

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

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The draft Restatement of the Law of Consumer Contracts (“the Draft Restatement” or “the Draft”) includes 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 Each study seeks to collect all available decisions on a legal question, published and unpublished; codes those decisions for factors such as issue, outcome, procedural posture, jurisdiction and citations; and

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analyzes the coded data to determine majority rules, trends, lines of influence and other patterns. The Reporters explain the advantages of such quantitative caselaw studies 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Using a quantitative analysis of all published decisions in state and federal courts, as well as unpublished decisions reported on Westlaw and Lexis, the Restatement distills the principles that most courts articulate and follow in adjudicating the most novel and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 caselaw studies in the Draft address: (a) whether a business's privacy policy is part of its contract with a consumer; whether and when (b) clickwrap terms, (c) browsewrap terms, or (d) shrinkwrap terms become part of the contract; (e) whether and when a business can modify a contract without express consumer consent; and (f) the application of the parol evidence rule to standard terms in consumer contracts.<sup>2</sup>

This article reports the results of an attempt to replicate the numerical results of the Reporters' study of privacy policy decisions. It also provides a qualitative analysis of the decisions in the Reporters' dataset, how those decisions were coded, and their persuasive authority. The author chose the privacy-policy study because the Reporters were kind enough to provide the data and some of their coding for it. And the Reporters

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<sup>1</sup> Restatement of the Law Consumer Contracts, Council Draft No. 3, Reporters' Introduction, at 6 (December 20, 2016) (hereinafter "Draft Restatement").

<sup>2</sup> Draft Restatement § 1, Reporters' Notes, at 12-15 (cases embracing privacy notices as creating contractual obligations are more numerous and influential); § 2, Reporters' Notes, at 30 (out of 110 cases, courts have enforced clickwrap contracts in each one absent fraud, unconscionability, or another intervening factor); § 2, Reporters' Notes, at 32 (notice and opportunity to review are required for browsewrap contracts to be enforceable); § 2, Reporters' Notes, at 34 (enforcement of PNTL terms are increasingly numerous and influential as long as there is no fraud, unconscionability, etc.); § 3, Reporters' Notes, at 43 (modifications in consumer transactions are consistently enforceable with notice and opportunity to reject); § 8 Reporters' Notes, at 87 (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).

considered the results reliable enough for separate publication in the University of Chicago Law Review.<sup>3</sup>

The Reporters conclude based on fifty-one decisions between 2004 and 2015 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. They cite these results in support of a comment stating that business's posted privacy policy can become a term in a consumer contract in accordance with the rules of the Restatement.<sup>4</sup>

The proposed comment is significant. Today when courts are asked to determine whether a consumer has consented to some use of her data, they often look not to contract law but to consent requirements drawn from tort law and privacy statutes. The proposed comment threatens to displace those requirements and put in their stead potentially laxer requirements for contractual assent. This approach could retard the development of rules that address the special concerns raised by data privacy.

This article's study of the Reporters' data suggests that the empirical support for the proposed comment is not nearly as strong as the Draft suggests. The author was unable to replicate the Reporters' numerical results. And a qualitative analysis of the decisions shows that those supporting the proposed comment are of little authoritative or persuasive power.

There are several significant differences between this study's numerical results and those of the Reporters. First, this study finds that only fifteen of the fifty-one decisions in the Reporters' complete dataset address the question they pose. The Reporters found forty. Second, whereas the Reporters find a seven-to-one ratio of contract to no-contract outcomes, this study finds a ratio of less than three to one. This weaker result together with the smaller sample provides significantly less support for the draft comment than the Reporters find. Third, this study's analysis of the data casts doubt on the Reporters' claim that there is a clear and increasing trend towards treating privacy policies as contract terms. Most of the change the Reporters observe appears to have 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 actually 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 salient legal proposition.

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<sup>3</sup> Oren Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler, *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 U. Chi. L. Rev. 7 (2017).

<sup>4</sup> Draft Restatement § 1, cmt. 8.

Like the Reporters, the author found 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 of case outcomes seeks to determine *how much* support in the caselaw there is for the draft comment. On the core question as to what most courts are holding, this study finds a much weaker effect (a 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.<sup>5</sup> For example, this article's study cannot reject with a standard level of certainty the null hypothesis: that courts are no more likely to recognize a privacy policy as a contract than not. And the Draft Restatement emphasizes more than decision counts. It also finds a "clear and increasing trend towards contractual recognition of privacy notices," and "that cases embracing privacy notices as contracts are not only more numerous, but more influential."<sup>6</sup> This study finds little support for the first proposition, none for the second. In short, the attempt to replicate the results reported in the Draft finds that the data do not provide the degree of empirical support claimed for the proposed comment.

A qualitative analysis of the decisions in the Reporters' dataset provides further reasons for doubt. The Reporters' coding appears to contain some significant errors, such as including cases that did not involve consumers and cases in which there was not even an arguably contractual claim or defense. In addition, the reported numerical results obscure the many difficult judgment calls needed to code the decisions. Most significant among these is the Reporters' coding of cases in which the business invoked its privacy policy as a defense against a claimed noncontractual privacy violation. Although the Reporters coded these decisions as recognizing that the privacy policy could be a contract term, the decisions do not apply rules from contract law, but principles of consent 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

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<sup>5</sup> 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.

<sup>6</sup> Draft Restatement § 1, Reporters' Note at 13 & 14.

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 often quite low.

The results of this study raise a broader methodological issue. The Reporters have appealed to six quantitative studies in support of rules or comments in the Draft. But they have provided neither detailed descriptions of their methods—such as the criteria used in coding cases—nor public access to the underlying data and coding. As a consequence, the meaning of the numerical results is not transparent, and other researchers have not had the opportunity to verify the studies by attempting to independently replicate their results. Part of the problem here may be the American Law Institute’s Restatement procedures, which are not designed for reliable quantitative studies of this type.

Part One of this article provides an introduction to the Restatement of Consumer Contract Law project, and to the Draft’s comment on privacy policies. Part Two describes this article’s method, presents the results of the author’s attempt to replicate the Reporters’ study, and discusses the significance of the difference between the author’s and the Reporters’ results. Part Three 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. Part Four steps back and suggests that the Restatement process is not well suited to the production of quantitative caselaw studies.

## 1 Background

### 1.1 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 the contract.”<sup>7</sup> The classical picture of contract, according 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, 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

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<sup>7</sup> Draft Restatement, Reporters’ Introduction, at 1.

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 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>8</sup> Or it might be because of 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. 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. 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>9</sup> These claims cohere with the Draft Restatement's observations about recent judicial approaches to consumer contracts:

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<sup>8</sup> See, e.g., Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (2012).

<sup>9</sup> See, e.g., Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. Empirical Legal Stud. 447 (2008); Omri Ben-Shahar, *The Myth of 'Opportunity to Read' in Contract*, 4 Eur. Rev. Cont. L. 428 (2000); 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); Oren Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (2012); Florencia Marotta-Wurgler, *Does Contract Disclosure Matter?*, 168 J. Inst. & Theoretical Econ. 94 (2012); Oren Bar-Gill, *Consumer Transactions*, in *The Oxford Handbook of Behavioral Economics and the Law* 465 (E. Zamir & D. Teichman eds., 2014); Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia* (reviewing Margaret Jane

By and large . . . common-law courts 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 disclosures and more meaningful informed consent would increase transaction costs without producing substantial benefit.<sup>10</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 that a fully informed, rational and self-interested consumer would not agree to. 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 Reporters’ term 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>11</sup>

Although this grand bargain is consistent with the Reporters’ scholarly commitments, their argument for it rests on caselaw. 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>12</sup> the Reporters’ provide quantitative empirical analyses of judicial decisions on six separate questions of law.<sup>13</sup> Each study involves compiling a dataset of all published and unpublished state and federal decisions on a given legal

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Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (2013)), 112 Mich. L. Rev. 883 (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, *Even More Than You Wanted to Know About the Failures of Disclosure*, 11 Jerusalem Rev. Legal Stud. 63 (2015).

<sup>10</sup> Draft Restatement, Reporters’ Introduction, at 3.

<sup>11</sup> Draft Restatement, Reporters’ Introduction, at 1. *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.”).

<sup>12</sup> Draft Restatement, Reporters’ Introduction, at 5.

<sup>13</sup> *See supra* note 2.

question, coding the decisions for variables such as jurisdiction, outcome, rationale and number of subsequent citations, then analyzing the coded dataset 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 improve the precision of that empiricism. They seek 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>14</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 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; the quantitative dimension is a rigorous way to ground and make transparent the concept of a majority rule.<sup>15</sup>

That said, the Draft is also clear that the quantitative method is meant to supplement, not replace, the traditional qualitative and evaluative empiricism of the Restatement projects.

## 1.2 Privacy Policies in the Draft Restatement

Section 1 of the Draft Restatement provides that a *consumer* is "[a]n individual acting primarily for personal, family, or household purposes," that a *business* is "[a]n individual or entity other than a consumer that regularly participates in or solicits, directly or indirectly, consumer transactions," and that a *consumer contract* is "a contract between a

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<sup>14</sup> Draft Restatement, Reporters' Introduction, at 5-6.

<sup>15</sup> Draft Restatement, Reporters' Introduction, at 6.

business and a consumer.”<sup>16</sup> The Draft Restatement’s rules apply to consumer contracts.<sup>17</sup> Comment 8 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.

The Reporters’ Notes to section 1 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>18</sup>

From one perspective, the fact that a consumer contract can include provisions related to use of the consumer’s data is unsurprising. The law of contracts is largely content neutral. Parties can, *ceteris paribus*, contract for whatever duties, powers, permissions and other legal relations they wish, including duties and permissions that relate to information generated in the transaction. Thus the increasingly familiar nondisclosure clause. One does not need an empirical study to show that parties can contract to expand or contract one side’s privilege to share information.

The significance of the proposed comment 8 is not its affirmation that consumers and businesses *can* contract over privacy, but what it says about *how* they can do so. The statement that “[p]rivacy policies are consumer contracts, and the Restatement’s rules apply to them”<sup>19</sup> brings privacy notices within the scope of sections 2 and 3 in the Draft, 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 Data Privacy.

Sections 2 and 3 of the Draft provide rules for contract formation and modification respectively. 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 only after the consumer’s assent to the

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<sup>16</sup> Draft Restatement §§ 1(a)(1), (2) & (4).

