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The New Privacy

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THE NEW PRIVACY

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OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE AND THE LIMITS OF PRIVACY. By *John Gilliom*. Chicago: University of Chicago Press. 2001. Pp. xv, 186. Cloth, $ 39; paper, $16.

INTRODUCTION

In 1964, as the welfare state emerged in full force in the United States, Charles Reich published *The New Property*, one of the most influential articles ever to appear in a law review.[1] Reich argued that in order to protect individual autonomy in an "age of governmental largess," a new property right in governmental benefits had to be recognized.[2] He called this form of property the "new property."[3] In retrospect, Reich, rather than anticipating trends, was swimming against the tide of history. In the past forty years, formal claims to government benefits have become more tenuous rather than more secure. *Overseers of the Poor: Surveillance, Resistance and the Limits of Privacy*, by John Gilliom, an associate professor of political science at Ohio State University, demonstrates both the tenuousness of welfare rights today and the costs that this system imposes on individual autonomy.

In *Overseers of the Poor*, Gilliom uses his case study of welfare recipients as the occasion for an attack on classic notions of privacy rights. Gilliom finds that welfare clients do not engage in "privacy talk" — indeed, he finds the concept to be devoid of value for the wel-

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1. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

2. *Id.* at 777; *see* CHARLES A. REICH, INDIVIDUAL RIGHTS AND SOCIAL WELFARE: THE EMERGING LEGAL ISSUES 1246, 1256 (1965) (discussing necessary "objective eligibility safeguards against revocation or loss of benefits").

3. *See* Reich, *supra* note 1, at 787 ("We must create a new property.").

fare recipients. Here, another comparison can be made with Reich's new property. Reich explicitly tied his idea of a property right in government entitlements to privacy.[4] He felt that the new property was needed to protect privacy and, in particular, individual autonomy.[5] Reich's notion of privacy reaches back to a classic concept of privacy, one that we term the "old privacy." It is precisely this classic idea that Gilliom finds welfare recipients to have rejected.

Theoretical work inside and outside of the legal academy has pointed, however, to a "new privacy."[6] The new privacy is centered around Fair Information Practices ("FIPs") and is intended to prevent threats to autonomy. The idea of privacy centered on FIPs is based not on a property interest in one's information, but the idea that processors of personal data should be obliged to follow certain standards. If, as we will see, classic notions of privacy are not of much use in the welfare state, the new privacy may be.

This Review begins by examining Gilliom's methodology and findings. It credits the insights of his look at the inner world of welfare recipients, but finds that he appears to ignore the need for income limits on aid recipients and the concomitant need for at least some personal information to enforce these limits. It also criticizes his failure to explore an interaction of an "ethics of care" among welfare recipients with possible use of retooled privacy rights or interests. In the second part of this Review, we consider the extent to which theoretical work inside and outside of the legal academy points to a new privacy and discuss how Gilliom's empirical research provides support for that scholarship. We also evaluate the extent to which the new privacy, centered on FIPs, can prevent the threats to personal autonomy so poignantly identified by Gilliom.

I.

Gilliom considers the "everyday politics of surveillance . . . by those who are among the most closely watched" (pp. 3-4). His research began with the idea of studying a group of "people [who] live with surveillance as a totalizing and encompassing force which can critically affect their well-being" (p. 42). Accordingly, Gilliom decided to engage in an ethnological exploration of welfare recipients, who in the mid-1990s were among the most closely scrutinized of any Americans. Specifically, Gilliom carried out empirical research concerning the attitudes of a small group of low-income women in Appalachian Ohio towards welfare bureaucracy and information

4. *Id.* at 778.

5. *Id.*

6. We discuss the old and new privacy in Part II of this Review.

surveillance. To a lesser (but equally fascinating) extent, Gilliom also looked at the attitudes of caseworkers in local welfare offices in southern Ohio.

In analyzing the interaction of welfare clients and bureaucracy, Gilliom first had to select a methodology. He decided not to work through the state-welfare bureaucracy because one of his "central interests was coming to know what the agencies cannot see or what they would forbid if they could" (p. 45). Instead, Gilliom and his assistants engaged in a series of in-depth and semistructured interviews with current welfare recipients as well as caseworkers in southern Ohio.

Interestingly enough, the interviews with the welfare clients, as opposed to those with the caseworkers, were carried out not by Gilliom, but by two former welfare recipients as paid project consultants. A number of strategic choices were involved in having consultants conduct these interviews. Gilliom's hope was that his consultants would be able to draw on their personal experience with welfare and their knowledge of Appalachian Ohio, and that "shared gender and social status, as well as the notable accent of the region, would help to establish a quicker relation of trust and more complete sharing of perspectives and practices" (p. 45). His use of the former welfare recipients as interviewers was also intended to help gain more distance from conventional discourse about privacy. Since the interviewers were unlikely to be steeped in the relevant academic and policy literature, their interactions with the welfare clients would be less likely to bias the field research (p. 45).

The final elements in the methodology of *Overseers of the Poor* involved finding a sample group for the interviews and selecting an interviewing technique. The sampling technique was informal: Gilliom opted for a "snowball" sampling in which the field interviewers followed initial interviews with welfare recipients whom they knew "with a request for a few names of other people . . . and for permission to mention the first subject's name in a personal introduction to those people" (p. 46). The interviewing technique involved taping semistructured interviews based on Gilliom's script. In the end, Gilliom's team interviewed forty-eight mothers from a four-county area.

Gilliom concedes that this sample cannot be certified as " 'scientifically representative' " (p. 46). But his aim was a different one than locating a sample that he could prove was representative; he wanted "to find access to the welfare poor of the region in a way that would offer the level of trust necessary to undertake meaningful interviews about topics which might include illegalities" (p. 46). Gilliom succeeded in this task; his interviews cast a brilliant light on the attitudes, language, and self-conception of at least one set of people receiving public assistance.

What did the interviews reveal? Gilliom first notes the general diversity of those in poverty and the differences among those interviewed by his study. He observes: "In many ways, there is so much diversity that catch phrases like 'the welfare poor' are, even if used as a shorthand, categorizations that belie the true complexity and particularity of the population" (p. 65). But he also identifies some significant similarities among his sample group. In particular, Gilliom concluded this group both lacked any notable rights consciousness and made almost no tactical use of the law (p. 70). In this relative void, however, Gilliom discovered a different language and different kinds of activities.

