

A POWERS-BASED APPROACH TO THE PROTECTION OF IDEAS

*Larissa Katz**

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Introduction

The common law¹ generally protects a person’s interest in her own novel and concrete ideas that, although shared confidentially with some, have not yet been published to the world at large. The cases that have contributed to the development of this narrow area of law typically follow a simple set of facts: a business or scientific idea or an idea for advertising slogans, radio or television programs, films, books, or products is shared with another in circumstances indicating an expectation of non-use or disclosure without permission.² These ideas may well be the precursors to patents,³ trademarks⁴, trade secrets⁵ or copyrightable expressions.⁶

* Assistant Professor, Faculty of Law, Queen’s University, Ontario, LL.M, Yale Law School. I am particularly grateful to Henry E. Smith for his comments on an earlier draft. I also thank Robert Chambers, Arthur Cockfield, Michael Pratt, Malcolm Thorburn and Mark D. Walters as well as the participants at the 5th Annual Intellectual Property Conference at Cardozo Law School for helpful suggestions. Michelle Roberts provided useful research assistance. I am grateful to the Advisory Research Council, Queen’s University, for funding this research.

¹ I use “common law” to mean judicially created law (rather than to refer to the law developed in courts with “common law” jurisdiction.) Specifically, I mean state law.

² See Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUD. 683, 707 (1980) (discussing “transaction cases” in which protection for ideas is sought).

³ See *Matarese v. Moore-McCormack Lines*, 158 F.2d 631 (2d Cir. 1947) (plaintiff’s idea later developed and patented); *The University of Colorado Foundation Inc. v. American Cyanamid Co.*, 22 Biotech. L. Rep. 665 (Fed Cir. 2003) (plaintiff’s idea was

Importantly, however, they do not qualify, for one reason or another, for protection within one of these well-established areas of intellectual property.

Some courts and commentators have tentatively asserted that the protection of these ideas constitutes a new area of intellectual property law called idea-submission law.⁷ What is lacking however is a unified account of why unauthorized use or disclosure of another's novel and original idea is a wrong. Some courts and academics⁸ appear to locate the source of the obligation not to use or disclose another's idea in property law,⁹ while

foundation for a patent; defendant's use of plaintiff's idea in patent application constitutes unjust enrichment.)

⁴See *Keane v. Fox Television Stations, Inc.*, 129 Fed.Appx. 874 (5th Cir. 2005) (Plaintiff's claim to have a trademark protection in the name "American Idol" rejected on the ground that "trademarks only protect fully developed products, not the ideas for the products. Also, unregistered trademark rights must be appropriated through use, that is, through some commercial activity and Keane asserted no such commercial activity sufficient to appropriate such rights.")

⁵A trade secret is "an item of information—commonly a customer list, business plan, recipe or manufacturing process—that has commercial value and that the firm possessing the information wants to conceal from its competitors in order to prevent their duplicating it." WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 354 (2003). It need not be novel or original. Importantly, a trade secret is an idea or information that is "used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939). But idea-submission law protects ideas that may not initially be trade secrets because they are not used continuously in the originator's business or perhaps are not business ideas at all. *See Ahlert v. Hasbro, Inc.*, 325 F.Supp 2d 506, 509, 513 (D.N.J. 2004) (Trade secret claim "re-characterized as a submission-of-idea case" because idea not used in business); *see also* RAYMOND T. NIMMER, *INFORMATION LAW DATABASE* § 5.5 (trade secret law and idea-submission law not co-extensive).

⁶ *See Werlin v. Reader's Digest Assoc. Inc.*, 528 F. Supp. 451 (S.D.N.Y. 1981) (RDA article about Down Syndrome Bas Mitzvah based on defendant's idea.) Although a protected idea might develop into an expression or may even be embedded within an expression, "an idea's expression is not entitled to protection under a state's misappropriation law." *See Duffy v. Charles Schwab & Co., Inc.* 123 F. Supp. 2d 802, 812 (D.N.J. 2000).

⁷ *See* Lionel S. Sobel, *Idea-submission Law Revisted*, U.C.L.A. ENT. L. REV 9, 91 (1994). (idea-submission law has produced a set of principles and demands a rigorous analysis not unlike that we see in copyright law.) *Cf.* Margreth Barrett, *The "Law of Ideas" Reconsidered*, 71 J. OF PAT. & TRADEMARK OFF. SOC'Y 691 (1989) (arguing idea-submission cases currently dealt with under unjust enrichment or confidential relationships law could be folded into trade secret law with two adjustments: (1) dropping the requirement in trade secret law that the idea be used in the plaintiff's business and (2) dropping the requirement in idea submissions law that the idea be novel and concrete).

⁸ These standard theories for the protection of ideas are also well documented in the academic literature. *See* BARRETT, *supra* note 7 at 691. MELVILLE B. MILLER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, ss. 16.02-16.06 (1993).

⁹ For example, *Belt v. Hamilton Nat'l Bank*, 108 F. Supp. 689, 691 (D.D.C. 1952), *aff'd* by 210 F.2d 706 (D.C. Cir. 1953); *Liggett & Meyer Tobacco Co. v. Meyer*, 194 N.E. 206, 210 (Ind. Ct. App. 1935) (although no property in "abstract idea", idea that takes on concrete form may be property if novel.)

others look to contract law,¹⁰ the law of confidential relationships¹¹ or the law of unjust enrichment.¹² These traditional theories, as I argue below, do not, singly or together, satisfactorily account for the protection of ideas at law. In sum, although there is judicial consensus that there is a protected interest in unpublished, novel ideas shared in confidence, its theoretical foundations remain undeveloped.

This paper takes up two challenges: the first is to account for the source of the duty not to use or disclose another's idea in a manner that reveals rather than obscures the contours of the positive law and the interests and values the law serves. I present an account of the law in which I characterize the juridical source of this duty as a limited, *in personam*¹³ legal power to control use or disclosure of one's novel and original idea. This powers-based account, I argue, unifies the case law, makes sense of the core criteria in the positive law and also explains certain features that limit the scope of idea-submission law –why for instance there is no duty created where an idea reaches a recipient inadvertently or without the originator's knowledge. Building on theoretical work by Joseph Raz and others on the formal nature of powers, my account also illuminates the kind of values and interests that underpin idea-submission law. Identifying a legal power as the source of the duty not to use or disclose another's novel and original ideas permits us to draw connections not just with other areas of the law aimed at protecting ideas and confidences but also to place the originator's power within a category of general powers that we all have as legal subjects, alongside of the power to contract, the power to acquire property, and the power to consent to sexual relations. These general, stand-alone powers serve in different ways our fundamental interest in pursuing our private ends while engaging selectively with others.

¹⁰ See *Landsberg v. Scrabble Crossword Game Players, Inc.*, 802 F.2d 1193 (9th Cir. 1986).

¹¹ See *Thompson v. California Brewing Co.*, 150 Cal. App. 2d 469 (1957) (denying motion to dismiss claim that defendant used idea for beer ad in breach of confidence.)

¹² See e.g. *Matarese v. Moore-McCormack Lines*, 158 F.2d 631 (2d Cir. 1946) (employee entitled to value of services for disclosing "inventive ideas" for cargo unloading to agent of employer on unjust enrichment theory.) See also Harold C. Havigurst, *The Right to Compensation for an Idea*, 49 NW. U. L. REV. 295, 301 (1954) (unjust enrichment theory best explains protection of ideas).

¹³ Powers and their correlate, liabilities, as well rights and their correlate, duties can be either *in rem* or *in personam*. See JAMES PENNER, *THE IDEA OF PROPERTY IN LAW* 30 (1997) (*in rem* norms, including powers, set up impersonal practices, and *in personam* norms, personal practices.) Powers that are *in personam* affect the legal status of specific persons, where their "individuality is relevant to the right." *Id.* at 29. See Section IV, *infra*, on the minimum foundation of voluntariness needed before a person becomes liable to the originator's power to control disclosure.

The second challenge that I confront in fashioning an account of the duty not to use or disclose another's idea is to reconcile this duty with the limited concept of responsibility that has developed in Anglo-American law. I argue that the creation of a non-general, personal duty through a legal power is consistent with the concept of responsibility that has emerged in the law only where the obligation rests on a foundation of voluntariness. The importance of voluntariness in the Anglo-American law of obligations is evident in the reception courts and commentators have given to a duty to rescue.¹⁴ While the interests of a person in need may indeed be sufficiently important to warrant legal protection, the law has shied away from imposing a duty to rescue where there is no basis grounded in voluntariness on which to select a specific individual to bear the burden.¹⁵ A foundation of voluntariness sufficient to support the imposition of a special duty exists where at minimum the position from which the duty flows is voluntarily assumed, even if the duty itself is not. Thus, while the duty not to use or disclose an idea need not itself be voluntarily assumed (as it would have to be on a contractual account), a person must have voluntarily assumed the position of recipient of an idea before she will be liable (in the Hohfeldian¹⁶ sense) to the originator's power to control the extent to which she shares her pre-published idea.

In this paper, I remain agnostic on some important debates on the broader economic and social implications of ideas-protection: Does a power-conferring norm in favor of originators of ideas provide the right incentives for further production of ideas? Does it foster a creative society in which thinkers and researchers are honored?¹⁷ However, by clarifying the juridical source of a duty not to use or disclose another's idea, and the limits on the recipient's liability, I hope also to have set the foundation for these and other inquiries.¹⁸

In the first part of this article, I argue that there is a doctrinal core to idea-submission law and I explain recent movement away from this core in terms of a struggle by courts to force a fit between idea-submission law and conventional theories of ideas protection.

In the second part, I analyze and reject the conventional accounts of the basis for the protection of such ideas at law with particular attention to property and unjust-enrichment theories. I argue that critical features of

¹⁴ See Section IV(B) *infra*.

¹⁵ *Id.*

¹⁶ See W. N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 72 (1919) (setting out basic legal relations, in which a right correlates to a duty, a power, to a liability, a privilege to a no-right).

¹⁷ William Fisher, *Theories of Intellectual Property* in STEPHEN R. MUENZER (ED.), NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (2001).

¹⁸ I also leave for another day a detailed discussion of the vulnerability of idea-submission law to claims of preemption. For treatment of preemption issues, see Barrett, *supra* note 7 at 717-36; Brian Devine, *Free as the Air: Re-thinking the Law of Short Ideas*, 24 HASTINGS COMM. & ENT. L. J. 355, 375-380 (2001-2002).

these general areas of law are overlooked or their proper scope distorted where they are deployed in the context of the protection of pre-published ideas.

In the third part, I advance a powers-based account of the juridical source of this duty and consider the implications of the concept of a legal power for our understanding of idea-submission law.

In the fourth part, I ask and respond to a question that is central to any account of obligation: on what basis does the law select a particular individual to bear a special duty?

In the fifth part, I explain how the powers thesis accommodates the core requirements in the positive law. The last part concludes.

I. Features of Protected Ideas

The common thread in idea-submission law has not traditionally been the particular legal theory on which a case is brought — contract, property, unjust enrichment, or confidential relationships¹⁹— but rather certain core criteria concerning the nature of the idea.²⁰ Even without an explicit unifying theory for idea-submission law, idea-submission cases across jurisdictions have typically turned on the novelty, originality, confidentiality and concreteness of the idea. While courts use the language of one or another legal theory, they did not traditionally force a fit between the general legal theories and idea-submission law.²¹ Courts increasingly

¹⁹ See Section II for a discussion of these conventional theories.

²⁰ See note 23, *infra*. See also *Flemming v. Ronson Corp.*, 107 N.J. Super 311 (N.J. Sup. Ct. 1969) (noting that “a plaintiff is required to establish as a prerequisite to relief that (1) the idea was novel, (2) it was made in confidence [sic], (3) it was adopted and made use of.”); *Murray v. National Broadcasting Co.*, 844 F.2d 988 (2d Cir. 1988) (focusing on characteristics of idea, stating: “The dispositive issue is whether plaintiff’s idea is entitled to legal protection.”); *Barrett*, *supra* note 7 at 710 (courts routinely apply core requirements, like novelty and concreteness, to claims for ideas under quasi-contract, confidential relationship and implied-in-fact contract as well as property theory); Uniform Computer Info. Transactions Act, Part 2(D) § 215 (“An agreement to disclose an idea creates a contract enforceable against the receiving party *only if the idea as disclosed is confidential, concrete, and novel* to the business, trade, or industry or the party receiving the disclosure otherwise expressly agreed.”) (my emphasis).

²¹ See *e.g.* *Barrett*, *supra* note 7 at 699-704 (noting language of misappropriation does not correlate to a real application of a property theory) and at 737 (noting that “in their nervousness about recognizing

treat these elements collectively as a baseline, from which they may and do depart, as they are led by the logic of one or another of the conventional theories of idea-protection. The drift away from this core is best understood as an effort to render idea-submission law consistent with the more general tenets of conventional legal theories.²² This motivation is misguided. A legal theory should *accommodate* (rather than *dictate*) the shape of the law.

I start here by setting out these core criteria in more detail and by tracking the disruptions of this core in the case law.

Novelty and originality

Traditionally, an idea to be protected had to show both “genuine novelty and invention.”²³ Courts across jurisdictions have not been entirely clear on how to assess novelty and originality nor on how these criteria are different.²⁴

Originality properly refers to the source of the idea: an idea is original if the plaintiff independently conceived of it.²⁵ Few courts have

individual rights in contract some jurisdictions have imposed special requirements upon idea contracts both express and implied that would not otherwise be imposed under common law contract principles”).

²² The effort to make idea-submission law responsive to the logic of the particular theory that is applied is often explicit. See notes 22, 36, 39, *infra*; see also Mary LaFrance, *Something Borrowed, Something New, The Changing Role of Novelty in Idea-Protection Law*, 34 SETON HALL L. REV. 485 (2004) (arguing that the rationale for requiring novelty in the context of a unjust enrichment claim not necessarily persuasive in the context of a contract claim).

²³ *Murray*, 844 F.2d at 992. See also *Downey v. General Foods*, 31 N.Y. 2d 256, 259 (1972) (no promise to pay and no property without novelty and originality); *Khreativity Unlimited. v. Mattel Inc.*, 101 F.Supp. 2d 177, *aff'd* by 242 F. 3d 366 (2d Cir. 2000), cert. denied, 534 U.S. 822 (2001) (general novelty essential for unjust enrichment); *Waner v. Ford Motor Co.*, 331 F.3d 851, 856 (Fed. Cir. 2003); *De Filippis v. Chrysler Corp.*, 53 F.Supp. 977 (D.C.N.Y.1944), *aff'd* by 159 F.2d 478 (2d Cir.), cert. denied, 331 U.S. 848 (1947).

²⁴ While some courts take care to observe the distinct meanings of novelty and originality (see *AEB & Associates Design Group, Inc. v. Tonka Corporation*, 853 F. Supp. 724, 734 (S.D.N.Y. 1994) (the court refers to novelty and originality as “two elements,” an acknowledgement that that they are in fact distinct requirements)), other courts use the words “original” and “novel” interchangeably or in the alternative, without explanation. See *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F. 3d 368, 374 (2d Cir. 2000) (contrasting novelty to the defendant with “originality or novelty generally”); *Murray*, 844 F.2d at 993 (treating originality and novelty as synonyms).

²⁵ Originality means “conceived by the plaintiff.” See *Soule v. Bon Ami Co.*, 195 N.Y.S. 574, 575 (1922); See *Murray*, 844 F.2d. at 992 (noting that protection requires “genuine novelty and invention” and that “in assessing whether an idea is in the public domain, the central issue is the uniqueness of the *creatioi*’ (my emphasis); *Educational Sales Programs, Inc. v. Dreyfus Corp*, 317 N.Y.S.2d 840, 844 (1970) (idea must show “genuine novelty and invention” in order to be considered original or novel); *Duffy*, 123 F. Supp. 2d at 810 (“idea must demonstrate innovation originality or invention”). See *Stanley*, 35 Cal. 2d at 675 (Traynor J. dissenting) (“the idea must be embodied in a concrete form attributable to plaintiff’s own ingenuity.”); *Smith v. Recrion Corp.*, 91 Nev. 666 (1975) (“The purpose of the

elaborated further on the definition and importance of originality²⁶—perhaps because they share Nimmer’s view that an objectively novel idea by definition originates from the plaintiff.²⁷ The originator of an idea must establish not just that she generated the idea independently but also that the idea is new to the world.²⁸ While objective or general novelty in this sense has proved difficult to assess,²⁹ it was traditionally required under all legal theories for protection of ideas across most jurisdictions³⁰ and

test [of concreteness] is to insure that the idea merits protection: That it is ‘tangible’ and would not exist but for the independent efforts of the author.” Melville B. Nimmer, *Idea-submission Law*, 27 SOUTHERN CALIFORNIA LAW REVIEW 144 (1954) (originality means “independent and creative in thought...not copied, imitated, or reproduced” but in context of law of ideas, “plaintiff must establish not merely that he did not copy another’s work but that no other such work ever existed).

