

# Empiricism and Privacy Policies in the Restatement of Consumer Contract Law

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Abstract

*The Draft Restatement of the Law of Consumer Contracts includes a quantitative study of judicial decisions concerning businesses' online privacy policies, which it cites in support of a claim that most courts treat privacy policies as contract terms. This Article reports an attempt to reproduce that study's results. Using the Reporters' data, this study was unable to reproduce their numerical findings. This study found in the data fewer relevant decisions, and a lower proportion of decisions supporting the Draft Restatement position. It also found little support for the Draft's claim that there is a clear trend recognizing privacy policies as contracts, and none for the claim that those decisions have been more influential than decisions coming out the other way. A qualitative analysis of the decisions in the dataset reveals additional issues.*

*The analysis reveals that the Draft Restatement study's numerical results obscure both the many judgment calls needed to code the decisions and their limited persuasive power. These results confirm the importance of transparency and replication in empirical case law studies. They also suggest that the closed nature of the Restatement process is perhaps ill-suited to producing reliable large-scale quantitative case law studies.*

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## I. Introduction

The draft Restatement of the Law of Consumer Contracts (“the Draft Restatement” or “the Draft”) invokes six quantitative studies of judicial decisions. Each study seeks to collect all available decisions on a legal question, published and unpublished; codes those decisions for factors such as issue, outcome, procedural posture, jurisdiction, and citations; and analyzes the coded data to determine majority rules, trends, lines of influence, and other patterns. The Reporters explain the advantages of their quantitative method as follows:

Using a quantitative analysis of *all published decisions in state and federal courts*, as well as unpublished decisions reported on Westlaw and Lexis, the Restatement distills the principles that most courts articulate and follow in adjudicating the most novel and contentious issues in consumer-contract law. By looking at all these cases and carefully organizing them by their outcomes, rationales, and

influence, this methodology makes it possible to decipher with greater subtlety the preeminent patterns within the law and measure their impact.<sup>1</sup>

The six quantitative case law studies in the Draft address: (1) whether a business's privacy policy is part of its contract with a consumer; whether and when (2) clickwrap terms, (3) browsewrap terms, or (4) shrinkwrap terms become part of the contract; (5) whether and when a business can modify a contract without express consumer consent; and (6) application of the parol evidence rule to standard terms in consumer contracts.<sup>2</sup>

This Article reports the results of an attempt to reproduce the numerical results of the Reporters' study of whether courts treat business privacy policies as part of their contracts with the consumer. It also provides a qualitative analysis of the decisions in the Reporters' dataset, how those decisions were coded, and their persuasive authority. I chose to analyze the privacy policy study because the Reporters were kind enough to provide the data and some of their coding for it. In addition to describing in the Draft Restatement the study's results, the Reporters have published the results in the *University of Chicago Law Review*.<sup>3</sup>

How companies use consumer information is today a highly salient topic. As illustrated by Cambridge Analytica's reported uses of Facebook data in the 2016 election cycle, we do not have a complete understanding of the potential costs, individual and social, of permitting businesses to sell, share, or otherwise use data that they harvest from consumers. How businesses use consumer data, the legal effect of their disclosure of such uses in posted "privacy policies," and the mechanisms of consumer consent to such uses are all important topics of public discussion.

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1. RESTATEMENT OF THE LAW CONSUMER CONTRACTS, Reporters' Introduction at 6 (AM. LAW INST., Discussion Draft No. 4, 2017) [hereinafter DRAFT RESTATEMENT]. On October 19, 2018, Omri Ben Shahr tweeted that "the ALI council approved UNANIMOUSLY our draft of the Restatement of Consumer Contracts." Omri Ben-Shahr (@omribenshahr), TWITTER (Oct. 19, 2018, 7:38 AM), <https://twitter.com/omribenshahr/status/1053294333057814530> [<https://perma.cc/9CYH-7NEP>]. As of the final editing of this Article, the ALI has not published a draft subsequent to the version discussed and quoted herein.

2. DRAFT RESTATEMENT § 1, Reporters' Notes at 13-15 (cases embracing privacy notices as creating contractual obligations are more numerous and influential); § 2, Reporters' Notes at 34 (out of 110 cases, courts have enforced clickwrap contracts in each one absent fraud, unconscionability, or another intervening factor); § 2, Reporters' Notes at 35-36 (notice and opportunity to review are required for browsewrap contracts to be enforceable); § 2, Reporters' Notes at 38 (enforcement of pay-now-terms-later contracts are increasingly numerous and influential as long as there is no fraud, unconscionability, etc.); § 3, Reporters' Notes at 47 (modifications in consumer transactions are consistently enforceable with notice and opportunity to reject); § 8 Reporters' Notes at 95-96 (cases where consumer standard-form contracts create a rebuttable presumption of integration are more likely to be cited than those where such a presumption is conclusive).

3. Oren Bar-Gill, Omri Ben-Shahr & Florencia Marotta-Wurgler, *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 U. CHI. L. REV. 7 (2017). The University of Chicago Law Review has not made available the data or coding for the studies described in this Article. The editors did not respond to an inquiry about their cite-checking process.

In the European Union, a business's use of consumer data is governed by the EU General Data Protection Regulation (GDPR).<sup>4</sup> The GDPR addresses how businesses store and protect consumer information and establishes default limits on how they may share it. The GDPR also provides rules for how a business can obtain legally effective consumer consent to otherwise prohibited information sharing. For example, a "request for consent shall be presented in a manner which is clearly distinguishable from . . . other matters, in an intelligible and easily accessible form, using clear and plain language,"<sup>5</sup> and "consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to him or her."<sup>6</sup>

There exists no analogous general law of data privacy in the United States. Instead, a business's use of its consumers' information is subject to a patchwork of federal and state laws. Nor is U.S. law today clear on when a consumer has effectively consented to an otherwise impermissible use of her information. Among other things, it is not yet settled whether the fact that a business provides notice of how it uses consumer information—for example, by posting its privacy policy online—establishes effective consumer consent to that use. There have, however, been moves toward adopting heightened requirements for effective consumer consent. California has required, and the U.S. Federal Trade Commission has recommended, that such notices be conspicuous and drafted in easily understood language.<sup>7</sup> And the American Law Institute (ALI) is currently working on a Principles of the Law, Data Privacy, which will address mechanisms of consent.<sup>8</sup>

All of this is relevant to understanding the Draft Restatement of the Law of Consumer Contract's statements on privacy policies. Comment 9 to section 1 provides that a business's posted privacy policy can become a term in a consumer contract in accordance with the rules of the Restatement.<sup>9</sup> Judicial adoption of such a rule would have significant consequences. Section 2 of the Draft describes a low bar for consumer assent to standard terms. A "business may establish how the assent may be manifested, as long as the manner and medium are reasonable in the circumstances."<sup>10</sup> Legally effective manifestations can include not returning a product after receiving terms (shrinkwrap)<sup>11</sup> and entering a place of business or using a website where the business provides reasonable notice of the

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4. Regulation (EU) 2016/679, of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, 2016 O.J. (L 119).

5. *Id.* art. 7, at 37.

6. *Id.* § 32, at 6.

7. *See infra* text accompanying notes 42 & 43.

8. *See infra* text accompanying note 46.

9. DRAFT RESTATEMENT § 1, cmt. 9.

10. *Id.* § 2, cmt. 2.

11. *Id.* § 2(b).

terms and an opportunity to review them (e.g., browsewrap).<sup>12</sup> Together with the proposed comment, it follows that a business's posted privacy policies would often become part of its contract with the consumer.<sup>13</sup> Whereas European law establishes heightened requirements for effective consumer *consent* to the sharing of their information, the Draft Restatement suggests applying its generic minimal requirements for contractual *assent* to a business's use of the consumer's information.

Of course, one cannot fault comment 9 if it accurately describes the rule U.S. courts apply. Although Restatements have sometimes staked out positions ahead of the courts,<sup>14</sup> the express purpose of a Restatement is to restate existing law. Thus the importance of evaluating the Reporters' authority for the proposed comment 9. The Reporters' Notes to section 1 identify one state appellate decision and two federal district court decisions whose logic the Reporters find "compelling."<sup>15</sup> But the Notes do not discuss the reasoning of those decisions. I argue in Section II.C that they provide little or no support for the proposed comment. The only other legal authority the Reporters provide for comment 9 is a quantitative study of fifty-one decisions between 2004 and 2015. The Reporters conclude from that study that courts are seven times more likely to recognize a privacy policy as part of a consumer contract than to exclude it from the contract; that there is a clear and increasing trend toward treating privacy policies as contract terms; and that decisions adopting this position have been more influential than those disagreeing with it. This study is in fact the principle authority for the proposed comment on privacy policies.

This Article examines the Reporters' coding and quantitative analysis of those cases and concludes that the empirical support for comment 9 is not nearly as strong as the Reporters suggest. Independent coding of the cases in the Reporters' dataset provided starkly different quantitative results. A qualitative analysis of the decisions that arguably support the proposed comments finds that they are of limited authoritative or persuasive power.

There are several significant differences between this study's quantitative results and those of the Reporters. First, using very generous coding criteria, I find that only fifteen of the fifty-one decisions in the Reporters' dataset address the question they pose. The Reporters find forty. Second, whereas the Reporters find that courts are seven times more likely than not to recognize that a business's privacy policy might be part of its contract with the consumer, I find a ratio of less than three to one. This weaker result together with the smaller sample

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12. *Id.* § 2, cmt. 5.

13. *See id.* § 1, Reporters' Notes at 13 ("[P]rivacy policies posted by businesses, that govern a business's data collection, use, and protection practices . . . are consumer contracts and the Restatement's rules apply to them.").

14. Most famous in contract law is section 90 of the Restatement of Contracts, which blazed the trail for the judicial recognition of promissory estoppel. RESTATEMENT OF CONTRACTS § 90 (AM. LAW INST. 1932).

15. DRAFT RESTATEMENT, Reporters' Notes at 13-14.

provides significantly less support for the draft comment than the Reporters describe. Third, my analysis of the data casts doubt on the Reporters' claim that there is a clear and increasing trend toward treating privacy policies as contract terms. Most of the change the Reporters observe occurred between 2004 and 2010. Between 2010 and 2015 the ratio of decisions coded as recognizing privacy policies as contract terms to those holding that they are not dropped somewhat. Fourth, the Reporters use of total citation counts to identify leading cases is flawed. Examination of citing cases reveals that most do not refer to the supposed leading case for a relevant legal proposition.

Like the Reporters, I find that a majority of relevant decisions in the dataset allowed that a business's privacy policy might be part of its contract with a consumer. It would be wrong, however, to interpret this as confirmation of the Reporters' results. The Reporters' quantitative study seeks to determine *how much* support in the case law there is for the draft comment. On the core question as to what most courts are holding, this study finds a much weaker effect (less than a three-to-one ratio vs. a seven-to-one ratio) in a much smaller number of decisions (fifteen vs. forty). This is comparable to the difference between a baseball team winning eleven of its first fifteen games and a team winning thirty-five of its first forty games. Both are winning records. But the latter win/loss ratio provides much more powerful evidence of the team's ability and likelihood of success in the season as a whole. Or one might think of the difference in terms of coin tosses. If a coin is flipped fifteen times, there is a one-in-twenty-four chance it will come up heads eleven times. If it is flipped forty times, the chance it will come up heads thirty-five times is approximately one in 1.6 million. Given the small sample size and weaker effect, this Article's study cannot reject with a standard level of certainty the null hypothesis that courts are in fact no more likely to recognize a privacy policy as a contract than not. And as noted above, the Draft Restatement emphasizes more than decision counts. It also finds a "clear and increasing trend towards contractual enforcement of privacy notices," and "that cases embracing privacy notices as contracts are not only more numerous, but more influential."<sup>16</sup> I find little support for the first proposition and none for the second. In short, the attempt to reproduce the results reported in the Draft finds that the data do not provide the degree of empirical support claimed for the proposed comment.

The numbers, however, mask deeper problems with the Reporters' quantitative study, as revealed by a qualitative analysis of the decisions in the Reporters' dataset. The Reporters' coding appears to contain some significant errors, such as including cases in which neither party was a consumer and cases in which there was not even an arguably contract claim or defense. The numerical results also obscure the many difficult judgment calls needed to code the decisions in the dataset. Most significant among these is the Reporters' coding of cases in which the business invoked its privacy policy as a defense against a

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16. DRAFT RESTATEMENT § 1, Reporters' Notes at 15.

claimed non-contractual privacy violation. Although the Reporters coded these “shield” decisions as recognizing that the privacy policy could be a contract term, courts in these cases in fact applied consent rules drawn from tort and statutory law. Finally, the vast majority of the decisions in the dataset are from federal trial courts, and two-thirds are on motions to dismiss. These decisions are not binding on other courts, and their persuasive value is very limited. In fact, many of the decisions that allow a contract claim to survive a motion to dismiss also include judicial statements contrary to the rules in the Draft Restatement. In short, even if a majority of the coded decisions contain some support for the proposed comment, the degree of support in those decisions is quite low.

There are four takeaways. First, and most narrowly, this study finds that the Reporters’ data regarding the judicial treatment of privacy policies do not adequately support the conclusions they draw or the proposed comment 9. The case law that the Reporters rely on does not provide sufficient support for their claim that most courts apply rules described in the Draft Restatement to determine the legal effect of a business’s privacy policy. Second and perhaps more significantly, the results of this study suggest that the results of the Draft’s five other quantitative case law studies should not be considered definitive until their methods have been examined and their results reproduced. To date, the Reporters have neither provided a detailed description of their coding methods nor published their coded data. Without knowing the Reporters’ coding methods, it is impossible to know how to interpret the numbers they present. And without the coded data, it is impossible for other researchers to attempt to reproduce their analysis of it. Third, and even more broadly, the results of this study illustrate the general importance of transparency and replication in quantitative case law studies. As the so-called replication crisis in the medical and social sciences illustrates,<sup>17</sup> transparency and replication are essential element of reliable empiricism. This holds all the more for attempts to code and quantify judicial holdings. The final lesson concerns the production of Restatements. Part of the problem here may be the American Law Institute’s procedures, which are not designed to be transparent or to give scholars outside the ALI an opportunity to examine or attempt to reproduce empirical results. If the ALI wishes to use quantitative case law studies in future Restatements, it should consider revising those procedures.

Part II of this Article provides an introduction to the Restatement of the Law of Consumer Contracts project and to the Draft’s comment on privacy policies. Part III describes this Article’s method, presents the results of my attempt to reproduce the Reporters’ study, and discusses the significance of the difference between my results and those of the Reporters. Part IV provides a qualitative analysis of the decisions in the dataset and their coding and draws conclusions about the strength of the Draft’s evidence for the proposed comment.

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17. See *infra* note 217.

Part V steps back and suggests that the American Law Institute's Restatement process is not well-suited to the production of quantitative case law studies.

Before jumping into the analysis, a few preliminary words on this Article's methods, which Section III.A describes in detail. One approach to replication would be to perform a completely independent study of judicial decisions that address whether and when a business's posted privacy policy becomes part of its contract with the consumer. Such a study would begin by independently compiling a set of relevant decisions to check the precision and recall of the Reporters' search methods. It would then establish a coding rubric in advance, employ blind coding, assign each decision to multiple coders, and perform appropriate interrater reliability checks to ensure the quality of the results.<sup>18</sup> This Article does not report the results of such a study. Instead, I have attempted to reproduce the Reporters' results using a more lawyerly form of empiricism. The Article seeks to determine what the Reporters' numbers *mean*, i.e., what those numbers *say* about what the law is. The answer to that question requires examining the underlying data using traditional lawyerly tools. The goal is not merely to determine whether the Reporters' results can be replicated, but to understand them.

## II. Background

### A. *The Restatement of Consumer Contract Law Project*

The Draft Restatement of the Law of Consumer Contracts seeks to identify rules specific to adhesive contracts between consumers and the businesses that sell them goods, software, services, or other products. As the Reporters observe, business-to-consumer transactions “present a fundamental challenge to the law of contracts, arising from the asymmetry in information, sophistication, and stakes between the parties to these contracts.”<sup>19</sup> The classical picture of contract, according to which much of contract law is structured, depicts two parties of relatively equal bargaining power who negotiate the details of a transaction that each fully comprehends, and who then expressly agree to the resulting terms. In the typical consumer contract, in distinction, the business drafts a set of standard terms, which are often lengthy and written in technical language, without consumer input. The business then gives those standard terms to many consumers, all on a take-it-or-leave-it basis. The consumer pays attention not to the standard terms, but to a few primary terms, such as the product's description and its price. Whereas the primary terms are put in front of the consumer's eyes, the standard terms are listed separately in an accompanying document or on a linked webpage, or they arrive later with the product. The consumer, who is

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18. For a good overview of the methodological issues involved in quantitative empirical case law studies, see Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63 (2008).

19. DRAFT RESTATEMENT, Reporters' Introduction at 1.



focused on primary terms, almost never reads or comprehends the standard terms, but indicates her assent to them by signing at the bottom of a long document, by clicking a button labeled “I agree,” by completing the transaction to which the terms are appended, or by not cancelling the transaction when the terms arrive. There is a widespread sense that the general rules of contract enforcement should not apply to such agreements. That sense might come from the fact that the consumer’s assent to standard terms is of such low quality.<sup>20</sup> Or it might come from the asymmetries in information, sophistication, and stakes that the Reporters emphasize. Legislatures, regulators, and courts have responded with a host of rules designed specifically for consumer contracts. Hence the perceived need for a Restatement of the Law of Consumer Contracts.

The American Law Institute appointed as Reporters for the project Oren Bar-Gill, Omri Ben-Shahar, and Florencia Marotta-Wurgler. All are law professors who have studied and written on consumer contracts. Professors Bar-Gill and Ben-Shahar both have PhDs in economics and have applied classical microeconomic analysis and behavioral economics to the study of consumer contracts. Professor Marotta-Wurgler is perhaps best known for her large-scale empirical studies of online consumer contracts and contracting behavior.

A central claim of all three Reporters’ scholarship is that it is nearly impossible to obtain fully informed consumer consent to standard contract terms.<sup>21</sup> These claims cohere with the Draft Restatement’s observations about recent judicial approaches to consumer contracts:

By and large . . . common-law courts, when applying the common-law rules of contract, have relaxed the assent rules, permitting businesses to use relatively lenient adoption processes. Courts have recognized that, in a world of lengthy standard forms, more restrictive assent rules that demand more thorough advance

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20. See, e.g., MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2012).

21. See, e.g., OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* (2012); Oren Bar-Gill, *Consumer Transactions*, in *THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW* 465 (Eyal Zamir & Doron Teichman eds., 2014); OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (2014); Yannis Bakos, David R. Trossen & Florencia Marotta-Wurgler, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 *J. LEGAL STUD.* 1 (2014); Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 *J. EMPIRICAL LEGAL STUD.* 447 (2008); Florencia Marotta-Wurgler, *Does Contract Disclosure Matter?*, 168 *J. INST. & THEORETICAL ECON.* 94 (2012); Florencia Marotta-Wurgler, *Does Increased Disclosure Help? Evaluating the Recommendations of the ALI’s ‘Principles of the Law of Software Contracts’*, 78 *U. CHI. L. REV.* 165, 168 (2011); Florencia Marotta-Wurgler, *Some Realities of Online Contracting*, 19 *SUP. CT. ECON. REV.* 11 (2011); Omri Ben-Shahar, *The Myth of ‘Opportunity to Read’ in Contract*, 4 *EUR. REV. CONT. L.* 428 (2000); Florencia Marotta-Wurgler, *Even More Than You Wanted to Know About the Failures of Disclosure*, 11 *JERUSALEM REV. LEGAL STUD.* 63 (2015); Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 *MICH. L. REV.* 883 (2014) (reviewing MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013)).

disclosures and more meaningful informed consent would increase transaction costs without producing substantial benefit.<sup>22</sup>

An obvious worry is that if consumers do not read standard terms, there will be no check on businesses that wish to add unfair and consumer unfriendly provisions to the contract—provisions to which a fully informed, rational, and self-interested consumer would not agree. The Draft’s answer is heightened judicial scrutiny of the substance of standard terms, especially using the unconscionability doctrine, to ensure that the terms are fair, reasonable and conform to consumers’ actual expectations. The Draft calls this the “grand bargain”: “fairly unrestricted freedom for businesses to draft and affix their terms to the transaction, balanced by a set of substantive boundary restrictions, prohibiting businesses from going too far.”<sup>23</sup>

Although this grand bargain is consistent with the Reporters’ scholarly commitments, their argument for it rests on case law. Their approach to that law, however, again reflects their scholarly expertise. In addition to the traditional method “of extracting rationales from leading cases and supporting them with convincing policy justifications,”<sup>24</sup> the Reporters’ provide quantitative empirical analyses of judicial decisions on six questions of law.<sup>25</sup> Each study compiles a dataset of all published and unpublished state and federal decisions on a given legal question, codes the decisions for variables such as jurisdiction, outcome, rationale, and number of subsequent citations, then analyzes the coded data to measure the relative frequency of outcomes and reasoning, trends over time and the influence of leading decisions. The Restatements have always been partly empirical projects, as Reporters have relied on citations to multiple cases and sometimes provided systematic overviews. These Reporters’ quantitative method purports both to expand the range and to improve the precision of that empiricism. It seeks to collect all decisions, published and unpublished, on a given question, and by coding those decisions for multiple variables to identify patterns that might evade other methods.

As the Reporters observe, the above-described quantitative method “has the potential to render [the Restatement’s] recommendations more transparent and reliable.”<sup>26</sup> The Reporters identify three more specific advantages of their quantitative empiricism:

First, it decreases the probability that important or well-reasoned cases might be missed. Second, it allows Reporters to carefully consider the evolution of the

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22. DRAFT RESTATEMENT, Reporters’ Introduction at 3.

23. *Id.* at Reporters’ Introduction at 4; *see also id.* at 25 (“One of the Restatement’s methodological cornerstones is the commitment, throughout, to reflect this fundamental tradeoff: as assent rules shift to the more permissive end of the continuum, courts have perceived greater need and justification for mandatory restrictions and ex post scrutiny of abusive terms.”).

