

- Third, these data actually do some good. I do not know why Nike thinks I am a good person to tell about their latest sneakers, and I do not know why Keds does not know to call. In both cases, I suspect the reason is bad data about me. I would love it if Nike knew enough to leave me alone. And if these data were better collected and sorted, it would.
- Finally, no one spends money collecting these data to actually learn anything about *you*. They want to learn about people *like* you. They want to know your type. In principle, they would be happy to know your type even if they could not then learn who you are. What the merchants want is a way to discriminate—only in the sense of being able to tell the difference between *sorts* of people.

The other side of this argument, however, also has a point.²⁴ It begins, as we have done elsewhere, by noticing the values that were originally protected by the imperfection of monitoring technology. This imperfection helped preserve important substantive values. One such value is the benefit of innocence. At any given time, there are innocent facts about you that may appear, in a particular context or to a particular set, guilty. Peter Lewis, in a *New York Times* article called “Forget Big Brother,” puts the point well:

Surveillance cameras followed the attractive young blond woman through the lobby of the midtown Manhattan hotel, kept a glassy eye on her as she rode the elevator up to the 23rd floor and peered discreetly down the hall as she knocked at the door to my room. I have not seen the videotapes, but I can imagine the digital readout superimposed on the scenes, noting the exact time of the encounter. That would come in handy if someone were to question later why this woman, who is not my wife, was visiting my hotel room during a recent business trip. The cameras later saw us heading off to dinner and to the theater—a middle aged, married man from Texas with his arm around a pretty East Village woman young enough to be his daughter.

“As a matter of fact,” Lewis writes, “she is my daughter.”²⁵

One lesson of the story is the burden of these monitored facts. The burden is on you, the monitored, first to establish your innocence, and second, to assure all who might see these ambiguous facts that you are innocent. Both processes, however, are imperfect; say what you want, doubts will remain. There are always some who will not believe your plea of innocence.

Modern monitoring only exacerbates this problem. Your life becomes an ever-increasing record; your actions are forever held in storage, open to being revealed at any time, and therefore at any time demanding a justification.

A second value follows directly from this modern capacity for archiving data. We all desire to live in separate communities, or among or within separate normative spaces. Privacy, or the ability to control data about yourself, supports this desire. It

enables these multiple communities and disables the power of one dominant community to norm others into oblivion. Think, for example, about a gay man in an intolerant small town.

The point comes through most clearly when contrasted with an argument recently advanced by David Brin.²⁶ Brin argues against this concern with privacy—at least if privacy is defined as the need to block the production and distribution of data about others. He argues against it because he believes that such an end is impossible; the genie is out of the bottle. Better, he suggests, to find ways to ensure that this data-gathering ability is generally available. The solution to your spying on me is not to block your spying, but to let me spy on you—to hold you accountable, perhaps for spying, perhaps for whatever else you might be doing.

There are two replies to this argument. One asks: Why do we have to choose? Why can't we both control spying and build in checks on the distribution of spying techniques?

The other is more telling. Brin assumes that this counterspying would be useful to hold others “accountable.” But according to whose norms? “Accountable” is a benign term only so long as we have confidence in the community doing the accounting. When we live in multiple communities, accountability becomes a way for one community to impose its view of propriety on another. And because we do not live in a single community; we do not live by a single set of values; and perfect accountability can only undermine this mix of values.

The imperfection in present monitoring enables this multiplication of normative communities. The ability to get along without perfect recording enables a diversity that perfect knowledge would erase.

A third value arises from a concern about profiling. If you search on “mortgage” in a web search engine, advertising for mortgages appears on your computer screen. The same for sex and for cars. Advertising is linked to the search you submit. Data about the search are collected—and not just about the search. The site collects every bit of personal information about you that it can.²⁷

Data collection is the dominant activity of commercial web sites. Some 92 percent of them collect personal data from web users, which they then aggregate, sort, and use.²⁸ Oscar Gandy calls this the “panoptic sort”—a vast structure for collecting data and discriminating on the basis of that data—and it is this discrimination, he says, that ought to concern us.²⁹

But why should it concern us? Put aside an important class of problems—the misuse of the data—and focus instead on its ordinary use. As I said earlier, the main effect is simply to make the market work more smoothly: products are matched to people, and interests to people, in a way that is better targeted and less intrusive than what we have today. Imagine a world where advertisers could tell which venues paid and which did not; where it was inefficient to advertise with billboards and on broadcasts; where most advertising was targeted and specific. Advertising would be more likely to go to those people for whom it would be useful information. Or so the argument goes. This is discrimination, no doubt, but

not the discrimination of Jim Crow. It is the wonderful sort of discrimination that spares me Nike ads.

But beyond a perhaps fleeting concern about how such data affect the individual, profiling raises a more sustained collective concern about how it might affect a community.

That concern is about manipulation. You might be skeptical about the power of television advertising to control people's desires. Television is so obvious, the motives so clear. But what happens when the motive is not so obvious? When options just seem to appear right when you happen to want them? When the system seems to know what you want better and earlier than you do, how can you know where these desires really come from?

Whether this possibility is a realistic one, or whether it should be a concern, are hard and open questions. Steven Johnson argues quite effectively that in fact these agents of choice will facilitate a much greater range and diversity—even, in part, chaos—of choice.³⁰ But there's another possibility as well—profiles will begin to normalize the population from which the norm is drawn. The observing will affect the observed. The system watches what you do; it fits you into a pattern; the pattern is then fed back to you in the form of options set by the pattern; the options reinforce the pattern; the cycle begins again.