²⁶ For instance, courts applying a property-based approach have considered fully the implications of requiring originality. If one only protects the originator against use or disclosure, then there is a restriction on full alienability of this resource: if the originator gives the idea to another who then wants share it in a limited way with a third person, that intermediate recipient should be able to, but cannot given the originality requirement, assume the exact same legal position as the first “owner” with respect to the idea. See PENNER, *THE IDEA OF PROPERTY*, *supra* note 12 at 112 (“there is nothing special about *my* ownership of a particular car –the relationship the next owner will have to it is essentially identical.”)

²⁷ NIMMER ON COPYRIGHT, *supra* note 8 at s. 16.08. Indeed, I have not read a case in which the plaintiff is not taken to be the source of the idea. Nimmer’s reasoning however is not entirely satisfactory: it ignores the point I make below that a recipient of an idea might possess an idea not in the public domain (*i.e.* that is novel) not because she came up with it herself, but rather because it has been shared privately only with her. Although novel, the idea has not originated with them.

²⁸ Nimmer, *Idea-submission Law*, *supra* note 25 at 144.

²⁹ Novelty means something less than non-obviousness in a patent context. See *Softel, Inc. v. Dragon Med. & Scientific Communications, Inc.* 118 F.3d 955, 969 (2d Cir. 1997), cert. denied 523 U.S. 1020 (1998) (“the term ‘novelty’ is used in this line of cases in a very different and much weaker sense than it is used in patent law.”); *Johnson v. Benjamin Moore & Co.*, 347 N.J. Super. 71, 89 (N.J. Sup. A.D. 2002), remanded, 796 A.2d 893 (N.J. 2002) (explaining *Softel*). Factors for assessing novelty in the context of idea-submission law include commonality (how many people know the idea?); specificity or generality (specificity cuts in favor of novelty); commercial availability; obviousness (is the idea an obvious adaptation from an idea in the public domain?); and secrecy (did an otherwise novel idea loses its novelty by disclosure to the world?). See *Nadel*, 208 F. 3d at 378; *Duffy*, 123 F. Supp. 2d at 810. See also *Oasis Music, Inc. v. 900 U.S.A., Inc.*, 614 N.Y.S. 2d 878 (1994) (“an improvement and mixture of know or preexisting ideas already in the public domain” not novel.)

³⁰ See *e.g.* *Noble v. Columbia Broadcasting System*, 270 F.2d 938, 939 (D.C. Cir. 1959) (“fatal difficulty” with plaintiff’s case “as a matter of law” is that it “lacks the essential element of novelty.”); *Lueddecke v. Chevrolet Motor Co.*, 70 F.2d 345 (8th Cir 1934) (plaintiff has no right to compensation because idea for improving the defendant’s product; it was not novel because many other car drivers knew of it.)

continues to be required in most,³¹ with the exception of California and, recently, New York.

In California, general novelty ceased to be a requirement for the protection of ideas quite early on.³² After the 1947 amendments to the California Civil Code § 980,³³ which eliminated a property-based theory for the protection of ideas,³⁴ courts in California set out to reconcile idea-submission law with contract law. Because they could not simply stipulate a requirement of novelty for the formation of a contract,³⁵ courts quickly did away with novelty as a pre-requisite to protection.³⁶ Novelty in the context of a contract took on an evidentiary function: evidence of valuable consideration rather than a necessary element of a claim.³⁷ On this reasoning, accepted in California, novelty to the buyer certainly would provide evidence of the value of the disclosure to the recipient; however, valuable consideration might exist even in the absence of novelty, simply in the act of bringing an idea to someone's attention.³⁸

³¹ See *Baer v. Chase*, 392 F.3d 609, 628 (3d Cir. 2004) (Courts in N.J. have established when an idea is "not novel" because it was "in the domain of public knowledge"). *Donchez v. Coors Brewing Co.*, 392 F.3d 1211, 1222 (10th Cir. 2004) ("It is not entirely clear under Colorado law whether an idea must be novel to be actionable.... [B]ecause most other states appear to require an idea to be novel before its misappropriation can be actionable.... It is reasonable to conclude the Colorado Supreme Court would likewise adopt such a requirement. To hold otherwise would seem nonsensical, because it would allow plaintiffs to sue and prevail on the basis of existing and commonly known ideas."). See also *Official Airlines Schedule Info. Serv., Inc. v. Eastern Air Lines*, 333 F.2d 672, 676 (5th Cir. 1964). For the traditional approach in New York and California, see *Murray*, 844 F.2d at 992 (a 1988 case noting that objective or general novelty required under all theories in NY); *Stanley v. Columbia Broadcasting Systems*, 35 Cal. 2d 653, 665 (1950) (pre-*Desny* case noting that an idea must be novel, reduced to concrete form and disclosed under circumstances indicating expectation of compensation).

³² The turning point was in *Desny*, 46 Cal. 2d at 729 (novelty not required where an express contract provides for payment for use); *Chandler v. Roach*, 156 Cal. App. 2d 435, 443 (1957) (no novelty for implied-in-fact contract.)

³³ Cal. Civ. Code. Div. 2, Title 3, Part 2, ch. 3 § 980.

³⁴ See *Weitzenkorn v. Lesser*, 40 Cal.2d 778, 788 (1953) ("The 1947 amendment to section 980 has eliminated the protection formerly given to 'any product of the mind.' ")

³⁵ Other basic requirements for the formation of a contract include legal capacity as well as a lawful subject matter. Restatement (Contracts) § 17 (requirement of mutual assent); § 22 (mutual assent manifest through offer and acceptance); § 71 (requirement of consideration); § 1 and comment g (requirement of capacity).

³⁶ See e.g. *Chandler*, 156 Cal. App. 2d at 445 (novelty not required to establish implied-in-fact contract because these are not required for other types of implied-in-fact contracts.)

³⁷ See *LaFrance*, *supra* note 22 passim (analyzing evidentiary role of novelty in the case law).

³⁸ *Desny*, 46 Cal. 2d at 729 ("even though an idea disclosed may be widely known and generally understood, it may be protected by an express contract providing that it will be paid for regardless of its lack of novelty"); *Donahue v. Ziv Television Programs, Inc.*, 245 Cal. App.2d 593, 612-13 (1966) (express and implied contract to pay for idea for a television format binds defendant even with respect to non-novel portions).

In a similar vein, courts in New York have been moved by the principles of contract law³⁹ to do away with the requirement of novelty for contracts formed after disclosure,⁴⁰ and have lowered the standard for pre-disclosure contracts from objective to subjective novelty or novelty to the buyer.⁴¹ The shift away from the traditional core prerequisite of novelty, as in California is unequivocally driven by the demands of consistency with the general legal theory offered for the protection of ideas: “[t]he law of contracts would have to be substantially rewritten were we to allow buyers of fully disclosed ideas to disregard their obligation to pay simply because an idea could have been obtained from some other source or in some other way.”⁴²

The logic of other conventional legal theories has exerted a similar pressure on courts to modify the novelty requirement. For unjust enrichment claims in New York and California, a plaintiff need only establish that the idea was novel to the defendant, rather than generally or objectively novel. The reasoning is plain enough: the disclosure of an idea that is new to the defendant might just as well constitute a valuable service, and hence enrichment, as the disclosure of an objectively novel idea.⁴³ An unjust enrichment account simply does not make sense of the requirement

³⁹ See *Nadel*, 208 F.3d at 377 (“We note... that the “novelty to the buyer” standard comports with traditional principles of contract law.”)

⁴⁰ See *Apfel*, 81 N.Y. 2d at 473, 476 (no novelty at all required for post-disclosure contracts).

⁴¹ See *Nadel*, 208 F.3d at 378 (picking up on dicta in *Apfel*, noting that novelty to the buyer establishes sufficient consideration in the context of pre-disclosure.)

⁴² *Apfel v. Prudential-Bache Securities Inc.*, 81 N.Y. 2d 470, 478 (1993); see also note 40 (citing concern with traditional principles of contract law).

⁴³ See *Werlin v. Reader's Digest Ass'n, Inc.*, 528 F.Supp. 451 (D.C.N.Y. 1981) (acknowledging that an unjust enrichment depends on a showing of novelty but reasoning: “While it might be argued [novelty] is not proven here because Werlin's idea had already been disclosed by publication of her article in Houston's Legal Advocate, RDA has not seriously suggested that it might have come across Werlin's article had she not mailed it in); see also *Trenton Industries v. A. E. Peterson Manufacturing Co.*, 165 F. Supp. 523, 532 (S.D. Cal. 1958) in which the plaintiff sent the defendant a sample chair of an unusual design. The defendant kept this specimen for two months, photographed it, and, finally, returned it with the message that he was not interested. Later, the defendant noticed that the exact same design was used for the chairs in his church. He simply had not noticed it before. Concluding that this meant the design was in the public domain, he began to manufacture chairs using it. The plaintiff sued and the court held that, although the design was indeed in the public domain, it was not novel in an objective sense but it was new to the defendant. However, the court decided that novelty to the defendant was enough to establish that the defendant had been unjustly enriched because the idea was novel to him: “he had seen these church chairs on numerous prior occasions, but did not take any particular notice of them and did not derive the thought that it was possible to use a similar mechanism in manufacturing a high chair until he received and scrutinized the plaintiff's disclosure.

of *genuine* novelty and courts have responded by lowering the standard of novelty.⁴⁴

As much as the courts in California and New York have pushed the logic of contract formation to the conclusion that no novelty⁴⁵ or only subjective novelty⁴⁶ is required and the logic of unjust enrichment to the conclusion that subjective novelty will suffice, the traditional shape of idea-submission law still holds in other idea-submission cases in these jurisdictions. For instance, California and New York courts continue to insist on novelty in other theories, such as breach of confidential relationship⁴⁷ — notwithstanding that novelty had no clear role in either the formation of a true confidential relationship or in the scope of the fiduciary-like obligations that ordinarily flow.

The requirement of novelty tells us something about the duration of the protection the law offers originators of ideas. When the idea ceases to be novel—when it enters the public domain—the originator can no longer insist that others have a duty not to use or disclose the idea.⁴⁸ The protection comes to a natural end where the plaintiff voluntarily releases the idea to the public⁴⁹ or where an independent originator does so⁵⁰ and

⁴⁴ See Section II(A) below on the strain in the other direction, on the law of unjust enrichment by idea-submission law due to Arrow's paradox.

⁴⁵ See notes 32, 36, 39, *supra* and accompanying text (novelty in California).

⁴⁶ See notes 40, 41, 43 *supra* and accompanying text (novelty in New York).

⁴⁷ Entertainment Research Group v. Genesis, 122 F.3d 1211, 1227 (9th Cir. 1997) (ideas must be novel and original to be protected under breach of confidence); Downey v. General Foods, 31 N.Y. 2d 56 (1972) (novelty required for protection where basis is confidential relationship).

⁴⁸ Havigurst, *supra* note 12 at 302 (public disclosure makes an idea free to all.)

⁴⁹ See J. Irizarry y Puente v. President and Fellows of Harvard College, 248 F.2d 799 (1st Cir.1957) (plaintiff "had already disclosed his idea to '1500 important business and banking institutions and leading law firms throughout the country'" and thus had no further claim against defendant even if idea had been novel and original.) See also *Waner*, 331 F.3d at 923. (By exhibiting fender lines publicly at a horse fair before sharing them with the defendant, originator had released the idea into the public domain; thus, defendant was free to use or disclose the idea (before patent issued)). See also *Kovacs v. Mutual Broadcasting System*, 99 Cal. App (2d) 56, 58-59 (the plaintiff had already shared the idea in confidence with a few radio stations, and was about to approach others, one by one, when the defendant broadcast his radio format, at which point he gave up negotiations.)

⁵⁰ See *Bristol v. Equitable Life Assur. Soc. of United States*, 132 N.Y. 264, 267 (1892) (No protection because idea for soliciting insurance business already in use in the industry: "Its use seems to be its disclosure"); See *AEB & Associate Design Group Inc. v. Tonka Corp.*, 853 F.Supp. 724, 733-35 (no protection where another has independently created idea, even if idea is novel and original). Independent creation is a popular defense, although it raises evidentiary problems. See *Sobel*, *supra* note 7 at 65-76. In *Hoeltke*, 80 F.2d 912, the defendants claimed to have come up with the same idea independently of the plaintiff. The court was understandably skeptical. In *Downey*, 334 N.Y.S. 2d at 875, the defendant argued both (1) that the idea was in the public domain and (2) that its people had "independently created and developed" the concept of using the name "Mr. Wiggle" to make Jell-O more appealing to kids. They won on the first defense rather than the second.

an unnatural end where another releases the idea without the originator's consent.⁵¹

Confidentiality

The third core prerequisite for idea-protection is the confidential nature of the disclosure. Traditionally, a recipient is not bound by a duty not to use or disclose the idea unless the originator indicates that disclosure is limited and private, rather than unlimited and public.⁵² However, it is not enough for the originator of an idea simply to claim that a disclosure is private and limited if in fact it is not. A prior publication of the idea would naturally defeat a claim that you are telling someone something that is secret⁵³ as would a disclosure that is in fact a publication rather than a private communication.⁵⁴ A confidential submission is one that accurately indicates to the recipient that the idea is *not* already publicly available⁵⁵ and is not through this disclosure being made public.

⁵¹ In this idea-submission law bears some resemblance to common law copyright that protects pre-published expressions. *See* *Holmes v. Hurst*, 174 U.S. 82, 89 (1899) (“If an author permits his intellectual production to be published..., his right to a copyright is lost as effectually as the right of an inventor to a patent which he deliberately abandons to the public—and this too irrespective if his actual intention not to make such an abandonment.”) Common law copyright and the common law power over ideas share an important feature: protection ceases whether or not the decision to publish is made by the person vested with the authority to do so, if as a matter of fact the expression or the idea is released to the public.

⁵² Courts' concern for private nature of submission, indicated by its purpose, reflects implicit criterion of confidentiality. *See e.g. Stanley*, 35 Cal. 2d at 653 (idea for radio program submitted to defendant “for the purpose of having the defendant determine whether or not it desired to purchase it or license the right to use it under an implied agreement that if the defendant did use the radio program it would pay plaintiff its reasonable value.”). The meaning of confidentiality emerges more explicitly in *Thompson*, 150 Cal. App. 2d at 476 (“The letter by which he transmitted this idea to the defendants ... does not of itself indicate any element of confidence in their relationship. Upon the other hand, nothing said in this letter necessarily negatives there having been an understanding between the parties of such a nature that when thus transmitted this new and novel idea was submitted to them ‘in confidence’ and accepted by them in confidence and upon the understanding that they would not use the idea without the consent of plaintiff.”)

⁵³ Not only must the originator indicate the confidentiality of the idea in the circumstances, the representation must be correct. *See Entertainment Research Group*, 122 F.3d at 1227 (notwithstanding express statement by plaintiff at time of disclosure that ideas for doll design, manufacturing and marketing were confidential court found: “plaintiff could not have conveyed any ‘confidential’ information to the defendant concerning her products for the express reason that three of the dolls in question—the products at issue—were already on the market.”)

⁵⁴ *See Waner*, 331 F.3d at 856 (non-confidential disclosure defeats claim of unjust enrichment)

⁵⁵ “In confidence” means sharing non-publicly. *See Keane v. Fox Television Stations, Inc.*, 297 F. Supp. 2d 921, 931, *aff'd* by 129 Fed.Appx. 874 (5th Cir. 2005) (claim that idea submitted “in confidence belied by allegation that ‘secret’ was mass-mailed.”)