24. *Id.* at Reporters’ Introduction at 6.

25. *See supra* note 2.

26. DRAFT RESTATEMENT, Reporters’ Introduction at 6.

doctrine to better understand how courts address key issues both at the appellate level and as applied on the ground. Third, while the empirical approach does not dictate which principles would ultimately find their way to the black letter of the Restatement, it can offer supporting evidence and reinforce the restated principles. This method helps implement a longstanding ALI commitment to identify majority rules and the best policy approach; the quantitative dimension is a rigorous way to ground and make transparent the concept of a majority rule.<sup>27</sup>

The Reporters state that their quantitative method is meant to supplement, not replace, the traditional qualitative and evaluative empiricism of the Restatement projects. That said, as I discuss in Section II.C below, the Reporters lean heavily on their quantitative study to justify the Draft's comment on privacy policies.

### *B. Privacy Policies in the Draft Restatement*

Section 1 of the Draft Restatement discusses the scope of the Restatement of the Law of Consumer Contracts. It provides that a *consumer* is “[a]n individual acting primarily for personal, family, or household purposes,” and that a *business* is “[a]n individual or entity other than a consumer that regularly participates in or solicits, directly or indirectly, consumer transactions.”<sup>28</sup> It further provides that the Draft Restatement's rules apply to *consumer contracts*, which are “contract[s] between a business and a consumer.”<sup>29</sup> Comment 9 to section 1 addresses privacy policies:

*Privacy contracts included.* The definition of “Consumer Contract” includes agreements between a consumer and business with respect to the consumer's personal information, such as standard-terms privacy notices relating to a consumer's personal information collected, used, shared, protected, or otherwise handled by the business. The rules of contract law, including the specific rules in this Restatement, as well as rules not included in this Restatement, apply to contracts involving personal information.<sup>30</sup>

The Reporters' Notes explain that the comment addresses “whether privacy policies posted by businesses, that govern the business's data collection, use, and protection practices, are contracts,” and conclude that “a notice that purports to create consent-based rights and obligations should be viewed as the subject matter of a consumer contract, in the same way that notices regarding the scope of warranty, remedies, or dispute resolution do.”<sup>31</sup>

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27. *Id.*

28. *Id.* §§ 1(a)(1) & (2).

29. *Id.* §§ 1(a)(4) & 1(b).

30. *Id.* § 1, cmt. 9.

31. *Id.* § 1, Reporters' Notes at 13.

From one perspective, the claim that a consumer contract can include provisions related to use of the consumer's data is uncontroversial. Contract law is largely content neutral. Parties can, *ceteris paribus*, contract for whatever duties, powers, permissions, and other legal relations they wish. That includes duties and permissions that relate to information generated in the transaction, as illustrated by the nondisclosure clauses that commonly appear in other types of contracts. One does not need an empirical study to show that parties can contract to expand or reduce one side's privilege to share information generated in the transaction.

The significance of the proposed comment 9 is not its affirmation that consumers and businesses *can* contract over privacy, but what it says about *how* they can do so. A rule that “[p]rivacy policies are consumer contracts, and the Restatement’s rules apply to them”<sup>32</sup> would bring privacy notices within the scope of the Draft’s sections 2 and 3, which provide the “grand bargain’s” relaxed rules for formation and modification. In doing so, the proposed comment has the potential to displace emerging areas of privacy law, including parts of the separate ALI project on the Principles of the Law, Data Privacy.

Sections 2 and 3 state rules for contract formation and modification. Section 2 adopts *inter alia* the *ProCD v. Zeidenberg* rule for shrinkwrap terms: standard terms are enforceable even if they are provided to the consumer after the consumer’s assent to the transaction, so long as the consumer had “reasonable notice” of their existence prior to that assent and has a “reasonable opportunity to terminate” after receipt.<sup>33</sup> Comment 5 to section 2 addresses browsewrap terms. “Browsewrap” refers to online terms of use, accessible via a link on a web page, that stipulate that the consumer’s use of the website shall constitute assent to those terms. Comment 5 states that under section 2, browsewrap terms are enforceable so long as the business provides the consumer reasonable notice of and opportunity to review them.<sup>34</sup> Section 3 then provides that modifications are subject to the section 2 rules for formation, with a proviso in the comments that “when the initial terms are adopted through a particular process, the consumer [might] expect the same or a similar process for modifications of the standard terms,” which could trigger “a heightened notice requirement for the modification.”<sup>35</sup>

The implications of including a business’s separately available privacy policy within the scope of the Draft Restatement therefore include the following. First, an online policy to which a consumer does not expressly agree and of

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32. *Id.* § 1, Reporters’ Notes at 13.

33. *Id.* § 2(b); *see ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

34. *Id.* § 2, cmt. 5 (“Standard contract terms governing the proprietary environment of the business may be adopted as part of a consumer contract upon entry to, or use of, that environment, even if no other purchase is concluded while in the environment . . . . In such case, entry into the proprietary environment signifies assent to the transaction, and the consumer’s choice not to exit or otherwise terminate the transaction leads to the adoption of the posted standard contract terms.”); *see also id.* illus. 11 (describing assent to standard terms through use of a website containing a link to those terms).

35. *Id.* § 3, cmt. 5.

which the consumer is unlikely to have read or understood can qualify as standard terms of the contract. Thus, a consumer who uses a website that includes a sufficiently prominent link to its privacy policy might be contractually bound to its provisions. Second, a consumer who receives the privacy policy in a post-formation correspondence—say in a follow-up email or mailing after agreeing to the transaction—would similarly be bound by it, so long as the consumer had notice of its existence prior to entering the transaction and has a reasonable opportunity to cancel the transaction after receiving it. Third, a business would have the power to modify a contractually binding privacy policy without receiving express consumer assent to that modification, and even in some instances without actual consumer knowledge of the change. Reasonable notice could be enough. In short, “a [privacy] notice that purports to create consent-based rights and obligations should be viewed as the subject matter of a consumer contract, in the same way that notices regarding the scope of warranty, remedies, or dispute resolution do” under the Draft’s proposed rules.<sup>36</sup>

In theory, the downstream consequences might be either pro-consumer or pro-business, depending on the nature of the dispute. The proposed comment could help consumers by making it easier to sue a business for breach of its own privacy policy. By lowering the requirements for consumer assent, the Draft’s approach could make it more likely that courts will hold that a posted policy binds the business and supports an action for breach. And the comment’s inclusion of privacy policies should bring them within the Restatement’s heightened scrutiny for substantive unconscionability—the “grand bargain.”<sup>37</sup>

In practice, however, the rule is likely to work to the benefit of the businesses in disputes over their use of consumer information.<sup>38</sup> First, treating privacy policy violations as breaches of contract might have the effect of displacing other, more consumer-friendly claims and remedies. A business’s violation of its own privacy policy can also support an action based on the torts of negligent misrepresentation or deceit, or on a state Unfair and Deceptive Acts and Practices statute. A consumer might prefer the remedies those laws already provide to the remedies available for breach. In other contexts, courts have held that misrepresentations within contracts are not actionable in tort.<sup>39</sup>

Second, and more importantly, privacy policies do not only impose new duties on the business. They commonly purport to give the business permission to use the consumer information in ways otherwise prohibited. There exists a raft of statutes, regulations, and common law actions that protect consumer

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36. *Id.* § 1, Reporters’ Notes at 13.

37. The proposed section 5 provides, for example, that “a contract term is presumed to be substantively unconscionable if its effect is to . . . [u]nreasonably limit the consumer’s ability to pursue a complaint or seek reasonable redress for a violation of a legal right.” DRAFT RESTATEMENT § 5(d)(3).

38. Whether consumers would also benefit in the form of lower prices is a question far beyond the scope of this Article.

39. See Dan B. Dobbs, *An Introduction to Non-Statutory Economic Loss Claims*, 48 ARIZ. L. REV. 713, 722-33 (2006); Gregory Klass, *Contracting for Cooperation in Recovery*, 117 YALE L.J. 2, 45-49 (2007).

information.<sup>40</sup> Businesses often draft privacy policies that purport to permit otherwise prohibited uses of that information. When a consumer sues for a privacy violation, the business then points to its published policy as evidence that the consumer consented to the use. Today such cases are often decided not by contract law, but by rules governing consent drawn from tort law, statutes, and regulations.<sup>41</sup> Those rules can differ from contractual assent requirements. The California Online Privacy Act, for example, requires that operators “conspicuously post” their privacy policies and provides a detailed list of sufficient disclosures.<sup>42</sup> The Federal Trade Commission has recommended layered privacy notices with “clearer, shorter, and more standardized” language,<sup>43</sup> and has brought numerous actions based on inadequate notice.<sup>44</sup> And the Michigan Video Rental Privacy Act requires that the consumer’s consent be in writing.<sup>45</sup> Consent rules in privacy law also continue to evolve. The ALI’s draft Principles of the Law, Data Privacy, for example, recommend requiring both detailed transparency statements, geared towards regulators, and more accessible privacy notices, written to be understood by individuals.<sup>46</sup> And the emergence of novel uses of consumer information—such as Cambridge

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40. The relevant texts of federal statutes alone take up 470 pages of Marc Rotenberg’s *The Privacy Law Sourcebook: United States Law, International Law and Recent Developments 1-470* (2016).

41. See discussion of shield decisions *infra* Sections III.B.3 and IV.B.2.

42. CAL. BUS. & PROF. CODE § 22575 (West 2018).

43. FEDERAL TRADE COMMISSION, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE 64 (2012).

44. See, e.g., *United States v. Path*, Consent Decree and Order, FTC File No. 122 3158 (2013), <http://www.ftc.gov/os/caselist/1223158/130201pathincdo.pdf> [<https://perma.cc/6R99-YLM5>]; *In re Facebook, Complaint*, FTC File No. 092 3184 (2012), <http://www.ftc.gov/os/caselist/0923184/120810facebookcmpt.pdf> [<https://perma.cc/C4EK-8VRY>]; *FTC v. Frostwire, 17 LLC*, No. 11-cv-23643 (S.D. Fla. Oct. 12, 2011) (complaint), <http://www.ftc.gov/os/caselist/1123041/111011frostwirecmpt.pdf> [<https://perma.cc/TE77-YC37>]; *FTC v. Echometrics, Complaint*, FTC File No. 102 3006, <http://ftc.gov/os/caselist/1023006/101130echometricscmpt.pdf> [<https://perma.cc/XW96-BZM3>] (2010). See generally Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014).

45. MICH. COMP. LAWS § 445.1712(1) & 1713 (a) (2018).

46. Principles of the Law, Data Privacy §§ 3 & 4 (ALI Council Draft No 1, 2016). The comments explains:

[T]he Data Privacy Principles distinguish between a “transparency statement” and “individual notice.” First, a transparency statement, as specified § 3, is aimed at regulators and can assist them in assessing whether organizations follow the law. Second, it informs the public about an entity’s policies and practices so that they can be discussed and debated. Third, a transparency statement binds a data manager to a regular set of practices and prevents it from acting in a purely ad hoc fashion. It can help an organization understand its own policies and operationalize them.

In contrast, individual notice, as specified in § 4, is intended to provide information to the individual whose personal data is processed.

*Id.* § 3 cmt. a. The Reporters for the Principles have not yet released a draft section 5, the provision that will address consent.

Analytica's use of Facebook data in the 2016 U.S. election—might well suggest new rules.<sup>47</sup>

None of these correspond to the Draft Restatement's rules for contractual assent. Were courts to begin treating privacy policies as standard contract terms pursuant to the rules described in the Draft's sections 2 and 3, they might conclude that non-contractual consent rules are inapposite. Unlike mere consent, the consumer has agreed to share her data in exchange for a benefit received, and so the resulting contract should be enforced. In fact, the Draft endorses this logic: "Increasingly, consumers 'pay' for services by allowing businesses to collect personal information, and it is therefore necessary to regard the personal-information provisions as part of the contract."<sup>48</sup> This could result in a broader shift away from rules of consent located in privacy law and toward rules of contractual assent such as those described in the Draft Restatement. Such a shift might retard further development of consent rules to address the special concerns of data privacy. It is therefore important to understand whether the proposed comment reflects the existing law of consumer contracts—the rules that courts are actually applying—or if it represents a proposed innovation or intervention.

*C. The Draft's Nonquantitative Arguments for Comment 9*

As noted above, the Reporters state in their Introduction that "the empirical method does not replace traditional legal analysis—the craft of discovering the DNA of the law through experienced reading of persuasive sources," and that "this Restatement relies on case analysis that applies both methods."<sup>49</sup> In addition to describing the results of the quantitative study of privacy policy decisions, the Reporters' Notes to section 1 include three more traditional arguments for the proposed comment 9. In order to understand the importance of the quantitative case law study, one needs to understand the limitations of the Reporters' more traditional arguments for the comment. The Draft's readings of what it identifies as leading cases also presages problems with the quantitative study's coding.

The Reporters' first argument for comment 9 is surprisingly formalistic, given that the Reporters' academic work is so attuned to policy considerations.

This inclusive classification is justified as a matter of principle, since the rights in information are at the core of many consumer products and services. Increasingly,

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47. For an example of the many reflections on the possible changing attitudes toward consumer privacy in the wake of Cambridge Analytica, see John Herrman, *Cambridge Analytica and the Coming Data Bust*, *New York Times* (April 10, 2018), <https://www.nytimes.com/2018/04/10/magazine/cambridge-analytica-and-the-coming-data-bust.html> [<https://perma.cc/GT8Q-CFX3>].

48. DRAFT RESTATEMENT § 1, Reporters' Notes at 13. For more, see Chris Jay Hoofnagle & Jan Whittington, *Free: Accounting for the Costs of the Internet's Most Popular Price*, 61 *UCLA L. REV.* 606 (2014).

49. DRAFT RESTATEMENT, Reporters' Introduction at 6.

consumers “pay” for services by allowing businesses to collect personal information, and it is therefore necessary to regard the personal-information provisions as part of the contract.<sup>50</sup>

There are at least two difficulties with the above argument. First, although the sale of consumer information is part of the business model of many companies, few of those businesses advertise their services as a quid pro quo for the consumer’s information. The use of the consumer’s information is not part of a bargain in the traditional sense of the term—one that the consumer understands. Second, the second sentence in the above passage is a non sequitur. Even if the business’s use of consumer information were the price of services provided, it would not automatically follow (“necessary to regard”) that the business’s privacy policy is part of the contract. What becomes part of any contract is a question of positive law, not logical deduction from metaphysical principles of exchange. Here Cardozo gets it right: considerations of public policy and reason should not be ignored to save the “symmetry of a concept.”<sup>51</sup> The relevant question is whether consumers and businesses would benefit from rules requiring clearer and more conspicuous notice and an affirmative act of assent, not on how businesses currently pay for and profit from the services they provide.

The Reporters’ Notes appeal to three cases as supporting the proposed comment: *Gwinnett Community Bank v. Arlington Capital*,<sup>52</sup> which they identify as “the one published state appellate case on this topic,”<sup>53</sup> as well as *In re JetBlue Airways Corporation Privacy Litigation*,<sup>54</sup> and *In re American Airlines Privacy Litigation*,<sup>55</sup> two district court decisions whose reasoning the Notes characterize as “compelling.”<sup>56</sup>

A look at the three decisions reveals that they provide little or no support for the comment. *Gwinnett* concerned a business-to-business dispute. The only contract issue in the case was a commercial borrowers’ counterclaim that the lender committed breach by not adhering to its own privacy statement. The trial court denied the defendant’s motion to dismiss that claim. The Georgia Court of Appeals reversed on the grounds that “[a] review of [the privacy] statement shows that the statement applies only to consumer customers,” and the commercial borrower was not a consumer.<sup>57</sup> Nowhere in the decision does the

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50. *Id.* § 1, Reporters’ Notes at 13.  
 51. *Allegheny Coll. v. Nat’l Chautauqua Cty. Bank of Jamestown*, 246 N.Y. 369, 375 (1927).  
 52. 757 S.E.2d 239 (Ga. Ct. App. 2014).  
 53. DRAFT RESTATEMENT § 1, Reporters’ Notes at 13.  
 54. 379 F. Supp. 2d 299 (E.D.N.Y. 2005).  
 55. 370 F. Supp. 2d 552 (N.D. Tex. 2005).  
 56. DRAFT RESTATEMENT § 1, Reporters’ Notes at 14.  
 57. 757 S.E. at 247. *See also* *Gwinnett Cmty. Bank v. Arlington Capital, LLC*, 2013 WL 9541946, at \*3 (Ga. Super. 2013) (denying the defendant’s motion to dismiss the breach of contract claim).



court state that the privacy statement created a contract with consumers. Nor did it need to reach the issue to dismiss the commercial borrower's claim of breach. The Draft therefore mischaracterizes the *Gwinnitt* opinion when it states that "the court found that privacy notices may give rise to contractual obligations."<sup>58</sup>

The Reporters describe the District Court for the Eastern District of New York's decision in *JetBlue* as the "dominant precedent" for their position that online privacy policies fall under the rules of the Draft Restatement.<sup>59</sup> Although the holding provides some support for the draft comment, that support is very limited, and the court's reasoning is sharply at odds with the Draft's proposed formation rules.

The relevant issue in *JetBlue* was the plaintiff's claim that "JetBlue's published privacy policy constitutes a self-imposed contractual obligation by and between the airline and the consumers with whom it transacted business."<sup>60</sup> JetBlue argued in its motion to dismiss that the policy did not create a contract, as customers were able to purchase tickets online or by phone "without ever viewing, reading, or relying on JetBlue's website privacy statement."<sup>61</sup> Applying the very deferential standard required for a Rule 12(b)(6) motion to dismiss,<sup>62</sup> the court found the pleadings sufficient to state a claim for breach, based on plaintiffs' allegation "that they and other class members relied on the representations and assurances contained in the privacy policy when choosing to purchase air transportation from JetBlue."<sup>63</sup> Because the court permitted the claim to go forward, this study coded the decision as providing support for the proposed comment.

Yet this was not the end of the opinion. The court emphasized that the plaintiffs would be required to prove actual reliance on the privacy policy, a factual question that would be addressed at the class certification stage.<sup>64</sup> That requirement is at odds with the formation rules in section 2 of the Draft Restatement, which require only "reasonable notice . . . and an opportunity to review."<sup>65</sup> In any case, the contract claim never reached class certification. The court granted in the same decision the defendants' motion to dismiss the claim on the separate ground that the plaintiffs had failed to allege injury.<sup>66</sup> The

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58. DRAFT RESTATEMENT § 1, Reporters' Notes at 14.

59. *Id.* § 1, Reporters' Notes at 14; *see also* Bar-Gill et al., *supra* note 3 at 29 (describing *JetBlue* as the "dominant case" based on citation counts). I discuss problems with the Reporters' use of citation counts in Section III.D.

60. 379 F. Supp. 2d at 316.

61. *Id.* at 325.

62. *Id.* at 305-06 ("In deciding a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted, a court must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff.").

63. *Id.* at 325.

64. *Id.*

65. DRAFT RESTATEMENT § 2(a).

66. 379 F. Supp. 2d at 326-27. A review of the case docket indicates that the plaintiff did not amend its complaint and that the above decision effectively ended the case.

statement that the privacy policy might have been a term of the contract was therefore unnecessary to the outcome, was never tested on the evidence, and suggested a reliance requirement absent from the Draft Restatement's own formation rules. Although there is evidence that the court considered the contract claim potentially viable, the decision as a whole does not support comment 9.

The third judicial decision that the Reporters' Notes identify as a leading authority is the district court's published decision in *In re American Airlines Privacy Litigation*. The decision does not appear on the table of decisions that the Reporters provided the author, although a subsequent unpublished decision in the same case does.<sup>67</sup>

The published decision in *American Airlines* does not support the proposed comment. The relevant question was similar to that in *JetBlue*: the defendant airline's motion to dismiss the plaintiffs' claim that it had committed breach by violating its own privacy policy. The only arguable evidence for the proposed comment is a sentence in the summary of the plaintiffs' complaint that "American's website sets out its privacy policy, which is part of the contract of carriage with passengers."<sup>68</sup> But that statement is not a legal conclusion. The proposition is assumed *arguendo* for the sake of deciding the motion to dismiss, on the grounds that the court was required at that stage of the proceedings to "accept[] as true all well-pleaded factual obligations, and draw[] all reasonable inferences in plaintiffs' favor."<sup>69</sup> Having granted the plaintiffs the benefit of that doubt, the court proceeded in the same decision to dismiss the contract claim based on their failure to plead injury.<sup>70</sup>

The third traditional argument one finds in the Reporters' Notes addresses an objection I suggested in the previous section. "The conclusion that privacy notices are contracts does not preclude the application of specific rules arising from privacy law. It suggests, however, that unless a clear overriding reason exists, the general rules and principles of this Restatement ought to apply."<sup>71</sup> In other words, applying the Draft's relaxed requirements for contractual assent to online privacy policies does not preclude legislative or perhaps regulatory action in this area that might address the special concerns raised by data privacy.

This is, of course, true. But it is not a reason why courts should not take the same considerations into account when determining how the common law of contracts applies to privacy policies in consumer transactions. And it requires only a passing familiarity with the Supreme Court's recent Federal Arbitration

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67. *In re Am. Airlines, Inc. Privacy Litig.*, 2005 WL 3323028 (N.D. Tex. Dec. 7, 2005).

68. 370 F. Supp. at 556.

69. *Id.* at 556, n.5.

70. *Id.* at 567. The subsequent unpublished *American Airlines* decision, which appears in the dataset of Reporters' quantitative study, provides some support for the proposed comment 9, and appears in this study's count of cases recognizing that a privacy policy might become part of the contract. But it too was on a motion to dismiss. Section IV.A.2 discusses the weakness of the authority provided by such decisions.

71. DRAFT RESTATEMENT § 1, Reporters' Notes at 16.

Act jurisprudence to understand how in our political and legal culture the rhetoric of contract can be wielded to great effect in battles over consumer protection.<sup>72</sup> The Draft Restatement’s treatment of online privacy policies as contract terms is not inconsequential.

