

Poverty, Privacy, and Living Out of Reach

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Michele Gilman & Rebecca Green, [The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization](#), 42 *N.Y.U. Rev. L. & Soc. Change* 253 (2018).

If in general we are to understand that, in our new age of surveillance and pervasive use of data, privacy is dead, something else is happening in poor communities. In Poverty Law scholarship, privacy is framed more accurately as violently absent. Hypersurveillance, hyperregulation, criminalization, stigma, and structural racism have created a world in which, in Khiara Bridges's words, "state intervention, coercion, and regulation"¹ are the norm. Poverty Law scholars also know privacy as something that is, in its idealized liberal form, profoundly inadequate. As Dorothy Roberts argues, "merely ensuring the individuals 'right to be let alone'—may be inadequate to protect the dignity and autonomy of the poor and oppressed."² Indeed a better notion of privacy "includes not only the negative proscription against government coercion, but also the affirmative duty of government to protecting the individual's personhood from degradation and to facilitate the processes of choice and self-determination."³

In *The Surveillance Gap*, [Michele Gilman](#) and [Rebecca Green](#) quite literally take all these realities and flip them over—revealing both the inevitable retreat that comes from intervention, coercion, and regulation, and the resulting lack of access to legal and institutional supports that might just support self-determination. But the flipping is just a piece of the contribution. After all, for those in the field, none of the facts are all that surprising. What is different here is what all this means for how we theorize privacy and how we create and support resistance.

Gilman and Green identify four groups who they describe as living at privacy's extremes, groups that are "being seen or tracked too little or too much." (P. 255.) The four are undocumented immigrants, day laborers, homeless people, and people with felony conviction histories. The "too much" piece of the tracking of these groups is well-known and well-told, both in the article and in the literature referenced above. Certainly the details vary, but all four groups are subject to hypersurveillance and punishment. And, being rational actors all, members of these groups resist through withdrawal. They meet pervasive attempts to track, control, and punish with often-successful attempts to evade detection and to retreat into some semblance of safety and privacy.

If all the surveillance and punishment are Gilmore and Green's "too much," the "too little" are the real harms that result from that retreat. In one chilling example, "the 1.1 million undocumented children in the United States can suffer from health deficits, because parents are scared to take them to doctors, and educational delays, because parents are scared of enrolling them in school." (P. 264.) So those who are most marginalized and stigmatized end up not being able to access what meager support might be out there. These harms not only lessen access to traditional social supports, but they also go to the center of our democracy. In short, it is tremendously difficult to participate in any meaningful way when you are deliberately retreating into the shadows.

Gilman and Green aptly describe both the causes and the conditions of living in what they term the surveillance gap. Initially, at least, all this is very depressing. If retreat is the logical and human response to surveillance and punishment, and is in fact a viable form of resistance, the retreat may create a little bit of safety or a semblance of autonomy, but it does not do much to, in Roberts' framing, "facilitate the processes of choice and self-determination."⁴

Gilmore and Green acknowledge these enormous theoretical and practical problems, and along the way they provide a

comprehensive summary of a wide range of privacy theories, but they do more than that. They conclude with a promising path forward. In short, if living in the surveillance gap means you trade access to support and participation for a minimal and degraded form of safety, then the only solution is to remake the terms of the bargain. Communities need a way both to emerge on different and safer terms, and to demand support separate from stigma. And of course, for that you need power.

For examples of this reframing and emergence Gilmore and Green highlight several organizing campaigns. For example, Workers Centers allow day laborers to emerge collectively and make demands on their own terms. Homeless folks in Seattle fought the terms of a surveillance system ([HMIS](#)) purportedly designed to help provide services. The organized community wanted the support but they also wanted a different bargain—a choice to access services without an assumption of pathology and without succumbing to surveillance. As Gilmore and Green describe, “after lengthy mediations the city adopted an ‘opt-in’ version of HMIS that did not require individuals to receive services or require shelters to participate as a funding condition.” (P. 304.)

In these and other examples, we see communities creating “strategies that give people the autonomy to assert or shed privacy.” These strategies are “essential to their individual dignity and to fulfilling our communal democratic promise.” (P. 305.) As Gilmore and Green argue, these examples “show that grassroots organizing, driven by the objectives and insights of affected groups, can be powerful in enhancing autonomy.” (P. 305.) None of this is easy and certainly there is strong resistance to these organizing campaigns, but it is nevertheless a glimmer of a path away from the harms of the surveillance gap.

This article reads like the beginning of work by these scholars on reconceptualizing both privacy theory and remedies to the surveillance gap. I, for one, am going to be paying attention as they take us down that road.

1. Khiara Bridges, **The Poverty of Privacy Rights** (2017), at P. 205.
2. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies; Women of Color, Equality and the Right of Privacy*, 104 **Harv. L. Rev.** 1419, 1478 (1991).
3. *Id.* at 1479.
4. *Id.*

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