“Confidentiality” in this sense is a core criterion, if only implicitly, across legal theories. Courts tend to reserve explicit language of confidentiality for cases brought under the rubric of breach of confidence or confidential relationship. Courts have not, however, tried to move this criterion into line with the law of confidential relationships more generally.⁵⁶ Even in the context of cases framed as actions for breach of confidential relationships, courts only require confidentiality in this special sense rather than in the more limited sense of reposing trust from the law of confidential relationships.⁵⁷

While courts traditionally required confidentiality in cases brought as actions for unjust enrichment,⁵⁸ they have followed the general logic of unjust enrichment in doing away with this requirement in cases framed in this theory. Whether or not the plaintiff shares the idea with the defendant in circumstances indicating the private or non-public nature of the disclosure simply does not bear on whether the plaintiff provided the defendant with a non-gratuitous benefit through his services for which he expected to be paid.⁵⁹ A person may be unjustly enriched where an idea is disclosed in circumstances that are not confidential, a point that courts have come to recognize in adjusting idea-submission law to fit the law of unjust enrichment theory.⁶⁰ Confidentiality might of course play a lesser, evidentiary role in establishing liability for use or disclosure on an unjust enrichment account: it might be a factor in establishing that the plaintiff was interacting with the defendant in particular with the expectation of getting paid. Such a move from an element of an action to a merely evidentiary device would be a significant change in emphasis from the traditional approach in idea-submission jurisprudence.

⁵⁶ See *Thompson*, 150 Cal. App. 2d at 476.

⁵⁷ See *Faris v. Enberg*, 97 Cal. App.3d 309, 323 (1979) (“There must exist evidence of the communication of the confidentiality of the submission.”) For more on the way in which the law of confidential relationships, among other conventional theories, is stretched to make sense of the core criterion, see section II(B), *infra*.

⁵⁸ See e.g. *De Filippis v. Chrysler Corp*, 53 Fed. Supp. 977, 980 (S.D.N.Y. 1944) (to recover in unjust enrichment for use of one’s novel and original idea, plaintiff must establish that he had shared his idea in confidence”).

⁵⁹ *Trenton*, 165 F. Supp. at 532 (“It is immaterial whether the communication is expressly made in confidence, so long as it is made on an understanding either tacit or express that the person communicating the idea, or the owner of the idea, expected to be compensated if it was to be used by the person receiving it.”)

⁶⁰ See *Vantage Point, Inc. v. Parker Bros., Inc.*, 529 F.Supp. 1204, 1216 (D.C.N.Y. 1981) (“To sustain recovery in quasi-contractual restitution it is unnecessary that the disclosure have been made in confidence, or that the parties be in a confidential relationship.”) See also *Trenton*, 165 F. Supp. at 532. In fact, Nimmer, who found a quasi-contract account compelling could not square the importance of confidentiality in the case law with the law of unjust enrichment. He noted that “enrichment might well be unjust in circumstances where disclosure was not confidential and therefore the element of a confidential relationship should not be a sine qua non to recovery.” Nimmer, *Idea-submission Law*, *supra* note 25 at 125-26.

Concreteness

Courts very early on in the development of idea-submission law insisted that only concrete ideas qualify for common-law protection.⁶¹ While the case law offers little clarity on the meaning of “concreteness,”⁶² the dominant view is that an idea is concrete only if it is far enough along in its development that it is “ripe for implementation.”⁶³ An approach with less traction in the case law takes not the stage of development but rather the tangibility of the idea as a measure of concreteness: an idea is concrete on this view only if it takes tangible form.⁶⁴ This second approach emerged in cases applying a proprietary theory for the protection of ideas: courts refused to protect merely “abstract” ideas because these are “so unattached as to be deemed legally without the quality of individual identity or property.”⁶⁵ While concreteness has traditionally had a role across legal theories,⁶⁶ some courts have started to drift from this baseline on the now-familiar ground that the criterion does not fit the legal theory on offer.⁶⁷

The trend toward greater consistency with traditional legal theories generally leads to greater inconsistency in the requirements for the protection of ideas *across* legal theories. This has led at least one court to call California law a “deviation from the ‘traditional view’”⁶⁸ and an

⁶¹ *Hamilton Nat’l Bank v. Belt*, 210 F.2d 706, 708 (D.C. Cir. 1953) (an idea may be property only if it is “more than a mere abstraction; it must be reduced to a concrete detailed form”); see *Flemming*, 107 N.J. Super at 316-317 (an idea must be “concrete and usable”, not abstract.) In *Flemming*, the fact that the idea could be transformed into a product meant that it was concrete and usable. See also *Matarese*, 158 F.2d at 634 (usable means marketable).

⁶² See *Sobel*, *supra* note 7 at 53 (concrete used in a variety of ways); *Barrett*, *supra* note 7 at 712-13 (noting that there are two general approaches, the first requiring that the idea be reduced to a tangible form, the second requiring that ideas be developed enough to be ready for use, citing *Smith*, 91 Nev at 670).

⁶³ See *Smith*, 91 Nev. at 670 (concrete means ready for immediate use and suggesting that concreteness establishes that “the idea is ‘tangible’ and would not exist but for the independent efforts of the plaintiff.”); *Tate v. Scanlan Intern., Inc.*, 403 N.W.2d 666 (Minn.App. 1987) (“If an idea requires extensive investigation, research, and planning before it is ripe for implementation, it is not concrete”); *Chandler*, 156 Cal. App. 2d at 439 (an idea is concrete where there is “[s]ufficient development of the idea to give it identifying characteristics).

⁶⁴ See *Barrett*, *supra* note 7 at 712 (citing to cases taking this approach).

⁶⁵ *Belt*, 210 F.2d at 708 (D.C. Cir. 1953).

⁶⁶ See *Stanley*, 35 Cal. 2d at 671 (no implied-in-fact contract unless idea is concrete); *Sobel*, *supra* note 7 at 56 (no recovery under confidential relationship theory unless concrete, citing *McGhan v. Ebersol*, 608 F.Supp. 277, 285 (D.C.N.Y. 1985) and *Fink v. Goodson-Todman Enterprises, Ltd.*, 9 Cal. App. 3d 996, 1009 (1970).

⁶⁷ *Chandler*, 156 Cal. App. 2d at 443 (concreteness not required for contract-based protection).

⁶⁸ *Benjamin Moore*, 347 N.J. Super. 71 at 87.

“aberration ... in comparison with other aspects of the law of California,”⁶⁹ in that core criteria abandoned under some legal theories in California (like novelty) *are* still required for the protection of ideas under some theories in that same state.⁷⁰ The emerging contours of idea-submission law—through the modification of core criteria—appear to reflect more a commitment to the general value of fit than it does a finer-grained appreciation of the particular values and interests that idea-submission law serves.⁷¹

Consistency and intelligibility do matter.⁷² Conventional legal theories have failed to make sense of certain core criteria. This has created one problem of fit that judges have gradually tried to resolve by modifying the baseline for protection. This approach is unsatisfactory in that the kind of protection that the law offers the originators of ideas should not be shaped by the choice of legal theory; rather, our choice of legal theories should reflect the shape of the law. But there is another problem of fit between idea-submission law and conventional legal theories that is even more intractable: these theories cannot account for idea-submission law unless we ignore critical aspects of the nature and structure of these areas of law or extend their reach to factual circumstances in which they ordinarily would not apply.

II. The Conventional Accounts of the Source of the Duty

Commentators and courts generally acknowledge four potential accounts of the liability of a recipient of an original and novel idea for its use or disclosure without the originator’s permission: accounts based on property, unjust enrichment, contract, and confidential relationship.⁷³ The first two accounts (property theory and unjust enrichment) are, I will argue here, untenable without distorting or weakening basic principles and doctrines in the law of property and the law of unjust enrichment. The other two accounts (contract and confidential relationship) are potential sources for a duty not to disclose or misuse another’s idea, but fail to cover all circumstances in which courts find recipients of an idea to be under a duty of non-disclosure or use or to account for the features that courts have

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ As discussed above, note 20 *et seq.* and accompanying text, the courts have largely been driven by a desire to fit the protection of ideas squarely within existing conventional accounts of the source of the duty not to use or disclose.

⁷² This really is nothing more than a common-sense recognition that intelligibility and consistency are valuable. See JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 264 (Clarendon Press, Oxford 1994) (noting the “undoubted value of coherence as intelligibility.”)

⁷³ See John Kettle, *What Every Litigator Must Know About Intellectual Property*, available at < http://www.pli.edu/emktg/toolbox/ip_protect.pdf > (Ideas are protected at state law under four theories: express contract, implied contract theory, unjust enrichment/quasi-contract; and conversion).

taken to be fundamental to the protection of ideas submitted in confidence to another.

A. Untenable Theories: Property and Unjust Enrichment

The first two accounts conventionally offered to explain idea-submission law are untenable on their own terms. The first rests on the idea that there is property in ideas, and that unauthorized use or disclosure of an idea is the misappropriation of property.⁷⁴ A proprietary account of idea-submission law makes use of the rhetoric of property law without really undertaking to treat ideas as property. Thus, it is not surprising that the duty that actually emerges in idea-submission law—an *in personam* duty held by a few specific individuals not to disclose or use the idea—does not comport with the structure of the duty that correlates to a property right, viz., a standing duty held by the world at large. A theory based on implied-in-law contract treats a recipient of a novel and original idea shared in confidence as unjustly enriched if she uses the idea without permission.⁷⁵ This position may capture the intuition that the defendant who uses or discloses someone else's idea has gotten something for free where he ought to have paid for it. However, there is a fundamental problem of fit between the law of unjust enrichment and idea-submission law caused by Arrow's paradox.

Proprietary Account

An intuitive explanation for the protection of ideas in law is that the originator of an idea is the *owner* of the idea—the idea is her property. This is in fact the response that a number of courts have given⁷⁶ although some

⁷⁴ See e.g. *Kovacs*, 99 Cal. App (2d) at 62-63 (pre-*Desny* case treating ideas for radio program as protectible “products of the mind” on a property theory); *Belt*, F. Supp. at 691 (claim for wrongful appropriation of an idea for a radio program succeeded, court finding “the law now gives effect to a property right in an idea even though the idea may be neither patentable nor subject to copyright.”)

⁷⁵ See e.g. *Trenton*, 165 F.Supp. 523.

⁷⁶ *Baer*, 392 F.3d at 628 (explaining predicates of a “property right in an idea”); *Downey v. General Foods Corp.*, 334 N.Y.S. 2d. 874, 877 (1972) (“An idea may be a property right” where it is novel and original); *Reeves v. Aleyska Pipeline Serv. Co.*, 926 P. 2d 1130 (1996) (Protection under a property theory requires that ideas possess “property-like” traits); *Maurizio v. Goldsmith*, 84 F.Supp.2d 455 (S.D.N.Y. 2000) (denying motion for summary judgment on the grounds that state law claim for the misappropriation of a novel and original idea is not preempted); *Nadel*, 208 F.3d at 378 (proprietary nature of right in ideas explains the novelty requirement); *Garrido v. Burger King Corp.*, 558 So.2d 79, 84 (Fla. Dist. Ct. App. 1990) (idea that is novel is property); *Irizarry v. President & Fellows of Harvard Col.*, 248 F.2d 799 (1 Cir. 1957) (no property in ideas that are not original and novel).

courts—notably in California—have clearly rejected this approach.⁷⁷ The appeal of the proprietary approach is intuitive: for example, we tend to use possessive pronouns to describe ideas—this special way of tying a rope is *my* idea, that concept for a television series is *his* idea. We also recognize that for some period after its conception, *at least* before the generator shares it with anyone, an idea is within the generator’s control. Our natural control over our own thoughts—the fact that no one else can force us to divulge them or change them—might suggest that ideas should in all circumstances continue to be treated in law as within the sphere of control of their originators.⁷⁸ We might be tempted then to think that ideas are property, as property is the institution by which the law treats a thing as permanently within the sphere of influence and control of a particular individual. Finally, especially where an idea is potentially patentable, courts are perhaps tempted by the proprietary nature of statutorily created patents to find that at common law, too, ideas are property.⁷⁹

The case against a property theory of protection for ideas has often been put too strongly: ideas, it has been argued, are *incapable* of being property.⁸⁰ In setting out why some pre-published ideas cannot be property, it should be evident why the ideas with which I am concerned – those protected in idea-submission law—*could* be the objects of property. I then go on to show why in fact they are not.

To understand how our concept of property is at odds with the kind of interest we have in some but not other pre-published ideas, we need to conceive of the progress of an idea from conception to publication in three stages:

⁷⁷ See *Desny*, 46 Cal. 2d at 732 (“it is clear that California does not now accord individual property type protection to abstract ideas.”) See also *Dallier v. Levi Strauss & Co.*, 86 F.3d 1149, *3 (4th Cir 1996) (unpublished) (noting that it is settled that there is no property in ideas under California law, and that, even though plaintiff argued that Virginia law, not California law applies, the plaintiff did not establish that the law is different in Virginia). Although a property theory is certainly not viable in California, Professor Sobel’s claim in 1994 that a property theory is superfluous is not accurate in the context of other jurisdictions, even if, as I argue here, it should be. See Sobel, *supra* note 7 at 28 (arguing that it is clear property theory no longer is viable).

⁷⁸ See e.g. James Buchanan, *Property as a Guarantor of Freedom* (1993).

⁷⁹ The *Duffy* court for example drew from patent law. See *Duffy*, 123 F. Supp 2d at 809.

⁸⁰ Justice Brandeis strongly expressed the view that there cannot be a right—good against the world—to exclude others from using ideas. See *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis J. dissenting.) See also Letter from Thomas Jefferson to Isaac MacPherson, Aug 13, 1813, cited in Adam Mossoff, “What is Property? Putting the Pieces Back Together,” 45 ARIZ. L. REV. 271, 377-78 (2003) (ideas cannot be property); Edwin Hettinger, *Justifying Intellectual Property*, 18 PHIL & PUB. AFFAIRS 31, 35 (1989).

Stage One	Stage Two	Stage Three
In the mind of the originator.	Shared confidentially with one or a few individuals.	Released to the world.

← Pre-publication

→ ←Published →

At stage one, when an idea is only to be found in the mind of the originator, ideas are bound up with the thinker: they are just a part of the thinker's consciousness or internal mental activity. Naturally, a person is privileged to control how and when to divulge novel and original ideas at this stage and is under no obligation to do so.⁸¹ Thus, Warren and Brandeis, in their famous article on privacy, wrote: "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others."⁸² But this privilege is not a right to exclude others. Because ideas are not at this first stage external to the person thinking them, they are not protected by a "property right." This is simply because property rights concern not our persons (of which our inner consciousness or our mind is a part) but rather external things in the world. David Hume made this point when he noted that the principal disturbance in society, which necessitates the creation of property rights, arises from the peculiar character of things "which we call external": "their looseness and easy transition from one person to another."⁸³ Property rules arise to put these external goods on the same footing as the "fixed and constant advantages of the mind," in which we are secure *without* the aid of property rights.⁸⁴ James Penner also

⁸¹ There is in general no standing obligation to disclose novel and original ideas (although one could conceivably contract to do so and a person in certain regulated relationships may come under a duty to disclose information, such as a seller's duty to disclose known latent defects). See Lynn Sharp Paine, *Secrets and the Justifications of Intellectual Property: A Comment on Hettinger*, 20 PHIL. AND PUBLIC AFFAIRS 247, 251 (1991).

⁸² Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890-91).

⁸³ DAVID HUME, TREATISE ON HUMAN NATURE (1740) Book 3 ("Of Morals"), Part II, Section 2.

⁸⁴ *Id.* Hume earlier distinguished between our thoughts and our external possessions: "There are different species of goods, which we are possess'd of; the internal satisfaction of our minds, the external advantages of our body, and the enjoyment of such possessions as we have acquir'd by our industry and good fortune. *We are perfectly secure in the enjoyment of the first.* The second may be ravish'd from us, but can be of no advantage to him who deprives us of them. The last only are both expos'd to the violence of others, and may be transferr'd without suffering any loss or alteration; while at the same time, there is

explains the importance of externality (what he calls separability) in understanding whether a thing may qualify as an object of property. A thing may be property if it is separable from—that is, not necessarily linked to—the putative owner.⁸⁵ The contingency of a person’s association with a thing (what Hume describes as the “looseness and easy transition” of things) explains how an object of property can be passed from owner to owner without triggering any legal change from the perspective of third parties. Because a thing is only contingently associated with its current owner, the new owner will stand in the same position with respect to the thing as the old owner, and the duty of others not to interfere with the thing will be unaffected by such a transfer.⁸⁶ Before an idea has been launched into the world, it does not have this critical attribute of property: it is (by definition at stage one) internal to the owner—an aspect of her mind.