### III. Attempt to Reproduce the Draft’s Quantitative Results

The limitations on the Draft’s traditional legal arguments for comment 9 make it all the more important to understand the strength of the Reporters’ quantitative study. The Reporters state that they find between 2004 and 2015 fifty-one decisions, representing “all published and readily available unpublished decisions involving claims for breach of contract for business violations of privacy policies.”<sup>73</sup> Based on their coding of those decisions, they find that out of forty relevant decisions, in thirty-five “the court concluded that privacy policies could give rise to contractual obligations,” whereas in only five did the court “conclude that privacy notices are not contracts.”<sup>74</sup> They also find a “clear and increasing trend toward contractual enforcement of privacy policies,” and, based on citation counts, that “cases embracing privacy notices as contracts are not only more numerous, but more influential.”<sup>75</sup> In addition to including these results in the Draft Restatement, the Reporters published them in the Winter 2017 issue of *University of Chicago Law Review* (the “Chicago Article”).<sup>76</sup>

The Reporters have not yet published the data or coding from any of the Draft Restatement’s six quantitative case law studies. In February 2017, I asked them via email whether they would share the data from those studies. They graciously sent a spreadsheet with the case citations and some of the coding from their study of privacy policies.<sup>77</sup> This Part reports the results of my attempt to reproduce the Reporters’ findings using the dataset they provided. Section III.A discusses this study’s methods. Section III.B describes the core results of my independent coding of the decisions in the dataset. Section III.C analyzes the Reporters’ claim of a trend toward enforcement in contract. Section III.D evaluates the Reporters’ use of citation counts to identify leading decisions.

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72. See, e.g., *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 240-53 (2013) (Kagan, J., dissenting); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 357-67 (2011) (Breyer, J., dissenting).

73. DRAFT RESTATEMENT § 1, Reporters’ Notes at 14. This study did not test the recall of the Reporters’ search methods.

74. *Id.* § 1, Reporters’ Notes at 15.

75. *Id.*

76. Bar-Gill et al., *supra* note 3.

77. The Reporters declined to provide data or coding from the other studies described in the Draft Restatement. The Reporters have provided data from the other studies to advisers and members of a consultative group for the Draft Restatement project. See Adam Levitin et al., *Independent Review of the Empirical Studies Supporting the Draft Restatement of Consumer Contracts*, 36 *YALE J. ON REG.* 447 (2019).

*A. Coding Criteria*

The Reporters provided a Microsoft Excel spreadsheet listing the fifty-one decisions they used in their study of privacy policies. Although the Reporters coded the decisions for features such as claim type (sword or shield), action type (class or bilateral), and transaction type (services, sale of goods, etc.),<sup>78</sup> the spreadsheet they provided coded for only three variables: (1) number of out-of-state citations, (2) out-of-state citations per year, and (3) whether the decision recognized the privacy policy as part of the contract (“k\_found”), did not recognize it as part of the contract (“pp\_not\_a\_contract”), or neither.

The Reporters did not provide and have not published a detailed description of their procedures for coding cases. The Chicago Article indicates that research assistants might have performed the coding.<sup>79</sup> The Reporters have not said whether coding was done blindly—whether coders were aware, for example, of any working hypothesis with respect to privacy policies. Nor do they describe external checks on coding—whether, for example, decisions were coded by more than one reader, and if so the interrater reliability measure,<sup>80</sup> or whether the Reporters themselves checked or corrected any coding.

Because I wanted to explore the coding decisions as much as the results of the coding, I did not use blind coding or multiple independent coders. A single research assistant gathered the fifty-one decisions in the Reporters’ dataset and did a first cut at coding.<sup>81</sup> I then read and recoded those decisions. Both of us were aware of the Reporters’ coding when reading the decisions. This Article reports only my coding. The results might therefore be described as “law office empiricism.” This study’s quantitative findings represent the judgment of a single experienced academic lawyer. A check on those judgments can be found in the parenthetical explanations in the footnotes in Section II.B, in the qualitative discussion of representative cases in Section IV.B, in the Appendix, which provides a summary of the coding of each case, and in the database available online that contains the complete coding.<sup>82</sup>

Often when attempting to replicate another study, a researcher uses the same coding procedures as in the original study. Neither the Draft Restatement

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78. Bar-Gill et al., *supra* note 3 at 20.

79. *Id.* at 16 (describing case selection).

80. The idea is familiar in empirical psychology. For an excellent introduction, see Steven E. Stemler, *A Comparison of Consensus, Consistency, and Measurement Approaches in Estimating Interrater Reliability*, PRACTICAL ASSESSMENT, RESEARCH & EVALUATION (2004), <http://PAREonline.net/getvn.asp?v=9&n=4> [<https://perma.cc/B2QH-3664>]. For a discussion of how it can be applied to the coding of cases, see Hall & Wright, *supra* note 18 at 112-16.

81. The research assistant was a law student in the second semester of her first year at Georgetown University Law Center. Consistent with the discussion in Part IV, the research assistant and I disagreed on a significant number of coding decisions.

82. Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, GEO. L.: SCHOLARLY COMMONS, <http://scholarship.law.georgetown.edu/facpub/1987/> [<https://perma.cc/NR97-KL97>] (under “Additional Files”). I am grateful to the Reporters for granting me permission to publish both their list of cases and their coding alongside mine.

nor the Chicago Article, however, describes a rubric given to coders. There is, however, also an advantage to attempting to reproduce results with independently constructed coding criteria. As described in Section II.B, the Draft makes several specific claims about the potential legal effects of a business's online privacy policy. Most significantly, the Draft states that "a notice that purports to create consent-based rights and obligations should be viewed as the subject matter of a consumer contract, in the same way that notices regarding the scope of warranty, remedies, or dispute resolution do."<sup>83</sup> This entails under sections 2 and 3 that such a notice can become part of the contract even if the consumer does not affirmatively assent to it. Taking that claim at face value—as voting members of the ALI must and as future users of the Restatement will—and then constructing a coding rubric to test it is also a way to check the Reporters' findings. This approach seeks to find the support an experienced scholar in the field would expect for the core legal claim that the Reporters use the quantitative study to bolster.

Coding the decisions in the dataset required both general criteria for identifying a decision's relevance, and in some instances case-specific judgments about a decision's meaning. This section discusses the generic coding criteria the author used. Case-specific judgments are described in Section III.B. Section IV.B describes in greater detail a representative sample of case-specific judgments.

Some generic coding decisions concerned which cases to treat as relevant to the question posed. The Reporters' Notes state that their study found "51 cases in which *consumers brought breach-of-contract claims* for violations of privacy notices or in which firms, as defendants, sought to enforce their own policies, *arguing that they constitute contracts* and that consumers' assent to them operates as a defense against the alleged privacy violations."<sup>84</sup> This study therefore counted only cases that were between businesses and consumers and in which one side or the other argued that a privacy policy was part of the contract.

This study also counted only decisions relevant to whether privacy policies are governed by the formation rules in the Draft Restatement's sections 2 and 3. As I have already observed, there is no question that parties can contract over information generated during a transaction. There is a question, however, about how a business can enter into such contracts with consumers, and particularly whether the Draft Restatement's formation rules apply to online privacy policies to which the consumer has not expressly assented.<sup>85</sup> The Reporters argue they do. They therefore attach the following illustration to comment 9:

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83. DRAFT RESTATEMENT § 1, Reporters' Notes at 13.

84. *Id.*, Reporters' Notes at 14 (emphasis added).

85. There is also a question about whether the rules apply to policies sent after a transaction is complete—shrinkwrap—and to modifications of privacy policies. None of the decisions in the dataset addressed those situations.

A consumer uses a business's website to order a product. Before the purchase is complete, the website refers the consumer to the Privacy Policy. The provisions of this Restatement apply to . . . the Privacy Policy.<sup>86</sup>

Similarly, the Reporters' Notes criticize the decision in *In re Northwest Airlines Privacy Litigation*, which held that a browsewrap privacy policy did not create a contract, as "inconsistent with the majority rule of what constitutes contractual assent (see § 2 of the Restatement)."<sup>87</sup> This study therefore counted only those decisions in which the consumer did not expressly agree to the privacy policy—in which the formation rules in the Draft section 2 would make a difference to the outcome.

Another set of general coding decisions related to the strength of the judicial statement. In an attempt to reproduce the Reporters' results, this study adopted a permissive rule—one that gave the Reporters' coding every benefit of the doubt.<sup>88</sup> It did not, for example, attempt to distinguish between dicta and holding. Any statement or holding in the decision that was relevant to the question was counted, although holding always trumped dicta. Thus, if a court permitted a contract claim to go forward, the decision was coded as supporting the proposed comment, even if it included dicta suggesting elements such as consumer reliance on the policy that were contrary to the rules in the Draft. Nor did this study differentiate between statements that the privacy policy *was* a contract term and statements that it *might be* a contract term. Either was coded as supporting the proposed comment. Finally, no distinction was made between bilateral and class actions, between pro se plaintiffs and plaintiffs represented by counsel, or based on other factors that might have affected the outcome. In short, when coding decisions, the author looked for any language or a holding that a later court might cite as direct, if nonbinding, authority for either the proposition that a separately provided privacy policy could be a contract term or that it could not be one. Part IV discusses how these permissive coding rules affect the authoritative and persuasive strength of the results.

This study therefore coded as supporting the proposed comment decisions that (a) held that the business's privacy policy was part of the contract, (b) permitted to go forward a well-pled contract-based claim or defense based on the privacy policy, or (c) stated that in the judge's view the privacy policy might be part of the contract. It coded as contrary authority decisions holding or stating that the privacy policy was not enforceable in contract for reasons inconsistent with sections 2 and 3 of the Draft. Like the Reporters, this study did not treat as

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86. DRAFT RESTATEMENT § 1, illus. 4.

87. *Id.* § 1, Reporters' Notes at 14; see *In re Nw. Airlines Privacy Litig.*, 2004 WL 1278459, at \*6 ("[A]bsent an allegation that Plaintiffs actually read the privacy policy, not merely the general allegation that Plaintiffs 'relied on' the policy, Plaintiffs have failed to allege an essential element of a contract claim: that the alleged 'offer' was accepted by Plaintiffs.").

88. Initial attempts at coding with a more restrictive rule resulted in many fewer relevant decisions.

relevant rejections of a contract-based claim or defense for other reasons, such as a failure to plead injury, or a finding that the behavior the consumer complained of was not contrary to the policy.<sup>89</sup> Such case-specific reasons do not address the general enforceability of privacy policies under the rules described in sections 2 and 3.

Like the Reporters, this study used a basic tripartite coding. Decisions in the dataset that contained support for the proposition that a business's posted privacy policy could become part of the contract pursuant to the rules in sections 2 and 3 were coded as "contract." Decisions that contained support for the opposite position, that a business's posted privacy policy does not become part of its contract with the consumer, were coded as "no contract." Decisions that did not contain support for either proposition were coded as "irrelevant."<sup>90</sup>

### *B. Judicial Decisions on Privacy Policies as Contracts*

This study's coding of the cases differs significantly from the Reporters' coding. The disagreements go both ways. In some decisions that the Reporters code as contract, I find that the court rejected the contract claim. In some decisions that the Reporters code as no contract, I find a statement or holding that the policy was or might have been a contract term. Overall, however, I find significantly more decisions containing no relevant statement or holding than do the Reporters. This study therefore both finds a smaller universe of relevant decisions and, within that universe, disagrees with the Reporters on a number of coding choices with respect to the fundamental question they sought to answer: "Are online privacy notices that businesses post on their websites treated by courts as contracts?"<sup>91</sup>

The reasons this study excludes decisions fall into three broad categories. I find nine decisions to be entirely inapposite to the question posed. Examples included cases that did not involve a dispute between a business and a consumer (such as *Gwinnett*,<sup>92</sup> described above in Section II.C), a decision that merely repeated the law of the case from an earlier decision in the dataset, and decisions that addressed terms of an end user license agreement or terms of service rather than separate privacy policies. Seventeen decisions are excluded based on a finding that the court said nothing, in either holding or dicta, about whether the

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89. See DRAFT RESTATEMENT § 1, Reporters' Notes at 14-15 (explaining the Reporters' decision not to count eleven cases in which the court "failed to find a valid claim for breach of contract for reasons internal to contract claims, including failure of consideration or lack of mutuality, insufficient notice to constitute mutual assent, and failure to ascertain damages for breach of contract"); Bar-Gill et al., *supra* note 3 at 26 n.59 (discussing the importance of identifying the grounds of decisions).

90. This correlates with the Reporters' coding of decisions "conclud[ing] that privacy notices could give rise to contractual obligations," decisions "concluding that privacy notices are not contracts," and decisions in which "the holding . . . did not turn on the classification of privacy notices as contracts." DRAFT RESTATEMENT, Reporters' Notes at 14-15.

91. Bar-Gill et al., *supra* note 3 at 25.

92. 757 S.E.2d 239 (Ga. Ct. App. 2014).

privacy policy at issue was or might be part of the contract. Finally, ten are excluded because they are what the Reporters describe as “shield cases”—cases in which the business invoked the privacy policy as a defense to a claimed non-contractual privacy violation. In these decisions courts did not ask whether or not the privacy policy was part of the contract, but applied rules drawn from torts and privacy law to determine whether consumers had effectively consented to the use of their information. Of the remaining fifteen decisions, I find that eleven arguably support the proposed comment (coded as “contract”) and that four are contrary authority (coded as “no contract”).

These numerical results can be summarized and compared to those of the Reporters in Table 1.

Table 1: Coding Comparisons

		Author	Draft Restatement
Irrelevant decisions in dataset	Inapposite	9	11
	No statement or holding	17	
	Shield	10	
Relevant decisions in dataset	Support Draft Comment	11	35
	Do Not Support Draft Comment	4	5

The remainder of this Section provides a more detailed description of the individual coding decisions that generated the above numbers, and then discusses what those numbers say about the empirical basis of comment 9. A summary of each case’s coding appears in the Appendix. The reader can access additional details of this study’s coding of individual cases in a Microsoft Excel file available online.<sup>93</sup>

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93. See Klass, *supra* note 82.



## 1. Inapposite Decisions

The Reporters provided a list of fifty-one decisions, all issued between 2004 and 2015. Of these, one state court decision has been “withdrawn from publication at the direction of the court” and was excluded from this study’s analysis.<sup>94</sup> Four decisions in the original dataset concerned business-to-business disputes, did not turn on the enforceability of a consumer contract, and so were removed.<sup>95</sup> The original dataset included two pairs of decisions that were separate rulings in the same case. In one of these, the later decision did not issue a new holding on the contract question but repeated the court’s earlier holding as the law of the case.<sup>96</sup> Given the relatively small size of the dataset, it seemed appropriate to exclude the later decision from the count. Finally, three decisions did not involve posted privacy policies or their analogs. Two of these concerned a clause in an end user license agreement or terms of service, as distinguished from a separate privacy policy, and required express consumer consent to those terms.<sup>97</sup> The third involved a written policy that the plaintiff signed at the

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94. Daniels v. JP Morgan Chase Bank, N.A., 2011 N.Y. Misc. LEXIS 4510 (N.Y. Sup. Ct. July 22, 2011) (coded by Reporters as contract). The docket indicates that the opinion was withdrawn on June 8, 2011, but does not indicate why. The opinion was found in a Bloomberg database. 2011 BL 243672. Had this study included the decision, it would have been coded as irrelevant. First, the opinion states that Account Agreement being sued upon “contains a privacy policy,” suggesting that the policy might not have been in a separate document. Second, and more importantly, the court dismissed the consumer’s breach claim because the plaintiffs failed to point to a provision of the account agreement or privacy policy that the defendant breached, and the defendant’s disclosures were pursuant to a magistrate’s subpoena. The court therefore did not address on the motion to dismiss the policy’s enforceability.

95. Be In, Inc. v. Google Inc., 2013 WL 5568706, at \*16 (N.D. Cal. Oct. 9, 2013) (plaintiff website operator argued defendant website operator violated browsewrap terms of service related to use of site code; coded by Reporters as neither contract nor no contract); Olney v. Job.Com, Inc., 2014 WL 4660851, at \*1, \*3-\*6 (E.D. Cal. Sept. 16, 2014) (although case was originally brought by consumer, order concerned the business defendant’s third-party complaint against another business; motion to dismiss granted based on holdings that third-party defendant was agent not undisclosed principal, and that browsewrap formation was insufficiently pled; coded by Reporters as neither contract nor no contract); Meyer v. Christie, 2007 WL 3120695, at \*1, \*3-\*5 (D. Kan. Oct. 24, 2007) (plaintiff was sophisticated real estate developer who sued lender; the complaint alleged contract based both on a privacy policy and on an implied relational obligation; the court relied on the long-term relationship with the bank to hold pleadings sufficient; coded by Reporters as contract); Gwinnett Cmty. Bank v. Arlington Capital, LLC, 326 Ga. App. 710, 710, 720-21 (Ga. Ct. App. 2014) (plaintiff was lender to real estate clients and borrowed \$4 million from defendant; no statement or holding was issued on whether the privacy policy would be enforceable for consumers, only that it did not apply to non-consumer party; coded by Reporters as contract).

96. In re Google Inc. Gmail Litig., 2014 WL 1102660, at \*14 (N.D. Cal. Mar. 18, 2014) (motion for class certification, following ruling on motion to dismiss, 2013 WL 5423918 (N.D. Cal. Sept. 26, 2013); coded by Reporters as contract).

The other follow-on decision, *In re Google, Inc. Privacy Policy Litigation*, 58 F. Supp. 3d 968 (N.D. Cal. 2014), issued a new ruling on the contract question for a subclass that had not been considered in the earlier decision, 2013 WL 6248499 (N.D. Cal. Dec. 3, 2013). This study coded the first decision as containing no relevant statement or holding, see *infra* note 107, and the second as holding that the privacy policy was a contract term.

97. Rudgayzer v. Yahoo! Inc., 2012 WL 5471149, \*1 (N.D. Cal. Nov. 9, 2012) (pro se plaintiff claimed breach of “Yahoo!’s Terms of Service statement, to which users are required to consent in order to obtain a Yahoo! email account”; coded by Reporters as neither contract nor no contract); Johnson v. Microsoft, 2009 WL 1794400, at \*2-\*5 (W.D. Wash. June 23, 2009) (contract claims based

defendant's place of business.<sup>98</sup> Because in each of these three cases the consumer affirmatively assented to the use of her information, the decisions do not support the Draft's suggestion that an online privacy policy can become part of a consumer contract pursuant to section 2's less demanding assent rules. Removing these nine inapposite decisions leaves forty-two decisions.

## 2. Decisions with No Relevant Statement or Holding

I believe all of the above judgments are relatively straightforward. This study's further paring of the dataset relied on coding decisions having to do with the reasoning in the decisions. Section IV.B describes in greater detail a representative sample of disagreements with the Reporters' coding and their causes.

Of the remaining forty-two decisions, and bracketing the shield decisions discussed in the next section, this study found that seventeen did not contain a statement or holding one way or the other on whether the privacy policy might be part of the contract. The Reporters' coding agrees for six of those seventeen decisions. In addition, the Reporters coded two decisions as neither contract nor no contract that this study coded as one or the other. The Reporters therefore coded a total of eight decisions in the pared dataset of forty-two as neither contract nor no contract, compared to this study's seventeen.

The reasons this study coded these decisions as irrelevant varied. Two decisions dismissed a breach of contract claim based on a failure to plead injury without discussing whether the privacy policy was part of the contract, one expressly declining to do so.<sup>99</sup> Another relied on the plaintiff's failure to plead

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on End User License Agreement where "user must accept [EULA] terms to complete installation"; three contract claims involved EULA only; one claim involved privacy statement expressly referenced in EULA; coded by Reporters as contract); *see also* *Be In, Inc. v. Google Inc.*, 2013 WL 5568706, \*1 (N.D. Cal. Oct. 9, 2013) (excluded because dispute did not involve a consumer contract; plaintiff claimed breach of browsewrap terms of service, not separate privacy policy).

98. *Pinero v. Jackson Hewitt Tax Serv. Inc.*, 594 F. Supp. 2d 710, 713 (E.D. La. 2009) (plaintiff signed privacy policy at tax preparer's office; contract claim dismissed for failure to plead cognizable injury; coded by Reporters as contract).

99. *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1028-29 (N.D. Cal. 2010) (breach claim dismissed based on failure to plead injury; coded by Reporters as neither contract nor no contract); *Trikas v. Universal Card Servs. Corp.*, 351 F. Supp. 2d 37, 46 (E.D.N.Y. 2005) (pro se plaintiff; expressly declining to rule on whether privacy policy was a contract term, but quoting *Dyer* on statements of policy not constituting contracts; coded by Reporters as neither contract nor no contract); *see also* *Rudgayzer v. Yahoo! Inc.*, 2012 WL 5471149, at \*6-\*7 (N.D. Cal. Nov. 9, 2012) (excluded because suit was for breach of clickwrap terms of service, not privacy policy; contract claim dismissed for failure to plead injury; coded by Reporters as neither contract nor no contract); *Pinero v. Jackson Hewitt Tax Serv. Inc.*, 594 F. Supp. 2d 710, 717-19 (E.D. La. 2009) (excluded because the plaintiff signed the privacy policy; breach of contract claim dismissed for failure to plead cognizable injury; coded by Reporters as contract).

