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Private Law Theory and Corrective Justice in Trade Secrecy

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INTRODUCTION

Trade secrecy suffers in a state of neglect. In practice, trade secrecy is central to intellectual property (“IP”). In IP scholarship, however, trade secrecy remains the “Cinderella” of IP doctrines, “the forgotten step-daughter who toils in the shadow of her more privileged siblings: patent, copyright, and trademark law.”¹

Although trade secrecy is neglected for several reasons, one is that the field suffers from an identity crisis. Judges and scholars intuit that trade secrecy would make more sense if it were “founded” in some separate field of law, such as tort, property, or contract. In current case law and scholarship, however, these and other foundations seem unsatisfactory. The dissatisfaction leads a few scholars to conclude that “there is no such thing as a normatively autonomous body of trade secret law.”² It leads many more to deplore that trade secrecy is a “chameleon”³ or a “real toad[] in a conceptual garden.”⁴

These intuitions and complaints are extremely suggestive. They appeal in an inchoate way to philosophical private law theory. In this Article, I use “private

* Professor of Law, George Mason University. This paper has benefited from comments received at the 2010 Intellectual Property Scholars’ Conference at Boalt Hall School of Law, a session of the Levy Workshop on Liberty and Law at George Mason University, and at the 2010 Conference on Property, Tort, and the Private Law at the University of Southern California. I thank George Mason University’s Law and Economics Center for a research grant. I thank Shyam Balganes, Greg Keating, Nelson Lund, Adam Mossoff, Amir Nezar, Michael Risch, and Pamela Samuelson for particularly penetrating comments. I thank Blake Bitter also for extremely helpful research and editing assistance.

¹ Sharon K. Sandeen, *The Cinderella of Intellectual Property Law: Trade Secrets*, in 2 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 399, 399 (Peter K. Yu ed. 2007).

² Robert G. Bone, *A New Look at Trade Secret Law: A Doctrine in Search of Justification*, 86 CAL. L. REV. 241, 245 (1998).

³ Vincent Chiappetta, *Myth, Chameleon, or Intellectual Property Olympian? A Normative Framework Supporting Trade Secret Law*, 8 GEO. MASON L. REV. 69 (1999).

⁴ Todd M. Sloan, *Trade Secrets: Real Toads in a Conceptual Garden*, 1 W. ST. U. L. REV. 113 (1972-73) (upper-case lettering removed).

law theory” to refer to the branch of conceptual philosophy identifying the basic social and normative concepts on which the private law relies. “Private law theory” so defined also explains the ways in which different fields of private law interact to accomplish the private law’s general functions. Some trade secrecy scholarship has gestured toward different fields of private law theory. For example, a few works have suggested that trade secrecy may be explained helpfully in relation to corrective justice, the principle according to which the private law must rectify wrongs to individuals’ rights.⁵

Yet while private law and corrective justice theories have important lessons to teach IP scholarship, they will do so only if they are presented modestly and carefully. Many IP scholars are (with William Landes and Richard Posner) “skeptical that . . . noneconomic theories of intellectual property have much explanatory power or normative significance.”⁶ Such scholars strongly prefer utilitarian normative foundations.⁷ If private law scholars apply conceptual philosophy to trade secrecy while underspecifying or overclaiming, they will confirm these IP scholars’ worst suspicions. Separately, while IP scholarship has drawn on corrective justice theory,⁸ some of that scholarship has received less than fully-enthusiastic endorsements for its use of conceptual philosophy.⁹ So if IP scholars use philosophical terms or tools casually, they will confirm conceptualists’ worst suspicions.

It would be unfortunate if such misunderstandings led IP scholars and conceptualists to keep walking past one another on opposite sides of the scholarly street. To diminish that likelihood, this Article aims to introduce trade secrecy scholars to an explicitly positive rendition of conceptual private law theory. This Article uses that rendition to conduct a positive study of trade secrecy. The Article asks two questions: Does trade secrecy have a normatively autonomous guiding principle? If so, in what field of private law does that principle sound?

In short, the answers are “Yes, and probably property.” In longer form, the answers state three firm theses and one more tentative one.

The first thesis is affirmative. Conceptually, trade secrecy is guided by a normatively autonomous principle: The law of trade secrecy presumes as true,

⁵ See, e.g., James W. Hill, *Trade Secrets, Unjust Enrichment, and the Classification of Obligations*, 4 VA. J.L. & TECH. 2 ¶¶ 111-23 (1999).

⁶ WILLIAM LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 5 (2003).

⁷ See, e.g., Dan Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1597 (2003) (“To a greater extent than any other area of intellectual property, courts and commentators widely agree that the basic purpose of patent law is utilitarian.”).