<sup>17</sup> Draft Restatement § 1(b).

<sup>18</sup> Draft Restatement § 1, Reporters’ Notes, at 11-12.

<sup>19</sup> Draft Restatement § 1, Reporters’ Notes, at 12.

transaction, so long as the consumer had “reasonable notice” of their existence prior to that assent and has a “reasonable opportunity to avoid or terminate” after receipt.<sup>20</sup> Comment 3 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 the terms. Comment 3 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>21</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>22</sup>

The implications of including separately available privacy policies within the scope of the Draft Restatement therefore include the following. First, online policies to which a consumer does not expressly agree and of which the consumer might be unaware 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 bound to those terms as a matter of contract. 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 those terms, so long as the consumer had notice of their existence prior to entering the transaction and has a reasonable opportunity to cancel the transaction after receiving them. Third, businesses would have the power to modify contractually binding privacy policies without receiving express consumer assent to those modifications, 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.”<sup>23</sup>

The downstream consequences might be either pro-consumer or pro-business, depending on the nature of the dispute. The proposed

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<sup>20</sup> Draft Restatement § 2(b); see *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

<sup>21</sup> Draft Restatement § 2, cmt. 3 (“A consumer may signify assent to a transaction without affirmatively acknowledging the standard contract terms. As long as the consumer receives reasonable notice of the standard contract terms, including reasonable notice that they are intended to be part of the transaction, and has a meaningful opportunity to review them . . . , they are adopted when the consumer signifies assent to the transaction.”)

<sup>22</sup> Draft Restatement § 3, cmt. 5.

<sup>23</sup> Draft Restatement § 1, Reporters’ Notes, at 12.

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 brings them within the Restatement's heightened scrutiny for substantive unconscionability—the "grand bargain."<sup>24</sup>

In other disputes the rule might work to the benefit of a business. 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 already existing remedies provided by those laws to the remedies available for breach. In other contexts, however, courts have held that misrepresentations within contracts are not actionable in tort.<sup>25</sup>

Second, and more importantly, many businesses' privacy policies do not impose new duties on the business, but purport to give it permission to use the consumer's data in ways otherwise prohibited. There exists a raft of statutes, regulations and common law actions that protect consumer information.<sup>26</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 generally decided not by contract law, but by rules governing consent drawn from tort law, statutes and regulations. 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>27</sup> The Federal Trade Commission has recommended layered notices with "clearer, shorter, and more standardized" language,<sup>28</sup> and has brought numerous actions based

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<sup>24</sup> The proposed section 5 provides that "a contract term is presumed to be substantively unconscionable if its effect is to . . . [u]nnecessarily limit the consumer's ability to pursue a complaint or seek redress for violation of a legal right." Draft Restatement § 5(c)(3).

<sup>25</sup> 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).

<sup>26</sup> 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).

<sup>27</sup> Cal. Bus. Prof. Code § 22575.

<sup>28</sup> FTC, *Protecting Consumer Privacy in an Age of Rapid Change* 64 (2012).

on inadequate notice.<sup>29</sup> And the Michigan Video Rental Privacy Act requires that the consumer's consent be in writing.<sup>30</sup> Consent rules in privacy law are also evolving. Thus the ALI's draft Principles of the Law of 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>31</sup>

None of these rules 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 noncontractual consent rules are inapposite. The consumer has agreed, perhaps unwittingly, to share her data in exchange for a benefit received, and the resulting contract must 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

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<sup>29</sup> See, e.g., *United States v. Path*, Consent Decree and Order, FTC File No. 122 3158, <http://www.ftc.gov/os/caselist/1223158/130201pathincdo.pdf> (2013); *In re Facebook*, Complaint, FTC File No. 092 3184, <http://www.ftc.gov/os/caselist/0923184/120810facebookcmpt.pdf> (2012); *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>; *FTC v. Echometrix*, Complaint, FTC File No. 102 3006, <http://ftc.gov/os/caselist/1023006/101130echometrixcmpt.pdf> (2010). See generally Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 *Colum. L. Rev.* 583 (2014).

<sup>30</sup> M.C.L. § 445.1712(1) & 1713 (a).

<sup>31</sup> 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 treat consent.

as part of the contract.”<sup>32</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.

## 2 Attempt to Replicate the Draft’s Quantitative Results

The Reporters’ Notes to section 1 state that “[t]he inclusion of privacy notices in the definition of ‘Consumer Contracts’ reflects recent doctrinal trends . . . gleaned in part from quantitative and qualitative analysis of recent cases.”<sup>33</sup> The quantitative support comes from a study of fifty-one decisions between 2004 and 2015, representing “all published and readily available unpublished cases involving claims for breach of contract for business violations of privacy policies.”<sup>34</sup> The Reporters find that out of forty relevant cases, 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>35</sup> The Reporters further find a “clear and increasing trend toward contractual recognition of privacy policies,” and, based on citation counts, that “cases embracing privacy notices as contracts are not only more numerous, but more influential.”<sup>36</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>37</sup>

The Reporters have not yet published the data or coding from any of the Draft Restatement’s six quantitative caselaw studies. In February 2017 the author 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>38</sup> This Part reports the results of the author’s attempt to replicate the Reporters’ findings using the dataset they provided. Section 2.1 discusses this study’s methods.

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<sup>32</sup> Draft Restatement § 1, Reporters’ Notes, at 12. 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).

<sup>33</sup> Draft Restatement § 1, Reporters’ Notes, at 12.

<sup>34</sup> Draft Restatement § 1, Reporters’ Notes, at 13. This study did not test the recall of the Reporters’ search methods.

<sup>35</sup> Draft Restatement § 1, Reporters’ Notes, at 13.

<sup>36</sup> Draft Restatement § 1, Reporters’ Notes, at 13-14.

<sup>37</sup> Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler, *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 *U. Chi. L. Rev.* 7 (2017).

<sup>38</sup> The Reporters declined to provide data or coding from the other studies described in the Draft Restatement.

Section 2.2 describes the results of the author's independent coding of the decisions in the dataset. Section 2.3 analyzes the Reporter's claim of a trend toward enforcement in contract. Section 2.4 evaluates the Reporters' use of citation counts to identify leading decisions.

## 2.1 Coding Criteria

The Reporters provided the author 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), class or bilateral action, and transaction type (services, sale of goods, etc.),<sup>39</sup> the spreadsheet they provided coded for three variables only: (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>40</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, or whether the Reporters themselves checked the coding.

Because the author was as interested in the nature of the coding decisions as in the results, this study 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>41</sup> The author then read and recoded those decisions. Both the research assistant and the author were aware of the Reporters' coding when reading the decisions. This article reports only the author's coding.

Typically when attempting to replicate another study, a researcher uses the same procedures as in the original study. But because neither the Draft Restatement nor the Chicago Article describes rubric given to coders, there is also an advantage to attempting to replicate the results with independently constructed coding criteria. As described in section 1.2 above, the Draft makes several fairly specific claims about the legal effects of businesses' privacy policies. Taking those claims at face value—as voting

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<sup>39</sup> 84 U. Chi. L. Rev. at 20.

<sup>40</sup> 84 U. Chi. L. Rev. at 16 (describing case selection).

<sup>41</sup> 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 Three, the research assistant and author disagreed on a significant number of coding decisions.

members of the ALI must and as future users of the Restatement will—and then constructing a coding rubric to test them is also a form of replication. In this instance, the study attempts to replicate the types of support an experienced scholar in the field would expect for such claims.

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 rules the author used. Case-specific judgments are briefly described in section 2.2 and discussed at greater length in the qualitative analysis of section 3.2.

Some generic coding rules 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>42</sup> This study therefore counted only cases that were between businesses and consumers and in which one or the other side 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 noted above, there is no question but 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>43</sup> The Reporters argue they do. They therefore attach the following illustration to comment 8:

A consumer uses a business's website to order a good. 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>44</sup>

Similarly, the Reporters' Notes criticize the decision in *In re Northwest Airlines Privacy Litigation*, which held that a browsewrap privacy policy did

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<sup>42</sup> Draft Restatement § 1, Reporters' Notes, at 13 (emphasis added).

<sup>43</sup> 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 questions.

<sup>44</sup> Draft Restatement § 1, ill. 3.

not create a contract, as “inconsistent with the majority rule of what constitutes contractual assent (see § 2 of the Restatement).”<sup>45</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. It coded as supporting the proposed comment decisions that (a) held that the business’s privacy policy was part of the contract, (b) permitted a well-pled contract-based claim or defense based on the privacy policy, or (c) simply stated that a privacy policy might be part of the contract. This study coded as contrary authority decisions holding or stating that the privacy policy was not enforceable in contract for reasons inconsistent with the proposed sections 2 and 3. Like the Reporters, this study did not count decisions that rejected 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>46</sup> Such case-specific reasons do not address the general enforceability of privacy policies pursuant to the proposed sections 2 and 3.

Another set of generic coding criteria concerned the strength of the judicial statement. In an attempt to reproduce the Reporters’ results, this study adopted a permissive rule.<sup>47</sup> It did not, for example, attempt to distinguish between dicta and holding. Any judicial statement or holding relevant to the question was counted, though dicta that pointed in the opposite direction to the court’s holding (e.g., permitting a contract-based claim to go forward) was not. 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 an outcome. In short, when

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<sup>45</sup> Draft Restatement § 1, Reporters’ Notes, at 13. See *In re Northwest 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.”).

<sup>46</sup> See Draft Restatement § 1, Reporters’ Notes, at 13 (explaining the Reporters’ decision not to count 11 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”); 84 U. Chi. L. Rev. at 26 n. 59 (discussing the importance of identifying the grounds of decisions).

<sup>47</sup> Initial attempts at coding with a more restrictive rule resulted in many fewer relevant decisions.

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 Three discusses the consequences of these permissive coding rules for the authoritative and persuasive strength of the results.

Like the Reporters, this study used a 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."

## 2.2 Judicial Decisions on Privacy Policies as Contracts

This study's coding of the cases differs significantly from the Reporters' coding. The disagreements went both ways. In some decisions that the Reporters coded as contract, the author found that the court rejected the contract claim. In some decisions that the Reporters coded as no contract, the author found a statement or holding that the policy was or might have been a contract term. Overall, however, this study coded significantly more decisions as containing no relevant statement or holding than did the Reporters. It 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>48</sup>

The reader can access the results of this study's coding online in a Microsoft Excel file.<sup>49</sup> Rather than summarizing those results in the form of partial tables, this section identifies the reasons for many of this study's codings and explains the story they tell.

