

## **Public Opinion Surveys and the Formation of Privacy Policy**

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*The laws that condition the boundaries that separate the public from the private spheres shape our expectations of privacy. Public opinion helps to shape the development and implementation of those laws. Commercial firms in the information-intensive industries have been the primary sponsors of public opinion surveys introduced into testimony as assessments of the public's will. Representatives of business and consumer organizations have relied upon the same industry-sponsored surveys to frame their arguments in support of or in opposition to specific privacy policies. In the past 25 years, references to public opinion have been used to frame the public as concerned, differentiated and, most recently, as willing to negotiate their privacy demands.*

Although the events of September 11, 2001, have brought about a dramatic shift in public sentiment regarding the relative importance of personal privacy as it relates to concerns about security (Harris Poll, 2002), there is little doubt that privacy remains an issue of primary importance to the American public (Wessel, 2002). The extent to which the public will be able to enjoy the privacy rights that they have come to expect will be determined in part by the new rules that will be put in place at the national and state levels of government. The reasonableness of a citizen's expectation of privacy will be assessed against the restrictions established by the USA PATRIOT Act (2001) as well as by a wide assortment of bills that are introduced during coming sessions of Congress (Electronic Privacy Information

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Center, 2002). Although many aspects of personal privacy have been, or will be, affected by legislative action, this article is concerned primarily with expectations regarding the privacy of personal information.

Informational privacy policy is concerned with rules governing the access, collection, use and, most importantly, the exchange of information about persons. Although there is an active movement to compress a broad range of privacy concerns under a narrow property regime, the future of this legislative approach is uncertain (Cohen, 2000). It is uncertain, in part, because of the ways in which individuals have historically resisted the exercise of power over information that has not been freely granted (Bartlett, 1989; Davies, 1999).

It is also uncertain because it is impossible to predict the outcomes of debates about rules and regulations that are taking place within a variety of organizations and institutions of business and government (Etzioni, 1999). Information about the attitudes and opinions of "ordinary Americans" is a critical component of these debates, and assessments of the nature and intensity of public opinion have been especially relevant in the formation of policies that govern the commercial use of personal information (Regan, 1995).

Estimates of the character of public opinion are increasingly derived from professionally administered surveys or polls (Herbst, 1993). Opinion polls influence policy formation by what they measure and report, as well as by what they ignore (Ginsberg, 1986). The fact that a particular question is asked may add legitimacy to a policy option that might otherwise not be considered. Questions asked in opinion surveys may, for example, help to establish the legitimacy of a policy framework or orientation, such as one that emphasizes the importance of "balancing" individual privacy against collective or institutional interests in using personal information (Etzioni, 1999). If a policy actor is successful in placing a balancing task at the center of the policy agenda through references to public opinion that underscore the importance of balances or "tradeoffs," they may at the same time succeed in banishing equally important questions, such as those dealing with corporate responsibility, to the fringes of the policy debate (Raab, 1999). It is through such strategies and techniques that a broad range of relevant policy concerns may be marginalized (Regan, 1995).

Scholars of public opinion often remind us that the assessment of opinion is a formidable task. Opinions may appear to differ, or to have changed, because of subtle differences in the ways in which problems and options are framed (Page & Shapiro, 1992; Zaller, 1992). Concerns related to framing are especially problematic in the realm of privacy policy because of the variety of ways in which privacy interests have been defined (Davies, 1997; Nissenbaum, 1998). In addition to these and other problems of measurement, policy scholars recognize also that there are strategic interests to be served by representing public opinion in particular ways at critical moments in the policy process. Gandy (1982) characterizes the supply of policy-related information by interested parties as an information subsidy.