The fact that ideas might be separable at another stage (as indeed they are) does not change our analysis of the status of ideas in this first stage. Certainly, something that is separable has the *potential* to be an object of property (and this is a necessary condition of its becoming an object of property) but it cannot *be* the object of property until it is at the stage that it could be treated as conceptually separate from the person. This is most clearly evident in the context of body parts. It makes no sense to us to speak of a property right in my blood while it is coursing through my veins, although it is of course separable. But once I draw my blood into a container, I may have property in the extracted blood. Someone who then runs off with the vessel of blood or pours it down a drain has not committed a battery and has not interfered with my bodily integrity, but has stolen or converted my property. The first step in this argument holds true with ideas too: an idea that has not left my head cannot be the object of property in this state because it is simply a part of me or my consciousness. Idea-submission law however concerns pre-published ideas that have been submitted in confidence to another (stage two). At this stage, the idea has been communicated to another human being but not to people generally.⁸⁷ Although the idea of course remains in my head, it also exists at this point in someone else’s head too. Thus, it has a separate existence in the world

not a sufficient quantity of them to supply every one's desires and necessities." [my emphasis.] HUME, *supra* note 83, Book 3 ("Of Morals") Part I, Section I.

⁸⁵ PENNER, IDEA OF PROPERTY, *supra* note 13 at 111-12.

⁸⁶ *Id.*

⁸⁷ A study of the English law of breach of confidence might require that a closer look at what happens when an idea is recorded by the originator (either written or represented in another fashion) but is not communicated to anyone. See *The Observer and the Guardian v. United Kingdom*, 14 E.H.R.R. 153 (1992) (in obiter, saying that someone may be bound by a duty not to disclose ideas that are written down in a private journal fall into her hands.) Idea-submission law in the U.S., however, is more narrowly circumscribed: it concerns the legal protection offered an originator of a novel idea who *submits* the idea in question to the recipient (i.e. who shares it in confidence.)

such that another human being can access and use it without first compelling me to disclose it. Other constraints aside,⁸⁸ courts could conceivably treat pre-published ideas at stage two as property. The important question is: is this in fact what courts are doing in awarding originators of novel ideas a degree of protection against those with whom they share the ideas?

Ideas at stage two are not property but this is not, as we have established, because they are categorically incapable of being the objects of property. Rather, ideas are not property because a property theory would inaccurately describe the kind of rights-duty relationship that is in fact at work in idea-submission law. Property rights are *in rem* rights exclusively to control the use of a thing correlating to duties *in rem* not to interfere with another's thing. The *in rem* nature of property rights refers to their exigibility: they are rights good against the world or an indefinite number of duty-owners. Property rights thus resolve potential conflicts between X and an indefinite number of others with respect to the use of an object of property in favor of X.⁸⁹

At stage 2 (where the originator has shared the idea confidentially with one or a few) courts do not treat the originator of the idea as pitted against the rest of the world in claiming exclusive control over and use of the idea. Rather they are concerned with the originator's right as against one or a few others with whom she has shared the idea confidentially. The focus in idea-submission law on the relationship between the originator and a certain recipient of the idea is consistent with a rights-duty relationship that is *in personam*. Even in New York, a jurisdiction that continues to use the rhetoric of property, one court frankly observed: "And while the idea disclosure cases generally refer to the idea in suit as the plaintiff's claimed 'property,' the decisions have focused primarily on the relationship between the parties (or lack thereof) and not on any a priori recognition of exclusivity in the idea."⁹⁰

We cannot look to property theory to uncover the source of the duty not to use or disclose another's idea shared in confidence for the simple reason that idea-submission law concerns a more limited or *in personam* rights-duty relationship than the *in rem* rights-duty relationship that property law describes.

An Unjust Enrichment Account

⁸⁸ And preemption is of course a considerable impediment to doing so. See Barrett, *supra* note 7 at 725 (property theory should be preempted pursuant to § 301 of the Copyright Act).

⁸⁹ See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (Clarendon Press, 1988) at 38.

⁹⁰ See e.g. *Vantage Point*, 529 F. Supp. at 1216.

An unjust enrichment account is the most compelling of the accounts conventionally offered to explain why courts may order defendants to pay over to the originator the value of an idea shared in confidence. Unjust enrichment occurs when: “(1) the plaintiff conferred a benefit on the defendant; (2) the defendant retains the benefit; and (3) under the circumstances, the defendant’s retention of the benefit is unjust.”⁹¹ On a claim of unjust enrichment in the context of idea-submission law,⁹² the defendant’s liability for the use or disclosure of the plaintiff’s ideas appears to be a function of the free acceptance of a valuable service that was not extended gratuitously.⁹³ Such an account is untenable in the special context of idea-submissions because it strains the law’s protection of a recipient of unwanted or unchosen services.

The doctrine of free acceptance can be seen both as a basis for finding a person unjustly enriched and as a limit on the law’s protection of innocent parties from liability to risk-takers who voluntarily confer alleged (but not incontrovertible⁹⁴) benefits.⁹⁵ If a person freely accepts a service,

⁹¹ *News World Communications, Inc. v. Thompsen*, 878 A.2d 1218, 1222 (D.C. Cir. 2005); *See Vereen v. Clayborne*, 623 A.2d 1190, 1994 (D.C. 1993) (if recipient of idea has not realized any benefit from use of idea, then he or she cannot be said to have been enriched).

⁹² In the context of idea-submission cases most unjust enrichment claims are for restitution of *quantum meruit* or the value of services rendered. *See e.g. Matarese*, 158 F.2d at 634 (plaintiff brought claim for *quantum meruit*). *Quantum valebat*, which measures unjust enrichment in terms of the value of the use of another’s property, is rarely used, largely because it is dependent on a prior claim to property in ideas, which has been rejected in some jurisdictions outright and in any case is flawed (see section III(A)(1) *supra.*). *See Weitzenkorn*, 40 Cal. 2d at 778 *et seq.* (a claim for *quantum valebat* is made out where the defendant used for his benefit the property of the plaintiff); *Thompson*, 150 Cal. App. 2d at 473 (“because there is no property interest in ideas,” a quantum valebat theory of unjust enrichment is untenable.)

⁹³ In the context of idea-submission cases, it is not perfectly clear whether free acceptance is sufficient grounds for finding unjust enrichment or whether something more, like a request, is required. A reading of the cases suggests that, where a benefit is requested it can also be said to be freely accepted, but even unrequested benefits support an action in unjust enrichment. *See Smith v. Recrion*, 91 Nev. 666 (Sup. Ct. Nev. 1975) (denying compensation because the idea was unsolicited and “one who officiously confers a benefit on another is not entitled to compensation therefore”); *see Werlin*, 528 F. Supp. at 466 (finding this to be a “classic case” of unjust enrichment because defendant in fact encouraged the plaintiff to submit ideas over the years.); but see *Matarese*, 158 F. 2d at 634 (“the doctrine [of unjust enrichment] is applicable in a situation where, as here, the product of an inventor’s brain is knowingly received and used by another to his own great benefit without compensating the inventor.”); *Flemming*, 107 N.J. Super at 156 (accepting the possibility of establishing unjust enrichment for an unsolicited idea but rejecting claim because idea not novel and ultimately not used); *Weitzenkorn*, 40 Cal. 2d at 794-95 (unjust enrichment turns on “benefit accepted” not benefit requested: “[unjust enrichment] is based upon benefit accepted or derived for which the law implies an obligation to pay;”) *Trenton Indus.*, 165 F. Supp. at 531-32 (unjust enrichment found where defendant accepts but does not solicit idea).

⁹⁴ *See Gareth Jones, Restitutionary Claims for Services Rendered*, 93 *The Law Quarterly Review*, 273, 276 (1977) (incontrovertible benefits (receipt of money or the avoidance of an inevitable expense because of plaintiff’s services) are *presumed* to be freely accepted (or at

having had the opportunity to refuse it, he may come under a duty to give back its reasonable value to the service-provider;⁹⁶ however, if the defendant neither requested the service nor was even given the opportunity to refuse it, we treat the service-provider as an officious intermeddler who is not entitled to restitution.⁹⁷

The question that I confront here is the basis on which the defendant can be said to have had an opportunity to reject an alleged benefit. As a starting point, the defendant cannot be said to have had the choice to accept or reject a benefit—and thus to have come under a duty to

least not open to subjective devaluation)); Michael Garner, *The Role of Subjective Benefit in the Law of Unjust Enrichment*, 10 *Oxford Journal of Legal Studs.* 42, 44 (1990) (discussing exceptional circumstances in which a claim for restitution cannot be resisted).

⁹⁵ PETER BIRKS, *AN INTRODUCTION TO THE LAW OF RESTITUTION* 280 (1985); Jones, *Restitutionary Claims for Services Rendered*, *supra* note 94 at 275. Scholars hotly debate the precise role of free acceptance in the law of unjust enrichment. On the debate between Peter Birks and Andrew Burrows on free acceptance, see Michael Garner, *The Role of Subjective Benefit in the Law of Unjust Enrichment*, 10 *OXFORD J. OF LEGAL STUDS.* 42 (1990). See also Lionel Smith, *Restitution: The Heart of Corrective Justice*, 79 *TEX. L. REV.* 2115, 2143 (1999) (noting that free acceptance is controversial, and pointing out that it has a role in a corrective justice account of unjust enrichment.) While there is debate about the proper role of free acceptance and whether something more, such as request, is needed to establish subjective benefit (a position associated with Andrew Burrows), at minimum it is agreed that the law of unjust enrichment must attend to the defendant's freedom of choice. If the defendant cannot even be said to have freely accepted the benefit, let alone to have requested it, it is not possible to show unjust enrichment unless, perhaps, there is an incontrovertible benefit. See note 94, *supra* (on incontrovertible benefit). While it may be that even establishing free acceptance is not enough to establish unjust enrichment in the context of unrequested benefits, it is a necessary (if insufficient) safeguard against officious intermeddling.

⁹⁶ See note 93, *supra*. For more general support of the doctrine of free acceptance in American law, see Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 *GEORGIA LAW REV.* 847, 848 (1999) (straightforward application of unjust enrichment in cases where defendant freely accepted a benefit, knowing it was not being offered gratuitously); see also Wendy Gordon et al., *Enforcing Coasean Bribes for Non-price Benefits*, 67 *S. CAL. L. REV.* 1519, 1561 (1994). Note that on some accounts a showing of free acceptance makes the defendant liable to pay back the full value of the services he freely accepted rather than simply to disgorge his material gains. Jones, *supra* note 94 at 275 (“Because [acceptance] was his own unhampered choice] it is irrelevant to inquire whether or not he has obtained any real benefit, such as a net increase in his assets from their receipt.”); see also Restatement (Restitution) Third, § 9 comment c. See also *Hill v. Waxberg*, 237 F.2d 936, 938 (reasonable value of services awarded where “one renders services at the request of another with the expectation of pay therefore and in the process confers a benefit on the other.”) Cf. *Werlin*, 528 F. Supp. at 467 (stating that ordinarily the measure of compensation not market value of services but the actual value of the benefit to the defendant but, because no evidence of defendants profits, court awarded what it deemed “proper, equitable and just under all the circumstances.”)

⁹⁷ *Falcke v. Scottish Imperial Insurance Co.*, 34 Ch.D. 234, 248 (C.A. 1886).

make restitution for the value of the service—unless he had “sufficient knowledge of the facts to make that choice a real one.”⁹⁸

In the context of ideas, a defendant who is taken to have accepted a benefit by choosing to receive the idea makes the decision on “less than optimal criteria” because of what is known as Arrow’s paradox.⁹⁹ Arrow famously pointed out that a market in ideas faces certain natural impediments that arise from the very nature of ideas themselves.¹⁰⁰ A seller and a buyer of ideas will have difficulties transacting business because an idea’s “value for the purchaser is not known until he has the information, but then he has in effect acquired it without cost.”¹⁰¹ In the context of a claim for unjust enrichment, this paradox would prevent a plaintiff from claiming that a defendant *freely* accepted her idea because it is only after acceptance of the idea that the defendant is able to assess its value. By way of illustration, consider a defendant who has accepted receipt of an idea, imagining that it would be of a certain kind. On receiving it, however he finds that the idea is very close to what his own scientists were working toward. Having faith in his own labs, and having sunk costs in coming up with a similar idea, he might have refused to receive the idea had he known in advance what it was. He cannot be said to have freely accepted an idea that he would have rejected had he known what it was.

But, it might be argued, an unjust enrichment claim can proceed on the basis that the service was freely accepted even though the defendant did not know in advance its exact value to him: No one ever can be sure until after a service is performed what quality of service he will receive. It is, after all, inherent in the nature of a service that the final product cannot be inspected or fully assessed until it is a *fait accompli*. It is important, however, to observe that there is a distinction between the impossibility of knowing for certain the *value* of a service until after it is provided from ignorance of the nature and *potential* value of the service that is about to be provided. It may be that knowledge of the quality of the service need not be available for a person to be able to accept freely. But what knowledge then must a person have in order for there to be a meaningful opportunity to reject? It seems that the most basic information a person must have in order to be said to have freely accepted the benefit is knowledge of the nature of the service that is provided and its potential value. Take Peter

⁹⁸ BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION, *supra* note 95 at 265; *See also* Brown v. Brown, 524 A.2d 1184, 1186 (D.C. 1987) (“[P]romise to pay will be implied in law when one party renders valuable services that the other party *knowingly and voluntarily accepts*”) (my emphasis).

⁹⁹ Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention* in NAT’L BUREAU OF ECONOMIC RESEARCH, THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 615 (1962).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

Birks' famous example of the home-owner, unjustly enriched by the services of a window-washer:

Suppose I see a widow-cleaner beginning to clean the windows of my house. I know that he will expect to be paid. So I hang back unseen till he has finished the job; then I emerge and maintain that I will not pay for the work that I never ordered. It is too late; I have freely accepted the service. I had my opportunity to send him away. I chose instead to let him go on. I must pay the reasonable value of his work.¹⁰²

The exploitative home-owner may not know in advance how well the window-washer will perform and thus exactly what the service will end up being worth.¹⁰³ But he does know the nature of the service and thus its *potential* value to him. Now suppose the man he took to be a window-cleaner turned out to be a painter (approaching the house with a squeegee, but taking out a paint-brush and paint at the very last second). Or suppose the service-provider gave no clue, as he walked toward the house, of what performance would follow. We would expect a home-owner to wait for some sign of what service is to come before turning the man away. If no sign is ever forth-coming—if the home-owner is unable to ascertain what sort of a service is about to come, while still leaving time enough for a refusal—then the homeowner cannot be said to have accepted the benefit with a real opportunity to reject—that is, with adequate knowledge of the facts. On this reasoning in the context of ideas, the recipient of an idea ought not to be held liable for the value of having an idea brought to his attention if he does not first know at the very least the nature of the idea.

It might be argued, against my position, that the opportunity to reject or accept the idea occurs *after* receipt, at the point when, with knowledge of the nature of the idea, the defendant then decides to use or disclose the idea. In other words, it might be said that the defendant has not accepted the benefit of an idea until he uses it and the decision to use is made with full knowledge of the nature of the idea.¹⁰⁴ There is a problem with finding free acceptance in the decision to use or disclose the idea after receipt. At this stage too the opportunity to reject the benefit is impaired.

¹⁰² BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION, *supra* note 95 at 265.

¹⁰³ Presumably, a thorough cleaning that leaves not a speck of dust behind has greater objective value to the homeowner than a shoddy job. A shoddy job not necessarily a bar to a claim in *unjust enrichment*, although, obviously, the amount in restitution that the plaintiff can claim will be less in the case of the job poorly done.

¹⁰⁴ *Freedman v. Beneficial Corp.*, 406 F.Supp. 917, 923 (D.Del.1975) (plaintiff who provided business ideas to “had a right to sue [for unjust enrichment] as soon as defendants began using his idea for their benefit”), cited in *News World*, 878 A2d. at 1224.

