

*A POWERS-BASED APPROACH TO THE PROTECTION OF  
IDEAS*

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INTRODUCTION

The common law in many states protects a person’s interest in her own novel 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 and often overlooked 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 under circumstances indicating an expectation that the idea will neither be used nor disclosed without permission.<sup>1</sup> This idea may well be the precursor to a patent,<sup>2</sup> trademark,<sup>3</sup> trade secret<sup>4</sup> or copyrightable expression.<sup>5</sup> Importantly,

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<sup>1</sup> 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).

<sup>2</sup> See *The Univ. of Colo. Found. Inc. v. Am. Cyanamid Co.*, 22 Biotech. L. Rep. 665 (Fed. Cir. 2003) (ruling that plaintiff’s idea was the foundation for a patent; defendant’s use of plaintiff’s idea in patent application constitutes unjust enrichment); *Matarese v. Moore-McCormack Lines*, 158 F.2d 631 (2d Cir. 1947) (plaintiff’s idea later developed and patented).

<sup>3</sup> See *Keane v. Fox Television Stations, Inc.*, 129 F. App’x 874 (5th Cir. 2005) (rejecting plaintiff’s claim to have trademark protection for the name “American Idol” on the grounds 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.”).

<sup>4</sup> A 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

however, it does 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 this idea constitutes a new area of intellectual property law called idea-submission law.<sup>6</sup> 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 locate the source of the obligation not to use or disclose another's idea in property law,<sup>7</sup> while others look to contract law,<sup>8</sup> the law of confidential relationships<sup>9</sup> or the law of unjust enrichment.<sup>10</sup> These traditional theories,<sup>11</sup> as I argue below, do not, singly or together, satisfactorily account for the protection of ideas law.

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continuously in the originator's business or perhaps are not business ideas at all. *See* Ahlert v. Hasbro, Inc., 325 F. Supp. 2d 509, 513 (D.N.J. 2004) (trade secret claim "re-characterized as a submission-of-idea case" because idea was not used in business); *see also* RAYMOND T. NIMMER, INFORMATION LAW DATABASE § 5.5 (asserting that trade secret law and idea-submission law are not co-extensive).

<sup>5</sup> *See* Duffy v. Charles Schwab & Co., Inc. 123 F. Supp. 2d 802, 812 (D.N.J. 2000); Werlin v. Reader's Digest Assoc. Inc., 528 F. Supp. 451 (S.D.N.Y. 1981) (describing article about Bas Mitzvah of a girl with Down Syndrome 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."

<sup>6</sup> *See* Lionel S. Sobel, *Idea-submission Law Revisited*, 1 U.C.L.A. ENT. L. REV. 9, 91 (1994) (asserting that 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. 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).

<sup>7</sup> *See, e.g.,* 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) (noting that an "abstract idea" may not be deemed property, an idea that takes on concrete form may be property if novel).

<sup>8</sup> *See* Landsberg v. Scrabble Crossword Game Players, Inc., 802 F.2d 1193 (9th Cir. 1986).

<sup>9</sup> *See* Thompson v. Cal. Brewing Co., 310 P.2d 436 (Cal. Ct. App. 1957) (denying motion to dismiss claim that defendant used idea for beer ad in breach of confidence).

<sup>10</sup> *See, e.g.,* Matarese v. Moore-McCormack Lines, 158 F.2d 631 (2d Cir. 1946) (holding that an employee is 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) (asserting that unjust enrichment theory best explains protection of ideas).

<sup>11</sup> These standard theories for the protection of ideas are also well-documented in the academic literature. *See* Barrett, *supra* note 6, at 691. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, §§ 16.02-06 (1993).

In sum, although there is a protected interest in unpublished, novel ideas shared in confidence, its legal foundation remains undeveloped.

This article 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*<sup>12</sup> 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.

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<sup>12</sup> 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 *infra* Section IV, on the minimum foundation of voluntariness needed before a person becomes liable

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.<sup>13</sup> 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.<sup>14</sup> 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 Hohfeldian<sup>15</sup> sense) to the originator's power to control the extent to which she shares her pre-published idea.

In this article, I remain agnostic on some important debates on the broader economic and social implications of idea-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

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to the originator's power to control disclosure.

<sup>13</sup> See *infra* Section IV(B).

<sup>14</sup> *Id.*

<sup>15</sup> 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).

society in which thinkers and researchers are honored? However, by clarifying the juridical source of a duty not to use or disclose another's idea and the internal normative framework of idea-submission law, I hope also to have set the foundation for these and other inquiries.<sup>16</sup>

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

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 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, in the context of idea-submission law, 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.

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<sup>16</sup> 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 6 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 (2002).

## I. FEATURES OF PROTECTED IDEAS

The common thread in idea-submission law has not traditionally been any particular unifying theory,<sup>17</sup> but rather certain core criteria concerning the nature of the idea.<sup>18</sup> Idea-submission cases across jurisdictions have typically turned on the novelty, originality, confidentiality and concreteness of the idea. While courts began early on to use the language of property, contracts, confidential relationships or unjust enrichment in idea-submission cases, they did not traditionally force a fit between these general areas of law and the actual criteria for protection.<sup>19</sup> Increasingly, courts treat the core criteria as a rough starting point, from which they may and do depart, as they are led by the logic of the general legal theories that they have mustered to explain the cases. The emerging contours of idea-submission law appear to reflect more a commitment to the general value of fit than responsiveness to the particular values and interests that idea-submission law serves. The drift away from the traditional criteria is best understood as an effort to render idea-submission law consistent with the more general tenets of property law, contract law, unjust

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<sup>17</sup> See Section II for a discussion of the diverse conventional theories—contract, property, unjust enrichment, or confidential relationships.

<sup>18</sup> UNIF. COMPUTER INFO. TRANSACTIONS ACT, Part 2(D) § 215 (amended 2002) (“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.”) (emphasis added). See *infra* note 21; see also *Murray v. Nat’l Broad. Co.*, 844 F.2d 988, 991 (2d Cir. 1988) (focusing on characteristics of idea, stating, “The dispositive issue is whether plaintiff’s idea is entitled to legal protection.”); *Flemming v. Ronson Corp.*, 258 A.2d 153, 157 (N.J. Super. Ct. Law Div. 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, (3) it was adopted and made use of.”); see also *Barrett*, *supra* note 6, at 710 (noting that 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).

<sup>19</sup> See, e.g., *Barrett*, *supra* note 6, 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 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”).

enrichment law or the law of confidential relationships. The motivation is the value of coherence in the law.<sup>20</sup> The motivation is sound but the process of rendering idea-submission law coherent has been misguided. A positive 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 departures from this core in the case law.

#### A. *Novelty and originality*

Traditionally, an idea to be protected had to show both “genuine novelty and invention.”<sup>21</sup> Courts across jurisdictions have not been entirely clear on how to assess novelty and originality nor on how these criteria differ.<sup>22</sup>

Originality properly refers to the source of the idea: an idea is original if the plaintiff independently conceived of it.<sup>23</sup> Few courts have

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<sup>20</sup> The judicial effort to make idea-submission law responsive to the logic of the particular theory that is applied is often explicit. See *infra* notes 18, 34 & 37; 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 an unjust enrichment claim is not necessarily persuasive in the context of a contract claim).

<sup>21</sup> *Murray*, 844 F.2d at 992; see also *Waner v. Ford Motor Co.*, 331 F.3d 851, 856 (Fed. Cir. 2003); *Khreativity Unlimited v. Mattel Inc.*, 101 F. Supp. 2d 177 (S.D.N.Y. 2000), *aff'd*, 242 F.3d 366 (2d Cir. 2000), *cert. denied*, 534 U.S. 822 (2001) (general novelty essential for unjust enrichment); *De Filippis v. Chrysler Corp.*, 53 F. Supp. 977 (D.C.N.Y. 1944), *aff'd*, 159 F.2d 478 (2d Cir.), *cert. denied*, 331 U.S. 848 (1947); *Downey v. Gen. Foods*, 286 N.E.2d 257, 259 (N.Y. 1972) (finding that there is no property right without novelty and originality).

