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ARTICLES

Taxing Privacy

Hayes Holderness*

ABSTRACT

In the United States, many low-income citizens are being held to a harsher standard than wealthier citizens—these low-income citizens are being asked to relinquish their privacy in order to obtain the public assistance they need, whereas wealthier individuals are not subjected to similar levels of public scrutiny for government benefits that they claim. Giving up privacy can have devastating effects on individuals' lives—they may suffer various dignitary harms, may experience repressed abilities to express themselves, and may even be coerced into important life decisions by the government. This situation presents a unique problem to the neediest in our society: they can either give up their privacy in order to receive benefits they are otherwise eligible for, or they can retain their private lives and suffer an economic burden in the amount of the foregone benefits.

This choice may not seem outrageous to many in the United States, but it presents a serious issue for our society. Under the current system of public benefits administration, we ask a vulnerable segment of our citizenry to surrender significantly more information about themselves to their communities and to the government than we ask of any other segment, and it is not clear that valid justifications for this system exist. Many have researched the effects of various procedural requirements for receiving various forms of public assistance. This Article follows that research and contrasts the economic effects of those requirements on eligible individuals who forego their benefits with the privacy harms created by those requirements for those who submit to them. Government actors must consider this balance to ensure that the burden we put on those receiving public assistance is fair and efficient. By considering that balance differently—through the lens of taxation—this Article hopes to shed light on a disturbing situation and to help frame the discussion for potential reform.

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I. INTRODUCTION

Individual concerns about privacy abound today and have throughout history. Privacy itself may be hard to define, but most people would probably prefer not to become victims of identity theft or to have incriminating photographs of themselves displayed on the front page of the National Enquirer.

Privacy concerns can attach to almost every facet of a person's life, be they rich or poor, young or old, famous or unknown. People desire privacy at home, privacy in public, and privacy on the internet. People seek to keep themselves and their information private with respect their friends, their co-workers, strangers, and the government.

This Article is concerned with the way that the government interacts with individuals eligible for public benefits. The way the government chooses to distribute benefits can have significant ramifications for recipients' privacy. In Overseers of the Poor: Surveillance, Resistance, and the Limits of Privacy, Professor John Gilliom chronicles the experiences of mothers receiving public benefits in Ohio. The picture he paints is not a pleasant one. The women he interviews live in fear of losing the benefits they rely on to survive. At the same time, they express disgust and anxiety over the many invasive application procedures and surveillance measures they must submit to. One interviewee named Mary describes her experience:

You have to watch every step like you are in prison. All the time you are on welfare, yeah, you are in prison. Someone is watching like a guard. Someone is watching over you and you are hoping every day that you won't go up the creek, so to speak, and [that you will] get out alive in any way, shape, or form. You know, 'Did I remember to say that a child moved in?' 'Did I remember to say that a child moved out?' And, 'Did I call within that five days?' You know ... making sure all the time . . . . It's as close to a prison that I can think of.

When the government imposes highly privacy-invasive requirements on the recipients of public benefits, it leaves needy individuals with a choice: submit to the ensuing privacy harms, or lose the benefits they are qualified for. Losing such benefits causes qualified individuals to suffer an economic burden, because had they not valued their privacy, they would have received the government aid. For those whose need is great enough, this choice between privacy and benefits may exist in theory only, leading to implicit coercion by the government to give up one's privacy by submitting to surveillance, public stigma, and government-compelled lifestyle choices.

2. Id. at 1.
The idea that public benefits programs can cause serious privacy harms for recipients is certainly not a new one. This Article seeks to contribute to the literature by offering a substantial analysis of the privacy concerns created by three redistributive programs in particular and then considering the potential economic burdens created by the privacy-invasive requirements for these programs. By considering these economic burdens through the lens of United States tax policy, it is hoped that state actors may become more aware of the consequences of their choice of distributive means, which will hopefully lead to more thoughtful and efficient program design.

Part II offers a general overview of redistribution in the United States. It examines the two prongs of redistribution: public benefits programs and taxation. The two should not be considered different in economic substance, but only in form. Both are simply tools the government can use to redistribute income. Public benefits programs use government spending to increase individuals' incomes; taxation can implement tax cuts to achieve the same increases in incomes. Part II explores this concept in greater depth, and also develops the principles of horizontal equity, vertical equity, and neutrality that drive the redistribution system.

Part III takes a closer look at three particular methods of income redistribution in the United States: the Temporary Assistance for Needy Families program (TANF), the Supplemental Nutrition Assistance Program (SNAP), and the Earned Income Tax Credit (EITC). The particular goals of each program within


4. Consider David Bradford's illuminating "weapons supply tax credit," showing the equivalency between spending and tax cuts:

Step 1 of the Bradford plan is to cut the weapons procurement request in the defense budget to zero. Taken by itself, this would harm defense capacity. Step 2, designed to offset this unfortunate effect, calls for enactment of a new "weapons supply tax credit" (WSTC). To qualify for the WSTC, manufacturers will sign appropriate documents prescribed by the Secretary of Defense (looking much like today's procurement contracts) and deliver to appropriate depots weapons systems of prescribed characteristics. The WSTC, which may be transferred to other taxpayers without limit, may only be used in payment of income tax. Step 2 is, apparently obviously, a tax cut.

David F. Bradford, Reforming Budgetary Language, in PUBLIC FINANCE AND PUBLIC POLICY IN THE NEW CENTURY 93-116 (Sijbren Cnossen & Hans-Werner Sinn eds., 2003). As demonstrated by the fictitious WSTC, even items of spending that seem far separated from the tax system, such as defense spending, could in theory be administered through the tax code.

5. SNAP was formerly known as the Food Stamps Program. See Food, Conservation, and Energy Act of 2008, Title IV, Subtitle A, Part I, § 4001(b) ("The Food and Nutrition Act of 2008... is amended by
the redistribution system are examined, and the implementation of each program is described. The discussion focuses primarily on the potentially privacy-invasive procedures that are used to implement each program and notes the significant differences in administration of the EITC as compared with the other two programs. These differences may be a result of different views of taxation and spending generally, or may reflect that the EITC contains fewer non-redistributive goals than SNAP and TANF. To illustrate, the EITC has a general goal of redistributing money to the working poor, whereas SNAP also has the goal of raising the nutritional value of the food that low-income individuals obtain, and TANF has the goal of encouraging marriage and traditional family structure.

Part IV considers the privacy concerns surrounding the different means of redistribution after first giving a broad overview of privacy and privacy harms. This Article uses a taxonomy created by Professor Daniel Solove to illuminate the broad range of activities that can create privacy harms, focusing not so much on recognized legal rights to privacy, but more on the harms to individuals that privacy-invasive procedures can create. Four main types of privacy harms created by public benefits administration are identified: (1) requiring recipients to give up significant amounts of personal information; (2) subjecting recipients to the stigma that attaches to the programs; (3) requiring recipients to subject themselves to various forms of investigation and surveillance; and (4) interfering with recipients' decisions and rights regarding their private affairs. This Part concludes that programs such as TANF are highly privacy-invasive and may inflict a number of these privacy harms on individuals applying to and currently enrolled in the programs, while initiatives such as the EITC are not very privacy-invasive and do not generate as many harms.

Part V then discusses the economic burden that privacy-invasive programs create in terms of an implicit tax on privacy. After finding that the economic burden is not normatively justifiable because it violates the principles of horizontal equity, vertical equity, and neutrality, this Article explores two possible justifications for the implicit tax: administrative concerns, and its potential as a corrective measure. This Article finds arguments for administrative necessity lacking given that the procedures put in place appear to be much more invasive than needed to run the programs efficiently. Corrective taxes seek to make actors internalize the social costs of their actions, and, while this Article does see some potential validity to the corrective taxation theory, policymakers need to collect data and make specific calculations to ensure that the economic burden is not punitive. Given that the value of privacy to the individual is difficult to quantify, neither justification can be fully accepted or rejected. Part VI concludes.
II. REDISTRIBUTION AND TAX EQUITY

This Part describes generally the system of income redistribution in the United States, as well as some of the principles that drive that system. Governments can redistribute income through taxation and through public benefit programs.6 Typically, a blend of the two methods will be used, but in theory, it is not hard to imagine a system of redistribution that relies solely on taxation.7 In this scenario, rates would presumably be highly progressive, placing larger burdens on the richer than on the poorer members of society. The poorest members would most likely encounter negative tax rates.8 This idea is not foreign: under the negative income tax proposed by President Nixon, the lowest taxpayers would have received payments from the government rather than pay taxes, i.e. they would have been subject to negative tax rates. Under the plan, a taxpayer with a family size of four with $1000 of income would have received $1000 from the government, a result economically equivalent to receiving public benefits today.9 Alternatively, redistribution could occur solely through public benefits programs if all members of a society were taxed the same amount, but benefits were only given to selected individuals. In this scenario, though taxes would be in place, they would not redistribute income in and of themselves because everyone would be required to pay the same absolute amount.

Guiding systems of redistribution are the principles of horizontal equity, vertical equity, and neutrality. Horizontal and vertical equity seek to ensure that similarly situated individuals, by whatever measure used (the Internal Revenue Code and this Article use income), share the same burden of society and that those who are better-off bear more of the burden than those who are worse-off.10 The principle of neutrality compels the system of redistribution to affect individuals’ decisions to the lowest possible degree when compared to the decisions the individuals would make if the system were not implemented.

6. JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 9 (2005); see David A. Weisbach & Jacob Nussim, The Integration of Tax and Spending Programs, 113 YALE L.J. 955, 958 (2004) (“If the underlying policy is held constant, there are no effects of putting a program into or taking a program out of the tax system even if doing so hurts or enhances traditional notions of tax policy. Welfare is the same regardless of whether the program is formally part of the tax system or is located somewhere else in the government.”); see also Eric J. Toder, Tax Cuts or Spending—Does it Make a Difference?, 53 NAT’L TAX J. 361, 361 (2000).


9. See MOYNIHAN, supra note 8, at 136-37.

10. As discussed below, infra note 13, vertical equity technically refers to the idea that those who are not equal by the measure used do not share equal burdens. Vertical equity within the United States system is implemented in a progressive manner, such that those with higher income pay a larger proportion of their income in taxes.
A. Horizontal Equity, Vertical Equity, and Neutrality

This section takes a closer look at the principles of horizontal equity, vertical equity, and neutrality. To simplify the discussion, it is couched in terms of income taxation only, though it should not be forgotten that taxation is typically just one side of a system of redistribution. Whether an individual reaches his post-redistribution level of income through taxes or public spending is economically irrelevant (though there may be significant practical implications). Understanding these principles is key to appreciating the United States' income redistribution system.

1. Horizontal Equity

Horizontal equity is the principle that individuals with the same amount of income should bear the same amount of taxation. Where income is the measure of similarity, as under an income tax, other considerations, such as an individual’s occupation or consumption choices, should not affect how much tax an individual owes.

As might be expected, the notion of horizontal equity is relatively uncontroversial. However, difficulties can arise in determining which taxpayers are the same. For instance, is a young single mother with two children who has income of $50,000 the same as an elderly lady with no dependents who also has income of $50,000 a year? The measure of similarity must be clearly defined to attain horizontal equity, a task that may be nearly impossible in the real world. As the complexity of the Internal Revenue Code demonstrates, defining income can prove to be rather difficult.

