LEXISNEXIS'S CONTRACT WITH ICE AS UNJUST ENRICHMENT

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For $22.1 million, LexisNexis is currently helping Immigration and Customs Enforcement (ICE) surveil, detain, and deport noncitizens. Like other data brokers, LexisNexis's role in the collection and sale of personal information has largely been ignored by regulators, judges, and the public. A recent lawsuit against LexisNexis in Illinois includes, among other claims, a claim of unjust enrichment. This often misunderstood and unpopular claim has a complex history which presents both a barrier to relief and an opportunity for advocates to push courts to clarify the doctrine. This Note examines the history of the theory of unjust enrichment, surveys its recent application in data privacy litigation, and argues that the contract between LexisNexis and ICE should be considered a case of unjust enrichment.

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INTRODUCTION

In June 2022, Claudia Marchan received a forty-six-page document detailing the personal information LexisNexis had on her and her family: addresses, emails, phone numbers, and her unredacted Social Security number.[1] As the director of an immigration rights advocacy group and someone who had spent much of her life without documentation, Marchan knew that LexisNexis likely had this information, but the breadth and depth of the report shocked her: it was "very precise, very complete, and very detailed."[2] Since receiving the report, she has lost sleep and suffered from anxiety, worrying about how this data could affect those with whom she is closest, especially her undocumented family members.[3]

Marchan's LexisNexis report—along with millions of similar reports linked to citizens and noncitizens alike—is available to Immigration and Customs Enforcement (ICE) through its $22.1 million contract with LexisNexis, the data broker best known for its legal research products.[4] In February 2021, LexisNexis signed a $16.8 million contract with ICE, providing ICE's enforcement arm, Homeland Security Investigations (HSI), access to billions of records of personal information aggregated from public and private sources.[5] In June of that year, ICE expanded the contract to include Appriss Insights's Justice Intelligence, a database that provides incarceration records and real-time jail booking data, increasing

1. Chelsea Verstegen, *LexisNexis' Contract with ICE Allows for Illegal Surveillance of Immigrants, Lawsuit Claims*, BORDERLESS (Mar. 2, 2023), https://borderlessmag.org/2023/03/02/lexisnexis-contract-with-ice-allows-for-illegal-surveillance-of-immigrants-lawsuit-claims [https://perma.cc/AJ6U-UUDC].

2. *Id.*

3. *Id.*

4. *Id.* LexisNexis Risk Solutions, Inc. is a subsidiary of RELX. It is referred to in this Note, for brevity, by its commonly used name, LexisNexis. This Note uses the term "data broker" to refer to companies that collect consumers' personal information and resell or share that information with others. *See* FED. TRADE COMM'N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY (2014), https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf [https://perma.cc/AXT3-9J83].

5. *Definitive Contract PIID 70CMSD21C00000001*, USA SPENDING, https://www.usaspending.gov/award/CONT_AWD_70CMSD21C00000001 [https://perma.cc/NX49-GJQB] [hereinafter *Definitive Contract*]; Sam Biddle, *LexisNexis to Provide Giant Database of Personal Information to ICE*, INTERCEPT (Apr. 2, 2021, 10:00 AM), https://theintercept.com/2021/04/02/ice-database-surveillance-lexisnexis [https://perma.cc/L6HN-PE5D].

the total contract value to $22.1 million over a five-year period.[6] In the first seven months of the contract, ICE searched LexisNexis's database over 1.2 million times, confirming fears that the data broker is "enabling the mass surveillance and deportation of immigrants."[7]

The contract sparked protests at law schools across the United States, as students called on LexisNexis to cut ties with ICE and on school administrations to cut ties with LexisNexis.[8] Over forty immigrant advocacy organizations and law school groups and over 2,500 individuals—law professors, librarians, attorneys, and law students—signed onto a letter expressing deep concern about the role that RELX Group P.L.C. (parent company to LexisNexis) and Thomson Reuters (parent company to Westlaw)[9] play in "fueling the surveillance, imprisonment,

6. U.S. Immigr. & Customs Enf't Off. of Acquisition Mgmt., ICE ACQUISITION MANUAL 3006.301-90, JUSTIFICATION FOR OTHER THAN FULL COMPETITION J&A A-21-00148 (June 2021), https://govtribe.com/file/government-file/p00002-ja-21-00148-competition-advocate-signed-6-dot-24-dot-21-redacted-dot-pdf [https://perma.cc/5KF2-JVUY]; *see also* Johana Bhuiyan, *US Immigration Agency Explores Data Loophole to Obtain Information on Deportation Targets*, GUARDIAN (Apr. 20, 2022, 1:35 PM), https://www.theguardian.com/us-news/2022/apr/19/us-immigration-agency-data-loophole-information-deportation-targets [https://perma.cc/6DJ5-PG7T]; AARON LACKOWSKI ET AL., SABOTAGING SANCTUARY: HOW DATA BROKERS GIVE ICE BACKDOOR ACCESS TO COLORADO'S DATA AND JAILS, COLO. I (Apr. 2022), https://coloradoimmigrant.org/wp-content/uploads/2022/04/Sabotaging-Sanctuary_Final-Report_Design-4-1.pdf [https://perma.cc/EYJ2-USKU].

7. Sam Biddle, *ICE Searched LexisNexis Database Over 1 Million Times in Just Seven Months*, INTERCEPT (June 9, 2022, 9:54 AM), https://theintercept.com/2022/06/09/ice-lexisnexis-mass-surveillances [https://perma.cc/5Q2H-CNVU]; LEXISNEXIS SEARCH LOGS, https://s3.documentcloud.org/documents/22056478/jfl-foias-on-national-lexis-searches.pdf [ttps://perma.cc/3Q9R-5UY5].

8. *See, e.g.*, Chris Mills Rodrigo, *Law schools pressured to cut ties with research firms over ICE, CBP*, HILL, (Oct. 4, 2021, 10:51 AM), https://thehill.com/policy/technology/575147-law-schools-pressured-to-cut-ties-with-research-firms-over-ice-cbp [https://perma.cc/4UAL-R3XX]; Josh Moody, *Law Students Protest Research Database Contracts with ICE*, INSIDE HIGHER ED (Dec. 6, 2021), https://www.insidehighered.com/news/2021/12/06/law-students-protest-lexisnexis-westlaw-contracts-ice [https://perma.cc/82AN-VMFX]; Trevor Mason, *Students protest LexisNexis and Westlaw over contracts with ICE, CBP*, NAT'L JURIST (Oct. 25, 2021, 12:08 PM), https://nationaljurist.com/national-jurist-magazine/students-protest-lexisnexis-and-westlaw-over-contracts-ice-cbp [https://perma.cc/UU4T-EDR8].

9. ICE's contract with LexisNexis appears to be a replacement for its previous agreement with Thomson Reuters, which began in 2017 and expired in February 2021. Thomson Reuter's CLEAR database includes a vast repository of data from "credit agencies, cellphone registries, social-media posts, property records, utility accounts, fishing licenses, internet chat rooms and bankruptcy filings" which provided ICE access to a "360-degree view of U.S. residents' lives." McKenzie Funk,

and deportation of hundreds of thousands of immigrants each year."[10] The letter called on the data brokers to terminate the contracts and to "stop enabling and profiting from the misery being inflicted on immigrant communities by ICE."[11] In response, LexisNexis published a page of Frequently Asked Questions about its relationship with DHS, stating that its tools "promote[] public safety" and are "not used to prevent legal immigration."[12]

ICE's contract with LexisNexis represents just one recent development in the transformation of the agency into a "domestic surveillance agency" akin to the National Security Agency and the FBI.[13] In 2014, Professor Anil Kalhan described a "sea change in the underlying nature of immigration governance" caused by the rise of surveillance and "dataveillance" technologies, which transformed a regime of border immigration control into a more expansive surveillance regime operating "without geographic bounds upon citizens and noncitizens alike."[14] The implications of this "unimpeded expansion" of immigration surveillance include the erosion of legal principles that have traditionally constrained aggregations of power and protected individual autonomy—protections that, in the immigration context, have always been relatively weak.[15] Since Kalhan's article, immigration surveillance has become a

How ICE Picks Its Targets in the Surveillance Age, N.Y. TIMES (Oct. 2, 2019), https://www.nytimes.com/2019/10/02/magazine/ice-surveillance-deportation.html [https://perma.cc/R4FS-RVJ7]. In 2022, after pressure to drop its contract from ICE, Thomson Reuters announced a human rights assessment of its "investigative and research solutions" but indicated no intention of severing ties with government agencies. Drew Harwell, *Thomson Reuters to Review Contracts, Including for Database Used to Track Immigrants*, WASH. POST (Apr. 29, 2022, 1:39 PM), https://www.washingtonpost.com/technology/2022/04/29/thomsonreuters-ice-clear-data [https://perma.cc/8H62-XUHZ].

