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## Policy Research in an Evidence-Averse Environment

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It has been a characteristic of the modern state ever since the French Revolution to favor evidence-based policymaking. Indeed, the word "statistics" refers to the interplay between the development of research methods and the uses of those methods by governments. But the nature of the state, and of knowledge production, and of state-society relations, have all continued to evolve. Unfortunately — but hopefully not necessarily — the current expression of the informational state (Braman, 2006) in the United States is evidence-averse policymaking. Recent inversions of the legal system have brought about a loss of innocence regarding the relationship between policymaking and the facts and about the relative efficacy of governmental processes as described by their formal outlines. It is now clear that those who hope that the results of their research will be used to influence the conditions of our lives must deal not only with government (the formal laws, decision-making processes, organizations, and programs of geopolitically recognized governments), but also with governance (the formal and informal rules, practices, decision-making procedures, and institutions of private and public actors that have structural effects) and governmentality (the cultural habits and predispositions out of which modes of governance and government arise, and by which they are sustained).

By the early 21st century, more than 250 scholarly publications had documented difficulties faced by communication researchers in their efforts to engage with the formal processes of governmental decision making. A 2003 collection presented 25 of the most important discussions of the relationship between communication researchers and policymaking in the U.S. context, along with an analysis of the entire then-existing literature.<sup>1</sup> Generalizable features of research policy relations became clear: Research results do not, in themselves, determine policy choices, for value hierarchies, politics, and pragmatic considerations must also necessarily enter into decision making. Research processes can be manipulated for political purposes such as slowing down or delaying decision making altogether, legitimating a decision already made, or providing a surrogate for public opinion or consent on a contested issue. Few politicians have any training in data analysis and often misunderstand, either innocently or deliberately, the results of research. As a genre, scholarship is opaque and inaccessible to policy makers. The institutional rhythm of academic life and research cycles do not line up with the timing of policy cycles. Scholarly reward systems give little due to involvement in policymaking, and so on.

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<sup>1</sup> Sandra Braman (Ed.), *Communication Researchers and Policy-Making* (Cambridge, MA: MIT Press)

A few lessons can be learned from the literature. The most important contributions of researchers may be ideas themselves. The thickness, richness, and stickiness of policy issues demand theoretical and conceptual innovations to achieve valid, reliable, and useful data. Researchers are often most successful when they are members of coalitions and policy networks rather than positioning themselves as "others" to decision making. For accessibility, research results need to be translated into briefing documents, press kits, and other narrative forms for the lay public in addition to receiving scholarly presentation. The conditions under which research results obtain must also be made clear when findings are communicated.

In this area, however, knowledge is definitely in the details. Summary conclusions of the findings of *Communication Researchers and Policy-Making* only touch the surface of what can be learned by reading the case studies, application of diverse theoretical perspectives to the policy-research nexus, examination of how efforts to inform policy with research have varied across issue area, in-depth examinations of existing policy-oriented research in numerous specific issue areas, and the approximately 30 issue-oriented sets of bibliographic references in that work. What can usefully be done here, then, is to reflect upon what was not addressed in a volume focused on formal policymaking processes of geopolitically recognized states. These developments point to additional and sometimes quite other responses necessary for those who strive to inform communication policymaking with the results of research. Following a review of some of the policy trends that have created an evidence-averse environment, this essay concludes with a look at the implications of such trends for researchers, activists, and advocates concerned about the public interest in the shaping and implementation of communication policy.

### ***Policy Trends***

Changes in the nature of the state and society-state relations affect the roles of research in political processes. The use of policymaking processes that are not open to either research or public inputs has grown. Researchers who produce results that support policies contrary to the George W. Bush Administration line have been muffled. The relative importance of various steps in complex policymaking processes has shifted. Globalization of the law moves a growing proportion of decision making away from the state-level processes that were established with the participation of identifiable publics in mind. Changes in governance must also be taken into account. Government functions are increasingly privatized. There is systematic openness to industrial concentrations such as those found in the media industries that can in themselves develop regulatory-like functions. Contract law is being used to evade constitutional responsibilities. Policy innovations include the use of technologies not susceptible to policy scrutiny to achieve policy goals.