2. Vertical Equity

Vertical equity technically is the principle that individuals with different amounts of income should bear different amounts of tax, but is commonly cited for the idea that those with more income should pay more in taxes than those with less income. There are three standard measures of vertical equity: (1) progressivity, (2) proportionality, and (3) regressivity.

Under a progressive tax system, individuals pay a larger percentage of their income in taxes as income grows. Under a proportional system, all individuals

12. GRUBER, supra note 6, at 495 (defining horizontal equity as “the principle that individuals who are similar but who make different economic or lifestyle choices should be treated in the same way by the tax system”).
13. Id. at 495 (defining vertical equity as “the principle that groups with more resources (higher income, higher wealth, higher profits) should pay higher taxes than do lower-resource groups”).
14. Id. at 496.
pay the same percentage of their income in taxes, therefore the absolute burden will be larger on those with larger incomes. Finally, under a regressive system, individuals pay a smaller percentage of their income in taxes as income grows.

3. Neutrality

The principle of neutrality holds that a tax should not change the economic decision making of individuals by not discriminating between different types of income, expenditures or other economic activities. Unless all possible economic decisions are taxed at the same rate, any particular tax system will not be neutral. Therefore, the practical goal of the principle of neutrality is to reduce the effect of taxes on economic decision making as much as possible.

In terms of an income tax, the neutrality principle demands that the tax be as broad-based as possible, applying to all forms of income, in order to avoid encouraging or discouraging individuals from deriving income in specific ways. For example, taxing income earned from investments less than income earned from wages may encourage individuals to invest instead of earn wages. Additionally, taxing economic income without taxing non-economic income—such as the value an individual derives from leisure—may serve to discourage individuals from deriving economic income at the margin where they value their non-economic activities at least as much as their pre-tax economic income.

B. Income Redistribution in the United States

This section takes a look at the system of income redistribution in place in the United States. It is meant more as a general overview than a comprehensive breakdown and will consider the two prongs of the system—taxation and public benefits programs. While this Article is only concerned with public redistribu-


16. See, e.g., Andrews, supra note 15, at 367 (“Indeed, it is probably better to describe the personal income tax by starting with the proposition that it is not neutral and cannot be made neutral in any comprehensive sense. The question is not how to eliminate disequality or bias but how to arrange it along the most tolerable lines.”). One of the biggest perceived hurdles to a negative income tax is the inability to design the tax in a way that would incentivize work while simultaneously providing a guaranteed level of income, which in fact turns out to be one of the main issues policymakers are concerned with when designing public benefits programs. The negative income tax encounters this problem because the definition of income is not neutral. To have a truly neutral definition of income, the value of such things as leisure and tasks done by one’s self rather than purchased would have to be included. Otherwise, such values are not taxed, and thus incentivized.

17. See generally, e.g., Bittker, supra note 15 (considering approaches to reform the federal personal income tax by introducing a comprehensive tax base).
tion, it should not be forgotten that private actors are also able to redistribute income through actions such as charitable giving.

1. Taxation

The United States employs a number of different forms of taxation.\textsuperscript{18} This Article addresses only the personal income tax, but it should be remembered that all taxes raise revenue and revenue is generally fungible in the end, even if it is earmarked for a specific purpose. Earmarked revenue, assuming it is spent on something that would command funds otherwise, merely frees up other revenue for other purposes.

The federal personal income tax is the largest revenue raiser for the United States, and probably the most visible federal tax.\textsuperscript{19} The tax works by having the individual taxpayer first calculate his gross income, defined as "all income from whatever source derived."\textsuperscript{20} The taxpayer then takes certain deductions from gross income to arrive at adjusted gross income.\textsuperscript{21} These deductions may be allowed for normative or for practical reasons; for example, one of the most significant deductions is for contributions to Individual Retirement Accounts, encouraging individuals to save for retirement.\textsuperscript{22} Finally, taxable income is calculated by taking certain exemptions and deductions from the adjusted gross income figure. Taxable income is the amount that determines the tax rate applied, and is the amount against which that tax rate is then applied.\textsuperscript{23} Once the amount of tax owed is determined, the taxpayer is allowed to apply any tax credits he is entitled to against that amount of tax.\textsuperscript{24}

The principles of horizontal equity, vertical equity, and neutrality drive the structure and application of the federal income tax, though none of the principles are fully realized in practice. The income tax ensures horizontal equity by applying the same rate to all taxpayers with the same amount of taxable income, but because of various deductions and exemptions, taxpayers with the same gross income who engage in different behaviors may pay different amounts of tax. Additionally, taxpayers with the same level of taxable income may owe different amounts if one is entitled to a tax credit that the other is not. Thus, the income tax is not purely horizontally equitable.

\textsuperscript{18} See generally I.R.C. Subtitle A (income taxes); I.R.C. Subtitle B (estate and gift taxes); I.R.C. Subtitle C (employment taxes); I.R.C. Subtitles D, E (excise taxes); GRUBER, supra note 6, at 486-87 (describing the payroll tax, the individual income tax, the corporate income tax, property taxes, estate taxes, and excise taxes).

\textsuperscript{19} See INTERNAL REVENUE SERV., DATA BOOK, 2010, at 3 (2010) (individual income tax raises 50.1\% of total revenues); GRUBER, supra note 6, at 488-89.

\textsuperscript{20} I.R.C. § 61 (2013).


\textsuperscript{22} I.R.C. § 219 (2013).

\textsuperscript{23} See I.R.C. § 1 (2013).

\textsuperscript{24} For a more detailed description of the mechanics of the individual income tax, see GRUBER, supra note 6, at 489-92.
The income tax is designed to be progressive. It achieves this, and secures a level of vertical equity, by applying graduated rates to individuals as their income increases.\(^\text{25}\) Thus, as a taxpayer's income increases, the percentage of it that she pays in taxes also increases. The tax is not purely progressive, however, in that the rates apply to broad ranges of income. Therefore, a taxpayer with $500,000 of income is subject to a top marginal rate of 39.6%, as is a taxpayer with $1,000,000 of income. For the tax to be purely progressive, the taxpayer with $1,000,000 of income should be subject to a higher top tax rate than the taxpayer with $500,000.

Finally, by beginning the taxpayer's calculation with all income from whatever source derived, the income tax attempts to introduce a level of neutrality to the system. However, by chipping away at that initial definition of income to determine taxable income, the system loses some of its neutrality. Taxpayers are encouraged to engage in behaviors that generate exempt or deductible income and are discouraged from engaging in behaviors that generate fully taxable income. Further, because the tax only applies to economic income, behaviors that generate non-economic or imputed income—such as leisure or doing chores around the home—are encouraged.

Because of the way the amount of tax is ultimately determined, the federal income tax works both as a revenue raiser and as a direct means of redistribution. Various exemptions, deductions, and credits can be used to redistribute income to lower-income individuals by lowering their effective tax rates. Additionally, progressive taxation in and of itself is redistributive, since it requires higher-income individuals to pay more of their income in tax, moving them closer to the mean income level. If the higher taxes on the higher-income taxpayers were used to fund the exemptions, deductions, credits, and lower rates applied to the lower-income taxpayers, then the income tax could serve as a self-contained and complete system of redistribution. However, as it currently operates, the income tax is not only used as a vehicle for income redistribution, but also is used to encourage certain types of behavior, such as investment in research and development, home ownership, and charitable giving.\(^\text{26}\)

2. Public Benefits Programs

The United States makes use of a number of public benefits programs to redistribute income.\(^\text{27}\) These programs take tax revenue and distribute it to qualified individuals as cash or in-kind benefits (i.e., non-cash benefits such as

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\(27\) See generally MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES (Robert A. Moffitt ed., 2003).
services or vouchers only redeemable for certain things). These distributions take place outside of the taxation system, and require their own administrative structures. However, it is important to remember that benefits received through these programs are economically indistinguishable from exemptions, deductions, credits, or tax rate cuts implemented through the tax code. Assuming equal levels of economic value, both tax relief and benefits will put a taxpayer in the same final economic position.

Public benefits programs can be means-tested or categorical. Means-tested programs use income and assets as the primary indicators of eligibility, but may also look to other measures, such as household size, to determine the appropriate level of benefits to which the applicant is entitled. These programs seek to redistribute income to lower-income individuals, working with the income tax to create a progressive system of redistribution. Categorical programs determine eligibility by certain demographic characteristics, as the goal for these programs is not to redistribute income in a progressive sense, but rather to distribute resources to encourage certain behaviors, such as joining the military. Applicants for either type of program may be subjected to formal and informal requirements for receiving benefits, such as burdensome applications and lengthy trips to administrative offices. Additionally, most United States programs are both means-tested and categorical to some degree. This Article is concerned with programs that are in significant part means-tested because their purpose is, in at least some sense, to redistribute income. As the next Part shows, however, even programs that are in significant part means-tested may also have strong categorical eligibility criteria that define the scope of the programs.

3. The Economic Equivalence of Taxation and Public Benefits Programs

Important to this Article is the concept that the effects on individuals of taxation and spending through benefits programs are economically similar. One is simply the inverse of the other, such that either could be used to achieve a desired economic end. For example, suppose the government decides that Abe should bear $5 of the social burden and Betty should bear $10. The government could achieve this result by taxing Abe $5 and Betty $10. Alternatively, the government could tax both $20 and then spend $15 on Abe and $10 on Betty. Any mix of taxation and spending could be used to achieve the result desired.

28. Gruber, supra note 6, at 459.
29. Id.
30. Id.
31. Id.
34. See, e.g., Weisbach & Nussim, supra note 6, at 972-73; Toder, supra note 6, at 363.
Policymakers should use this insight to implement the most efficient means of distributing the social burden.\(^{35}\)

Because of this equivalency, one cannot ignore the effects of spending programs on the horizontal equity, vertical equity, and neutrality of the redistribution system. Spending programs may be able to better target relief, so that a desired end result is efficiently met. However, it should also be noted that categorical requirements for eligibility under these programs may further exacerbate concerns surrounding all three principles. Taxpayers with similar income may be entitled to different levels of benefits, violating pure horizontal equity. Additionally, a taxpayer who is denied public benefits may end up paying the same effective tax rate as someone with a higher income, violating the progressive taxation principle under vertical equity. Finally, taxpayers may be encouraged to engage in behaviors that they would not normally engage in so that they may become eligible for benefits, violating the principle of neutrality.

III. TEMPORARY ASSISTANCE FOR NEEDY FAMILIES, THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM, AND THE EARNED INCOME TAX CREDIT

Part III will explore three particular methods of income redistribution in the United States: Temporary Assistance for Needy Families (TANF), the Supplemental Nutrition Assistance Program (SNAP), and the Earned Income Tax Credit (EITC). TANF and SNAP are means-tested public benefits programs; TANF may distribute cash benefits or in-kind services to eligible individuals and SNAP distributes benefits in-kind.\(^{36}\) The EITC is a refundable tax credit that functions to lower the amount of tax an eligible taxpayer owes.\(^{37}\) This Part first explores the goals behind each initiative and then examines how each initiative achieves its goals, particularly focusing on eligibility requirements.