Gilliom describes an important phenomenon that he terms "rights talks and rights reticence" (p. 69). Following his research into how welfare clients view issues of "welfare administration, surveillance, and client information policy," Gilliom finds a striking lack of recourse to "the discourse of rights" (p. 70). By "rights talk," Gilliom specifically means "privacy rights talk." But what would "privacy rights talk" sound like for welfare clients? To be sure, welfare recipients talked about the indignities and oppressiveness of constantly being monitored (p. 67). But welfare clients did not react to this experience with a belief either that they had "a right to be let alone," to use the classic term of Warren and Brandeis,[7] or that they had existing legal interests that would allow them to oppose these practices (pp. 70-71). Instead, they engaged in "a more personalized discourse of need, care and responsibility" (p. 92).

The welfare clients' great concern was to provide for their families when supplied with a monthly welfare check that they viewed as inadequate to provide for their needs. Gilliom stresses at several points that the low level of support provided by state welfare was inadequate and drove its recipients to find ways to supplement their income that the state bureaucracy would not detect. As he writes, "very few people could be eligible for aid *and* make it through the month on welfare without such measures" (p. 67). Thus, Delilah, one of the recipients interviewed, was cutting hair and helping her brother wallpaper while receiving payment in cash to evade the computers of the Ohio bureaucracy. When she talked about this behavior, Delilah did not engage in "privacy talk," but stressed her obligation to her family. As she stated, "I think as long as someone is using what they are doing for their home or they are buying something that their kids need, I don't see anything wrong with it" (p. 94). As Elizabeth, another mother, said: "[M]y girl means more to me than what they're gonna do" (p. 95). Or in Dewey's words, "[Y]our kids come first" (p. 93).

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

Gilliom reports the existence of "an ethics of care" of the kind that Carol Gilligan first elaborated in her famous book, *In a Different Voice: Psychological Theory and Women's Development.*[8] As Gilliom summarizes this work by Gilligan, "[T]he ethic of care emphasizes responsibilities, particular needs and differences, and compassion" (p. 109). A discourse of care leads not to a discussion of an individualistic right to privacy, but "an emphasis on responsibility, on particular needs, on care for dependents" (p. 109).

Gilliom views the welfare clients in his study as adopting an ethics of care because it is the most logical point of reference from which to organize their world. He writes, "[W]e should view these women not as being driven by some structure of language or perception, but, rather, as choosing from among the many terms and references that we can use to make sense of our lives and our conditions" (p. 111). The women at the center of his book faced "abusive practices in welfare administration, rural isolation, and low education" (p. 111). Moreover, their lives were "surrounded by the obligations of meeting both the needs of their dependents and the commands of those upon whom they depend" (p. 111). The consequence: "In many critical dimensions, then, their lives, roles, experiences, and values appear to gravitate away from the assertion of individualistic rights and toward the focus on responsibility and care" (p. 111). Thus, the female welfare recipients at the center of Gilliom's book challenged the legitimacy of state government's attempts to gain information on them but not on the ground that the state's scrutiny involves their privacy rights. Rather, "their lives, roles, experiences, and values" led them to offer an alternative critique (p. 111). They challenged the state's information collection on the grounds that this data processing might lead to the denial of benefits and thus prevent them from satisfying "the needs of their dependents and the commands of those upon whom they depend" (p. 111). With loved ones who needed help on one side, and the welfare bureaucrats and their computers on the other, the welfare clients viewed the idea of privacy rights as empty.

Beyond the ethics of care, *Overseers of the Poor* also identifies a cluster of three additional factors that led the welfare recipients away from a privacy discourse: (1) their lack of knowledge of how their personal data were actually being processed and their accompanying dread about surveillance; (2) their generally low level of actual rights or other legal interests; and (3) a lack of an active legal movement to help them (pp. 71-72). Thus, the interviews revealed the widespread ignorance of welfare recipients about the precise databases to which the computers of the Ohio welfare administration were linked and an oppressive worrying about the level of scrutiny into their lives. In

8. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1993).

interview after interview, Gilliom's assistants recorded complaints about the degradation that the welfare system visited upon the recipients. For example, Mary explained: "You have to watch every step like you are in prison. All the time you are on welfare, yeah, you are in prison" (p. 51). Gilliom also found the women plagued by strong feelings of guilt about their self-help measures.

The other factors that undercut any privacy talk are the low level of actual rights or other legal interests for welfare recipients and a lack of financial resources or an active legal movement to help them. On these points, Gilliom traces a decline in activity to assist welfare recipients by the judiciary, legislative branch, and public interest organizations since a high point during the mid-1960s. As Gilliom concludes, "Welfare mothers, as constituted by their ongoing relationships and status within the welfare bureaucracy, are almost the inverse of the rights-bearing individual who would rise up against surveillance with a legal challenge" (p. 91).

By this point in *Overseers of the Poor*, Gilliom has shifted from his earlier, apparently dialectical proposition that pitted the ethics of care against privacy. Gilliom's ultimate view is not dialectic; rather, it is simply that a group of people lacking financial resources and possessing almost no privacy or legal rights are unlikely to view their world through the privacy perspective (pp. 70-73). Gilliom admits, in fact, "the importance of context . . . in the formation and mobilization of rights claims and protest" (p. 84). This analysis suggests that the ethics of care could form part of a heightened interest in privacy rights. Later in this Review, we will discuss Fair Information Practices as the necessary legal building blocks of modern information privacy rights. At this point, we only wish to introduce the point that an ethics of care and recognition of privacy rights can reinforce each other as a basis for challenging information collection. A group with better defined interests, institutional support, financial resources, and access to legal resources might seek to protect their loved ones and affirm its connections with them through privacy claims. Here, Gilliom might have considered activities by public interest groups engaged in the area of welfare reform. The critical question is whether any interest group activity would encourage "the formation and mobilization of rights claims and protest" (p. 84).

The first part of Gilliom's findings concerns the presence of an ethics of care among welfare recipients. The second part reveals a pattern of everyday resistance rather than formal legal claims. At this point in *Overseers of the Poor*, Gilliom explores the actions that welfare recipients take and how they attempt to shield their behavior from the awareness of the welfare bureaucracy. Faced with state scrutiny, a level of monthly care they find inadequate, and ignorance about important parts of the welfare system, the mothers seek cash-only jobs that they hide from welfare services; obtain gifts in kind from relatives

and friends; and enlist others in their community in avoiding rules (pp. 93-114).