Some of the results of these developments are counter-intuitive to those concerned about the public interest in communication policy — the greatest successes for civil society in this arena is not in achievement of a space for public interest advocates within Internet Corporation for Assigned Names and Numbers (ICANN) or World Summit on the Information Society (WSIS) processes, but the strengthening of stockholder rights in media corporations.

Often these issues are intertwined — globalization exacerbates privatization, and vice versa. Taken together, these developments mean that governmentality is also of importance.

### ***Research-Insensitive Policymaking Processes***

There are numerous sources of policymaking in the United States that do not require evidence as support for the positions they take, and these have become increasingly important in recent years. Presidential fiat has been used in a particularly aggressive manner by George W. Bush, exercised through techniques that include the use of executive orders (unilateral announcements of policy by the president) (Relyea, 2003; Rosenberg, 2007) and signing statements (statements issued by the president after signing a piece of legislation explaining his or her understanding of the legislation and intentions regarding its implementation) (Magill, 2007). Attorneys general opinions guide interpretation and implementation of the law at both the federal and state levels, but their importance as sources of policy-making has become more evident, and more critically salient to free speech rights and other civil liberties, in the 21st century (see, e.g., Redman, 2007). And since the 1980s, the Office of Management and Budget (OMB) — in essence the government's office manager — has put in a series of rules restricting the ways in which federal agencies can use research as inputs into decision-making (Cooper & West, 1988; Bressman, 2007).<sup>2</sup> Just one recent example of the impact of OMB interventions: No peer reviewers of research used as a decision-making input by a federal agency can have received funding from the federal government (whether that funding was for work pertinent to the issue at hand, and even in situations in which the number of researchers with deep knowledge pertinent to the research being reviewed is quite small). Peer reviewers can, however, include employees of corporations in the regulated industries that would be affected by resulting decisions.

### ***The Silencing of Politically Unwelcome Data***

There is always the potential that politically unwelcome data will draw a strong response; the first books burned in Nazi Germany were those of sociologists reporting on poverty levels the government was trying to hide (Nowotny, 1983). Executive branch efforts to control communications about scientific findings under the George W. Bush Administration, however, have been so pervasive, extreme, and, many believe, damaging to society in the long run, that the National Research Council (2007) issued a report carefully enunciating principles that should guide governmental treatment of research findings, and of scientists. There are those within government who are also concerned about how far these practices have gone (Shea, 2006); a report from the Office of the Inspector General of the Department of the Interior (2007), for example, condemned deliberate governmental manipulation of scientific data in order to evade responsibilities under the Endangered Species Act. There have been restrictions on speech both by government scientists and by those funded by government agencies (Stedeford, 2006-2007), through bureaucratic processes as well as through direct pressure (OMBWatch, 2007).

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<sup>2</sup> The best source for developments in the ways the OMB is affecting government use of research findings is the Web site of OMBWatch, at [www.ombwatch.org](http://www.ombwatch.org)

We are just beginning to see work conducting this type of analysis on research referred to by the Federal Communications Commission. The role of the media in alerting the public and policy makers to this issue, however, vividly demonstrates the reflexive importance of communication policy as that which creates the context within which all other policymaking takes place. It was *The Washington Post* that documented Vice President Cheney's demands that scientists be brought into line with government agriculture policy in work on water shortages (Becker & Gellmann, 2007), and the Associated Press that provided the public with the information that United States Geological Service scientists are now required to have all of their data and their interpretations of data screened by the Interior Department before any form of public presentation, even if doing so results in reports that distort actual scientific findings (Heilprin, 2006).

### ***Globalization of the Law***

Communication researchers have been paying attention to the development of global policymaking (e.g., ICANN) and to communications issues as they are dealt with by international organizations such as the International Telecommunications Union (ITU), the World Trade Organization (WTO), and the World Intellectual Property Organization (WIPO). However, the impact of globalization on law and policy extends further, into forms of policy transfer and coordination referred to as policy convergence (Bennett, 1991; Busch & Jorgens, 2005); harmonization is the outcome of such processes when they result in conformance of the laws of multiple states with each other. These processes affect the jurisprudential foundations of the law — the principles and arguments upon which law-making and -interpretation are based (Twining, 2000) — so significantly that the early 21st century is considered equivalent in historical importance to the period during which the international system of geopolitically recognized states first formed several hundred years ago (Kirby, 2006). Since differences in jurisprudence both manifest and justify differences in the ways that democracy is theorized and implemented (Edelman, 2005), these developments are of enormous importance for the ways in which the public can participate in decision making and in which evidence is used as a policy input.