A. Goals of the Programs

These three initiatives all seek to redistribute income in a general sense, in line with the progressive system of taxation adopted in the United States. However, each initiative has its own nuances that will be explained in the discussion that follows.

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35. Weisbach & Nussim, supra note 6, at 983 ("We view the integration question as one of how best to organize the government rather than a question of tax policy."). Weisbach & Nussim continue in their paper to consider the advantages and disadvantages of integrating certain types of programs into the tax code. In particular they consider the design of the Earned Income Tax Credit and the Food Stamps Program. Id. at 997-1026. Eric Toder also considers potential efficiency differences between tax expenditures and direct spending that can affect the cost of administering government programs. Toder, supra note 6, at 368-71.


1. TANF

TANF, as its name implies, is intended as temporary poverty relief for needy individuals. TANF was created through the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) and replaced the Aid to Families with Dependent Children program (AFDC). PRWORA established sweeping changes to the public benefits system in the United States, and the replacement of AFDC with TANF was perhaps the most substantive. Political opinion had shifted the goals of AFDC from providing support to single mother families during the 1930s through the 1970s to encouraging support recipients to seek work opportunities from the 1970s until AFDC's death in 1996.

Against the backdrop of reform to AFDC, TANF's goals are easily understood. TANF's goal is to distribute aid to needy individuals, while also providing strong work incentives. Through TANF, the federal government allows states to design their own programs to distribute aid and encourage recipients to work. States are also allowed to encourage other behaviors that are deemed beneficial, such as entering into traditional marriage and limiting family size. In general, TANF's main non-redistributive goal is to encourage work, which in theory relieves the burden of poverty on working individuals and, in turn, relieves the burden on the state of supporting those individuals.

2. SNAP

SNAP is a new name for an old program, the Food Stamps Program (FSP), which began as a small program in 1961 and expanded nationwide by 1975. The goal of the FSP was very straightforward: to provide a nationwide safety net of assistance by ensuring that all United States citizens were able to procure at least some minimum level of food.

The name change to SNAP in 2008 did not alter this basic goal, but rather was meant to signal the expansion of the assistance program to both create a minimum safety net for food and also to promote nutrition. Along with

38. See Moffitt, supra note 36, at 291.
40. See Moffitt, supra note 36, at 292-99.
41. See id. at 306.
42. See id. at 299-301.
43. See id. at 305, 307.
44. See id. at 306-07.
46. See Currie, supra note 36, at 205.
47. See id. at 199, 205.
48. This goal of promoting a minimum level of nutrition may be more of a goal in theory than in practice, as it would be exceedingly difficult for the government to force recipients to buy "nutritious"
implementing the name change, the Food and Nutrition Act of 2008 also increased the individual benefits under the program, with the hope that individuals receiving assistance would be able to purchase more nutritious foods for home consumption.\footnote{49}

As a federally mandated and designed program, SNAP also offsets state variance in public benefits programs.\footnote{50} It achieves this goal by ensuring that the states must give SNAP benefits to individuals who meet the federal eligibility requirements, thus refusing the states the same autonomy received under TANF to design their aid programs.\footnote{51}

3. The EITC

The EITC was implemented in 1975 as a response to congressional and presidential interest in a negative income tax, which would have served as a universal antipoverty safety net.\footnote{52} The designer, Senator Russell Long, and proponents of the EITC feared that a negative income tax would discourage lower-income individuals from working.\footnote{53} The EITC thus provided assistance in the form of a “work bonus,” thereby incentivizing work.\footnote{54}

In 1993, President Bill Clinton pushed for and signed into law significant expansions of the EITC.\footnote{55} The President’s initiative increased the credit from 23% to 34% of earned income for taxpayers with one child and from 25% to 40% of earned income for taxpayers with two or more children.\footnote{56} It is declared to be the policy of Congress, in order to promote the general welfare, to safeguard the health and well-being of the Nation’s population by raising levels of nutrition among low-income households. Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of the Nation’s agricultural abundance and will strengthen the Nation’s agricultural economy, as well as result in more orderly marketing and distribution of foods. To alleviate such hunger and malnutrition, a supplemental nutrition assistance program is herein authorized which will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation.\footnote{57}

\footnote{49}{See 7 U.S.C. § 2011 (Declaration of Policy).}

\footnote{50}{See Currie, supra note 36, at 205.}

\footnote{51}{See id.}

\footnote{52}{See V. Joseph Hotz & John Karl Scholz, The Earned Income Tax Credit, in MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES 144-45 (Robert A. Moffitt ed., 2003).}

\footnote{53}{See id. at 142.}

\footnote{54}{See id. at 142, 144-45.}

\footnote{55}{See id. at 146.}
for taxpayers with two or more children. The maximum credit was increased by over $1500. The income limit on eligibility was increased by about $3700. President Clinton described the changes in his first State of the Union Address:

The new direction I propose will make this solemn, simple commitment: By expanding the refundable earned income tax credit, we will make history; we will reward the work of millions of working poor Americans by realizing the principle that if you work forty hours a week and you've got a child in the house, you will no longer be in poverty.

President Clinton’s expansion of the EITC turned it into the major antipoverty measure that it is today. In 2001, Congress expanded the credit to reduce the “marriage penalty” that occurs when taxpayers receive a lower credit after they are married than when they were single.

In sum, the EITC has evolved from a modest “work bonus” into one of the largest means-tested methods of redistribution. EITC spending now dwarfs both TANF and SNAP spending. In 2010, the EITC was estimated to account for $49,733,000,000 of federal government outlays, while TANF and SNAP combined were estimated to account for $20,045,000,000. As noted in President Clinton’s address, the goal of the EITC is to distribute aid to the working poor; thus, it is both a redistributive program and a program designed to encourage work.

**B. Implementation of the Programs**

Having explored the goals behind each of the three initiatives, the means adopted for achieving those goals are now considered. This section will particularly focus on the eligibility requirements for each initiative.

1. TANF

TANF is funded by the federal government through block grants to the states, but the states themselves are responsible for the design of their benefits programs,

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57. Id.
58. Id.
61. See Hotz & Scholz, supra note 52, at 146.
63. Id. at 107, Table 8-4 (TANF is estimated to account for $17,059,000,000 and SNAP is estimated at $2,986,000,000).
subject to some basic requirements that the federal government mandates.64 Those requirements include time limits on the receipt of funds (individuals may not receive TANF funds for more than sixty months over their lifetime); restrictions on the eligibility of minors and aliens; and minimum work requirements (e.g., thirty hours per week for single mothers).65 These requirements reflect the clear goal of the federal government to encourage recipients to enter the workforce.66

States possess considerable freedom to design their TANF programs.67 They may set benefit levels, income/asset requirements, family caps on assistance, and the form of the benefits.68 Also, the entitlement nature of AFDC was not carried over to TANF, so states are not required to serve all eligible individuals, allowing the states to define eligibility beyond income, assets, and work requirements.69

As the discretion granted to the states is so broad, this Article will explore only New York’s program design.70 New York’s approach is not meant to serve as an example of the typical approach, but rather is intended to provide a set of discrete eligibility requirements to consider. New York requires applicants to submit a fifteen-page application to their local Department of Social Services.71 The applicant is then interviewed by a Social Services worker and may be required to prove the information contained in the application.72 Much of the information must be certified by third-party individuals, such as doctors or landlords.73

The information the application requires ranges from basic identifying information to more in-depth household and personal information.74 Applicants must disclose how long they have been living at their current residence; other individuals living at the same residence; and the employment, education level, citizenship/immigration status, and race/ethnicity of all individuals at the residence.75 Applicants are also asked to disclose a variety of personal issues they may be facing, such as being pregnant, being a victim of domestic violence, having a drug or alcohol problem, or having had their utilities shut off.76 Child

64. See Moffitt, supra note 36, at 299.
65. See id. at 299-301.
66. See id. at 306.
67. See id. at 299.
68. See id.
69. See id.
72. See Source Book, supra note 70, at 3-4, 5-10 to -11.
73. Id. at 5-10 to -11.
75. See id.
76. See id. at 1. The application asks, "Do any of these apply to you?" and the full list includes the following: pregnant; victim of domestic violence; need to establish paternity; need child support;
and medical support information must be reported, along with any information regarding absent children or spouses and teen parentage. Medical information about the applicant, and anyone living with and applying with the applicant, must be reported, including the due date of anyone pregnant. Applicants must provide their landlords' contact information and report the amount of housing bills they pay. If the applicant lives in a domestic violence or a drug/alcohol abuse shelter, that must be reported. If the applicant or anyone living with and applying with the applicant has expenses such as alimony, child support, or tuition, those must be reported. Prior military service must be reported, as well as prior felony convictions, violations of parole or probation, and prior denials of public benefits.

All of the information given is subject to verification by the caseworker, and the applicant must consent to investigation by the Department of Social Services. Such investigation may include unannounced visits to the recipient's home. New York uses computer matching with databases of other agencies such as the Internal Revenue Service (IRS) to verify benefit amounts and prevent fraud. All recipients of benefits must pose for a photographic "Common Benefit Identification Card" issued by the state and must enroll in the "Automated Finger Imaging System" of the state.

As is evident, the New York application for TANF-funded support requires a

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77. See id. at 5.
78. See id. at 10.
79. See id. at 11.
80. See id.
81. See id. at 12.
82. See id.
83. See id. at 14-16; Source Book, supra note 70, at 5-10 to -11.
84. New York Office of Temporary and Disability Assistance, Temporary Assistance Source Book, supra note 70, at 5-4 (The home visit by an investigator is one of the tools available for obtaining a total picture of an applicant's situation. Normally, home visits are made after other tools, such as computer checks and collateral contacts have been used. Aside from possible fraud, the investigator can observe the need for services to develop parenting skills, or whether the residence has obvious health and safety defects that should be reported to the appropriate staff).

An applicant may decline to comply with an unannounced visit and doing so cannot be the basis for denial of benefits, but the investigator may schedule an appointment to investigate. Id. Failure to comply with the application procedure is basis for denial of the application. Id. Failure to comply with the application procedure is basis for denial of the application. Id.
85. Id. at 5-13.
86. Id. at 5-28.
87. Id. at 9-6. The Automated Finger Imaging System is "a computer managed system, operated by a contractor designated by the department which captures the image of the two index fingers and the facial photograph of the subject and provides a means of storing a record of those finger images in a manner so that other records of finger images can be compared to those finger images." N.Y. Comp. Codes R. & Regs. tit. 18, § 384.1.
significant amount of information and imposes burdensome and potentially invasive certification and investigation requirements on applicants. The information is requested to determine eligibility and benefit levels and to prevent fraud. Refusing to comply is grounds for denial of benefits unless good cause is shown for refusing, and the New York courts can be unsympathetic to non-compliant applicants. Additionally, this information is required to be recertified, usually every six months. Recertification involves more in-office interviews and documentation. Failure to recertify can result in the denial of benefits. The federal government requires certain demographic information on participants to be reported quarterly by the states, although the information can be disaggregated from the individual and the states are allowed to use sampling techniques to gather the information.