10. *Law Letter: Reuters & RELX – Drop Your Ice Contracts!*, NO TECH FOR ICE, https://notechforice.com/lawletter [https://perma.cc/22L4-7N2M].

11. *Id.*

12. *About LexisNexis Risk Solutions and the U.S. Department of Homeland Security*, LEXISNEXIS RISK SOL., https://risk.lexisnexis.com/government/our-services-for-homeland-security [https://perma.cc/QZC7-UVHL]; *see* Biddle, *supra* note 7.

13. Nina Wang et al., *American Dragnet: Data-Driven Deportation in the 21st Century*, CTR. ON PRIV. & TECH. AT GEO. L. 1, 1 (May 10, 2022).

14. Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 1–2 (2014); *see also* Sarah Sherman-Stokes, *Immigration Detention Abolition and the Violence of Digital Cages*, 95 U. COLO. L. REV. 219 (2024).

15. Kalhan, *supra* note 14, at 9.

"sweeping dragnet" without any meaningful limits.[16] A recent report—the first that attempts to quantify the expansive reach of ICE surveillance—found that the agency has scanned the driver's license photographs of one in three adults in the United States, has access to driver's license data of three in four adults, and can locate three in four adults through their utility records.[17] ICE has built a surveillance infrastructure that enables its agents to "pull detailed dossiers on nearly anyone, seemingly at any time."[18]

ICE's expansive surveillance system has direct negative impacts on noncitizens and their families including, but not limited to, increased risk of detention and deportation. Immigration authorities use big data technology to employ "increasingly cruel and invasive techniques" in the arrests, detentions, and deportation of immigrants.[19] A growing body of research suggests that fear of ICE surveillance deters immigrants and their families from seeking access to a broad range of programs necessary for the health and well-being of individuals and their communities, including health services and the legal system.[20] ICE leverages people's trust in state motor vehicle departments and people's need for water, gas, electricity, phone, and internet to target deportations, forcing immigrants to make "impossible choices" about what kinds of services they need.[21]

Scholars, advocates, and activists have called for a variety of measures to combat ICE's dragnet surveillance. Professor Sarah Lamdan has argued that lawyers should purchase legal research services from socially responsible vendors rather than LexisNexis and Westlaw.[22] Another author has asserted that LexisNexis has a legal responsibility under international human rights law to terminate its relationship with ICE.[23] Advocacy organizations have called on law enforcement agencies to cut ties with LexisNexis and urged legislators to strengthen privacy

16. Wang et al., *supra* note 13, at 13.
17. *Id.* at 2, 14.
18. *Id.* at 1.
19. Sarah Lamdan, *When Westlaw Fuels ICE Surveillance: Legal Ethics in the Era of Big Data Policing*, 43 N.Y.U. REV. L. & SOC. CHANGE 255, 258 (2019).
20. Wang et al., *supra* note 13, at 5.
21. *Id.* at 3; Biddle, *supra* note 7.
22. Lamdan, *supra* note 19, at 255.
23. Yulanda Lui, *LexisNexis and I.C.E.: An Examination of LexisNexis's Human Rights Responsibilities*, 54 N.Y.U. J. INT'L L. & POL. 70, 82 (2022).

protections.[24] In an extensive report published in May 2022, the Center on Privacy and Technology at Georgetown Law recommended that Congress reform immigration and privacy laws; states better protect immigrants and prevent information sharing; and DHS and ICE end all dragnet surveillance programs that indiscriminately collect data on as many people as possible, including the purchase of bulk data sets from data brokers like LexisNexis.[25] In response, Senators Edward Markey and Ron Wyden called on ICE to "immediately shut down its Orwellian data-gathering efforts."[26] In February 2023, a coalition of eighty immigrants' rights, racial justice, government accountability, human rights, and privacy organizations urged DHS Secretary Alejandro Mayorkas to cancel ICE's contract with LexisNexis ahead of its February 2023 scheduled renewal—to no avail.[27] ICE's "data-driven deportation" continues.[28]

In the absence of legislative or agency action, advocates are turning to litigation. In 2022, activists including Claudia Marchan sued LexisNexis over its contract with ICE, alleging violations of privacy rights, statutory rights, and unjust enrichment.[29] The complaint in *Ramirez v. LexisNexis*, filed in Illinois district court, alleges that LexisNexis collects and aggregates "the private and sensitive data of hundreds of millions of individuals into searchable and detailed dossiers" by amassing records from "the most intimate corners of [their]

24. *See* LACKOWSKI ET AL., *supra* note 6, at 24–27; #NOTECHFORICE, https://notechforice.com [https://perma.cc/VS64-ZN9U].

25. Wang et al., *supra* note 13, at 5–8, 65–72.

26. Letter from Edward J. Markey, U.S. Senator, & Ron Wyden, U.S. Senator, to Tae D. Johnson, Acting Dir. of ICE (Sept. 12, 2022), https://www.markey.senate.gov/imo/media/doc/senators_markey_and_wyden_-_letter_to_ice.pdf [https://perma.cc/WF4C-ETRG]; *see* Suzanne Monyak, *Senate Democrats sound alarm on ICE's 'Orwellian' surveillance,* CONG. Q. (Sept. 13, 2022).

27. Letter from Advocates for Immigrants Rights et al. to Alejandro Mayorkas, Sec'y, Dept. of Homeland Sec., https://www.documentcloud.org/documents/23688425-letter-from-80-groups-to-dhs-cancel-lexisnexis-contract [https://perma.cc/UB24-ADV3]; *see also* Joseph Cox, *Immigration Advocates Urge DHS to Drop ICE's LexisNexis Contract*, VICE NEWS (Feb. 23, 2023), https://www.vice.com/en/article/g5vz5w/ice-urged-to-drop-lexisnexis-contract [https://perma.cc/D3NK-TQQZ].

28. Wang et al., *supra* note 13.

29. Ramirez v. LexisNexis Risk Solutions, No. 1:22-cv-05384 (N.D. Ill. Sept. 30, 2022); *see also* Kathleen Foody, *Immigration advocates sue LexisNexis over personal data*, AP NEWS (Aug. 16, 2022), https://apnews.com/article/chicago-lawsuits-georgia-immigration-635396b572cadf172c74b4a0000f52e8 [https://perma.cc/2D8W-V8MN].

lives" and selling these dossiers to law enforcement agencies, including ICE.[30] The plaintiffs, which include individuals and immigrants' rights organizations, "fear that ICE will indiscriminately use [LexisNexis's database] to target them, their organizational members, and their communities."[31] In addition to the more straightforward statutory and privacy claims, the plaintiffs brought a claim of unjust enrichment, arguing that LexisNexis has profited from "the collection and aggregation of the Plaintiffs' personal and sensitive data without their consent and without providing them any compensation."[32]

This Note examines the unjust enrichment claim brought in *Ramirez v. LexisNexis*. Although it is often overlooked, unjust enrichment has the potential to provide relief in cases like *Ramirez*, where traditional privacy claims often fail. The complex and confused history of the theory of unjust enrichment presents both a barrier to relief and an opportunity for advocates to push courts to clarify the doctrine. This Note examines that history and argues that the contract between LexisNexis and ICE, a contract under which LexisNexis profits from the unauthorized sale of private information (to an agency known for systemic, institutionalized racism) and causes harm to many of the individuals whose data it sells, should be considered a case of unjust enrichment.

Part I of this Note examines the history of the theory of unjust enrichment, focusing on two unresolved issues: the threshold question of whether unjust enrichment is a standalone cause of action and the meaning of the term "unjust." Part II examines the success of recent unjust enrichment claims in data privacy lawsuits against Facebook and Thomson Reuters. Finally, Part III applies the theory of unjust enrichment to the contract between LexisNexis and ICE, arguing that the contract should be considered unjust enrichment under a broad, equitable view of the doctrine that takes into account not only

30. Complaint for Damages, Declaratory, and Injunctive Relief at 8, *Ramirez v. LexisNexis Risk Solutions*, No. 1:22-cv-05384 (N.D. Ill. Sept. 30, 2022).

31. *Id.* at 20.

32. *Id.* at 29. In an opinion published shortly before the publication of this Note, Judge LaShonda A. Hunt dismissed the case, finding that the plaintiffs lacked standing. Ramirez v. LexisNexis Risk Solutions, Case No. 1:22-cv-05384 (N.D. Ill. Apr. 8, 2024). Judge Hunt's dismissal of the unjust enrichment claim rested largely on the conclusion that Illinois law does not permit an independent unjust enrichment claim, a conclusion which this Note discusses in Section I.A.

the source of LexisNexis's profits but also the tremendous harm that the contract has upon individuals like Claudia Marchan.

