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Opt-In/Opt-Out Debate Glosses Over Privacy Issue  
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Privacy remains a hotly debated subject in Congress, in the press, on the Internet, and in corporate boardrooms. Too often, the discussion does not rise beyond the cartoon level.

This phenomenon is, of course, not unique to privacy. Discussions of many current political and policy issues are superficial. This may be due to the influence of television, where cursory arguments are often presented with no depth, sophistication, or recognition of the world's complexity. If you saw the presidential debates, you get the point.

Consider the ongoing debate over opt-in and opt-out. For those who came in late, opt-in is a requirement for affirmative consent from a data subject before personal information can be used or disclosed for unrelated purposes like marketing. Opt-out is negative consent. Opt-out means that personal information can be used unless the data subject objects.

Those who value privacy favor opt-in. Marketers and others trying to make greater use of personal information favor opt-out. Legislative proposals are sometime cast as opt-in or opt-out to appeal to one side or the other.

The debate is overly simplistic. Opt-in and opt-out are *not* diametrically opposed ways of accomplishing the same goal. Privacy choices are not always black or white. Methodologies of choice are best considered as a continuum, with a variety of intermediate alternatives.

Let's look at two different forms of opt-out. Under one traditional model, those who want to opt-out must compose a snail mail letter and send it to a list owner or merchant in an envelope separate from a bill or other correspondence.

As you all know, that type of opt-out imposes a very high barrier. Few people will opt-out under a snail mail regime.

Indeed, the Federal Trade Commission's financial privacy rules state expressly that it is *unreasonable* if the only means of opting out is writing a letter. Compare the letter requirement to checking a box on a website. Both may be opt-outs, but one is easy and the other deliberately difficult.

Many other flavors of opt-out are available. I recently had an experience with a merchant who published a full-page newspaper ad trying to attract business from consumers like me. The ad promised discounts to new customers, and I went to the advertised website. I selected some items to purchase, and I was just about to close the transaction when I read the privacy policy.

To opt-out of email solicitations, you had to send an email to the company. The site did not offer a checkoff box or a link to the opt-out address. Customers had to cut and paste the address into their own mail program and then compose a message describing their preferences for email. This struck me as unduly burdensome and unfair, but I could live with it. It is easy to write a *no email* message.

The merchant also offered an opt-out for snail mail ads. Here, the customer was required to compose and send a snail mail letter. At this point, I was so mad that I canceled my order. I don't much care about receiving snail mail, and I rarely opt-out. However, the requirement for a letter was outrageous. It denied the essence of the Internet.

Instead of a new customer who would have opted out of email but not snail mail, this merchant had nothing. Not only did this bricks-and mortar-company lose a new Internet customer, but I took my real world business to its competitor.

Choice on the Internet allows many variations. The terms opt-in and opt-out are not adequate to characterize them all. Consider an Internet registration page that offers users a choice about receiving offers. Websites frequently have a *please send me email offers* box on a registration page. Sometimes the boxes are prechecked and sometimes not.

Is that an opt-in or opt-out? Does the answer depend on whether the box is prechecked or not? You could argue that a prechecked box is opt-out and an unchecked box is opt-in.

The difference is pretty small. If the consumer has clear notice and an easy way to exercise choice, I don't much care if the box is checked or not.

Suppose that a website describes the choices and makes the user select before completing the registration? Is that opt-in, opt-out, or something else again? Beats me.

It is too hard to describe all choice alternatives as either opt-in or opt-out. Websites have many ways to present alternatives and to allow users to review and modify those choices. Any legislation that requires opt-in or opt-out will only raise more questions than it will answer, and we will litigate over the meaning and application of the terms for years.

So what to do? Give consumers a real choice and a simple and fair means to express that choice. Offer several alternatives because when the choice is just spam or no spam, many will say no. But if some middle grounds are available, you might find more takers.

Let's stop debating choice only in opt-in and opt-out terms. The right answer is *fair choice*, and we have to recognize that what is fair depends on the context, the type of information, the proposed uses, and the process for exercising choice.

I know that this is more complicated, but life is not a television debate.