For Gilliom, these welfare mothers engage in important acts of "everyday resistance" that attempt to reject and challenge "the political commands of the state" (p. 100). Instead of legal or political mobilization, the welfare mothers in the book carry out in important "daily actions seeking to frustrate the mission of the welfare bureaucracy and its surveillance system" (p. 92). Gilliom summarizes: "Rather than publicly objecting to the infringement of their rights as citizens, they quietly meet the needs of their dependents through daily actions that defy the commands of the state" (p. 111).

While this struggle is quiet, it is not lonely; Gilliom discusses "clear evidence of mutual support and cooperation among the mothers" and within their larger community (p. 106). As a specific example of such community cooperation, one mother in the study, Mary, talks about a helpful convenience store clerk, who allowed her to use food stamps to buy diapers and other family necessities. She stated, "I mean, I don't buy whiskey or anything, but you can't make it if you can't buy your diapers and your laundry soap and things. . . ." (p. 49).

Yet, resistance has its price. Gilliom finds that welfare recipients feel guilt and degradation, among other emotions, caused by their everyday evasions. He notes the "mixtures of defiance, fear, pride, guilt, and anger" involved in their struggles "to scrape up a little extra cash, or use food stamps for diapers, or hide resources which might threaten their eligibility" (p. 67). The presence of these emotions shows that the welfare recipients have accepted and internalized, at least to some extent, the demands of the all-knowing surveillance system. With reference to seminal work by Michel Foucault, Gilliom talks of "the frequent emergence of guilt and regret over the rule breaking [as] an important sign of the 'internalizing of the gaze' that Foucault writes of."[9]

Although the bureaucratic gaze has been internalized, resistance continues. It is striking that parallel resistance can also be found among caseworkers in the welfare system. As Gilliom notes, computer surveillance is intended to control not only recipients, but caseworkers and other administrators (pp. 96-99). Rather than a system that allows local discretion, the state seeks to impose hierarchical control from the

9. P. 133. The scholarship in question is MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 1995) (1975). Foucault discusses Jeremy Bentham's 1787 proposal for a Panoptican, a prison building constructed in the form of a wheel to allow surveillance by a warden located in a central area. JEREMY BENTHAM, THE PANOPTICAN WRITINGS (Miran Bozovic ed., Verso 1995) (1787). For further discussions of the Panoptican, Bentham, and Foucault, see Jamie Boyle, *Foucault in Cyberspace: Surveillance, Sovereignity, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 177-78 (1997). *See also* OSCAR H. GANDY, JR., THE PANOPTIC SORT: A POLITICAL ECONOMY OF PERSONAL INFORMATION 53-94 (1993).

top down. Yet, local officials battle against such control. Thus, a caseworker identified only as "T" explained that she fights the computer system by putting false information into it. "T" wishes to avoid the computer's denying benefits to people who, in her view, were clearly eligible. As she states, "We can't wait until the state decides to reprogram [the computer]. I mean, we have to get these people a check if they're eligible for it and I guess you have to do it by whatever means possible because we have no other way" (p. 98). One is left wishing that Gilliom devoted more time and space to exploring the views of the caseworkers. This evidence of resistance from within the system provides a tantalizing suggestion of internal limits on bureaucratic rationality.[10]

In a nutshell then, Gilliom views the chief contribution of his research as its "exploration of the everyday consciousness of people who are struggling with political domination on their own and in the absence of organization or support" (p. 85). In place of rights talk, he describes both an ethics of care and the politics of everyday resistance. And in Gilliom's view, our future experience may well look like the present condition of the welfare mothers of his book. In a key passage he argues:

> Once elaborate systems of bureaucratic surveillance are erected, it may be especially difficult to confront them with conventional political challenge. And as mechanisms of surveillance push the issues of visibility and verification to the forefront of long-standing struggles between citizens and institutions, practices of deception, camouflage, and secrecy are the necessary politics of our times. *Everyday tactics of evasion, subterfuge, and concealment, then, may very well become a defining form of politics in the surveillance society.* (p. 101)

Gilliom also faults privacy laws that seek to limit surveillance programs with requirements of access and correction. In his view, rather than these underused legal rights, a more likely future pattern will be "complaint, evasion, and resistance" by affected individuals (pp. 101, 112).

Finally, in a coda to *Overseers of the Poor*, Gilliom offers a firsthand account of his own experiences in the summer of 1999 as he sought to complete the book. In August 1999, law enforcement officials landed at Gilliom's farm, searched his back fields and hills, and an adjacent national forest, and then obtained a warrant and searched his home. This armed invasion, search of his home, and investigation of Gilliom and his wife for federal felonies amounted to a "rapid, intense, and visceral education into the politics of surveillance, privacy, power, and the law" (p. 137).

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10. For a classic exploration from the 1980s of these limits within the administration of social security disability claims, see JERRY MASHAW, BUREAUCRATIC JUSTICE (1983).

In his account of these events, Gilliom first describes the setting of his home as "an aging farmhouse situated in a small valley of about sixty rough, hilly, and mostly wooded acres" (p. 138). His house is surrounded by forests of private and public land, and the region of the state in which he lives is known both for its marijuana cultivation and constant observation by the helicopters of the State Bureau of Criminal Identification and Investigation. When the police helicopters landed at his home, his housesitters reached him out of town, where Gilliom was visiting friends, to tell him of this development. Gilliom assured them that "[w]e were innocent of wrongdoing and had no reason for concern" (p. 139). As Gilliom writes, he knew that he was innocent of growing the marijuana, but "I was lying . . . with the assertion that we had nothing to worry about" (p. 139).

Gilliom was worried because he and Amy King, his life partner, had been vocal and public critics of the local police department. Moreover, King was the head of the regional branch of the American Civil Liberties Union ("ACLU"). With King, Gilliom had engaged in high profile activism to challenge the practices of local police, including the policies of narcotic officers and prosecutors. In fighting the war on drugs, the local constabulary "had committed strings of rights violations" (p. 139). Gilliom reports that, beyond violating individual rights, local law enforcement had engaged in offenses including "an almost endless string of corruptions, excesses, and embarrassments among the law enforcement agencies and the offices of the county prosecutor" (p. 139). In light of his activism, Gilliom advises us, "I hope that the reader can pause and imagine absolutely every nook and cranny of your home ransacked not just by strangers, but by strangers who would probably like nothing more than to hang you out to dry" (p. 145).