I. THE THEORY OF UNJUST ENRICHMENT

The basic principle of unjust enrichment is deceptively straightforward: "A person who is unjustly enriched at the expense of another is subject to liability in restitution."[33] The theme for the basis of liability is that the plaintiff has done or given "something for nothing."[34] Unjust enrichment has been defined as "any treatment of an unequal transfer of value that operates as a source of obligation separate from obligations arising from consent or wrongdoing."[35] It is "a form of Aristotelian justice, which aims to maintain an equilibrium of goods among members of society."[36] Although unjust enrichment developed as a common law source of obligation and an equitable principle, it was characterized predominantly as an action in equity after the fusion of "common law" and "equity" in U.S. courts.[37] As such, it came to occupy an "uncomfortable space in American jurisprudence" and became "unpopular and misunderstood in the United States, in contrast to the vibrant unjust enrichment scholarship in other countries."[38] Although the theory of unjust enrichment has a long history, two issues have remain largely unresolved in U.S. jurisprudence: first, whether unjust enrichment is an independent source of obligation; and second, whether the doctrine should be understood as broad and equitable or narrow and technical.

33. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. L. INST. 2011).

34. Ernest J. Weinrib, *The Structure of Unjustness*, 92 B.U. L. REV. 1067, 1070 (2012).

35. *The Intellectual History of Unjust Enrichment*, 133 HARV. L. REV. 2077, 2077 (2020).

36. *Id.* at 2100 (internal quotations omitted).

37. *Id.* at 2077.

38. *Id.* at 2077–78. While a full review of the unjust enrichment scholarship in other countries is beyond the scope of this Note, it draws on the work of the late Peter Birks, Professor of the Law of England at the University of Oxford, whose scholarship has influenced the law of unjust enrichment not only in England and Wales but also in other jurisdictions including Australia, Canada, and Hong Kong.

A. *Is Unjust Enrichment an Independent Source of Obligation?*

A central debate in the development of the doctrine of unjust enrichment has been whether it is an independent source of obligation, separate from tort and contract, or whether it operates primarily as a remedy. This question is unresolved in the intellectual history of the doctrine and in present day jurisprudence.

While some scholars argue that unjust enrichment should be explained simply as instances of restitutionary remedies given to breaches of contract or torts, others defend the idea of unjust enrichment as an "alternative source of obligation to contract and tort, rather than a subject identified by a restitutionary remedy."[39] Judge Learned Hand explained that, in many cases, there is "no contract or tort that could plausibly explain the source of the obligation to make restitution."[40] In these cases, there is no breach of consensual obligation or wrongdoing, but the defendant "simply holds what he has wrongfully, *ex aequo et bono*; that is the whole story."[41] English legal scholarship and courts have adopted this view, while U.S. jurisprudence on the topic has remained unsettled.[42] This debate is evident in the naming of the doctrine as both "unjust enrichment," the cause of action, and "restitution," which more accurately refers to the remedy.[43] The use of the term "restitution" over "unjust enrichment"—which the American Law Institute has adopted in its Restatements—suggests that the doctrine is merely a remedy rather than an independent cause of action.

Despite its choice of title, the American Law Institute recognized unjust enrichment as an independent basis of

39. *Id.* at 2088.

40. *Id.*

41. *Id.* at 2088–89 (quoting Learned Hand, *Restitution or Unjust Enrichment*, 11 HARV. L. REV. 249, 257 (1897)).

42. *Id.* at 2077, 2084.

43. *See* Peter Birks, *Misnomer*, *in* RESTITUTION: PAST, PRESENT AND FUTURE I, I (W.R. Cornish et al. eds., 1998) ("When we substitute restitution for unjust enrichment, we appear to have invited a cuckoo into the nest. One term now refers, not to a cause, but to an effect."); *see also* Douglas L. Johnson & Neville L. Johnson, *What Happened to Unjust Enrichment in California? The Deterioration of Equity in the California Courts*, 44 LOY. L.A. L. REV. 277, 279 (2010) ("The doctrine is sometimes no longer interpreted as a cause of action; rather, it has been rendered a light echo in remedial analysis.").

liability in the First Restatement of the Law of Restitution, published in 1937.[44] The Reporters explained that the unification of unjust enrichment under common law and equity "recognized the tripartite division of the law into contracts, torts and restitution."[45] While some scholars argued that this represented an "invention of a new branch of the law," it was readily accepted by the profession.[46] Yet, despite assertions that this would lead to a "golden age" of unjust enrichment, the field never came to occupy an equal place in law school curricula as contracts and torts and remained unpopular.[47] A Second Restatement was abandoned after debate regarding whether restitution was simply a remedy or a substantive doctrine creating sources of civil liability other than contract and tort.[48]

The Third Restatement of the Law of Restitution, published in 2011, was hailed as having the potential to revive a field that had "long lain dormant in the United States."[49] Writing in 2007, Professor James Rogers described the project of drafting the Third Restatement as "a Cinderella moment for the law of restitution."[50] Yet the Restatement failed to resolve confusion surrounding the basic doctrinal boundaries of unjust enrichment.[51] The Third Restatement fails to offer a clear definition of what exactly unjust enrichment is, stating: "it is by no means obvious, as a theoretical matter, how 'unjust enrichment' should best be defined; whether it constitutes a rule of decision, a unifying theme, or something in between; or what role the principle would ideally play in our legal system."[52] Instead, the Third Restatement is written on the assumption

44. *The Intellectual History of Unjust Enrichment*, *supra* note 35, at 2091; RESTATEMENT (FIRST) OF RESTITUTION § 1 (AM. L. INST. 1937).

45. *The Intellectual History of Unjust Enrichment*, *supra* note 35, at 2091 (quoting Warren A. Seavey & Austin W. Scott, *Restitution*, 54 LAW Q. REV. 29, 31 (1938)).

46. John D. McCamus, *The Restatement (Third) of Restitution and Unjust Enrichment*, 90 CANADIAN BAR REV. 439, 442 (2011).

47. *The Intellectual History of Unjust Enrichment, supra* note 35, at 2092.

48. McCamus, *supra* note 46, at 443.

49. *See* Lionel Smith, *American Law Institute, Restatement of the Law Third: Restitution and Unjust Enrichment*, 57 MCGILL L.J. 629 (2012); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (AM. L. INST. 2011).

50. James Steven Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution and Unjust Enrichment*, 42 WAKE FOREST L. REV. 55, 55 (2007).

51. *See The Intellectual History of Unjust Enrichment*, *supra* note 35, at 2099.

52. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1, cmt. a (AM. L. INST. 2011).

that "the law of restitution and unjust enrichment can be usefully described without insisting on answers to any of them."[53]

The Third Restatement—which adds "Unjust Enrichment" to its title—appears to adopt, in part, the First Restatement's view of unjust enrichment as an independent basis of liability separate from tort and contracts. Its authors describe the identification of unjust enrichment as an independent basis of liability as the "central achievement" of the First Restatement.[54] It defines the source of liability in unjust enrichment as "the receipt of a benefit whose retention without payment would result in the unjust enrichment of the defendant at the expense of the claimant."[55] Some comments hint at the view of unjust enrichment as both separate from and analogous to torts: "Restitution is the law of nonconsensual and nonbargained benefits in the same way that torts is the law of nonconsensual and nonlicensed harms."[56] And while "the law of torts identifies those circumstances in which a person is liable for injury inflicted, measuring liability by the extent of the harm; the law of restitution identifies those circumstances in which a person is liable for benefits received, measuring liability by the extent of the benefit."[57] But other comments state that the determination of rightful versus wrongful conduct can only be made based on other law, suggesting that the principle of unjust enrichment plays no independent role.[58] The text itself appears to be neutral on the question of whether unjust enrichment is an independent cause of liability.[59] As such, the debate surrounding the fundamental question of whether unjust enrichment is an independent cause of liability remains unresolved.

This uncertainty has created a threshold obstacle to bringing unjust enrichment claims in federal and state courts. An examination of California and Illinois caselaw illustrates the

53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* cmt. d.
57. *Id.*
58. Rogers, *supra* note 50, at 63; *accord The Intellectual History of Unjust Enrichment*, *supra* note 35, at 2100.
59. *The Intellectual History of Unjust Enrichment*, *supra* note 35, at 2099.

remarkable confusion surrounding the question of whether unjust enrichment can be an independent cause of liability.[60]

The past thirty years of unjust enrichment caselaw in California—where much data privacy litigation takes place—has been uncertain and inconsistent.[61] Despite a 1996 California Supreme Court decision that recognized a cause of action for unjust enrichment, subsequent lower court decisions refused to follow suit.[62] In *Fraley v. Facebook*, a California district court dismissed the plaintiffs' claim for unjust enrichment, stating that "there is no such independent cause of action in California."[63] The court repeated that assertion in *Low v. LinkedIn*, stating that "[u]njust enrichment is not a cause of action, just a restitution claim."[64] However, in 2015, the California Supreme Court held that unjust enrichment is an independent cause of action, stating that unjust enrichment applies "even if no contract between the parties itself expresses or implies such a [restitutionary] duty," and recognized a claim for unjust enrichment without any other theory of liability.[65] Quoting the Third Restatement, the court explained that the obligation of restitution arises "when the enrichment obtained lacks any adequate legal basis and thus 'cannot conscientiously be retained."[66] Most (but not all) California courts have since recognized unjust enrichment as an independent cause of action.[67]

60. This Note focuses on California and Illinois caselaw because there is more scholarship analyzing the state of the unjust enrichment doctrine in those states' courts, particularly in the data privacy context.