Once a person possesses an idea, it may be that “he cannot help accepting the benefit”¹⁰⁵ by using or disclosing the idea. An idea once known exerts inevitable influence on the person who received it: “the moment (an idea) is divulged, it forces itself into the possession of everyone and the receiver cannot dispossess himself of it.”¹⁰⁶

There is a second, related reason why it is unsatisfactory to find evidence of free acceptance in the decision to use or disclose the idea (rather than in the decision to receive the idea). Where the defendant (or his agents) independently generates an idea very close to the one he received from the plaintiff, it will be very difficult for him to prove that he did not accept a benefit from the plaintiff. Courts are already skeptical of defendants’ claims to have independently developed an idea substantially similar to the one received. In *Hoeltke v. CM Kemp Mfg.*,¹⁰⁷ the defendant chose to receive the plaintiff’s idea for an improvement on his device, thinking it was of a certain kind. It turned out to be a fire check that (so the defendant claimed at trial) it was working on itself. The court was not willing to believe, and the defendant was unable to prove, that it had indeed come up with the fire check itself. As in *Hoeltke*, if a decision to use an idea is taken to be free acceptance of the benefit, the question of whether the defendant accepted or rejected the benefit becomes an evidentiary contest that he is likely to lose. The defendant will find herself without an opportunity to reject a benefit in most cases but rather will be taken to have accepted the benefit of an idea unless she bars herself from freely pursuing her own ends involving the use of her independently generated idea. The concern for freedom of choice, which the law of unjust enrichment aims to accommodate through the doctrine of free acceptance, would not be met on an unjust enrichment account of idea-submission law.

In sum, a meaningful opportunity to reject the benefit of an idea may not exist before the receipt of the idea but also—for different reasons—may not exist after the receipt of the idea in the decision to use or disclosure. Idea-submission law and the law of unjust enrichment are in tension. Actions for unauthorized use or disclosure of ideas would either violate a doctrinal premise of unjust enrichment (that there can be no liability without a meaningful opportunity to reject) or plaintiffs would lose many more cases than they now do (because of the difficulty in showing free acceptance).

B. Incomplete theories: Contract and Confidential Relationships

¹⁰⁵ Leigh v. Dickeson, 15 Q.B.D. 60 (C.A. 1884) quoted in PETER BIRKS, UNJUST ENRICHMENT 51 (2003).

¹⁰⁶ Thomas Jefferson, quoted in Havigurst, *supra* note 12 at 300, n. 13.

¹⁰⁷ 80 F.2d 912 (4th Cir. 1936).

On a contract-based theory of liability, courts must find the existence of a contract to pay for an idea. The problem with collapsing idea-submission law into contract is that, simply put, it would stretch credulity to find a contract in all cases, although of course an express or implied-in-fact contract may indeed provide the source of the duty not to use or disclose another's idea in some situations.¹⁰⁸ As at least one court has recognized, the protection of ideas "reaches and renders liable persons other than the limited number who may have consented to a contractual relationship."¹⁰⁹

Courts have resorted to implying contracts to cover circumstances in which recipients have encouraged disclosure or have, however ambiguously, suggested that compensation for use may be arranged later on. In a typical case in which a contract might be implied, the recipient indicates a willingness to review the idea or indeed solicits the idea, knowing that compensation is expected or agrees to receive an unsolicited idea, coupled with a promise that she will not divulge the idea or that she will discuss compensation if the idea proves useful to her. Implied contract might be a source of a duty of non-use or disclosure where the conduct of the parties permits the inference of a promise. However, implied contract fails to provide an account of idea-submission cases generally.

The most important limit to explaining idea-submission law generally in terms of contract principles relates to the requirement that, for there to be an implied contract, the submission must be for the purpose of

¹⁰⁸ Initially it was thought that the obstacles to a contract-theory of idea-submission law concerned problems with consideration, statute of frauds and preemption. The courts have for all intents and purposes waved these issues aside. See Sobel, *supra* note 7 at 23 (courts have not taken any of these consideration, statute of fraud and pre-emption issues – identified as problems by Nimmer – to be fatal to a claim under contract law.) The consideration problem is resolved in some jurisdictions by insisting on the novelty standard. An important initial objection to a contract approach was that there is no consideration in an idea-submission situation where a person does not "own" the idea. Courts used to reject contract claims on the basis that a non-novel idea could not serve as valuable consideration. See *Murray*, 844 F.2d at 994. The *Apfel* court, however, has changed the law in NY, indicating that novelty is evidence of valid consideration but not a necessary element of a claim. See *Apfel*, 81 N.Y.2d at 477. See also *Nadel*, 208 F.3d at 379-80 (abrogating *Murray*). A struggle on this issue persisted for quite some time in the case law of various jurisdictions. See, for example, *Smoley v. New Jersey Zinc Co.*, 106 F. 2d 314, 315 (3d Cir. 1969) (an idea disclosed in confidence may be protected by an implied agreement to refrain from use, but only where it is novel). California courts by contrast quite early on felt that the act of disclosure constituted valuable consideration. See note 32 *supra* (California courts find the act of disclosure consideration enough.) It is also quickly becoming a settled question that contracts to pay for idea-disclosure are not pre-empted by federal law. See Barrett, *supra* note 7 at 724. See also *Pro CD v. Zeidenberg*, 86 F. 3d 1447, 1454-55 (7th Cir.)

¹⁰⁹ See *Fink*, 9 Cal. App. 3d at 1010 (referring to cases resolved under breach of confidence and unjust enrichment theories.)

selling the idea.¹¹⁰ Thus, the originator of the idea must have clearly conditioned his offer to convey the idea upon a promise to pay for it if used," by the recipient" and "the recipient must know the condition and must voluntarily accept its disclosure."¹¹¹

Implied-contract theory cannot explain cases where an originator shares an idea with another purpose in mind—to entice the recipient to enter into a business relationship,¹¹² or to acquire a trademark, for example.¹¹³ Expectation of being paid for the idea itself is critical to the implied contract to pay for use, which makes the implied contract useful in some cases but certainly not broad enough to cover idea-submission cases that are now being treated inadequately under unjust enrichment theory or the law of confidential relationships.

The law of confidential relationships is similarly insufficient in its reach. In order to treat the relationship between originator and recipient of an idea as a confidential relationship, the courts would have to find either that the parties are in a recognized fiduciary relationship or that the originator reposed trust in the recipient, the recipient accepted that trust and purported to act with the originator's best interests in mind.¹¹⁴ While in some cases the parties may be in a true confidential relationship, it is not necessarily the case that there is a relationship of trust or intimacy in all situations in which courts protect ideas through idea-submission law.¹¹⁵

In an effort to close the gap between the law of confidential relationships and the protection of novel, original, concrete and confidential ideas, courts resort to an expansive definition of a confidential

¹¹⁰ See *Keane*, Fed. Appx. at 876 (plaintiff "did nothing to indicate that disclosure of his idea was contingent on payment. Consequently, the district court correctly concluded that the defendants' acceptance of plaintiff's idea cannot be taken as an implied acceptance"); *Whitfield v. Lear*, 751 F.2d 90, 92 (2nd Cir. 1984) (originator cannot recover unless he has obtained a promise to pay or the conduct of the offeree reflects an intent to pay for the proffered idea).

¹¹¹ *Sobel*, *supra* note 7 at 39.

¹¹² *Faris*, 97 Cal. App.3d at 309 (no implied in fact contract where plaintiff submits idea for TV show in order to convince defendant to join him as masters of ceremony. Defendant then turned around and made a similar show himself without plaintiff.)

¹¹³ *Landsberg*, 736 F.2d at 489 (Initial disclosure of idea for a book of scrabble strategies was in order to get defendant's approval to use the Scrabble trademark on it and not in order to obtain compensation. This initial disclosure, without more, would not permit inference of an implied in fact contract.); *Kleck v. Bausch & Lomb, Inc.*, 145 F.Supp.2d 819, 825 (W.D. Tx. 2000) (no intent to sell marketing idea communicated as part of effort to obtain joint venture and therefore no implied contract).

¹¹⁴ A confidential relationship exists "where one has gained the confidence of the other and purports to act or advise with the other's interest in mind.... It is particularly likely to exist where there is a family relation or one of friendship or such a relation of confidence as that which arises between physician and patient or priest and penitent." RESTATEMENT (SECOND) OF TRUSTS § 2, cmt. b (1959). This does not describe the relationship of the "idea man" trying to leverage his power to create duties in others with respect to his ideas into payment for their use. See also *Sobel*, *supra* note 7 at 53.

¹¹⁵ See *Sobel*, *supra* note 7 at 24 ("true confidential relationships" are quite rare.)

relationship that includes circumstances in which the submission is confidential even if the relationship is not more generally one of trust and confidence. The California Court of Appeal in *Faris*, for instance, held that while a confidential relationship is not created from the mere submission of an idea to another, it was enough if there was “evidence of the communication of the confidentiality of the submission or evidence from which a confidential relationship can be inferred.”¹¹⁶ The court went on to stipulate that “proof that the material submitted was protected by reason of sufficient novelty and elaboration” was, quite apart from proof of a particular relationship such as partners, joint adventurers, principal and agent or buyer and seller under certain circumstances, sufficient to support an inference of the existence of a confidential relationship.¹¹⁷ In short, to shelter idea-submission law within the law of confidential relationships without sacrificing the traditional scope of protection would require courts to assert the existence of a confidential relationship where there is not one in fact.¹¹⁸

There are limits to how far established legal categories can or should be bent to accommodate all situations in which a recipient of an idea comes under a duty not to use or disclose ideas. Implying confidential relationships or contracts in defiance of the facts undermines the utility of our legal concepts and the predictability and clarity that the law might otherwise have. As Warren and Brandeis noted, in arguing for a new right to privacy:

¹¹⁶ *Faris*, 97 Cal. App.3d at 323 (emphasis added).

¹¹⁷ *Id.*

¹¹⁸ See *Hoeltke*, 80 F.2d at 923 (finding a “confidential relationship” where plaintiff “offered to disclose his invention to defendant with a view of selling it to defendant, and so stated in his letter. Defendant was interested in the proposition and invited the disclosure; otherwise it would not have seen complainant’s specification and drawings until the patent was granted. While there was no express agreement that defendant was to hold the information so disclosed as a confidential matter and to make no use of it unless it should purchase the invention, we think that in equity and good conscience such an agreement was implied; and having obtained the disclosure under such circumstances, defendant ought not be heard to say that there was no obligation to respect the confidence thus reposed in it.) *Faris*, 97 Cal. App.3d at 313, the court makes the mistake of treating the protection of ideas in such cases (as well as situations in which there is a contract implied-in-fact) as a species of confidential relationship: “Among the factors from which [an inference of a confidential relationship] can be drawn are: proof of the existence of an implied-in-fact contract; proof that the material submitted was protected by reason of sufficient novelty and elaboration; or a proof of a particular relationship such as partners ... principal and agent or buyer and seller....” That said, there are situations in which the relationship between the plaintiff and defendant is indeed a fiduciary one. See e.g. *Johnson v. Schmidt*, 119 F. Supp. 2d 90 (D. Conn. 2000) (finding a fiduciary obligation of supervisors not to appropriate ideas of graduate students).

So long as these circumstances happen to present a contract upon which such a term can be engrafted upon the judicial mind, or to supply relations upon which a trust or confidence can be erected, there may be no objection to working out the desired protection through the doctrines of contract or trust. But the court can hardly stop there.¹¹⁹

“New applications of traditional theories”¹²⁰ have not satisfactorily accounted for the source of the duty not to use or disclose another’s novel idea. The hodge-podge of legal theories mustered to explain idea-submission law *under* – rather than *over* – explains idea-submission law. These theories, singly or together, fail to account for the formal legal origins of the duty not to use or disclose another’s idea.

III. The Juridical Source of the Duty not to Use or Disclose Another’s Idea: A Legal Power

A good account of the source of the duty not to use or disclose another’s novel idea strives for internal coherence, fit with the core criteria of the positive law and also consistency with the idea of obligation implicit in other well-established areas of Anglo-American law. In this section, I set out a unifying theory of idea-submission law that accounts for the juridical source of the duty not to use or disclose another’s idea in terms of powers. The account I offer here provides a general account of the source of the duty without distorting existing categories of obligation. At the same time, it makes sense of the core criteria for protection that have given shape to idea-submission law. Finally, a powers-based account brings conceptual clarity to idea-submission law and reveals something of the moral reasons that motivate this area of law.

A. The Source of the Duty: A Legal Power

The normative change that occurs when a person submits her novel idea to another in confidence is best explained as the result of the exercise of a legal power to control the extent to which one shares one’s pre-published novel ideas with another. On this account, the source of the recipient’s duty not to use or disclose a novel, original idea is the originator’s legal power with respect to her own ideas to create such a duty in those with whom she shares the idea in confidence. As Warren and Brandeis recognized in the context of privacy rights: “Under our system of government, [an individual] can never be compelled to express [his thoughts] (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of

¹¹⁹ Warren & Brandeis, *supra* note 82 at 210.

¹²⁰ See Nimmer, *Idea-submission Law*, *supra* note 25 at 119 (1953-54).

the publicity which shall be given them.”¹²¹ Similarly, a power to control the extent to which one shares one’s idea is the source of duties in recipients not to disclose or use novel, original, concrete and confidential ideas without permission. By sharing her novel idea in confidence with a voluntary recipient (more on that later), the originator creates in herself a right to control the use or disclosure of that idea that is exclusive at least as against the defendant. This right and its correlating duty are *in personam*: the legal relationship that the originator creates is between herself and a single person (rather than herself and a very large and indefinite class of people).¹²²

B. Beyond Unity: Conceptual Implications of a Powers-Based Account

A single and distinct source for the recipient’s duty suggests that idea-submission law is a unified if narrow branch of law. Treating a restriction on the use or disclosure of an idea as the result of the exercise of a legal power rather than as an occurrence by operation of law has several additional conceptual implications. First, the formal nature of legal powers suggests a limit on the scope of the protection of ideas: an originator must intend to bind the recipient of the idea if the source of the duty not to use or disclose another’s idea is the exercise of a power. Second, the way in which we identify the exercise of a legal power (by the kind of reasons that justify it) importantly guides our thinking about moral questions to do with the justification of idea-submission law. Specifically, a powers-based account suggests the reasons that motivate idea-submission law have to do with the value of enabling the originator to control disclosure, and not directly to do with the desirability of restricting the use or disclosure of ideas in particular cases.

1) Formal Features of Powers: Decision and Intention

The formal features of legal powers may explain certain positive aspects of idea-submission law. A legal power is at work in the law where

¹²¹ Warren & Brandeis, *supra* note 82 at 198. I will argue that a similar power is at work here, in the context of novel and original ideas.

¹²² For a definition of *in personam* rights, or what Hohfeld calls “paucital rights,” see HOHFELD, *supra* note 16 at 72

a person's decision to bring about a change in legal relations (to bind someone where otherwise they were at liberty, for instance, or to grant them a privilege where otherwise they were under a duty) is given legal recognition.¹²³

The exercise of a legal power entails decision—in other words, an intention to bring about the legal change.¹²⁴ By contrast, intent to bring about a change in legal relations is not a necessary characteristic of events that trigger legal changes by operation of law. These events might not always even be the result of human action. For example, when a person reaches the age of maturity, this natural event triggers the acquisition of new powers such as the right to vote, to make valid, binding contracts and to join the military. Similarly, when a person's spouse dies, she acquires anew the ability to enter a binding marriage, which (at least in a state that does not permit bigamy) she did not have before.¹²⁵ And even where human conduct is a relevant determinant of legal consequences that arise by operation of law, the actor's intent to bring about that change will be irrelevant to the occurrence of those legal changes.¹²⁶

There is room for disagreement on the interpretation of the meaning of decision in the context of the exercise of a legal power. One view is that, if the exercise of a power is a decision to bring about the normative change, then the exercise of a legal power requires *subjective* intent to bring about the consequences.¹²⁷ This view, however, construes

¹²³ PENNER, *THE IDEA OF PROPERTY IN LAW*, *supra* note 13 at 17 (“a normative power is the normative ability or capacity to change one's own or another's normative position by modifying, creating or destroying rules, rights, duties or other powers.”). *See also* Joseph Raz, *Voluntary Obligations and Normative Powers*, 46 *PROC. ARISTOTELIAN SOC.* 79, 80 (1972). An early, influential but arguably incomplete definition of legal powers was famously offered by W. N. HOHFELD, *supra* note 16 at 51 (a power-holder is one on whom the law has conferred paramount volitional control over facts that bring about legal change.) *See also* Walter Wheeler Cook, *Hohfeld's Contribution to the Science of Law*, 28 *YALE L.J.* 721 (1919) (a Hohfeldian power “has the legal ability by doing certain acts to alter legal relations.”)