As noted above, the Reporters agree that decisions based on failure to plead injury should not be included. *See supra* note 89. In the Chicago Article, however, they state that these cases turned on the "inability to ascertain damages," and argue that "the willingness of courts to address issues internal to contract enforcement—such as the measure of damages for breach—provides further evidence for the rejection of the original *Dyer* case" (which held that a privacy policy was not a contract term). Bar-Gill et al., *supra* note 3 at 28. This is a mistake. These cases are not about the certainty rule or the measure of

injury to conclude that the plaintiff lacked Article III standing.<sup>100</sup> One decision dismissed the complaint based on failure to plead consideration or breach.<sup>101</sup> Another addressed a case in which an integrated online membership agreement expressly provided that the privacy policy was not enforceable, causing the plaintiff to withdraw its claim for breach.<sup>102</sup> Yet another was decided on a collection of several of the above non-relevant reasons, again without addressing whether the consumer assented to the policy.<sup>103</sup> Five decisions concerned the scope of either an arbitration or a forum selection clause that was not in the privacy policy, although there were privacy-related claims. None of those five decisions addressed the legal effect of the privacy policy, much less whether it was a contract term.<sup>104</sup> In three other decisions the plaintiff did not attempt to enforce the privacy policy in contract and the defendant did not invoke it as a defense against a privacy claim.<sup>105</sup> And three decisions were reached based on

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damages. All were decided on Rule 12(b)(6) motions to dismiss for failure to plead cognizable injury. These decisions are simply examples of courts dismissing the case on one ground when others were perhaps available. In none did the court investigate the measure of damages or their ascertainability. *See also* DRAFT RESTATEMENT § 1, Reporters' Notes at 15 ("Note, however, that even in these eleven cases [that the Reporters did not count], courts applied contract-law doctrines to evaluate whether the privacy notices created enforceable obligations.").

100. *Carlsen v. GameStop Inc.*, 112 F. Supp. 3d 855, 866 (D. Minn. 2015) (pro se plaintiff; coded by Reporters as neither contract nor no contract).

101. *London v. New Albertson's, Inc.*, 2008 WL 4492642, at \*5-\*6 (S.D. Cal. Sept. 30, 2008) (coded by Reporters as neither contract nor no contract); *see* Bar-Gill et al., *supra* note 3 at 26 n.59 (stating that judicial doubts about whether a privacy policy is supported by consideration are not salient to the Reporters' question).

102. *Freedman v. America Online, Inc.*, 325 F. Supp. 2d 638, 640, 643 (E.D. Va. 2004) (pro se plaintiff; coded by Reporters as contract).

103. *Austin-Spearman v. AARP Servs.*, 113 F. Supp. 3d 130, 139-43 (D.D.C. 2015) (holding that because defendant's actions were permitted by the privacy policy, the plaintiff suffered no injury, and that because there was no notice of the privacy policy prior to the consumers' assent to a membership agreement, the policy was not part of that agreement; coded by Reporters as no contract).

104. *Bassett v. Elec. Arts, Inc.*, 2015 U.S. Dist. LEXIS 36175, at \*4 (E.D.N.Y. Feb. 9, 2015) (arbitration clause in clickwrap terms of service, not in privacy policy; coded by Reporters as contract); *Mendoza v. Microsoft*, 1 F. Supp. 3d 533, 548 (W.D. Tex. 2014) (choice-of-venue clause in terms of use covered alleged privacy violations described in privacy policy; motion to dismiss for improper venue granted; coded by Reporters as contract); *Hodson v. Bright House Networks, LLC*, 2013 WL 1499486, at \*1-\*2 (E.D. Cal. Apr. 11, 2013) (contract arbitration clause not narrowed by privacy policy, incorporated by reference, indicating consumers "may" bring Cable Communications Policy Act claims in district court; coded by Reporters as contract); *Hodson v. DirecTV, LLC*, 2012 WL 5464615, at \*3-\*4 (N.D. Cal. Nov. 8, 2012) (scope of arbitration clause in satellite television customer agreement; review of complaint shows no breach of contract claim based on privacy policy; coded by Reporters as contract); *Greer v. 1-800 Flowers.com*, 2007 WL 3102178, at \*2-\*3 (S.D. Tex. Oct. 3, 2007) (scope of choice of venue clause in terms of use, where privacy policy sued upon provided that it was subject to terms of use; coded by Reporters as contract).

105. *Padilla v. Dish Network L.L.C.*, 2013 WL 3791140, at \*8 (N.D. Ill. July 19, 2013) (plaintiff's implied contract claim withdrawn after defendant argued contrary terms in privacy policy; no leave to replead for violations of privacy policy, as no injury; coded by Reporters as neither contract nor no contract); *Burton v. Time Warner Cable*, 2012 WL 1415471, at \*4-\*5 (C.D. Cal. Mar. 20, 2013) (plaintiff's implied contract claim withdrawn after defendant argued contrary terms in privacy policy; leave to re-plead violation of privacy policy; court declined to address "the potentially amended express contract claim, until that claim is properly before the Court"; coded by Reporters as contract); *Browning v. AT&T Corp.*, 682 F. Supp. 2d 832 (N.D. Ill. 2009) (claims of privacy torts, violation of Illinois Consumer Fraud Act, and other statutory violations; coded by Reporters as contract).

evidentiary deficiencies or misleading of claims, again without addressing whether the privacy policy was enforceable in contract.<sup>106</sup> Removing these seventeen decisions leaves twenty-five decisions from the Reporters' original dataset.<sup>107</sup>

### 3. Shield Decisions

Like the Reporters, this study coded for whether the privacy policy was being used as a sword or as a shield. Sword cases in this context are those in which the plaintiff consumer claimed breach of contract based on the business's violation of its privacy policy. In other words, they are cases in which the plaintiff's argument relied on the policy being part of the contract. Shield cases are those in which the defendant business invoked the policy as a defense against a claim of statutory or common law privacy violations.

Although the dataset that the Reporters provided did not include sword/shield coding, the Chicago Article reports in the entire dataset twenty-four sword decisions, twenty-two shield decisions, and five "Consent for Statutory Liability" decisions.<sup>108</sup> This study independently coded for sword or shield. In the entire dataset, it found thirty-one sword decisions, ten shield decisions, two decisions that included both sword and shield claims, and eight decisions that were not classifiable as either sword or shield. Of the twenty-five decisions that remain after the above paring, this study coded fourteen as sword, ten as shield, and one as including both types of claims.<sup>109</sup>

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106. *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 979 (S.D. Cal. 2014) (breach of warranty claims subject to California law; plaintiffs did not address defendant's argument that they failed as a matter of California law; no leave to re-plead; coded by Reporters as contract); *Lucky v. Ky. Bank (In re Lucky)*, 2011 Bankr. LEXIS 5734, at \*23-\*24 (Bankr. E.D. Ky. Mar. 21, 2011) (granting defendant's motion for summary judgment where plaintiff did not provide evidence that privacy policy was in place, or indicate what terms were breached; coded by Reporters as no contract); *Lee v. Picture People, Inc.*, 2012 WL 1415471, at \*4 (Del. Sup. Ct. Mar. 19, 2012) (court rejected breach of warranty claim based on privacy policy since policy did not relate to the quality of the goods; coded by Reporters as neither contract nor no contract).

107. A portion of one other case was coded as irrelevant at this stage. *In re Google Inc., Privacy Policy Litigation*, 2013 WL 6248499 (N.D. Cal. Dec. 3, 2013), involved both the plaintiff's claim of breach of contract based on the privacy policy and the defendant's claim that the policy shielded them against separate privacy-based claims. The court rejected the plaintiff's claim of breach after finding that the policy expressly permitted the actions at issue. *Id.* at \*13-\*14. It therefore did not need to reach, and did not express an opinion on, the question of whether the policy was enforceable in contract. The defendant's invocation of the privacy policy as a defense appears in this study's shield count.

108. Bar-Gill et al., *supra* note 3 at 27.

109. *Cain v. Redbox Automated Retail, LLC*, 136 F. Supp. 3d 824 (E.D. Mich. 2015); *Garcia v. Enterprise Holdings, Inc.*, 78 F. Supp. 3d 1125 (N.D. Cal. 2015); *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016 (N.D. Cal. 2014); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190 (N.D. Cal. 2014); *Toney v. Quality Resources, Inc.*, 75 F. Supp. 3d 727 (N.D. Ill. 2014); *In re Google, Inc. Gmail Litig.* (1), 2013 WL 5423918 (N.D. Cal. Sept. 26, 2013); *In re Google, Inc. Privacy Policy Litig.* (1), 2013 WL 6248499 (N.D. Cal. Dec. 3, 2013); *Deering v. CenturyTel, Inc.*, 2011 WL 1842859 (D. Mont. May 16, 2011); *Del Vecchio v. Amazon.com, Inc.*, 2011 WL 6325910 (W.D. Wash. Dec. 1, 2011); *Dunbar v. Google, Inc.*, 2011 WL 12907501 (E.D. Tex. May 23, 2011); *Mortensen v. Bresnan Communication, L.L.C.*, 2010 WL 5140454 (D. Mont. Dec. 13, 2010).

The Reporters included both sword and shield decisions in their published results. This was significant. Of the eleven shield decisions (as coded by this study) in the pared dataset, the Reporters coded ten as recognizing the privacy policy as a contract term.<sup>110</sup> This study's coding agreed for all ten of those decisions that the privacy policy effectively shielded the defendant from a non-contractual privacy claim. These results, together with those described in the next subsection, suggest that, in the decisions in the dataset, invoking a privacy policy as a shield was significantly more likely to succeed than invoking it as a sword.

The question is whether these shield decisions should be counted as treating the privacy policy *as a term of the contract*. The Chicago Article addresses the fact that the ALI's Draft Principles of the Law, Data Privacy "articulates sui generis consent and 'heightened notice' rules, not founded in general contract law doctrine."<sup>111</sup> And it states that the Reporters' study "asked whether courts enforce privacy practices as contracts."<sup>112</sup> Neither the Chicago Article nor the Draft Restatement, however, explains how the Reporters distinguished enforcement of the privacy policy in contract from uses of the policy to satisfy non-contractual consent rules belonging to privacy law.

The shield cases (as coded by this study) include statutory claims based on the Electronic Communications Privacy Act ("Wiretap Act"),<sup>113</sup> the Computer Fraud and Abuse Act,<sup>114</sup> the Telephone Consumer Protection Act,<sup>115</sup> the Stored Communications Act,<sup>116</sup> Michigan's Video Rental Privacy Act,<sup>117</sup> and the California Invasion of Privacy Act,<sup>118</sup> as well as common law claims of invasion of privacy, trespass to chattels, and violations of the right to publicity.<sup>119</sup> As Section IV.B.2 discusses in greater detail, in none of these decisions did the court rely on the existence of a contract or contract doctrine to determine whether the privacy policy provided a defense to the non-contractual privacy claim. Instead those decisions applied rules governing consent or reasonable expectations drawn from the relevant statute or common law action, or from tort law generally.

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Two of the above decisions were coded as both sword and shield. With respect to *In re Google Inc., Privacy Policy Litigation*, this study found no holding or other statement on the sword claim. See *supra* note 107. *Cain v. Redbox* appears both in the count of shield cases and in the count of no contract cases, as the court held on summary judgment that only portions of the privacy policy expressly referenced in the clickwrap terms of use were part of the contract. See *infra* note 123.

110. The Reporters coded *Toney v. Quality Resources, Inc.*, 75 F. Supp. 3d 727 (N.D. Ill. 2014), as neither contract nor no contract, despite the fact that the court rejected the shield defense. See *id.* at 738-39.

111. Bar-Gill et al., *supra* note 3 at 25.

112. *Id.* at 26.

113. 18 U.S.C. § 2510 *et seq.* (2018).

114. 18 U.S.C. § 1030(a) (2018).

115. 47 U.S.C. § 227(b), (c) (2018).

116. 18 U.S.C. § 2701 (2018).

117. MICH. COMP. LAWS § 445.1711 *et seq.* (2018).

118. CAL. PENAL CODE § 637.6 (West 2018).

119. The privacy claims relevant to each of the shield cases can be found in this study's coded results, which are available online. See *supra* note 82.

Because of the different legal rules being applied and their different legal effects, this study coded the shield decisions as irrelevant. Put simply, they are not decisions “in which firms, defendants, sought to enforce their own policies, arguing that they constitute contracts . . .”<sup>120</sup> This means removing the eleven remaining decisions or partial decisions coded as shield.<sup>121</sup> That final paring leaves a dataset of fifteen cases in which there is a statement or holding on the question posed.

#### 4. Remaining Decisions

The Reporters do not address the size of their dataset, or whether forty decisions over the course of twelve years is a large enough number to draw robust conclusions, whether about what the law is or about how courts are likely to decide future cases. Reducing the number to fifteen decisions in twelve years—the result of the above paring—makes the question even more pressing. We simply might not have enough decisions to predict what future courts will do, much less to infer what rules courts apply when asked to determine whether a privacy policy is a standard term in a consumer contract.

With those caveats, it is still worth noting that this study’s coding generated result substantially different from those of the Reporters. Of the fifteen relevant decisions, this study found support for the proposed comment in eleven<sup>122</sup> and negative authority in four.<sup>123</sup> Based on their coding, the Reporters conclude that “courts are seven times more likely to recognize privacy policies as contracts than they are not to recognize them as contracts (thirty-five cases versus five cases).”<sup>124</sup> This study’s coding, on the contrary, found in a smaller number of

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120. DRAFT RESTATEMENT § 1, Reporters’ Notes at 14.

121. See *supra* note 107 for complications with a case that involved both sword and shield claims.

122. *Svenson v. Google Inc.*, 2015 U.S. Dist. LEXIS 43902 (N.D. Cal. Apr. 1, 2015) (coded by Reporters as contract); *Owens v. Dixie Motor Co.*, 2014 U.S. Dist. LEXIS 59006 (E.D. Cal. Mar. 31, 2014); *Yunker v. Pandora*, 2014 U.S. Dist. LEXIS 30829 (N.D. Cal. Mar. 10, 2014) (coded by Reporters as contract); *In re Google Inc. Privacy Policy Litig.*, 58 F. Supp. 3d 968 (N.D. Cal. 2014) (coded by Reporters as contract); *Claridge v. RockYou*, 785 F. Supp. 2d 855 (N.D. Cal. 2011) (coded by Reporters as contract); *Azeltine v. Bank of Am.*, 2010 WL 6511710 (D. Ariz. Dec. 14, 2010) (coded by Reporters as neither contract nor no contract); *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159 (S.D. Cal. 2010) (coded by Reporters as contract); *Smith v. Trusted Universal Standards in Elec. Transactions, Inc.*, 2010 WL 1799456 (D.N.J. May 4, 2010) (coded by Reporters as contract); *Loeffler v. Ritz-Carlton Hotel Co.*, 2006 WL 1796008 (D. Nev. Jun. 28, 2006) (coded by Reporters as contract); *In re Am. Airlines, Inc. Privacy Litig.*, 2005 WL 3323028 (N.D. Tex. Dec. 7, 2005) (coded by Reporters as contract); *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299 (E.D.N.Y. 2005) (coded by Reporters as contract).

123. *Cain v. Redbox Automated Retail, LLC*, 136 F. Supp. 3d 824 (E.D. Mich. 2015) (under Illinois law, only portions of privacy policy expressly mentioned in clickwrap terms of use were part of contract; coded by Reporters as contract); *Starkey v. Staples, Inc.*, 2013 U.S. Dist. LEXIS 186592 (M.D. Tenn. Nov. 5, 2013) (coded by Reporters as no contract); *Dyer v. Nw. Airlines Corps.*, 334 F. Supp. 2d 1196 (D.N.D. 2004) (coded by Reporters as no contract); *In re Nw. Airlines Privacy Litig.*, 2004 WL 1278459 (D. Minn. Jun. 6, 2004) (coded by Reporters as no contract).

124. Bar-Gill et al., *supra* note 3 at 28.

relevant decisions that courts were a little less than three times as likely to find a contract (eleven cases versus four cases).

The accuracy of any quantitative empirical study depends both on the size of the sample and the magnitude of the observed effect.<sup>125</sup> A smaller sample reduces the likelihood that the findings reflect underlying phenomena, as does a smaller observed effect. One way to see the difference between the strength of this study’s results and that of the Reporters is by calculating the confidence intervals for each.<sup>126</sup> In a study that uses inferential statistics to predict, for example, the future probability  $P$  of outcome  $O$  based on past outcomes, a 95% confidence interval with lower bound of  $A$  and upper bound of  $B$  means that, given the study’s sample size and the outcomes observed, there is a 95% chance that  $P$ ’s true value lies somewhere between  $A$  and  $B$ . There are several methods for calculating confidence intervals. Whereas normal, or Wald, approximation intervals work well for large sample sizes, other methods are more appropriate when a study is testing for ratios in a smaller sample.<sup>127</sup> Four methods for identifying the 95% confidence interval provide the following results for each study:

Table 2: 95% Confidence Intervals

		Draft’s Coding (7:1, $n=40$ )	Author’s Coding (11:4, $n=15$ )
Wald approximation intervals (“normal” intervals)	<i>lower bound</i>	0.773	0.510
	<i>upper bound</i>	0.977	0.957
Wilson score intervals	<i>lower bound</i>	0.739	0.484
	<i>upper bound</i>	0.945	0.891
Agresti-Coull intervals	<i>lower bound</i>	0.732	0.449
	<i>upper bound</i>	0.958	0.922
Clopper-Pearson intervals (“exact” method)	<i>lower bound</i>	0.732	0.476
	<i>upper bound</i>	0.950	0.895

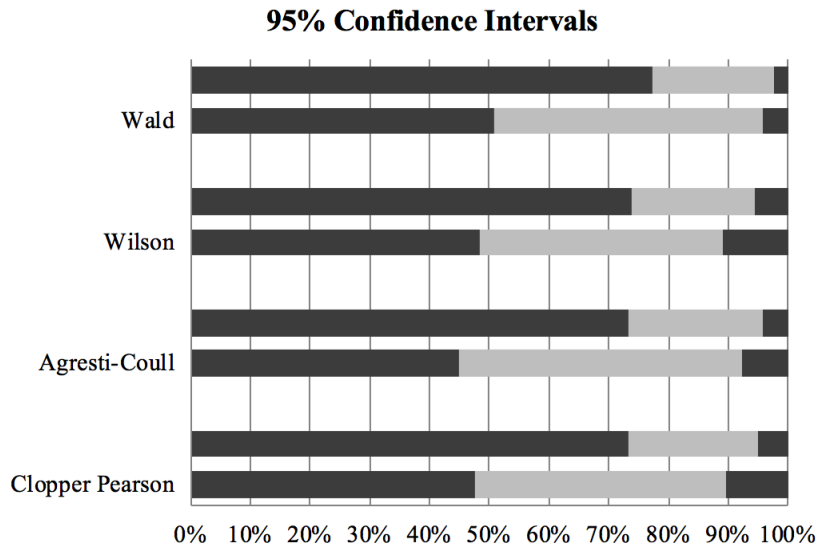
125. See John P. A. Ioannidis, *Why Most Published Research Findings Are False*, 2 PLOS MED. 696, 697 (2005).

126. I am grateful to my colleagues Neil Sukhatme and Joshua Teitelbaum for helping me with the statistical analysis in this and the next paragraph.

127. See Lawrence D. Brown, T. Tony Cai, Anirban DasGupta, *Interval Estimation for a Binomial Proportion*, 16 STAT. SCI. 101 (2001); Måns Thulin, *The Cost of Using Exact Confidence Intervals for a Binomial Proportion*, 8 ELECTRONIC J. OF STAT. 817 (2014).

These confidence intervals can be represented graphically as follows.

Figure 1



The light area in each bar represents the 95% confidence interval. The top bar for each method provides the confidence interval based on the Reporters' coding, the bottom the confidence interval based on this study's coding.

There are two things to notice about the above numbers and figure. First, as one would expect, as the size of the sample and magnitude of the effect go down, so too does a study's accuracy. The Reporters' coding of forty decisions and finding of a 7:1 ratio provide a 95% confidence interval of approximately 0.2 under each method. According to the Reporters' coding, there is a 95% level of confidence that the actual likelihood that a future court will recognize a privacy policy as a contract is somewhere between roughly 75% and 95%. This study's conclusion that there were in fact only 15 relevant decisions that produced a 11:4 ratio results in a 95% confidence intervals of somewhat more than 0.4, with lower and upper bounds of around 50% and 90%. If this study's coding is correct, the cases the Reporters found tell us much less about the actual likelihood that a future court will recognize a privacy policy as a contract—only that it lies somewhere between around fifty percent and around ninety percent.

Second, under all three of the preferred methods, this study finds that the lower bound of the 95% confidence interval is below 0.5, and under the Wald method the lower bound is only slightly higher than 0.5. This means that under the preferred methods, this study cannot reject the null hypothesis. Based on this study's coding of the data, one cannot say with 95% certainty even that it is more



likely than not that a future court will recognize a business's privacy policy as part of the contract.<sup>128</sup>

All that said, there nothing magical about a probability greater than 0.5. Although lawyers and courts regularly speak of "majority rules," the concept is rarely given a precise numerical meaning. Thus, a finding that 51% of courts adopt one rule and 49% another might reasonably be described, for purposes of determining what the law is, as a split with no clear majority. The important question—both for the ALI members who might be asked to vote on a proposed draft and for future users of a Restatement—is not what the majority of courts have held, but the strength of judicial support for one or another rule. That question is not binary, but scalar. It depends both on the ratio of the decisions coming out each way and on the number of decisions on the question. The above quantitative results suggest that the Reporters' coding significantly overstates the degree of support for their proposed rule. Part IV's qualitative analysis argues in addition that the decisions coded as contract have little authoritative or persuasive value.

A Reporter for the Principles of the Law, Data Privacy has recently observed that "contract proves largely irrelevant to information privacy law in the United States. There are relatively few cases involving this doctrine, and these show a divide between courts that view privacy notices as possible contracts and those that see them only as nonbinding expressions of preferences."<sup>129</sup> The study's results confirm that characterization of the case law.