Like other economic subsidies, an information subsidy reduces the cost of acquiring or consuming policy-relevant information (Gandy, 1982). By reducing the cost of acquisition, the subsidy giver expects to increase the probability that the target of the subsidy will consume more of the preferred information. Thus, it is likely that in the context of a legislative debate about privacy policy, a sponsor or supporter of a bill that would establish a minimal requirement of “notice and choice” would provide evidence of the public’s willingness to accept such protections. That evidence might be in the form of responses to questions asked in a recent national survey. The survey data would be considered to be an “indirect information subsidy” because its “source” is assumed to be uninterested and authoritative (Gandy, 1982, pp. 80–86). As with the other sorts of strategic information that policy actors seek to introduce into a policy debate, it is especially important for estimates of public opinion to be perceived by targets of information subsidies as being accurate and unbiased, or objective (Kollman, 1998).

Although policy actors can deliver these information subsidies through a variety of direct and indirect means, including conferences, newspaper editorials, and special events (Gandy, 1982), the presentation of evidence from opinion surveys within congressional hearings actually provides an opportunity for policy-makers to challenge, or raise questions “on the record” about, the data and their interpretation. Testimony within congressional hearings also provides an opportunity for policy advocates to make reference to, and offer challenges or support for, arguments made by others who have given testimony. Because of the importance of public testimony to the development of privacy policy at the federal level (Kollman, 1998), this article will focus primarily on the use of public opinion data in congressional hearings on privacy-related legislation.

### **Background: Public Opinion and Public Policy**

It is a basic tenet of democratic theory that government is responsive to the public will, and that measured public opinion is increasingly used as an index of the public’s interest in and support for particular policy options (Burstein, 1998; Herbst, 1993; Monroe, 1998). A realistic, rather than cynical, perspective on the amount of attention that politicians pay to public opinion assumes that legislators take due note of the ways in which the policies they support may affect the willingness of constituents to vote for them in the next election (Jacobs, Lawrence, Shapiro, & Smith, 1998). The relationship between constituent opinion and the policies supported by legislators is likely to be closer at the state than at the federal level, but the underlying concern about being, or appearing to be, responsive to public sentiment is still felt at the national level (Sharp, 1999).

In some cases, legislators appear to be responding to their best sense of the public mood, or the “broad climate of opinion” rather than detailed estimates of opposition or support for particular policy options (Sharp, 1999, p. 237; Page,

1999). Indeed, there are examples within the literature that suggest that members of Congress will respond to indirect assessments of the public will as reported in the press, even though the mood suggested by the media was at odds with formally measured opinion (Cook, 1998).

Public opinion surveys, or polls as they are often called, are used within the policy process in other ways. Frequently, legislators and their staffs make use of polls for guidance in their own efforts to bring opinion into line with the policies they intend to support. Critical observers suggest that policymakers have “primarily used public opinion information to craft their arguments, to justify their positions, and otherwise to shape public thinking” (Jacobs et al., 1998, pp. 27–28).

Baumgartner and Jones (1993) credit Kingdon (1984) with the development of an approach to the analysis of public policy agendas that emphasizes the role of policy entrepreneurs. Policy entrepreneurs are identified as those policy actors who are most often responsible for the infusion of new ideas into the policy environment. The power is theirs to place issues on the public agenda (Baumgartner & Leech, 1998). Policy entrepreneurs are especially skilled at recognizing and taking advantage of those critical moments in the cycles of policy formation in which strategic influence is most likely to be achieved. Public opinion polls would appear to be an important resource that these entrepreneurs use in their attempts to shape public policy (Sharp, 1999). Logically, policy entrepreneurs will take every opportunity to introduce survey data that supports their position, and ignore that which supports the views of the opposition.

### **Policy Entrepreneurs, Issue Advocates, and the Press**

Much of what policy makers know and understand about public orientations toward privacy will have been shaped to a large extent by what the media report about that opinion. This outcome reflects the increasing role that the media have come to play in making the results of these polls public. It also reflects a more active role being played by media organizations as the source, or sponsor, of those polls (Cook, 1998; Ladd & Benson, 1992).