61. *See* Bernard Chao, *Privacy Losses as Wrongful Gains*, 106 IOWA L. REV. 555, 592–95 (2021).

62. *See* Johnson & Johnson, *supra* note 43, at 285 (discussing Ghirardo v. Antonioli, 924 P.2d 996 (Cal. 1996)).

63. Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 795 (N.D. Cal. 2011).

64. Low v. LinkedIn Corp., 900 F. Supp. 2d 1010, 1031 (N.D. Cal. 2012).

65. Hartford Cas. Ins. Co. v. J.R. Mktg., LLC, 353 P.3d 319, 326 (Cal. 2015). The Ninth Circuit recognized this clarification in Bruton v. Gerber Products Company, 703 F. Appx. 468, 470 (9th Cir. 2017) ("At the time when the district court dismissed this claim, California's caselaw on whether unjust enrichment could be sustained as a standalone cause of action was uncertain and inconsistent. But since then, the California Supreme Court has clarified California law, allowing an independent claim for unjust enrichment to proceed in an insurance dispute.").

66. *Hartford*, 353 P.3d at 326 (quoting RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 1, cmt. b (AM. L. INST. 2011)).

67. *See* Chao, *supra* note 61, at 595; Brooks v. Thomson Reuters Corp., No. 21-cv-01418-EMC, 2021 WL 3621837, at *11 (N.D. Cal. 2021). *But see* Klein v. Facebook, Inc., 580 Supp. 3d 743, 829 (N.D. Cal. 2022) ("California does not

Caselaw in Illinois—where the *Ramirez* lawsuit was brought—illustrates a similar level of confusion and contradiction. A recent article analyzing the treatment of unjust enrichment claims in Illinois concluded that there is a "surprising degree of disagreement" among courts over this issue and described the law as being "effectively in shambles."[68] Two Seventh Circuit decisions published in the same year came to opposite conclusions, with the latter failing to even acknowledge the former. In its January 2011 decision in *Pirelli v. Walgreen*, the Seventh Circuit perfunctorily stated that "[u]nder Illinois law, unjust enrichment is not a separate cause of action."[69] In August 2011, the court came to the opposite conclusion in *Cleary v. Philip Morris*, stating: "it appears that the Illinois Supreme Court recognizes unjust enrichment as an independent cause of action."[70] Judge Manion, writing for the majority, explained that the inconsistency in caselaw (despite failing to mention *Pirelli*) might have resulted because an unjust enrichment claim usually involves some improper conduct by the defendant, and that where improper conduct usually forms the basis of another claim in tort, contract, or statute, the unjust enrichment claim "will stand or fall with the related claim."[71] But the court refrained from "resolv[ing] definitively whether Illinois law recognizes unjust enrichment as an independent cause of action" because the plaintiffs' allegations in that case were insufficient to support the cause of action.[72]

In a more recent case, the Seventh Circuit cited *Pirelli* to perfunctorily conclude that unjust enrichment is not a separate cause of action and then remarkably also cited *Cleary* for the proposition that the request for relief based on unjust enrichment is "tied to the fate" of the statutory claim, taking the quote entirely out of context.[73] Scholars suggest advocating for

recognize a separate cause of action for unjust enrichment.") (internal quotations omitted).

68. Mason W. Kienzle & Samuel M. Zuidema, *Unjust Enrichment in Illinois: Uncommon Confusion Over a Common Claim*, 2020 U. ILL. L. REV. ONLINE 53, 59 (2020).

69. Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. Walgreen Co., 631 F.3d 436, 447 (7th Cir. 2011).

70. Cleary v. Philip Morris Inc., 656 F.3d 511, 516 (7th Cir. 2011) (This decision was not only issued by the same court in the same year but also included one of the same judges: Circuit Judge Manion.).

71. *Id.* at 517.

72. *Id.* at 518.

73. Vanzant v. Hill's Pet Nutrition, Inc., 934 F.3d 730, 740 (7th Cir. 2019).

clarity, recognizing that "[u]ntil the Illinois Supreme Court actually resolves the issue, there will be an uncomfortable degree of uncertainty."[74]

This unsettled doctrine and associated caselaw surrounding the question of whether unjust enrichment is an independent cause of liability presents a challenge to litigating unjust enrichment claims. It also presents an opportunity for advocates to push courts to clarify the issue and make sense of muddled precedent.

B. Broad and Equitable or Narrow and Technical?

A second unresolved debate in the theory of unjust enrichment surrounds the meaning of the term "unjust." While some scholars and courts view the doctrine as an equitable, redistributive theory, others—including the authors of the Third Restatement—restrict the meaning to "unjustified enrichment."

One result of the view of unjust enrichment as primarily an equitable doctrine is that it has the potential to be used as an expansive redistributive tool.[75] The redistributive understanding of unjust enrichment focuses on the natural law implications of "unjust" and views unjust enrichment as the "legal framework through which considerations of justice traditionally precluded from orthodox doctrine find their expression in the positive law."[76]

It was this line of reasoning that led to successful litigation surrounding the Holocaust in U.S. courts.[77] At the end of the twentieth century, over fifty civil lawsuits were filed in federal and state courts against both individual and corporate defendants arising from events during the Holocaust.[78] Most cases involved claims against Swiss banks for failure to return assets that Holocaust survivors deposited with them during World War II, and several cases specifically involved claims of unjust enrichment.[79] One such case resulted in a $1.25 billion

74. Kienzle & Zuidema, *supra* note 68 at 59.

75. *See* Chaim Saiman, *Restitution in America: Why the US Refuses to Join the Global Restitution Party*, 28 OXFORD J. LEGAL STUD. 99, 114–15 (2008).

76. *Id.* at 114.

77. *Id.*

78. Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in the United States Courts*, 34 U. RICH. L. REV. 1, 6 (2000).

79. *Id.* at 6, 39; *see, e.g.*, *In re* Holocaust Victim Assets Litig., 424 F.3d 132, 135 (2d Cir. 2005) (describing the principal claims of a consolidated set of class actions

settlement—the largest settlement in a human rights case in U.S. history.[80] Because the settlement process was intensely political, the rhetoric of unjust enrichment played a larger role than technical legal arguments in producing this outcome.[81] In a similar vein, some scholars have suggested that the theory of unjust enrichment offers a strong case for reparations for the descendants of enslaved African Americans.[82] These examples show how the natural law underpinnings of the doctrine can be employed to stress "substantive justice over analytic theory."[83]

U.S. doctrine is inconsistent in its requirements of the showing necessary to state a cause of action for unjust enrichment. American Jurisprudence adopts the broad, equitable view, explaining that the plaintiff must allege that "the defendant has unjustly retained a benefit to the plaintiff's detriment, and that the defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience."[84] The Third Restatement, on the other hand, is "decisively against a broad and expansive view of unjust enrichment."[85] In an effort to restrict the meaning of the principle, the Restatement emphasizes that unjust enrichment is a term of art, and that the law does not impose liability for every instance of what might be called unjust enrichment in the nontechnical sense, but for enrichment that is "unjustified."[86] The Restatement argues that, in its natural and nontechnical sense, "unjust enrichment" might seem to be a "pervasive fact of human experience."[87] *Unjustified* enrichment, by contrast, is defined narrowly as "enrichment that lacks an adequate legal basis" or that results from an ineffective transaction, meaning

against Swiss banks as including claims that the defendants enriched themselves unjustly).

80. Bazyler, *supra* note 78, at 68–69.

81. Saiman, *supra* note 75, at 114.

82. *See* Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and other Historical Injustices*, 103 COLUM. L. REV. 689, 700–03 (2003); Dennis Klimchuk, *Unjust Enrichment and Reparations for Slavery*, 84. B.U. L. REV. 1257 (2004). *But see* Emily Sherwin, *Reparations and Unjust Enrichment*, 84. B.U. L. REV. 1443 (2004) (arguing that restitution is not an appropriate vehicle for reparations claims and similar historical injustices because unjust enrichment lacks the requisite moral force).

83. Saiman, *supra* note 75, at 114.

84. 66 AM. JUR. 2D *Restitution and Implied Contracts* § 3.

85. *The Intellectual History of Unjust Enrichment*, *supra* note 35, at 2099.

86. RESTATEMENT (THIRD) § 1, cmt. b.

87. *Id.*

in general terms, a transaction that is nonconsensual.[88] Defined this way, unjust enrichment "merely fills in the space[s] around consensual transfers of wealth."[89]

As with the issue of whether unjust enrichment is an independent cause of liability, this inconsistency presents both an obstacle and an opportunity: advocates seeking to pursue unjust enrichment claims in cases like *Ramirez v. LexisNexis* can and should ask courts to adopt the broad, redistributive understanding of the doctrine.