### 2.2.1 *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," no longer appears on Lexis or Westlaw, and so was excluded from this study's

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<sup>48</sup> 84 U. Chi. L. Rev. at 25.

<sup>49</sup> Available at: <http://scholarship.law.georgetown.edu/facpub/1987/> (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.

analysis.<sup>50</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>51</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>52</sup> Given the relatively

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<sup>50</sup> *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. 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 defendants' actions were authorized by the policy. The court therefore did not need to reach on the motion to dismiss the policy's enforceability, and its opinion does not address the issue.

<sup>51</sup> *Meyer v. Christie*, 2007 U.S. Dist. LEXIS 79285, at \*1, \*3, \*4-\*5 (D. Kan. Oct. 24, 2007) (plaintiff was sophisticated real estate developer who sued lender; complaint alleged contract based both on privacy policy and on implied relational obligation; court relied on long-term relationship with the bank to hold pleadings sufficient; coded by Reporters as contract); *Be In, Inc. v. Google Inc.*, 2013 U.S. Dist. LEXIS 147047, \*1 (N.D. Cal. Oct. 9, 2013) (plaintiff website operator argued defendant website operator violated terms of service related to use of site code; coded by Reporters as neither contract nor no contract); *Gwinnett Cmty. Bank v. Arlington Capital, LLC*, 326 Ga. App. 710, 710, 720-21 (2014) (plaintiff was lender to real estate clients and borrowed \$4 million from defendant; no statement or holding 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); *Olney v. Job.Com, Inc.*, 2014 U.S. Dist. LEXIS 131276, \*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).

<sup>52</sup> *In re Google Inc. Gmail Litig.*, 2014 WL 1102660, \*14 (N.D. Cal. Mar. 18, 2014) (motion for class certification, following ruling on motion to dismiss, 2013 WL 5423918 (N.D. Cal. September 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

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 that required express consumer consent.<sup>53</sup> The third involved a written policy that the plaintiff signed at the defendant's place of business.<sup>54</sup> Removing these nine inapposite decisions leaves forty-two decisions.

### 2.2.2 *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 3.2 describes in greater detail a representative sample of these disagreements and their causes.

Of the remaining forty-two decisions, and excluding 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. In one decision, the court expressly declined to rule and did not express an

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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 63, and the second as holding that the privacy policy was a contract term.

<sup>53</sup> *Johnson v. Microsoft*, 2009 U.S. Dist. LEXIS 58174, \*2-\*5 (W.D. Wash. June 23, 2009) (contract claims based 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); *Rudgayzer v. Yahoo! Inc.*, 2012 U.S. Dist. LEXIS 161302, \*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). See also *Be In, Inc. v. Google Inc.*, 2013 U.S. Dist. LEXIS 147047, \*1 (N.D. Cal. Oct. 9, 2013) (excluded because not a consumer contract, *supra* note 51; plaintiff claimed breach of browsewrap terms of service, not separate privacy policy).

<sup>54</sup> *Pinero v. Jackson Hewitt Tax Serv. Inc.*, 594 F. Supp. 2d 710, 713 (E.D. La. 2009) (contract claim dismissed for failure to plead injury; coded by Reporters as contract).

opinion on whether the privacy policy was a contract term, ruling instead on the failure to plead injury.<sup>55</sup> Two others also dismissed a breach of contract claim based on a failure to plead injury without discussing whether the privacy policy was part of the contract.<sup>56</sup> In another, the court used the plaintiff's failure to plead injury to conclude that the plaintiff lacked Article III standing.<sup>57</sup> One decision dismissed the complaint based on failure to plead consideration or breach.<sup>58</sup> Another addressed a case in which an

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<sup>55</sup> *Trikas v. Universal Card Servs. Corp.*, 351 F. Supp. 2d 37, 46 (E.D.N.Y. 2005) (*pro se* plaintiff; coded by Reporters as neither contract nor no contract).

<sup>56</sup> *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); *Austin-Spearman v. AARP Servs.*, 113 F. Supp. 3d 130, 140, 143 (D.D.C. 2015) (dismissing based finding that activities complied with privacy policy and failure to plead injury; coded by Reporters as no contract). *See also* *Pinero v. Jackson Hewitt Tax Serv. Inc.*, 594 F. Supp. 2d 710, 717-19 (E.D. La. 2009) (excluded because plaintiff signed privacy policy, *supra* note 54; breach of contract claim dismissed for failure to plead injury; coded by Reporters as contract); *Rudgayzer v. Yahoo! Inc.*, 2012 U.S. Dist. LEXIS 161302, \*6-\*7 (N.D. Cal. Nov. 9, 2012) (excluded because suit was for breach of terms of service, not privacy policy, *supra* note 53; contract claim dismissed for failure to plead injury; coded by Reporters as neither contract nor no contract).

As noted above, the Reporters agree that decisions based on failure to plead injury should not be included. *See supra* note 46. But in the Chicago Article 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). 84 U. Chi. L. Rev. at 28. This is a mistake. These cases are not about the certainty rule or the measure of 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.

<sup>57</sup> *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).

<sup>58</sup> *London v. New Albertson's, Inc.*, 2008 U.S. Dist. LEXIS 76246, \*5-\*6 (S.D. Cal. Sept. 30, 2008) (coded by Reporters as irrelevant). *See* 84 U. Chi. L. Rev. at 26 n.59 (stating that judicial doubts about whether a privacy policy is supported by consideration are not salient to the Reporters' question).

integrated online membership agreement expressly provided that the privacy policy was not enforceable, causing the plaintiff to withdraw its claim for breach.<sup>59</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>60</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 shield against a privacy claim.<sup>61</sup> And three decisions were reached based on evidentiary deficiencies or mispleading of claims, again without addressing whether the privacy policy was enforceable in contract.<sup>62</sup>

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<sup>59</sup> *Freedman v. America Online, Inc.*, 325 F.Supp.2d 638, 640, 643 (E.D. Va. 2004) (coded by Reporters as contract).

<sup>60</sup> *Greer v. 1-800 Flowers.com, Inc.*, 2007 U.S. Dist. LEXIS 73961, \*2-\*3 (S.D. Tex. Oct. 3, 2007) (scope of choice of venue clause in terms of use that expressly incorporated privacy policy; coded by Reporters as contract); *Hodson v. DirecTV, LLC*, 2012 WL 5464615, \*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); *Mendoza v. Microsoft, Inc.*, 1 F. Supp. 3d 533, 548 (W.D. Tex. 2014) (scope of choice-of-venue clause in terms of use; motion to dismiss for improper venue granted; coded by Reporters as contract); *Bassett v. Elec. Arts, Inc.*, 2015 U.S. Dist. LEXIS 36175, \*4 (E.D.N.Y. Feb. 9, 2015) (arbitration clause in clickwrap terms of service; coded by Reporters as contract); *Hodson v. Bright House Networks, LLC*, 2013 WL 1499486, \*1-\*2 (E.D. Cal. Apr. 11, 2013) (cable contract arbitration clause not narrowed by privacy policy that indicated consumers “may” bring Cable Communications Policy Act claims in District Court; coded by Reporters as contract).

<sup>61</sup> *Browning v. AT&T Corp.*, 682 F.Supp.2d 832 (N.D. Ill. 2009) (claims of privacy torts and violation of Illinois Consumer Fraud Act; coded by Reporters as contract); *Padilla v. Dish Network L.L.C.*, 2013 U.S. Dist. LEXIS 101120, \*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, Inc.*, 2013 U.S. Dist. LEXIS 94310, \*4-\*5 (C.D. Cal. Mar. 20, 2013) (plaintiff’s implied contract claim withdrawn after defendant argued contrary terms in privacy policy; leave to replead 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).

<sup>62</sup> *Lucky v. Ky. Bank (In re Lucky)*, 2011 Bankr., LEXIS 5734, \*23-\*24 (Bankr. E.D. Ky. Mar. 21, 2011) (granting defendant’s motion for summary

Removing these seventeen decisions leaves twenty-five decisions from the Reporters' original dataset.<sup>63</sup>

### 2.2.3 *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>64</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. 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>65</sup>

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judgment where plaintiff did not submit copy of privacy policy; coded by Reporters as no contract); *Lee v. Picture People, Inc.*, 2012 Del. Super. LEXIS 159, \*4 (Del. Super. Ct. Mar. 19, 2012) (court rejected breach of warranty claim holding that alleged violation of privacy policy did not relate to the quality of the goods; coded by Reporters as neither contract nor no contract); *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 plead; coded by Reporters as contract).

<sup>63</sup> 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.

<sup>64</sup> 84 U. Chi. L. Rev. at 27.

<sup>65</sup> In one decision originally coded as both sword and shield, *In re Google Inc., Privacy Policy Litigation*, 2013 WL 6248499 (N.D. Cal. Dec. 3, 2013),

The Reporters included both sword and shield decisions in their published results. This was significant. Of the eleven shield decisions (as coded by the this study) in the pared dataset, the Reporters coded ten as holding that the defense succeeded, and therefore as treating the privacy policy as a contract term. In nine of those ten decisions the author's coding agreed that the privacy policy effectively shielded the defendant from a noncontractual privacy claim, finding no relevant statement or holding in one.<sup>66</sup> This study's coding also agreed with the Reporters' on one decision holding that the privacy policy was not effective as a shield. These results, together with those described section 2.2.4, suggest that, in the decisions in the dataset, invoking a privacy policy as a shield was significantly more likely to succeed than invoking its 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>67</sup> And it states that the Reporters' study "asked whether courts enforce privacy practices as contracts."<sup>68</sup> Neither the Chicago Article nor the Draft Restatement, however, explains how the Reporters distinguished enforcement of the privacy policy in contract from enforcement under 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, aka the Wiretap Act,<sup>69</sup> the Computer Fraud and Abuse Act,<sup>70</sup> the Telephone Consumer

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this study found no holding or other statement on the sword claim. See *supra* note 63. In the above sentence this decision appears in the count of shield cases.

The other decision coded as both was *Cain v. Redbox Automated Retail, LLC*, 2015 WL 5728834. This decision 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 79.