¹²⁴ This is the position taken by Andrew Halpin. *See* Andrew Halpin, *The Concept of a Legal Power*, 16 *OXFORD J. OF LEGAL STUDS.* 129, 140 (1996). I will argue, *infra*, that this position, properly construed is not contrary to the position taken by Joseph Raz in *PRACTICAL REASONS AND NORMS* 104 (Hutchinson & Co, 1975) (definition of powers not concerned with intentions but with reasons for enabling the power-holder). *See* note 129, *infra* and accompanying text.

¹²⁵ Halpin, *supra* note 124 at 140 n. 51 (making the point that a power to marry reverts itself on death of spouse).

¹²⁶ A classic example of a normative change arising through operation of law is the law's response to criminal conduct. When a person commits a crime, he is then liable to a judge's power to sentence him. This is true whether or not the criminal intended to bring about that result (where, for instance he hoped to gain a free night in jail—the Supertramp example).

¹²⁷ This is Halpin's view. *See* Halpin, *supra* note 124 at 144. This of course would significantly narrow the range of actions that we consider exercises of a normative power and would exclude the treatment of implied-in-fact contracts as the exercise of a legal power to contract. *Id.* 146 (“Upon this analysis [of the exercise of powers in terms of decisions] we would have to deny that [an objective contract] was the exercise of a power.”)

the meaning of decision in the context of law too narrowly. Intention to bring about a normative change *is* a salient aspect of decision. But intention may be inferred (objectively) from conduct or circumstances.¹²⁸ Thus, we can speak of a person's having exercised a power to contract where there is objective evidence of intention to bind herself. This position is consistent with Joseph Raz's approach. Raz has acknowledged that, *normally*, only acts done with the intention to bring about the legal change count as the exercise of a legal power.¹²⁹ However, the "exceptions" to this general observation (he refers to implied-in-fact contract) led him to conclude that the definition of powers does not turn on intentions.¹³⁰ Raz was primarily concerned with including the formation of objective contract in the category of legal powers. Keeping this in mind, it seems that Raz's reservations about intention are really reservations about *subjective* intention, which he was quite right to say is normally, but not always, present in the exercise of a power. Raz does not suggest, however, that an action can be the exercise of a legal power in the absence of *any* evidence (objective or otherwise) of intent to bring about that legal change. It is consistent with Raz's position to insist that there is no exercise of a legal power where there cannot even objectively be said to be expressions of a decision to bring about that legal change.

Circumstances of which a person is entirely ignorant cannot constitute the expression of a decision to bring about a change. Where someone finds a lost thing or steals it, the law's response is to hold the finder or thief liable to return the thing in vindication of the true owner's title (if, in the case of a finder, the true owner can be found).¹³¹ The law also imposes a duty to return the value of money paid in error on the ground that the payor's ignorance of the fact of the payment explains why the enrichment of the payee is unjust.¹³² In these cases, it is quite clear that the source of the duty to return the thing or make restitution of the value of

¹²⁸ This point was suggested by an e-mail conversation with Michael Pratt.

¹²⁹ Identifying powers by looking at whether certain actions standardly are directed at bringing about a normative change rules out from the class of legal powers situations in which some intend to bring about by certain legal consequences what others standardly do not (the Supertramp for instance who breaks the law in order to get arrested, so that he can have a warm, safe place to sleep) but includes cases where some do not subjectively intend by certain actions what others standardly do (implied in fact contracts). And yet, in these latter cases, the actor at the very least *objectively* intends what others standardly intend before she or he is held to have exercised a power. Indeed, the standard behavior is likely to serve as a gauge of what an act objectively tells us about the power-holder's intention.

¹³⁰ See RAZ, PRACTICAL REASON, *supra* note 124 at 104.

¹³¹ 36A CORPUS JURIS SECUNDUM §3 (Rights and duties of finder vis à vis owner).

¹³² Ewan McKendrick, *Restitution, Misdirected Funds and Change of Position*, 55 MLR 377 (1992) (discussing Peter Birks' suggestion that ignorance is an unjust factor.)

the money paid arises by operation of law and *not* by the exercise of a legal power by the owner. This is because, where the owner was wholly unaware of the circumstances of the loss or theft, we cannot find an expression of a decision by the original owner to bind the finder or thief.

The decisional aspect of legal powers suggests a limit on the scope of protection offered by idea-submission law. In this context, the originator must intend to restrict the use or disclosure of the idea by the recipient and where she does not (because the idea is shared inadvertently or even without her knowledge), she will not create a binding duty of non-use or disclosure in the recipient.¹³³ Thus, if the source of the duty not to use or disclose is a legal power, the originator cannot be said to create a duty in others in circumstances in which the idea is discovered without her knowledge. When a snoop finds out another's idea, or when a person receives the idea from a third party, without the originator's knowledge, we could not find the expression of a decision to restrict that person's use or disclosure of that idea. The conceptual limit suggested by the very idea of a legal power shapes our understanding of the limited scope of idea-submission law in a way that is consistent with the positive law. While courts have not offered much discussion on this point, idea-submission law appears to protect novel and original ideas only where the originator shares or submits the idea to another.¹³⁴ Thus, a third party who comes to know of an idea through someone other than the originator is not liable to the originator's power not to use or disclose the idea.¹³⁵ In some circumstances, other rules of law from trade secret law, contract law, the

¹³³ See Sobel, *supra* note 7 at 25 (noting that courts do not protect ideas "where the person who originally disclosed the idea had no contact with the third person who eventually used it," a restriction explained on a contract theory on the basis that there is no "privity of contract."); see also *Giangrasso v. CBS, Inc.*, 534 F. Supp. 472, 479 (1982) (common law protection of idea rejected because plaintiffs "never directly offered their script to any of the defendants.")

¹³⁴ This limit to idea-submission law follows from the other theories of idea-submission law, with the exception of a property-based account. Thus, on an unjust enrichment account, one cannot be said to be enriched by the services of the originator when the service of disclosing the idea was provided by another. Unless one takes the view that the idea is the property of the originator, there is no other basis on which to find that the originator has suffered a legal deprivation corresponding the benefit enjoyed by the third party from the use of the idea. Similarly, where a person has not acquired an idea through a confidential relationship with the originator, there is no way to connect her personally to the originator. Unless this connection is mediated through a *res* – an acknowledgement that there is property in ideas --there cannot be a duty not to use or disclose. Cases in which officers of a corporation are bound not to use or disclose an idea that they was submitted in confidence to the corporation do not suggest otherwise. In these cases, the officer (third party) is bound because of the nature of corporations and the fact that ultimately corporations are composed of people who act on its behalf. See *Davies v. Krasna*, 245 Cal. App. 2d 535, 549 (1975).

¹³⁵ See *Vantage Point*, 529 F. Supp. at 1214 (former employee submits plaintiff's game idea to new employer, who was not aware of employee's misconduct. No duty not to use or disclose the idea where there is not also notice of misconduct).

law of confidential relationships¹³⁶ and tort law—specifically duties of non-interference with the contractual or fiduciary relations of others¹³⁷—may kick in to prevent use or disclosure of an idea without permission or at least compensation. But the core protection offered by idea-submission law is consistent with the requirement that the exercise of a power to create a duty not to use or disclose an idea in others must be intentional.

2) Reasons for Conferring Power

Identifying the source of the recipient's duty as a legal power also tells us something about the (moral) reasons why a recipient is bound not to use or disclose a novel idea that is shared in confidence. We distinguish between a legal power and acts that the law treats as having legal consequences by looking to the kind of reasons that motivate the power-conferring norm. As Raz explained, "a legal power can be identified only by the reasons which led the law (*i.e.* the institutions which make and sustain it) to attach those legal consequences to the act."¹³⁸ A legal power is conferred, as Penner puts it, *for the very purpose* of enabling persons to make the normative changes they enable persons to make.¹³⁹ Powers are conferred *not* on the basis of the value of the particular legal result that a person can bring about through the exercise of a legal power *but rather* the value of enabling people as the power does. In other words, the moral reasons that justify the conferral of a power have to do with the desirability of enabling the originator of an idea to share his ideas in a limited way rather than the value of the outcome: the value of restricting a recipient's use or disclosure.

A legal power to control use or disclosure serves the interest we all have in sharing something of ourselves with a select few, and thus serves

¹³⁶ *Thompson v. California Brewing Co.*, 150 Cal. App. 2d 469 (1957). The court acknowledged that a duty may exist where one is in a confidential relationship, or where one discovers the idea "by improper means," which maybe interpreted narrowly to the acquisition of an information through legal misconduct, such as through a tort of inducing breach of contract or otherwise interfering with fiduciary relations. See e.g., *Joyce v General Motors Corp.*, 49 Ohio St. 3d 93, 97-101 (1990) (Holmes J., dissenting, noting that employee A may be protected against use of idea on a theory of interference with contractual relations.)

¹³⁷ See Sobel, *supra* note 7 at 25 (interference with confidential or fiduciary relations may be a wrong: a third person who eventually uses an idea disclosed by the original recipient "could be held liable for doing so if he knew of that confidential relationship and that it was breached by the disclosure to him.")

¹³⁸ Joseph Raz, *Legal Rights* in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS*, 251-52 (1994).

¹³⁹ PENNER, *supra* note 13 at 17.

our more general interest in maximum freedom.¹⁴⁰ Our freedom is maximized in this context where the law does not simply secure an insular sphere of privacy (by for example, privileging people to choose not to divulge ideas to another) but rather where it enables people to share their ideas in a limited way with a select audience.¹⁴¹ The power conferred in idea-submission law is motivated by the desirability of enabling people to engage others without requiring them to forego entirely any say as to the extent of that interaction.¹⁴²

Perhaps the relationship of an originator's power to this interest is best illuminated by considering in a general way how other powers also relate to our fundamental interest in controlling the scope of interaction. The power to control disclosure has two features in common with the power to consent to sexual relations, the power to acquire property and the power to contract. These are general powers that all mature adults have¹⁴³ rather than special powers that attach to some by virtue of their position.¹⁴⁴ That is to say, we all have the power to control disclosure, as well as the power to contract, to acquire property and to consent to sexual relations, just in virtue of being legal subjects.

Second, these general, stand-alone powers all serve our fundamental interest in being able to interact with others without foregoing our own control. For example, the power to acquire property is

¹⁴⁰ Understood broadly to mean, "a freedom from coercion even in the performance of acts carried out where the world can see." See Eduardo Peñalver, *Property as Entrance*, 91 VA L. REV. 0, 10 (2005). For a similar discussion in the context of trade secrets, see Lynn Sharp Paine, *Trade Secrets and the Justification of Intellectual Property*, 20 PHIL. & PUB. AFFAIRS 247 (1991).

¹⁴¹ See Paine, *supra* note 140 at 247-263. She describes the moral backdrop for the right to control disclosure of ideas in terms of respect for autonomy, personality and privacy but also respect for freedom: "freedom of expression also implies a prima facie right not to express one's ideas or to share them only with those we love or trust or with whom we wish to share." *Id.* at 252.

¹⁴² The origins of idea-submission law reflect this focus. California courts, for instance, saw idea-submission law as a direct response to the needs of screen-writers in Hollywood, who found it "necessary to submit ideas to ... producers and not to develop them into complete works until and unless they [were] approved. See *Rokos v. Peck*, 182 Cal. App. 2d 604, 613 (1986), quoted in Sobel, *supra* note 7 at 19.

¹⁴³ For instance, every mature person has a power to contract and to acquire property. PENNER, *supra* note 13 at 51.

¹⁴⁴ Special powers by contrast are powers that are vested in particular persons only in virtue of a position, event, or association specific to them. For example, the power to arbitrate a dispute may be conferred by contract on a particular person, the power to adjudicate a case inheres in an appointed judge, the power to appoint a remainder-man, is conferred on a particular individual by a will. Special rather than general powers that exist independently of contract, will or legislation and which are recognized at common law are typically nested within property rights. For example, powers to share property (to grant others privileges to use) and to abandon or destroy it are considered incidents of property, and thus flow from ownership. Others, such as the power to sell or to bequeath property, are not incidents of ownership but nonetheless cannot be exercised except with respect to things that one owns (and thus may be associated with property rights).

conferred in recognition of our interest not just in acquiring a sphere of exclusivity but also in acquiring the means to engage the world.¹⁴⁵ The right to exclusively decide the use of a thing thus carries with it a power to share that property with others. But our interest in making social uses of our property is not best served by a simple on/off approach. Thus, people expect to be able to invite friends over for an evening without at the same time being committed to opening their house to the entire neighborhood. Similarly, the power to consent to sex enables a person to privilege certain individuals to engage in otherwise prohibited action. The power to consent in this context serves our interest to engage in limited sexual interactions with one, select individual without foregoing our control over the scope of that interaction or sexual interactions generally. The law would not serve our interest in interacting with others without at the same time failing to serve our interest in our own autonomy if, say, it forced us to choose between being a sexually active person, whose rejection of someone is not legally significant, and being a sexually inactive person, who is protected in her wish not to interact sexually with others. All of these general stand-alone powers enable the power-holder to engage with others, but not on an all-or-nothing basis. Rather, these powers, like the power to control disclosure permit the power-holder to interact with others by degrees.

A powers-based account, in contrast to an account derived from the law of confidential relationships or the law of unjust enrichment, brings to light the justificatory core of idea-submission law. Other conventional accounts would commit us to understanding the moral basis for the law in terms of the value of restricting a particular recipient (that is the value of the outcome) rather than the value of enabling people to bring about legal change.¹⁴⁶ In other words, if the duty not to use or disclose another's idea were created by a rule of law rather than by the exercise of a power, we should then be led to cast the moral backdrop of idea-submission law very differently, by reference to why it is desirable to restrict the recipient.¹⁴⁷

¹⁴⁵ See e.g. Penalver, *supra* note 140 (property's function in enabling entrance is too often overlooked in the liberal fixation on property as exit). See also PENNER, *supra* note 13 at 74 ("The right to property permits the owner not only to make solitary use of his property by excluding all others but also permits him to make a social use of his property by selectively excluding others, which is to say by selectively allowing some to enter.")

¹⁴⁶ See notes 138-42 *supra* and accompanying text.

¹⁴⁷ Indeed, some have already been led to see idea-submissions law in these terms. This has already happened. See Barrett, *supra* note 7 at 741 (asserting that both trade secret law and idea-submission law concern the inequities in the defendant's behavior.); see also *Thompson*, 150 Cal. App. 2d at 475 (This is we think a good deal like some aspects of the law relating to trade secrets).

IV. Voluntariness and Obligation

Idea-submission law is not concerned solely with the intent and actions of the originator of the idea. The law is clear that the recipient of an idea comes under no duty if she neither voluntarily undertook the duty nor voluntarily put herself in a position to receive the idea.¹⁴⁸ Why does the law not enable the originator of an idea to create a duty of non-disclosure in another (and thus a limited right in herself to control use or disclosure), simply by blurting the idea out to her? This is a question of some practical concern given that, in many cases in which the protection of ideas is sought, the defendant has not solicited the idea. Indeed, we can discern a flavor of officiousness in the behavior of many plaintiffs: they often develop ideas for which they claim protection specifically with the defendant's use in mind although not at the invitation of the defendant.¹⁴⁹

In this section, I explain why a minimum foundation of voluntariness matters in my account of the duty not to use or disclose another's idea. The answer lies simply with the limited bases on which Anglo-American law will recognize obligation: the interests of another cannot, contrary to Raz's view, provide sufficient justification for the imposition of duties on specific persons. There must be a further reason for finding that one person, rather than another, is the appropriate owner of the duty protecting that interest. By voluntarily receiving the idea, a person creates a nexus between herself and the originator sufficient to render her liable not to use or divulge the originator's idea without permission.

A. Special Duties and Voluntariness

Idea-submission law recognizes an *in personam* duty created by the exercise of a legal power in a particular recipient of a novel idea shared in confidence. On what basis does the law select an individual from among its subjects to bear a duty that serves the interest of another?¹⁵⁰ A good theory of obligation is consistent with the limited bases on which the

¹⁴⁸ See *Thompson*, 150 Cal. App. 2d at 476 ("A cannot impose a confidence on B without B's consent. If A discloses the secret to B despite B's protest that he does not wish to hold in confidence and will not so hold if it is disclosed" then B does not come under a duty not to use or disclose.