C. *A Formula for Unjust Enrichment Claims*

The complex history of unjust enrichment has led to confusion in the current application of the doctrine. Despite familiarity with the basic principle of unjust enrichment, "scholars, judges, and lawyers remain uncertain about how to practically apply it."[90] One scholar put it bluntly: "American lawyers today (judges and law professors included) do not know what restitution is."[91] Attorneys often raise unjust enrichment claims only as an "afterthought following a long list of other causes of action," and courts often refuse to recognize unjust enrichment as a cause of action, instead viewing it only as a remedy.[92]

Some jurisdictions set out the elements for an unjust enrichment claim as a multi-factor test, requiring that the plaintiff prove, for example: (1) the plaintiff conferred a benefit upon the defendant; (2) the defendant had an appreciation or knowledge of the benefit; and (3) the defendant accepted or retained the benefit under circumstances making it inequitable for the defendant to retain the benefit without payment of its value.[93] The Third Restatement authors describe this formula

88. *Id.*
89. *The Intellectual History of Unjust Enrichment*, *supra* note 35, at 2099.
90. Johnson & Johnson, *supra* note 43, at 281.
91. Andrew Kull, *Rationalizing Restitution*, 83 CALIF. L. REV. 1191, 1195 (1995).
92. Chao, *supra* note 61, at 572.
93. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1, cmt. d (AM. L. INST. 2011); *see, e.g.*, DCB Const. Co. v. Cent. City Dev. Co., 965 P.2d 115, 119–20 (Colo. 1998) (restating the test for recovery under a theory of unjust enrichment as: (1) at plaintiff's expense (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying); LaSalle Nat. Bank v. Perelman, 82 F. Supp. 2d 279, 294–95 (D. Del. 2000) (stating the elements of unjust enrichment as: (1) an enrichment, (2) an

as unhelpful because, among other issues, the third element (circumstances making it inequitable for the defendant to retain the benefit) "incorporates the whole of the question presented, making the rest of the formula superfluous."[94] Yet the Restatement fails to offer an alternative mode of analysis, limiting its guidance to the deceptively simple statement that: "A person who is unjustly enriched at the expense of another is subject to liability in restitution."[95]

Professor Peter Birks, a prominent unjust enrichment scholar, sets forth a three- or five-question analysis for unjust enrichment claims:

> (1) Was the defendant enriched?
> (2) Was it at the expense of the claimant?
> (3) Was it unjust?
> (4) What kind of right did the claimant acquire?
> (5) Does the defendant have a defense?[96]

The first three questions establish a prima facie cause of action, while the latter two focus on consequences.[97] The first two questions (enrichment; at the expense of the claimant) are generally not problematic, but the third question (unjust) is "the heart of the law of unjust enrichment."[98] Although based in English legal theory rather than U.S. precedent, Birks's formula provides a helpful method of separating the elements of a claim.

II. UNJUST ENRICHMENT IN DATA PRIVACY LITIGATION

Several data privacy scholars have argued that unjust enrichment offers one of the best causes of action for modern privacy claims against data brokers, in part because of its potential to give plaintiffs standing.[99] Professor Lauren Scholz explains that unjust enrichment is one of three principal

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impoverishment, (3) a relation between the enrichment and the impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law).

94. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1, cmt. d (AM. L. INST. 2011).

95. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. L. INST. 2011).

96. PETER BIRKS, UNJUST ENRICHMENT 39 (2nd ed. 2005).

97. *Id.*

98. *Id.* at 40.

99. Lauren Scholz, *Privacy Remedies*, 94 IND. L.J. 653, 667 (2019); Chao, *supra* note 61, at 571–72.

categories of causes of action that can be brought against data brokers (with the other two being tort claims and consumer contract claims).[100] The traditional privacy torts—intrusion upon seclusion, appropriation of likeness, public disclosure of private facts, and false light—require a variety of elements that often do not apply to the loss or misuse of data, and therefore are not a good fit for privacy victims.[101] And contract claims fail where privacy policies are not considered contractual obligations.[102] The traditional claims also frequently fail to pass the threshold issue of standing because privacy injuries are often too intangible to qualify.[103] But because unjust enrichment focuses on the defendant's wrongful gain rather than the harm to plaintiffs, it can avoid some of these problems and give plaintiffs standing.[104] Scholz explains that if a plaintiff can show a likely ability to recover in restitution—which is measured by economic gain to the defendant—that should be sufficient to at least pass the motion to dismiss stage of litigation.[105]

These advantages are beginning to be recognized not only in theory, but also in practice: an increasing number of plaintiffs are succeeding in unjust enrichment claims for privacy infringements in the courts.[106] Three recent cases in California show promise for unjust enrichment claims in the context of data privacy. In two class action lawsuits against Facebook discussed in Section III.A, claims for unjust enrichment passed the motion to dismiss stage where other claims failed, and ultimately resulted in large settlements.[107] A claim of unjust enrichment in a recent lawsuit against Thomson Reuters—for very similar claims to those raised in *Ramirez v. LexisNexis*—has also survived the motion to dismiss and class certification stage, as discussed in Section III.B below.[108]

100. Scholz, *supra* note 99, at 667. Scholz's article predominantly uses the term "restitution" rather than "unjust enrichment," perhaps because it focuses primarily on the remedy rather than the cause of action.

101. Chao, *supra* note 61, at 564.

102. *Id.* at 555.

103. *Id.*

104. *Id.*

105. Scholz, *supra* note 99, at 655.

106. *Id.* at 658.

107. *In re* Facebook, Inc., Consumer Priv. User Profile Litig., 402 F. Supp. 3d 767, 776–77 (N.D. Cal. 2019); *In re* Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 599 (9th Cir. 2020).

108. Brooks v. Thomson Reuters Corp., No. 21-cv-01418-EMC, 2021 WL 3621837, at *11 (N.D. Cal. Aug. 16, 2021).

A. *Facebook: Consumer Profile and Internet Tracking Litigation*

In two recent data privacy class action lawsuits against Facebook, California courts have shown willingness to hear independent claims of unjust enrichment. While both cases resulted in settlements, making it unclear to what degree the unjust enrichment claims affected the outcome, the allegations and analysis provide some guidance as to how courts are considering such claims in the data privacy context.

In *Facebook, Inc. Internet Tracking Litigation,* the Ninth Circuit upheld an unjust enrichment claim at the motion to dismiss stage.[109] The class action lawsuit alleged that Facebook improperly used plug-ins, such as the "Like" button, to track logged-out users' browsing histories when they visited third-party websites.[110] Facebook then compiled the browsing histories into personal profiles which were sold to generate revenue.[111] The plaintiffs claimed that this correlation of users' browsing history with personal Facebook profiles (which included users' employment history and political and religious affiliations) created a "cradle-to-grave profile without users' consent."[112] The district court granted the motion to dismiss without addressing the unjust enrichment claim.[113] This may have simply been the result of the plaintiffs' failure to pursue the unjust enrichment claim after the initial complaint, omitting it from the amended complaints after the class action was consolidated.[114]

109. *In re Facebook*, 956 F.3d at 599.

110. *Id.* at 595.

111. *Id.*

112. *Id.* at 599.

113. The district court granted Facebook's motions to dismiss three times, after granting plaintiffs leave to amend twice. None of the three orders mention unjust enrichment. *See In re* Facebook Internet Tracking Litig., 290 F. Supp. 3d 916 (N.D. Cal. 2017), *aff'd in part, rev'd in part and remanded sub nom*. *In re* Facebook, Inc. Internet Tracking Litig., 956 F.3d 589 (9th Cir. 2020); *In re* Facebook Internet Tracking Litig., 263 F. Supp. 3d 836 (N.D. Cal. 2017), *rev'd in part sub nom*. *in re Facebook*, 956 F.3d; Order Granting Defendant's Motion to Dismiss, ECF No. 87.

114. Subsequent amended complaints include eleven statutory and common law claims but exclude the ultimately successful unjust enrichment claim. *See* Corrected First Amended Consolidated Class Action Complaint, *In re* Facebook, Inc. Internet Tracking Litigation, ECF No. 35 (containing twelve claims but excluding the unjust enrichment claim); First Amended Class Action Complaint, *In re* Facebook Internet Tracking Litigation, ECF No. 18 (containing the original unjust enrichment claim).