What journalists report about a policy debate is often shaped by their own policy preferences, as well as by the preferences of the sources of the information upon which they depend (Gandy, 1982, 1992; Leff, Protess, & Brooks, 1986). Policy entrepreneurs and others who advocate a particular policy response to a social problem or opportunity regularly attempt to use the press to mobilize and shape public opinion. Businesses that depend upon unfettered access to personal and transaction-generated information will be especially concerned to represent the public as unconcerned about, or supportive of, businesses having that access (Gandy, 1993). They will use estimates of public opinion to help convince policy makers of the wisdom of supporting the policy options that they prefer (Herbst, 1993). As a result, skillful public relations often explains the disparity between

what the public actually believes and the character of their beliefs as they are represented in the press (King & Schudson, 1995).

Important policy change frequently occurs during periods in which the attention of the public has been drawn to an issue in response to a critical event that generates expanded media coverage that activates and amplifies public concern (Kasperson & Kasperson, 1996; Sharp, 1999). The Video Privacy Protection Act of 1988 was introduced and passed in record time in part because of the publicity generated by the publication of the videotape rentals of Supreme Court nominee Robert Bork (Regan, 1995). The even quicker passage of the USA PATRIOT Act of 2001, which threatened rather than protected personal privacy, was undoubtedly facilitated by media attention to the threat of terrorism (King, 2001).

In each of these cases, there is evidence to suggest that policy advocates helped to shape the ways in which the interests of the public were characterized in the press, and in the legislative debates. In the case of the Video Privacy Protection Act, the Direct Marketing Association (DMA) was actively involved in an attempt to legitimize the controlled use of consumer information for marketing purposes. They were ultimately successful in transforming key features of the legislation (Gandy, 1993).

In the case of the USA PATRIOT Act, high technology firms rushed to promote the use of their privacy-invasive systems that they framed as a solution to the public's concerns about safety (Streitfeld & Piller, 2002). On September 24, 2001, The Visionics Corporation, one of the emerging leaders in the development of facial recognition technology, issued a widely distributed special report with an extremely lofty title: "Protecting Civilization From the Faces of Terror" (Visionics, 2001). After describing the way their system might be implemented in order to prevent terrorists from engaging in international travel, the Visionics report claimed that "there is no doubt that an identification based security infrastructure using biometrics raises privacy concerns." Those concerns were discounted later in the report's conclusion: "we should nevertheless emphasize that the threat to privacy is theoretical while that of terrorism is unfortunately very real" (Visionics, 2001, pp. 6–8).

On the same day, the legislative counsel of the American Civil Liberties Union (ACLU) offered testimony before the House Judiciary Committee on what was at that time The Anti-Terrorism Act of 2001 (King, 2001). Much of the ACLU testimony was concerned with sections of the proposed bill that would weaken a citizen's right to privacy. While urging "calm deliberation," the ACLU noted, "Congress is under great pressure to adopt this legislation lest it be perceived as not doing all that it can to help the war against terrorism" (King, 2001, p. 5). Perhaps because the mood of the majority was actually hostile and seeking retribution if not revenge, the ACLU's counsel sought to represent the voice of reason within the public by means of a sample of one: "I was talking to someone on the phone the other day about the fear in our country in the aftermath of the attack. He said, 'I

do not fear what will happen to us as much as I fear what we will become” (King, 2001, p. 5). Following on from that reflection, the ACLU appealed to Congress to rely upon the democratic public sphere and approach this problem in a serious and deliberative way that would involve “a public hearing process and full public discussion and debate” (King, 2001, p. 5).

Policy scholars have noted that media attention sometimes leads, and sometimes follows, an increase in attention being paid to particular issues within the Congress (Baumgartner & Jones). Clearly, the relationship is far too complex to suggest that the causal direction is always from Congress to the press, or from the press to Congress, or from advocates or the public at large. The literature does suggest, however, that policy advocates are likely to be involved in shaping each of these causal paths.