<sup>22</sup> While some courts take care to observe the distinct meanings of novelty and originality (see *AEB & Assocs. Design Group, Inc. v. Tonka Corp.*, 853 F. Supp. 724, 734 (S.D.N.Y. 1994) (referring to novelty and originality as “two elements” and acknowledging 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).

<sup>23</sup> Originality means “conceived by the plaintiff.” See *Soule v. Bon Ami Co.*, 195 N.Y.S. 574, 576 (N.Y. App. Div. 1922); see *Murray*, 844 F.2d at 992-3 (noting that protection requires “genuine novelty and invention” and that “[i]n assessing whether an idea is in the public domain, the central issue is the uniqueness of the creation,”) (emphasis added); *Duffy v. Charles Schwab & Co. Inc.*, 123 F. Supp. 2d 802, 810 (D.N.J. 2000) (“idea must demonstrate innovation originality or invention”); *Stanley v. Columbia Broad. Sys. Inc.*, 221 P.2d 73, 86 (Cal. 1950) (Traynor, J., dissenting) (“the idea

elaborated further on the definition and importance of originality<sup>24</sup>—perhaps because they share Nimmer’s view that an objectively novel idea by definition originates from the plaintiff.<sup>25</sup> 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.<sup>26</sup> While objective or general novelty in this sense has proved difficult to assess,<sup>27</sup> it was traditionally required under all legal theories for protection of ideas across most jurisdictions<sup>28</sup> and continues to be required in most,<sup>29</sup> with the exception

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must be embodied in a concrete form attributable to plaintiff’s own ingenuity.”); *Smith v. Recrion Corp.*, 541 P.2d 663, 665 (Nev. 1975) (“The purpose of the 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.”); *Educ. Sales Progs., Inc. v. Dreyfus Corp.*, 317 N.Y.S.2d 840, 844 (N.Y. Sup. Ct. 1970) (holding that an idea must show “genuine novelty and invention” in order to be considered original or novel); Melville B. Nimmer, *The Law of Ideas*, 27 S. CAL. L. REV., 119, 144 (1954) (stating that originality means “independent and creative in thought . . . not copied, imitated, or reproduced” but in the context of the law of ideas, “plaintiff must establish not merely that he did not copy another’s work but that no other such work ever existed”).

<sup>24</sup> 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 to share it in a limited way with a third person, that intermediate recipient should be able to share it, but cannot, given the originality requirement, and assumes the exact same legal position as the first “owner” with respect to the idea. See PENNER, *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.”).

<sup>25</sup> MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, *supra* note 6, at § 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.

<sup>26</sup> Nimmer, *supra* note 22, at 144.

<sup>27</sup> Novelty means something less than non-obviousness in a patent context. See *Softel, Inc. v. Dragon Med. & Scientific Commc’n, 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.*, 788 A.2d 906, 917-18 (N.J. Super. Ct. App. Div. 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 lose 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, 880 (N.Y. Sup. Ct. 1994) (“an improvement and mixture of known or preexisting ideas already in the public domain” is not novel).

<sup>28</sup> See, e.g., *Noble v. Columbia Broad. Sys.*, 270 F.2d 938, 939 (D.C. Cir. 1959) (stating that the “fatal difficulty” with the plaintiff’s case “as a matter of law” is that it “lack[s] the essential element of novelty”); *Lueddecke v. Chevrolet Motor Co.*, 70 F.2d 345 (8th

of California and, recently, New York.

In California, general novelty ceased to be a requirement for the protection of ideas quite early on.<sup>30</sup> After the 1947 amendments to the California Civil Code section 980,<sup>31</sup> which eliminated a property-based theory for the protection of ideas,<sup>32</sup> 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,<sup>33</sup> courts quickly did away with novelty as a pre-requisite to protection.<sup>34</sup> Novelty in the context of a contract took on an evidentiary function: evidence of valuable consideration rather than a necessary element of a claim.<sup>35</sup> On this reasoning, accepted in California, novelty

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Cir. 1934) (holding that plaintiff has no right to compensation because idea for improving the defendant's product was not novel since many other car drivers knew of it).

<sup>29</sup> See *Baer v. Chase*, 392 F.3d 609, 628 (3d Cir. 2004) (showing that courts in N.J. have established that an idea would "not be 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 . . . [i]t 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, Inc.*, 333 F.2d 672, 676 (5th Cir. 1964). For the traditional approach in New York and California, see *Stanley v. Columbia Broad. Sys.*, 221 P.2d 73, 81 (Cal. 1950) (pre-*Desny* case noting that an idea must be novel, reduced to concrete form and disclosed under circumstances indicating expectation of compensation); *Murray v. Nat'l Broad. Co.*, 844 F.2d 988, 992 (2d Cir. 1998) (noting that objective or general novelty is required under all theories in New York).

<sup>30</sup> The turning point was *Desny v. Wilder*, 299 P.2d 257, 263-64 (Cal. 1956) (establishing that novelty is not required where an express contract provides for payment for use); *Chandler v. Roach*, 319 P.2d 776, 781-82 (Cal. Dist. Ct. App. 1957) (no novelty for implied-in-fact contract).

<sup>31</sup> CAL. CIV. CODE § 980 (1947).

<sup>32</sup> See *Weitzenkorn v. Lesser*, 256 P.2d 947, 956 (Cal. 1953) ("The 1947 amendment to section 980 has eliminated the protection formerly given to 'any product of the mind'.").

<sup>33</sup> Other basic requirements for the formation of a contract include legal capacity as well as a lawful subject matter. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981) (requirement of mutual assent for contract formation); § 22 (manifestation of mutual assent through offer and acceptance); § 71 (requirement of consideration for contract formation); § 1 and § 1 cmt. g (requirement of capacity for a contract to be binding).

<sup>34</sup> See, e.g., *Chandler*, 156 Cal. App. 2d at 443 (holding that novelty is not required to establish an implied-in-fact idea-protection contract because it is not required for other types of implied-in-fact contracts).

<sup>35</sup> See generally, *LaFrance*, *supra* note 20 (analyzing evidentiary role of novelty in the case law).

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.<sup>36</sup>

In a similar vein, courts in New York have been moved by the principles of contract law<sup>37</sup> to do away with the requirement of novelty for contracts formed after disclosure,<sup>38</sup> and have lowered the standard for pre-disclosure contracts from objective to subjective novelty or novelty to the buyer.<sup>39</sup> 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.”<sup>40</sup>

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

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<sup>36</sup> *Desny v. Wilder*, 299 P.2d 257, 266 (Cal. 1956) (“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 Progs., Inc.*, 54 Cal. Rptr. 130, 142 (Cal. Dist. Ct. App. 1966) (holding that when there exists both an express and an implied contract to pay for an idea for a television format, the contract binds the defendant, even with respect to non-novel portions).

<sup>37</sup> *See Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368, 377 (2d Cir. 2000) (“We note . . . that the ‘novelty to the buyer’ standard comports with traditional principles of contract law.”).

<sup>38</sup> *See Apfel v. Prudential-Bache Sec. Inc.*, 616 N.E.2d 1095, 1095, 1097-98 (N.Y. 1993) (holding that no novelty at all is required for post-disclosure contracts).

<sup>39</sup> *See Nadel*, 208 F.3d at 378 (picking up on dicta in *Apfel*, noting that novelty to the buyer establishes sufficient consideration in the pre-disclosure context).

<sup>40</sup> *Apfel*, 616 N.E.2d at 1098; *see also* note 40 (citing concern with traditional principles of contract law).

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.<sup>41</sup> An unjust enrichment approach simply does not make sense of the requirement of *genuine* novelty, so courts have responded by lowering the standard of novelty.<sup>42</sup>

As much as the courts in California and New York have pushed the logic of contract formation to the conclusion that no novelty<sup>43</sup> or only subjective novelty<sup>44</sup> 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 relationship<sup>45</sup>—notwithstanding that novelty has no obvious relevance either to the formation of true confidential relationships or to the scope of the fiduciary-like obligations that arise from them.