The search of Gilliom and King's home did not lead to formal charges against them, and he in turn decided not to sue the law enforcement officials. With the passage of some time, Gilliom organized his thoughts about this experience around two insights. First, he and his life partner engaged in a mixture of both law talk and care talk in reaction to the search and its aftermath. As for the law talk, Gilliom notes, "We had called a defense attorney within minutes of hearing the news; hired a former judge as our attorney within a few days; and consulted with the state director of the ACLU and a widely recognized civil rights attorney in subsequent weeks" (p. 147). Gilliom attributes his recourse to rights talk, in contrast to the welfare clients, to his superior resources and better awareness of legal language ("due process, warrants, the Fourth Amendment") (p. 147).

As for the care talk, Gilliom notes how he and his life partner worried most about "the impact of arrest or litigation on our children" (p. 147). He observes:

> In short, every calculation and decision that we attempted to make about

> how we were going to cope with the law was embedded in a context of thinking about our own needs for money, security, and dignity and our children's needs for a sane household, nonincarcerated parents, and, of course, all the money we might need to spend on litigation. (pp. 147-48)

Thus, Gilliom's report of his personal experience shows that privacy rights and care are not opposed, but rather embedded in a given context that shapes their relation to each other.

Gilliom's second set of insights concerned the nature of the politics of surveillance. He found that while the invasion of his home was "a massive violation of our privacy," that was perhaps "the most fleeting" of the harms suffered (p. 149). He writes, "What continued was how the structures of power, surveillance, and law interacted with the realities of our daily lives to rob us of what we felt to be both our integrity and our citizenship" (p. 149). Gilliom ultimately decided not to sue the authorities for the violation because of the accompanying stress, money to be spent on lawyers, and "the possibility that poking the authorities with a lawsuit would provoke retaliatory action" (p. 149). Regarding the language of rights, Gilliom sadly concludes, "[A]ll the accessibility that we had felt regarding the language of rights was misleading. We could speak them, but we could not really afford them" (p. 149).

Thus, for Gilliom, the experience of surveillance caused a harm to his self-image and his desire and capacity to engage in activism. He writes, "The combined impact of the state's power to compel, watch, and punish, the sheriff's power to retaliate against challenge, and our duty to meet the needs of our family, has stolen the senses of autonomy and control upon which full citizenship is based" (p. 150). In his view, this loss hurt him more than the theft of his privacy when his house was ransacked. Gilliom ends his book by noting that like the welfare recipients, "We are all watched, we are all angry, and we are all afraid. And we are increasingly without a language to speak about it" (p. 150).

This incident and Gilliom's response to it suggest how surveillance stifles dissent. But in challenging surveillance by law enforcement agencies, Gilliom does not confront the other side of the equation. Obviously, there is a legitimate role for criminal investigation in the realm of criminal-law enforcement. This critique of Gilliom's discussion of law enforcement is equally applicable in his treatment of welfare oversight, where there is a similar necessity of some surveillance by the state.[11] Here, we wish to leave criminal procedure behind and return to the topic of welfare oversight.

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11. At least some surveillance by private parties is also needed at times, see, for example, Anita Allen, *The Wanted Gaze: Accountability for Interpersonal Conduct at Work*, 89 GEO. L.J. 2013 (2001) (discussing need for accountability in the workplace, including workplace monitoring of employees, to prevent sexual harassment of working women).

At times, Gilliom writes as if the government has no valid interest in gathering information about welfare recipients. He seems to regard the so-called "declaration era" of the late 1960s with straightforward approval. This was a short-lived epoch when "the poor — at least in some regions of the country — [were] in the position of advancing their own version of needs and budgets, their own version of resources, and their own take on the government's 'mean's test' " (p. 29). During that period, "program administrators placed greater emphasis on accepting the terms and condition of poor people's needs as they were presented by the poor themselves" (p. 28). This state of affairs is a potential prescription for disaster. Imagine any group in society, regardless of the identity of this aggregation, able to advance "their own version of needs and budgets, their own version of resources" when asking for governmental money, as well as their own perspective on outside controls. The danger is that any one-sided claim on both governmental resources and on the nature of the evaluations of requests will lead to waste, to extravagant demands for support, and to exploding governmental budgets. Put simply, it is as if Gilliom considers the government to be acting only for the purpose of social control and not for valid administrative purposes, such as fraud prevention.

Gilliom ignores the necessity for income limits on aid recipients and the concomitant need for information to enforce these limits. In the kind of achievement-oriented "service administration" that is now in place at the federal and state levels, information collection is a central necessity. As one of us wrote over a decade ago, "the state today depends upon the availability of vast quantities of information, and much of the data it now collects relates to identifiable individuals. Indeed, the fulfillment of many governmental objectives depends on the gathering of such personal information."[12]

In the specific context of welfare, moreover, administrators have turned to information processing to avoid two sets of past problems. First, scarce resources must be distributed among a high volume of applicants. Gilliom cites scholarship depicting welfare administration before computerization as "organized anarchy" in which "the effects of actions or techniques could not even be assessed" (p. 33). Computerized information processing appears to offer an alternative to "an administrative and record-keeping system based entirely on paperwork and oral exchanges" (p. 33). Second, abuses of administrative discretion within the old system also made a shift to a data-processing model attractive. These abuses included midnight searches of the

12. Paul M. Schwartz, *Data Processing and Government Administration: The Failure of the American Legal Response to the Computer*, 43 HASTINGS L.J. 1321, 1332 (1992).

homes of welfare recipients and the application of widely divergent local norms within the same state.[13]

Gilliom's account is therefore flawed because it fails to recognize the need for income limits and information collection. Gilliom also passes over an important area for exploration — the impact of the massive legislative changes made in 1996 to the long-established welfare program, Aid to Families with Dependent Children ("AFDC").[14] The Temporary Assistance to Needy Families ("TANF") program, established in 1996, seeks no less than an end to welfare dependency in the United States. It makes recipients of welfare assistance subject to a two-year limit on aid and a work requirement.[15] Gilliom's book, published five years after enactment of the TANF, should have evaluated the extent to which this new statute is encouraging the same kind of massive, low-profile resistance as AFDC once did. One promising area for research would be TANF's combination of a work requirement with a low level of support for child-care services.[16] This combination may encourage the kind of off-the-books activity and other evasions that Gilliom found prevalent under AFDC.