2. SNAP

SNAP works as an in-kind benefits program: recipients receive credits on an electronic debit card (EBT card) that can be redeemed at participating retailers for eligible food. Cash assistance is not provided, as the program is meant to ensure that SNAP recipients are only able to procure food with their benefits. Though the federal government funds the program and sets the majority of the eligibility requirements, the states are responsible for administering the program and distributing the benefits. New York, for example, has individuals apply for SNAP using the same application as for TANF-funded benefits. As a result of federal control over eligibility requirements and the requirement that all eligible

88. The same application is used for SNAP and emergency assistance. As seen in the SNAP section, the federal government mandates the eligibility requirements for that program.
89. See New York Application, supra note 71, at 14.
90. N.Y. Comp. Codes R. & Regs. tit. 18, § 351.26 ("An applicant for or recipient of public assistance is exempt from complying with any requirement concerning eligibility for public assistance if the applicant or recipient establishes that good cause exists for failing to comply with the requirement.").
92. New York Office of Temporary and Disability Assistance, Temporary Assistance Source Book, supra note 70, at ch. 6.
93. Id.
94. Id.
96. 7 U.S.C. § 2016 (2013). In general, "[f]ood means... any food or food product for home consumption except alcoholic beverages, tobacco, and hot foods or hot food products ready for immediate consumption... [and] seeds and plants for use in gardens to produce food for the personal consumption of the eligible household." Id. § 2012(k). Retailers are responsible for redeeming the benefits only for eligible food and can be punished for violating the rules. Id. §§ 2019, 2021.
98. 7 U.S.C. § 2020 (2013); see Currie, supra note 36, at 206.
99. See New York Application, supra note 71.
individuals who apply must receive the benefits, the program serves to some degree to offset state variance in public benefits by ensuring some minimal level of benefits that each state must provide. However, applicants are still subject to the application procedures and requirements of the states.

Eligibility and benefit levels are determined by income and household. Individuals who live, purchase food, and prepare meals together are counted as one unit under the program. To meet the income restrictions, an applicant’s net monthly income must be less than the federal poverty line; gross monthly income must be less than 130% of the federal poverty line. Applicants must also pass household asset tests, but the family home and one car are excluded from the tests. Beyond these federally set eligibility requirements, states have some leeway to define the length of eligibility certification periods, the design of outreach programs, and some “workfare” requirements for participation in the program.

Applicants must go to a state office to apply and must recertify their eligibility throughout the year, often on a monthly basis. Recertification often involves returning to the administrative offices. Applications, as seen in the New York example above, are often lengthy and burdensome, and they require supporting documentation.

3. The EITC

The EITC is a refundable tax credit administered by the IRS. The amount of the credit depends on the number of children the claimant has and how much income the individual is earning. The largest credit is available for wage earners with two or more children. The credit itself is a proportion of earned income up to a certain level, after which the dollar amount of the credit plateaus before the credit is eventually reduced by a percentage of income above a certain

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100. See Currie, supra note 36, at 205.
101. 7 U.S.C. § 2020 (2013); see id. at 206.
102. 7 U.S.C. § 2014 (2013); see Currie, supra note 36, at 206-08.
103. 7 U.S.C. § 2012(n) (2013); see Currie, supra note 36, at 206.
104. 7 U.S.C. § 2014(c) (2013); see Currie, supra note 36, at 206-08.
105. 7 U.S.C. § 2014(g) (2013); see Currie, supra note 36, at 208.
106. See Currie, supra note 36, at 206.
107. See Weisbach & Nussim, supra note 6, at 1000-01.
108. The New York application is also used for SNAP and requires a significant amount of information from the applicant. New York Application, supra note 71. Weisbach & Nussim explore the Indiana program in a footnote, finding that, “while only two pages long, [it] requires applicants to provide extensive documentation,” the collection of which is “a formidable task.” Weisbach and Nussim, supra note 6, at 1000 n.135.
109. See Hotz & Scholz, supra note 52, at 152-55; Weisbach & Nussim, supra note 6, at 1001-03.
110. I.R.C. § 32(b) (2013); see Hotz & Scholz, supra note 52, at 157-59.
111. I.R.C. § 32(b) (2013).
level. Eventually, the EITC phases out when the claimant’s income becomes high enough. Unlike TANF, the EITC is not a temporary measure; as long as the recipient remains within the specified income range, he can receive the credit.

The eligibility requirements for the EITC are relatively simple. The claimant must have both earned income and adjusted gross income below a certain level, which varies based on the number of qualifying children the claimant has. Qualifying children must pass age, relationship, and residence tests. Finally, the claimant may not have passive income above a certain level.

To apply for the EITC, the claimant must file a regular tax return along with a Schedule EIC. The Schedule EIC collects information about any qualifying children. Because the EITC is refundable, it is available to individuals who do not owe any federal income tax. Therefore, some claimants may have to file tax returns that they would not otherwise file; however, data show that such taxpayers represent a very small portion of those claiming the EITC.

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Now that the goals and implementations of TANF, SNAP, and the EITC have been discussed, the next Part will consider the impact of these programs on individuals’ privacy and the resulting effects on the United States’ redistribution system. It is the theory of this Article that TANF and SNAP create significantly inequitable taxes on privacy because of their invasive procedures and requirements, especially when compared with the EITC.

IV. PRIVACY CONCERNS

Given the information-intensive applications for some public benefits programs, the stigma that attaches to individuals enrolled in benefits programs, and the governmental surveillance of recipients, significant privacy concerns arise in the context of the United States redistribution system. This Article will again use TANF, SNAP, and the EITC as examples to demonstrate how some redistribution initiatives can generate privacy harms for their recipients.

112. I.R.C. § 32 (2013); see Hotz & Scholz, supra note 52, at 147-53; Weisbach & Nussim, supra note 6, at 1001.
113. I.R.C. § 32(b) (2013); see Hotz & Scholz, supra note 52, at 147-53; Weisbach & Nussim, supra note 6, at 1001.
115. I.R.C. § 32(c)(1).
117. I.R.C. § 32(i).
118. See Weisbach & Nussim, supra note 6, at 1001.
119. I.R.S., Form 1040, Schedule EIC.
120. See Cong. Budget Office, Refundable Tax Credits, 1, 3 (2013).
A. Privacy

Although the notion of privacy means many things to many people and can be exceedingly difficult to define,122 this Article will explore some common conceptions. It should be noted that this Article is not necessarily concerned with any legal right to privacy per se, although legal rights to privacy may make a more compelling argument for the inequity of taxing privacy.123 Rather, the concern is that individuals who value some form of privacy, whether they have legal rights to that form or not, are being taxed because they value that form of privacy. Daniel Solove identifies six general conceptions of privacy in his article Conceptualizing Privacy: (1) the right to be let alone, (2) limited access to the self, (3) secrecy, (4) control over personal information, (5) personhood, and (6) intimacy.124 In addition, Professor Solove offers a contextual conception of privacy. These will be dealt with in turn.

The first notion of privacy, the right to be let alone, concerns the harms to the individual resulting from new inventions and business methods that could make a person's private and domestic life public.125 Samuel Warren and Louis Brandeis argued that the protection of privacy was just as important as the protection of property.126 This right of privacy protects the individual's personal life, and was recognized by Justice Douglas as “[including] the privilege of an individual to plan his own affairs, for 'outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.'”127 The right did not apply to public matters or matters of general interest, though.128 The right to privacy found recognition in the privacy torts, which include intrusion upon seclusion, public disclosure of private facts, false light, and appropriation.129

The conception of the right to privacy as limited access to the self involves the
individual's ability to shield himself from unwanted access by others. Privacy encompasses the "right of every man to keep his affairs to himself, and to decide for himself to what extent they shall be the subject of public observation." It is "the condition of being protected from unwanted access by others—either physical access, personal information, or attention." This ability is crucial to "the promotion of liberty, autonomy, selfhood, human relations, and furthering the existence of a free society."

Privacy as secrecy embraces the notion that the individual may conceal certain matters from others. Judge Richard Posner describes it as the individual's "right to conceal discreditable facts about himself." The Supreme Court has recognized that privacy encompasses the "individual interest in avoiding disclosures of personal matters." Secrecy is especially important given the legal "third-party doctrine," which holds that any information made known to any third party can no longer be protected by the Fourth Amendment from disclosure to government actors. If an individual does not have the right to keep his information private, then he is powerless, under the third-party doctrine, to protect his information from the government.

The control over personal information idea, somewhat popular in the literature, holds that "[p]rivacy is the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." The key to this concept is not simply how much information others know about the individual, but what type of information is known, and whether the individual has the ability to control that information. The Supreme Court has noted that privacy is the individual's "control
over information concerning his or her person.” It is argued that such control allows for personal autonomy, private emotional release of the stress of society, a safety valve to vent anger, and for limited and protected communications that are needed for healthy social interactions and interpersonal relationships.

The personhood model of privacy encompasses the protection of the individual’s personality, individuality, and dignity. This concept of privacy “comport[s] with important values concerning the fair and just treatment of individuals within society.” Individuals who lack privacy may feel stifled by the society they are in and thus unable to grow and participate in that society appropriately. From another vantage point, privacy protects the “fundamental freedom not to have one’s life too totally determined by a progressively more normalizing state.” The Supreme Court has also weighed in:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Our precedents “have respected the private realm of family life which the state cannot enter.” These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Finally, the conception of privacy as intimacy refers to the individual’s ability to exercise control over access to her intimate relationships or aspects of life. This allows individuals the ability to ensure that others do not judge them out of context. It also ensures individuals can make decisions on personal matters

142. See WESTIN, supra note 139, at 32-39.
143. See Solove, supra note 124, at 1116-20.
145. Stanley L. Benn, Privacy, Freedom, and Respect of Persons, in NOMOS XIII: PRIVACY 2, 26 (J. Ronald Pennock & J.W. Chapman eds., 1971) (“[R]espect for someone as a person, as a chooser, implies respect for him as one engaged on a kind of self-creative enterprise, which could be disrupted, distorted, or frustrated even by so limited an intrusion as watching.”).
without fearing that the world will find out.150

These six conceptions of privacy—the right to be let alone, limited access to
the self, secrecy, control over personal information, personhood, and intimacy—are
interdependent and much overlap occurs among them. However, they offer
a useful starting point for considering the relationship between privacy and
means-tested redistribution initiatives such as TANF, SNAP, and the EITC. In
addition to, and drawing from, the conceptions of privacy presented above,
Professor Solove advocates for a contextual conception of privacy that keys in on
particular problems and the value of privacy within the circumstances of those
particular problems.151 In furthering his goal of identifying particular privacy
problems, Solove acknowledges four general groups of potentially harmful
practices: (1) information collecting, (2) information processing, (3) dissemina-
tion of information, and (4) invasions into people's private affairs.152 Many of the
harmful activities Solove describes are relevant to the discussion of means-tested
redistributive programs.