### **The Corporate Interest in Public Opinion Regarding Privacy**

Other than elected officials and bureaucrats, representatives of private corporations are among the most important sources of influence within the policy environment (Baumgartner & Jones, 1993). Etzioni (1988) suggests that corporations and other policy actors develop and use “interventionist power” in an effort to influence government decisions. Indeed, he suggests that for the private firm, the returns on investments in influencing government are often higher than returns on investments in product development. Information is a critical resource in the production of influence over government decisions.

There are a number of industries whose survival depends upon the capture, storage, transmission, and high-speed processing of information about individuals. These industries are at the core of what we define as an information economy (Preston, 2001). In the past 25 years, leaders in these industries (employment, credit, insurance, direct marketing, and telecommunications) have been especially concerned about the sorts of economic and competitive costs that federal privacy regulations seemed likely to impose on their enterprises (Smith, 1994). Historically, members of information intensive industries have tended to be reactive, rather than pro-active, with regard to privacy policy. As Smith (1994) suggests, unless there is some competitive advantage to be gained from stepping out ahead of the pack, businesses tend to just drift along until some crisis demands a response. Nevertheless, like their counterparts in other sectors of the economy, organizations in the information intensive industries have invested in the management of privacy policy.

In this area, as in others, specialists within the corporation have been assigned the responsibility for “issues management” (Gaunt & Ollenburger, 1995; Renfro, 1993). For many corporations, issues management usually means “being able to anticipate issues early enough in the development process and respond quickly and effectively to forestall their movement up the public agenda and

graduation into major public issues” (Renfro, 1993, p. 37). Demonstrating the power of corporate influence is quite difficult, however, because in many cases, corporations will contract with independent agencies and consultants to deliver strategic information subsidies (Gandy, 1982). Sometimes these relationships are kept private and confidential, and in other cases the relationship is publicized because of the public relations benefits it provides. It seems likely that the credibility of Alan Westin as a noted privacy scholar justified the prominent linkage of his name with a series of corporate sponsored privacy surveys. Through their partnership with Westin, Equifax, one of the major players in the credit reporting industry, became the most highly visible source of privacy-related opinion data in the 1990s.

In the early 1980s, about the same time that public attention was being focused on “Big Brother” and the threat to civil liberties represented by government databases, Equifax had begun to expand the scope of its privacy-intensive information business. Equifax’s product managers actively sought additional markets for its information about consumers (Gandy, 1993). In 1988, there was a dramatic expansion in the scope of Equifax’s involvement in the privacy-intensive sector of the information services market. Equifax created a new division, the Marketing Services Sector, and acquired 14 companies that would further develop its capacity to provide sophisticated profiling services (Equifax, 1989). Also, 1988 was the year in which Equifax hired Westin as a consultant on privacy matters (Smith, 2000).

Although the corporation modified some of its information practices and products in response to Westin’s advice, the company also enjoyed the less tangible benefits of “having a noted ‘privacy expert’ vouch for its good faith” (Smith, 2000, p. 322). Smith notes that Westin was frequently quoted in the newspapers as indicating that the credit-reporting industry was making improvements in its handling of personal information, but that these articles rarely identified Westin as being “on the payroll of one of the bureaus” (p. 322).

### **Congressional Hearings and the Policy Process**

As noted earlier, information about the nature of public opinion comes to the attention of legislators through a number of different routes. A large number of special commissions, task forces and advisory groups may be formed at the request of a legislative committee or federal agency head. Special research entities, such as the Congressional Research Service and the now defunct Office of Technology Assessment, prepared special reports on legislative concerns such as information privacy that included assessments of public opinion (Office of Technology Assessment, 1986). Although it is most unlikely that subcommittee hearings are the source of many conversion experiences, these special events are recognized as also being important to the process of policy formation.

As Hilgartner and Bosk (1988, p. 59) suggest, "Congressional committees can only schedule a limited number of hours of hearings per session of Congress, and of the topics discussed in hearings, only a small fraction will be brought to the House or Senate floor." Because of this, the selection of topics and witnesses is of considerable importance to all concerned. Committee chairs are more likely to invite their allies, rather than their opponents, to offer testimony in the hearings they schedule. Committee and subcommittee chairs then are able to use the testimony provided by their allies in their own statements in support of or in opposition to legislation being discussed in the House or the Senate (Jacobs et al., 1998).