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<sup>41</sup> See *Werlin v. Reader's Digest Ass'n, Inc.*, 528 F. Supp. 451, 466 (S.D.N.Y. 1981) (acknowledging that an unjust enrichment claim depends on a showing of novelty but reasoning, "While it might be argued that [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 Indus. v. A. E. Peterson Mfg. 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), it was new to the defendant, and novelty to the defendant was enough to establish that the defendant had been unjustly enriched. "[H]e had seen these church chairs on numerous prior occasions, but he 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."

<sup>42</sup> 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.

<sup>43</sup> See *supra* notes 30, 34 & 36 and accompanying text (novelty in California).

<sup>44</sup> See *supra* notes 38, 39 & 41 and accompanying text (novelty in New York).

<sup>45</sup> *Entm't Research Group v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1227 (9th Cir. 1997) (ideas must be novel and original to be protected under breach of confidence); *Downey v. Gen. Foods Corp.*, 286 N.E.2d 257 (N.Y. 1972) (noting that novelty is required

The requirement of novelty in traditional idea-submission law 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.<sup>46</sup> The protection comes to a natural end where the plaintiff voluntarily releases the idea to the public<sup>47</sup> or where an independent originator does so<sup>48</sup> and an unnatural end where another releases the idea without the originator’s consent.<sup>49</sup>

### B. Confidentiality

The third core prerequisite for idea-protection is the confidential nature of the disclosure. Traditionally, a recipient is not bound by a

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for protection where basis is confidential relationship).

<sup>46</sup> Havigurst, *supra* note 10, at 302 (public disclosure makes an idea free to all).

<sup>47</sup> See *Puente v. President and Fellows of Harvard College*, 248 F.2d 799 (1st Cir. 1957) (noting that since plaintiff “had already disclosed his idea to 1500 important business and banking institutions and leading law firms throughout the country,” he thus had no further claim against defendant even if his idea had been novel and original); see also *Waner v. Ford Motor Co.*, 331 F.3d 851, 923 (Fed. Cir. 2003) (holding that by exhibiting fender lines publicly at a horse fair before sharing them with the defendant, the originator had released the idea into the public domain, allowing defendant to use or disclose the idea); *Kovacs v. Mutual Broad. Sys. Inc.*, 221 P.2d 108, 110 (Cal. Dist. Ct. App. 1950) (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).

<sup>48</sup> See *AEB & Assoc. Design Group, Inc. v. Tonka Corp.*, 853 F. Supp. 724, 733-35 (S.D.N.Y. 1994) (finding no protection where another has independently created an idea, even if the idea is novel and original); *Bristol v. Equitable Life Assurance Soc’y of N.Y.*, 30 N.E. 506, 507 (N.Y. 1892) (finding no protection because the idea for soliciting insurance business was already in use in the industry: “Its use seems to be its disclosure.”). Independent creation is a popular defense, although it raises evidentiary problems. See *Sobel*, *supra* note 6, at 65-76. In *Hoeltke v. C.M. Kemp. Mfg. Co.*, 80 F.2d 912 (4th Cir. 1936), the defendants claimed to have come up with the same idea independently of the plaintiff. The court was understandably skeptical. In *Downey*, 286 N.E.2d at 257-58, the defendant argued that: (1) the idea was in the public domain; and (2) the defendant’s 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.

<sup>49</sup> 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 permit his intellectual production to be published . . . his right to a copyright is lost as effectually as the right of an inventor to a patent upon an invention which he deliberately abandons to the public and this too, irrespective of his actual intention not to make such 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. *Id.*

duty not to use or disclose the idea unless the originator indicates that disclosure is limited and private, rather than unlimited and public.<sup>50</sup> 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 secret<sup>51</sup> as would a disclosure that is in fact a publication rather than a private communication.<sup>52</sup> A confidential submission is one that accurately indicates to the recipient that the idea is *not* already publicly available<sup>53</sup> and is not through this disclosure being made public.

“Confidentiality” in this sense has traditionally been a core criterion for the protection of ideas, 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

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<sup>50</sup> Courts’ concern for the private nature of submission, indicated by its purpose, reflects implicit criterion of confidentiality. *See, e.g., Stanley v. Columbia Broad. Sys. Inc.*, 221 P.2d 73, 74 (Cal. 1950) (noting that the idea for radio program was 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*:

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.

*Thompson v. Cal. Brewing Co.*, 310 P.2d 436, 440 (Cal. Ct. App. 1957).

<sup>51</sup> Not only must the originator indicate the confidentiality of the idea in the circumstances, but the representation must be correct. *See Entm’t Research Group v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1227 (9th Cir. 1997) (finding that notwithstanding express statement by plaintiff at time of disclosure that ideas for doll design, manufacturing and marketing were confidential, “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”).

<sup>52</sup> *See Waner*, 331 F.3d at 856 (holding that non-confidential disclosure defeats a claim of unjust enrichment).

<sup>53</sup> “In confidence” means sharing non-publicly. *See Keane v. Fox Television Stations, Inc.*, 297 F. Supp. 2d 921, 931 (S.D. Tex. 2004), *aff’d*, 129 F. App’x 874 (5th Cir. 2005) (claiming that idea submitted “in confidence belied by allegation that ‘secret’ was mass-mailed”).

relationship. Courts have not, however, tried to move this criterion into line with the law of confidential relationships more generally.<sup>54</sup> 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.<sup>55</sup>

While courts traditionally required confidentiality in idea-protection cases brought as actions for unjust enrichment,<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> Confidentiality might, of course, play a lesser,

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<sup>54</sup> See *Thompson*, 310 P.2d at 440.

<sup>55</sup> See *Faris v. Enberg*, 158 Cal. Rptr. 704, 712 (Cal. Ct. App. 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 *infra* Section II(B).

<sup>56</sup> See, e.g., *De Filippis v. Chrysler Corp.*, 53 F. Supp. 977, 980 (D.C.N.Y. 1944), *aff’d*, 159 F.2d 478 (2d Cir.), *cert. denied*, 331 U.S. 848 (1947) (noting that 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).

<sup>57</sup> *Trenton Indus. v. A. E. Peterson Mfg. Co.*, 165 F. Supp. 523, 532 (S.D. Cal. 1958) (“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.”).

<sup>58</sup> See *Vantage Point, Inc. v. Parker Bros., Inc.*, 529 F. Supp. 1204, 1216, 1217 (E.D.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

evidentiary role in establishing liability for use or disclosure on an unjust enrichment account of protection: 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.

### C. *Concreteness*

Courts very early on in the development of idea-submission law insisted that only concrete ideas qualify for common-law protection.<sup>59</sup> While the case law offers little clarity on the meaning of “concreteness,”<sup>60</sup> 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.”<sup>61</sup> 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 under this view only if it

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of a confidential relationship should not be a sine qua non to recovery.” Nimmer, *supra* note 22, at 125-26.

<sup>59</sup> 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 v. Ronson Corp.*, 258 A.2d 153, 156 (N.J. Super. Ct. Law Div. 1969) (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 v. Moore-McCormack Lines*, 158 F.2d 631, 634 (2d Cir. 1947) (usable means marketable).

<sup>60</sup> See Sobel, *supra* note 6, at 53 (concrete used in a variety of ways); Barrett, *supra* note 6, at 712-13, citing *Smith v. Recrion Corp.*, 541 P.2d 663, 665 (Nev. 1975) (noting that there are two general approaches, the first requiring that the idea be reduced to a tangible form, and the second requiring that ideas be sufficiently developed enough to be ready for use).