A matrix of the processes through which policy convergence takes place, however, has numerous cells that are vacant of any research on communication laws and regulations (Braman, in press). There is some pertinent work, including work on the variety of techniques used to align media policies of transition societies with those of other nations (Price, 2002), and on legal harmonization as it appears in the course of health campaigns (Smith et al., 2004; Taylor, 2004), antitrust law involving media and telecommunication oligopolies (Donovan, 2006), and treatment of consumer fraud (Rabkin, 2007). However, the overall paucity of research on the globalizing of media law and policy is problematic from the perspective of the protection of constitutional values.

Globalization of the law also significantly diminishes points of access for the insertion of research into decision-making. The processes that achieve harmonization of the law across states and other types of legal globalization are often political and cultural, rather than procedural in ways that include opportunities for the use of research results and public participation of other kinds. Even in international organizations that feature decision making by consensus, those with concerns that differ from the interests of economic elites often fail to be heard because representatives cannot afford to be a part of the

processes that shape the epistemic communities behind successful policymaking (Cogburn, 2004). Similarly, the growth in domestic civil society engagement with communication policy issues (Mueller, Page & Kuerbis, 2004) does not always translate into desired results at the global level. Transnational activists and advocates are often isolated from domestic social movements and find themselves unable to bridge the local and the global, undermining the ability of transnational coalitions to achieve their goals (Tarrow, 2005). Theatrical or carnivalesque protests may express political frustrations, but don't often have traceable political impact (Chvasta, 2006). The processes by which international and global decision-making take place so differ from those found at national and subnational levels that non-governmental organizations (NGOs) can find it difficult to operate effectively (Steinhardt, 2005). Even when there is civil society participation in international or global meetings, it receives relatively little media coverage, in turn further limiting impact (Bennett et al., 2004).

### ***Privatization of Governmental Functions***

Privatization of government functions makes it possible to avoid legal and regulatory requirements regarding public participation, including those procedures that make it possible to insert research results into decision making. Privatization can occur through the explicit release of formerly government activities into the private sector as well as the achievement of regulatory-like qualities by corporations and corporate alliances with powerful global reach. The growing dominance of private law — as opposed to privatization of what had been a matter of public law — is discussed in the next subsection.

The privatization of government functions is evident across states (Rose, Chaison & de la Garza, 2000), often resulting in concentration of the privatized functions despite claims that the process would lead to competition (Guedhami & Pittman, 2006). In telecommunications, privatization has led to improved efficiency — but only because of regulatory interventions, not the market itself, and only in terms of corporate profit rather than the achievement of social policy goals (Bortoletti et al., 2002). Alliances among firms in the audiovisual sector, for example, are proving to be so powerful that they are effectively taking over the national cultural policy role (Feigenbaum, 2002). Globalization of the communications infrastructure and of content flows are vivid examples of the policy impact of privatization. With satellite systems, both access to data collected (Florini & Dehqanzada, 2003) and the management system itself (Thussu, 2002) have been privatized. The Internet is managed by an organization that is currently a public-private partnership linked to the U.S. government (ICANN) (Mueller, 1999), but which is likely to become purely private within the immediately foreseeable future (Kesan & Shah, 2001).

The range of techniques being used to privatize the law go even further. Patents remove processes from regulatory purview (Thomas, 2006). It is the private sector that develops standards used to implement public law, whether those are technical standards (Burk, 2005) or those used in accounting (Cunningham, 2005). Use of audio and videoconferencing technologies to take depositions and testimony from one country directly to court in another can serve as a means of shopping for rules of evidence and procedure even when the jurisdictional locus has been established (Davies, 2007). Globalization of the delivery of legal services opens up spaces for private sector actors (Dezalay & Garth, 1996), and the same

can be said for cognate services such as accounting (Dilevko & Gottlieb, 2002). Use of arbitration rather than the courts for conflict resolution also removes decision making from public scrutiny and research input (Ware, 1999).

