press-releases/2022/10/20/som-settlement-of-civil-rights-class-action-alleging-false-accusations-of-unemployment-fraud> [<https://perma.cc/ZV84-H3JD>]. The parties worked with a neutral mediator to negotiate class action payment, using detailed records and information. *Id.*

¹⁰⁴ See Adrienne Roberts, *Another Class Action Lawsuit Filed Against Michigan's Unemployment Insurance Agency*, DET. FREE PRESS (Aug. 31, 2022) (providing updates on different class action lawsuits against the Agency related to due process). Dissenting Justice David Vivano predicted severe consequences for state and local governments following *Bauserman* because of a swelling of cases and taxpayer liability. *Bauserman v. Unemployment Ins. Agency*, No. 160813, 2022 WL 2965921, at *42 (Mich. July 26, 2022) (Vivano, J., dissenting) ("A deluge of cases and a swelling of taxpayer liability will surely ensue."). The rise in cases may also lead to better efforts by state and local governments to protect citizens constitutional rights, which would make the use of taxpayer money worthwhile.

technology before making purchases, to make sure AI-centered applications are correct, transparent, explainable, and accountable.¹⁰⁵ Michigan hopes to achieve this by replacing MiDAS with Deloitte's uFACTS.¹⁰⁶

The White House's Blueprint for AI Bill of Rights is a good step towards addressing the impact of AI on society, and some states have gone even further by taking measures to protect the rights of their constituents. Seventeen states introduced general artificial intelligence bills or resolutions in 2022, and Colorado, Illinois, Vermont, and Washington even enacted them.¹⁰⁷ Congress can take similar measures to pass meaningful AI-centered legislation.

Solving AI-centered stategraft can unite people for social causes across political, racial, and religious divides. People need to know that their hard-earned resources will not be unlawfully taken. Citizens need to know that the government will not abuse its responsibility to its citizens by taking from the people to fill its coffers. Communities need to know that they can raise their families, live their lives, and experience the world without worrying about algorithms, false data, or confirmation bias violating their constitutional rights. These are shared societal goals that serve as a cornerstone upon which stategraft can be rooted out and rectified.

CONCLUSION

King Midas learned a valuable lesson. His quest to fill his coffers left him depleted in ways he had never anticipated. States' use of unregulated and untested AI systems to acquire funds can result in harmful outcomes for their communities. The unregulated use of AI by government entities has the potential to exacerbate corruption and destabilize democracy. The law

¹⁰⁵ For example, the Algorithmic Justice Working Group at the Santa Fe Institute in New Mexico is made up of computer scientists, lawyers, and social scientists, working to educate policymakers and the community about artificial intelligence. *Algorithmic Justice*, SANTA FE INST., <https://www.santafe.edu/research/projects/algorithmic-justice> [https://perma.cc/23XC-R9Y6].

¹⁰⁶ Adrienne Roberts, *Michigan's UIA Selects Deloitte to Replace Unemployment Insurance System*, DET. FREE PRESS (Nov. 15, 2022), <https://www.freep.com/story/MONEY/business/michigan/2022/11/15/michigan-unemployment-insurance-system-deloitte-midas-ufacts/69649312007> [https://perma.cc/XGG2-NLAU]. They expect it to be up and running by 2025, and it will cost around \$78 million over ten years. Deloitte says the software will use "intuitive, human-centered design," be an "open system," and allow claimants to access the site from mobile devices. *Id.* Deloitte manages unemployment insurance benefits in fifteen states, including California, Florida, and Massachusetts. *Id.* Deloitte's product also has serious flaws that have resulted in billions of dollars being distributed due to fraudulent claims. *Id.*

¹⁰⁷ *Legislation Related to Artificial Intelligence*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 26, 2022), <https://www.ncsl.org/technology-and-communication/legislation-related-to-artificial-intelligence> [https://perma.cc/2CZG-7RTQ]. Colorado, Illinois, and Vermont launched task forces or commissions to study AI. *Id.* Illinois passed legislation amending its 2021 Artificial Intelligence Video Interview Act. *Id.* Washington provided funding for the office of the chief information officer to convene a work group to audit automated decision-making systems for fairness, transparency, and accountability. *Id.*

remains outdated, reactive, and out of step with the reality of rogue AI systems. Innovation is exciting and critical for a society's development. Technology is one of the means used to achieve these ends. Professor Atuahene was correct: Society is entering untrodden territory as we integrate AI and automation into our everyday systems, but shining a light on issues like stategraft will help us find a way to remedy the harms that they cause.