<sup>66</sup> In *In re Google Inc. Gmail Litigation*, the court held that the wording of the defendant's terms of service and privacy policy did not cover the activities at issue, and therefore could not shield the defendant from claimed Wiretap Act violations. 2014 WL 1102660, \*13-\*15 (N.D. Cal. Mar. 18, 2014). The court therefore did not need to decide whether the terms of service or privacy policy would have constituted consent to those actions had they been worded differently.

<sup>67</sup> 84 U. Chi. L. Rev. at 25.

<sup>68</sup> *Id.* at 26.

<sup>69</sup> 18 U.S.C. § 2510 *et seq.*

<sup>70</sup> 18 U.S.C. § 1030(a).

Protection Act,<sup>71</sup> the Stored Communications Act,<sup>72</sup> Michigan's Video Rental Privacy Act,<sup>73</sup> and the California Invasion of Privacy Act,<sup>74</sup> as well as common law claims of invasion of privacy, trespass to chattels, and violations of the right to publicity.<sup>75</sup> 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 noncontractual 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. The reasoning in the shield decisions is discussed further in section 3.2.2 below.

Because of the different legal rules being applied and the different legal effects, this study coded the shield decisions as irrelevant. They are not decisions "in which firms, defendants, sought to enforce their own policies, arguing that they constitute contracts . . ." <sup>76</sup> This means removing the eleven remaining decisions or partial decisions coded as shield.<sup>77</sup> This final paring leaves a dataset of fifteen cases in which there is a statement or holding on the question posed.

#### 2.2.4 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. Reducing the number to fifteen decisions in twelve years—the result of the above pairing—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 rule courts are applying 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 different result than those of the Reporters. Of the fifteen relevant decisions, this study found support for the proposed comment in eleven<sup>78</sup>

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<sup>71</sup> 47 U.S.C. § 227(b) and (c).

<sup>72</sup> 18 U.S.C. § 2701.

<sup>73</sup> M.C.L. § 445.1711 *et seq.*

<sup>74</sup> Cal. Pen. Code § 637.6.

<sup>75</sup> The privacy claims relevant to each of the shield cases can be found in this study's coded results, which are available online. *Supra* note 49.

<sup>76</sup> Draft Restatement § 1, Reporters' Notes, at 13.

<sup>77</sup> See *supra* note 63 for complications with a case that involved both sword and shield claims.

<sup>78</sup> Meyer v. Christie, 2007 U.S. Dist. LEXIS 79285 (coded by Reporters as contract); In re American Airlines, Inc. Privacy Litig., 2005 WL 3323028 (coded by Reporters as contract); In re JetBlue Airways Corp. Privacy Litig., 379 F. Supp. 2d 299 (2005) (coded by Reporters as contract); Loeffler v. Ritz-Carlton Hotel Co., 2006 U.S. Dist. LEXIS 44202 (coded by Reporters as

and negative authority in four.<sup>79</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>80</sup> This study’s coding, on the contrary, concluded based on a much smaller number of decisions found relevant that courts are 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>81</sup> A smaller sample reduces the likelihood that the findings are accurate, as does a smaller observed effect. One way to see the difference between the results of this study and those of the Reporters’ is by calculating the confidence intervals for each.<sup>82</sup> 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>83</sup> Four methods for identifying the 95% confidence interval provide the following results for each study:

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contract); *Azeltine v. Bank of Am.*, 2010 U.S. Dist. LEXIS 142693 (coded by Reporters as neither contract nor no contract); *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159 (2010) (coded by Reporters as contract); *Smith v. Trusted Universal Stds. in Elec. Transactions, Inc.*, 2010 U.S. Dist. LEXIS 43360 (coded by Reporters as contract); *Claridge v. RockYou*, 785 F. Supp. 2d 855 (2011) (coded by Reporters as contract); *In re Google Inc. Privacy Policy Litig.*, 58 F. Supp. 3d 968 (2014) (coded by Reporters as contract); *Owens v. Dixie Motor Co.*, 2014 U.S. Dist. LEXIS 59006; *Yunker v. Pandora*, 2014 U.S. Dist. LEXIS 30829 (coded by Reporters as contract); *Svenson v. Google Inc.*, 2015 U.S. Dist. LEXIS 43902 (coded by Reporters as contract).

<sup>79</sup> *Dyer v. Northwest Airlines Corps.*, 334 F.Supp. 2d 1196 (2004) (coded by Reporters as no contract); *In re Northwest Airlines Privacy Litig.*, 2004 WL 1278459 (coded by Reporters as no contract); *Starkey v. Staples, Inc.*, 2013 U.S. Dist. LEXIS 186592 (coded by Reporters as no contract); *Cain v. Redbox Automated Retail, LLC*, 136 F.Supp. 3d 824 (2015) (under Illinois law, only parts of privacy policy expressly mentioned in clickwrap terms of use was part of contract; coded by Reporters as contract).

<sup>80</sup> 84 U. Chi. L. Rev. at 28.

<sup>81</sup> See John P. A. Ioannidis, *Why Most Published Research Findings are False*, 2 PLOS Med. 696, 697 (2005).

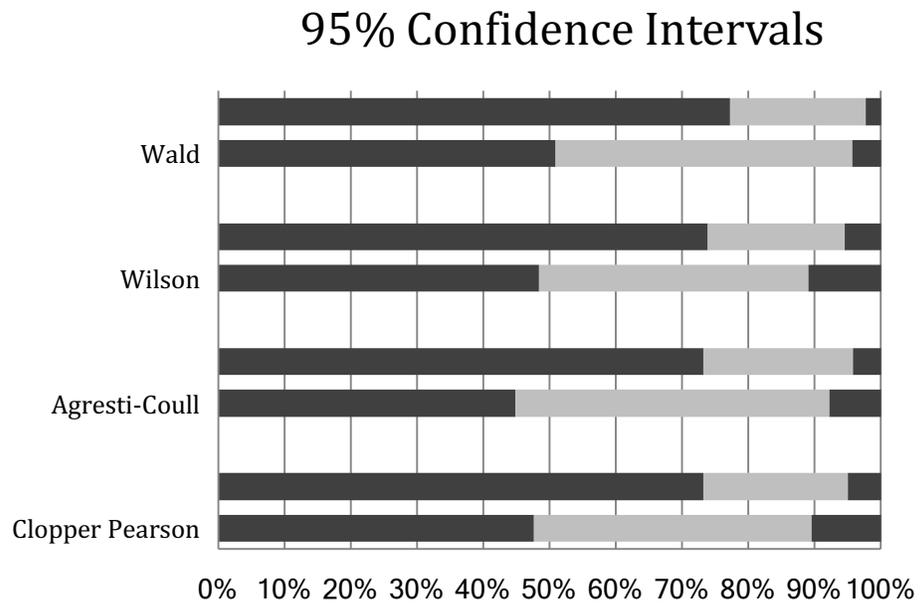
<sup>82</sup> I am grateful to my colleague Joshua Teitelbaum for helping me with the statistical analysis in this and the next paragraph.

<sup>83</sup> See Måns Thulin, *The Cost of Using Exact Confidence Intervals for a Binomial Proportion*, 8 Electronic J. of Stat. 817 (2014); Lawrence D. Brown, T. Tony Cai, Anirban DasGupta, *Interval Estimation for a Binomial Proportion*, 16 Statistical Sci. 101 (2001).

		Reporters' Coding (7:1, n=40)	Author's Coding (11:4, n=15)
Wald approximation intervals ("normal" intervals)	<i>lb</i>	0.77251	0.50954
	<i>ub</i>	0.97749	0.95713
Wilson score intervals	<i>lb</i>	0.73888	0.48409
	<i>ub</i>	0.94541	0.89103
Agresti-Coull intervals	<i>lb</i>	0.73197	0.44900
	<i>ub</i>	0.95814	0.92213
Clopper-Pearson intervals ("exact" method)	<i>lb</i>	0.73240	0.47613
	<i>ub</i>	0.95006	0.89535

These confidence intervals can be represented graphically as follows.

Figure Five



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 chart. First, as one would expect, as the size of the sample and magnitude of the effect go down, so too does a study's precision. The Reporters' coding of 40 decisions and finding of a 7:1 ratio provide a 95% confidence interval of approximately 0.2 under each method. According to the Reporter's 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. Under the standard method the lower bound is only slightly higher than 0.5.<sup>84</sup> This means that under the preferred methods, this study cannot reject the null hypothesis. Based on this study's coding of the Reporters' 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.

There is of course nothing magical about a simple majority. 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 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 there have been. The above quantitative results suggest that the Reporters' coding significantly overstates the degree of support for their proposed rule. Part Three's qualitative analysis argues that both the authoritative and the persuasive strength of the decisions coded as contract is also weak.

### 2.3 Trends

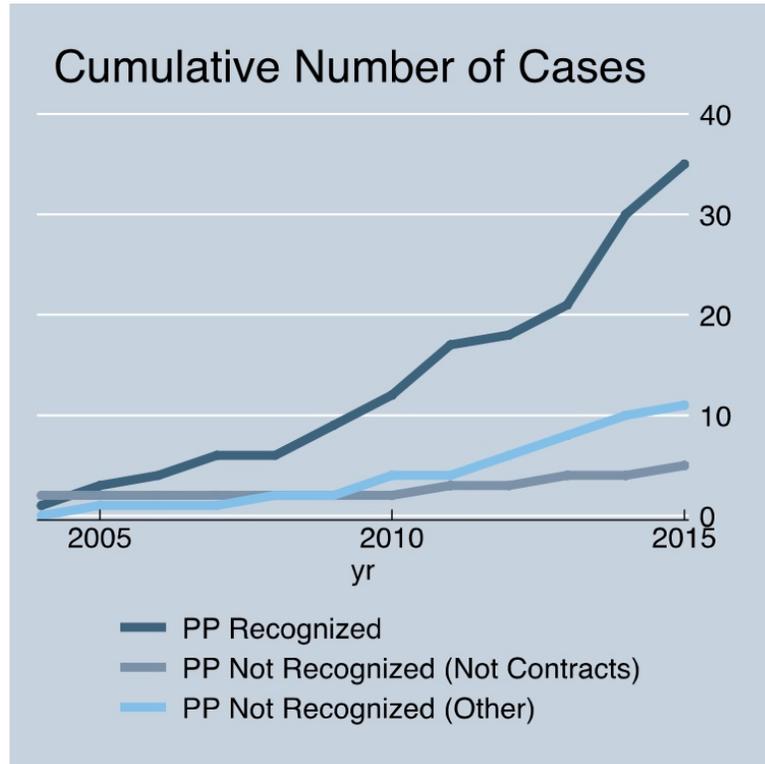
In addition to counting cases, the Reporters examined their coded data for trends over time. Perhaps because of the relatively small number of decisions each year, rather than plotting the number of decisions of each type for each year, the Reporters plotted the change in the cumulative