<sup>61</sup> See *Chandler v. Roach*, 319 P.2d 776, 779 (Cal. Dist. Ct. App. 1957) (explaining that an idea is concrete where there is “sufficient development of the idea to give it identifying characteristics”); *Tate v. Scanlan Int’l. Inc.*, 403 N.W.2d 666 (Minn. Ct. App. 1987) (“If an idea requires extensive investigation, research, and planning before it is ripe for implementation, it is not concrete.”); *Smith*, 541 P.2d at 665 (noting that 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 author”).

takes tangible form.<sup>62</sup> This second approach emerged in cases applying a proprietary theory for the protection of ideas: courts refused to protect merely “abstract” ideas because they are “so unattached as to be deemed legally without the quality of individual identity or property.”<sup>63</sup> While concreteness has traditionally had a role across legal theories,<sup>64</sup> some courts have started to drift from this core criterion on the now-familiar ground that it does not fit the legal theory on offer.<sup>65</sup>

The trend toward greater consistency with the general legal principles behind conventional theories of idea-submission law has led to greater inconsistency in the requirements for protection *across* legal theories. This has led at least one court to call California law a “deviation from the ‘traditional view’”<sup>66</sup> and an “aberration . . . in comparison with other aspects of the law of California,”<sup>67</sup> in that core criteria (like novelty) abandoned under some legal theories in California *are* still required for the protection of ideas under other theories in that same state.<sup>68</sup>

Consistency and intelligibility do matter.<sup>69</sup> Conventional legal theories have indeed failed to make sense of certain core criteria. This has created one problem of fit that judges have gradually tried to resolve

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<sup>62</sup> See Barrett, *supra* note 6, at 712 (citing to cases taking this approach).

<sup>63</sup> *Belt*, 210 F.2d at 708.

<sup>64</sup> See *Stanley v. Columbia Broad. Sys. Inc.*, 221 P.2d 73, 83-84 (Cal. 1950) (holding that there can be no implied-in-fact contract unless an idea is concrete); Sobel, *supra* note 6, at 56, citing *McGhan v. Ebersol*, 608 F. Supp. 277, 285 (S.D.N.Y. 1985) and *Fink v. Goodson-Todman Enterprises, Ltd.*, 88 Cal. Rptr. 679, 690 (Cal. Ct. App. 1970) (noting that there can be no recovery under confidential relationship theory unless an idea is concrete).

<sup>65</sup> *Chandler*, 319 P.2d at 781-82 (noting that concreteness is not required for contract-based protection).

<sup>66</sup> *Johnson v. Benjamin Moore & Co.*, 788 A.2d 906, 917-18 (N.J. Super. Ct. App. Div. 2002), *remanded*, 796 A.2d 893 (N.J. 2002)

<sup>67</sup> *Id.*

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

<sup>69</sup> 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 (1994) (noting the “undoubted value of coherence as intelligibility”).

by modifying the traditional criteria for protection. This approach, I have argued, is unsatisfactory in that the kind of protection that the law offers the originators of ideas should not be shaped by the positive constraints of a legal theory; rather, a legal theory offered to explain an area of law 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 have acknowledged 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.<sup>70</sup> 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 taken to be fundamental to the protection of ideas submitted in confidence to another.

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<sup>70</sup> See John Kettle, *What Every Litigator Must Know About Intellectual Property*, [http://www.pli.edu/emktg/toolbox/ip\\_protect.pdf](http://www.pli.edu/emktg/toolbox/ip_protect.pdf) (last visited Oct. 18, 2005) (noting that state law protects ideas under four theories: express contract, implied contract, unjust enrichment/quasi-contract and conversion).

### 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.<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup>

#### 1. 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

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<sup>71</sup> See, e.g., *Belt*, 108 F. Supp. at 691 (finding that in a claim for wrongful appropriation of an idea for a radio program, “the law now gives effect to a property right in an idea even though the idea may be neither patentable nor subject to copyright”); *Kovacs v. Mutual Broad. Sys. Inc.*, 221 P.2d 108, 112 (Cal. Dist. Ct. App. 1950) (pre-*Desny* case treating ideas for radio program as protectable “product[s] of the mind” on a property theory).

<sup>72</sup> See, e.g., *Trenton Indus. v. A. E. Peterson Mfg. Co.*, 165 F. Supp. 523 (S.D. Cal. 1958).

<sup>73</sup> See *infra* notes 95-97 and accompanying text.

property. This is in fact the view that a number of courts have taken,<sup>74</sup> although some courts, notably in California, have clearly rejected this approach.<sup>75</sup> 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.<sup>76</sup> 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

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<sup>74</sup> Baer v. Chase, 392 F.3d 609, 628 (3d Cir. 2004) (explaining predicates of a “property right in an idea”); Nadel v. Play-By-Play Toys & Novelties, Inc., 208 F.3d 368, 378 (2d Cir. 2000) (noting that proprietary nature of right in ideas explains the novelty requirement); 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); Irizarry v. President & Fellows of Harvard College, 248 F.2d 799 (1st Cir. 1957) (finding no property in ideas that are not original and novel); Reeves v. Alyeska Pipeline Serv. Co., 926 P.2d 1130 (Alaska 1996) (explaining that protection under a property theory requires that ideas possess “property-like” traits); Garrido v. Burger King Corp., 558 So. 2d 79, 84 (Fla. Dist. Ct. App. 1990) (idea that is novel is property); Downey v. General Foods Corp., 286 N.E.2d 257, 259 (N.Y. 1972) (“[a]n idea may be a property right” where it is novel and original).

<sup>75</sup> See Desny v. Wilder, 299 P.2d 257, 265-66 (Cal. 1956) (“[I]t is clear that California does not now accord individual property type protection to abstract ideas.”); see also Dallier v. Levi Strauss & Co., 1996 U.S. App. LEXIS 12282, at \*3 (4th Cir. 1996) (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 6, at 28 (arguing that property theory is clearly no longer viable).

<sup>76</sup> See, e.g., JAMES BUCHANAN, PROPERTY AS A GUARANTOR OF LIBERTY (1993).

created patents to find that at common law, too, ideas are property.<sup>77</sup>

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.<sup>78</sup> 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:

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

<sup>77</sup> For example the *Duffy* court drew from patent law. See *Duffy v. Charles Schwab & Co., Inc.* 123 F. Supp. 2d 802, 809 (D.N.J. 2000).

<sup>78</sup> Justice Brandeis strongly expressed the view that there cannot be a right—good against the world—to exclude others from using ideas. See *Int’l 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), in Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 377-78 (2003) (ideas cannot be property); Edwin Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFFAIRS 31, 35 (1989).

ideas at this stage and is under no obligation to do so.<sup>79</sup> 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.”<sup>80</sup> 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.”<sup>81</sup> Property rules arise to put these external goods on the same footing as the “fix’d and constant advantages of the mind,” in which we are secure *without* the aid of property rights.<sup>82</sup> James Penner also 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

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<sup>79</sup> 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, *Trade Secrets and the Justification of Intellectual Property: A Comment on Hettinger*, 20 PHIL. & PUB. AFFAIRS 247, 251 (1991).

<sup>80</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890-91).

<sup>81</sup> 3 DAVID HUME, A TREATISE OF HUMAN NATURE, Part II, § II (1740).

<sup>82</sup> *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 not a sufficient quantity of them to supply every one’s desires and necessities.

*Id.*, Part I, § I (emphasis added).

linked to—the putative owner.<sup>83</sup> 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.<sup>84</sup> 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.

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<sup>83</sup> PENNER, *supra* note 12, at 111-12.

<sup>84</sup> *Id.*

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.<sup>85</sup> 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 such that another human being can access and use it without first compelling me to disclose it. Practical constraints on jurisdiction aside, 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 inexactly 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 is best understood by reference to their exigibility: *in rem* rights are enforceable generally against others in society.<sup>86</sup> 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.<sup>87</sup>

At stage 2, where the originator has shared the idea confidentially

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<sup>85</sup> A study of the English law of breach of confidence might require 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 one may be bound by a duty not to disclose ideas that are written down in a private journal that fell 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).

<sup>86</sup> See P.B.H. BIRKS, *AN INTRODUCTION TO THE LAW OF RESTITUTION* 49-50 (Oxford: Clarendon Press, 1985); see also Penner, *supra* note 12, at 29;

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 that "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."<sup>88</sup>

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.

## 2. Unjust Enrichment Account

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."<sup>89</sup> On a claim of unjust enrichment in the context of idea-

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<sup>87</sup> See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 38 (1988).

<sup>88</sup> See, e.g., *Vantage Point, Inc. v. Parker Bros., Inc.*, 529 F. Supp. 1204, 1216 (E.D.N.Y. 1981).