On appeal to the Ninth Circuit, the plaintiffs re-incorporated the unjust enrichment argument, albeit in the form of a remedy rather than a standalone claim, citing to the Third Restatement and similar provisions in the California civil code.[115] Amicus curiae Douglas Laycock argued that the district court had "rendered a decision that ignores the law of restitution and unjust enrichment, remedies which are available to Plaintiffs-Appellants in this case."[116] The Ninth Circuit agreed and reversed the lower court's ruling, explaining that "California law recognizes a right to disgorgement of profits resulting from unjust enrichment, even where an individual has not suffered a corresponding loss."[117] The court found that the plaintiffs' allegations were sufficient to demonstrate that Facebook's profits from their data were unjustly earned.[118]

The court's analysis followed a three-part test similar to those outlined above, finding that the plaintiffs sufficiently pleaded (1) financial value, (2) profit to Facebook, and (3) a demonstration that the profits were unjustly earned.[119] First, the plaintiffs sufficiently alleged that their browsing histories carry financial value by citing a study that values users' browsing histories at fifty-two dollars per year and referencing research panels that pay participants for access to their browsing histories.[120] Second, the plaintiffs alleged that Facebook profited from this valuable data by selling user data to advertisers to generate revenue and that Facebook's advertisement sales constituted over 90 percent of the social media platform's revenue during the relevant period.[121] Third, based on the plaintiffs' claims that they "did not provide

115. Brief for Plaintiffs-Appellants [Redacted Version] at 20–23, *In re Facebook*, 956 F.3d (No. 17-17486). The brief noted that "[t]he bedrock principles [of the Third Restatement] are important because California courts have adopted these very provisions of the Restatement when defining economic damages, even though California does not have a separate claim for 'unjust enrichment.'" *Id.* at 22. The brief cited to a 2014 California court of appeal case, Meister v. Mensinger, 178 Cal. Rptr. 3d 604 (Cal. Ct. App. 2014), rather than to the more recent California caselaw on unjust enrichment outlined above, suggesting, to the contrary, that California *does* have a separate claim for unjust enrichment. *See supra* text accompanying note 65.

116. Motion for Leave to File Amicus Curiae Brief of Professor Douglas Laycock in Support of Plaintiffs-Appellants, *In re Facebook*, 956 F.3d at *2 (No. 17-17486).

117. *In re Facebook*, 956 F.3d at 599.

118. *Id.* at 601.

119. *Id.* at 600–01.

120. *Id.* at 600.

121. *Id.*

authorization for the use of their personal information, nor did they have any control over its use to produce revenue," the court concluded that this "unauthorized use of their information for profit would entitle Plaintiffs to profits unjustly earned."[122] The Ninth Circuit remanded the case back to the district court, and in March 2022, the district court judge preliminarily approved a settlement agreement for $90 million.[123] Commentators noted that the Ninth Circuit's ruling might encourage attorneys to bring unjust enrichment claims more often and "open the door for more privacy plaintiffs."[124]

The theory of unjust enrichment also played a role in a 2018 class action lawsuit against Facebook following the Cambridge Analytica scandal.[125] In *Facebook Inc., Consumer Privacy User Profile Litigation*, a California district court allowed an unjust enrichment claim to proceed based on improper information disclosure to third parties.[126] The class action lawsuit involved claims that Facebook shared its users' sensitive personal information with various third parties and failed to prevent those third parties from selling or misusing the data.[127] The district court allowed the plaintiffs to proceed on their unjust enrichment, negligence, and breach of contract claims, while dismissing several privacy and unfair competition law claims.[128] Although the opinion provides limited analysis of the unjust enrichment claim, the court appeared to adopt the theory of unjust enrichment as an independent cause of action, allowing

122. *Id.* at 601.

123. *See* Bonnie Eslinger, *Facebook's 90M Deal to End Privacy Lawsuit Gets Early OK*, LAW360 (Mar. 31, 2022, 6:42 PM), https://www.law360.com/articles/1479626/facebook-s-90m-deal-to-end-privacy-lawsuit-gets-early-ok [https://perma.cc/38DP-W5WS]; *In Re Facebook Internet Tracking Litigation*, FB INTERNET TRACKING SETTLEMENT, fbinternettrackingsettlement.com [https://perma.cc/XFD5-KBGD].

124. Alaina Lancaster, *Could Unjust Enrichment Be a New Weapon in Privacy Enforcement?*, RECORDER (Apr. 15, 2020, 7:01 PM), https://www.law.com/therecorder/2020/04/15/could-unjust-enrichment-be-a-new-weapon-in-privacy-enforcement [https://perma.cc/BG7N-AKPY].

125. The Cambridge Analytica scandal involved the exposure of millions of Facebook users' data to Cambridge Analytica, a political data firm hired by President Trump's 2016 election campaign. *See* Kevin Granville, *Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html [https://perma.cc/7HM8-WNA6].

126. *In re* Facebook, Inc., Consumer Priv. User Profile Litig., 402 F. Supp. 3d 767, 803 (N.D. Cal. 2019).

127. *In re Facebook*, 402 F. Supp. 3d at 776.

128. *Id.* at 795–96.

the plaintiffs to plead claims for breach of contract and unjust enrichment in the alternative.[129] The court noted that, even if the plaintiffs suffered no economic loss from the disclosure of their information, they could proceed on a claim for unjust enrichment "to recover the gains that Facebook realized from its allegedly improper conduct."[130]

In October 2023, the court approved a $725 million settlement, the largest recovery ever achieved in a data privacy class action.[131] Despite the court's suggestion that the unjust enrichment claim might be a standalone claim, the plaintiffs' filing proposing the settlement noted that it would have sought restitution as a remedy for its breach of contract claims, rather than a standalone claim.[132] Although the plaintiffs "believe[d] the law [of unjust enrichment was] on their side," pursuing the remedy was "not without risks," including the difficulty of quantifying the value of the plaintiffs' (Facebook users') data to Facebook.[133]

B. Brooks v. Thomson Reuters*: Unjust Enrichment of Data Brokers*

Litigation against data brokers has proved similarly successful. In *Brooks v. Thomson Reuters*, a California district court preliminarily accepted a claim for unjust enrichment in a privacy lawsuit against data broker Thomson Reuters.[134] The lawsuit centered on Thomson Reuters's online platform CLEAR, a database that "aggregates both public and nonpublic information about millions of people and contains detailed cradle-to-grave dossiers on each person."[135] The plaintiffs—two civil rights activists—brought claims under California's unfair competition law, the common law right of publicity, and unjust

129. *Id.* at 803.

130. *Id.*

131. Christopher Brown, *Facebook's $725 Million Cambridge Analytic Deal Gets Final OK*, BLOOMBERG L. (Oct. 11, 2023), https://news.bloomberglaw.com/litigation/facebooks-725-million-cambridge-analytica-deal-gets-final-ok [https://perma.cc/NWE7-Q42K].

132. Plaintiffs' Notice of Motion and Motion to Certify a Settlement Class and Grant Preliminary Settlement Approval at 21, *In re* Facebook, 402 F. Supp. 767 (N.D. Cal. 2019).

133. *Id.* at 22.

134. *Brooks*, 2021 WL 3621837, at *11–12.

135. Complaint at ¶ 2, *Brooks*, 2021 WL 3621837.

enrichment.[136] Under the unjust enrichment claim, the plaintiffs alleged that Thomson Reuters wrongfully sold the plaintiffs' and class members' personal information without consent for substantial profits; that this personal information conferred an economic benefit on Thomson Reuters; that Thomson Reuters had been unjustly enriched at the expense of the plaintiff and unjustly retained those benefits; and that it would be unjust for Thomson Reuters to be permitted to retain the unlawful proceeds.[137]

Despite dismissing the privacy claim, the district court declined to dismiss the unjust enrichment and statutory claims.[138] Notably, the court rejected Thomson Reuters's argument that unjust enrichment cannot be asserted as a standalone cause of action as "based on outdated law."[139] The court acknowledged that California caselaw on whether unjust enrichment can be sustained as a standalone cause of action has been "uncertain and inconsistent," but explained that since the Supreme Court's decision in *Hartford*,[140] courts have "routinely recognized standalone unjust enrichment claims."[141] As such, the plaintiffs could raise a standalone unjust enrichment claim.[142] The court's assessment of the statutory claim described the harm to plaintiffs as "tremendous: an all-encompassing invasion of Plaintiff's privacy, whereby virtually everything about them—including their contact information, partially redacted Social Security number, criminal history, family history and even whether they got an abortion, to name just a few—is transmitted to strangers without their knowledge, let alone their consent."[143] While not mentioned specifically in relation to the unjust enrichment claim, the description hints toward the expansive, equitable view of unjust enrichment described above.

In July 2023, the court granted the plaintiffs' motion to certify a class of tens of millions of people: "[a]ll persons who, during the limitations period, both resided in the state of California and whose information Thomson Reuters made

136. *Id.* at ¶ 81–118.
137. *Id.* at ¶ 85–88.
138. *Brooks*, 2021 WL 3621837, at *16.
139. *Id.* at *11.
140. *Id.*; *see Hartford*, 353 P.3d.
141. *Brooks*, 2021 WL 3621837, at *11.
142. *Id.* at *12.
143. *Id.* at *8.

available for sale through CLEAR without their consent."[144] In its analysis of the unjust enrichment claim, the court found that common claims predominated, making the claim suitable for class certification.[145]

The success of these claims against Facebook and Thomson Reuters—albeit only in the early stages of litigation—suggests that at least some courts are willing to accept unjust enrichment as an independent cause of action in data privacy class actions lawsuits.