Private sector power can also, however, be turned to the service of public interest values. Citron (2007) argues that doing so may be absolutely necessary in areas such as the protection of personal data, and the same argument has been made regarding online hate speech (Bailey, 2004). The success of the United Church of Christ in achieving standing for the community in Federal Communications Commission (FCC) decision making is an example of such activity, in which private sector entities in effect act as private "attorneys general" by engaging parties on behalf of the public interest (Shapiro, 2006). A variety of techniques can be used to accomplish this, including torts (Rustad, 2001-2002), contracts (Bailey, 2004), and persuasion such as that seen in successful efforts to expand access to documentaries under the leadership of Pat Aufderheide at the Center for Social Media ([www.centerforsocialmedia.org](http://www.centerforsocialmedia.org)).

### ***Private Law***

Privatization of course increases the importance of the roles of private law relative to those of public law. Private law — those areas of the law that are open to ordering by private parties, generally by contract, rather than the state — offers not only a means of facilitating transactions, but also of compensating for harms and serving the public function of regulating conduct (Wai, 2005). Private law has been particularly important in recent decades for the media because, as a result of digitization, there have been so many legal issues for which there were previously no law at either the national or international levels. As a result, law firms such as Debevoise and Plimpton have had a great deal of global influence because the development of contractual arrangements on behalf of their private clients has established legal principles that then serve precedential roles for public law (see e.g., Bruce, Cunard & Director, 1986).

Some organizations in the private sector exercise such control globally that they are effectively developing private regulatory systems that sometimes supplement and sometimes supplant those of national governments; in the case of Walmart, for example, such power is exercised via control over the organizations involved in each stage of the supply chain (Backer, 2007). Such law-like activity is so extensive and influential that some believe private entities performing sovereign functions should be offered the same immunity to which states are entitled (Wen, 2003).

One of the most important ways in which contract law affects communication policy is through the flow-down contract system put in place by ICANN, which has effectively created a parallel legal environment with the capacity to touch all aspects of Internet structure and use (Mueller, 1999). Individuals experience this system through their End User Licensing Agreements (EULAs) to which agreement is required for Internet access. These agreements radically change the conditions under which communication takes place without or in contravention of public policymaking. Such contracts not only undermine constitutional protections for free speech, but they also grant property rights in content communicated to the corporations and organizations through which Internet access is achieved in complete contravention of common carriage principles (Braman & Lynch, 2003).

### ***Material Policy Tools***

One of the most striking policy innovations of the last decades of the 20th century was the embedding of controls with regulatory effect in objects themselves, what Kitchin and Dodge (2006) describe as "mundane governance." Technical approaches to preventing copyright infringement have been around since the 1970s, when non-reproducing ink began to be used for newsletters and signals from videotapes were distorted in a manner to ensure that re-recorded material would not play back appropriately (Ganley, 2002), and innovation in the development of digital resource management (DRM) techniques continues today (Fisher, 2006).

Just as happens in encryption wars, so the use of "technological protection measures" (TPMs) generates repetitive cycles of innovations for the claimed purpose of protecting property rights, and of innovations by hackers to develop work-arounds. The costliness of such efforts has led the European Union and other governments to consider laws banning both. Meanwhile, though there is evidence that such policies do not achieve their goals (von Lohmann, 2004), some argue that *de facto* reliance upon such techniques suggests that thinking about best practices and model laws may be more effective than any effort to reverse this legal trend (Gasser, 2006). Problems with TPMs include not only property rights wars, but also damage to equipment, secrecy regarding how access to content is being controlled (Denicola, 2004), prevention of many legal uses of content (Rothchild, 2005), facilitation of surveillance for other purposes (Hoofnagle, 2004), and the generation of co-ownership between content producers/distributors and those who produce the software and hardware involved in restricting access (Field, 2001). In this area, communication issues are on the leading edge, but the use of such policy tools in other areas is already being proposed; California, for example, is discussing a proposal to require homes to have radio-sensitive thermostats so that power companies can control energy use (Barringer, 2008).