A second concern is about equality. Profiling raises a question that was latent in the market until quite recently. For much of the nineteenth century in the United States economic thought was animated by an ideal of equality. In the civil space individuals were held to be equal. They could purchase and sell equally; they could approach others on equal terms. Facts about individuals might be known, and some of these facts might disqualify them from some economic transactions—your prior bankruptcy, for example, might inhibit your ability to make transactions in the future. But in the main, there were spaces of relative anonymity, and economic transactions could occur within that anonymity.³¹

Over time this space of equality has been displaced by economic zonings that aim at segregation.³² They are laws, that is, that promote distinctions based on social or economic criteria.³³ The most telling example is zoning itself. It was not until this century that local law was used to put people into segregated spaces.³⁴ At first, this law was racially based, but when racially based zoning was struck down, the techniques of zoning shifted.³⁵

It is interesting to recall just how contentious this use of law was.³⁶ To many, rich and poor alike, it was an affront to the American ideal of equality to make where you live depend on how much money you had. It always does, of course, when property is something you must buy. But zoning laws add the support of law to the segregation imposed by the market. The effect is to re-create in law, and therefore in society, distinctions among people.

There was a time when we would have defined our country as a place that aimed to erase these distinctions. The historian Gordon Wood describes this goal as an important element of the revolution that gave birth to the United States.³⁷ The enemy

was social and legal hierarchy; the aim was a society of equality. The revolution was an attack on hierarchies of social rank and the special privileges they might obtain.

All social hierarchies require information before they can make discriminations of rank. Having enough information about people required, historically, fairly stable social orders. Making fine class distinctions—knowing, for instance, whether a well-dressed young man was the gentleman he claimed to be or only a dressed-up tradesman—required a knowledge of local fashions, accents, customs, and manners. Only where there was relatively little mobility could these systems of hierarchy be imposed.

As mobility increased, then, these hierarchical systems were challenged. Beyond the extremes of the very rich and very poor, the ability to make subtle distinctions of rank disappeared as the mobility and fluidity of society made them too difficult to track.

Profiling changes all this. An efficient and effective system for monitoring makes it possible once again to make these subtle distinctions of rank. Collecting data cheaply and efficiently will take us back to the past. Think about frequent flyer miles. Everyone sees the obvious feature of frequent flyer miles—the free trips for people who fly frequently. This rebate program is quite harmless on its own. The more interesting part is the power it gives to airlines to discriminate in their services.

When a frequent flyer makes a reservation, the reservation carries with it a customer profile. This profile might include information about which seat she prefers or whether she likes vegetarian food. It also tells the reservation clerk how often this person flies. Some airlines would then discriminate on the basis of this information. The most obvious way is through seat location—frequent flyers get better seats. But such information might also affect how food is allocated on the flight—the frequent flyers with the most miles get first choice; those with the fewest may get no choice.

In the scheme of social justice, of course, this is small potatoes. But my point is more general. Frequent flyer systems permit the re-creation of systems of status. They supply information about individuals that organizations might value, and use, in dispensing services.³⁸ They make discrimination possible because they restore information that mobility destroyed. They are ways of defeating one benefit of anonymity—the benefit of equality.

Economists will argue that in many contexts this ability to discriminate—in effect, to offer goods at different prices to different people—is overall a benefit.³⁹ On average, people are better off if price discrimination occurs than if it does not. So we are better off, these economists might say, if we facilitate such discrimination when we can.

But these values are just one side of the equation. Weighed against them are the values of equality. For us they may seem remote, but we should not assume that because they are remote now they were always remote.

Take tipping: as benign (if annoying) as you might consider the practice of tipping, there was a time at the turn of the century when the very idea was an insult. It offended a free citizen's dignity. As Viviana Zelizer describes it:

In the early 1900s, as tipping became increasingly popular, it provoked great moral and social controversy. In fact, there were nationwide efforts, some successful, by state legislatures to abolish tipping by turning it into a punishable misdemeanor. In countless newspaper editorials and magazine articles, in etiquette books, and even in court, tips were closely scrutinized with a mix of curiosity, amusement, and ambivalence—and often open hostility. When in 1907, the government officially sanctioned tipping by allowing commissioned officers and enlisted men of the United States Navy to include tips as an item in their travel expense vouchers, the decision was denounced as an illegitimate endorsement of graft. Periodically, there were calls to organize anti-tipping leagues.⁴⁰

There is a conception of equality animating the history that Zelizer recounts that would be corrupted by the efficiency that profiling embraces. In both cases, there is a value that is weighed against efficiency. Although I believe this value is relatively weak in American life, who am I to say? The important point is not about what is strong or weak, but about the tension or conflict that lay dormant until revealed by the emerging technology of profiling.

The pattern should be familiar by now, for the change is the change we have seen elsewhere. Once again, the code changes, throwing into relief a conflict of values. Whereas before there was relative equality because the information that enabled discrimination was too costly to acquire, now it pays to discriminate. The difference—what makes it pay—is the emergence of a code. The code changes, the behavior changes, and a value latent in the prior regime is displaced.

We could react by hobbling the code, thus preserving this world. We could create constitutional or statutory restrictions that prevent a move to this world. Or we could find ways to reconcile this emerging world with the values we think are fundamental.

S O L U T I O N S

I've identified two distinct threats to the values of privacy that we might imagine cyberspace presenting. No doubt there are others. And no doubt it is an open question how seriously we will take these threats. But I want to end by considering a few responses. How might we, if convinced of the danger or committed to privacy values, act to restore in the individual a kind of control over these personal data that are collected and searchable by the architectures of cyberspace?

The problems are of two sorts. The first is the question of "efficient invasion": technologies now enable searching with none of the burdens that searches ordinarily entailed. Second is the question of monitoring, and the control over data that monitoring produces. These two problems invite different solutions. I touch on the first, and then focus on the second.