III. LEXISNEXIS'S CONTRACT WITH ICE AS UNJUST ENRICHMENT

In *Ramirez v. LexisNexis*, the plaintiffs' unjust enrichment claim roughly follows the formula outlined in the Restatement: LexisNexis obtained a monetary benefit from the plaintiffs "by using and profiting from the collection and aggregation of the Plaintiffs' personal and sensitive data"; LexisNexis "appreciated" the benefit; and LexisNexis "accepted, and retained the benefit" under "inequitable and unjust circumstances."[146] Those unjust circumstances included the plaintiffs' lack of consent: they "did not authorize LexisNexis to collect, aggregate, store, and sell or otherwise profit off their personal data."[147] In response, LexisNexis filed a motion to dismiss, arguing that the plaintiffs' unjust enrichment claim should fail along with their statutory and privacy claims.[148] The motion acknowledged the uncertainty in Illinois courts as to the threshold question of whether unjust enrichment is an independent cause of action, stating that "unjust enrichment is not *always* a standalone cause of action under Illinois law."[149]

Depending which Illinois precedent the court chooses to apply, it may or may not reach the substantive question of whether this is a case of unjust enrichment—as explained above, there is caselaw asserting both that unjust enrichment is an

144. Order Granting Plaintiffs' Motion for Class Certification, *Brooks*, 2021 WL 3621837.
145. *Id.* at 27–29.
146. Complaint at 29–30, *Ramirez*, No. 1:22-cv-05384 (Sept. 30, 2022).
147. *Id.* at 30.
148. Mot. to Dismiss at 8–9, *Ramirez*, No. 1:22-cv-05384 (Sept. 30, 2022).
149. *Id.* at 8 (emphasis added).

independent claim and finding that it is not.[150] This Section focuses on the substantive question, asking whether the contract between LexisNexis and ICE is a prima facie case of unjust enrichment, following Professor Birks's formula outlined above: First, was LexisNexis enriched? Second, was that enrichment at the expense of the claimant? Third, and most importantly, was that enrichment unjust? It answers all three questions in the affirmative. The first question is the most straightforward: LexisNexis has clearly been enriched by its ongoing contract with ICE. As to the second question, while some of the contract is based on LexisNexis's data aggregation software, the underlying data comes from, and at the expense of, the plaintiffs. And finally, under the broad, equitable theory of the doctrine, the contract between LexisNexis and ICE should be considered unjust.

A. Enrichment: A $22 Million Contract

In the vast majority of unjust enrichment cases, the enrichment question is "passed over unnoticed" because the defendant usually has received money and is thus enriched.[151] And this case is no exception: LexisNexis's contracts with ICE have clearly enriched LexisNexis. The contracts between LexisNexis and ICE are valued at $22.1 million over a five-year period (February 2021 to February 2026).[152] As of March 2024, LexisNexis has received $17.4 million.[153] Under the first part of the contract, LexisNexis gave ICE access to its Accurint Virtual Crime Center for law enforcement.[154] Although the details of the contract are not publicly available (ICE withheld an overview of its first contract with LexisNexis, claiming that it was "law enforcement sensitive and not for public release"), it appears to include access to the Accurint Virtual Crime Center.[155] According to its website, the Accurint Virtual Crime Center "brings together disconnected data from over 10,000 different

150. In her decision granting LexisNexis's motion to dismiss, Judge Hunt agreed with the defendants, finding that Illinois law does not permit a freestanding unjust enrichment claim. Ramirez v. LexisNexis Risk Solutions, Case No. 1:22-cv-05384 (N.D. Ill. Apr. 8, 2024).

151. BIRKS, *supra* note 96, at 49.

152. *Definitive Contract*, *supra* note 5.

153. *Id.*

154. U.S. Immigr. & Customs Enf't Off. of Acquisition Mgmt, *supra* note 6, at 5.

155. *Id.*; Wang et al., *supra* note 13, at 36.

sources," providing law enforcement personnel with a "comprehensive view of peoples' identities."[156] It includes access to over 276 million U.S. consumer identities through "LexID."[157] Under the second part of the contract, LexisNexis gave ICE access to Insights's Justice Intelligence, a database that provides incarceration records and jail booking data.[158] ICE required access to Justice Intelligence in order to "search, track, and find persons of interest."[159]

B. At the Expense of Another: "Person Reports"

Second, at least some part of LexisNexis's enrichment is "at the expense of" the individuals whose personal information is collected and aggregated by LexisNexis and shared with ICE. This second inquiry often turns on whether there is a "sufficient connection between the would-be claimant and the enrichment [they want] to claim."[160] ICE and LexisNexis have "sought to keep the public in the dark about the terms of their relationship," making it difficult to determine that connection with precision.[161] But an overview of the contract obtained by The Intercept notes that "[a]vailable functionality includes person, vehicle, watercraft and phone searches and the National Comprehensive Report."[162] LexisNexis's "Comprehensive Person Reports" gather personal information into "one easy to read report that shows relationships, assets, contact info, derogatory information and more."[163] These reports, each linked to a person, are transferred from LexisNexis to ICE and enrich LexisNexis without that person's consent.

156. *LexisNexis Accurint Virtual Crime Center*, LEXISNEXIS RISK SOLUTIONS, https://risk.lexisnexis.com/products/accurint-virtual-crime-center [https://perma.cc/YTL5-7GF4].
157. *Id.*
158. U.S. Immigr. & Customs Enf't Off. of Acquisition Mgmt, *supra* note 6, at 1.
159. *Id.*
160. BIRKS, *supra* note 96, at 49.
161. Wang et al., *supra* note 13, at 35.
162. CONTRACT NUMBER 70CMSD21C00000001, https://www.documentcloud.org/documents/23854204-2021-icfo-34162-1 [https://perma.cc/8BUQ-T44N]; *see* Sam Biddle, *LexisNexis is Selling Your Personal Data to ICE So It Can Try to Predict Crimes*, INTERCEPT (June 20, 2023) (describing the ICE contract).
163. *SmartLinx Comprehensive Person Report*, LEXISNEXIS SUPPORT CENTER (June 2023), https://supportcenter.lexisnexis.com/app/answers/answer_view/a_id/1097237/~/smartlinx-comprehensive-person-report [https://perma.cc/66N3-RR6X].

Although not explicitly outlined in the contract, these person reports each have monetary value. Under a 2023 pricing schedule marketed toward legal professionals, Accurint charges $6.47 for an "Advanced Person Search" and $18.48 for a "Comprehensive Person Report," its "best value" offering including, among other things, access to driver's licenses, vehicle registrations, voter registrations, associates, relatives, neighbors, criminal records, and phone information.[164] Advanced Person Search allows a user to "include additional information about your subject, such as a relative name or previous state of residence, or even use partial information you may have, to more accurately pinpoint where they may currently be located."[165] Search results can display name, date of birth, age, gender, Social Security number (including a red flag if the Social Security number was issued to a noncitizen), LexID, address, and phone number (including listing type, carrier name, location, and date range)—illustrating the dragnet nature of the data aggregation and surveillance.[166] After seeing these results, a user may "search deeper" to find more personal information linked to the individual.[167] A "Comprehensive Report" includes public records, nonpublic information and publicly available information.[168] These two searches formed the overwhelming majority of ICE's actual use of Accurint in the first seven months of its contract: out of a total of over 1.2 million searches, 727,771 were Advanced Person Searches and 237,808 of the total 302,431 reports retrieved were Comprehensive Reports.[169]

164. *Accurint for Legal Professionals: Pricing Schedule*, LEXISNEXIS, https://www.lexisnexis.com/pdf/AccurintForLegalProfessionals/24.pdf [https://perma.cc/8Y8M-SUTL]. According to the schedule, the Comprehensive Person Report includes: "Summary Report, Bankruptcy, Liens/Judgments, UCC Filings, People at Work, Driver Licenses, Vehicle Registrations, Property, Watercraft, FAA Pilots, FAA Aircraft, Professional Licenses, Florida Accidents, Voter Registration, Hunting/Fishing Permits, Concealed Weapons Permits, Federal Firearms & Explosives, Associates, Relatives (3 Degrees), Neighbors, Criminal Records, Sexual Offenders and Phones Plus." *Id.*

165. *Locating People Using Advanced Person Search*, ACCURINT HELP, https://www.accurint.com/help/bps/v3/le/advanced_person_help.html [https://perma.cc/658P-NB5S].

166. *Id.*

167. *Id.*

168. *Accurint Individual Access Program*, LEXISNEXIS, https://www.lexisnexis.com/en-us/privacy/for-consumers/request-personal-information.page [https://perma.cc/TXU7-JUEB].