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<sup>84</sup> Also relevant is that each method produces an upper bound for this study's coding below that the Reporters' coding. Even with its wider confidence interval, this study was unable to confirm the upper bound of the Reporters' results.

number of decisions. This produces the following graph, taken from the Reporters' Notes.<sup>85</sup>

Figure One



The Reporters argue that "the graph shows the clear and increasing trend towards contractual enforcement of privacy policies."<sup>86</sup>

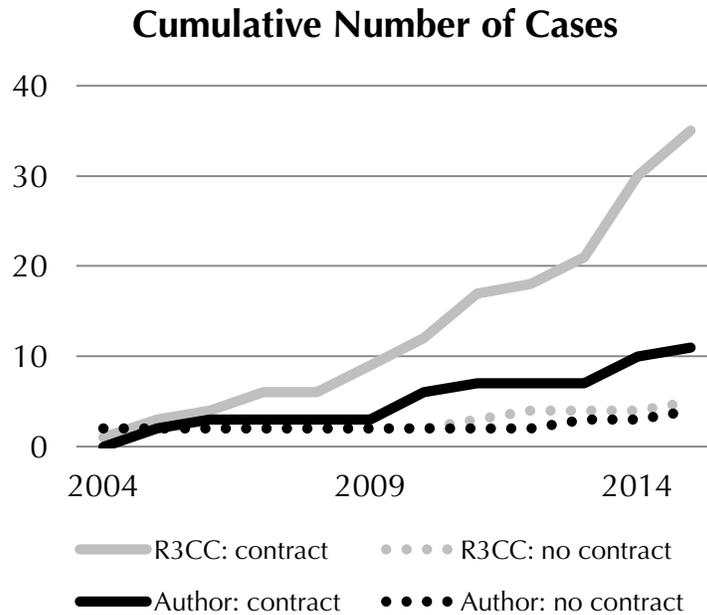
Adding the results from this study's coding provides a somewhat different picture of trends over time, keeping in mind that the smaller the relevant number of cases, the less reliable any conclusions drawn from them. Omitting the category of cases that the Reporters coded as neither contract nor no contract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

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<sup>85</sup> Draft Restatement § 1, Reporters' Notes at 14.

<sup>86</sup> Draft Restatement § 1, Reporters' Notes at 13.

Figure Two



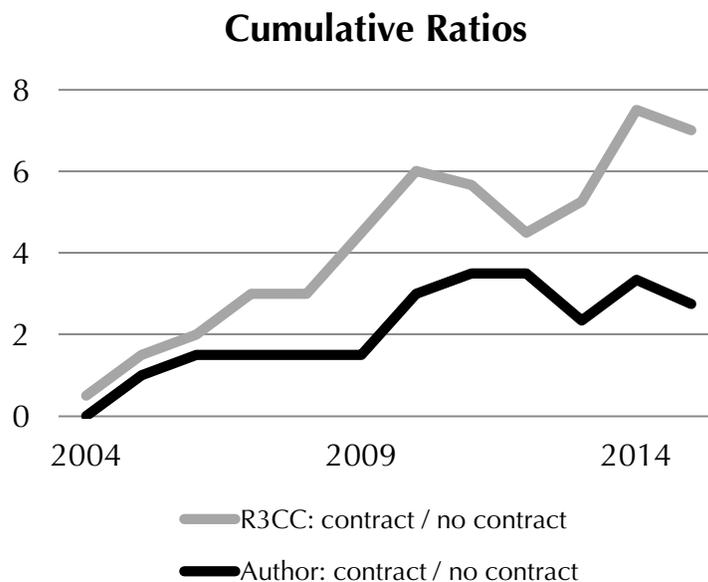
The darker lines represent the counts from this study’s coding, the lighter lines the counts from the Draft Restatement’s coding. In both studies there is an increase over time in the difference between the cumulative number of decisions stating that the privacy policy could be a contract term and the 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 that this study excluded from consideration for one reason or another, twenty-four were coded by the Reporters 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. As noted above, the Reporters perhaps chose to focus on the cumulative number of decisions 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 One and Two 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>87</sup>

One can get at this question by plotting the ratios between the number of each type of decision. Sticking for the moment with the Reporters' decision to use cumulative counts, this produces the following graph:

Figure Three



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

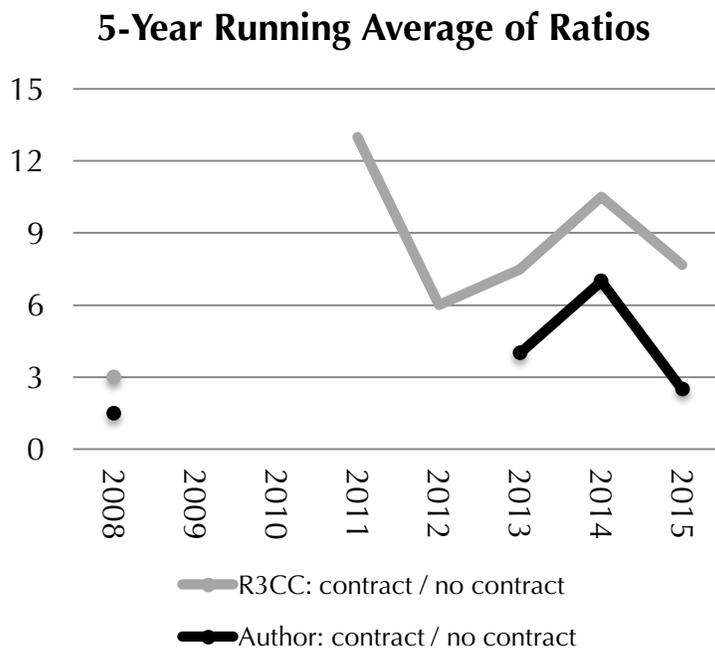
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<sup>87</sup> If the distinction is not obvious, consider this: Every year sees a growing difference, or delta, between the cumulative number of weekdays since the invention of the seven-day week and the cumulative number of weekend days since that 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 2018 than it was in the year 8.

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.

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 Four



The labels on the horizontal axis in Figure Four 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 Four belies the Reporters’ statement that there is a “clear and increasing trend towards contractual enforcement of privacy policies.”<sup>88</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’ study finds a decline the ratio of contract to no-contract decisions over the last five years of the study period.

<sup>88</sup> Draft Restatement § 1, Reporters’ Notes, at 13 (emphasis added).

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. As argued above, however, if the question is "whether privacy policies posted by businesses . . . are contracts,"<sup>89</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. We do 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 this study coded as shield, the Reporters coded eleven as recognizing the privacy policy as a contract.<sup>90</sup> 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 coded as shield were decided between 2010 and 2015.<sup>91</sup> The timing is not surprising. Questions about data security and privacy have achieved increased salience in recent years, meaning more plaintiffs claiming noncontractual privacy violations and more opportunities for defendants to invoke their privacy policies as defenses. Taken together, these facts suggest that the Reporters' decision 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 contract.

## 2.4 Citation Counts

In addition to looking at ratio of contract to no-contract decisions and trends over time, the Reporters examine out-of-state citation counts, on

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<sup>89</sup> Draft Restatement § 1, Reporters' Notes at 11-12.

<sup>90</sup> The Reporters coded the twelfth decision, *Toney v. Quality Resources, Inc.*, 75 F.Supp.3d 727 (N.D. Ill. 2014), as neither contract or no contract. This study coded it as rejecting the shield defense based on insufficient consent. *See id.* at 738-39.

<sup>91</sup> 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.

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 missing.”<sup>92</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 use average citations per year as a measure of influence.<sup>93</sup> They also recognize that citation counts can be noisy, as not all cases are cited for the relevant holding or positively. The Chicago Article states that they “addressed the problem of overinclusiveness by using an alternative, narrower measure of influence, which counts only those cases that have been followed by other courts.”<sup>94</sup>

Both the Draft Restatement and the Chicago Article use citation counts to identify leading privacy-policy decisions.<sup>95</sup> Although the Chicago Article recognizes the advantages of counting only citing cases that follow the relevant holding, both the Draft and the Chicago Article studies rely on total citations. 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 “after 2005 . . . courts have predominantly recognized privacy policies as contracts.”<sup>96</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>97</sup>

This study examined the citations to the fifty-one decisions in the Reporters’ dataset, coding them *inter alia* for the holding that the dataset decision was cited for and how Westlaw classified the citation.<sup>98</sup> The

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<sup>92</sup> 84 U. Chi. L. Rev. at 17. As noted in section 3.1.1 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 apple-to-apple comparison, however, this study sticks to the Reporters’ method and focuses on out-of-state citations.

<sup>93</sup> The Reporters do not address that fact that a recent case is more likely to be cited (citations to a case commonly decline over time), or that fewer years since the decision provides a smaller sample, meaning that the annual citation count is a less accurate predictor of a recent cases’ eventual influence. Average annual citation counts of recent cases should generally be taken with a grain of salt.

<sup>94</sup> 84 U. Chi. L. Rev. at 18.

<sup>95</sup> 84 U. Chi. L. Rev. at 29; Draft Restatement § 1, Reporters’ Notes, at 14-15.

<sup>96</sup> 84 U. Chi. L. Rev. at 28-29.

<sup>97</sup> Draft Restatement § 1, Reporters’ Notes at 14.

<sup>98</sup> 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

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>99</sup> (2005, 39 citations in the Reporters' period, 4 per year), *In re Sony Gaming Networks*<sup>100</sup> (2014, 5 citations, 3 per year), and *Perkins v. LinkedIn*<sup>101</sup> (2014, 3 citations, 2 per year).<sup>102</sup> This article's study coded the latter two decisions as irrelevant. The court in *In re Sony Gaming* dismissed the plaintiffs' breach of warranty claim without leave to replead based on a choice-of-law analysis, never addressing the question of the policy's enforceability.<sup>103</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 3.2.2 below. The two leading no-contract decisions are *Dyer v. Northwest Airlines*<sup>104</sup> (2004, 16 citations, 1 per year) and *In re Northwest Airlines*<sup>105</sup> (2004, 10 citations, 1 per year).<sup>106</sup> This study coded both as sword cases and, like the Reporters, as no contract.