¹⁴⁹ See e.g. *Hoeltke*, 80 F.2d. at 914 in which the defendant took it upon himself to come up with a specific idea to improve the plaintiff's product, and then sought to interest the plaintiff in it.

¹⁵⁰ This question is generally posed in the context of duties that arise by operation of law, in service of interests that are deemed sufficiently important to count as rights. The same concern with the imposition of obligations is raised in the context of a power and a correlative liability, from which a duty flows (and I use "liability" in the Hohfeldian sense to refer to the one whose rights, duties or powers stand to be altered by the exercise of a power). See note 16, *supra*.

common law selects any particular individual to bear a duty that serves another's interest.¹⁵¹

The *outer* limits on the law's ability to impose duties are set by the requirements of moral intelligibility. John Gardner puts the point this way:

There are limits to the law's ability, in the fashion of Humpty Dumpty to make things legally obligatory simply by designating them as legally obligatory. Legal obligations must also satisfy what I like to call the 'moral intelligibility' condition. They must be such that, if only the law were justified, they would be moral obligations. Or to put the same point another way, it must make sense for those who regard the law as having a claim on their allegiance to regard their legal obligations as being among their moral obligations.¹⁵²

Anglo-American law, however, evinces an even tighter restraint in imposing legal obligations.¹⁵³ That is to say, in some cases where it might be said that an obligation could be understood as a moral obligation, Anglo-American law nonetheless treats the nexus between duty-owner and rights-holder as insufficient to support a legal obligation.¹⁵⁴ This will become clear when we consider the law's unwillingness to recognize duties that automatically flow from inescapable positions, which, as Bernard Williams reminds us, may well generate some of our most basic moral duties.¹⁵⁵ On what basis then does Anglo-American law take itself to be justified in imposing legal duties?

¹⁵¹ See Ernest J. Weinrib, *Restoring Restitution*, 91 VA L. REV. 861, 868 (2005) (book review) (identifying the "central theoretical question for any liability regime: Why is it that the law connects a particular plaintiff with a particular defendant?"). I take up the question without taking on a corrective justice approach, rather treating consistency with the bases on which Anglo-American law selects an appropriate duty-owner as a hallmark of a good theory of obligation.

¹⁵² John Gardner, *Backwards and Forwards with Tort Law*, forthcoming in Michael O'Rourke and Joseph Keim-Campbell (eds) *Law and Social Justice* (MIT Press 2005) at 22, available at <<http://users.ox.ac.uk/~lawf0081/progress.htm>>.

¹⁵³ I do not mean to suggest that Gardner would agree that the law is necessarily concerned with voluntariness in the imposition of obligation. For instance, Gardner embraces the concept of the tragic in law, such that obligations may be imposed even where there is no possibility of meeting them. See John Gardner, *Justifications and Reasons*, in ANDREW SIMESTER AND A.T.H. SMITH (EDS), *HARM AND CULPABILITY* (Oxford: Clarendon Press, 1996)

¹⁵⁴ Not all systems of law exercise such restraint. See for instance REBECCA WEST, *BLACK LAMB, GREY FALCON: A JOURNEY THROUGH YUGOSLAVIA* 46 (Edinburgh: Canongate Classics, 1993) ("In the Third and Fourth centuries, congregations were consistently insisting on electing people as bishops who were unwilling to accept the office.... Sometimes these men were so reluctant that the congregation was obliged to kidnap them and ordain them forcibly. But once they were installed as bishops, they often performed their duties admirably.")

¹⁵⁵ BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 7 (1985) ("it has been in every society a recognizable ethical thought, and remains so in ours, that one can be

The propriety of imposing legal duties will depend on showing that there is “a relation of the right kind between the individual and the putative duty-owner such that it is appropriate that the latter should have that duty.”¹⁵⁶ To justify a legal duty, it is not enough simply to point to the existence of an interest sufficiently important to be protected by a right (whether that right is created by operation of law or by the exercise of a legal power).¹⁵⁷ James Penner identifies an important gap in the view that another’s legally protected interest is a sufficient and prior justification for the imposition of duties.¹⁵⁸ Penner argues that “[n]ot only is [the justification of a right] dependent on a person’s having an interest of sufficient importance but it is also dependent on there being another person ... upon whom it is *appropriate* to impose the correlative duty.... We conceive of [rights] as imposing duties on a determinate set of duty-holders: either an individual or... generally on everyone.”¹⁵⁹

As Penner points out, the assumption that a nexus between a rights-holder and duty-owner exists “is more difficult to make in the case ... where the class of duty owners is ...restricted” rather than comprised of everyone generally.¹⁶⁰ Assumptions about such a nexus are more problematic in the context of special duties, like the duty of non-use or disclosure in the context of idea-submission law, simply because the law must sort through and select from its subjects to find the appropriate duty-owner.

The circumstances in which Anglo-American law takes for granted that it is appropriate to impose special duties all evince respect for a potential duty-owner’s will or agency. Thus, absent binding everyone on the basis of reciprocity,¹⁶¹ the idea of responsibility in our legal system rests on a minimum foundation of voluntariness. Special duties are imposed on

under a requirement of this kind simply because of who one is and of one’s social situation.”) There is also anecdotal evidence of willingness in the Western tradition to accept duties that flow from a position into which one was forced (extra-legally, by some act of duress, in some cases physical force). For instance, Rebecca West reports that it was customary in medieval Croatia to starve recalcitrant priests into accepting the position of bishop, a position fraught with danger and of course onerous obligations. Once in the position, Ms. West reports that the bishops considered themselves morally bound to perform their duties.

¹⁵⁶ J. E. Penner, *The Analysis of Rights*, 10 *RATIO JURIS* 300, 306 (1997).

¹⁵⁷ RAZ, *ETHICS AND THE PUBLIC DOMAIN*, *supra* note 138 at 243 (“To say that a person has a right is to say that an interest of his is sufficient ground for holding another to be subject to a duty, i.e. a duty to take some action which will serve that interest or a duty the very existence of which serves that interest. One justifies a statement that a person has a right by pointing to an interest of his and to reasons why it is to be taken seriously.”)

¹⁵⁸ J. E. Penner, *The Analysis of Rights*, *supra* note 156 at 300 *et seq.*

¹⁵⁹ *Id.* at 310. Note that Penner was comparing special private law duties with general legislative duties.

¹⁶⁰ *Id.*

¹⁶¹ For example, imposing reciprocal duties on everyone not to interfere with the property and bodily integrity of others.

three bases. First, there are duties imposed on some but not everyone on the basis that the obligors consensually undertook them. Contractual duties are the paradigm for this sort of special duty. Still other duties are imposed on individuals because of their own misfeasance – the voluntary invasion of the vested exclusive rights (a duty to make good on tortious interference with another’s property or person).¹⁶²

Finally, there is a third basis on which Anglo-American law will assume a sufficient nexus: where the duty-ower voluntarily accepted position, from which certain duties inescapably flow. In all of these cases, the law-maker is not so much selecting an appropriate duty-ower but rather responding to self-selection. A person who *voluntarily* takes on a duty, a person who *voluntarily* interferes with the vested rights of others and a person who *voluntarily* accepts an avoidable position have all identified themselves to the law as appropriate candidates to assume a duty.

The kind of special duties that most concern me here is this third category of positional duties. The basis on which positional duties are imposed suggest the kind of nexus between the originator and recipient that justifies a duty of non-disclosure.

B. Positional Duties and Duties to Rescue

The law does not fix a person with special duties that flow from a position unless at minimum that person voluntarily accepted the position. The law adheres to its assumption that there is an insufficient nexus between duty-ower and rights-holder absent some voluntariness even in the most apparently innocuous of situations.¹⁶³ Consider, for example the *inter vivos* gift. Even the recipient of a gift is not vested with rights without

¹⁶² Peter Benson, *he Basis for Excluding Liability for Economic Loss in Tort Law* in DAVID G. OWENS, *THE PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 447 (1995). ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 97 (1995).

¹⁶³ Thus, even a power to acquire property by the unilateral act of possession cannot create any new personal duties in any particular person but rather must correlate to a general, already existing duty *in rem*. See Peter Benson, *The Philosophy of Property* in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 752 (Jules Coleman & Scott Shapiro, eds. 2002). Simply put, because no *new* duty is created by acquisition of property through possession. That is because we are under a *general* duty (a duty *in rem*) not to interfere with property that we do not own. We are not under several million such duties with respect to each piece of property that is not owned by us. Penner makes this point in *THE IDEA OF PROPERTY IN LAW*, *supra* note 13 at 23-26. He also explains why this characterization of property rights and duties is superior to the Hohfeldian one, which treats a right *in rem* “as a myriad of rights *in personam*.” *Id.* at 23. Assuming that we have a well-established property scheme in place, no new duty *in rem* arises with each piece of new thing that is created and then claimed as property.

having voluntarily accepted the gift¹⁶⁴ because ownership entails certain duties. In the case of land, an owner faces tax liability, liability for environmental damage on the property,¹⁶⁵ and heightened duties of care to members of the public.¹⁶⁶ Because duties flow from this position, the law requires acquiescence. It is similarly the case with other positions, such as that of trustee, judge, lawyer, or executor of an estate.¹⁶⁷

My claim that the law requires a minimum foundation of voluntariness for the imposition of a duty is bolstered by the reluctance in Anglo-American law to impose duties on a particular person in a situation over which she had no control or exercised no choice.¹⁶⁸ Duties to rescue or limits on rights in the face of another's need arise (in jurisdictions where these duties and limits are accepted) even where the duty-owner has not volunteered either for the duty or the position that gives rise to it.

¹⁶⁴ See 38A CORPUS JURIS SECUNDUM § 11 (essentials of a gift are donative intent, delivery and acceptance.)

¹⁶⁵ For instance, under CERCLA legislation, the federal government singles out present and past owners of land or facilities where hazardous substances have been released or threaten to be released to cover the entire cost of a clean-up even if the owner had nothing to do with producing or storing the waste, and, in fact, did not even own the land either at the time of the improper disposal of the waste or at the time of its eventual leak. See Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601-28, ELR Stat, CERCLA § 107. Private owners are also drafted to meet the purposes of the Federal government in the Endangered Species Act. They are required not use their land in a way that harms, harasses or kills species listed as endangered or threatened or that modifies or degrades a species' critical habitat under the Endangered Species Act, 16 U.S.C. § 1531-1544, ESA § 9.

¹⁶⁶ See 65A CORPUS JURIS SECUNDUM § 402, 403 (discussing common law rules governing occupier's liability to invitees, licensees and trespassers); 65A CORPUS JURIS SECUNDUM § 568 (discussion liability of owner to neighboring landowners.)

¹⁶⁷ See 14 CORPUS JURIS SECUNDUM § 18 (Charitable trust does not vest in trustee until trustee accepts position.) Of course some of the duties that arise in these cases will be contractual. Also, some fiduciary duties arise because of the relations of the parties rather than the position the defendant assumes. See J. E. PENNER on fiduciary relationships in THE LAW OF TRUSTS 22 (3d ed. 2002). The law sometimes makes case by case determinations of who is a fiduciary, and imposes duties on this basis, but this really is just the acknowledgement of a special relationship, in which the duties arise because of the voluntary interaction of the parties. See PENNER, *id.* at 22-23 (discussing inappropriate extensions to the concept of fiduciary.)

¹⁶⁸ See TONY HONORÉ, *Nécessité Oblige*, in MAKING LAW BIND 125-29 (1987) (noting reluctance in Anglo-American law but arguing in favor of duties to rescue). See e.g. *Union Pacific v. Cooper*, 72 P. 281 (Kan S.C. 1903) (railway company not liable for failure to assist Plaintiff's son when the injury that resulted in his death was not their fault); *Home Office v. Dorset Yacht*, [1970] A.C. 1004, 1026-28 (no obligation in common law to confer a benefit on another or to aide another to avoid foreseeable loss where there is no legally recognized relationship between plaintiff and defendant). And of course scholars like Ernest Weinrib find a duty to rescue outside the scope of the common law idea of responsibility because there should not be liability for nonfeasance, in the sense of failing to provide a hoped for benefit to which the plaintiff had no vested right. See ERNEST J. WEINRIB, *supra* note 162 at 97 (Harvard Univ. Press, 1995). But note that Ernest Weinrib expressed a different view in support of a duty to rescue in an earlier article, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

There are of course those within the Anglo-American tradition who argue that the law should recognize non-voluntary duties that flow from non-voluntary positions. Honoré for instance argues that these duties are justifiably imposed because a burden has to be assumed by someone, and the duty-holder is the most expediently placed to do so—*nécessité oblige*.¹⁶⁹ There are a few cases in American case law that appear to agree with him and which find that necessity gives rise to a duty to offer another benefits.¹⁷⁰ Most famously, in *Depue v. Flatau*, the Flataus refused the plaintiff's request to spend the night after dinner. Although the plaintiff was evidently ill and it was a bitterly cold, the Flataus bundled him into his cutter and sent him on his way. He was found nearly frozen to death the next morning, having fainted and fallen out of the cutter. In the suit that followed, the Flataus argued that they were under no legal obligation to act as Good Samaritans, and could not be liable for refusing to let the plaintiff spend the night. On appeal, the court rejected this argument, finding that, in such circumstances, the law imposes a duty to provide the necessary relief.

Generally, however, courts are reluctant to import necessity as broadly into the law of obligations as Honoré thinks it ought to be. Even those courts that do accept a limited duty to rescue have restricted it to circumstances of undeniable proximity between the potential rescuer and the victim such that the former would have to take *positive* steps to avoid rescuing (by for example shoving a refugee out of his house to face certain injury; or pushing a ship out of a safe harbor into a stormy sea).¹⁷¹

It is no surprise that the dominant common law position is that there is no duty to rescue another. This category of obligation pushes the law to assume a nexus between rights-holder and duty-ower without any regard to the duty-ower's agency.¹⁷² As I have argued, it would represent a departure from the principles of obligation in Anglo-American law to

¹⁶⁹ Honoré, *supra* note 168 at 142. One example that Honoré gives is from early Roman Republic, a son automatically inherited his father's land, and so the burdens and obligations that ran with the land, whether he wanted to or not.

¹⁷⁰ *Depue v. Flatau*, 111 N.W. 1 (Minn Sup. Ct. 1907); *Ploof v. Putnam*, 71 A. 188 (Vt. S.C. 1908).

¹⁷¹ *See Depue*, 111 N.W. 1 (plaintiff was already in the defendant's house, which required defendant to push him out in order to avoid rescuing); *Ploof*, 71 A. 188 (dock owner responsible in damages for unmooring plaintiff's ship after plaintiff had sought refuge from the storm at defendant's dock—the nearest safe harbor). *See also Vincent v. Lake Erie Transportation*, 124 N.W. 221 (Minn. S.C. 1910) (defendant allowed on the basis of necessity to remain at the plaintiff's dock, because otherwise defendant would have been cast out into a dangerous storm, although liable for damage to the dock).

¹⁷² Scholars like Richard Epstein have argued that a duty to rescue introduces a slippery slope of social interference with individual liberty. *See Richard Epstein, A Theory of Strict Liability*, 2 J. OF LEGAL STUD. 151, 197 (1973).

assume a sufficient nexus between duty-ower and rights-holder in the absence of some minimal foundation of voluntariness. The law, in order to recognize rights must identify a significant interest that the right would protect. But, in recognizing rights the law must also identify who should be burdened with the correlating duty.

In the discussion above, we have seen the conventional bases by which the law selects suitable duty-owers. In all such cases, the law selects the prospective duty-ower for reasons that concern him: his own claims, his own promise, his own tortious act. In the context of the duty to rescue, there is no possible basis for singling the potential rescuer out that concerns her as an agent: a potential Good Samaritan did nothing to bring about the situation and, further, did not volunteer to be in closest proximity to the person in need. The law's reluctance to recognize a duty to rescue confirms that the law requires a minimum foundation of voluntariness in the acceptance of a position from which duties flow, if not in the assumption of the duty itself, before it imposes a duty.

C. Minimum Voluntariness in the Context of Idea-submission Law

How then does the duty of non-use or disclosure come within the limited idea of legal responsibility in Anglo-American law? A duty of non-disclosure is related to positional duties—those duties that flow from a voluntarily assumed position. The obligation not to use another's idea comes from the position of recipient of another's novel, original and concrete idea shared in confidence. An originator cannot, through her unilateral intention and action, force another to assume a position that leads to the imposition of duties. Although the defendant need not have agreed to assume a duty of non-disclosure or use, he must have voluntarily assumed the position that makes him liable to the originator's power: he must have agreed to receive the idea or at least have freely accepted it, having had the opportunity to refuse to hear it.¹⁷³ Once the defendant submits to the originator's power, the originator is able to create in him a duty not to use or disclose the idea.