In the information-collecting group, surveillance—the watching, listening to,
or recording of one's activities153—and interrogation—various forms of ques-
tioning or probing for information154—are both relevant. Surveillance harms
individuals by causing uneasiness, self-censorship, and inhibition, creating a
form of social control that adversely affects freedom, creativity, and self-
development.155 Interrogation can make individuals uncomfortable regarding
how they appear to others, leading to compulsion, divulgence of private infor-
mation, and forced betrayal by confidants.156

Three forms of information processing harms are relevant: aggregation—the
combination of various pieces of data about a person;157 identification—linking
information to particular individuals;158 and secondary use—the use of inform-

150. See JULIE C. INNESS, PRIVACY, INTIMACY, AND ISOLATION (1992); see also Robert S. Gerstein,
Intimacy and Privacy, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 265 (Ferdinand David
Schoeman ed., 1984); James Rachels, Why Privacy is Important, in PHILOSOPHICAL DIMENSIONS OF
PRIVACY: AN ANTHOLOGY 290 (Ferdinand David Schoeman ed., 1984); Tom Gerety, Redefining Privacy,
12 HARV. C.R.-C.L. L. REV. 233, 274 (1977) (considering a women's decision to have an abortion in the
context of the privacy as intimacy approach).

151. See Solove, supra note 124, at 1128-29, 1147. Solove contends that "[c]onceptualizing privacy is
about understanding and attempting to solve certain problems." Id. at 1129.


153. Id. at 490.

154. Id.

155. See id. at 491-99; see also GILLIOM, supra note 1, at 47-68 (describing the unpleasant experiences
of many individuals receiving TANF benefits in southeast Ohio while under the surveillance of the state).

156. See Solove, supra note 152, at 499-504.

157. Id. at 506.

158. Id. at 510.
Aggregation causes dignitary harms by unsettling expectations of what others know about an individual and by creating a profile of the individual that is reductive and disconnected from the original context in which the individual's information was gathered. Identification harms the individual by attaching informational baggage to him, inhibiting his ability to change, and preventing self-development. Identification also increases the government's power over individuals and limits the ability of the individual to be anonymous. Secondary use creates fear and uncertainty over how one's information will be used, leading to a sense of powerlessness and vulnerability. It also creates dignitary harms because information is used in a way not consented to by the individual.

Disclosure—the revelation of truthful information about a person that impacts the way others judge that person's character—is a dissemination of information harm. It can cause reputational harm to the individual, thus inhibiting people from associating with others, and can threaten the individual's ability to develop by tying her to past actions. Additionally, due to the third-party doctrine, disclosure of information permanently renders it no longer legally private from the government.

Finally, regarding invasion harms, intrusions—invasive acts that disturb one's tranquility or solitude—and decisional interference—the government's incursion into people's decisions regarding their private affairs—are both important. Intrusion violates an individual's ability to retreat from the presence of others, making the individual uncomfortable and uneasy, and inhibits her ability to form healthy relationships and artistic, political, and religious ideas. The home has long been the legal fortress of privacy, and intrusion into the home is recognized as one of the most serious violations of privacy. Decisional interference creates harm by chilling a person's decisions on subjects which we believe should be free from the incursions of others, especially the government, such as matters involving the home, family, and body.

159. Id. at 519.
160. See id. at 506-09.
161. See id. at 510-15.
162. See id.
163. See id. at 520.
164. See id. at 518-20.
165. Id. at 529.
166. Id. at 523.
167. See id. at 527-32.
168. See id. at 531-32.
169. Id. at 549.
170. Id. at 554.
171. See id. at 549-53.
172. See id. at 549; see also, e.g., Kyllo v. United States, 533 U.S. 27, 31 (2001) ("At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." (quoting Silverman v. United States, 365 U.S. 505, 511 (1961))).
173. See Solove, supra note 152, at 553-58.
These harms have manifested themselves in many areas of the law, and legal rights protecting privacy have been defined in tort law. Although harms resulting from the violation of legal rights likely are more compelling than other harms, what is important to take from this discussion is that there are numerous interrelated conceptions of what privacy is, and these conceptions allow a number of potentially harmful actions to be defined. The discussion of privacy conceptions and harms in this section is by no means meant to be exhaustive. The Article now considers how these potential privacy harms can manifest themselves in the realm of means-tested redistribution programs and the impact they can have on potential recipients.

B. Privacy Harms and Redistribution

Having laid out the theories of privacy and privacy harms above, this Article now considers how various methods of redistribution might create or avoid these privacy harms. Again, the Article will focus on TANF, SNAP, and the EITC as examples. The potential harms may be limitless, but as will be developed, the biggest harms result from requiring recipients to give up significant amounts of personal information, subjecting recipients to the stigma that attaches to the programs, requiring recipients to subject themselves to various forms of investigation and surveillance, and interfering with recipients’ decisions regarding their private affairs.

1. TANF

Of the three initiatives, TANF affords state actors the most opportunity to harm the privacy interests of recipients. These opportunities arise because states are allowed broad leeway to define eligibility standards and are not required to distribute benefits to all eligible individuals. Essentially, because states are allowed to say “take it or leave it,” they have been able to easily intrude into the private lives of TANF recipients.

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175. For an in-depth study of the effects of the various invasive procedures and requirements of TANF programs on individuals, see Gilliom, supra note 1 (studying the experiences of a sample of mothers receiving TANF benefits in southeast Ohio).

176. See Moffitt, supra note 36, at 299.

177. Federal courts have stepped in and enjoined at least two states’ laws requiring public benefits applicants to submit to drug testing because they were seen as violating individuals’ Fourth Amendment rights. See Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011); Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1144 (E.D. Mich. 2000), aff’d, 60 Fed. App’x. 601 (6th Cir. 2003). However, most recipient protection from the courts comes in the form of restricting the states’ ability to deny the continuation of benefits, not the original acquisition of them, where there is a property interest in the benefits created by statute. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982) (“While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the
To begin with, the application process typically involves numerous affronts to the applicants' privacy interests. Applicants are asked to provide a wealth of personal information and must undergo a “multi-stage, multi-day application process” that is far from private.\footnote{178} The example of the New York program shows that the information gathered is wide-ranging. Gathering this information, as well as any confirming documents, can force applicants to expose their private information to others outside of the TANF administration.\footnote{179}

This exposure outside of the public benefits administration, typically to individuals that know and have a relationship with the recipient (explaining their deprivation of such an interest, once conferred, without appropriate procedural safeguards.”) \footnote{178} (internal quotations removed); cf. Burns v. Alcala, 420 U.S. 575, 580 (1975) ("[A] participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional."). Courts require procedural safeguards in such situations. See Youakim v. McDonald, 926 F. Supp. 719, 733-34 (N.D. Ill. 1995) aff’d in part, rev’d in part, 71 F.3d 1274 (7th Cir. 1995) (As Logan \footnote{178} establishes, procedures or systems that govern the administration of public aid programs must be fair and rational. States cannot create systems which arbitrarily deprive persons of property. In \textit{Carey v. Quern}, 588 F.2d 230, 232 (7th Cir. 1978), the Seventh Circuit wrote: “In the context of eligibility for welfare assistance, due process requires at least that the assistance program be administered in such a way as to insure fairness and to avoid the risk of arbitrary decision making.”).}

\textit{Humphrey v. Onondaga County Dept. of Soc. Services} summarizes the considerations well:


\footnote{178} See, \textit{e.g.}, Michele Estrin Gilman, \textit{Welfare, Privacy, and Feminism}, 39 U. BALI. L.F. 25, 29 (2008). Indeed, in addition to—and partially as a result of—the potential privacy harms generated by this application process, the process imposes informal qualification criteria on applicants by requiring them to expend considerable amounts of time and effort to apply for benefits. See \textit{Super, supra} note 33. These informal requirements likely cause some potential applicants to avoid enrolling in the public benefits programs they may need to survive. \textit{Id.}

\footnote{179} See \textit{Source Book, supra} note 70, at 3-4, 5-10-5-11 (requiring verification by third-parties of information on the New York Application); Gilman, \textit{supra} note 178, at 29.
ability to confirm the information provided), ensures that recipients are unable to keep private the fact that they are receiving benefits. Individuals receiving benefits are stigmatized by the government and society, and thus may wish to keep that information private. The application procedures are not the only part of the TANF process that identifies recipients to their communities; investigation procedures also contribute to this exposure and generate other privacy harms of their own.

TANF recipients can be required to submit to many different investigation procedures. Their application information may be shared with other agencies to confirm data, electronic surveillance may be used to track spending, DNA testing may be required to prove paternity, applicants may be fingerprinted and photographed, and recipients may be subject to unannounced investigations of their homes while they are receiving benefits. All of these procedures can create the privacy harms discussed above. Home visits and information sharing increase the likelihood that the recipient is unable to keep his participation in the program private. In addition, surveillance and interrogation can cause stress, fear, and degradation. The aggregation of data and sharing of information between government agencies raises fears of unapproved use of a significant amount of personal data. This can generate stress and stifle the individual in making both public and private decisions. DNA testing and fingerprinting can also be affronts to bodily integrity. Finally, investigations of the home, especially unannounced ones, can serve to disturb the recipient’s tranquility and solitude. The harm here may be seen as particularly severe given that the home has widely been  

181. Id. at 29-30.
182. See id.; see, e.g., Source Book, supra note 70, at 5-6 to -9, 5-13 to -16 (allowing for information sharing for law enforcement purposes and with other federal and state agencies). This information sharing is considered by the government to fall within the “routine use” exception to the Privacy Act of 1974, found at 5 U.S.C. § 552a(b)(3) (2010). Computer matching programs among agencies are used to confirm data on public benefits recipients. See, e.g., GILLiOM, supra note 1, at 32-37 (detailing the effects of computer matching programs in place in rural Ohio on public benefits recipients in the area). These programs are subject to loose statutory provisions requiring that written agreements be in place between the two agencies that are sharing data. 5 U.S.C. § 552a(o). For a broader discussion on the right to privacy, see DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAw 658-60, 684-85 (4th ed. 2011).
183. See Gilman, supra note 178, at 30.
184. See id.; cf. Source Book, supra note 70, at 9-72, 9-73 (describing cooperation requirements for establishing paternity that an applicant or recipient must take; even though such requirements do not explicitly include DNA testing, they require the applicant or recipient to disclose a significant amount of information about the parent).
185. See Gilman, supra note 178, at 30; e.g., Source Book, supra note 70, at 5-28 (requiring applicants to be photographed for identification cards).
186. See Gilman, supra note 178, at 30; e.g., Source Book, supra note 70, at 5-4 (allowing for unannounced home visits).
187. See Gilman, supra note 178, at 7; GILLiOM, supra note 1, at 1-13, 115-136.
recognized as the bastion of privacy.\textsuperscript{188}

Finally, TANF programs can serve as governmental means of decisional interference; they can be used to affect the recipient's decisions regarding private affairs.\textsuperscript{189} Not only can surveillance stifle the individual, causing him to act differently than he would otherwise, but also some TANF programs affirmatively push recipients into certain decisions, most commonly with respect to marriage and family size. One of the goals of PRWORA was to encourage traditional marriage structure, and TANF benefits are used to achieve this goal.\textsuperscript{190} Some states require minimum standards of parenting performance for eligibility.\textsuperscript{191} Further, many states impose family caps, whereby after a certain number of children the recipient's benefits will not increase and the recipient receives no benefit increases for children she has while receiving benefits.\textsuperscript{192} Finally, many women recipients are given unsolicited family planning advice, such as counseling and family planning classes, and are incentivized to put their children up for adoption.\textsuperscript{193} All of these things strongly encourage recipients not to have additional children and may even cause some recipients to reduce their family size. Though the Supreme Court arguably sanctioned such measures in \textit{Planned Parenthood v. Casey},\textsuperscript{194} the privacy concerns surrounding them are no less significant, especially if recipients feel compelled to comply so that they can receive benefits they need to survive.