Although it is often the case that "conclusions have been arrived at in advance and that the hearings serve only to create a record to convince others to support the committee's action," hearings still represent a critical stage in the policy process (Wildavsky, 1974, p. 84). Hearings are understood, also, as an exercise of, and a contribution to, the power of congressional leaders. As Baumgartner and Jones (1993, p. 200) suggest, "Committee and subcommittee leaders are active in seeking out new areas for jurisdictional expansion, and they take advantage of new understandings of public issues in order to expand their own powers." Finally, policy entrepreneurs enter into partnerships with committee and subcommittee heads in an effort to establish and defend policy "turf" because of the importance that the origins of policy initiatives assume in the life of public issues.

Subcommittee hearings provide an opportunity for the sponsors of bills to provide evidence in support of their claims of urgent priority for the interventions they have designed. In 1984, Representative Robert Kastenmeir began hearings on the "National Security State" with references to a then recent Harris poll that indicated a new level of concern about privacy had been reached. People were apparently concerned because "four out of five of them believe that it would be easy for someone to assemble a master file on their lives that would violate their privacy" (1984: *Civil Liberties*, 1984, p. 259). Kastenmeir suggested that his hearing would "consider whether that threat is real" (1984: *Civil Liberties*, 1984, p. 260). Even though the invited witnesses were supposed to focus on the nature of government uses of computers for database matching (i.e., the comparison of independent computer files for the purpose of detecting fraud), the justification for scheduling the hearing was an expression of growing public concern about privacy.

Even though Kastenmeir framed his hearings in the mold of an investigation, not all congressional leaders followed that approach. Representative Edward Markey made use of a then current Harris survey to emphasize not what the public feared, but what they felt they had lost. Because more than 70% of American consumers felt that they had "lost control over how personal information is circulated and used by companies," Markey suggested that it was time to "restore the important balance in personal privacy that has been skewed by some offerings of Caller



ID and some uses of Automatic Number Identification” (*Telemarketing/Privacy Issues*, 1991, p. 1).

In 1991, Senator Ernest Hollings used personal examples of individual experiences, letters from constituents, and surveys financed by telephone companies to make the point that most American consumers disliked receiving calls from telemarketers. Armed with what appeared to be public support for legislative action, Hollings used the hearings he scheduled to frame the policy debate: “There are those who are trying to talk about the freedom of speech. This particular measure of mine withstands first amendment [*sic*] analysis in that the first amendment rights can be restricted on the basis of time, place and manner. . . . So, we have got it constitutionally, we have got the authority, we have got the responsibility, and I hope the committee can move on this one” (*Automated Telephone*, 1991, p. 4).

Although committee chairs can shape the policy agenda through the scheduling of witnesses who will offer testimony in support of or in opposition to favored policy initiatives, they have only limited influence over the quality of the evidence that can be brought to bear.

### **The Use of Public Opinion Surveys in Hearings on Privacy Legislation**

There are remarkably few studies of the ways in which public opinion surveys have been used strategically by interest groups in an attempt to shape the outcome of a legislative debate (Cook, Barabas, & Page, 2002; Kollman, 1998). None have focused specifically on privacy policy. Traugott (2000) examined the references to public opinion surveys in federal government deliberations during four months in 1997. He was concerned primarily with the quality of the data that were being introduced into legislative debates, and he sought to characterize the actors most likely to make such references. Although Traugott’s analysis included statements about public opinion made by officials on the floor of the House or Senate, he observed that more than half of the references to public opinion polls came from congressional testimony. Traugott’s observation reinforces the importance of such testimony as an entry point into the policy process. It will be important at some stage to trace the path that survey data make from sponsors, through congressional testimony, to references made on the floor of the House and Senate as the merits of a bill are explored in open debate. This project begins such an analysis at the level of congressional testimony.