Gilliom's *Overseers of the Poor* demonstrates both the impact of information collection and the response of a particular group of people to such surveillance. But this book, despite its value as an empirical study, is weakened by a too simplistic challenge to information collection. Failing to acknowledge in any meaningful way that information collection can be legitimate, Gilliom fails to explore the tough questions: What personal information should be collected and what uses should be made of the data?

II.

In the second part of this Review, we explore the relationship between Gilliom's findings and an emerging critique of privacy law. This path bring us back to Charles Reich's famous article from 1964, *The New Property*. As noted in our introduction, Charles Reich

13. *Id.* at 1354.

14. For a discussion of AFDC, see *id.* at 1352.

15. The Temporary Assistance to Needy Families Act was enacted as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. For more on this Act, see the home page of the bureaucracy, The Office of Family Assistance, which oversees it. The Office of Family Assistance, *at* http://www.acf.dhhs.gov/programs/ofa/ (last visited Sept. 23, 2003).

16. The current political stalemate over TANF's future sees President Bush advocating a tougher work requirement and Democrats wanting to increase funding for child care. *See* Amy Goldstein, *Bush Presses Lawmakers to Back Welfare Changes*, WASH. POST, Jan. 15, 2003, at A4. Regardless of the issue of resistance by welfare recipients to program obligations, an increasing problem is homelessness among the working poor. *See* Francis X. Clines, *Life After Welfare in the Here and Now of America's Jammed Shelters*, N.Y. TIMES, Dec. 24, 2002, at A22.

argued in this article that in light of changed social circumstances, a new property in governmental benefits was necessary. Reich observed, "The wealth of more and more Americans depend upon a relationship to government."[17] Reich found that this reliance on government also created dependence — especially in the context of public assistance.[18]

The solution of Reich almost four decades ago was to propose a property right in government entitlements. Reich argued, "Property is a legal institution the essence of which is the creation and protection of certain private rights in wealth of any kind."[19] Moreover, property "performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner."[20] Property matters, in fact, because it helps preserve autonomy, or as Reich writes at one point, "the American character" and the "independent base" from which people can "assert their individuality and claim their rights."[21] Interestingly enough, Reich links property to privacy.

For Reich, privacy provides a sanctuary that shelters the individual from the power of the government and organizations in the private sector. As he notes of the threat that appeared by the 1960s, "The pressures on the individual are greatly increased by the interrelatedness of society and the pervasiveness of regulation."[22] The consequences are potentially dire: "Caught in the vast network of regulation, the individual has no hiding place."[23] In contrast, a propertization of government benefits, Reich's new property, would protect liberty. As Reich proposed, "[T]here must be a zone of privacy for each individual beyond which neither government nor private power can push — a hiding place from the all-pervasive system of regulation and control."[24] Propertization of benefits would create the needed "sanctuaries or enclaves where no majority can reach."[25] Or, as Reich writes in developing his privacy-as-sanctuary metaphor, property gives the individual "a small but sovereign island of his own."[26]

While Reich demanded the creation of a new property, he did so based on an "old privacy." Although he did not cite to any privacy literature in *The New Property*, Reich's language of privacy-as-

17. Reich, *supra* note 1, at 733.

18. *Id.* at 758.

19. *Id.* at 771.

20. *Id.*

21. *Id.*

22. *Id.* at 759.

23. *Id.* at 760.

24. *Id.* at 785.

25. *Id.* at 787.

26. *Id.* at 774.

sanctuary evoked another famous law review article. In 1890, Samuel Warren and Louis Brandeis in *The Right of Privacy* conceived of privacy as the right "to be let alone."[27] In their words, the law cannot merely consider "a man's house as his castle" and then "open wide the back door" to invasions of privacy.[28] This idea is shared by Reich who writes, "There must be a zone of privacy for each individual beyond which neither government nor private power can push — a hiding place from the all-pervasive system of regulation and control."[29]

In contrast to Reich, however, Warren and Brandeis were more than ambivalent about property law. Much of their article analyzes leading intellectual property cases of their day. Based on their close reading of these cases, Warren and Brandeis argued that certain judicial opinions that seemed to protect only intellectual property rights, such as a decision stopping an unauthorized publication of a photograph, were actually seeking to protect the individual's "inviolate personality."[30] Warren and Brandeis also appeared doubtful whether property as an institution would be capable of providing a solid basis for "a general right to privacy for thoughts, emotions, and sensations."[31] Thus, unlike Reich's neat tie between privacy and property, Warren and Brandeis were less certain that privacy could be protected through property rights.

The old privacy reached its apogee in tort law and the Restatement of Torts. In 1960, William Prosser first proposed that the tort of invasion of privacy be divided into four distinct branches and then, as reporter for the relevant sections, imported his proposal into the Restatement of Torts.[32] It is essentially this tort-based concept of "old privacy" that Gilliom attacks in *Overseers of the Poor.* As we saw in Part I, Gilliom finds the idea of privacy rights to be absent from the discourse of welfare recipients. To the extent that the privacy at stake is a notion of a right "to be let alone," (Warren and Brandeis) or an idea of an "enclave" beyond the reach of the majority (Reich), it is not surprising that welfare beneficiaries avoid these concepts. After all, as Gilliom himself holds, welfare recipients are "constituted by their ongoing relationships and status within welfare bureaucracy" (p. 91).

If there is an old privacy, however, there must also be a new one. We now wish to explore the relationship between Gilliom's findings

27. Warren & Brandeis, *supra* note 7, at 195.

28. *Id.* at 220.

29. Reich, *supra* note 1, at 785.

30. Warren & Brandeis, *supra* note 7, at 205.

31. *Id.* at 206. For an exploration of the ambivalence of Warren and Brandeis to property-based conceptions of privacy, see Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property and Appropriation*, 41 CASE W. RES. L. REV. 647, 668-70 (1991).