The minimum foundation of voluntariness is established when the originator alerts the defendant to the fact that, in agreeing to hear an idea,

¹⁷³ Courts have understood the importance of bilaterality but have often confused this with what is necessary to find a confidential relationship. See *Official Airlines Schedule Info. Service*, 333 F.2d at 674 ("The problem here is whether one person, by his gratuitous and unilateral act, may impose upon another a confidential relationship. That he may not be clear.") Here I argue that even where we are not trying to establish a confidential relationship, for there to be liability to another's power, unilaterality is not enough. See also *Thompson*, 150 Cal. App. 2d at 476 ("A cannot impose a confidence on B without B's consent. If A discloses the secret to B despite B's protest that he does not wish to hold in confidence and will not so hold if it is disclosed" then B does not come under a duty not to use or disclose.

he is assuming the position of recipient of an original and novel idea that is not yet in the public domain. Where the defendant knows that he is receiving another's novel, original and confidential idea, and yet does not refuse to hear it, he is liable to the originator's power that is exercised when the idea is shared.¹⁷⁴ Thus, where an originator informs the defendant that she has an idea for a new product, and writes "if you would like me to submit the same to you please advise," she has clearly taken the steps necessary to ensure that the defendant has had an opportunity to refuse to hear the idea.¹⁷⁵ So has a plaintiff who writes to the defendant that he has developed a substantial improvement of the defendant's product "but had not shown to any one," and asks, "whether he could interest defendant in this safety device."¹⁷⁶ Similarly, where the originator calls the defendant's assistant, who invites him then to send the idea along, and he does so, in an envelope marked "confidential," he has again protected himself.¹⁷⁷ Must the originator always have contacted the defendant first before sending the idea? This is a question of fact that can be resolved by common sense and industry custom. If I were to send an email without a subject line that, on being opened, sings out my idea to the recipient it cannot be said that the recipient voluntarily received my idea. On the other hand, if I send an idea for a story, with a cover letter explaining that my novel and confidential idea is inside, this might suffice.¹⁷⁸

A careless disclosure that is not shared confidentially or a disclosure that does not give the recipient that opportunity to refuse to hear the idea is not the exercise of a power to control disclosure. Of course, an "idea man" might be anxious to negotiate with a defendant, and so does not want to make it too easy for the defendant to turn him away. However, where the originator presses his idea on the defendant without giving her an opportunity to refuse to hear it, he has left himself unprotected. While the burden falls to the originator to make sure that the defendant has the opportunity to reject the benefit, in practice, most defendants take elaborate steps to ensure that they do not inadvertently accept an idea. These include returning scripts unread or routing all unsolicited

¹⁷⁴ See e.g. *Whitfield*, 751 F.2d at 93. In this case, the plaintiff first sent a notice to the defendant, advising that his script was forthcoming, following which he sent the script. Plaintiff argued that it was industry custom to refuse to receive scripts or to return them unopened if a studio does not want to accept outside submissions. The court, framing its discussion in the language of contract, agreed, holding that where a defendant, having been given notice that a script is forthcoming, then opens and reads it, there is an implied promise to pay for its use.

¹⁷⁵ *Flemming*, 107 N.J. Super. at 313 (court ultimately rejected claim because idea was not novel).

¹⁷⁶ *Hoeltke*, 80 F.2d at 915.

¹⁷⁷ *Duffy*, 123 F. Supp. 2d at 805.

¹⁷⁸ These were the facts in *Davies v. Krasna*, 14 Cal. 3d 502 (S.C. 1975).

submissions through a department separate from the defendant's own research and development team.¹⁷⁹

My insistence, in the powers-based approach, on the defendant's opportunity to refuse to assume the position of recipient of an idea brings to mind our discussion of unjust enrichment and the problems in the context of ideas in finding an adequate opportunity to reject the benefit. Recall that the concern there was that, after receipt of the idea, in many cases one cannot help but use the idea (and so one has not freely accepted the benefit).¹⁸⁰ But I also argued that, before receipt of the idea, you have not had an opportunity to reject the benefit with a full understanding of its potential value because the nature and quality of the idea—critical to your understanding of what it is you are receiving—are unknowable before the idea is disclosed. From this, I concluded the law of unjust enrichment was in tension with idea-submission law. Why does it now make sense to suggest that we can find a person has freely assumed the position of recipient where in another context I argue that there are difficulties in establishing free acceptance of the benefit of an idea?

The illusion of contradiction disappears once we realize that there are different questions posed in these two different contexts. In the context of an unjust enrichment account, free acceptance turns on the acceptance of a *benefit*: the law of unjust enrichment concerns whether or not the defendant has been enriched or received a benefit, having been given an opportunity to refuse the benefit. To determine whether a defendant has had the chance to accept the benefit freely, we naturally require that she have the chance to assess the nature and potential value of the benefit on offer. Where free acceptance is possible only on an assessment of the nature and quality of the idea, Arrow's paradox is engaged.

By contrast, in the context of a powers-based approach, our analysis does not turn on the defendant's enrichment or receipt of a benefit. Naturally I do not deny that ideas might be valuable. Someone who is liable as a recipient to the originator's power to control disclosure of an idea may contract around the duty not to use or disclose (and so in a sense pay for) the idea. Rather, I emphasize that, on a powers-based approach, the salient concern is not whether a *benefit* has been conferred but rather whether an idea—beneficial or not—has been shared and received. A full understanding of the *potential value* of the idea does not bear on the assumption of the position of recipient of an idea as it does on the decision to receive a *benefit*. Thus, it is entirely consistent to say, (1) in the context of unjust enrichment, that you have not had an opportunity to reject the benefit from an idea before you are able to assess its nature and potential value; and (2) in the context of a powers-based approach, that the

¹⁷⁹ See e.g. *Vantage Point*, 1529 F. Supp. 1204 (unsolicited game idea routed to the defendant's secretary and then rerouted to customer service for return to plaintiff, in circumstances which made clear that the defendant did not see the idea).

¹⁸⁰ See *supra* notes 92 *et seq.* and accompanying text.

requirement of voluntariness is met by an opportunity to refuse to receive an idea.

D. Voluntary Acceptance and the Problem of Volitional Control

A question that might occur to some is whether the requirement of assent by the recipient of the idea belies my characterization of the source of the duty as a legal power. As I mentioned above, there is some disagreement about what distinguishes legal powers from mere events to which the law responds. However, there is consensus that a necessary if not sufficient condition for the existence of a legal power is that the acts that constitute its exercise are within the volitional control of the power-holder.¹⁸¹ It might be argued against a powers-based approach that the actions that constitute the exercise of the power are not wholly within the volitional control of the power-holder because the recipient must have voluntarily received the idea before she is said to come under a duty not to use or disclose the idea.

While it is true that the voluntary acceptance of the idea by the recipient is not within the volitional control of the power-holder, the recipient's acceptance need not be treated as an event that directly gives rise to the legal result but rather as a limit on the scope of the originator's power: only those who are in the position of voluntary recipient have a liability correlating to the originator's power. The acts that constitute the exercise of the legal power—sharing a novel and original idea confidence—remain within the volitional control of the originator.

This characterization of the place of the recipient's assent within idea-submission law finds corroboration in the way in which powers generally work. While the acts that are the exercise of these powers must be within the volitional control of the power-holder, the opportunity to perform these acts and to exercise the power need not be.¹⁸² Thus, the opportunity to exercise a power to acquire property requires there to be

¹⁸¹ Volitional control over the facts that constitute the action was the defining characteristic of a power offered by Hohfeld. Although it is now recognized that this element is insufficient to distinguish the exercise of a legal power from other actions of which the law takes notice, volitional control continues to be a necessary if insufficient element.

¹⁸² I think that Halpin overstated the matter when he wrote: "Every legal power affords the opportunity to exercise the power and to affect the legal position of another subject." Halpin, *supra* note 124 at 140. He would have been better off simply to recognize that, while the actions that constitute the expression of the decision to bring about legal change must be within the volitional control, a particular opportunity to exercise the power might depend on circumstances outside one's control. And one in fact may be vested with a power that one never has an opportunity to exercise.

unowned property or property for sale. However, the power-holder has no control over whether someone else abandons the thing or puts it on the market. An opportunity to exercise the power to consent to sexual relations does not exist unless there is someone else prepared to have sexual relations. A judge has no opportunity to exercise her power to sentence absent criminal activity by another, nor a member of parliament the opportunity exercise her power to vote on a bill, absent one put before her. In each of these cases, we recognize the existence of the power even though the power-holder may not have the opportunity to exercise it and certainly cannot control the production of the opportunity.

Similarly, the power to control the extent of the sharing of an idea requires something beyond itself for its exercise: the voluntary assumption of the position of recipient by another.¹⁸³

V. Accommodation of Core Criteria in a Powers-Based Account

A unified powers-based account of idea-submission law has an advantage over the existing, pluralist approach to idea-submission law in that it is consistent with the core requirements that an idea be novel, original, concrete and confidential.

Novelty

On my account, the role of novelty is to distinguish a privately controlled idea from a publicly available one and so to limit the scope of an originator's power. If an idea is novel, it is one that is not known to the public, and is thus naturally within the originator's private control at least before she shares it with anyone else.¹⁸⁴ Idea-submission law, in conferring a limited power to control disclosure of novel ideas, ensures that an originator of an idea is not put to choosing between the natural control over ideas that she has simply in virtue of being the only person to know of it (in stage one) and her interest in engaging in a limited way with others with respect to her idea.¹⁸⁵ The power is conferred on the basis that it is valuable to expand our freedom by enabling us to engage others without entirely foregoing the control over our own thoughts we might otherwise have by keeping ideas to ourselves.¹⁸⁶ Where the person does not start out

¹⁸³ *Desny*, 46 Cal.2d at 715 (in the context of a contract theory, the court noted that the recipient must have consented by words or deeds to the disclosure.)

¹⁸⁴ See notes 48-51, *supra* and accompanying text (definition of novelty).

¹⁸⁵ Interests are related to our appreciation of values. Otherwise put, values are translated into interests and are localized to individuals. See PENNER, *supra* note 13 at 10 (explaining Raz's account of the elements of a normative system).

¹⁸⁶ See note 142, *supra* and accompanying text.

with any natural control over the idea,¹⁸⁷ because the idea is *not novel* and thus is not known only to her, nothing is *preserved* by enabling her to bind another to non-use or disclosure when she relays it (although of course a legal advantage would be gained). A power to control non-novel ideas would thus not be justified on the basis that it is valuable to enable people to share ideas selectively. It is thus consistent with the justificatory core of idea-submission law that it does not protect non-novel ideas.

Originality

A powers-based account of idea-submission law is also consistent with an originality requirement. The role of this criterion is to limit who qualifies as a power-holder with respect to particular ideas. Someone with knowledge of and thus the ability to communicate an idea does not have a *legal* power to restrict use or disclosure by another unless she can show that the idea originates from her.¹⁸⁸ Thus, a recipient with whom the originator shares the idea in confidence cannot turn around and create a duty of non-use or disclosure in third parties with respect to another's novel idea. Of course a recipient of an idea can bring about a legal change—the termination of the originator's power—through her actions (by using or broadcasting the idea to the world). But in such cases, the law simply treats the recipient's conduct as an event in the world that has legal significance. The law does not treat the recipient as the holder of a legally conferred power with respect to the originator's idea.¹⁸⁹ This is because the reasons motivating the law's response do not have to do with the value of

¹⁸⁷ That is, control that exists without the law's help.

¹⁸⁸ In future studies of moral and social questions concerning the proper scope of idea-submission law, it might be argued that there is no moral basis for distinguishing between ideas that originate with a person and ideas that are not original in this sense but which nonetheless are intimately connected with a person. For instance, it might be that a person discovers a novel idea for a book in a diary of her dead lover. While this paper does not provide a full account of the moral foundations of idea-submission law, it is worth noting that a potential gap between the broad justificatory core and the narrower articulation of this power in idea-submission law is not troubling. The reason is simply because we should not expect a study of the justificatory basis for conferring a power to provide the full contours of the law. The precise limits on a right or a power cannot be deduced from the moral reasons that justify it. As Joseph Raz put it, "it seems to be a common philosophical mistake to think that the core justification of a right or any other normative institutions is sufficient for fixing its boundaries. The boundaries of a right are greatly affected by existing local conventions and practices, and by institutional considerations." JOSEPH RAZ, *Free Expression and Personal Identification*, in *ETHICS AND THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 133 (1994).

¹⁸⁹ NIMMER ON COPYRIGHT, *supra* note 8 § 16.05 a b at 16-31 34 Nimmer acknowledges also that idea-submission law does not treat a defendant as under a duty of non-disclosure where the defendant received the idea other than from the originator/plaintiff. However, Nimmer makes sense of this in the context of implied contract.

enabling the recipient to cut short the originator's power but rather with the desirability of limiting the originator's power to controlling disclosure of ideas that are not publicly available.¹⁹⁰

Concreteness

Concreteness on my account simply establishes that indeed the plaintiff is the originator of the idea in question. In other words, in requiring that the originator show that his idea was "ripe for implementation,"¹⁹¹ we maintain the divide between the originator's ideas and the recipient's own ideas fairly in place. A concreteness requirement ensures that the originator's power is not so broad in scope as to conflict with a recipient's interest in using and disclosing her own ideas.

Confidentiality

Confidentiality serves two purposes on my account. The requirement of confidentiality ensures that the recipient is not treated in law as a public audience (albeit a small one). Because publication results in the termination of the power to bind others, expressing the confidential nature of the idea in effect characterizes the kind of disclosure the originator is made: a limited, private rather than an unlimited public disclosure. Conveying the fact of confidentiality also objectively demonstrates an intention to bind the recipient, which is a necessary element of the exercise of a power.

Finally, conveying the fact that an idea is shared in confidence goes some way toward giving the recipient the opportunity to refuse to hear the idea. A defendant has voluntarily assumed the position of recipient where she has either requested the submission of an idea, or voluntarily accepts a novel and original idea, having had the opportunity to refuse to hear it.¹⁹² A defendant who has consented to receive the novel and original idea is a person under a Hohfeldian liability—she is "one whose legal relations will be altered if the power is exercised."¹⁹³

¹⁹⁰ As discussed in Section III(B)(2), the exercise of a power is distinguished from an event that triggers legal change by operation of law by the kind of reasons that motivate the conferral of the power: the desirability of enabling the power holder in that way rather than the desirability of the particular outcome.

¹⁹¹ See *supra* note 63 and accompanying text.

¹⁹² The gist of this requirement is expressed in *Faris*, 97 Cal. App. 3d at 313. The court noted that the defendant in that case could not be held liable to the plaintiff because "one could not infer from anything that Enberg did or said that he was given the chance to reject disclosure in advance or that he voluntarily received the disclosure with an understanding that it was not to be given to others." *Id.* at 324.

¹⁹³ Cook, *supra* note 123 at 8 (a liability is the correlative of a power and the opposite of an immunity.)

Conclusion

Courts and commentators have been quick to recognize that originators of ideas have a strong interest in protection from those who would use or disclose those ideas without their permission. They have been much less successful in explaining the jurisprudential basis for this obligation. I have argued that none of the conventional theories for the protection of ideas in state law comprehensively explain the circumstances under which a recipient of an idea will be held liable for use or disclosure. Further, of these standard theories, at least two—a proprietary account and an account based on unjust enrichment—are wholly or significantly flawed.

I offer a unified account of an obligation not to use or disclose another's idea that is consistent with the existing nature of idea-submission law and the law of obligations more generally. I suggest that the source of this duty is the originator's legal power with respect to her own novel ideas. The law confers this legal power on the basis of our interest in being able to share original and novel ideas selectively with others.

This paper suggests that idea-submission law is indeed a cognizable category in the law rather than a loosely related set of responses to the relationship between an originator of an idea and the recipient. As such it encourages further study of the moral and other reasons that motivate this branch of the law. More generally, this paper contributes to our understanding of how the law treats confidences and the relationship people have to their ideas, a topic that has been considered mainly in other legal contexts such as patent law, the law of trade secrets and the law of confidential relationships.