I examined hearings for each of the key privacy bills identified in Regan’s (1995) analytical history of privacy legislation for references to public opinion surveys. In addition, I examined published reports from 70 hearings that were included in the legislative history of all privacy-related bills that were passed between 1974 and 1999. Only testimony, or letters submitted for the record, which made explicit reference to a survey or poll were selected in order to limit the analysis to formal and broadly available assessments of public opinion. Of course,

as Cook, Barabas, and Page (2002) have observed, very few of the references by policy makers to public opinion actually cite specific surveys or facts. Formal statements and the oral testimony of a single witness in a hearing were treated as a single contribution. As a result of this quite restrictive screen, only 64 contributions were retained for analysis.

Explicit references to public opinion surveys or polls in privacy-related hearings were not evenly distributed across the period examined for this study. Many years had no references at all; several had four or fewer. The years in which references to public opinion polls were most frequent were 1990 ( $n = 6$ ), 1991 ( $n = 18$ ), and 1999 ( $n = 6$ ). The distribution of references reflects the substantial reliance of those giving testimony on public opinion polls financed by corporate sponsors.

Over the years, the surveys produced by Louis Harris & Associates for sponsors within the privacy sensitive industries were cited most frequently (44% of the contributions mentioned Harris polls). The surveys administered by Harris for Equifax were identified by name most often (23% of contributions examined). There were 12 references to Westin's role either as an advisor to Equifax or Harris, as an expert on privacy, or as the author of an analysis of opinion data (18.8% of cases). There was the same number of contributions ( $n = 21$ ) from representatives of business as there was from representatives of consumer groups. However, witnesses from consumer organizations ( $n = 10$ ) were more likely than business representatives ( $n = 7$ ) to make reference to or cite data from Harris surveys in their testimony. However, five business representatives mentioned Westin specifically, but only one consumer representative mentioned his name in their testimony. I interpret this as an indication of a corporate attempt to capture the benefits of an association with an authoritative source that agreed with their policy preferences.

There were occasional references made to polls administered by news organizations, such as Time/CNN. There were a small number of references to polls administered or commissioned by the organization making testimony, such as the American Association for Retired Persons (AARP). Surveys of special populations, such as persons who had recently completed a polygraph examination, were also relatively rare (5.3%). Only two academic researchers presented the results of their own independent analyses of privacy-related public opinion.

### **Strategic Representations of Public Opinion**

Witnesses include references to specific assessments of public opinion because of the support those assessments lend to the arguments they hope to make in support of, or in opposition to, particular aspects of the privacy policies under discussion. Space limitations make it impossible to do more than provide a few examples of these representations. Three primary themes emerged in the testimony presented between 1970 and 1999: (a) the public is concerned, (b) there is more

than one public, and (c) the majority of the public is reasonable. In addition to these themes, a small number of examples focused on specific policy options.

Explicit reference to some numerical proportion of the public, or of survey respondents that held some view, or of people who reported having some privacy-related experience were made by 39 contributors (60.1%). It seemed to be important to those giving testimony to be able to provide some estimation of the weight of those proportions as indications of dominant perspectives. Indeed, 16 (25%) of these contributions made reference to what they called “majority” views. Business representatives were more likely ( $n = 6$ ) to make such references than were representatives of consumer groups ( $n = 3$ ).

A question included in the 1978 survey for Sentry Insurance, and in the 1990 survey for Equifax, explored the extent to which people thought privacy was a fundamental right, one that would be added to “life, liberty, and the pursuit of happiness” if the Declaration of Independence were to be rewritten. Perhaps because of the substantial majorities (76% in 1978, and 79% in 1990) who agreed with this statement when asked (Equifax, Inc., 1990; Sentry Insurance, 1979), none of the five references made to this question was by a business representative.