Interestingly, language from \textit{Casey} itself suggests that the government should be careful not to interfere with individuals' decisional autonomy in areas surrounding family life.\textsuperscript{195} Other Supreme Court cases likewise emphasize the individual's autonomy in this area.\textsuperscript{196} Professor Jed Rubenfeld views the right to

\textsuperscript{188} See, e.g., Kyllo v. United States, 533 U.S. 27, 31 (2001) ("At the very core of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.") (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

\textsuperscript{189} See, e.g., Gilman, \textit{supra} note 178, at 4.

\textsuperscript{190} See Moffitt, \textit{supra} note 36, at 307.

\textsuperscript{191} See, e.g., ARIZ. REV. STAT. ANN. § 46-292 (2010); \textit{see also Super, supra} note 33, at 859.


\textsuperscript{193} See, e.g., N.Y Soc. SERv. LAw §§ 350, 409-i (McKinney 2003); WASH. REV. CODE § 74.12.255(4) (2013); \textit{see also Smith, supra} note 192, at 177-84.


\textsuperscript{195} See \textit{id.} at 851 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the state.").

\textsuperscript{196} See \textit{Lawrence v. Texas}, 539 U.S. 558 (2003) (protecting the individual's right to choose intimate sexual partners); \textit{Roe v. Wade}, 410 U.S. 113 (1973) (protecting the individual's right to choose to have an abortion); \textit{Loving v. Virginia}, 388 U.S. 1 (1967) (protecting the individual's right to choose whom to marry); \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965) (protecting the individual's right to choose to use
privacy as a means for resisting government compulsion of individual actions. Applicants who are in dire financial need might be compelled to submit to TANF's invasive procedures, thus exposing them to potential state interference in their lives by removing the protections offered by retaining their privacy.

2. SNAP

SNAP programs may be less privacy-invasive than TANF programs. Eligibility requirements are federally mandated, and all who are eligible must receive benefits—SNAP is an entitlement program. This restricts the states' ability to intrude into the private lives of the recipients. However, this does not mean that there are no privacy concerns surrounding SNAP.

As an initial matter, as seen in the New York experience, states may use the same application for both TANF and SNAP benefits. This may lead some applicants to provide more information than required to receive their SNAP benefits. That information may be shared with other agencies for confirmation, leading to secondary use and aggregation concerns similar to those in TANF. Additionally, applicants are still required to apply in person at the administrative office, are interviewed by caseworkers, and may have to submit confirming documents regarding work, income, and assets. These procedures can lead to third-party disclosure concerns regarding both the applicant's private information and the recipient's inability to control who knows that she is receiving benefits.

One unique feature of SNAP is that the benefits are provided in-kind, rather than in cash. This ensures that the benefits are used solely to buy food (in theory, but there is certainly a black market for SNAP) and, as such, may reduce the amount of stigma placed on the program. On the other hand, the fact

contraceptive devices); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (protecting the individual's right to choose to send her children to private school).

197. Rubenfeld, supra note 146, at 784 (defining privacy as "the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state"). Rubenfeld continues: "The anti-totalitarian right to privacy... prevents the state from imposing on individuals a defined authority." Id. at 794.

198. See Currie, supra note 36, for a discussion of the requirements for applying to the Food Stamps Program, the previous name of SNAP. Professors Weisbach and Nussim also offer a brief description of the requirements for applying to the Food Stamps Program. See Weisbach & Nussim, supra note 6, at 999-1001. SNAP is codified at 7 U.S.C. § 2011 (2012).

199. However, courts have noted that different verification measures may be required for the different programs when joint applications are used, perhaps alleviating this concern. See, e.g., S.L. v. Whitburn, 67 F.3d 1299, 1306 (7th Cir. 1995).

200. See supra note 182 and accompanying text.

201. See, e.g., Source Book, supra note 70, at 3-4; 5-10-5-11; New York Application, supra note 71.

202. See, e.g., Source Book, supra note 70, at 3-4; 5-10-5-11 (requiring verification by third-parties of information on the New York Application).

203. 7 U.S.C. § 2016 (2013); see Currie, supra note 36, at 205.

that the benefits are provided in-kind rather than in cash may make it harder for a recipient to conceal the fact that she is on the program. As soon as she makes a purchase with SNAP benefits she is exposed to the immediate community, thus allowing whatever stigma exists to attach. The use of the EBT cards may serve to increase recipients' ability to conceal that they are on the program, as others (except perhaps the cashier) would not likely realize that they are using SNAP benefits rather than a debit or credit card to pay for their food.

Investigative and decisional interference harms are less of a concern with SNAP than with TANF. Initial investigative procedures and recertification procedures may stifle the individual and cause stress, but home visits are not made under SNAP. Purchases may be monitored through the use of the EBT cards, which is invasive and may influence the recipient's purchasing decisions. Additionally, some "workfare" requirements may be imposed on the individual under SNAP, affecting her decision to work or not, but no provisions similar to the marriage and family size provisions of TANF exist under SNAP.

3. The EITC

The EITC is far less privacy-invasive than either TANF or SNAP. EITC applicants are not required to go to any administrative office, to give up significant amounts of private information, or to be subjected to caseworker interviews or investigations (outside of the normal IRS auditing procedures). Recipients are required to provide information that proves the qualifications of the children they claim. Recipients may be concerned that the information will be put to unapproved secondary uses, but the Internal Revenue Code does provide for some protection of taxpayer data. Any information needed to prove employment is already required on the individual's tax return. For those recipients who have no tax liability and thus would not otherwise file tax returns, there is a larger informational burden for applying in that they have to submit their income and employment information to the IRS.
Also, there is no significant stigma attached to receiving the EITC, and recipients have a high level of control over the disclosure of the fact that they are receiving the credit. There is no need to go into public to apply for the benefit, and there is no general need to get third-party confirmation of the information provided.\textsuperscript{212} Other than work requirements, the EITC, like SNAP, does not have any non-economic requirements or provisions attached to it, minimizing any decisional interference from the government.

Indicative of the concern for the privacy of individuals receiving the EITC, widespread objections were made to IRS proposals for expanded precertification requirements for receiving the EITC.\textsuperscript{213} The IRS proposed to require a limited number of applicants to "provide more information on their relationship to and/or residency status of the qualifying children listed on their [2002] return."\textsuperscript{214} This pilot program would be expanded in future years. Notable objections came from the Tax Section of the American Bar Association, which asked the IRS to "identify . . . the categories of data and information that will be obtained through the pilot precertification program and describe how such data and information will assist the Service in curbing perceived high noncompliance,"\textsuperscript{215} as well as from forty-five United States Senators, who claimed that the "pre-certification program subjects only low-income working Americans to a harsher standard than other taxpayers—simply because they are claiming a tax benefit designed to assist the working poor."\textsuperscript{216} Even some individuals not opposed to the program in theory recognized its potential to discourage EITC claims by eligible individuals.\textsuperscript{217} The IRS subsequently toned down the proposed program, and the deterrent effect of the program on potential EITC claims is unclear.\textsuperscript{218}

The three programs discussed above demonstrate the various levels of privacy harms often created by redistributive programs. At the most invasive and harmful end of that scale is a program like TANF with burdensome application procedures and information requirements, a high level of stigma attached to the program, intrusive surveillance techniques, and provisions that can affect decision making on personal affairs. Somewhere in the middle of the scale is a program like SNAP with less burdensome information requirements, lower levels of stigma, and less intrusive surveillance techniques and personal decision affecting provisions. At

\textsuperscript{212} Some self-employed individuals may be subject to closer scrutiny given fraud concerns, see Zelenak, \textit{supra} note 121, at 1886 n.79, which may cause them to seek third-party certification. Individuals who use tax preparers presumably give up their information to the preparers in a voluntary way.  
\textsuperscript{213} See Zelenak, \textit{supra} note 121, at 1869-73. 
\textsuperscript{214} \textit{Internal Revenue Serv., IRS Explanation of EITC Verification Initiative} ¶ 5 (2003). 
\textsuperscript{215} Herbert N. Beller, ABA Section of Taxation, ABA Tax Section Submits Comments to IRS on EITC Precertification Program: Comments on the Internal Revenue Service Pilot Precertification Program to Determine Compliance with the Residency Test for Claiming the Earned Income Credit with Respect to Qualifying Children (2003). 
\textsuperscript{216} Max Baucus, Baucus, Colleagues Urge End to "Burdensome" EITC Precertification ¶ 21 (2003). 
\textsuperscript{217} Zelenak, \textit{supra} note 121, at 1870. 
\textsuperscript{218} \textit{Id.} at 1871-72.
the least invasive and harmful end of the scale are programs like the EITC, which do not have burdensome application procedures or information requirements, have almost no stigma, and lack intrusive surveillance techniques and provisions that affect personal decision making. Participation rates of eligible individuals in the various programs may represent the privacy concerns surrounding them, as TANF and SNAP have lower levels of participation among eligible individuals than the EITC.219 The next section focuses on the effect of the privacy concerns surrounding redistributive programs on the redistribution system.

V. THE IMPLICIT TAX ON PRIVACY

When the privacy harms associated with the redistributive programs cause eligible individuals to avoid enrolling, they lead to an implicit tax on privacy.220 This is not a literal tax, but the economic burden created by the choice to forgo benefits is similar to the burden created by a tax. Analyzing the burden as a tax, in the context of United States tax policy, can be instructive. The privacy-loving individual who is economically eligible for means-tested benefits is denied those benefits when she refuses to submit to privacy-invasive aspects of a program. This could result from refusing to give up information, refusing to ask for information-confirming documents from others, or refusing to submit to home investigations. The individual may value her information, may not wish to subject herself to stigma, or may wish to avoid governmental interference with her personal decisions. As a result, she will not receive benefits and her after-tax economic position is worse than it would be if she did not so value her information. The resulting economic burden she suffers is therefore similar to a tax for valuing her privacy.

The implicit tax works similarly to a fee, because it is an all-or-nothing approach. To the extent one values his privacy such that he avoids redistributive programs, he suffers an economic burden in the full amount of the benefits forgone; the actual value personally placed on privacy does not affect the amount of the implicit tax.221 In other words, someone who is somewhat concerned about his privacy such that he barely decides not to participate in SNAP suffers the same burden as someone who cares so greatly about privacy such that she never leaves her house (assuming the two are entitled to equal benefit levels).

There is an argument that the population subject to the implicit tax is not

219. See Weisbach & Nussim, supra note 6, at 1004; Zelenak, supra note 121, at 1888-90. Of course, privacy concerns likely are not the only factor driving nonparticipation. See ROBERT MOFFITT ET AL., A STUDY OF TANF NON-ENTRANTS (2003), available at http://web.jhu.edu/bin/g/k/16_moffitt_final1.pdf (detailing the reasons for non-entry into TANF programs).

220. Recall that a reduction in benefits—where the individual is eligible for the benefits—is equivalent to a raise in taxes. See supra Part II.