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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.

<sup>99</sup> *In re Jetblue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299 (E.D.N.Y. 2005).

<sup>100</sup> *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942 (S.D. Cal. 2014).

<sup>101</sup> *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190 (N.D. Cal. 2014).

<sup>102</sup> Draft Restatement § 1, Reporters' Notes, at 14.

<sup>103</sup> 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, permit the plaintiffs to proceed with their noncontractual negligent misrepresentation and state UDAP claims. *Id.* at 973-76, 985-1009.

<sup>104</sup> *Dyer v. Nw. Airlines Corps.*, 334 F. Supp. 2d 1196 (D.N.D. 2004).

<sup>105</sup> *In re Nw. Airlines Privacy Litig.*, No. CIV.04-126(PAM/JSM), 2004 WL 1278459 (D. Minn. June 6, 2004).

<sup>106</sup> The Reporters' Notes mention only *Dyer*. Draft Restatement § 1, Reporters' Notes, at 15. The *In re Northwestern Airlines* numbers are taken from the spreadsheet the Reporters provided.

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 case citing *Perkins* did so for its lengthy noncontractual analysis of when a privacy policy shields a defendant from liability.<sup>107</sup> And although the forty-four citations to *In re JetBlue* during this study's period might make it appear to be a leading case, only two are for the court's statement that the privacy policy was part of the contract, both of which Westlaw classified as "cited by."<sup>108</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 cases that cite *Dyer*, ten are for its holding that the privacy policy was not part of the contract.<sup>109</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. Five 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 two as declining to follow.<sup>110</sup>

In short, the Reporters' use of total citation counts paints a misleading picture of influence. The three cases the Reporters identify as the "dominant precedent"<sup>111</sup> for treating privacy policies as part of the

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<sup>107</sup> *Gridiron Management Group LLC v. Pimmel*, 2014 WL 3490958, at \*2 (classified by Westlaw as "cited by").

<sup>108</sup> *Smith v. Trusted Universal Standards In Electronic Transactions, Inc.*, 2010 WL 1799456 (classified by Westlaw as "cited by"); *Meyer v. Christie*, 2007 WL 3120695 (D. Kan. Oct. 24, 2007) (same).

<sup>109</sup> *Smith v. Trusted Universal Standards In Electronic Transactions, Inc.*, 2010 WL 1799456, \*9; *Meyer v. Christie*, 2007 WL 3120695, \*4 (D. Kan. Oct. 24, 2007); *Dolmage v. Combined Insurance Company of America*, 2016 WL 754731, \*7; *Willingham v. Global Payments, Inc.*, 2013 WL 440702, \*20; *Azeltine v. Bank of America*, 2010 WL 6511710, \*10; *Trikas v. Universal Card Services Corp.*, 351 F.Supp.2d 37, 46 (E.D.N.Y. 2005); *Jianjun Fu v. Wells Fargo Home Mortg.*, 2014 WL 4681543, \*6; *Mireskandari v. Daily Mail and General Trust PLC*, 2013 WL 12114762, \*18; *Mireskandari v. Daily Mail and General Trust PLC*; 2013 WL 12114762, \*18; *Mireskandari v. Mail*, 2013 WL 12129559.

<sup>110</sup> *Starkey v. Staples, Inc.*, 2013 WL 5936898; *Willingham v. Global Payments, Inc.*, 2013 WL 12172926; *Smith v. Trusted Universal Standards In Electronic Transactions, Inc.*, 2010 WL 1799456; *Meyer v. Christie*, 2007 WL 3120695 (D. Kan. Oct. 24, 2007).

<sup>111</sup> Draft Restatement § 1, Reporters' Notes, at 14.

contract are, by the most generous standards, together cited only three times for that proposition.<sup>112</sup> The two dominant cases holding that the privacy policy was not a standard term together generated fifteen 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.” Their data do not support that conclusion.

\* \* \*

The Draft identifies three results from the quantitative study of privacy-policy decisions that support the proposed comment 8: a high proportion of decisions treating privacy policies as contract terms, a “clear and increasing” trend in that direction, and the greater influence of decisions enforcing privacy policies in contract. The study’s data do not underwrite 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 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 at least some of the increase that the Reporters observe might be due to their questionable coding of the shield decisions. Finally, decisions treating privacy policies as contract terms have not been more often cited for that proposition than have decisions refusing enforcement in contract.

### 3 Qualitative Analysis of the Evidence

As noted in section 2.1, neither the Draft Restatement nor the Chicago article provides the criteria used for coding cases. The Reporters describe their results most frequently as finding that courts “recognize privacy policies [or “privacy notices”] as contracts.”<sup>113</sup> “Recognition” is not a legal term of art, and could encompass a wide range of judicial expressions. In a few places, the Reporters suggest stronger findings. Thus the Reporters’ Notes characterize the “dominant jurisprudence in this area”

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<sup>112</sup> Assuming *arguendo* that the holding in *Perkins v. LinkedIn*, a shield case, is relevant to the question.

<sup>113</sup> See Draft Restatement § 1, Reporters’ Notes at 13-14; 84 Chi. L. Rev. at 28-29. See also Reporters’ Notes at 14 (describing cases as “embracing privacy notices as contracts”); 84 Chi. L. Rev. at 28 (stating that “two state appellate courts . . . have suggested that privacy polies could be contracts.”)

as “the *JetBlue* approach, which held that privacy notices can create contractual obligations,” and concludes that “privacy notices are contracts.”<sup>114</sup> Similarly, the Chicago Article states that question was “whether courts enforce privacy practices as contracts.”<sup>115</sup>

Because the Reporters did not specify the strength of the legal authority in their coded cases, this study adopted a highly permissive coding rule. As described in section 2.1, 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 and the Reporters’ studies coded as contract, what do their numerical results tell us about the state of the law? This Part addresses that question with a qualitative assessment of the cases in the Reporters’ dataset and their coding. Section 3.1 discusses the types of decisions that comprise the Reporters’ dataset. Section 3.2 describes some difficulties in identifying authority in those decisions, persuasive or binding, for the Reporters’ proposed comment. Section 3.3 summarizes and draws conclusions.

### 3.1 Composition of the Dataset

Two general features of the decisions in the Reporters’ dataset are relevant to assessing the empirical support 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, which is discussed in section 3.2.

#### 3.1.1 *Lack of Appellate Decisions*

Of the fifty-one decisions in the dataset, only one is from an appellate court—a decision this study excluded because it involved a business-to-business dispute.<sup>116</sup> Of the remaining decisions, two were from

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<sup>114</sup> Draft Restatement § 1, Reporters’ Notes at 13, 15.

<sup>115</sup> 84 Chi. L. Rev. at 26.

<sup>116</sup> *Gwinnett Cmty. Bank v. Arlington Capital, LLC*, 326 Ga. App. 710, 710, 720-21 (2014). *Gwinnett* involved a commercial borrowers’ claim that the lender committed breach by not adhering to its own privacy statement. The court dismissed the contract claim on the grounds that “[a] review of [the privacy] statement shows that the statement applies only to consumer customers.” *Id.* at 720. This conclusion did not require the court to consider whether a consumer might have brought a claim of breach based on noncompliance with the privacy statement. Nor did the court opine on the question. The Draft Restatement is therefore incorrect in stating that “the

state courts and forty-eight from federal District Courts or Bankruptcy Courts.

When appellate courts have not yet ruled on a question of law, it is reasonable to ask how trial courts are handling it. A District Court's holding on an issue and its statements about the law can have significant persuasive authority. Because of their high degree of competence, District Courts judgments about what the law requires are good evidence of what the law is. In the absence of appellate decisions, it is therefore worth knowing how trial courts are handling arguments that privacy policies generate contractual obligations or privileges.

That said, there is a significant difference between a legal question on which there exists appellate authorities 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 "such courts are not bound by the cited . . . cases under stare decisis principles."<sup>117</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>118</sup> With respect to binding precedent—or what the law is—a District Court decision is no more significant than that of an arbitration panel. Federal District Courts do not make 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. It is somewhat odd for the American Law Institute to weigh in on a question in a Restatement before any appellate court in the country has. 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

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[*Gwinnitt*] court found that privacy notices may give rise to contractual obligations." Draft Restatement § 1, Reporters' Notes, at 12.

The Chicago Article states in passing that "the two state appellate courts to address this issue have suggested that privacy policies could be contracts." 84 U. Chi. L. Rev. at 28. The authors do not cite the two decisions they intend to refer to. This study did not find a second appellate decision in the dataset.

<sup>117</sup> Draft Restatement § 1, Reporters' Notes, at 14.

<sup>118</sup> 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.").

legal issues. Often the goal is to dispose of the case before the court, not to provide future courts guidance on how to decide similar cases. Thus a trial court might simply state that the privacy policy is part of the contract, without explaining how customers assented to the policy, whether it was mentioned in separately agreed-to terms of service, or the rule that the court is applying.<sup>119</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 numerical results.

### 3.1.2 *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>120</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>121</sup> others identify factual issues as sufficiently pled but expressly leave their resolution for a later stage in the proceedings.<sup>122</sup> At least one decision in the dataset, issued

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<sup>119</sup> See, e.g., *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1172 (SD Cal. 2010); *In re American Airlines, Inc., Privacy Litig.*, 2005 WL 3323028, \*2 (N.D. Tex. Dec. 7, 2005).

<sup>120</sup> 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 contract or neighboring claims.

<sup>121</sup> This is often the case in the shield decisions. See, e.g., *Del Vecchio v. Amazon.com Inc.*, 2011 WL 6325910, at \*4 (discussing the details of Amazon's privacy policy); *In re Google Inc. Gmail Litig.*, 2013 WL 5423918, at \*7 (granting Google's motion to take judicial notice of its terms of service and privacy policies); *Toney v. Quality Resources, Inc.*, 75 F.Supp.3d 727, 738-39 (2014) (taking judicial notice of privacy policy and converting motion to dismiss to motion for summary judgment).

<sup>122</sup> See, e.g., *In re American Airlines, Inc., Privacy Litig.*, 2005 WL 3323028, \*2 ("The issue is not whether the plaintiff will ultimately prevail, but

before the Supreme Court raised federal pleading requirements, emphasizes the low bar of notice pleading.<sup>123</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, assuming the *ratio decidendi* was relevant, 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>124</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.