### *The Public Is Concerned*

Politicians respond to expressions of anxiety and fear among their constituents. That fear need not have an objective basis in fact, and those most concerned about a potential threat need not be those at the greatest risk (Bennett & Raab, 1998). The periodic emergence of threats to privacy on the policy agenda suggests that a substantial number of policy actors believe that representations of public anxiety have some strategic potential. As a result, they periodically seek novel ways of presenting these fundamental concerns (Hilgartner & Bosk, 1988).

Given the strategic nature of this testimony it is not surprising that the presentation of items from surveys was highly selective. Most witnesses limited their references to one or two questions from the polls they cited, and the items used most frequently were those that indicated the level of public concern or anxiety. Of the 64 witnesses whose testimony was reviewed for this study, nearly half (47%) made reference to the public’s concern about privacy.

John Baker, Senior Vice President of Equifax, indicated that the general public was concerned about threats to privacy. He was unequivocal: “[T]he concerns about privacy are real. They are widespread” (*Amendments*, 1990, p. 52). Hubert Humphrey, III, the Attorney General of Minnesota, wrote to Esteban Torres, Chairman of the Subcommittee on Consumer Affairs, to offer his thoughts on proposed amendments to the Fair Credit Reporting Act. Humphrey cited the Equifax report (Equifax, 1990) in expressing his concern about the “disturbing rise in the American public’s concern that personal privacy is threatened” (*Fair Credit Reporting Act*, 1991b, p. 662).

Very little was made of the fact that, despite the apparent increase in the share of the public that is concerned about threats to privacy, there was no associated rise in reports of personal experience with such threats. The fact that the public knows so little about the ways in which personal information is used, and has little way of knowing that they have been victimized by its use, is rarely presented for consideration by policy makers (Sovern, 1999). In part, this may reflect the fact that questions that would emphasize this aspect of public concern have rarely been included in opinion surveys (Gandy, 1993).

### *There Is More Than One "Public"*

In 1991, Westin introduced a three-group classification of privacy orientations (Equifax, 1991). He created an index in which respondents who had agreed with three or four privacy concerns were labeled "high"; "moderates" had agreed with two concerns; those who agreed with one or no privacy concerns were assigned to the "low" concern group. Westin named these groups, respectively, "the privacy fundamentalists," "the pragmatic majority," and "the unconcerned." The pragmatic majority (57% of the American public in 1991) was then framed as the "reasonable consumer" whose interests ought not be subordinated to the demands of the more radical fundamentalists (25% of the American public in 1991). Although Westin provided this and other more finely textured analyses of public opinion in his testimony, and in the reports published by the corporate sponsors of the surveys, few others who gave testimony referred explicitly to a tripartite, or any other, segmentation of the public. Depending upon the perspective they wished to convey, witnesses tended to talk about some sizeable majority as though it was a stable, coherent segment. Consumer advocates tended to talk about a concerned public. Business representatives talked about a reasonable public. These "publics" were largely the product of their activation within the question frame, in that the ways in which the questions were posed helped to determine the character of the average response (Zaller, 1992).

### *The Public Is Reasonable*

Mary Culnan, a business school professor, relied upon her own research and several Harris surveys to make it clear that the public she envisioned would not object to businesses gathering and sharing their personal information as long as the information is actually "relevant" or for "compatible" purposes (*Financial Privacy*, 1999a, p. 148). Survey data included in her testimony reported the percentage of the public that felt that it was generally all right for corporations to use public record information if its use was appropriate. Culnan noted that 77% of respondents felt that it would be acceptable for automobile insurance companies to check accident and driving records of applicants, but that only 32% felt that it would be all

right to use public record information for marketing purposes (*Financial Privacy*, 1999a). The general point of her testimony was that the reasonable consumer demands no more than what most people would recognize as fair information practices.

### *Specific Policy Options*

Several Harris surveys provided data that witnesses interpreted as being in support of the right of consumers to “opt-out” of relationships in which businesses would use personal information for marketing. Opting-out would require an affirmative act, such as checking a box on a form, which would supposedly limit secondary use of transaction-generated information. This was the version of “consumer choice” that the industry seemed to prefer. “Opt-in,” the policy supported by consumer activists, would require corporations to obtain explicit permission from individuals before personally identifiable information could be shared with third parties. Equifax surveys were used most often to demonstrate support for the corporate version of consumer choice.