32. RESTATEMENT (SECOND) OF TORTS, § 652A (1976); William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

and an emerging critique of privacy law. As developed in writings by Julie Cohen, Priscilla Regan, Paul Schwartz, Daniel Solove, and others, a significant attempt has been made in the academy to go beyond existing "privacy rights" talk.[33] These authors, working independently of each other, have sought to develop a normative basis for an information privacy law based not in a right of "individual control" over information, but in the idea of privacy as a social good. Gilliom states: "[T]he language of privacy rights is the only show in town" in academic and policy debates (p. 120). Yet, the new critique of the individualistic privacy paradigm marks the emergence of a significant new approach. From the work of these writers, we see the emergence of a "new privacy."

Before turning to these scholars, however, we explore the scholarship of Robert Post, who provides a key intellectual link between the old and new concepts of privacy. As noted, the old privacy is tort privacy, which has its origins in the famous article by Samuel Warren and Louis Brandeis and the Restatement of Torts as shaped by Dean Prosser.[34] Scholars have frequently seen the privacy tort as concerned predominately with individual interests, but Post in 1989 offered an innovative reinterpretation of the classic right of privacy.[35]

As Post explains, the privacy tort represents not "a value asserted by individuals against the demands of a curious and intrusive society," but a necessary aspect of relations with others.[36] Rather than upholding "the interests of individuals against the demands of community," information privacy creates rules that in some significant measure "constitute both individuals and community."[37] The fashion by which privacy standards carry out this constitutive task is by confining personal information within boundaries that the standards normatively define. In Post's words, privacy's function is to develop "infor-

33. PRISCILLA M. REGAN, LEGISLATING PRIVACY (1995); Julie E. Cohen, *Examined Lives: Information Privacy and the Subject As Object*, 52 STAN. L. REV. 1373 (2000); Paul M. Schwartz, *Beyond Lessig's Code for Internet Privacy: Cyberspace Filters, Privacy-Control, and Fair Information Practices*, 2000 WIS. L. REV. 743 [hereinafter Schwartz, *Beyond Lessig's Code*]; Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815 (2000) [hereinafter Schwartz, *Internet Privacy*]; Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609 (1999) [hereinafter Schwartz, *Privacy in Cyberspace*]; Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087 (2002) [hereinafter Solove, *Conceptualizing Privacy*]; Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393 (2001) [hereinafter Solove, *Privacy and Power*].

34. Warren & Brandeis, *supra* note 7, at 193.

35. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989).

36. *Id.* at 958.

37. *Id.* at 959.

mation terrorities."[38] The establishment of these "information preserves" is a critical means for defining social and individual life.[39]

But how does the privacy tort shape and constitute information preserves? According to Post, litigants, judges, and juries draw on and refine the legal expression of general community norms through open-ended inquiries around language fixed in state tort law and the Restatement of Torts. The critical inquiry developed in these sources is whether the "reasonable person" would find certain invasions of privacy "highly offensive."[40] The resulting legal verdicts confirm or elaborate shared values and thereby strengthen community.

Here is where the difficulty arises: this legal method worked in the past, in Post's view, because it rested upon a certain kind of community. Post argues that "privacy is for us a living reality only because we enjoy a certain kind of communal existence."[41] Yet, we now interact increasingly with large bureaucracies. The relationships we have with such organizations are not "social and communal."[42] As Post observes, these relationships are based on managerial efficiency and lack the characteristics that are necessary to generate privacy rules.[43] One is reminded of Jürgen Habermas's warning of the fashion in which bureaucratic entities engage in a "colonialization of the lifeworld" of the individual.[44] Habermas believes that democratic values both create and depend on a discursive building of consensus.[45] The danger of the "colonialization" that he decries is that the instrumental views of bureaucracy will occupy and hollow out the private sphere in which equal citizens can engage in free discussion and opinion formation.[46]

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38. *Id.* at 984-85.

39. *Id.*

40. *Id.* In other words, the judge or jury evaluates an informational privacy interest in reference to an act of intrusion or disclosure, and thereby makes a judgment about the appropriate use of the related personal information. *Id.* at 985.

41. *Id.* at 1010.

42. *Id.* at 1009.

43. *Id.*

44. 2 JÜRGEN HABERMAS, THEORIE DES KOMMUNIKATIVEN HANDELNS 221 (1981).

45. *Id.*

46. *Id*; *see* JÜRGEN HABERMAS, STRUKTURWANDEL DER ÖFFENTLICHKEIT 27 (1990) (describing the rise of a public sphere in the eighteenth century and its later fall under pressure of mass media, bureaucracy, and "juridification" (Verrechtlichungssphaenomene)); JÜRGEN HABERMAS, TECHNIK UND WISSENSCHAFT ALS "IDEOLOGIE" 131 (1969) (demonstrating the difficulties of participatory role for the public in discussions between politicians and experts). Despite the pessimistic conclusions about bureaucracy and information privacy that we derive from Habermas's work, we wish to note that Michael Froomkin has used Habermas to derive relatively optimistic conclusions concerning bureaucracy and the standards-setting process for the Internet. *See* A. Michael Froomkin, *Habermas@discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749 (2003).

Post's work represents an important revision of the old privacy because he sees privacy, not simply as an individual right, but as a necessary precondition for community. Nonetheless, Post's approach is still an old privacy approach because it rests on the notion of shared, pre-existing norms of the private. Despite its analytical power, Post's approach does not provide a foundation for a normative conceptualization of privacy in a bureaucratic, rather than a communal setting. Post simply considers the bureaucratic realm a domain in which privacy, at least as he conceives of it, cannot exist. To be sure, Post does furnish a deeper theoretical basis for Gilliom's attack on classic notions of privacy. His work shows that it is not surprising that Gilliom finds weaknesses in classic notions of privacy; the subjects of *Overseers of the Poor* are located, after all, in a setting in which the assumptions of the old privacy do not fit. Post accomplishes much, but his work does not provide help to those who would rethink data privacy in the Information Age.

Thus, the old privacy, even in Post's hands, proves of limited assistance in confronting the modern bureaucratic state. What then of the new privacy? The proponents of the new privacy provide a guide to the creation of privacy rules in settings where the assumptions of the old privacy fall short. Like Post, these scholars reject privacy as an individual right of control. These authors argue that privacy is a kind of social good. As Priscilla Regan wrote in 1995, for example, "Most privacy scholars emphasize that the individual is better if privacy exists; I argue that society is better off as well when privacy exists."[47]

The theorists of the new privacy desire protection for autonomy. As Julie Cohen writes, for example, "Autonomy in a contingent world requires a zone of relative insulation from outside scrutiny and interference — a field of operation within which to engage in the conscious construction of self."[48] For Cohen, the autonomy fostered by information privacy generates concrete collective benefits. As she writes, "A robust and varied debate on matters of public concern requires the opportunity to experiment with self-definition in private, and (if one desires) to keep distinct social, commercial, and political associations separate from one another."[49] Solove made the same connection by creatively linking the problem of privacy in the modern world to that depicted in Franz Kafka's *The Trial*.[50] Elaborating on this linkage, Solove states that *The Trial* illustrates that "relationships to bureauc-

47. REGAN, *supra* note 33, at 221.

48. Cohen, *supra* note 33, at 1424.

49. *Id.* at 1426-27.