### C. Trends

In addition to counting judicial decisions, the Reporters examined their coded data for trends over time. Perhaps because of the relatively small number of decisions, rather than plotting the number of decisions of each type for each year, the Reporters plotted the change in the cumulative number of decisions. This produces the following graph, which appears both in the Draft's Reporters' Notes and in the Chicago Article.<sup>130</sup>

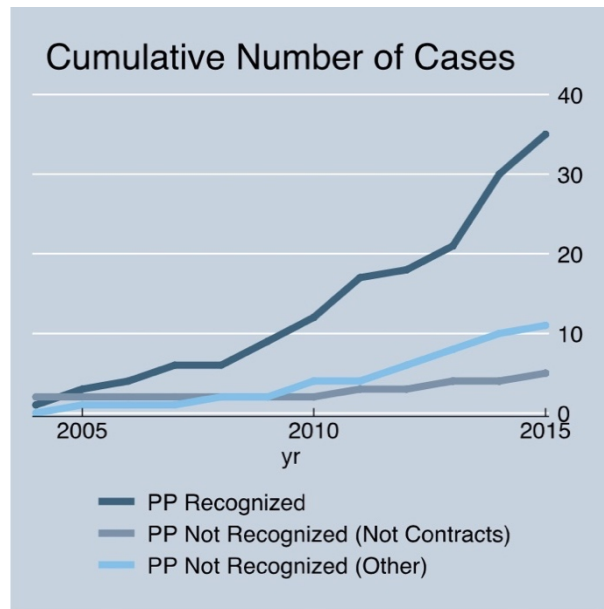
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128. Also relevant is that each method produces an upper bound for this study's coding below that of the Reporters' coding. Even with its wider confidence interval, this study was unable to confirm the upper bound of the Reporters' results.

129. Paul Schwartz & Karl-Nikolaus Peifer, *Transatlantic Data Privacy Law*, 106 GEO. L.J. 115, 151 (2017).

130. DRAFT RESTATEMENT § 1, Reporters' Notes at 15; Bar-Gill et al., *supra* note 3 at 29.

Figure 2



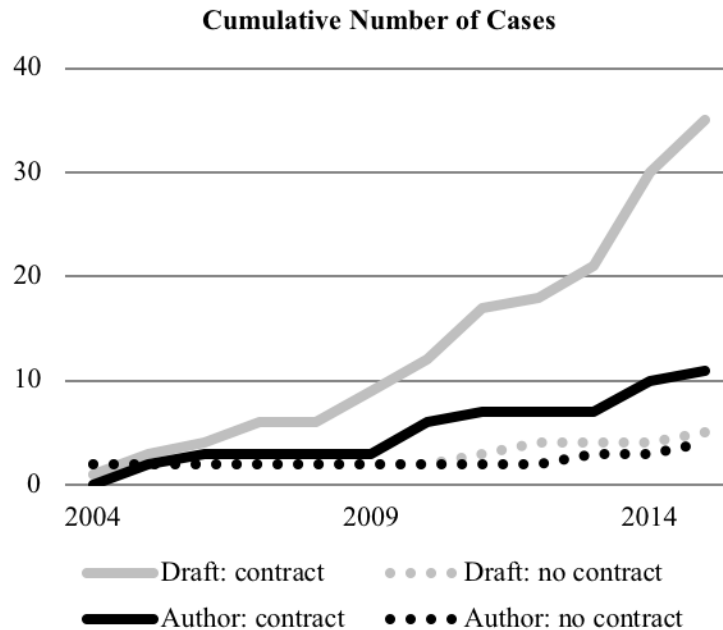
The Reporters argue that “[t]he graph shows the clear and increasing trend towards contractual enforcement of privacy policies.”<sup>131</sup>

Adding the results from this study’s coding provides a somewhat different picture of trends over time, keeping in mind that the smaller the relevant number of cases, the less reliable any conclusions drawn from them. Omitting the category of cases that the Reporters coded as neither contract nor no contract (“PP Not Recognized (Other)” in Figure Two) and combining the data from the two studies produces the following comparison graph:

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131. *Id.* § 1, Reporters’ Notes at 15; see also Bar-Gill et al., *supra* note 3 at 28 (“The evolution of the case law over time shows a drift away from the Dyer position.”).

Figure 3

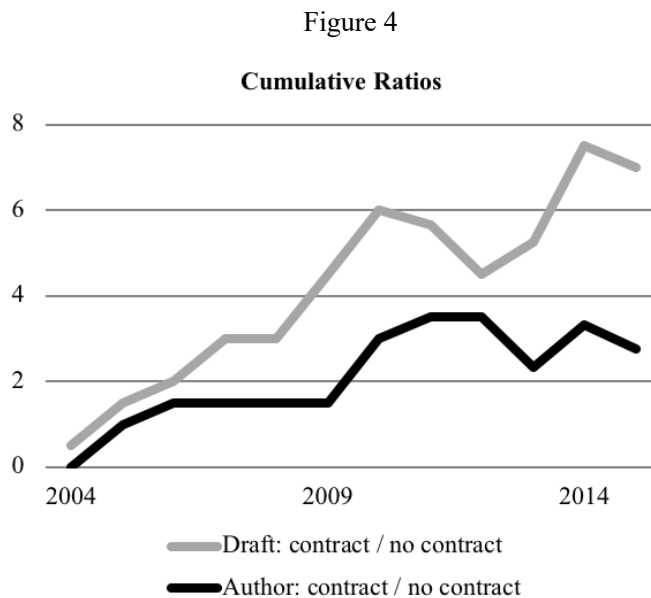


The darker lines represent the counts from this study's coding, the lighter lines the counts from the Draft Restatement's coding. In both studies there is an increase over time in the difference between the cumulative number of decisions stating that the privacy policy could be a contract term and the number stating that it was not, as one would expect given the final numbers in each study. But the rate of increase is much less significant using this study's coding. It is also worth noting that the lines representing the no-contract decisions in the two studies largely overlap. The difference between the studies' results lies almost entirely in the different number of decisions coded by each as suggesting that the privacy policy could be a contract term. And in fact, of the thirty-six decisions this study excluded from consideration for one reason or another, the Reporters coded twenty-four as recognizing a privacy policy as a contract term.

One might also question the Reporters' decision to present their results in the above form, and particularly to graph *cumulative* numbers of decisions. The Reporters perhaps chose to focus on the cumulative number because there are relatively few decisions each year. A bar chart of the number of decisions of each type each year, using either the Reporters' coding or this study's, does not suggest to the eye any obvious trends. But choosing to graph the cumulative number of decisions risks misleading some readers. A casual reader might not realize that a decision from 2004 appears twelve times in the graph—once in the year handed down, and again in every subsequent year as part of the cumulative count. To the reader who does not think mathematically or who is not paying

close attention, it might look like the number of decisions per year has increased dramatically over time. It has not, although the cumulative number of decisions naturally has. As importantly, though more subtly, what is significant in Figures 2 and 3 is not the growing delta between the cumulative numbers of contract and of no-contract decisions, but the relative changes in the slope of each line over time—or what is equivalent, the change in the ratio of contract to no-contract decisions over time. The trend question is not whether there are ever more holdings that a privacy policy is a term in the contract, but whether it is becoming more likely that a privacy policy will be treated as a term.<sup>132</sup>

One can approach this question by plotting the ratios between the number of each type of decision. Using the Reporters' decision to use cumulative counts, this produces the following graph:

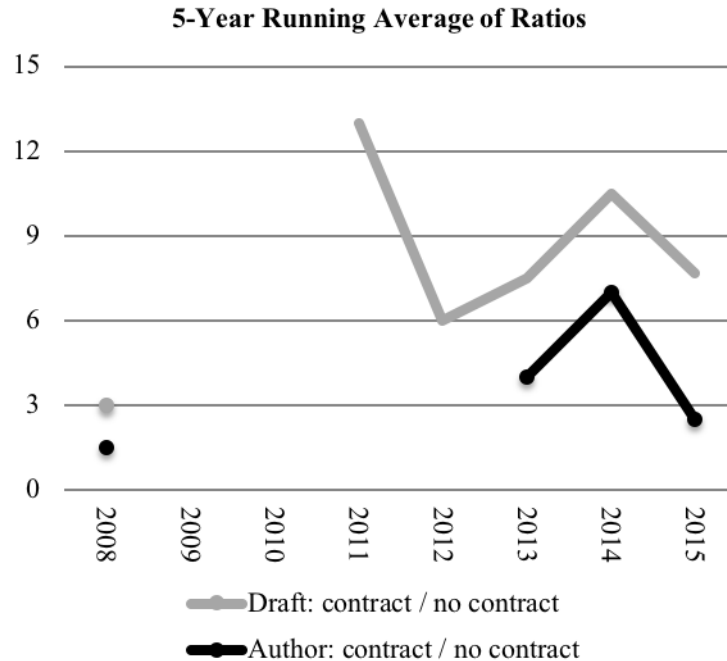


According to the Reporters' coding, the ratio of cumulative contract to no-contract decisions increases rapidly between 2004 and 2010, growing from 1:2 to 6:1. The rate of increase is much less dramatic between 2010 and 2015, first decreasing a bit then increasing back to 7:1. Using this study's coding, the change over time is considerably smaller. Beginning with zero contract cases in 2004, we arrive in 2010 at a ratio of 3:1, which by 2015 has drifted down to 2.75:1.

132. If the distinction is not obvious, consider this: Every year sees a growing difference, or delta, between the cumulative number of weekdays since year one and the cumulative number of weekend days since that date. But the ratio of weekdays to weekend days has remained fairly constant. Any given day is no more likely to be a weekday in the year 2019 than it was in the year nine.

An even more telling way to analyze the data is to look not at cumulative decisions, but discrete time slices. Because the total number of decisions is relatively low, yearly ratios do not tell us much. But taking five-year running averages—the ratio of contract to no contract decisions during multiple five-year periods—provides a very different picture.

Figure 5



The labels on the horizontal axis in Figure 5 are the last year of each five-year period. The gaps in the lines reflect that fact that in the Reporters’ coding there were two five-year periods (2005-2009 and 2006-2010) in which there were zero no-contract decisions, and in this study’s coding there were four such periods (running between 2005 and 2012). The longer gap for this study is attributable to the exclusion of many more decisions as not relevant to the question.

Figure 5 belies the Reporters’ statement that there is a “*clear and increasing trend towards contractual enforcement of privacy policies.*”<sup>133</sup> Instead it shows that according to the Reporters’ coding there has not been a net increase in the ratio of contract to no-contract decisions from around 2011 until 2015, or according to this study’s coding between 2013 and 2015. In fact, the Reporters’

133. DRAFT RESTATEMENT § 1, Reporters’ Notes at 15 (emphasis added).

study finds a decline in the ratio of contract to no-contract decisions over the last five years of the study period.

There is one additional factor to consider when thinking about the Draft's identification of trends. As noted above, the Reporters coded twenty-two of the original fifty-one decisions as shield cases. This study coded twelve decisions in the original dataset as shield cases, one of which was removed from the analysis because it reported an earlier holding in the same case. But as I noted above and will discuss at greater length in Section IV.B.2, if the question is "whether privacy policies posted by businesses . . . are contracts,"<sup>134</sup> there are good reasons to exclude the shield decisions from the analysis.

Because the Reporters did not provide their sword/shield coding, it is impossible to know with certainty the effect of including the shield decisions on the trends they observed. The Author does not know which decisions the Reporters coded as shield decisions, or how they pair up with their coding of contract, no contract, or neither. It is significant, however, that out of the twelve decisions in the complete dataset that this study codes as shield, the Reporters coded eleven as recognizing the privacy policy as a contract. This suggests that shield decisions might be significantly more likely to be coded in the Draft Restatement's analysis as contract than as no contract. As important, all twelve of the decisions this study codes as shield were decided between 2010 and 2015.<sup>135</sup> The timing is not surprising. Questions about data security and privacy have achieved increased salience in recent years, meaning more plaintiffs claiming non-contractual privacy violations and more opportunities for defendants to invoke their privacy policies as defenses. Taken together, these observations suggest that the Reporters' choice to include the shield decisions might have affected not only their analysis of the likelihood that a court will find a privacy policy to be part of the contract, but also their observations of trends over time. The increase in the ratio of contract to no-contract decisions that the Reporters observe might be, in whole or in part, an artifact of their decision to code shield decisions as supporting comment 9.

#### *D. Citation Counts*

In addition to looking at the ratio of contract to no-contract decisions and trends over time, the Reporters examined out-of-state citation counts, on the theory that "[w]hen such discretionary references are made, it is likely that the citing court found the cited cases helpful when internal precedent was unclear or

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134. *Id.*

135. One decision in 2010; two decisions in 2011, three decisions in 2012; two decisions in 2013; four decisions in 2014; two decisions in 2015. One of these decisions was removed from this study's dataset not because it was a shield case, but because it repeated the holding of an earlier decision in the same case also in the dataset.

missing.”<sup>136</sup> Because there is an eleven-year gap between the earliest and latest cases in the dataset, a comparison of the total number of citations is not telling. The Reporters therefore used average citations per year as a measure of influence.<sup>137</sup> They also recognize that citation counts can be noisy, as not all cases are cited positively or for the relevant holding. The Chicago Article states that they “addressed the problem of over-inclusiveness by using an alternative, narrower measure of influence, which counts only those cases that have been followed by other courts.”<sup>138</sup>

Both the Draft Restatement and the Chicago Article use citation counts to identify leading privacy policy decisions.<sup>139</sup> Although the Chicago Article appears to recognize the advantages of counting only citing cases that follow the relevant holding, both the Draft and the Chicago Article studies rely on total citation counts. The Chicago Article states that “[c]ases recognizing privacy policies as contracts are more likely to get cited out of state,” and that this supports the conclusion that “[a]fter 2005 . . . courts have predominantly recognized privacy policies as contracts.”<sup>140</sup> The Draft similarly reports that the “analysis of citations indicates that cases embracing privacy notices as contracts are not only more numerous, but more influential.”<sup>141</sup>

This study examined the citations to the fifty-one decisions in the Reporters’ dataset, coding them *inter alia* for the holding that the decision was cited for and how Westlaw classified the citation.<sup>142</sup> The coding was performed by the research assistant who had coded the cases in the original dataset. Citations were searched through June 2017.

Based on average citations per year, the Reporters identify the top three decisions recognizing privacy policies as contract terms to be *In re JetBlue Airways*<sup>143</sup> (2005, 39 citations in the Reporters’ period, 4 per year), *In re Sony*

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136. Bar-Gill et al., *supra* note 3 at 17. As noted in Section IV.A.1 below, the majority of decisions in the Reporters’ dataset are from federal district and bankruptcy courts. These decisions are not binding on other courts, including federal courts in the same jurisdiction. Unlike citations to a federal appellate or some state court decision, a citation to a federal trial court is always discretionary. For an apples-to-apples comparison, however, this study sticks to the Reporters’ method and focuses on out-of-state citations.

137. The Reporters do not address the fact that the number of annual citations to decisions commonly declines over time and that fewer years since the decision provides a smaller sample. Both reduce the likelihood that an average annual citation count of a recent decision accurately predicts that decision’s eventual influence. A relatively high average annual citation count for a recent case should therefore be taken with a grain of salt.

138. Bar-Gill et al., *supra* note 3 at 18.

139. DRAFT RESTATEMENT § 1, Reporters’ Notes at 14-15; Bar-Gill et al., *supra* note 3 at 29.

140. Bar-Gill et al., *supra* note 3 at 28-29.

141. DRAFT RESTATEMENT § 1, Reporters’ Notes at 15.

142. Westlaw uses eight classifications: “cited by,” “mentioned by,” “discussed by,” “examined,” “distinguished by (negative),” or “declined to follow by (negative),” “declined to extend by (negative),” and “disagreed with (negative).” Because of the larger number of cases and the time it would take to ensure completeness, this study did not exclude multiple decisions in a single case.

143. *In re Jetblue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299 (E.D.N.Y. 2005).

*Gaming Networks*<sup>144</sup> (2014, 5 citations, 3 per year), and *Perkins v. LinkedIn*<sup>145</sup> (2014, 3 citations, 2 per year).<sup>146</sup> This Article's study coded the latter two decisions as irrelevant. The court in *In re Sony Gaming* dismissed the plaintiffs' breach of express warranty claim without leave to re-plead based on a choice-of-law analysis, never addressing the question of the policy's enforceability.<sup>147</sup> *Perkins v. LinkedIn* is a shield case in which the court did not find that the privacy policy was part of the contract, but applied consent rules drawn from the Wiretap Act, the Stored Communications Act, and the common law right of publicity. Pertinent sections of the *Perkins* opinion are quoted at length in Section IV.B.2 below. I discuss the holding and reasoning of *JetBlue* above, in Section II.C. The Reporters identify as the two leading no-contract decisions *Dyer v. Northwest Airlines*<sup>148</sup> (2004, 16 citations, 1 per year) and *In re Northwest Airlines*<sup>149</sup> (2004, 10 citations, 1 per year).<sup>150</sup> This study coded both as sword cases and, like the Reporters, as no contract.

Although the total per-year citation counts appear to tell a compelling story, the narrative loses its power upon inspection. As one would expect given their holdings, none of the citations either to *In re Sony Gaming* or to *Perkins v. LinkedIn* are for the proposition that a privacy policy might be a contract term. During the period this study examined, only one decision citing *Perkins* did so for its lengthy non-contractual analysis of when a privacy policy shields a defendant from liability—the only section of the opinion even arguably relevant to the question.<sup>151</sup> And although the forty-four citations to *JetBlue* during this study's period might make it appear to be a leading decision, only two are for the court's statement that the privacy policy was part of the contract, both of

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144. *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942 (S.D. Cal. 2014).

145. *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190 (N.D. Cal. 2014).

146. DRAFT RESTATEMENT § 1, Reporters' Notes at 16.

147. The plaintiffs brought breach of implied and express warranty claims under Florida, Michigan, Missouri, New Hampshire, New York, Ohio, and Texas law. 996 F. Supp.2d 942, 976 (S.D. Cal. 2014). It is unclear from the opinion whether the plaintiffs founded their express warranty claims on the privacy policy. In any case, the court dismissed all seven counts based on choice-of-law clauses in the user agreements that specified California law. Because the plaintiffs did not address the defendant's argument that California express warranty claims would fail as a matter of law, the court did not grant leave to amend. *Id.* at 979. The court did, however, hold that the plaintiff's implied warranty claims were precluded by disclaimers in the clickwrap user agreement and privacy policy. *Id.* at 980-83 (noting *inter alia* that "each Plaintiff was required to consent to the PSN User Agreement and the PSN Privacy Policy"). And the court permitted the plaintiffs to proceed with their state UDAP statutes claims. *Id.* at 985-1009.

148. *Dyer v. Nw. Airlines Corps.*, 334 F. Supp. 2d 1196 (D.N.D. 2004).

149. *In re Nw. Airlines Privacy Litig.*, 2004 WL 1278459 (D. Minn. June 6, 2004).

150. The discussion of citation counts in the Reporters' Notes mentions only *Dyer*. Draft Restatement § 1, Reporters' Notes at 16.

151. *Gridiron Mgmt. Group LLC v. Pimmel*, 2014 WL 3490958, at \*2 (D. Neb. Jul. 11, 2014) (classified by Westlaw as "cited by").



which Westlaw classified as “cited by.”<sup>152</sup> Fourteen citations, in distinction, are for the holding that the plaintiff’s failure to plead injury warranted dismissal of the contract claim.

Citations to *Dyer v. Northwest Airlines* and to *In re Northwest Airlines*—the two leading no-contract decisions—more often address the Reporters’ question. Of the twenty-two out-of-state decisions that cite *Dyer*, ten are for its holding that the privacy policy was not part of the contract.<sup>153</sup> Of these, Westlaw classifies six as citing, one as mentioning, two as distinguishing and one as declining to follow. *In re Northwest Airlines* was cited by twelve out-of-state courts. Four citations are to its holding that the policy was not a contract term, with Westlaw classifying one as citing, one as mentioning, one as distinguishing, and one as declining to follow.<sup>154</sup>

In short, the Reporters’ use of total citation counts paints a misleading picture of influence. The three decisions the Reporters identify as the “dominant precedent”<sup>155</sup> for treating privacy policies as part of the contract are, by the most generous standards, together cited only three times for that proposition.<sup>156</sup> The two dominant decisions holding that the privacy policy was not a standard term together generated fourteen relevant citations, both positive and negative. The Reporters state that their “analysis of citations indicates that cases embracing privacy notices as contracts are not only more numerous, but more influential.”<sup>157</sup> Their data do not support that conclusion.

### E. Summary

The Draft identifies three results from the quantitative study of privacy policy decisions in support of the proposed comment 9 to section 1: a high proportion of decisions treating privacy policies as contract terms, a clear and

152. *Smith v. Trusted Universal Standards In Electronic Transactions, Inc.*, 2010 WL 1799456 (D.N.J. May 4, 2010) (classified by Westlaw as “cited by”); *Meyer v. Christie*, 2007 WL 3120695 (D. Kan. Oct. 24, 2007) (same).

153. *Dolmage v. Combined Ins. Co. of Am.*, 2016 WL 754731, at \*7 (N.D. Ill. Feb. 23, 2016); *Jianjun Fu v. Wells Fargo Home Mortg.*, 2014 WL 4681543, at \*6 (N.D. Ala. Sept. 12, 2014); *Mireskandari v. Daily Mail and Gen. Trust PLC*, 2013 WL 12114762, at \*18 (C.D. Cal. Oct. 8, 2013) (special motion to strike plaintiff’s amended complaint); *Mireskandari v. Mail*, 2013 WL 12129559 (C.D. Cal. Jul. 30, 2013) (motion to dismiss); *Willingham v. Glob. Payments, Inc.*, 2013 WL 440702, at \*20 (N.D. Ga. Feb. 5, 2013); *Azeltine v. Bank of Am.*, 2010 WL 6511710, at \*10 (D. Ariz. Dec. 14, 2010); *Smith v. Trusted Universal Standards In Electronic Transactions, Inc.*, 2010 WL 1799456, at \*9 (D.N.J. May 4, 2010); *Meyer v. Christie*, 2007 WL 3120695, at \*4 (D. Kan. Oct. 24, 2007); *Trikas v. Universal Card Servs. Corp.*, 351 F. Supp. 2d 37, 46 (E.D.N.Y. 2005). On the decision to count both *Mireskandari* decisions, see *supra* note 142.