The types of technical decision-making and standard-setting processes involved in the development and use of TPMs do not include requirements for either public participation or social science evidence in the course of decision-making (Davidson, Morris & Courtney, 2002). Going beyond specific policy-driven tools such as those of DRM, it is now widely acknowledged that technical decision-making — the design and architecture of technologies and networks — should be treated as social policy (Benoliel, 2004; Yu, 2004). We know that manipulation of technical design can be used to escape scrutiny by policy makers (and competitors) (Mansell, 1996), and that technical protocols that successfully accomplish one task may exacerbate other problems (Pau, 2002). There are many more calls for policy analysis of technical decision-making (e.g., Galloway, 2004; Langlois, 2005), however, than there are actual analyses or recommendations for ways of ensuring that the results of research by those in the social sciences and humanities are taken into account.

### ***Civil Society***

Among those who do research on or are involved as advocates or activists in global media policy-making, the focus has been on civil society as represented by issue-oriented NGOs. Twenty-first century meetings of the World Summit on the Information Society (WSIS) process provide examples of both

practice and research of this type (see e.g., Calabrese, 2004; Raboy, 2004). However, the greatest success in terms of a strengthened legal presence for members of civil society at the global level has been in the very different arena of investors' rights (Van Harten, 2005). Trade union enthusiasm for International Framework Agreements that adapt and extend representation for the global environment provides additional testimony to the growing legal strength of those members of civil society whose primary goal is capital accumulation rather than maximizing the public interest (Fairbrother & Hammer, 2005). For those concerned about media policy, this may be an even more important dimension of civil society activity, given the global nature of media consolidation (McChesney, 1999).

### ***Researcher Responses***

The literature on communication researcher interactions with formal government processes explored in *Communication Researchers and Policy-Making* suggests both institutional and individual responses to barriers to success. On the institutional side, it is clear that systematic and enduring relationships with the staffers of those in Congress, submissions to agencies such as the FCC when there are opportunities for public comment, and encouragement of universities to give credit to policy-related work during tenure and promotion processes are all goals to pursue. For individuals, the development of systematic and focused research programs and expansion of the skill set to include various forms of communication as public intellectuals are recommended.

The experience of those who have gone before also identifies some things that should not be done. Sustaining research industries that pursue the same research topic over and over with essentially unvarying results does not in itself add to the persuasiveness of policy arguments that refer to such data. Nor does engaging in research that is invalid and conceptually weak.<sup>3</sup> The tiresome and circular quibbling about qualitative vs. quantitative research methods so important to politics within many academic institutions distracts from the real political issues at hand, and confuses public and policy-making audiences.

Incorporating the trends discussed in this essay into the analysis suggests additional recommendations for researchers, activists, and advocates concerned about protecting the public interest in communication policy. These of course begin with the need to fill in research gaps, such as those that have been identified elsewhere regarding the ways in which media law is being globalized. Other approaches that may be of value include connecting diverse types of data on a problem into a single coherent story, attending to shareholders as policy makers, incorporating policy precession into both research and political activity, and working with education as a policy venue.

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<sup>3</sup> Both of these problems characterize the continuing research on media localism, where new studies do not change the findings of the already-large literature on the subject, and where much of the work that is done is invalid because it does not link content localism with decision-making localism (Braman, 2007).



### ***Triangulating Research into Coherent Stories***

Schön and Rein (1994) point out that any given policy problem has multiple levels, each one of which should receive a different type of policy analysis. In their formulation these begin with cost-benefit and other narrowly and quantitatively evaluative examinations of diverse options for resolving a particular problem, and move out through appreciation of conflicts among stakeholders, trends in stakeholder discourses, and the framing of those discourses themselves. To these we can add conflicts among various policymaking processes themselves, including those that are emerging rather than traditional (Braman, 2004). There are at least two practical implications of this view. First, the persuasive value of research will be greater if multiple research studies, each focusing on a different level of the policy problem but focused on the same issue, are linked together so that research findings can be presented as a coherent story. And second, efforts by activists and advocates who wish to promote actionable attention to such research findings similarly need to be operating at each level.