<sup>89</sup> *News World Communications, Inc. v. Thompson*, 878 A.2d 1218, 1222 (D.C. 2005); see *Vereen v. Clayborne*, 623 A.2d 1190, 1994 (D.C. 1993) (explaining that if recipient of

submission law,<sup>90</sup> 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.<sup>91</sup> 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 incontrovertible)<sup>92</sup> benefits.<sup>93</sup> If a person freely accepts

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idea has not realized any benefit from use of idea, then he or she cannot be said to have been enriched).

<sup>90</sup> In the context of idea-submission cases most unjust enrichment claims are for restitution of the value of services rendered. *See, e.g.,* *Matarese v. Moore-McCormack Lines*, 158 F.2d 631, 634 (2d Cir. 1947) (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 employed. This is because *quantum valebat* 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 supra* section III(A)(1)). *See generally* *Weitzenkorn v. Lesser*, 256 P.2d 947 (Cal. 1953) (noting that a claim for *quantum valebat* is made out where the defendant used the plaintiff's property for his benefit); *Thompson*, 310 P.2d at 438 ("because there is no property interest in abstract ideas," a *quantum valebat* theory of unjust enrichment is untenable).

<sup>91</sup> 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, such as a request, is required. A reading of the cases suggests that, where a benefit is requested it may be deemed freely accepted, but even unrequested benefits support an action in unjust enrichment. *See* *Werlin v. Reader's Digest Ass'n, Inc.*, 528 F. Supp. 451, 466 (S.D.N.Y. 1981) (finding situation to be a "classic case" of unjust enrichment because defendant in fact encouraged the plaintiff to submit ideas over the years); *Smith v. Recrion Corp.*, 541 P.2d 663, 665 (Nev. 1975) (denying compensation because the idea was unsolicited and "one who officiously confers a benefit on another is not entitled to compensation therefore"). *But see* *Matarese*, 158 F.2d at 634 ("[T]he doctrine [of unjust enrichment] is applicable to 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."); *Trenton Indus. v. A. E. Peterson Mfg. Co.*, 165 F. Supp. 523, 531-32 (S.D. Cal. 1958) (noting that unjust enrichment is found where defendant accepts but does not solicit idea); *Weitzenkorn*, 256 P.2d at 959 (explaining that unjust enrichment turns on "benefit accepted," not benefit requested: "[quasi-contractual recovery] is based upon benefit accepted or derived for which the law implies an obligation to pay"); *Flemming v. Ronson Corp.*, 258 A.2d 153, 155-56 (N.J. Super. Ct. Law Div. 1969) (accepting the possibility of establishing unjust enrichment for an unsolicited idea, but rejecting claim because idea was not novel and ultimately not used).

<sup>92</sup> *See* Gareth Jones, *Restitutionary Claims for Services Rendered*, 93 L.Q.R. 273, 276 (1977) (explaining that 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 least not open to subjective devaluation]); Michael Garner, *The Role of Subjective Benefit in the Law of Unjust Enrichment*, 10 O.J.L.S. 42, 44 (1990) (discussing exceptional circumstances in which a claim for restitution cannot be resisted).

<sup>93</sup> *See* PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 280 (1985); *see also*

a service, having had the opportunity to refuse it, he may come under a duty to give back its reasonable value to the service-provider;<sup>94</sup> 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.<sup>95</sup>

The question that I confront here is the basis on which the defendant in an idea-submission case 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 make restitution for the value of the service—unless he had “sufficient knowledge of the facts to

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Jones, *supra* note 92, 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 Garner, *supra* note 92. See also Lionel Smith, *Restitution: The Heart of Corrective Justice*, 79 TEX. L. REV. 2115, 2143 (2001) (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 *supra* note 92 (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.

<sup>94</sup> See *supra* note 91. 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 GA. L. REV. 847, 848 (1999) (describing a straightforward application of unjust enrichment in cases where defendant freely accepted a benefit, knowing it was not being offered gratuitously); see also Wendy Gordon & Tamar Frankel, *Enforcing Coasian Bribes for Non-Price Benefits: A New Role for Restitution*, 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 92, 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 Hill v. Waxberg, 237 F.2d 936, 938 (9th Cir. 1956) (awarding reasonable value of services 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 . . .”); RESTATEMENT (THIRD) OF RESTITUTION § 9 cmt. c (2005). Cf. *Werlin*, 528 F. Supp. at 467 (stating that ordinarily the measure of compensation is not market value of services but the actual value of the benefit to the defendant; but, because there was no evidence of defendant’s profits, court awarded what it deemed “proper, equitable and just under all the circumstances”).

<sup>95</sup> *Falcke v. Scottish Imperial Ins. Co.*, [1886] 34 Ch.D. 234, 248 (App. Cas.).

make that choice a real one.”<sup>96</sup>

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.<sup>97</sup>

Arrow famously pointed out that a market in ideas faces certain natural impediments that arise from the very nature of ideas themselves.<sup>98</sup> 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.”<sup>99</sup> 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 can ever be sure until after a service is performed what quality of service he will receive.

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<sup>96</sup> BIRKS, *supra* note 93, 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.*”) (emphasis added).

<sup>97</sup> 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).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

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, and ignorance of the nature and *potential* value of the service that is about to be provided. It may be that a person need not have knowledge of the actual value or the quality of the service in order to be able to accept the service 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 Birks' famous example of the homeowner, unjustly enriched by the services of a window-washer:

Suppose I see a window-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.<sup>100</sup>

The exploitative homeowner may not know in advance how well the window-washer will perform and thus exactly what the service will end up being worth.<sup>101</sup> 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

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<sup>100</sup> BIRKS, *supra* note 93, at 265.

<sup>101</sup> Presumably, a thorough cleaning has greater objective value to the homeowner than a shoddy job. But a shoddy job is not necessarily a bar to a claim in *unjust enrichment*, although, obviously, the amount in restitution that the plaintiff can claim may be less in the case of the job poorly done.

squeegee, but taking out a paintbrush 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 homeowner 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 homeowner 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.<sup>102</sup> 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. Once a person possesses an idea, it may be that “he cannot help accepting the benefit”<sup>103</sup> 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

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<sup>102</sup> *Freedman v. Beneficial Corp.*, 406 F. Supp. 917, 923 (D. Del. 1975) (holding that a plaintiff who provided business ideas “had a right to sue [for unjust enrichment] as soon as defendants began using his idea for their benefit.”), *cited in* *News World Communications, Inc. v. Thompsen*, 878 A.2d 1218, 1224 (D.C. 2005).

<sup>103</sup> *Leigh v. Dickeson*, [1884] 15 Q.B.D. 60 (App. Cas.), *quoted in* PETER BIRKS, *UNJUST ENRICHMENT* 51 (2003).

it.”<sup>104</sup>

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. C. M. Kemp Manufacturing Co.*,<sup>105</sup> the defendant chose to receive the plaintiff’s idea for an improvement on its device, thinking it was of a certain kind. At trial, the defendant claimed that the idea presented by the plaintiff was for a fire check device that the defendant had already been developing. 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 she 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

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<sup>104</sup> Thomas Jefferson, *quoted in* Havigurst, *supra* note 10, at 300 n.13.

<sup>105</sup> 80 F.2d 912 (4th Cir. 1936).

reasons—may not exist after the receipt of the idea in the decision to use or disclose. 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*

The law of contracts and the law of confidential relationships, the other two theories into which idea submission cases are commonly fit, remain possible sources of a duty not to use or disclose an idea without permission. They cannot, however, account for all idea-submission cases.

#### 1. Contract-based Account

On a contract-based theory of liability, courts look for existence of a promise, either express or implied from the parties' conduct. In idea-submission law, contracts to pay for the use of ideas are implied in limited circumstances: the originator of the idea “must have ‘clearly conditioned his offer to convey the idea upon an obligation to pay for it if it is used’” by the recipient, and “the idea recipient must ‘know the condition . . . ’ and must ‘voluntarily accept its disclosure . . . ’”<sup>106</sup>

Courts have refused to imply a contract to pay for the use of an idea shared for a purpose other than for sale—to entice the recipient to enter into a business relationship,<sup>107</sup> or to acquire a trademark, for example.<sup>108</sup>

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<sup>106</sup> Sobel, *supra* note 6, at 38, quoting *Desny v. Wilder*, 299 P.2d 257, 270 (Cal. 1956).