154. *Starkey v. Staples, Inc.*, 2013 WL 5936898 (M.D. Tenn. Nov. 4, 2013), *vacated* (Nov. 5, 2013); *Willingham v. Global Payments, Inc.*, 2013 WL 12172926 (N.D. Tex. Aug. 15, 2013); *Smith v. Trusted Universal Standards In Electronic Transactions, Inc.*, 2010 WL 1799456 (D.N.J. May 4, 2010); *Meyer v. Christie*, 2007 WL 3120695 (D. Kan. Oct. 24, 2007).

155. DRAFT RESTATEMENT § 1, Reporters’ Notes at 14.

156. Assuming *arguendo* that the holding in *Perkins v. LinkedIn*, a shield case, is relevant to the question.

157. DRAFT RESTATEMENT § 1, Reporters’ Notes at 14.

increasing trend in that direction, and the greater influence of decisions enforcing privacy policies in contract. The Reporters' data do not support these claims. The power of any empirically based prediction is a function of the strength of the observed effect and the size of the sample. This study's independent coding finds a significantly weaker effect than does the Draft (less than three-to-one vs. seven-to-one) in a significantly smaller set of relevant decisions (fifteen vs. forty). This is much weaker quantitative evidence for the proposed comment than the Reporters find. Nor does this study find significant support for the trend reported in the Draft. Although there was a large increase in the proportion of contract decisions between 2004 and 2010, there was some downward movement between 2010 and 2015. And some or all of the increase that the Reporters observe might be due to their questionable coding of the shield decisions. Finally, decisions treating privacy policies as possible contract terms have not been more often cited for that proposition than have decisions refusing enforcement in contract.

#### IV. Qualitative Analysis of the Evidence

As noted in Section III.A, neither the Draft Restatement nor the Chicago Article provides the criteria used for coding cases. The Reporters frequently describe their results as finding that courts "recognize" privacy notices as contracts.<sup>158</sup> "Recognition" is not a legal term of art and might encompass a wide range of judicial expressions. In a few places, the Reporters suggest stronger findings. Thus, the Reporters' Notes to section 1 characterize the "dominant jurisprudence in this area" as "the *JetBlue* approach, which held that privacy notices can create contractual obligations," and conclude that "privacy notices are contracts."<sup>159</sup> Similarly, the Chicago Article states that question was "whether courts enforce privacy practices as contracts."<sup>160</sup>

Because the Reporters did not specify the strength of the legal authority in their coded cases, this study adopted a generous coding rule. As described in Section III.A, any decisions that might be cited for or against the Draft's proposed rule was counted. This was true whether the evidence was holding or dicta, and whether the decision stated that a posted privacy was a contract term, that it might be a contract term, or merely held that a contract claim could go forward.

All this raises the question: Given the decisions that this study and the Reporters' study coded as contract, what do their numerical results tell us about the state of the law? This Part addresses that question with a qualitative

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158. See DRAFT RESTATEMENT § 1, Reporters' Notes at 15; Bar-Gill et al., *supra* note 3 at 28-29; see also Reporters' Notes at 15 (describing cases as "embracing privacy notices as contracts"); Bar-Gill et al., *supra* note 3 at 28 (stating that "two state appellate courts . . . have suggested that privacy policies could be contracts").

159. Draft Restatement § 1, Reporters' Notes at 14, 16.

160. Bar-Gill et al., *supra* note 3 at 26.

assessment of the decisions in the Reporters’ dataset and their coding. Section IV.A discusses the types of decisions that comprise the Reporters’ dataset. Section IV.B describes difficulties in identifying authority in those decisions, persuasive or binding, for the Reporters’ proposed comment. Section IV.C summarizes and draws conclusions.

*A. Composition of the Dataset*

Two generic features of the decisions in the Reporters’ dataset are relevant to assessing how much support they provide for the proposed comment. First, the vast majority of decisions are from federal trial courts. Second, most of the decisions were reached on motions to dismiss. These features also explain the difficulty of coding many of the cases, discussed the next section.

1. Lack of Appellate Decisions

Of the fifty-one decisions in the dataset, only one is from an appellate court, *Gwinnett Community Bank v. Arlington Capital, LLC*,<sup>161</sup> discussed in Section II.C. This study coded the decision as irrelevant because the case was a business-to-business dispute and the court did not address the enforceability of the bank’s consumer privacy policy. Of the remaining decisions, two were from state trial courts and forty-eight from federal district courts or federal bankruptcy courts.

When appellate courts have not yet ruled on a question of law, it is reasonable to ask how trial courts handle it. Because of their high degree of competence, district court judgments about what the law requires are good evidence of what the law is, and accordingly enjoy considerable persuasive authority. In the absence of appellate decisions, it is therefore worth knowing how trial courts rule on claims that businesses’ privacy policies generate belong to their contracts with consumers.

That said, there is a significant difference between a legal question on which appellate courts have spoken and one that no state or federal appellate court has yet addressed. In making the case for treating out-of-state citations as more significant for weighting purposes, the Reporters emphasize that “[s]uch courts are not bound by the cited . . . cases under stare decisis principles.”<sup>162</sup> In fact, a federal district court ruling on a question of law is never binding on another court—including another district court within the same jurisdiction or even the same court in a different case.<sup>163</sup> Federal district courts do not make

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161. 326 Ga. App. 710 (2014). The Chicago Article states in passing that “the two state appellate courts to address this issue have suggested that privacy policies could be contracts.” Bar-Gill et al., *supra* note 3 at 28. The authors do not cite the two decisions they intend to refer to. There is not a second appellate decision in the dataset.

162. DRAFT RESTATEMENT § 1, Reporters’ Notes at 15-16.

163. 18 J. Moore et al., Moore’s Federal Practice § 134.02(1)(d), at 134-26 (3d ed. 2011) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.”).

federal law, much less the law of the state in which they sit. That is the job of state and, when there is no contrary binding authority, federal appellate courts. With respect to binding precedent—one natural understanding of what the law is—a district court decision is no more significant than that of an arbitration panel. The absence of any appellate decisions—federal or state—on the Reporters’ question suggests that it might not be ripe for Restatement.

The lack of appellate decisions also has practical consequences for attempts to quantify judicial reasoning and holdings. Because trial court decisions are of limited precedential value, trial judges are less likely than are appellate judges to fully describe the facts of the case, to identify a single *ratio decidendi*, or to provide a systematic discussion of relevant legal issues. Often the goal is to dispose of the case at bar and to forestall reversal on appeal, rather than to provide future courts guidance on how to decide similar cases. Thus, a trial court might simply state that the privacy policy might be part of the contract, without explaining how customers assented to the policy, whether it was mentioned in separately agreed-to terms of service, or even the rule that the court is applying.<sup>164</sup> As a result, it can be much more difficult to code the holding, reasoning and even relevant dicta in a trial court decision than it is in an appellate decision. That difficulty has consequences for the reproducibility and reliability of a quantitative study’s coding and numerical results.

## 2. Procedural Posture

Of the fifty-one decisions in the Reporters’ dataset, thirty-five—over two-thirds—were issued on Rule 12(b)(6) motions to dismiss.<sup>165</sup> Nine considered motions for summary judgment. The remaining decisions were on pre-discovery motions for class certification, to compel arbitration, to dismiss for improper venue, to dismiss for lack of subject-matter jurisdiction, or to transfer. Of the thirty-five decisions that the Reporters coded as contract, thirty were reached on pre-discovery motions. Of the eleven cases this study coded as contract, ten were reached on motions to dismiss.

The high proportion of Rule 12(b)(6) decisions is also significant. The question before the court on such motions is not the actual legal effect of the privacy policy, but whether the plaintiff has pled facts sufficient to survive the motion. And though some of the Rule 12(b)(6) decisions take judicial notice of the substance of the privacy policy,<sup>166</sup> others identify factual issues as

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164. See, e.g., *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1172 (S.D. Cal. 2010); *Yunker v. Pandora*, 2014 U.S. Dist. LEXIS 30829 (N.D. Cal. Mar. 10, 2014).

165. Many of the decisions involved multiple motions on different issues. A Rule 12(b)(6) motion to dismiss for failure to state a claim, for example, might be accompanied by a Rule 12(b)(1) motion to dismiss for lack of standing. This section describes only the procedural posture relevant to the contractual or neighboring issues.

166. This is often the case in the shield decisions. See, e.g., *Toney v. Quality Resources, Inc.*, 75 F. Supp. 3d 727, 740 (N.D. Ill. 2014) (taking judicial notice of privacy policy and converting motion to dismiss to motion for summary judgment); *In re Google Inc. Gmail Litig.*, 2013 WL 5423918,

sufficiently pled but expressly leave their resolution for a later stage in the proceedings.<sup>167</sup> One decision in the dataset, issued before the Supreme Court raised federal pleading requirements, emphasizes the low bar of notice pleading.<sup>168</sup>

The import of a Rule 12(b)(6) decision turns in part on the holding. If the court grants the motion to dismiss a claim of breach, it holds that there is no contract claim. Here the procedural posture does not much matter, and if the *ratio decidendi* is relevant to the study, the case should be coded as no contract. If the court denies the motion, it holds only that the policy *might* be a term in the contract, not that it *is* one. Here the procedural posture is crucial to the weight given the decision—and thereby also to the Reporters’ conclusion that courts are likely to recognize privacy policies as contract terms.

Although the Reporters coded for procedural posture,<sup>169</sup> neither the Draft Restatement nor the Chicago Article discusses the high proportion of decisions on motions to dismiss for failure to state a claim, much less whether some or all of those decisions should be weighted differently.

### B. Coding Decisions

The Reporters are eminent law professors and experienced empiricists. Some variation is always to be expected among independent empirical studies of the same question, or separate codings of the same decisions. But there is a very large gap between this study’s results and those of the Reporters. Much of the gap derives from differences in the coding of decisions. This section provides a qualitative analysis of those differences. The goal is not to explain or justify every coding decision in this study. For basic explanations, the reader can look to the parentheticals to case citations in Section III.C, to the descriptions in the Appendix, and to the comments in the coded data posted online. The aim is rather to identify the types of judgments that the coding required and where the two studies generally disagreed on those judgments. A closer look at a representative sample of judicial opinions also illustrates the difficulties in coding trial court

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at \*7 (granting Google’s motion to take judicial notice of its terms of service and privacy policies); *Del Vecchio v. Amazon.com Inc.*, 2011 WL 6325910, at \*4, \*13 n.7 (W.D. Wash.) (discussing details of Amazon’s privacy policy).

167. See, e.g., *Garcia v. Enter. Holdings, Inc.*, 78 F. Supp. 3d 1125, 1138 (N.D. Cal. 2015) (shield case dismissing privacy claim based on plaintiff’s failure to plead lack of consent to privacy policy, but granting plaintiff leave to amend complaint); *Smith v. Trusted Universal Standards in Elec. Transactions, Inc.*, 2010 WL 1799456, at \*9 (D.N.J.) (“[G]iving [the pro se] Plaintiff the benefit of the doubt, he seems to have alleged that all of the above provisions were part of his agreement with Comcast and that he relied on them.”); *In re Am. Airlines, Inc., Privacy Litig.*, 2005 WL 3323028, at \*2 (N.D. Tex. Dec. 7, 2005) (“The issue is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim.”); *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 325 (E.D.N.Y. 2005) (reasoning that “the issue of who actually read and relied on the policy would be addressed more properly at the class certification stage”).

168. *Loeffler v. Ritz-Carlton Hotel Co.*, 2006 WL 1796008, at \*4 (D. Nev.). Section IV.B.3 provides a detailed discussion of the *Loeffler* decision.

169. *Bar-Gill et al.*, *supra* note 3 at 17 n. 25.

decisions, especially on a motion to dismiss. And it exposes the weakness of the authority that the Reporters found for the proposed comment.

### 1. Inapposite Decisions and Decisions with No Relevant Holding or Statement

Because the Reporters have neither published their coding rubric nor described individual coding choices, one can only guess at the judgments that lie behind their coding. Some coding simply appears to be mistaken.

For example, four of the fifty-one decisions in the dataset involved business-to-business contract claims, not consumer-to-business claims.<sup>170</sup> I have already discussed one example: *Gwinnett Community Bank v. Arlington Capitol*.<sup>171</sup> Another is *Meyer v. Christie*.<sup>172</sup> This case involved two real estate developers' suit against a bank, based on the bank's disclosure of their financial information to other developers in the project.<sup>173</sup> On the motion to dismiss the court rejected the bank's argument that "its privacy policy [was] nothing more than a mere unilateral statement of company policy,"<sup>174</sup> which perhaps explains why the Reporters coded the case as contract. But the plaintiff developers were not consumers under the Restatement definition, "individual[s] acting primarily for personal, family, or household purposes."<sup>175</sup> Moreover, the court's reasons for holding that the privacy policy might be part of the contract included the parties' long-term relationship, one plaintiff's claimed reliance on the privacy policy, and the bank's demand for the information as a condition of entering into the transaction.<sup>176</sup> None of these correspond to the typical consumer contract. It is difficult to understand why this and the other decisions in business-to-business disputes were counted in a study of consumer contracts.

Nor is it clear why the Reporters included decisions in which there was neither a breach of contract claim nor an attempt to use the privacy policy as defense against alleged privacy violations.<sup>177</sup> The Reporters coded *Browning v. AT&T*, for example, as recognizing the privacy policy as a contract. Yet the

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170. See *supra* note 95.

171. 326 Ga. App. 710 (2014). See *supra* Section II.C.

172. 2007 WL 3120695 (D. Kan. Oct. 24, 2007).

173. *Id.* at \*1-3.

174. *Id.* at \*4.

175. Draft Restatement §§ 1(a)(1).

176. "Plaintiffs' complaint alleges that Mr. Meyer had a long-term banking business and banking relationship with Security Savings; that in the course of that relationship he relied on the bank to preserve his confidential information according to the terms of its privacy policy; and that the bank had solicited his financial information when it requested that he act as a personal guarantor on the loans that it made to [Meyer's other business]. Inferentially, then, the bank's privacy policy was part and parcel of its offer to make the loan to [the business], which was accepted when Mr. Meyer divulged information to the bank with the understanding that the bank would keep it confidential in accordance with its privacy policy. Under this view of the facts, the bank's privacy policy constituted part of Mr. Meyer's bargained-for exchange with the bank." Meyer, 2007 WL 3120695, at \*4.

177. See *supra* note 107.

complaint in *Browning* did not include a claim for breach,<sup>178</sup> and the defendant did not attempt to invoke the policy as a shield against the plaintiff's statutory and tort privacy claims.<sup>179</sup> The plaintiff did argue that the defendant's privacy policy violated the Illinois Consumer Fraud Act. The court rejected that claim based on its finding that the privacy policy permitted the disclosures in question. That reasoning might look similar to the reasoning in some contract cases. The legal question, however, was neither whether there was a breach of contract nor whether the plaintiff consented to the disclosure, but whether the policy was deceptive.

Also difficult to understand is the choice to count decisions that turned on terms embedded in clickwrap agreements, rather than separate privacy policies.<sup>180</sup> In *Johnson v. Microsoft*, for example, the district court found that Microsoft's clickwrap EULA, which users were required to accept before installing its software, did not prohibit the collection of IP addresses, and on that basis granted the defendant's motion for summary judgment on the plaintiffs' breach of contract claim.<sup>181</sup> In reaching this conclusion, the court expressly rejected the plaintiffs' argument that the EULA incorporated Microsoft's security glossary, which was separately available on its website.<sup>182</sup> The court explained later in the opinion that "[s]tatements or definitions found on web sites unrelated to the EULA do not bind or obligate the parties, and cannot give rise to a claim for breach of contract."<sup>183</sup> This study codes the decision as irrelevant, as it did not involve a claim based on a privacy policy. The Reporters coded it as recognizing the privacy policy as a contract, despite the lack of a holding to that effect and the court's suggestions to the contrary.

## 2. Shield Decisions

The coding of the shield decisions, which accounts for a significant portion of the difference between the two studies' results, deserves special attention.<sup>184</sup> In a shield case, the defendant invokes its privacy policy against one or more claims of non-contractual privacy violations. This study found in all the shield decisions in the dataset, courts looked not to the law of contract, but to tort and

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178. *Browning v. AT&T Corp.*, 682 F. Supp. 2d 832, 841-44 (N.D. Ill. 2009) (dismissing a claim of violation of the Illinois Consumer Fraud Act).

179. *Browning*, 682 F. Supp. 2d. at 835-41.

180. *See supra* notes 97 & 98.

181. *Johnson v. Microsoft*, 2009 WL 1794400, at \*3-\*5 (W.D. Wash. June 23, 2009).

182. *Id.* at \*12 ("Because the EULA does not incorporate the web glossary by reference, and there is no evidence that any of the Plaintiffs even read the glossary, the court finds that the web glossary is not helpful to construing the provision.").

183. *Id.* at \*14 (describing the holding in the analysis of the privacy claim).

184. *Supra* Section III.B.3.

statutory law to determine the requirements for a legally effective consent to the use in question.<sup>185</sup>

*Perkins v. LinkedIn Corp.*, provides a good example. The district court in *Perkins* held that the privacy policy shielded the defendant against claimed violations of the Stored Communications Act (SCA) and the Wiretap Act. The court's analysis of these questions is more fulsome than that of others, but otherwise representative:

The SCA exempts from its coverage conduct "authorized . . . by the person or entity providing a wire or electronic communications service," [18 U.S.C.] § 2701(c)(1), or "by a user of that service with respect to a communication of or intended for that user," *id.* § 2701(c)(2). While there is relatively scant authority on the definition of "authorized" under the SCA, the Ninth Circuit has analogized authorization under the SCA to consent that defeats a common law trespass claim. *Theofel v. Farey-Jones*, 359 F.3d 1066, 1072 (9th Cir. 2004). The Restatement (Second) of Torts, which the Ninth Circuit cited for this proposition, describes the consent exception as follows: "If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact." Restatement (Second) of Torts § 892.

. . . Under [the Wiretap Act], it is not unlawful "to intercept a wire, oral, or electronic communication . . . where one of the parties to the communication has given prior consent to such interception." Consent to an interception can be explicit or implied, but any consent must be actual. [citations omitted] "[G]enerally, consent must be express, but consent may be implied where there are surrounding circumstances indicating that the defendant knowingly agreed to the surveillance." *U.S. v. Staves*, 383 F.3d 977, 981 (9th Cir.2004) (internal quotation marks omitted). "In the [the Wiretap Act] milieu as in other settings, consent inheres where a person's behavior manifests acquiescence or a comparable voluntary diminution of his or her otherwise protected rights." *Griggs-Ryan v. Smith*, 904 F.2d 112, 116 (1st Cir.1990).

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185. One case used the existence of a contract in analyzing a shield defense but did not turn on the contract analysis. In *Cain v. Redbox Automated Retail, LLC*, 136 F. Supp. 3d 824 (2015), the court held on summary judgment that plaintiffs had provided "written permission" as required by Michigan's Video Rental Privacy Act (VRPA), MICH. COMP. LAWS § 445.1713, for the defendant's use of consumer information. The written permission requirement was satisfied when customers completed the transaction after a notice reading, "By pressing 'pay' or 'use credits' you agree to the Terms," and where the terms of use expressly referenced salient permissions in the defendant's privacy policy. 136 F. Supp. 3d at 833-37. Although the court stated that the clickwrap terms of use were a contract, the salient question was whether proceeding with the transaction after notice constituted written permission under the VRPA. The court's analysis of the issue presupposes that the mere availability of the policy prior to checkout was not enough to satisfy the VRPA. Moreover, the court held that the terms of use did not "completely adopt the Privacy Policy in its entirety." *Id.* at 834.



There may be subtle differences between the consent exception to Wiretap Act liability and the authorization exception to SCA liability. However, the parties conceded, and the Court finds that for the purposes of the instant Motion, the question under both is essentially the same: Would a reasonable user who viewed the LinkedIn's disclosures have understood that LinkedIn was collecting email addresses from the user's external email account such that the user's acquiescence demonstrates that she consented to or authorized the collection?<sup>186</sup>

Nowhere in the above analysis does the court refer to contract law or to the rules of contract formation. Nor did the plaintiff in the case claim breach of contract. Yet the Reporters coded the case as recognizing the privacy policy as a term of the contract.

The Reporters presumably had a reason for including the shield decisions in their study. Although *consent* to an otherwise impermissible act and *assent* to an adhesive contract are distinct legal concepts, they are neighbors. If courts are lowering the bar for consent to what would otherwise be a privacy violation, one might guess that they could be lowering it for contractual assent to privacy policies. And given the small number of sword cases (twenty-four by the Reporters' count, thirty-one by this study's), perhaps it makes sense to look to decisions on a neighboring legal question for guidance. That said, if this is the Reporters' reason for including the shield cases, their sample could be skewed. The Reporters' search criteria appear to have been designed for finding contract cases, not a complete or representative sample of privacy cases.<sup>187</sup> One should therefore take care before drawing conclusions from the Reporters' data about rules of consent in privacy law.

More importantly, the Reporters make no argument like the one considered above, either in the Draft Restatement or in the Chicago Article. In their published results, the Reporters do not explain the differences between the judicial reasoning in the sword and in the shield cases or disaggregate the results of each. Quite the contrary. The Reporters' Notes describe shield decisions as those in which "firms, as defendants, sought to enforce their own policies, arguing that they constitute contracts and that consumers' assent to them operates as a defense against the alleged privacy violations."<sup>188</sup> In fact, the shield decisions (as coded by this study) do not discuss whether the privacy policies constitute contracts. Nor do their holdings—shielding the defendant from liability for non-contractual privacy violations—have all the legal consequences

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186. Perkins v. LinkedIn Corp., 53 F. Supp.3d 1190, 1212-13 (N.D. Cal. 2014). See also, e.g., *id.* at 1215 (discussing rules for consent under common law right of publicity); *In re Yahoo Mail Litig.*, 7 F. Supp.3d 1016, 1028 (N.D. Cal. 2014) (discussing rules for consent under Wiretap Act); *Toney v. Quality Resources, Inc.*, 75 F. Supp.3d 727, 734-35 (N.D. Ill. 2014) (discussing rules for consent under the Telephone Consumer Protection Act).