50. Solove, *Privacy and Power*, *supra* note 33, at 1422.

racies which are unbalanced in power can have debilitating effects upon individuals — regardless of the bureaucracies' purposes."[51]

One of the authors of this Review has offered an expanded justification of the right to privacy. Paul Schwartz proposes that information privacy be seen as protecting both deliberative autonomy and deliberative democracy.[52] Deliberative autonomy is an individual process of self-governance; deliberative democracy is a group-oriented process for critical discourse.[53] Schwartz's approach highlights the extent to which privacy is a necessary precondition to a fully functioning democracy. And, here, the old privacy (as reinterpreted by Post) and the new privacy agree on the necessary communal basis for privacy: "[T]he law must structure the use of personal information so that individuals will be free from state or community intimidation that would destroy their involvement in the democratic life of the community."[54]

While defenders of the new privacy and the old privacy both see this interest as vital, they differ in how we should determine the proper scope of the necessary privacy protections. Post had seen the old privacy as generated and protected through tort litigation. Litigants, judges, and juries were to develop the legal expression of general community norms through inquiries around issues such as whether the "reasonable person" would find certain invasions of privacy "highly offensive."[55] Thus, the old privacy reflects the premise of shared norms being identified and elaborated through litigation. In contrast, the generally agreed upon path to the new privacy is through FIPs, which are generated primarily through the legislative process. These rules for use of personal data have been discussed and used in the United States — and on an international basis — since the 1970s.[56] FIPs, therefore, predate the work of the theorists of the new privacy, but have assumed new significance in the work of these scholars.

FIPs are attractive because they offer the chance for autonomy protection through rules for the use of personal data that are created

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51. *Id.* at 1423.

52. Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 560-61 (1995) [hereinafter Schwartz, *Privacy and Participation*]; *see* Schwartz, *Privacy in Cyberspace*, *supra* note 33, at 1650-54. For the elaboration of the distinction between deliberative autonomy and deliberative democracy, see James E. Fleming, *Constructing the Substantive Constitution*, 72 TEXAS L. REV. 211, 253-55 (1993).

53. Schwartz, *Privacy in Cyberspace*, *supra* note 33, at 1648-56.

54. Schwartz, *Privacy and Participation*, *supra* note 52, at 561.

55. For Post, the judge or jury evaluates an informational privacy interest in reference to an act of intrusion or disclosure, and thereby makes a judgment about the appropriate use of the related personal information. Post, *supra* note 35, at 981-82.

56. For a discussion that notes differences between Fair Information Practices in Europe and the United States, see PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW 5-17 (1996).

by democratic institutions — in particular, but not exclusively, by the legislature.[57] That is, at least, the rosy scenario, which we first wish to sketch before considering a darker picture of FIPs. Where advocates of the old privacy see privacy norms as preexisting, new privacy advocates see them as constructed largely through majoritarian decisionmaking. Thus, Schwartz proposes, "FIPs can play a significant role in the construction of multidimensional information territories that insulate personal data from socially harmful kinds of observation and use by different parties."[58] Or, as Cohen writes, legislating for information privacy "must delineate the appropriate boundary between ownership and speech, specify the parameters for effective consent, and impose meaningful procedural and substantive protections of information practices."[59] Cohen also discusses the need to revisit certain FIPs on an ongoing basis: "Some fair information practices are likely to require ongoing regulatory oversight. Others are likely to require rulemaking at regular intervals."[60]

What are FIPs to look like? Although the expression of FIPs in different statutes and regulations will vary in details, sometimes crucially, a formulation with nine elements is possible: (1) defined limits, often statutory in nature, for processors of personal information (purpose specification); (2) processing systems that the concerned individual can understand (transparent processing systems); (3) notice to the individual; (4) individual choice or consent regarding the further use of her personal information; (5) security for stored data; (6) limits on data retention; (7) data quality (accurate and timely information); (8) access to one's personal data; and (9) enforcement of privacy rights and standards, which can involve, often in combination, individual litigation, government oversight, or industry self-regulation. We return to these elements of FIPs shortly and assess Gilliom's portrait of Ohio welfare law in light of them.

In Part II, we have gone from the old to the new privacy and addressed the idea of FIPs. We now return to Gilliom and his *Overseers of the Poor*. Gilliom builds on the interviews with the welfare clients to criticize a privacy paradigm that posits a ruggedly autonomous individual located in a natural state of solitude. For Gilliom, an individual cannot be seen "as existing in a free and natural state prior to the 'visitation' by a surveillance program and as returning to that state of privacy and solitude once the observation is completed" (p. 122). In particular, privacy is not something that can be restored once the

57. For a discussion of the importance of courts in interpreting information privacy statutes, see Edward J. Janger, *Muddy Property: Generating and Protecting Information Privacy Norms in Bankruptcy*, 44 WM. & MARY L. REV. 1801 (2003).

58. Schwartz, *Beyond Lessig's Code*, *supra* note 33, at 780.

59. Cohen, *supra* note 33, at 1435.

60. *Id.* at 1436.

surveillance system is turned off. As he writes, "the impact of surveillance" is the way it forms "permanent frames of reference, assessment, and decision" (p. 122). The effects of surveillance include:

> degradation, the loss of control, the implied suspicion, the feelings of being just a number, the anxiety over errors or subterfuges being caught, the fear of malevolence or incompetence on the part of surveillance practitioners, the fear of breaking rules or departing from norms that are unknown, and, especially, the need or desire to break the rules. (p. 125)

As we have seen in this Part, this view of privacy is shared by the scholars who have developed the new privacy. To return again to Cohen, she writes, "Autonomous individuals do not spring full-blown from the womb .... [A]utonomy is radically contingent upon environment and circumstance."[61] And the concerns of these scholars with deliberative democracy and deliberative autonomy is also well illustrated by *Overseers of the Poor*. Indeed, both the welfare recipients and Gilliom's encounter with the local police illustrate the contingency of autonomy, and the necessity of information privacy, for deliberative democracy. If adequate rules are not in place for the collection and use of personal information, citizens will engage in neither criticism of the government nor unfettered debate about social issues. As Gilliom insightfully observes, surveillance systems are "both an expression and instrument of power" (p. 3).