<sup>107</sup> *Faris v. Enberg*, 158 Cal. Rptr. 704, 705-06 (Cal. Ct. App. 1979) (finding no implied-in-fact contract where plaintiff submitted an idea for a television show to convince defendant to join him as masters of ceremony and defendant then made a similar show without plaintiff).

Expectation of being paid for the idea itself is critical to the implied contract theory of liability.<sup>109</sup>

Contract law can account for the legal protection of ideas where the parties have expressly agreed to condition disclosure on payment or where the conduct of the parties permits the inference of a promise to pay for an idea that is disclosed and used. However, 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.”<sup>110</sup> The problem with collapsing idea-submission law into contract is that, simply put, it would stretch credulity to find a contract in all cases.<sup>111</sup>

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<sup>108</sup> *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 489 (9th Cir. 1984) (finding that initial disclosure of idea for a book of Scrabble strategies was to get defendant’s approval to use the Scrabble trademark on it and not 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. Tex. 2000) (holding that there was no intent to sell a marketing idea communicated as part of an effort to obtain a joint venture and therefore no implied contract).

<sup>109</sup> See *Keane v. Fox Television Stations, Inc.*, 129 F. App’x 874, 876 (5th Cir. 2005) (“[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 (2d Cir. 1984) (stating that the 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).

<sup>110</sup> See *Fink v. Goodson-Todman Enterprises, Ltd.*, 88 Cal. Rptr. 679, 690 (Cal. Ct. App. 1970) (referring to cases resolved under breach of confidence and unjust enrichment theories).

<sup>111</sup> 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 6, at 23 (noting that courts have not taken any of these consideration, statute of frauds and preemption 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 v. Nat’l Broad. Co.*, 844 F.2d 988, 994 (2d Cir. 1988). The *Apfel* court, however, has changed the law in New York, indicating that novelty is evidence of valid consideration but not a necessary element of a claim. See *Apfel v. Prudential-Bache Sec. Inc.*, 616 N.E.2d 1095, 1097-98 (N.Y. 1993); see also *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368, 379-80 (2d Cir. 2000) (abrogating *Murray*). A struggle on this issue persisted for quite some time in the case law of various jurisdictions. See, e.g., *Smoley v. New Jersey Zinc Co.*, 106 F.2d 314, 315 (3d Cir. 1939) (showing that 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 *supra* note 30 (finding by California courts that the act of disclosure is consideration

## 2. Confidential Relationship Account

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.<sup>112</sup> 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.<sup>113</sup>

In an effort to close the gap between the law of confidential relationships and idea-submission law, courts have resorted to an expansive definition of a confidential 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.”<sup>114</sup> The court went on

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enough). It is also quickly becoming a settled question that contracts to pay for idea-disclosure are not preempted by federal law. *See Barrett, supra* note 6, at 724; *see also ProCD v. Zeidenberg*, 86 F.3d 1447, 1454-55 (7th Cir. 1996).

<sup>112</sup> A confidential relationship exists:

when 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 on payment for their use. *See also Sobel, supra* note 6, at 53.

<sup>113</sup> *See Sobel, supra* note 6, at 24 (explaining that “true confidential relationships” are quite rare).

<sup>114</sup> *Faris*, 158 Cal. Rptr. at 712 (emphasis added).

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.<sup>115</sup> In short, to shelter idea-submission law within the law of confidential relationships without sacrificing the traditional scope of protection, courts must assert the existence of a confidential relationship where there is not one in fact.<sup>116</sup>

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:

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<sup>115</sup> *Id.*

<sup>116</sup> For example, in *Hoeltke*, the court found 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. *Hoeltke v. C.M. Kemp. Mfg. Co.*, 80 F.2d 912, 923 (4th Cir. 1936). In *Faris*, 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 . . . .  
*Faris*, 158 Cal. Rptr. at 712. That said, there are situations in which the relationship between the plaintiff and defendant is indeed a fiduciary one. See, e.g., *Johnson v. Schmitz*, 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.<sup>117</sup>

“[N]ew applications of traditional legal theories”<sup>118</sup> 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, fits with the core criteria of the positive law, and is also consistent 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 interests and values that motivate this area of law.

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<sup>117</sup> Warren & Brandeis, *supra* note 80, at 210.

### 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 the publicity which shall be given them."<sup>119</sup>

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 large and indefinite class of people).<sup>120</sup>

### 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

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<sup>118</sup> Nimmer, *supra* note 22, at 119.

<sup>119</sup> Warren & Brandeis, *supra* note 80, at 198. I will argue that a similar power is at work here, in the context of novel and original ideas.

<sup>120</sup> For a definition of *in personam* rights, or what Hohfeld calls "paucital rights," see

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 the interests and values that frame 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 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.<sup>121</sup>

The exercise of a legal power entails decision—in other words, an

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HOHFELD, *supra* note 15, at 72.

<sup>121</sup> PENNER, *supra* note 12, 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’Y 79, 80 (1972). An early, influential but arguably incomplete definition of legal powers was famously offered by W. N. HOHFELD, *supra* note 15, at 51 (defining a power-holder as 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, 725 (1919) (stating that a Hohfeldian power “has the legal ability by doing certain acts to alter legal relations”).

intention to bring about the legal change.<sup>122</sup> 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.<sup>123</sup> 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.<sup>124</sup>

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.<sup>125</sup> This view, however, construes the meaning of decision in the context of law too narrowly.

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<sup>122</sup> This is the position taken by Andrew Halpin. See Andrew Halpin, *The Concept of a Legal Power*, 16 O.J.L.S. 129, 140 (1996). I will argue, *infra*, that this position, properly construed, is not contrary to the position taken by Joseph Raz in PRACTICAL REASON AND NORMS 104 (Hutchinson & Co, 1975) (explaining that the definition of powers is not concerned with intentions but with reasons for enabling the power-holder). See *infra* note 126 and accompanying text.

<sup>123</sup> Halpin, *supra* note 122, at 140 n. 51 (making the point that a power to marry reverts itself on death of spouse).

<sup>124</sup> 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.

<sup>125</sup> This is Halpin's view. See Halpin, *supra* note 122, 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.* at 146 ("[U]pon the analysis [of the exercise of powers in terms of decisions], we would have to deny that [an objective contract] was an exercise of power . . .").

Intention to bring about a normative change *is* a salient aspect of decision. But intention may be inferred (objectively) from conduct or circumstances. 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.<sup>126</sup> However, the "exceptions" to this general observation (he refers to implied-in-fact contracts) led him to conclude that the definition of powers does not turn on intentions.<sup>127</sup> Raz was primarily concerned with including the formation of objective contracts 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 the expression 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

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<sup>126</sup> 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.

<sup>127</sup> See RAZ, *supra* note 122, at 104.

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).<sup>128</sup> 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.<sup>129</sup> In these cases, it is quite clear that the source of the duty to return the thing or make restitution of the value of 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.<sup>130</sup> 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

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<sup>128</sup> 36A C.J.S. § 3 (describing rights and duties of finder vis à vis owner).

<sup>129</sup> Ewan McKendrick, *Restitution, Misdirected Funds and Change of Position*, 55 MOD. L. REV. 377 (1992) (discussing Peter Birks' suggestion that ignorance is an unjust factor).

<sup>130</sup> See Sobel, *supra* note 6, at 25 (noting that courts do not protect ideas "[w]here 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 (E.D.N.Y. 1982) (rejecting common law protection of ideas because plaintiffs "never directly

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.<sup>131</sup> 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.<sup>132</sup> In some circumstances, other rules of law from trade secret law, contract law, the law of confidential relationships<sup>133</sup> and tort law—specifically duties of non-interference with the contractual or fiduciary relations of others<sup>134</sup>—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

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offered their script to any of the defendants”).