### 3.2 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 data. 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 2.2, and 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 them. A closer look at a representative sample of judicial opinions also illustrates the difficulties in

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whether he is entitled to offer evidence to support his claim.”); *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 325 (2005) (reasoning that “the issue of who actually read and relied on the policy would be addressed more properly at the class certification stage”); *Smith v. Trusted Universal Stds. in Elec. Transactions, Inc.*, 2010 U.S. Dist. LEXIS 43360, \*9 (“[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.”); *Garcia v. Enterprise Holdings, Inc.*, 78 F.Supp.3d 1125, 1138-39 (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).

<sup>123</sup> *Loeffler v. Ritz-Carlton Hotel Co.*, 2006 U.S. Dist. LEXIS 44202, at \*4. Section 3.2.3 provides a detailed discussion of the *Loeffler* decision.

<sup>124</sup> 84 U. Chi. L. Rev. at 17 n. 25.

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

3.2.1 *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 codings simply appear to be mistakes.

For example, four of the fifty-one decisions in the dataset, or almost eight percent, involved business-to-business contract claims, not consumer-to-business claims.<sup>125</sup> *Meyer v. Christie*, for example, involved two sophisticated real estate developers' suit against a bank, based on the bank's disclosure of their financial information to other developers in the project.<sup>126</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>127</sup> which probably explains why the Reporters coded the case as contract. But the plaintiffs were not "individual[s] acting primarily for personal, family, or household purposes."<sup>128</sup> That is, they were not consumers under the Restatement definition. And the court's reasons for rejecting the motion to dismiss included the parties' long-term relationship, one of the plaintiff's reliance on the privacy policy, and the bank's demand for the information as a condition of entering into the contract.<sup>129</sup> None of these describe 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.

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<sup>125</sup> See *supra* note 51.

<sup>126</sup> 2007 WL 3120605, at \*1-\*3 (D. Kan. Oct. 24, 2007).

<sup>127</sup> *Id.* at \*4.

<sup>128</sup> Draft Restatement §§ 1(a)(1).

<sup>129</sup> "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." *Id.*

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>130</sup> The Reporters coded *Browning v. AT&T*, for example, as recognizing the privacy policy as a contract. Yet the complaint in *Browning* did not include a claim for breach,<sup>131</sup> and the defendant did not attempt to invoke the policy as a shield against the plaintiff's statutory and tort privacy claims.<sup>132</sup> The plaintiff did argue that the defendant's privacy policy violated the Illinois Consumer Fraud Act. The court rejected the Consumer Fraud Act claim based on its finding that the privacy policy permitted the disclosures in question. That interpretive question might look similar reasoning in some contract cases. The legal question, however, was not whether there was a breach of contract or whether the plaintiff consented to the disclosure, but whether the policy was deceptive.

Another coding decision that is difficult to understand is the choice to count decisions that turned on terms embedded in clickwrap agreements, rather than separate privacy policies.<sup>133</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>134</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>135</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>136</sup> This study coded the decision as irrelevant, as it did not involve a claim based on a privacy policy. The Reporters coded it as

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<sup>130</sup> See *supra* note 63.

<sup>131</sup> *Browning v. AT&T Corp.*, 682 F.Supp. 2d 832, 841-44 (N.D. Ill. 2009) (permitting claim of violation of Illinois Consumer Fraud Act). See also *Mendoza v. Microsoft, Inc.*, 1 F. Supp. 3d 533, 540 (W.D. Tex. 2014) (plaintiff did not claim breach of contract, but that privacy policy violated Texas Deceptive Practices Act).

<sup>132</sup> *Browning*, 682 F.Supp. 2d. at 835-41.

<sup>133</sup> See *supra* notes 53 & 54.

<sup>134</sup> *Johnson v. Microsoft*, 2009 U.S. Dist. LEXIS 58174, \*3-\*5 (W.D. Wash. June 23, 2009). See also *supra* note \_\_\_\_ (listing other cases).

<sup>135</sup> *Id.* at \*4 ("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.").

<sup>136</sup> *Id.* at \*5 (describing the holding in the analysis of the privacy claim).

recognizing the privacy policy as a contract, despite the lack of a holding to that effect and the court's suggestions to the contrary.

### 3.2.2 *Shield Decisions*

Other differences between the studies' codings result from what might be considered judgment calls. The coding of the shield decision is an example.<sup>137</sup> In a shield case, the defendant invokes its privacy policy against one or more claims of noncontractual privacy violations. In the decisions in the dataset, courts ruled on such defenses not on the basis of the law of contract, but by applying requirements for legally effective consent drawn from tort and statutory law.<sup>138</sup>

In *Perkins v. LinkedIn Corp.*, for example, the court 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

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<sup>137</sup> *Supra* section 2.2.3.

<sup>138</sup> 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), M.C.L. § 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.

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).

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>139</sup>

Nowhere in the above analysis does the court refer to contract law or to the rules of contract formation. The decision therefore should not be included in a count of decisions “in which firms, defendants, sought to enforce their own policies, arguing that they constitute contracts . . .”<sup>140</sup> 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

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<sup>139</sup> *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 Telephone Consumer Protection Act).

<sup>140</sup> Draft Restatement § 1, Reporters’ Notes, at 13.

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>141</sup> One should therefore take care before drawing conclusions about rules of consent in privacy law from the Reporters' data.

More importantly, the Reporters make nothing like the above argument 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 state that they counted cases 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>142</sup> In fact, the shield decisions (as coded by this study) do not discuss whether the privacy policies constitute contracts. No do their holdings—shielding the defendant from liability for noncontractual privacy violations—have all the legal consequences that a contractual obligation would. The shield case count might capture some courts' application of a neighboring rule. But it is not capturing whether courts are treating privacy policies as contract terms. Rather than "render[ing the Restatement's] recommendations more transparent and reliable,"<sup>143</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>144</sup>

### 3.2.3 *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 a decision. Some of the reasons why this is so have already been identified: District Courts are less likely than are appellate courts to fully explain the logic of their decisions, and the legal significance of decisions on a motion to dismiss is often equivocal at best. Four examples illustrate the limits of the ternary coding of contract, no contract

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<sup>141</sup> See 84 Chi. L. Rev. at 27 n.65 (describing search methods).

<sup>142</sup> Draft Restatement § 1, Reporters' Notes, at 13 (emphasis added).

<sup>143</sup> Draft Restatement, Reporters' Introduction, at 5-6.

<sup>144</sup> Draft Restatement, Reporters' Notes, at 11-12.

or not relevant as applied to such decisions.<sup>145</sup> They also illustrate the limited persuasive authority of decisions coded as supporting the proposed comment.

The first is *Loeffler v. Ritz-Carlton Hotel Co.*, in which the defendant Ritz-Carlton argued for dismissal of the breach of contract claim because the complaint failed to mention the company's privacy policy. The District Court therefore 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." The court nonetheless concluded that "the contract is pled sufficiently to meet notice pleading standards."<sup>146</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>147</sup> One wonders whether the motion to dismiss would succeed under the contemporary rule. Certainly the court's application of the pre-*Twombly* standard would be an obvious objection to citing the case today. Second, in the same opinion the court 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>148</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 section 2. Third, a glance at the docket reveals that the court subsequently granted Ritz-Carlton's motion for summary judgment, and later awarded it over \$26,000 in fees and costs.<sup>149</sup> The court did not issue a written opinion, but in announcing its decision from the bench stated, "we conclude that

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<sup>145</sup> Or in the Reporters' schema, 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 13.

<sup>146</sup> 2006 WL 1796008, \*4 (D. Nev. June 28, 2006).

<sup>147</sup> *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).

<sup>148</sup> 2006 WL 1796008 at \*4 (emphasis added).

<sup>149</sup> Docket, *Loeffler v. Ritz-Carlton Hotel Co.*, 2:06-CV-00333 (D.Nev.), items 54 & 55.

there is no evidence that the defendant's privacy policy constituted a contractual agreement with plaintiff under these circumstances."<sup>150</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>151</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 accordingly very weak support for the claim that such policies are subject to the rules of the draft section 2.

The limits of the ternary coding scheme can again be seen in *Claridge v. RockYou*, also coded by both this and the Reporters' study as contract. Like *Loeffler*, *RockYou* involved claims that the defendant breached both its implied and an 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>152</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>153</sup> Looking back to the filings, one finds that *RockYou* did not make a formation argument.<sup>154</sup> Consequently, although the court allowed the contract claims to go forward, it was neither required nor chose to address the Reporters' question: whether the online privacy policy could be part of the consumer contract. *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>155</sup>

A third illustrative decision is the District Court's ruling in *Burton v. Time Warner Cable*. In this case, the consumer-plaintiff originally claimed *inter alia* that Time Warner had breached an implied contract with its

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<sup>150</sup> 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.

<sup>151</sup> 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.

<sup>152</sup> 785 F.Supp. 2d 855, 865-66 (N.D. Cal. 2011).

<sup>153</sup> *Id.* at 864-65.

<sup>154</sup> *RockYou*'s Notice of Motion and Motion to Dismiss Complaint, in *Claridge v. RockYou*, No. C-09-6032-VRW (N.D. Cal.), filed June 6, 2010, at 13-18.

<sup>155</sup> Docket, *Claridge v. RockYou*, No. C-09-6032-VRW (N.D. Cal.), item 58.

customers to comply with industry standards for handling personally identifiable information.<sup>156</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>157</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 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 support for the proposed comment.

Finally, consider *In re JetBlue Airways*, whose logic the Reporters characterize as “compelling” and which they identify as the “dominant precedent” for their position that online privacy policies fall under the rules of the Draft Restatement, including the formation rules in section 2.<sup>158</sup> At issue in *JetBlue* was *inter alia* a 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>159</sup> JetBlue argued 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>160</sup> The court found the pleadings sufficient to state a claim for breach, based on plaintiffs’

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<sup>156</sup> 2013 WL 3337784, \*4 (C.D. Cal. Mar. 20, 2013).

<sup>157</sup> *Id.* at \*5. For another decision along the same lines, see *Padilla v. Dish Network L.L.C.*, 2013 U.S. Dist. LEXIS 101120, \*8 (N.D. Ill. July 19, 2013).

<sup>158</sup> Draft Restatement § 1, Reporters’ Notes at 13 & 14. See also 84 U. Chi. L. rev. at 29 (describing *JetBlue* as the “dominant case” based on citation counts).