187. See Bar-Gill et al., *supra* note 3 at 27 n.65 (describing search methods).

188. DRAFT RESTATEMENT § 1, Reporters' Notes at 14 (emphasis added).

that a contractual obligation would. The shield case count might capture some courts' application of a neighboring rule. But it says nothing about whether courts are treating privacy policies as contract terms. Rather than "render[ing] the Restatement's] recommendations more transparent and reliable,"<sup>189</sup> the inclusion of the shield cases without further explanation obscures the degree of empirical support for the Reporters' "conclusion that privacy notices are contracts."<sup>190</sup>

### 3. Case-Specific Judgments and the Limited Authority of Many Decisions

The shield cases are not the only examples of coding that clouds important features of decisions in the dataset. Section II.C discussed an example: *In re JetBlue Airways Corporation Privacy Litigation*<sup>191</sup> which the Reporters' Notes identify as a leading case, but in fact contains only limited support for the proposition that courts treat privacy policies as contract terms. Three other examples illustrate the limitations of the tripartite coding of contract, no contract or not relevant as applied to the decisions in the dataset, and the limited persuasive authority of decisions the Reporters coded as supporting the proposed comment.

The first is *Loeffler v. Ritz-Carlton Hotel Co.*<sup>192</sup> Here the defendant argued for dismissal of the breach of contract claim because the complaint failed to mention its privacy policy. The district court accordingly focused on whether the plaintiff's complaint was pled with sufficient specificity, observing that "[t]he present pleading leaves out what Plaintiff claims is a critical element, i.e. that the claimed implied contract incorporates Defendant's alleged strong policy of confidentiality."<sup>193</sup> The court nonetheless concluded that "the contract is plead sufficiently to meet notice pleading standards."<sup>194</sup> Because that holding suggested that the privacy policy *could* generate contractual obligations, this study coded it as supporting the Reporters' position. The Reporters' coding agreed.

That classification, however, does not capture everything of relevance in the case. First, the decision was reached in 2006, a year before the Supreme Court first suggested, in *Bell Atlantic v. Twombly*, a heightened federal pleading standard.<sup>195</sup> One wonders whether the motion to dismiss would succeed today. Certainly, the court's application of the pre-*Twombly* standard would be an obvious objection to citing the decision. Second, in the same opinion the court

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189. *Id.* at Reporters' Introduction at 5-6.

190. *Id.* § 1, Reporters' Notes at 16.

191. 379 F. Supp. 2d 299 (E.D.N.Y. 2005).

192. 2006 WL 1796008 (D. Nev. June 28, 2006).

193. *Id.* at \*4.

194. *Id.*

195. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (raising the bar for notice pleading); *see also* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (same).

expressed doubt as to whether the privacy policy alone created a contract. “We observe incidentally that the Complaint may sufficiently allege that Defendant’s alleged privacy policy could have been incorporated into the claimed contracts for lodging, but that *violation by Defendant of its own privacy policy, in and of itself, would not confer a right of action on Plaintiff.*”<sup>196</sup> The italicized clause is dicta. But such a decision is far from robust evidence of a trend toward the treatment of online privacy policies as standard contract terms pursuant to the rules described in the Draft’s sections 2 and 3. Third, a glance at the docket reveals that the court subsequently granted defendant Ritz-Carlton’s motion for summary judgment, and later awarded it over \$26,000 in fees and costs.<sup>197</sup> The court did not issue a written opinion, but in announcing its decision from the bench stated, “we conclude that there is no evidence that the defendant’s privacy policy constituted a contractual agreement with plaintiff under these circumstances.”<sup>198</sup> In its motion for summary judgment, Ritz-Carlton extensively discussed both *Dyer* and *In re Northwest Airlines*, the two leading cases rejecting the Reporters’ proposed approach.<sup>199</sup> The mere fact that the on the motion to dismiss the court held that in theory the privacy policy could have been integrated into the contract is very weak support for the claim that such policies are subject to the rules of the Draft section 2.

The limits of the tripartite coding scheme can again be seen in *Claridge v. RockYou*,<sup>200</sup> also coded by both this and the Reporters’ study as contract. Like *Loeffler*, *RockYou* involved claims that the defendant breached both its implied and express contractual obligations, though *RockYou* was filed as a class action. This study coded it as contract because the district court rejected *RockYou*’s motion to dismiss, allowing the contract claims to go forward.<sup>201</sup>

The court’s opinion, however, considered only the two arguments in *RockYou*’s motion to dismiss: that the plaintiff had failed to plead injury, and that the policy expressly provided that no liability would result from the acts complained of.<sup>202</sup> Looking back to the filings, one finds that *RockYou* did not make a formation argument.<sup>203</sup> Consequently, although the court allowed the

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196. 2006 WL 1796008, at \*4 (emphasis added).

197. Docket, *Loeffler v. Ritz-Carlton Hotel Co.*, 2:06-CV-00333 (D. Nev.), items 54 & 55.

198. Reporter’s Transcript of Motion Hearing No. 38, in *Loeffler v. Ritz-Carlton Hotel Co.*, 2:06-CV-00333 (D. Nev.), June 10, 2008, at 17. See also *id.* at 13 (“[T]here is no contention here that the privacy policy was a part of any express, explicit agreement between the parties. There was no offer or acceptance and there is no evidence in this record that any such agreement was incorporated by reference into any offer or acceptance.”). The court also held even if the privacy policy were a part of the contract, the defendant’s actions would not have breached it. *Id.* at 17.

199. Defendant Motion for Summary Judgment, in *Loeffler v. Ritz-Carlton Hotel Co.*, 2:06-CV-00333 (D. Nev.), filed Jan. 15, 2008, at 10-12.

200. 785 F. Supp. 2d 855 (N.D. Cal. 2011).

201. *Id.* at 865-66.

202. *Id.* at 864-65.

203. *RockYou*’s Notice of Motion and Motion to Dismiss Complaint, in *Claridge v. RockYou*, No. C-09-6032-VRW (N.D. Cal.), filed June 10, 2010, at 14-18.

contract claims to go forward, it was neither required nor chose to address the Reporters' question: whether or when a business's online privacy policy is part of its contract with the consumer. RockYou settled the class action—which also involved surviving claims under the Stored Communications Act and common law negligence—shortly after the court's decision.<sup>204</sup>

A final illustration can be found in the district court's ruling in *Burton v. Time Warner Cable*.<sup>205</sup> In this case, the consumer-plaintiff originally claimed *inter alia* that Time Warner had breached an implied contract with its customers to comply with industry standards for handling personally identifiable information.<sup>206</sup> Time Warner responded that its Privacy Notice was part of its express contract with customers, permitted the use of the information, and therefore forestalled the implied-contract claim. Apparently without waiting for the court to rule on that defense, the plaintiff dropped his implied-contract claim and requested leave to add a claim of breach of express contract based on the privacy policy. In its motion to dismiss, Time Warner also raised objections to that new claim. The court granted leave to amend, but expressly declined to “address any of the arguments [Time Warner] put forth in its [motion] as to . . . the potentially amended express contract claim, until that claim is properly before the Court.”<sup>207</sup>

How should this case be coded with respect to the Reporters' question: Do courts enforce privacy policies as contracts? Time Warner's argument that its privacy policy was part of the contract, and therefore forestalled the plaintiff's implied-contract claim, seems to have won the day. The plaintiff withdrew the implied-contract claim. But because the plaintiff withdrew that claim, the court did not have occasion to rule on, or even discuss, Time Warner's express contract defense. The court's decision to permit the plaintiff to add a claim of breach of express contract based on the privacy policy would seem to presuppose that some such claims are viable. Yet the court expressly declined to address the sufficiency of that claim, which had not yet been pled. Because the court stated that it was not ruling on the as yet unpled claim of breach, this study coded *Burton* as irrelevant. The Reporters coded *Burton* as supporting the proposed comment.

### C. Summary

Part III described the numerical results of my attempt to reproduce the Draft Restatement's study of privacy policy cases. Using the Reporters' data and generous coding criteria, this study's coding and analysis produced far less quantitative support than did the Reporters' for the proposition that a business's privacy policy can become part of a consumer contract pursuant to the rules of

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204. Docket, *Claridge v. RockYou*, No. C-09-6032-VRW (N.D. Cal.), item 58.

205. 2013 WL 3337784 (C.D. Cal. Mar. 20, 2013).

206. *Id.* at \*4.

207. *Id.* at \*5. For another decision along the same lines, see *Padilla v. Dish Network L.L.C.*, 2013 WL 3791140, at \*8 (N.D. Ill. July 19, 2013).

the Draft Restatement.<sup>208</sup> More specifically, this study's coding and analysis found a weaker effect in a smaller number of relevant cases, no recent trend towards recognizing privacy policies as contracts, and that cases supporting the proposed comment have not been more influential.

This Part's qualitative analysis casts further doubt on the strength of the Reporters' quantitative evidence for the proposed comment. I have explained why my coding differs from the Reporters' and shown that many of the decisions coded as supporting the proposed comment are of limited authoritative or persuasive value. Three broad conclusions emerge.

First, there are by all appearances a number of mistakes in the Reporters' coding. Not counting shield cases, Part III identified twenty-six, or over half, of the fifty-one decisions in the Reporters' dataset as not relevant to the hypothesis being tested.<sup>209</sup> The reasons this study coded these cases as irrelevant varied, ranging from the fact that they did not involve consumers to non-relevant *rationes decidendi*. Perhaps the Reporters had independent reasons for including so many of these cases in their counts.<sup>210</sup> But because neither the Draft Restatement nor the Chicago Article provides a detailed discussion of their coding criteria, it is difficult to know what they would be. In the absence of further explanation, these appear to be simple coding errors.

Second, a number of the coding decisions rest on contestable judgment calls. Most significant was the Reporters' decision to treat shield cases as support for the proposed comment. Much of the difference between the two studies' quantitative results stems from my finding that the shield decisions do not support the Reporters' position, as the opinions neither hold nor suggest that privacy policies might be contract terms. Other judgment calls are particular to individual decisions, such as a 12(b)(6) ruling that a contract claim could go forward, in which the court also suggests requirements contrary to the rules in the Draft Restatement. The case counts and cumulative charts that the Reporters have published and presented in the Draft Third Restatement appear at first glance to be compelling evidence of what courts are doing on the ground. But the numbers do not capture the individual decisions and often complicated coding judgments that lie beneath them. Sometimes numbers obscure more than they reveal.

Finally, the nature of the data and the expansive criteria for coding decisions as contract means that even decisions on point provide only limited support for the proposed comment. All but one of the fifty-one decisions in the dataset were issued by trial courts, and all but nine were reached at the pre-discovery motions stage. Over eighty-five percent of the decisions that the

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208. Draft Restatement § 1, cmt. 9.

209. *Supra* sections III.B.1 & III.B.2. This count does not include *In re Google, Inc. Privacy Policy Litigation*, 2013 WL 6248499 (N.D. Cal. Dec. 3, 2013), whose breach of contract claim was not counted, *supra* note 96, but which was included in the shield count.

210. The Reporters coded fifteen of the twenty-seven decisions as recognizing that the privacy policy might be part of the contract, and two as rejecting the contract claim.

Reporters coded as contract (thirty out of thirty-five) were reached on pre-discovery motions, and over ninety percent of the decision this study coded as contract (ten out of eleven) were on motions to dismiss. In a sword case, such a decision says at most that the plaintiff pled sufficient facts for the case to go forward. It does not say the business's privacy policy is part of the contract, but only that under some conceivable set of facts it might be. That conceivable set of facts might not correspond to the Draft Restatement rules. Thus, several decisions coded as contract using this study's criteria suggest that at a later stage the plaintiff would be required to prove reliance on the privacy policy or that the privacy policy was "integrated" into contract between the parties—requirements that run contrary to the formation rules in section 2. Again, the numerical presentation of the final count fails to capture important facts about the underlying data—facts that weaken the support for the Reporters' conclusions.

Both in its coding and in its qualitative analysis, this study has occasionally employed sources beyond those used by the Reporters. It has referred in some instances to the details of a complaint, to contents of the parties' motions, or to subsequent decisions that do not appear in searchable databases. One might object that the resources devoted to this attempt to reproduce and understand the Reporters' privacy policy study are far beyond what one could expect of large quantitative case law studies, which deal with masses of data and often require coding by research assistants. The point is well taken. But it also suggests the limits of the methods the Reporters employ. The decisions collected in the dataset, together with the Reporters' approach to coding them, produced numerical results that do not reflect the strength of the underlying data. I do not believe this was the result of bad faith. It was the net effect of the types of judicial decisions found, and of many independent coding decisions. None of that, however, appears in the published results. One must dig deeper to understand what the numbers mean.

#### V. Quantitative Case Law Studies and the Restatement Project

This Article has examined only one of the six quantitative studies in the Draft Restatement. Elsewhere the Draft invokes the results of five similar studies: of clickwrap, shrinkwrap, browsewrap, unilateral modifications, and applications of the parol evidence rule.<sup>211</sup> It might well be that the coding in the other studies was more reliable and the decisions less equivocal; that the data provide stronger support for trends that the Reporters observed; and that the decisions that the Reporters identified as influential in fact received more relevant citations. That said, this study's findings suggest that those studies should not yet be taken as authoritative on the legal questions they address. Among the core methodological principles of empirical science are transparency and replication. The Reporters have not yet published their coding methods or

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211. See *supra* note 2.

the coded data. Nor have their results been subject to independent scrutiny or attempts to reproduce or replicate their findings.<sup>212</sup>

In their Introduction to the Draft, the Reporters describe their use of quantitative studies as follows:

In order to reduce the ambiguity regarding the state of the law and offer a comprehensive account of how courts have ruled on a given question, the standard ALI methodology (of extracting rationales from leading cases and supporting them with convincing policy justifications) is complemented with a methodology that has the potential to render its recommendations more transparent and reliable.<sup>213</sup>

The proposal is an attractive one. There has always been a tension in the Restatements between the descriptive and the prescriptive. Although Restatements are written as accounts of what the law is, they often pick a side on questions on which authorities are divided, and sometimes stake out positions ahead of most courts.<sup>214</sup> A Reporter can always find a decision in support of their preferred rule. Systematic empirical work on the corpus of decisions, including unpublished and trial court decisions, would add to our understanding of the relationship between the propositions in a Restatement and the case law.

One wonders, however, whether the existing Restatement process is suited to that task.<sup>215</sup> Among the fundamental checks in most empirical sciences are peer review and replication.<sup>216</sup> In recent years biomedical science and empirical psychology have both seen “replication crises.” Researchers in these fields have argued that too often a single study is treated as decisive, that professional incentives disfavor attempts to replicate, and that a significant proportion of published studies fail attempted replication.<sup>217</sup> And there are special reasons to

212. But see the independent results of Levitin et al., *supra* note 77.

213. DRAFT RESTATEMENT, Reporters’ Introduction at 5-6.

214. See N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 L. & HIST. REV. 55 (1990); Herbert Wechsler, *The Course of the Restatements*, 55 AM. BAR ASSOC. J. 147 (Feb. 1969); G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 L. & HIST. REV. 1 (1997).

215. The arguments that follow also speak against William Baude, Adam Chilton, and Anup Malani’s recent suggestion that judges use quantitative empirical methods, or that they take seriously studies produced by parties to litigation. William Baude, Adam S. Chilton & Anup Malani, *Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews*, 84 U. CHI. L. REV. 37, 38, 55 (2017).

216. See, e.g., John P. A. Ioannidis, *How to Make More Published Research True*, PLOS MED. 1 (Oct. 21 2014), <https://doi.org/10.1371/journal.pmed.1001747> [<https://perma.cc/YRA7-YAM2>]; see also Bar-Gill et al., *supra* note 3 at 28 (stating that there were two state appellate decisions in the dataset, though only one appears in it).

Although I believe peer review provides the best check on empirical work, student-edited publications have one important advantage: student editors cite commonly check articles. I am grateful for the cite check performed by the editors of this journal, which caught several coding or counting issues.

217. For a good summary, see Kristin Firth, David A. Hoffman and Tess Wilkinson-Ryan, *Law and Psychology Grows Up, Goes Online, and Replicates* 4-6 (August 16, 2017), <https://ssrn.com/abstract=3020401> [<https://perma.cc/E89H-DCZQ>].





specifies only that “Tentative Drafts, Discussion Drafts, and Proposed Final Drafts are made available to the Public after the Annual Meeting.”<sup>221</sup>

This process is not well suited either to independent assessment of quantitative case law studies produced within it or to attempts to replicate their results. If independent assessment and replication are to figure into drafting decisions, they must be performed early. Yet the ALI process does not provide for any public input prior to a draft’s presentation to, and possible approval by, the Council, and perhaps even the membership.<sup>222</sup> Nor has the ALI established any mechanisms for publicizing coding criteria or coded data, or for inviting other researchers to examine the methods and attempt to replicate the results of quantitative studies as part of the drafting process. Restatements are not crowd-sourced. They are written, debated and approved by a closed group of experts in the field.

This is not to say that Reporters who wish to incorporate such studies could not publicize their methods, the coding rubric, and the coded data on their own and invite others to examine them and attempt to replicate the results. But it is not obvious exactly how this would fit into the ALI process. Would Reporters integrate quantitative empirical results into a draft before other researchers had corroborated them? Waiting could mean considerable delay. Yet including the results might mean sending a draft to the Council with studies that had not yet been subject to external review and verification.

The Reporters for the Restatement of Consumer Contract Law incorporated the results of their studies long before anyone else had seen the data or coding, much less had attempted to reproduce the results. Nor have the Reporters yet made their coding methods or coded data public. In the Chicago Article, the Reporters state, “We emphasize the importance of transparency, and we will make our databases, search criteria, and coding decisions publicly available once the Restatement is published.”<sup>223</sup> If “published” means after final approval by the ALI membership, it is not obvious how the two halves of that sentence fit together. A scholar might wait until publication to share their data and coding. But the Restatements are not mere scholarly projects. Courts have traditionally granted them significant persuasive authority—much more than the average law review article.<sup>224</sup> Including empirical work that has not been subject to the highest standards of review and verification puts that authority at risk.

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221. ALI, Project Life Cycle, *supra* note 218.

222. The Draft Restatement of Consumer Contracts was first presented to the Council in February of 2017. The ALI’s 2015-2016 Annual Report stated that it was possible that the Restatement of Consumer contracts “may appear on the 2017 Annual Meeting Agenda, potentially completing this project”—that is, a few months after the Council would have approved it. 2015-2016 Am. Law Inst. Annual Report, at 14, [https://www.ali.org/media/filer\\_public/d6/07/d607955b-a668-4459-bb44-ca26c817bcae/annualreport-web-2016update.pdf](https://www.ali.org/media/filer_public/d6/07/d607955b-a668-4459-bb44-ca26c817bcae/annualreport-web-2016update.pdf) [<https://perma.cc/N5ZA-9YLV>].

223. Bar-Gill et al., *supra* note 3 at 9 n. 2; *see also id.* at 14 (“[W]e make the database and our analysis openly available to allow replication or rebuttal of our conclusions.”).

224. *But see* Kansas v. Nebraska, 135 S. Ct. 1042, 1064, 1069-70 (2015) (Scalia, J., & Thomas, J., each concurring in part and dissenting in part) (observing that section 39 of the Restatement

Among the basic principles of the empirical sciences—natural, social or legal—are transparency and replication. Especially given the judgments that can figure into coding judicial decisions, a quantitative study of those decisions should not be treated as verified until the methods and data have been made publicly available, and the results corroborated. By the same token, the case law studies in the Draft Restatement should not be treated as authoritative until the Reporters make their rubric, data and coding publicly available for examination and assessment, and other researchers take on the project of attempting to separately replicate their results.

## VI. Conclusion

The Reporters describe their quantitative studies of judicial decisions as supplementing rather than supplanting the traditional methods of case law research.<sup>225</sup> The authority for the Draft's proposed rules does not rise and fall on the six quantitative studies they describe. At the same time, the Reporters tout their studies as an important methodological advance in the ALI's project of restating the law. The method can make a Restatement's "recommendations more transparent and reliable," and "make[] it possible to examine with greater subtlety the preeminent patterns within the law and measure their impact."<sup>226</sup> Nor should one minimize the persuasive power of numbers and graphs. No matter how much or how little the Reporters relied on their quantitative case law studies in drafting the black-letter rules and comments, many readers are likely to give those studies considerable weight. Today those readers include the ALI Council and membership. If the Draft is approved, the audience will include courts looking for authoritative guidance on what the law is.

The problem is that the numbers can eclipse the many judgment calls that go into producing them. This Article has argued that the Reporters' privacy policy data do not support the conclusions they draw. To date the five other quantitative case law studies whose results the Draft Restatement reports and relies on have not been fully evaluated or replicated by other scholars. As such, these studies should not yet be treated as authoritative—certainly not by courts, and also not by those who might be asked to vote on a Council or Tentative Draft.

All this suggests a relative advantage of the qualitative empiricism of earlier Restatements. Although the approach is sometimes less comprehensive in coverage and does not always explain the choice of leading cases, it is more transparent along other dimensions. When a Reporters' Note discusses a judicial opinion or provides a string cite to a list of decisions, it is an easy thing for a reader to pull the opinions, to read them, and to use familiar tools to check for negative authority and find additional decisions on the same question. Purely

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(Third) of Restitution and Unjust Enrichment has little or no support in the case law, and criticizing the majority's reliance on it).

225. See, e.g., DRAFT RESTATEMENT, Reporters' Introduction at 6.

226. *Id.* at 5-6.

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quantitative studies, even when they publish the data, lack this type of transparency. Not every reader will have the time or resources to go back to the data, recode the cases, and assess the analytic tools. This is not to say quantitative case law studies are without value. But they require transparency and corroboration, and they should be used with an appreciation of the limits of what they tell us about the law.