<sup>131</sup> 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 another provided the service of disclosing the idea. 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 to 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 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 their behalf. *See Davies v. Krasna*, 54 Cal. Rptr. 37, 45-46 (Cal. Ct. App. 1966).

<sup>132</sup> *See Vantage Point, Inc. v. Parker Bros., Inc.*, 529 F. Supp. 1204, 1214 (E.D.N.Y. 1981) (finding no duty not to use or disclose the idea where there is no notice of misconduct in a case where a former employee submits plaintiff's game idea to a new employer, who is not aware of the employee's misconduct).

<sup>133</sup> *Thompson v. California Brewing Co.*, 310 P.2d 436 (Cal. Ct. App. 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 may be interpreted narrowly to the acquisition of information through legal misconduct, such as through a tort of inducing breach of contract or otherwise interfering with fiduciary relations. *Id.* at 440; *see, e.g., Joyce v. General Motors Corp.*, 551 N.E.2d 172, 175-79 (Ohio 1990) (Holmes, J., dissenting) (noting that an employee may be protected against use of an idea on a theory of interference with contractual relations).

<sup>134</sup> *See Sobel, supra* note 6, at 25 (suggesting that 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 liable for having done so if he knew of that confidential relationship and that it was breached by the disclosure of the idea to him.”).

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 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."<sup>135</sup> 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.<sup>136</sup> 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 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 our more general interest in maximum freedom.<sup>137</sup> Our freedom is maximized in this context where the law does not simply secure an

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<sup>135</sup> Joseph Raz, *Legal Rights*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 251-52 (1994).

<sup>136</sup> PENNER, *supra* note 12, at 17.

<sup>137</sup> Understood broadly to mean, a "freedom from coercion even in the performance of acts carried out where the world can see." Eduardo Peñalver, *Property as Entrance*, 91 VA. L. REV. (forthcoming Dec. 2005) (manuscript at 10), available at <http://ssrn.com/abstract=705282>. For a similar discussion in the context of trade secrets, see Lynn Sharp Paine *supra* note 79.

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.<sup>138</sup> 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.<sup>139</sup>

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 have,<sup>140</sup> rather than special powers that attach to some by virtue of their position.<sup>141</sup> 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 by virtue of being legal subjects.

Second, these general, stand-alone powers all serve our

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<sup>138</sup> See Paine, *supra* note 79, at 247-63. 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.

<sup>139</sup> 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 screenwriters in Hollywood, who found it "necessary to submit ideas to . . . producers, and not develop them into complete works until and unless they [were] approved." *Rokos v. Peck*, 227 Cal. Rptr. 480, 485-86 (Cal. Ct. App. 1986), *quoted in* Sobel, *supra* note 6, at 19.

<sup>140</sup> For instance, every mature person has a power to contract and to acquire property. PENNER, *supra* note 12, at 51.

<sup>141</sup> Special powers by contrast are powers that are vested in particular persons only by 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, and the power to appoint a remainderman is conferred on a particular individual by a will. Rather than general powers that exist independently of a contract, will or legislation and which are recognized at common law, special powers 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

fundamental interest in being able to interact with others without foregoing our own control. For example, the power to acquire property is conferred in recognition of our interest not just in acquiring a sphere of exclusivity but also in acquiring the means to engage the world.<sup>142</sup> 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 degree.

A powers-based account, in contrast to an account derived from

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associated with property rights).

<sup>142</sup> See, e.g., Peñalver, *supra* note 137 (suggesting that property's function in enabling entrance is too often overlooked in the liberal fixation on property as exit). See also PENNER, *supra* note 12, 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

the law of confidential relationships or the law of unjust enrichment, brings to light the normative core of idea-submission law. Other conventional accounts would commit us to understanding the idea-submission 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.<sup>143</sup> 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 normative framework of idea-submission law very differently, by reference to why it is desirable to restrict the recipient.<sup>144</sup>

#### 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.<sup>145</sup> 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 blurring 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

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allowing some to enter.”).

<sup>143</sup> See *supra* notes 135-139 and accompanying text.

<sup>144</sup> Indeed, some have already been led to see idea-submission law in these terms. This has already happened. See Barrett, *supra* note 6, at 741 (asserting that both trade secret law and idea-submission law concern the inequities in the defendant's behavior.); see also Thompson v. California Brewing Co., 310 P.2d 436, 439 (Cal. Ct. App. 1957) (idea-submission law is a good deal like some aspects of the law relating to trade secrets).

<sup>145</sup> “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 it in confidence and will not so hold it if it is disclosed,” then B does not come under a duty not to use or disclose. *Id.* at 440.

specifically with the defendant's use in mind although not at the invitation of the defendant.<sup>146</sup>

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?<sup>147</sup> A good theory of obligation is consistent with the limited bases on which the common law selects any particular individual to bear a duty that serves another's interest.<sup>148</sup>

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<sup>146</sup> See, e.g., *Hoeltke v. C.M. Kemp. Mfg. Co.*, 80 F.2d 912, 914 (4th Cir. 1936), 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.

<sup>147</sup> 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). HOHFELD, *supra* note 15.

<sup>148</sup> 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

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.<sup>149</sup>

Anglo-American law, however, evinces an even tighter restraint in imposing legal obligations. 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.<sup>150</sup> 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.<sup>151</sup> On what basis then does Anglo-American law take itself to be justified in imposing legal duties?

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with the basis on which Anglo-American law selects an appropriate duty-owner as a hallmark of a good theory of obligation.

<sup>149</sup> John Gardner, *Backwards and Forwards with Tort Law*, in *LAW AND SOCIAL JUSTICE* (Michael O'Rourke & Joseph Keim-Campbell eds., forthcoming 2005).

<sup>150</sup> Not all systems of law exercise such restraint. See for instance REBECCA WEST, *BLACK LAMB AND GREY FALCON: A JOURNEY THROUGH YUGOSLAVIA VOL. I* (1941):

In the third and fourth centuries, Christian congregations were constantly insisting on electing people as bishops who were unwilling to accept the office . . . [s]ometimes these men were so reluctant that the congregations were obliged to kidnap them and ordain them forcibly. But once they were installed as bishops, they often performed their duties admirably.

*Id.* at 46.

<sup>151</sup> BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 7 (1985) ("[I]t has been in every society a recognizable ethical thought, and remains so in ours, that one can be under a requirement of this kind simply because of who one is and of one's social situation.").

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-ower such that it is appropriate that the latter should have that duty.”<sup>152</sup> 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).<sup>153</sup> 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.<sup>154</sup> 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. <sup>155</sup>

As Penner points out, the assumption that a nexus between a rights-holder and duty-ower exists “is more difficult to make in the case . . . where the class of duty-owers is . . . restricted” rather than comprised of everyone generally.<sup>156</sup> 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

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<sup>152</sup> J. E. Penner, *The Analysis of Rights*, 10 *RATIO JURIS* 300, 306 (1997).

<sup>153</sup> This is contrary to Raz’s position. See Raz, *supra* note 135:

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.

*Id.* at 243.

<sup>154</sup> See generally Penner, *supra* note 152.

<sup>155</sup> *Id.* at 310. Note that Penner was comparing special private law duties with general legislative duties.

<sup>156</sup> *Id.*

the appropriate duty-ower.

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-ower's will or agency. Thus, absent binding everyone on the basis of reciprocity,<sup>157</sup> the idea of responsibility in our legal system rests on a minimum foundation of voluntariness. Special duties are imposed on 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).<sup>158</sup>

Finally, there is a third basis on which Anglo-American law will assume a sufficient nexus: where the duty-ower voluntarily accepted a 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.

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<sup>157</sup> For example, imposing reciprocal duties on everyone not to interfere with the property and bodily integrity of others.

<sup>158</sup> ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 97 (1995); Peter Benson, *The Basis for Excluding Liability for Economic Loss in Tort Law*, in DAVID G. OWENS, *THE PHILOSOPHICAL*

## 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-owner and rights-holder absent some voluntariness even in the most apparently innocuous of situations.<sup>159</sup> Consider, for example the *inter vivos* gift. Even the recipient of a gift is not vested with rights without having voluntarily accepted the gift<sup>160</sup> because ownership entails certain duties. In the case of land, an owner faces tax liability, liability for environmental damage on the property,<sup>161</sup> and heightened duties of care to members of the public.<sup>162</sup> 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

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FOUNDATIONS OF TORT LAW 447 (1995).