221. For simplicity's sake, this analysis assumes that privacy concerns are the only factor causing the individual not to enter public benefits programs, an unlikely real world scenario. See supra note 219. Without this assumption, the actual tax on privacy could be seen as a portion of the benefit amount forgone equal to the weight the privacy concerns carried in causing the individual to forego the benefits.
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limited only to recipients of public benefits, but includes all taxpayers who are asked to give up more information to the government than the "base taxpayer"—the taxpayer who is required to file a return and is asked to give up the least amount of information. This broadened subgroup would include individuals who itemize their deductions (such individuals are most likely wealthy). These individuals must tell the IRS to whom they donated money, what medical payments they made, and a variety of other information. To some degree, this argument is accurate—such taxpayers are subject to the implicit tax on their privacy should they decide not to comply with the itemization procedures. However, with respect to the discussion below of administrative concerns, the itemization procedures do not appear to go beyond the limits of administrative necessity for preventing fraud. In comparison, the procedures of the various public benefits programs do appear to go beyond those administrative limits, thus creating the concern that lower-income individuals in particular are subjected to undue privacy-invasive procedures that can result in the loss of benefits for the privacy-loving individual.

Taking a look at the three programs, the EITC has higher take-up rates by eligible individuals than TANF and SNAP. This disparity may stem from a number of factors, but one may be that the less privacy-invasive procedures of the EITC discourage fewer applicants than the more invasive procedures of TANF and SNAP. It may not be possible to determine if privacy concerns are what drive eligible individuals away from the programs, but given the number of possible privacy harms one could suffer from the programs' various requirements, there should be unease that individuals are not receiving benefits because they are concerned for their privacy. Indeed, the objections to the IRS's proposed precertification program for the EITC indicate that these privacy concerns do exist. When privacy-invasive procedures reduce take-up levels, the implicit tax on privacy is levied.

The implicit tax on privacy may have some merit, however. First, it may turn out that the implicit tax is normatively proper because it fits the prescriptions of horizontal equity, vertical equity, and neutrality. Second, there could be administrative justifications for the implicit tax, even if it is not normatively proper. Finally, there could be corrective justifications for the implicit tax.

222. See infra Part V-B.
223. Echoing this concern, Dorothy A. Brown notes that "[l]ow-income taxpayers are more likely to be audited than any other taxpayer group." Brown, supra note 208, at 792.
224. See Weisbach & Nussim, supra note 6, at 1004-05 ("[T]he EITC participation rate is about 89%, while FSP participation is around 70%."); Zelenak, supra note 121, at 1888-90 (placing Food Stamps take-up at 54% in 2001).
225. See supra notes 213-18 and accompanying text. Additionally, other support exists for the idea that individuals do not seek benefits they are eligible for because of privacy concerns. See Moffitt et al., supra note 219 (detailing the reasons for non-entry into TANF programs); see also Gilman, supra note 178, at 4 ("[T]he privacy deprivations associated with applying for welfare discourage many needy women from seeking assistance."
A. Horizontal Equity, Vertical Equity, and Neutrality

The implicit tax on privacy may violate the principles of horizontal equity, vertical equity, and neutrality. This analysis relies on the measure of income used by the Internal Revenue Code, but it should be noted that income can be measured in many different ways, and the Internal Revenue Code's definition is certainly no beacon of clarity. Alternative measures of income that would include the value of retaining one's privacy would change the analysis that follows. The Internal Revenue Code, however, does not consider that value in its calculation of a taxpayer's income.

The implicit tax on privacy violates the principle of horizontal equity. Two taxpayers can have the same income yet be taxed differently. Take Chris and Deb, for example. Both individuals have income of $10,000 a year, neither have any federal income tax liability, and both qualify for TANF benefits. Chris, however, concerned for his privacy, does not want to submit to the privacy-invasive parts of the TANF program and does not participate in the program. Deb, meanwhile, does participate in TANF and receives $500 in benefits. At the end of the year, Deb has $10,500, and Chris only has $10,000. Since under the redistributive system, both Chris and Deb should end up with $10,500, all else being equal, Chris has implicitly been taxed on his privacy by $500. Chris and Deb have the same amount of income but are taxed differently. Looking at it from another perspective, Deb is taxed at a negative rate, meaning she receives money, and Chris is not taxed at all. Either way, the principle of horizontal equity has been violated.

Similarly, the implicit tax on privacy violates the principle of vertical equity. The violation occurs because taxpayers with different levels of income may be taxed the same amount, or, in progressive systems of taxation, at the same rate. To illuminate this violation, take Ed and Frank as examples. Ed has income of $10,000 a year, and Frank has income of $50,000 a year. For simplicity's sake, assume that Ed has no tax liability and Frank is subject to a 1% tax. Assume that Ed is eligible for SNAP benefits of $500, but Frank is not eligible for SNAP benefits. Ed, however, values his privacy and does not submit to the SNAP procedures and thus does not receive his benefits. He has been implicitly taxed $500, a rate of tax roughly equal to 4.76%. Frank is simply taxed on his income of $50,000 at 1% and therefore he has also been taxed $500. Thus, here the implicit tax on privacy not only violates vertical equity by taxing Ed and Frank the same amount but also has resulted in a regressive tax rate structure, as Ed is subject to a higher tax rate even though he has less income than Frank.

Finally, the implicit tax on privacy also violates the principle of neutrality. Because the implicit tax affects only one kind of behavior, retaining privacy, it discourages people from engaging in that behavior. That is, the implicit tax on privacy discourages people from retaining their privacy. For the implicit tax to be neutral, it would have to fall on all decisions regarding privacy, so that one type of behavior would not be favored over the other. This could be achieved by
imposing a fee on individuals who decide to submit to the privacy-invasive procedures of the programs, although such a solution would certainly not harmonize well with the goals of the programs.

**B. Administrative Justifications**

Given that the implicit tax on privacy is not normatively justifiable, perhaps administrative concerns can justify the tax. That is, perhaps it is simply not possible to deliver the redistributive benefits without imposing the implicit tax on privacy. To some degree, this must be true. To redistribute income, the government must have information identifying those in need. At the most basic level, this includes identity and income information. In addition, information is needed to coordinate the provision of other types of assistance associated with public benefits programs, such as job training and child care assistance. Some degree of publicity will occur when the benefits are given, even if it is simply a check in the mail from the IRS. The question here is whether administrative needs justify the invasions of privacy that go beyond these basic levels.

Perhaps the most basic administrative need for privacy-invasive procedures is establishing the burden of proving eligibility. There are two parts to this need: determining what party must prove eligibility and preventing fraud and abuse. The first concern—relating to how eligibility is proven—is a story of administrative economy. Who should bear the cost of proving eligibility? Is it more efficient to have the individual prove his case to the government, or for the government to prove its case against the individual? That is, should we presume applicants are ineligible until proven eligible, or vice versa?

The answer to the burden question might not be as straightforward as it may seem. Take TANF, for example. On the one hand, a presumption of eligibility could bankrupt the system if too many ineligible people receive benefits. State administrative resources are limited and might not be able to ensure accurate results. On the other hand, a presumption of ineligibility may place a heavy burden on eligible individuals to get their benefits. Some may become discouraged and social welfare as a whole may suffer if too many eligible individuals do not receive their benefits. As noted by Professor Lawrence Zelenak, apparently the American government finds it much more troubling should an individual get benefits he is not entitled to, than should an individual not receive benefits he is entitled to, and thus policymakers have established a strong presumption of ineligibility, placing the burden of proof on the individual.\(^\text{226}\) However, this system is costly; significant amounts of administrative resources and personal resources of the applicants are used to ensure eligibility. Not only does it place the initial cost of proving eligibility on the individual, but it also creates additional verification costs the government must bear.

\(^{226}\) See Zelenak, *supra* note 121, at 1874.
Having the government be responsible for proving that people are not eligible would probably ask too much. It would essentially equate to a presumption of eligibility, given the limited resources of the state. However, asking the individual to prove eligibility in a system that is not subject to very extensive verification procedures may be the most efficient result. The EITC offers a good example of this approach. Applicants claim their eligibility with supporting documentation. Extensive probing is not preformed on every applicant, but some auditing does occur, allowing for a degree of checking. This approach hearkens back to the approach of the “Declaration Era” of public benefits administration.227 During this time, applicants were not subjected to extensive interviews and verification procedures, saving valuable administrative resources. Importantly, reported payouts to ineligible individuals did not increase relative to periods with more extensive verification procedures, so the state did not end up losing money by paying out to more ineligible people.228 Therefore, it seems likely that the current verification procedures under programs like TANF could be reduced to a more efficient level, and the individual, who presumably has the least costly access to the information needed,229 would provide that information.

To focus too much on the eligibility criteria of any particular program misses the point. The appropriate question to ask is: no matter what the eligibility requirements are, is the individual required to prove his eligibility in a way that unjustifiably impinges on his privacy? Perhaps other administrative concerns explain the more invasive procedures seen in programs like TANF.

The second concern relating to the need to establish eligibility reflects the desire to ensure that benefits are distributed accurately. One of the most common administrative needs cited for the privacy-invasive procedures is fraud prevention.230 Fraud prevention needs may be substantial, although the amount of resources devoted to them varies among the programs. As one commentator

227. See Cong. Research Serv., Administration of the AFDC Program (1977) (describing the declaration method as “provid[ing] for eligibility determination to be based, to the maximum extent feasible, on the information furnished by the applicant without routine applicant interviews or verification procedures”); Gilliom, supra note 1, at 28-29.

228. See Administration of the AFDC Program: Hearing before the Subcomm. on Intergovernmental Relations and Human Res. of the H. Committee on Gov’t Operations, 95th Cong. (1977). This is not to say that there was no fraud, but fraud did not increase. Leon Ginsberg, commissioner of the West Virginia Department of Welfare, stated, “[m]y statisticians tell me that there was no significant difference in error rates under the simplified declaration system and the rather tedious interviews, home visits, and complex eligibility determination we perform now.” Id. at 367. Ultimately, the opponents of the declaration system won out when the Nixon administration ushered in the more stringent procedures of the “Quality Control” era. See Gilliom, supra note 1, at 29-32.

229. See Ward v. Thomas, 895 F. Supp. 406, 419 (D. Conn. 1995) (“The burden of proof on the recipient in showing eligibility for welfare benefits is particularly appropriate where the knowledge is solely with the recipient.”) (internal quotations omitted). That the individual is the least cost provider of information is by no means necessarily true. Consider that the government already has a wealth of information on the individual, particularly income and work information, that the individual might not have easy access to.