## Appendix: Cases and Coding

<b>Case</b>	<b>Draft Restatement Coding</b>	<b>Klass Coding</b>	<b>Description</b>
Austin-Spearman v. AARP Servs., 2015 U.S. Dist. LEXIS 84315 (D.D.C.)	no contract	irrelevant	Court granted 12(b)(6) motion on contract claim and 12(b)(1) motion to dismiss for lack of standing, holding: (1) sharing of information did not violate PP, and (2) no injury. In its injury analysis, court held that PP was not part of membership agreement. But this was not about enforceability of PP. PP appears to have been clickwrap: “viewed, and agreed to.”
Azeltine v. Bank of Am., 2010 U.S. Dist. LEXIS 142693 (D. Ariz.)	neither	contract	Magistrate recommended dismissal with leave for plaintiff to amend breach of contract claim to allege diversity, reliance on PP and injury. Recommendation accepted by District Court, 2011 WL 1465462. Leave to amend and magistrate’s reasoning suggests contract claim at least possible, hence coded as contract. But plaintiff was required to plead and prove actual reliance. Pro se.
Bassett v. Elec. Arts, Inc., 2015 U.S. Dist. LEXIS 36175 (E.D.N.Y.)	contract	irrelevant	Magistrate recommendation to grant motion to compel arbitration, based on clause in clickwrap TOS that covered “any and all disputes.” Arbitration clause was not in clickwrap PP, though PP mentioned in passing. District court adopted magistrate’s recommendation to grant motion to compel arbitration. 93 F.Supp. 3d 95.
Be In, Inc. v. Google Inc., 2013 U.S. Dist. LEXIS 147047 (N.D. Cal.)	neither	inapposite	Website operator alleged Google violated not PP, but browwrap TOS related to use of code. Court granted 12(b)(6) motion, based on plaintiff’s failure to plead details of font size, placement or text of the link.
Browning v. AT&T Corp., 682 F.Supp.2d 832 (N.D. Ill. 2009)	contract	irrelevant	No breach of contract claim. The only issue involving PP was alleged violations of Illinois Consumer Fraud Act. Court granted 12(b)(6) motion on that claim, as PP permitted defendant’s actions and therefore was not deceptive.

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<b>Case</b>	<b>Draft Restatement Coding</b>	<b>Klass Coding</b>	<b>Description</b>
Burton v. Time Warner Cable, Inc., 2013 U.S. Dist. LEXIS 94310 (C.D. Cal.)	contract	irrelevant	Plaintiff claimed implied contract to abide by industry standards. Defendant responded that actual PP governed and permitted uses. Plaintiff dropped implied contract claim. Court granted defendant's 12(b)(6) motion with leave to replead breach of PP. "The Court will not address any of the arguments TWC put forth in its MTD as to . . . the potentially amended express contract claim, until that claim is properly before the Court."
Cain v. Redbox Automated Retail, LLC, 136 F. Supp. 3d 824 (E.D. Mich. 2015)	contract	shield / no contract	Shield: Court granted defendant's motion for summary judgment on Michigan Video Rental Privacy Act claim. Clickwrap Terms of Use satisfied the Act's written consent requirements; Terms of Use expressly partially incorporated PP; and PP permitted actions complained of.  Sword: Court granted defendant's motion for summary judgment on contract claim because under Illinois law only portions of PP expressly referenced in Terms of Use were incorporated into it.
Carlsen v. GameStop Inc., 2015 U.S. Dist. LEXIS 72297 (D. Minn.)	neither	irrelevant	Court granted 12(b)(1) motion to dismiss for lack of standing, based on no injury in fact. In summarizing plaintiff's complaint, court states that clickwrap TOS incorporated privacy policy. No discussion of or ruling on the substance of plaintiff's contract or other claims.
Claridge v. RockYou, 785 F. Supp. 2d 855 (N.D. Cal. 2011)	contract	contract	Plaintiff created account with defendant for online services. In denying 12(b)(6) motion, court considered only defendant's argument that plaintiff failed to plead injury and that PP included exculpatory clauses. Court rejected both and denied motion. No discussion of plaintiff's assent to PP.

Case	Draft Restatement Coding	Klass Coding	Description
Daniels v. JP Morgan Chase Bank, N.A., 2011 N.Y. Misc. LEXIS 4510 (N.Y. Sup. Ct.)	contract	inapposite	“Opinion withdrawn from publication at the direction of the court.” Found on Bloomberg. Breach claim based on violation of “Account Agreement, which contains a privacy policy.” Court granted 12(b)(6) motion, as (1) magistrate’s subpoena insulated bank from any liability pursuant to it; (2) plaintiffs did not cite any provision of the Account Agreement or PP that was breached.
Deering v. CenturyTel, Inc., 2011 WL 1842859 (D. Mont.)	contract	shield	Court relied on <i>Mortensen v. Bresnan</i> (same plaintiff attorneys) to grant 12(b)(6) motion on Electronic Communications Privacy Act and invasion of privacy claims, based on consent. “[T]here is no reasonable expectation of privacy when a plaintiff has been notified that his Internet activity may be forwarded to a third party.” No discussion of whether PP was part of contract.
Del Vecchio v. Amazon.com, Inc., 2011 WL 6325910 (W.D. Wash.)	contract	shield	Court granted 12(b)(1) motion on Computer Fraud and Abuse Act claim, based on failure to plead injury. In permitting plaintiffs to amend complaint, court expressed concern that PP authorized alleged actions by providing notice of them. No discussion of whether PP was a contract term.
Dunbar v. Google, Inc., 2011 WL 12907501 (E.D. Tex.)	contract	shield	On 12(b)(6) motion on Electronic Communications Privacy Act claim, court suggested that clickwrap TOS might constitute consent to uses of data. Clickwrap PP also mentioned, but not discussed as possibly authorizing data use. Motion to dismiss denied because complaint alleged uses beyond those in TOS.

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<b>Case</b>	<b>Draft Restatement Coding</b>	<b>Klass Coding</b>	<b>Description</b>
Dyer v. Northwest Airlines Corps., 334 F.Supp. 2d 1196 (D.N.D. 2004)	no contract	no contract	Court granted 12(b)(6) motion on contract claim, holding (1) broad statements of policy in PP did not give rise to contract claims, (2) plaintiffs did not allege that they read the PP before purchasing tickets, and (3) plaintiffs failed to allege contractual damages.
Freedman v. America Online, Inc., 325 F.Supp. 2d 638 (E.D. Va. 2004)	contract	irrelevant	Integrated member agreement stipulated that the PP was not enforceable, so plaintiff withdrew breach claim. Thus, the court never reached issue of enforceability of PP. No attempt to use PP as shield against Electronic Communications Privacy Act claim. Court granted 12(b)(6) motion on Connecticut UDAP claim, as member agreement provided that Virginia law governed. Pro se.
Garcia v. Enterprise Holdings, Inc., 78 F.Supp.3d 1125 (N.D. Cal. 2015)	contract	shield	Clickwrap TOS and PP. Court granted 12(b)(6) motion on California Invasion of Privacy Act claim, based on plaintiff's failure to allege lack of consent despite clickwrap TOS and PP. Leave to amend so plaintiff might allege lack of consent, which court treated as fact question.
Greer v. 1-800 Flowers.com, Inc., 2007 U.S. Dist. LEXIS 73961 (S.D. Tex.)	contract	irrelevant	Court granted 12(b)(3) motion to dismiss for improper venue. Plaintiff and defendant both argued that PP was contract, so court never addressed the issue. The only question was whether PP was subject to the choice of venue clause in defendant's Terms of Use. Court concluded that PP "states clearly . . . that the 'Privacy Policy is part of the Terms of Use.'"
Gwinnett Cmty. Bank v. Arlington Capital, LLC, 326 Ga. App. 710 (Ga. Ct. App. 2014)	contract	inapposite	Plaintiff, mezzanine financier, borrowed \$4M from defendant bank. No statement on whether the PP would be enforceable for consumers, but holding on summary judgment that it did not apply to non-consumer plaintiff.

<b>Case</b>	<b>Draft Restatement Coding</b>	<b>Klass Coding</b>	<b>Description</b>
Hodson v. Bright House Networks, LLC, 2013 WL 1499486 (E.D. Cal.)	contract	irrelevant	Issue was scope of contract arbitration clause covering “any dispute.” The contract also incorporated by reference PP, and PP suggested Cable Act claims might be enforced in district court. Court invoked presumption in favor of arbitration to resolve ambiguity and compel arbitration of Cable Act claim.
Hodson v. DirecTV, LLC, 2012 WL 5464615 (N.D. Cal.)	contract	irrelevant	Court addressed PP only when discussing scope of arbitration agreement. Plaintiffs argued that their claims were under PP, not under arbitration clause in customer agreement. Court granted motion to compel arbitration, finding arbitration clause worded broadly enough to capture plaintiff’s claims. No judicial statement on the merits of the PP’s use as sword or shield. Review of complaint shows that plaintiffs did not try to enforce PP, but claimed only breach of implied contract to keep information private.
In re American Airlines, Inc. Privacy Litig., 2005 WL 3323028 (N.D. Tex.)	contract	contract	Denial of 12(b)(6) motion on contract claim. Earlier order in the case stated in summary of complaint: “American’s website sets out its privacy policy, which is part of the contract of carriage with passengers.” 370 F.Supp.2d at 556. This order did not discuss assent but held that plaintiff had cured earlier failure to plead injury. No indication in either opinion of assent mechanism.
In re Easysaver Rewards Litig., 737 F. Supp. 2d 1159 (S.D. Cal. 2010)	contract	contract	Breach claim concerned not privacy violation per se, but sharing of payment information with third party that enrolled them in rewards program with signup and monthly charges. Plaintiffs were enrolled by entering email and e-signature in pop-up window during purchase from florist. Court denied 12(b)(6) motion stating, without explanation, that terms of use, PP and other provisions were part of contract created by purchases from online florist.



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<b>Case</b>	<b>Draft Restatement Coding</b>	<b>Klass Coding</b>	<b>Description</b>
In re Google, Inc. Gmail Litig. (1), 2013 WL 5423918 (N.D. Cal.)	contract	shield	Court denied 12(b)(6) motion on Wiretap Act claim, based on holding that the wording of TOS and PP did not capture alleged acts. TOS referenced PP. Court's reasoning suggests that if no violations of TOS or PP, plaintiffs would have expressly or impliedly consented to uses of information. No discussion of whether either was contractually binding, though it appears that TOS and perhaps PP were clickwrap. Judge: Koh.
In re Google, Inc. Gmail Litig. (2), 2014 WL 1102660 (N.D. Cal.)	contract	inapposite	In class certification decision, court invoked its earlier denial of a 12(b)(6) motion (2013 WL 5423918). Earlier holding rejected shield defense based on holding that PP did not cover plaintiff's claims. No new holding with respect to legal effects of PP. Judge: Koh.
In re Google, Inc. Privacy Policy Litig. (1), 2013 WL 6248499 (N.D. Cal.)	contract	irrelevant / shield	Sword: Court granted 12(b)(6) motion on claim of breach of PP based on finding that PP permitted alleged actions.  Shield: Based on holding that PP established consent, court granted 12(b)(6) motion on claims of misappropriation of likeness (consent), California Unfair Competition Law (disclosure precludes claim of misrepresentation), and intrusion upon seclusion (reasonable expectation).
In re Google, Inc. Privacy Policy Litig. (2), 58 F. Supp. 3d 968 (N.D. Cal. 2014)	contract	contract	Subsequent order in 2013 WL 6248499. Plaintiff pled narrower subclass in which TOS and PP were arguably violated. On 12(b)(2) motion, court rejected defendant's arguments that narrower class was not identified, that plaintiffs were not members of class, and that plaintiffs had not pointed to precise terms. No discussion of mechanisms of assent, and no defendant challenge to existence of contract.

<b>Case</b>	<b>Draft Restatement Coding</b>	<b>Klass Coding</b>	<b>Description</b>
In re JetBlue Airways Corp. Privacy Litig., 379 F.Supp. 2d 299 (E.D.N.Y. 2005)	contract	contract	On 12(b)(6) motion, court rejected defendant's argument that PP was not a contract, emphasizing that plaintiffs pled reliance on PP. Court stated reliance was a fact issue to be considered at class certification stage. Court then granted motion to dismiss contract claim based on failure to plead cognizable injury.
In re Northwest Airlines Privacy Litig., 2004 U.S. Dist. LEXIS 10580 (D. Minn.)	no contract	no contract	Court granted 12(b)(6) motion. General statements of policy are not contractual, and language in defendant's PP gave defendant discretion, suggesting not a contract. Additionally: no allegation of having read and no allegation of injury.
In re Sony Gaming Networks & Customer Data Sec. Breach Litig., 996 F.Supp. 2d 942 (S.D. Cal. 2014)	contract	irrelevant	Plaintiff claimed breach of express warranty based on PP and breach of implied warranties. Court granted 12(b)(6) motion on express warranty claims without leave to amend, as plaintiffs did not address defendant's arguments that claims failed as a matter of California law. Court dismissed implied warranty claims because clickwrap user agreement and PP disclaimed implied warranties, and sale was not a sale of goods subject to the UCC. Court denied motion to dismiss claim that assurances in PP violated state UDAP statutes.
In re Yahoo Mail Litig., 7 F.Supp.3d 1016 (N.D. Cal. 2014)	contract	shield	Plaintiff conceded that both clickwrap TOS & PP were agreements. On 10(b)(6) motion, court discussed details of consent rules for Wiretap Act and found consent in TOS. Stored Communications Act claim survived because defendant failed to properly argue consent in its opening brief, waiving defense. Judge: Koh.

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<b>Case</b>	<b>Draft Restatement Coding</b>	<b>Klass Coding</b>	<b>Description</b>
Johnson v. Microsoft, 2009 U.S. Dist. LEXIS 58174 (W.D. Wash.)	contract	inapposite	Microsoft clickwrap EULA (not separate PP) prohibited transmission of personally identifying information to Microsoft. On summary judgment, court held that transmission of IP addresses was not personally identifiable information. With respect to Microsoft's security glossary: "Statements or definitions found on web sites unrelated to the EULA do not bind or obligate the parties, and cannot give rise to a claim for breach of contract."
Lee v. Picture People, Inc., 2012 Del. Super. LEXIS 159 (Del. Super. Ct.)	neither	irrelevant	Plaintiff claimed sharing of photograph contrary to online PP was breach of warranty. Court held that UCC governed. Summary judgment for defendant. PP did not create an express warranty because it did not relate to the quality of the goods. Nor did plaintiff's claims fall under UCC implied warranties.
Loeffler v. Ritz-Carlton Hotel Co., 2006 U.S. Dist. LEXIS 44202 (D. Nev.)	contract	contract	Court denied 12(b)(6) motion on contract claims, which were based on PP and implied agreement to keep information private. Court emphasized notice pleading and that plaintiff would have to demonstrate that PP was incorporated into customer contract with hotel: "violation by Defendant of its own privacy policy, in and of itself, would not confer a right of action on Plaintiff."
London v. New Albertson's, Inc., 2008 U.S. Dist. LEXIS 76246 (S.D. Cal.)	neither	irrelevant	On 12(b)(6) motion and after summarizing privacy notices to consumers, court concluded without explanation that there was no allegation of consideration and that the policy permitted actions complained of. No discussion of assent to policy.

<b>Case</b>	<b>Draft Restatement Coding</b>	<b>Klass Coding</b>	<b>Description</b>
Low v. LinkedIn Corp., 900 F.Supp. 2d 1010 (N.D. Cal. 2010)	neither	irrelevant	12(b)(6) motion on contract claims granted based on insufficient pleading of injury. Opinion does not address whether PP was enforceable as contract. Motion to dismiss California False Advertising Law claim granted because plaintiff did not allege reliance on PP. Defendant did not invoke PP as shield to claims of statutory privacy violations. Judge: Koh.
Lucky v. Ky. Bank (In re Lucky), 2011 Bankr. LEXIS 5734 (Bankr. E.D. Ky.)	no contract	irrelevant	Court granted defendant's motion for summary judgment on contract claim based on fact that plaintiff provided no evidence that policy was effect during the relevant time and did not identify provisions the defendant breached.
Mendoza v. Microsoft, Inc., 1 F.Supp. 3d 533 (W.D. Tex. 2014)	contract	irrelevant	Court granted motion to dismiss complaint for improper venue based on Terms of Use clause covering "all disputes related to this contract or the Service." Plaintiffs brought only claims of statutory violations, including state UDAP statutes. Plaintiff suggested practices described in PP established statutory violations and that PP was part of Terms of Use, which Court used to illustrate that claims were covered by choice of venue clause. Court did not discuss enforceability or legal effect of PP and held that claims were covered even if not related to the contract.
Meyer v. Christie, 2007 U.S. Dist. LEXIS 79285 (D. Kan.)	contract	inapposite	Plaintiff was sophisticated real estate developer. Complaint alleged contract based on both PP and implied relational obligation. Based on long-term relationship with the bank, district court denied 10(b)(6) motion.

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<b>Case</b>	<b>Draft Restatement Coding</b>	<b>Klass Coding</b>	<b>Description</b>
Mortensen v. Bresnan Communication, L.L.C., 2010 WL 5140454 (D. Mont.)	contract	shield	On 12(b)(6) motion, court held subscriber agreement and PP shielded defendant against Electronic Communications Privacy Act and invasion of privacy claims by establishing consent. Court denied motion to dismiss claimed violations of Computer Fraud and Abuse Act and trespass to chattels, as no notice of alleged acts in subscriber agreement or PP.
Olney v. Job.Com, Inc., 2014 U.S. Dist. LEXIS 131276 (E.D. Cal.)	neither	inapposite	Although suit was originally brought by consumer, this decision concerns a third-party business defendant's motion to dismiss claim by original defendant business. Court granted 12(b)(6) motion because of (1) agency relationships, and (2) browsewrap agreement insufficiently pled (typeface, etc., citing Be In v. Google).
Owens v. Dixie Motor Co., 2014 U.S. Dist. LEXIS 59006 (E.D. Cal.)	contract	contract	Auto financing contract of adhesion, with plaintiff claiming breach of express and implied duties to safeguard information. No discussion of how plaintiff agreed to published PP. Court denied defendant's motion for summary judgment, focusing on injury, consideration and specificity of terms. Alleged breach involved release of credit and personal information to imprisoned felon.
Padilla v. Dish Network L.L.C., 2013 U.S. Dist. LEXIS 101120 (N.D. Ill.)	neither	irrelevant	Plaintiff claimed breach of implied contract based on use of data. In 12(b)(6) motion, defendant argued that PP permitted actions. Plaintiff withdrew breach of implied contract claim. Court denied permission to amend complaint to allege violation of PP, as plaintiff had not plausibly alleged damages.

<b>Case</b>	<b>Draft Restatement Coding</b>	<b>Klass Coding</b>	<b>Description</b>
Perkins v. LinkedIn Corp., 53 F.Supp.3d 1190 (N.D. Cal. 2014)	contract	shield	Clickwrap User Agreement and PP. 12(b)(6) motion granted for claimed violations Stored Communications Act and Wiretap Act, and some right of publicity claims, based on detailed analysis of consent rules. No discussion of whether PP was a contract term. Judge: Koh.
Pinero v. Jackson Hewitt Tax Serv. Inc., 594 F.Supp. 2d 710 (E.D. La. 2009)	contract	inapposite	Plaintiff signed PP in defendant tax return preparer's offices. Court granted 12(b)(6) motion based on failure to plead compensable damages. No argument that policy was not enforceable.
Rudgayzer v. Yahoo! Inc., 2012 U.S. Dist. LEXIS 161302 (N.D. Cal.)	neither	inapposite	Not a separate privacy policy, but clickwrap TOS. Court granted 12(b)(6) motion based on no alleged actual injury. Pro se.
Smith v. Trusted Universal Stds. in Elec. Transactions, Inc., 2010 U.S. Dist. LEXIS 43360 (D.N.J.)	contract	contract	Court held on 12(b)(6) motion, and giving pro se plaintiff "benefit of the doubt," that plaintiff sufficiently pled (1) that PP was part of cable provider agreement and (2) that plaintiff relied on PP. Court nonetheless dismissed contract claim, holding (3) that "even assuming" contract exists, plaintiff failed to plead injury. Other defendants' PPs were not contracts, as plaintiff was not in contractual relationship with them. Pro se.
Starkey v. Staples, Inc., 2013 U.S. Dist. LEXIS 186592 (M.D. Tenn.)	no contract	no contract	Poor pleading and possibly overly litigious plaintiff. Plaintiff paid store to have document printed from a thumb drive. Court granted 12(b)(6) motion, holding that general policy does not create a contract with in-store customer. Pro se.
Svenson v. Google Inc., 2015 U.S. Dist. LEXIS 43902 (N.D. Cal.)	contract	contract	On 12(b)(6) motion, court held that clickwrap assent to TOS incorporating PP sufficed to show existence of contract. Court also rejected defendant's argument that damages were insufficiently pled.

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Case	Draft Restatement Coding	Klass Coding	Description
Toney v. Quality Resources, Inc., 75 F.Supp.3d 727 (N.D. Ill. 2014)	neither	shield	Defendant against Telephone Consumer Protection Act claim argued PP was consent to use of phone number for marketing calls. Court read statute as requiring express consent and treated 12(b)(6) motion as request for summary judgment. Court found (1) no evidence that plaintiff saw or agreed to PP, thus not satisfying express consent requirement, and (2) that statement in policy was not clear enough to put plaintiff on notice of data uses.
Trikas v. Universal Card Servs. Corp., 351 F.Supp. 2d 37 (E.D.N.Y. 2005)	neither	irrelevant	Court granted summary judgment to defendant on contract claim based on plaintiff's failure to plead injury. Court declined to rule on whether policy was a contract, but quoted <i>Dyer</i> for principle that "broad statements of company policy do not generally give rise to contract claims, so might have been coded as no contract. Pro se.
Yunker v. Pandora, 2014 U.S. Dist. LEXIS 30829 (N.D. Cal.)	contract	contract	On 12(b)(6) motion, defendant claimed PP was not a contract. Magistrate held without explanation that pleadings sufficed "at this stage in the proceedings." No discussion of mechanisms of assent.