<sup>159</sup> 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). 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 PENNER, *supra* note 12, 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.

<sup>160</sup> See 38A C.J.S. *Gifts* § 11 (2005) (essentials of a gift are donative intent, delivery and acceptance).

<sup>161</sup> 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 § 107, 42 U.S.C. §§ 9607 (2005). Private owners are also drafted to meet the purposes of the Federal government in the Endangered Species Act. They are required not to 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 § 9, 16 U.S.C. § 1538 (2005).

<sup>162</sup> See 65A C.J.S. *Negligence* §§ 402-03 (discussing common law rules governing occupier's liability to invitees, licensees and trespassers); *Id.* § 568 (2005) (discussing liability of owner to neighboring landowners).

executor of an estate.<sup>163</sup>

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.<sup>164</sup>

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.

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*.<sup>165</sup> There are a few cases in American law that appear to agree with him and which find that necessity gives rise to a duty to

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<sup>163</sup> See 14 C.J.S. *Adjoining Landowners* § 18 (2005) (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, *THE LAW OF TRUSTS* 22 (3d ed. 2002) on fiduciary relationships. 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 *id.* at 22-23 (discussing inappropriate extensions to the concept of fiduciary).

<sup>164</sup> 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. Cappier*, 72 P. 281 (Kan. 1903) (holding a 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 Co. Ltd.*, [1970] A.C. 1004, 1026-28 (H.L.) (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). 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 158, at 97. 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).

<sup>165</sup> HONORÉ, *supra* note 164, at 142. One example that Honoré gives is from the early Roman Republic: a son automatically inherited his father's land, along and therefore the burdens and obligations that ran with the land, whether he wanted to or not.

offer another benefits.<sup>166</sup> 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).<sup>167</sup>

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-owner without any regard to the duty-owner's agency.<sup>168</sup> As I have argued, it would represent a departure from the principles of obligation in Anglo-

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<sup>166</sup> *Depue v. Flatau*, 111 N.W. 1 (Minn. 1907); *Ploof v. Putnam*, 71 A. 188 (Vt. 1908).

<sup>167</sup> See *Depue*, 111 N.W. at 1 (plaintiff was already in the defendant's house, which required defendant to push him out in order to avoid rescuing); *Ploof*, 71 A. at 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 Transp.*, 124 N.W. 221 (Minn. 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).

<sup>168</sup> 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*

American law to 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 whom it is appropriate to burden 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

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*Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 197 (1973).

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.<sup>169</sup> 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, 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.<sup>170</sup> 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.<sup>171</sup> 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 it to any one," and asks, "whether he could interest defendant in this safety device."<sup>172</sup>

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<sup>169</sup> 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. Serv., Inc. v. Eastern Air Lines, Inc.*, 333 F.2d 672, 674 (5th Cir. 1964) ("The problem here is whether one person, by his gratuitous and unilateral act, may impose upon another a confidential relationship. That he may not is clear."). *See also* *Thompson v. California Brewing Co.*, 310 P.2d 436, 440 (Cal. Ct. App. 1957). 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.

<sup>170</sup> *See, e.g., Thurman v. Whitfield*, 751 F.2d 90, 93 (2d Cir. 1984). 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 there is an implied promise to pay for a script's use, where a defendant, having been given notice that a script is forthcoming opens and reads it.

<sup>171</sup> *Flemming v. Ronson Corp.*, 258 A.2d 153, 154 (N.J. Super. Ct. Law Div. 1969) (court ultimately rejected claim because idea was not novel).

<sup>172</sup> *Hoeltke v. C.M. Kemp. Mfg. Co.*, 80 F.2d 915 (4th Cir. 1936).

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.<sup>173</sup> 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.<sup>174</sup>

A careless 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 on 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 submissions through a department separate from the defendant's own research and development team.<sup>175</sup>

My insistence, in the powers-based approach, on the defendant's opportunity to refuse to assume the position of recipient of an idea

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<sup>173</sup> *Duffy v. Charles Schwab & Co., Inc.* 123 F. Supp. 2d 802, 805 (D.N.J. 2000)

<sup>174</sup> These were the facts in *Davies v. Krasna*, 535 P.2d 1161 (Cal. 1975).

<sup>175</sup> *See, e.g., Vantage Point, Inc. v. Parker Bros., Inc.*, 529 F. Supp. 1204, 1204 (E.D.N.Y. 1981) (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).

brings to mind our discussion of unjust enrichment and the difficulty in finding an adequate opportunity to reject the benefit in the context of ideas. Recall that the concern 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).<sup>176</sup> 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 voluntarily 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 assessing the potential value of an

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<sup>176</sup> See *supra* notes 90 *et seq.* and accompanying text.

idea protected by idea-submission law is important to the recipient as a practical matter. Rather, I emphasize that, on a powers-based approach, the salient legal 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 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.<sup>177</sup> 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.

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<sup>177</sup> Volitional control over the facts that constitute the action is 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. See [supra note 121](#).

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. Viewed this way, 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.<sup>178</sup> Thus, the opportunity to exercise a power to acquire property requires there to be 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 to 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

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<sup>178</sup> 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 122, 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

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.<sup>179</sup>

## 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.

### A. *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.<sup>180</sup> Idea-submission law, in conferring a limited power to control disclosure of novel ideas, ensures that an originator of an idea is not forced to choose between the natural control over an idea that she has simply by virtue of being the only person to know of it and her interest in engaging in a limited way with others with respect to her idea.<sup>181</sup> 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

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fact may be vested with a power that one never has an opportunity to exercise.

<sup>179</sup> *Desny v. Wilder*, 299 P.2d 257 (Cal. 1956) (in the context of a contract theory, the court noted that the recipient must have consented by words or deeds to the disclosure).

<sup>180</sup> See *supra* notes 46-49, and accompanying text (definition of novelty).

<sup>181</sup> Interests are related to our appreciation of values. Otherwise put, values are translated into interests and are localized to individuals. See PENNER, *supra* note 12, at 10 (explaining Raz's account of the elements of a normative system).

might otherwise have by keeping ideas to ourselves.<sup>182</sup> Where the person does not start out with any natural control over the idea,<sup>183</sup> because the idea is *not novel* and thus is not known only to her, there is no similar dilemma that is resolved by enabling her to bind another to non-use or disclosure. 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 normative framework of idea-submission law that it does not protect non-novel ideas.

### B. *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.<sup>184</sup> 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

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<sup>182</sup> See *supra* note 139 and accompanying text.

<sup>183</sup> That is, control that exists without the law's help.

<sup>184</sup> It might be argued that there is no 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 article does not provide a full account of the normative 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).

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.<sup>185</sup> This is because the reasons motivating the law’s response do not have to do with the value of enabling the recipient to cut short the originator’s power but rather with the desirability of limiting the originator’s power to control disclosure of ideas that are not publicly available.<sup>186</sup>

### C. *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,”<sup>187</sup> we maintain the divide between the originator’s ideas and the recipient’s own ideas. 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.

### D. *Confidentiality*

Confidentiality serves two purposes in 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

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<sup>185</sup> NIMMER ON COPYRIGHT, *supra* note 6 § 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.

<sup>186</sup> 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.

confidential nature of the idea in effect characterizes the kind of disclosure the originator has 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.

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.<sup>188</sup> 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.”<sup>189</sup>

#### 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 source of 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

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<sup>187</sup> See *supra* note 61 and accompanying text.

<sup>188</sup> The gist of this requirement is expressed in *Faris v. Enberg*, 158 Cal. Rptr. 704, 706 (Cal. Ct. App. 1979). 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 713.

<sup>189</sup> Cook, *supra* note 121, at 8 (a liability is the correlative of a power and the opposite of an immunity).

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 article 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 justify this branch of the law. More generally, this article 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.