### ***Recognizing Stockholders as Policy Makers***

Deepening our knowledge of the processes by which structural decision-making for the media is becoming globalized and privatized can suggest new research questions and activist targets. Those concerned about media concentration, for example, have been focusing efforts on Congress and the FCC, but to my knowledge little effort has been spent learning about, studying, and communicating with stockholders of the firms involved. Stockholder interventions have affected policies of corporations in other industries successfully.

### ***The Importance of Policy Precession***

"Policy precession" is the recognition that the effects of the implementation of diverse laws and regulations interact with each other so fundamentally that analysis of any one must necessarily include attention to others that are related to be comprehensive — and for action based on that analysis to be effective. One historical story from the media reform movement exemplifies what happens when policy precession is not taken into account.

During the fall of 2003, the media reform movement claimed a success when a rider to a budget bill dealing with military matters (and thus not the subject of much public discussion) that would have raised the cap on the percentage of the national audience one broadcaster could serve was altered by a few percentage points — just far enough to get Democratic buy-in on the bill as a whole — in response to public demand. There was, however, a second rider in that bill: legislation that expanded the Federal Bureau of Investigation's (FBI) ability to request financial information from any entity on anyone of interest without even the requirement of any judicial scrutiny of the grounds claimed to justify such surveillance that remained in the USA PATRIOT Act. This extraordinary expansion of FBI surveillance powers included a gag on those entities from whom information was requested. Direct relationships between this watershed moment in the history of U.S. surveillance and media content diversity have become clear by 2008, when surveillance practices are being used to discern who has read particular news

items online and presented particular political positions anonymously. Yet that rider was accepted by those in the media reform movement because all attention was on the media concentration question.

At least one leader of the media reform movement responded to a question regarding the fact that the bill claimed to be such a success included this extraordinary change in our privacy environment by saying that it was "not their issue." Of course it is. Fragmentation of the policy environment in this way by those who seek change offers great opportunities to those who prefer the status quo, or to engage in change in the opposite direction, who understand much more fully than do media activists and advocates the interrelationships among diverse policy matters.

### ***Education as a Policy Venue***

A primary venue for working with governmentality as the source from which policy-relevant perception and understanding drives is the education system. The Recording Industry Association of America and Microsoft are already deep into targeting primary school children with educational materials presenting their views of copyright. It is time to provide primary school materials that present the alternative perspective as well.

The focus in media law and policy in higher education is on those students in journalism, mass communication, and media studies courses. However, few legislators and policy makers involved in communication policy issues receive degrees in any of these areas. A study of the educational backgrounds of the 180+ members of Congress involved in the Internet Caucus in 2003 found only one person who had graduated from communication. Matters related to communication law and policy, however, are actually found across disciplines that also include political science, sociology, urban studies, information science, and even, now — because of accreditation requirements — computer science. Researchers interested in communication policy and the public interest would do well to engage with colleagues across campus to provide curricular support for this much wider audience of students who, in turn, shape the political environment of the future.

In the 1980s, many journalism departments began requiring some training in research methods, often under rubrics such as "precision journalism," based on the sound argument that journalists need to be able to evaluate the quality of the research upon which they are reporting so that they are not held captive by misrepresentations. Given the evidence-aversion of the current political environment, general education in research methods, the same argument should now be used to apply across all students in higher education as a significant part of the effort to return the requirement of evidence-based policymaking to the center of expectations and practices. Research methods courses are most often taught from a disciplinary perspective, so those engaged in policy analysis in communication are urged to also include the teaching of research methods to undergraduates — using research of pertinence to current policy issues — as part of their policy-oriented program of work.

Finally, those who teach communication law and policy at the higher education level almost unanimously report that they are unable to keep up with the technological developments that underlie and often cause policy issues. Nor does anyone yet report use of a sustainable approach to teaching the

relationships between technological innovation and the law. There is a deep need for the creation of curriculum development and course materials to widen the community of scholars, activists, and advocates sufficiently grounded in knowledge of both technology and the law to be able to cope with contemporary and future issues.

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