In her testimony, Culnan (*Fair Credit*, 1991a) referred to the 1990 Equifax report in suggesting that the public “did not object to the use of personal data for targeted marketing” if there were limits on the sharing of financial information, and if they had the opportunity to “opt-out” of marketing lists entirely (p. 223). It is important to note, however, that none of the surveys cited in congressional testimony inquired specifically about whether the public preferred that “opt-in” would be the default. Moreover, there was no mention of any surveys in which consumers were asked to express their preferences for one option over the other.

Despite the absence of *specific* survey items, Marc Rotenberg (*Financial Privacy*, 1999b), of the Electronic Privacy Information Center (EPIC), testified that there “is plenty of data and plenty of polling information that shows that the American public, *if asked* [emphasis added], would much prefer an opt-in regime to an opt-out regime, and these questions have been asked by Time, CNN, by Lou Harris and other organizations” (p. 51).

The fact that none of the privacy surveys funded by Equifax explicitly asked consumers whether they preferred opt-in over opt-out as the policy default underscores the importance of being able to determine just which way policy-related questions are ultimately framed. The importance of question framing and interpretation was exemplified especially well in 1991. When the 1990 Equifax survey was first administered, respondents had been asked whether the use of consumer information by direct marketers was acceptable. Seventy-six percent of the public said that it was not. However, a follow-up survey was completed before the report was published. This reframed question made it possible for business representatives to report that when presented with a more “fair and balanced” framing

of the question, 67% of the public found direct marketing practices “acceptable” (Equifax, 1990, pp. 70–73).

In an attempt to clarify the apparent confusion that resulted from the publication of these conflicting assessments of the public’s views, Baker, Equifax’s representative, noted that “it is true . . . that there was a negative response in our survey last year to a question about marketing uses of information. When the marketing uses were not defined in the question and when the question ended with the statement, ‘and they do this without your permission,’ the statistic is correct of people saying they disapprove of the process. But two-thirds of the public approved the use of information to help companies advertise new services and market credit products when the process is explained to them” (*Amendments*, 1990, p. 106).

What Baker was suggesting, and what corporate strategy sought to establish as fact, was that the great majority of the public was reasonable, and that all they required was the “right” information in order to choose. As a result, there would be no need for government to impose any additional requirements or constraints beyond the opportunity to “opt-out” that the industry would reluctantly provide.

### Summary and Conclusions

Despite uncertainty about the power of public opinion, policy advocates continue to introduce strategic representations of public opinion into the policy process. This analysis suggests that private corporations are the primary sponsors of this public opinion data. The use of reputable survey firms and respected academic advisors seems to have blunted the charge of self-serving bias in the framing of questions. At the same time, it seems clear that these surveys and their authors have played an instrumental role in “steering” the policy debate toward a market-oriented standard of pragmatic self-regulation (Raab, 1999).

It seems likely, also, that, in the case of public policies that have the effect of defining consumer choice, public opinion surveys have been used to establish the legitimacy of a common industry practice after the fact. For example, the public was not invited to speak on the privacy policy options that they preferred until long after the policy actors involved in the management of the Video Privacy Protection Act of 1988 had succeeded in establishing “opt-out” as the policy default in this class of transactions (Gandy, 1993).

Whether or not public opinion polls become a more *visible* resource for the management of personal information, as would be reflected in their citation in congressional floor debates, there is little doubt that the use of public opinion polls by policy entrepreneurs and activists will continue. The fact that policy scholars know so little about the ways in which interest groups help to shape government policy in general (Baumgartner & Leech, 1998) means that an even

greater effort will have to be made to understand the ways in which these groups have been able to use a specific resource like public opinion data in the formation of privacy policy (Traugott, 2000). An important part of that effort should be directed toward understanding the process through which particular questions and policy perspectives come to be included in or excluded from surveys.

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