169. LEXISNEXIS SEARCH LOGS, *supra* note 7, at 4.

Of course, some part of that value is LexisNexis's "cutting-edge investigative technology," data-aggregation software, and its vast database.[170] Yet without the private information of noncitizens—their "assets, addresses, relatives and business associates"—it would have little to no value to ICE.[171] As alleged by the plaintiffs in *Ramirez*, "Accurint would be worthless without the vast amounts of underlying data it contains."[172] Claudia Marchan's LexisNexis report would be little use without her personal addresses, emails, phone number, Social Security number—information that LexisNexis likely gathered from documents like her electricity bill.[173] In *Facebook Internet Tracking Litigation*, the court considered it sufficient—at least at the pleading stage—to show that the plaintiffs' browsing histories were of value: it was not necessary to differentiate between the value of the technology and the plaintiffs' personal information, or to put a precise figure on the value.[174]

C. Unjust: Toward an Expansive, Equitable View

The crux of this case may come down to whether a judge takes the expansive or narrow view of "injustice" under the theory of unjust enrichment.[175] Under the narrow view endorsed by the Third Restatement, where unjust enrichment really means "*unjustified* enrichment" and the (lack of) justification is "not moral but legal," the enrichment here might not be considered unjust.[176] However, even under this narrow view, there is some room for argument based on lack of consent, which finds support in California caselaw. Under the expansive view of the doctrine, LexisNexis's enrichment—by gathering and selling noncitizen's data to ICE, an agency with a history of institutionalized racism and abuse along with the ensuing consequences of surveillance and possible detention and deportation faced by noncitizens—should be considered unjust.

170. *Accurint for Law Enforcement*, LEXISNEXIS RISK SOLUTIONS, https://risk.lexisnexis.com/products/accurint-for-law-enforcement [https://perma.cc/Q9LP-344X].

171. *Id.*

172. Plaintiff's Response in Opposition to Defendant's Motion to Dismiss, at 15, *Ramirez*, No. 1:22-cv-05384.

173. Verstegen, *supra* note 1.

174. *In re Facebook*, 956 F. 3d at 600.

175. *See infra* Section II.B.

176. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1, cmt. b (AM. L. INST. 2011).

Under the narrow view of the doctrine, courts may require a corresponding legal loss (based on some other privacy or contract claim) in order to find unjust enrichment. LexisNexis adopts this narrow view of unjust enrichment in their motion to dismiss, arguing that unjust enrichment is not a standalone claim and that LexisNexis's conduct is not wrongful because they did not violate any laws.[177] In the absence of new state or federal legislation protecting personal data against third-party brokers, the unjust enrichment claim may fail at this point.[178]

However, even under this narrow view, the lack of consent may be sufficient to show that the enrichment here was unjust. The Third Restatement describes an ineffective transaction as one that is "nonconsensual."[179] The Ninth Circuit appeared to adopt this view in the *Facebook Internet Tracking Litigation*.[180] Here, LexisNexis does not request the consent of individuals whose data it aggregates.[181] In most cases, "consumers do not know that LexisNexis has collected their personal information and data, let alone that it is selling this information for profit."[182] While some of the information is publicly available (and therefore not protected by traditional privacy rights), other information is private.

LexisNexis's enrichment is more obviously unjust under broader equitable theories of unjust enrichment, including public policy considerations. The context behind the contract lends support for finding the transaction unjust in this broader sense. First, ICE's express intentions in forming this contract were to subvert local democratic lawmaking: ICE contracted with LexisNexis for the purpose of subverting sanctuary laws.[183] According to contract documents, ICE required access to the Justice Intelligence database (a database containing incarceration records and jail booking data) due to "policy or legislative changes" that have resulted in an "increase in the

177. Defendant's Memorandum in Support of Its Motion to Dismiss the Complaint, at 10, *Ramirez*, No. 1:22-cv-05384.

178. *See* Wang et al., *supra* note 13, at 49–57.

179. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. L. INST. 2011).

180. *In re Facebook*, 956 F. 3d at 601 ("Plaintiffs allegedly did not provide authorization for the use of their personal information, nor did they have any control over its use to produce revenue. This unauthorized use of their information for profit would entitle Plaintiffs to profits unjustly earned.").

181. Complaint at 8, *Ramirez*, No. 1:22-cv-05384.

182. *Id.*

183. *See* LACKOWSKI ET AL., *supra* note 6.

number of law enforcement agencies and state or local governments that do not share information about real time incarceration of foreign-born nationals with ICE."[184]

Second, and relatedly, the individuals that ICE targets are already members of marginalized communities who experience less privacy, are subject to greater degrees of surveillance, and feel the burdens of surveillance more acutely.[185] The systemic and institutionalized racism of ICE has been well-documented: ICE predominantly targets immigrants of color in its enforcement operations.[186] It has been described as a "rogue agency" and widely condemned for human rights abuses.[187] Scholars and community leaders have called for the abolition of ICE based on its "brutality, lawlessness, and ineffectiveness."[188] ICE's 287(g) program, which allows local law enforcement agencies to collaborate with ICE agents, has resulted in widespread racial profiling.[189] Programs like 287(g) create a "prison to deportation pipeline"—a system that works to funnel Black and Latinx immigrants from the criminal system into ICE custody.[190] It is these kinds of interactions between ICE and

184. U.S. Immigr. & Customs Enf't Off. of Acquisition Mgmt., *supra* note 6, at 3.

185. *See generally* SCOTT SKINNER-THOMPSON, PRIVACY AT THE MARGINS 16 (2020).

186. *See generally* Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307 (2009); Bill Ong Hing, *Addressing the Intersection of Racial Justice and Immigrant Rights*, 9 BELMONT L. REV. 357 (2022).

187. *See, e.g.*, Julian Borger, *New Claims of Migrant Abuse as ICE Defies Biden to Continue Deportations*, GUARDIAN (Feb. 2, 2021), https://www.theguardian.com/us-news/2021/feb/02/ice-immigration-migrants-asylum-seekers-abuse-allegations [https://perma.cc/GGN9-66TK]; Alice Speri, *Detained, Then Violated: 1,224 Complaints Reveal a Staggering Pattern of Sexual Abuse in Immigration Detention. Half of Those Accused Worked for Ice*, THE INTERCEPT (Apr. 11, 2018), https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs [https://perma.cc/LG2A-2JJL].

188. Peter L. Markowitz, *Abolish ICE . . . and Then What?*, 129 YALE L.J. F. 130, 131 (2019).

189. NAUREEN SHAH, ET AL., LICENSE TO ABUSE: HOW ICE'S 287(G) PROGRAM EMPOWERS RACIST SHERIFFS AND CIVIL RIGHTS VIOLATIONS 4–5, ACLU (2022); *The 287(g) Program: An Overview*, AM. IMMIGR. COUNCIL (July 8, 2021) https://www.americanimmigrationcouncil.org/sites/default/files/research/the_287g_program_an_overview.pdf [https://perma.cc/LK5A-ZV2M]; Abigail F. Kolker, *The 287(g) Program: State and Local Immigration Enforcement*, CONG. RSCH. SERV. (Aug. 12, 2021) https://crsreports.congress.gov/product/pdf [https://perma.cc/L98P-U9ED]; Hing, *Institutional Racism*, *ICE Raids, and Immigration Reform*, *supra* note 186, at 319.

190. Hing, *Addressing the Intersection of Racial Justice and Immigrant Rights*, *supra* note 186, at 361.

local communities that sanctuary laws seek to prevent—and that ICE's contract with LexisNexis enables.

Third, the personal nature of the data that LexisNexis has aggregated and sold supports a finding that the contract is unjust. Because LexisNexis gathers data from sources including state driver's license information and utility records, individuals are placed in a position of choosing between accessing basic services and having their information sold to ICE.[191] Accurint provides ICE with access to phone and driver's license data—and likely other utility information—meaning that any person who wants to use those essential services will likely have their information available to ICE.[192] As other scholars have noted, this constitutes a violation of noncitizens' rights to access essential services.[193]

CONCLUSION

Unjust enrichment is an under-theorized and often overlooked doctrine which has the potential to be used successfully in efforts to halt the expansion of ICE's domestic surveillance system. The complexity and confusion in the doctrine poses a challenge for plaintiffs and advocates. Courts have not definitively resolved basic questions around the theory of unjust enrichment: Is it an independent cause of action? What kind of "injustice" suffices? Depending on their answer to those questions, courts may dismiss or simply ignore unjust enrichment claims. However, the lack of clear doctrine presents an opportunity for creative advocacy, particularly in cases where there is a strong moral claim to the injustice involved. The contract between LexisNexis and ICE is such a case: LexisNexis is profiting off the immigration enforcement system's surveillance, detention, and deportation of noncitizens, undermining democratically enacted sanctuary city policies—and using noncitizens' personal information to do so. LexisNexis's contract with ICE should be considered unjust enrichment.

191. Wang et al., *supra* note 13, at 36, 49.
192. LACKOWSKI ET AL., *supra* note 6, at 10 ("Data points include real-time phone records, vehicle registrations, court and property records, utility bill and address information, and booking and release times, among many others.").
193. Lui, *supra* note 23.