The remaining issue is whether FIPs are likely to have a positive impact, as the scholars of the new privacy hope, or are doomed to failure, as Gilliom concludes of the privacy rights that he criticizes. Although he does not explore the concept of FIPs in any detail, Gilliom depicts their failure within Ohio welfare administration. Indeed, the problems that Gilliom identifies can be analyzed through a focus on FIPs.

To begin with, the Ohio system is exceptionally difficult to understand. Indeed, Gilliom describes how even caseworkers in Ohio are frequently at a loss to explain basic elements of regulation, such as whether potential employment is permissible or not. It is also clear that the individual receives notice neither of initial data processing nor of further data sharing. Limits on data retention appear not to exist. Moreover, access to one's personal data is generally limited. Gilliom also notes that any existing requirements of access and correction are underused. Finally, enforcement of privacy rights is almost completely absent. As Gilliom describes it, the ignorance, fear and need of wel-

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61. Cohen, *supra* note 33, at 1424; *see* Schwartz, *Internet Privacy*, *supra* note 33, at 821 (discussing "autonomy trap," a belief in choice that ignores "(1) the strong limitations existing on informational self-determination ... (2) the fashion in which individual autonomy itself is shaped by the processing of personal data; and (3) the extent to which the State and private entities remove certain uses or certain types of personal data entirely from the domain of two-party negotiations").

fare recipients causes a low level of use of whatever legal interests do exist (pp. 85-90).

Gilliom's account does not mean, however, that privacy rights cannot be protected. Most obviously, a group with better-defined rights, institutional support, financial resources, and access to legal resources would be better able to make privacy claims. Indeed, the lack of institutional support in asserting privacy claims, which is a principal focus of Gilliom's critique, can be remedied and, in some circumstance, this remedy can be obtained at a modest price. A recent survey sponsored by the Center for Policy Research has analyzed the usefulness of using telephone hotlines to provide brief legal advice and referrals to low-income people.[62] This survey found that telephone hotlines could be quite helpful; the callers who understood what they were told to do and followed the advice given tended to prevail in resolving their problems.[63] Telephone hotlines might also be created to give a target population privacy advice, such as regards available FIPs.

In large measure, however, this Review has stuck to the rosy scenario about FIPs. One can also be decidedly less positive regarding these standards as potential safeguards for autonomy and democracy. As we have seen, FIPs should be defined by the legislative branch and administrative agencies, and, by Cohen's suggestion, even frequently revisited as technological and other changes occur. The first danger for FIPs is of data-collection creep — the legislature and administrative agencies, whether focused on welfare or other areas, may prove likely to increase information collection, processing, and sharing. The second danger is that the legislature and administrative agencies may create only watered-down FIPs or dilute existing ones. The result will be weak or ineffective FIPs.

As for data collection creep, Gilliom notes that obtaining welfare in Ohio involved answering roughly 770 questions (p. 34). One can imagine no better example of excessive data collection. As for the weak or ineffective FIPs, the lack of notice to individuals, and the absence of a transparent, or understandable, information processing system are also notable in Gilliom's portrait of Ohio welfare administration. The danger is that these kinds of data processing systems become a way to keep deserving applicants from obtaining welfare — potentially deserving recipients may either be scared off or overwhelmed by paperwork and other requirements.[64]

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62. Jessica Pearson & Lanae Davis, Ctr. for Pol'y Research, *The Hotline Outcomes Assessment Study: Final Report — Phase III: Full-Scale Telephone Survey* (Nov. 2002), *available at* http://www.clasp.org/NLADA/DMS/Documents/1037903536.22/finalhlreport.pdf.

63. *Id.*

64. For a discussion of how welfare applicants can be overwhelmed by paperwork requirements, see Schwartz, *Privacy and Participation*, *supra* note 52, at 1359-60.

There can be no underestimating the dangers of data-collection creep and weak FIPs. Here, we offer three concluding observations. First, we need a constant internal critique of data-processing systems that collect personal data. Put differently, bureaucratic rationality is anything but rational — recall the 770 questions asked of welfare applicants in Ohio and the way that data collection practices become a bar to assisting the needy. Those interested in information privacy must be ready to show where data collection and processing are unnecessary, are disproportionate to the ends sought, or are ill-designed to meet stated goals. This kind of analysis should draw on the perspective not only of the new privacy, but of administrative law, computer science, and economics.

Second, the kind of participation and process available under the old privacy tort has no real equivalent in the bureaucratic world of the new privacy and FIPs. Thus, the issues of inadequate support levels in AFDC and inadequate allowances for child care under TANF, are not something that FIPs can resolve. Moreover, as Post points out, we will not be able to discover communal norms in the bureaucratic world of administered social services. The second-best strategy? To try to structure the greatest transparency possible about the process of creating information processing systems and shaping FIPs. Information will also be needed about the functioning of the resulting systems.

Overseers of the Poor, a largely empirical work, enriches the theoretical debate about information privacy. It shows how a particular group in a particular context thinks about governmental attempts to use information. Based on his empirical study of welfare recipients, Gilliom critiques what we have termed the "old privacy" in this Review. His data can also be used to deepen an analysis centered on the new privacy. As Gilliom suggests, classic old privacy conceptions provide scant help when people do not engage in privacy-rights talk and when interactions are with a bureaucratic organization. Moreover, the threat to individual autonomy that Gilliom chronicles is a significant problem.

The new privacy seeks to confront precisely the issue of the threat to autonomy that is raised by data processing in bureaucracies. The new-privacy scholarship calls for majoritarian construction of privacy standards that will, in turn, help foster the individual autonomy necessary for majoritarian governance. Drawing on his case studies, Gilliom finds the old privacy irrelevant to the world he describes. But the *Overseers of the Poor* also shows why the new-privacy scholars are so worried about threats to autonomy. It demonstrates the importance of developing privacy standards in law to help preserve the individual capacity for self-determination.