230. See Gilman, supra note 178, at 5.
TAXING PRIVACY REPORTS, "[a]lthough the total size of the EITC is about 70 percent greater than that of the Food Stamp program, EITC criminal enforcement activities are a small fraction of Food Stamp criminal enforcement activities." 231 Many report that the EITC, which does not have many privacy-invasive procedures, suffers from a seemingly high level of fraudulent payouts, perhaps almost 32%. 232 In comparison, improper payments under TANF were estimated at around 28.5% of payments in New York in the second half of 2005 and as high as 40% in Michigan during the same period. 233 Therefore, from the fraud prevention point of view, TANF’s highly privacy-invasive fraud prevention measures do not appear to be working efficiently. Of course, these percentages do not tell the whole story. Fraud prevention measures may be justifiable if the benefits of fraud prevention outweigh the costs. 234 However, as the number of a program’s eligibility criteria increase, so will the cost of verifying that an applicant is eligible, and in relation to the EITC’s measures, TANF’s measures do not seem cost effective. 235 This imbalance may be caused by the differences between providing aid through tax breaks instead of benefit programs, or it may be a result of TANF’s non-redistributive goals. But in a world of limited resources, administrative resources used for fraud prevention in programs like TANF might be put to better use elsewhere. 236

231. Zelenak, supra note 121, at 1892. Granted, criminal enforcement is only one side of fraud prevention, but it is telling that, even though all the programs have the effect of doling out government money, “[EITC] fraud prosecutions are virtually nonexistent relative to prosecutions of Food Stamp and TANF fraud.” Id. at 1893. Weisbach and Nussim note that the EITC’s administrative costs, calculated to be one percent of its distributed benefits, are estimated at less than one-tenth the amount spent on the FSP. They continue to note that “[n]otwithstanding the vastly higher administrative and compliance costs of the FSP, it is not clear that it is any more accurate.” Weisbach & Nussim, supra note 6, at 1003-04.

232. See Zelenak, supra note 121, at 1890 (citing INTERNAL REVENUE SERV., COMPLIANCE ESTIMATES FOR EARNED INCOME TAX CREDIT CLAIMED ON 1999 RETURNS 10 (2002)).


234. See Zelenak, supra note 121, at 1875; cf. Weisbach & Nussim, supra note 6, at 982 (“The decision to put a program into the tax system can be seen as a decision that the accuracy costs . . . are outweighed by the simplicity benefits of integration for those particular programs.”).

235. Other concerns around eligibility requirements exist. That some means-tested programs are used as carrots rather than entitlements begs the question of what it means to be eligible. Is one eligible solely because of her condition in life, or is she eligible only after she agrees to submit to the privacy-invasive procedures? That is to say, does the single mother of two who has income under the poverty line become eligible only once she has proven those facts? In the case of TANF, which is not an entitlement program and used more as a carrot to get people to work, a convincing argument can be made that she is eligible only after proving her situation. The argument is not as strong for entitlement programs. In this respect, the goals of the programs may have a significant impact on the level of respect for privacy chosen.

236. See Zelenak, supra note 121, at 1900-06; cf. Weisbach & Nussim, supra note 6, at 1026-27 (noting that certain initiatives are better implemented through the tax code and others though administrative programs, perhaps because administrations are able to more directly target recipients that are deserving of aid, i.e. have met not only income requirements, but other requirements as well).
Another administrative concern is that of saving the state money, which may be accomplished by discouraging eligible individuals from claiming their benefits. While this is perhaps not the most righteous of purposes, it is recognized that state actors have an interest in reducing the public benefits rolls, and if people are discouraged from applying because of privacy-invasive procedures, the state pays less in benefits. Engaging in such discouragement may save a state money on the front end, but if individuals are not given benefits that they need to survive, then the state may eventually have to spend more on them in terms of medical care, emergency housing, or even covering the costs of death, which should include the cost of the human life lost. Of course, if benefit levels are set above the appropriate level, as might happen if the federal government sets a national standard that is not adjusted for region, then discouraging individuals from applying for certain benefits may prove to be less nefarious than it initially sounds.

Finally, as mentioned above, the administrators of the various public benefits programs clearly need some level of information regarding the recipients in order to deliver the appropriate benefits to each recipient. Programs like TANF that have many goals in addition to the redistribution of income will require more information to effectively meet these goals, perhaps justifying more privacy-invasive requirements. In such cases, administrators should still strive to ensure that their programs do not impose unnecessary privacy-invasive requirements, and administrators should not rely on the presence of non-economic goals to justify unwarranted and potentially harmful requirements.

In the end, there may be administrative concerns that justify the imposition of the implicit tax on privacy. The states must impose some administrative hurdles to ensure that the programs run effectively, so perhaps the implicit tax is inevitable. But to truly justify the administrative hurdles, the state should ensure that they are at least generating net benefits. Determining whether net benefits are generated involves comparing the cost of administrative hurdles with the savings the state realizes from those hurdles, such as savings from preventing fraud or discouraging applicants. One of the costs of these hurdles is the burden that individual taxpayers experience from the tax on privacy. Implementing efficient levels of administrative requirements will ensure that limited resources are not wastefully spent.

C. Corrective Taxation

In addition to administrative concerns, it may be that the information gained from the privacy-invasive procedures is overvalued by individuals from a social welfare point of view. If such is the case, then the implicit tax on privacy can be

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237. See generally Super, supra note 33. Professor Super’s article offers extensive analysis of the use of formal and informal eligibility rules for government benefit programs.
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seen as a corrective measure designed to encourage individuals to give up their information. Corrective taxes serve to require actors to internalize the consequences of their actions. For example, a business might find it beneficial to pollute, but in so doing it harms society. The business could be fined—taxed—for the pollution it creates in order to compensate the rest of society for the harm the pollution created. Alternatively, a dog owner could fail to clean up after his dog, and be fined for that inaction, covering the cost to society of cleaning up.\footnote{It could be that the invasive procedures the programs require applicants to submit to are beneficial to society as a whole. This would occur when the gain to society from subjecting the individual to the privacy-invasive procedures is greater than the harm to the individual of submitting. In such a case, individuals are not aware of the external effects of protecting their privacy, so society forces them to realize the cost of those effects by imposing the implicit tax. The burden imposed should be equal to the harm that society feels when the individual retains his privacy. In the context of redistribution, society could benefit from the information by using it to create more efficient and targeted public benefits programs.}

In the case of non-entitlement programs like TANF, which may intend to encourage certain behavior by providing benefits, perhaps society has decided that participants in such programs should have to give something to society in return. Privacy could be that something; as a society, we demand that recipients submit to the public gaze. That submission could be deemed to make up for the externalities of receiving benefits, in that it allows society to ensure that it does not suffer from those who do not change their behavior appropriately. Therefore, those who do not enter the program are not taxed in a sense because the benefits were never guaranteed to them. Only when one enters the program must she give something in return. In such a scenario, one is ineligible for benefits until she submits to the privacy-invasive measures.\footnote{Again, it is hard to quantify the costs and benefits associated with requiring individuals to engage in privacy-invasive procedures to receive redistributive benefits. Until a monetary value can be placed on privacy, such will always be the case. Even so, if the implicit tax on privacy is meant to be a corrective tax, it should accurately reflect the cost to society that the individual generates when he does not submit to the invasive procedures; otherwise, individuals are being subjected to punitive fines for failing to submit.\footnote{The individual’s benefit levels may reflect those costs, but then again they might not. They certainly should not...}}

\footnote{Granted in most places, this would typically be a punitive fine, but the example still holds weight. Imagine that the fee is meant only to compensate society for the dog owner’s inaction; the fee goes straight to the city’s sanitation department to fund the cleanup effort. Then the example is much more in line with the implicit tax on privacy as described in this section.}

\footnote{See supra note 235.}

\footnote{When the fine exceeds the cost of the externality, it becomes a punitive measure, actually inflicting harm on the individual for engaging in certain behavior.}
be used as the measure of the implicit tax without some sort of justification from policymakers, and one would hope that legislative studies would be able to establish whether benefits levels are an acceptable estimate of the social harm. If so, then the argument for using the tax on privacy as a corrective measure is particularly strong. Without that data, though, policymakers should be careful justifying the tax as a corrective one.

D. Conclusion

This Part has explored the implicit tax on privacy created by some redistributive programs. This implicit tax is not normatively desirable because it violates neutrality and horizontal and vertical equity, but might be defended on grounds of administrative needs and as a corrective measure. It is important that state actors understand the effects of a program's design and act in ways that benefit their communities.

Without a good way to measure the value of an individual's privacy, the best program design is unclear, but current administrative burdens appear to be too costly in programs like TANF. Further, without knowing for sure what harm will fall on an individual who does not submit to privacy-invasive procedures and the societal value of that submission, it is impossible to conclude that a corrective tax on privacy is justifiable. These ambiguities raise a difficult political question, the answer to which depends on whether one believes that the individuals applying for benefits or society as a whole should bear the brunt of any miscalculated costs. If the corrective justification is relied on when placing the burden on individuals, policymakers should establish an acceptable estimate of the social cost of withheld privacy so that such individuals are not punished for failing to submit to invasive procedures by forfeiting more benefits than those costs.

The outlook for what to do is not particularly bleak, however. General recommendations can be made. Programs with a goal of redistribution of income should carefully consider the implementation of highly privacy-invasive procedures. Programs designed during the Declaration Era of public benefits administration provide examples of effective procedures.241 Requiring fewer confirming documents and not requiring applicants to come to administrative offices to apply and interview can make application procedures less public and can save significant state administrative costs. States can rely less on invasive investigative procedures and disallow unannounced home visits. Redistributive programs such as TANF, with goals to encourage certain behaviors, might require more privacy-invasive measures to ensure eligibility than entitlement programs, but program designers should be careful not to go too far and to ensure that the measures they implement achieve their purposes. When state actors begin to think of the economic burden that they may impose on potential recipients of

241. See supra note 227.
public benefits concerned about their privacy, hopefully they will design more efficient and privacy-sensitive benefits programs.

VI. Conclusion

In today’s digital age, privacy concerns are becoming more and more prevalent. Spyware programs mine computers for personal data, websites track people’s online behavior, and cell phone apps collect geographical data through GPS devices. But technology does not represent the only threat to privacy in today’s world, nor do private actors. Equally as threatening is the burden that governmental actors impose on potential recipients of redistributive benefits concerned for their privacy. Government actors certainly need information on the individuals they serve, but some basic adjustments to redistributive programs could help protect the privacy of those people. These adjustments should not be quickly dismissed in the name of administrative convenience but rather carefully considered given the effects they could have on the neediest in our society. Without such consideration, programs can quickly become unnecessarily repressive and invasive. This repression and the control that arises from it bleed through these comments from Mary, the same public benefits recipient quoted in the introduction:

It’s not right. I have nothing to really hide, but it’s just I don’t think it is right that they have to know everything about you instead of just your income part . . . I just don’t think they should have to know everything. But like I said, they have you over the barrel. If you don’t turn everything in you don’t get the check. So it’s that simple to a client. They know that if they don’t do it they don’t get any income and whether it is right or wrong, you are just out. So you do what the system says to do. You kind of follow along.242

Participants should only be asked to follow along with requirements that make sense and are justifiable. Many of the current requirements may be neither.

Additionally, as new programs are developed, the privacy concerns of potential recipients should play a major role in program design. Old programs and the privacy issues they have created should serve as examples and guides for new programs. As technology advances and information gathering, processing, and disclosure become increasingly easy, privacy protections should be a primary concern in any program design. Following the advice of the forty-five United States Senators that objected to the IRS’s proposed precertification program for the EITC, we should ensure that benefits programs do not “subject[] . . . low-income working Americans to a harsher standard than other taxpayers—simply because they are claiming a . . . benefit designed to assist the working poor.”243 Such a system of classism simply will not do.

242. GILLOM, supra note 1, at 50.
243. BAUCUS, supra note 216.