<sup>159</sup> 379 F.Supp. 2d 299, 316 (2005).

<sup>160</sup> 379 F. Supp. 2d at 325 (E.D.N.Y. 2005).

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>161</sup> Because the court permitted the claim to go forward, this study coded the decision as contract.

Yet this was not the end of the opinion. The court went on to emphasize that the plaintiffs would be required to prove actual reliance on the privacy policy, a fact question that would be addressed at the class certification stage.<sup>162</sup> That requirement is at odds with formation rules in section 2 of the Draft Restatement. In any case, the contract claim never reached the class certification stage. The court granted in the same decision the defendants’ motion to dismiss the contract claim on the separate ground that the plaintiffs had failed to allege injury.<sup>163</sup> The 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 formation rule. Although there is evidence that the court considered the contract claim potentially viable, the decision as a whole does not support the Draft’s comment 8.<sup>164</sup> Yet the Reporters identify it as a leading case.

### 3.3 The Strength of the Empirical Support for the Proposed Comment

Part Two described, the quantitative results of the author’s attempt to replicate the Draft Restatement’s study of privacy policy cases. Using the Reporter’s data, the author’s coding and analysis produced far less numerical support than did the Reporters’ study for the proposition that a business’s privacy policy can become part of a consumer contract pursuant to the rules of the Draft Restatement.<sup>165</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.

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 326-27. A review of the case docket indicates that plaintiff did not amend its complaint and that the above decision effectively ended the case.

<sup>164</sup> For another decision with the same pattern of reasoning, see *Smith v. Trusted Universal Stds. in Elec. Transactions, Inc.*, 2010 U.S. Dist. LEXIS 43360, \*9-\*10 (D.N.J. May 4, 2010) (holding on a motion to dismiss that “giving 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,” then dismissing contract claim based on failure to plead injury).

<sup>165</sup> Draft Restatement § 1, cmt. 8.

This Part's qualitative analysis casts further doubt on the strength of the Reporters' quantitative evidence for the proposed comment. It has explained why the author's results differ from those of the Reporters, and argued 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. Excluding shield cases, Part Two identified twenty-six of the fifty-one decisions in the Reporters' dataset as not relevant to the hypothesis being tested.<sup>166</sup> The Reporters coded fifteen of these decisions as recognizing that the privacy policy might be part of the contract, and two as rejecting the contract claim. 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. 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 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 the author's finding that the shield decisions do not support the Reporters' position, as those decisions neither hold nor suggest that privacy policies might be contract terms. Other judgment calls are particular to individual cases, such as decisions holding that a contract claim could go forward, in which the court also suggested 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 Reporters coded as contract (thirty out of thirty five) were reached on pre-discovery motions, and over ninety percent of the decision

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<sup>166</sup> *Supra* sections 2.2.1 & 2.2.2. 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 62, but which was included in the shield count.

this study coded as contract (ten out of eleven) were on motions to dismiss. In sword cases, these decisions say at most that the plaintiff pled sufficient facts for the case to go forward. The decision does not say the business's privacy policy is a contract, but that under some conceivable set of facts it might be. And which 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 the plaintiff will 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 tend to weaken the support for the Reporters' conclusions.

Both in coding the decisions and in its qualitative analysis, this study has occasionally employed sources beyond those that the Reporters used. 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 replicate and understand the Reporters' privacy-policy study are far beyond what one could expect of most quantitative caselaw 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 quantitative methods that the Reporters employ. The decisions collected in the dataset together with the Reporters' approach to coding them produced numerical results that did 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 separate facially neutral coding choices. None of that, however, appears in the published results. One must dig deeper to understand what the numbers mean.

#### **4 Quantitative Caselaw Studies and the Restatement Project**

This article has examined only one of the six quantitative studies in the Draft Restatement. The Draft invokes the results of five similar studies: of clickwrap, shrinkwrap, browsewrap, unilateral modifications, and applications of the parol evidence rule.<sup>167</sup> It might well be that 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, the findings of this study 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

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<sup>167</sup> See *supra* note 2.

published their methods or coded data. Nor have their results been subject to independent scrutiny or attempts at replication.

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, this Restatement complements the standard ALI methodology (of extracting rationales from leading cases and supporting them with convincing policy justifications) with a methodology that has the potential to render its recommendations more transparent and reliable.<sup>168</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>169</sup> A Reporter can always find a decision in support of their preferred rule. Systematic empirical work on the corpus of decisions as a whole, including unpublished and trial court decisions, would add to our understanding of the relationship between propositions in a Restatement and the caselaw.

The question is whether the Restatement process, as currently designed, is suited to that task.<sup>170</sup> The fundamental check on any empirical study is independent replication.<sup>171</sup> Thus 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

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<sup>168</sup> Draft Restatement, Reporters’ Introduction, at 5-6.

<sup>169</sup> See Herbert Wechsler, *The Course of the Restatements*, 55 Am. Bar Assoc. J. 147 (Feb. 1969); N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 L. & Hist. Rev. 55 (1990); G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 L. & Hist. Rev. 1 (1997).

<sup>170</sup> Some of the considerations 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).

<sup>171</sup> See, e.g., John P.A. Ioannidis, How to Make More Published Research True, 11 PLOS Medicine 1 (2014), available at: <https://doi.org/10.1371/journal.pmed.1001747>.

a significant proportion of published studies fail attempted replication.<sup>172</sup> There are additional reasons to seek replication of quantitative studies of judicial decisions. As the qualitative analysis in Part Three illustrates, counting judicial authority for a legal proposition can be very different from determining the ratio of black to white marbles in a jar. Depending on the question posed and the types of decisions in the dataset, there are often many shades of grey—or plaid, or Pollockian swirls and splatters—in between. The coding for quantitative studies of judicial decisions can require a host of judgment calls. Independent scrutiny and replication is therefore essential to establishing the reliability of the results.

The American Law Institute describes the life cycle of a Restatement Project as follows:<sup>173</sup>

1. Preliminary Draft ← - - - - - ↓
2. Council Draft                      Discussion Draft
3. Tentative Draft    - - - - - ↑
4. Proposed Final Draft (only if there are extensive changes)
5. Official Text

Reporters produce Preliminary Drafts in consultation with the Project Advisors and Members of a Consultative Group, bodies constituted specially for the project.<sup>174</sup> The drafting process results in a Council Draft, which goes to the ALI Council.<sup>175</sup> The Council can then do any of three

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<sup>172</sup> 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); available at: <https://ssrn.com/abstract=3020401>.

<sup>173</sup> American Law Institute, Project Life Cycle, at <https://www.ali.org/projects/project-life-cycle/> (last accessed June 12, 2017).

<sup>174</sup> “Advisers . . . are selected for their particular knowledge and experience of the subject or the special perspective they are able to provide. They constitute an intellectually and geographically diverse group of practitioners, judges, and scholars and normally include one or more members of the Council. Members Consultative Groups consist of Institute members who have a special interest in the project's subject.” *Id.*

<sup>175</sup> The ALI Council is “a volunteer board of directors that oversees the management of ALI’s business and affairs. Made up of no fewer than 42 and no more than 65 members, the Council consists of lawyers, judges, and academics, and reflects a broad range of specialties and experiences.

things: (1) send the Council Draft on for approval of the membership as a whole, in which case it becomes a Tentative Draft until approved; (2) send the Draft back to the Reporter for further revisions; or (3) present the Draft to the full membership for discussion only, in the form of a Discussion Draft, which will after discussion be subject to further revisions by the Reporter. Although *samizdat* Preliminary Drafts and Council Drafts are often circulated outside the ALI, the ALI website specifies only that “Tentative Drafts, Discussion Drafts, and Proposed Final Drafts are made available to the Public after the Annual Meeting.”<sup>176</sup>

This process is not well suited to independent replication of quantitative caselaw studies produced within it. If attempts at independent 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>177</sup> Nor has the ALI established any mechanisms for publicizing coding criteria or coded data, or for inviting other researchers 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 the coding rubric and coded data on their own, and invite others to examine and attempt to replicate them. But it is not obvious exactly how this would fit into the ALI process. Would Reporters integrate 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, or had attempted to replicate them. Nor have the Reporters yet made their coding rubric or coded data public. In the Chicago Article, the Reporters state, “We emphasize the importance of transparency,

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Council members are elected from the Institute membership for terms of five years.” American Law Institute, Officers and Council, <https://www.ali.org/about-ali/officers-council/> (last accessed June 12, 2017)

<sup>176</sup> ALI, Project Life Cycle, *supra* note 173.

<sup>177</sup> 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 American Law Institute Annual Report, at 14, *available at*: [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).

and we will make our databases, search criteria, and coding decisions publicly available once the Restatement is published.”<sup>178</sup> If “published” means after final approval by the ALI membership, it is not obvious how the two halves of this 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>179</sup> Including empirical work that has not been subject to the highest standards of verification puts that authority at risk.

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 caselaw 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.

## Conclusion

The Reporters describe their quantitative studies of judicial decisions as supplementing rather than supplanting the traditional methods of caselaw research.<sup>180</sup> The authority for the Draft’s proposed rules does not rise and fall on the quantitative studies. 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 reliable and transparent,” and “make[] it possible to decipher with greater subtlety the preeminent patterns within the law and measure their impact.”<sup>181</sup> Nor should one minimize the persuasive power of numbers and graphs. No matter how much the Reporters relied on their quantitative caselaw studies in drafting the black-letter rules and comments, many readers are likely to give those studies considerable weight. Today those

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<sup>178</sup> 84 U. Chi. L. Rev. 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.”).

<sup>179</sup> *But see* *Kansas v. Nebraska*, 135 S.Ct. 1042, 1064, 1069-69 (2015) (Scalia, J., & Thomas, J., each concurring in part and dissenting in part) (observing that section 39 of the Restatement (Third) of Restitution and Unjust Enrichment has little or no support in the caselaw, and criticizing the majority’s reliance on it).

<sup>180</sup> See, e.g., Draft Restatement, Reporters’ Introduction, at 6.

<sup>181</sup> Draft Restatement, Reporters’ Introduction, at 5-6.

readers include the ALI Council and ALI members. 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 caselaw studies whose results the Draft Restatement reports and relies on have not been replicated or fully evaluated 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 Reporter's 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 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 a data, recode the cases, and assess the analytic tools. This is not to say quantitative caselaw 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.