⁸ See, e.g., Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149 (1992).

⁹ See, e.g., Jules L. Coleman, *Intellectual Property and Corrective Justice*, 78 VA. L. REV. 283 (1992) (reviewing Gordon, *supra* note 8).

declares, and implements a normative interest in determining exclusively the research, development, and commercial use of a secret and competition-enhancing intellectual work. No matter in what field of law this interest sounds, it integrates trade secrecy doctrine across many fields of private law.

Another thesis is negative: This interest does *not* sound in contract, equity, unjust enrichment, or tort. Conceptually, these fields all assume that a political community has already embraced and instituted principles of justice specifying what normative interests community members deserve to have and from which kinds of conduct other members must abstain to respect those interests. Contract, equity, unjust enrichment, and the corrective parts of tort institute legal rights and duties embodying those prescriptions. Those rights and duties teach and require parties to conform their behavior to controlling principles of justice. In doing so, however, contract, unjust enrichment, equity, and the corrective aspects of tort are all reactive. Doctrines in these fields conform to normative principles supplied from outside their respective domains.

That insight leaves three candidates still standing: normative interests in unfair competition, confidential relations, and property. My third thesis is also negative: Trade secrecy's foundations do not sound in unfair competition or confidential relations, either. Although interests in these fields have the right conceptual structure, neither interest explains enough of trade secrecy's doctrines to say trade secrecy sounds in it.

My last thesis is more tentative: Trade secrecy sounds in property—if and to the extent that one agrees that “property” consists conceptually as a right securing a normative interest in determining exclusively the use of an external asset. The field of property supplies normatively-autonomous principles just as confidential relations and unfair competition do. Property principles seem to explain important variations in trade secrecy's tort, contract, and remedy doctrines—and also corresponding variations in the parts of trade secrecy that implicate unfair competition and confidentiality principles. Nevertheless, the definition of “property” I provide above seems heterodox to many property and IP scholars. So my last thesis is contingent on acceptance of that definition. If the definition is rejected, trade secrecy sounds in a normative category not adequately accounted for by existing private law categories.

These insights advance contemporary scholarship on two separate fronts. In IP scholarship, this Article answers in positive, conceptual terms important doctrinal and conceptual questions that have troubled trade secrecy law and scholarship for at least forty years. In private law-theoretic scholarship, this Article suggests generally how to extend corrective justice and other private law principles to IP. Scholars who specialize in tort and in private law theory have noticed that IP infringement or misappropriation suits have many of the hallmarks

of “property tort litigation.”¹⁰ These scholars are right—but there are important pitfalls in extending private law theory to IP. This Article is meant to illustrate the potential and flag the pitfalls for other scholars interested in patent, copyright, trade mark, or other fields involving unfair competition or the misappropriation of intellectual works.

I. AN OVERVIEW OF TRADE SECRECY DOCTRINE

Let us begin by recounting the most basic features of trade secrecy. A trade secret confers on a claimant a narrow legal interest in determining the use of a secret likely to generate competitive advantage. Historically, trade secrecy emerged out of the field of unfair competition law; doctrinally, it is now covered in the *Restatement (Third) of Unfair Competition*.¹¹ Common trade secrets include recipes, customer lists, designs for industrial parts, manufacturing processes, and data-processing computer programs.

Standard accounts of trade secrecy are organized around the *prima facie* cause of action for the tort of misappropriation. In that case, a claimant must first demonstrate that he has a legally cognizable secrecy interest. To make this showing, the claimant must show that he has information that is secret, minimally novel (in a colloquial sense, to be qualified below), and valuable, and that he is taking reasonable steps to keep the information secret. In this definition, “valuable” refers to a tendency to enhance the claimant’s advantage at selling some good or service separate from the work.¹² A secret generates competitive value in this sense if it makes a product easier or cheaper to make,¹³ if it makes the product more attractive to customers,¹⁴ or if it helps the producer target likely customers.¹⁵ The work must be “secret” in a literal sense; the claimant must keep his iteration of the work secret to individuals not bound to the claimant to keep it

¹⁰ JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 251 (2010).

¹¹ See, e.g., *Abbott Labs. v. Norse Chem. Corp.*, 147 N.W.2d 529, 533-34 (Wis. 1967); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. a, at 425-26 (1995); RESTATEMENT (FIRST) OF TORTS § 757 cmt. a, at 2-5 (1939).

¹² RESTATEMENT (FIRST) OF TORTS § 757 cmt. b, at 5 (1939); UNIF. TRADE SECRETS ACT § 1(4). The distinction between the secret and the product excludes from trade secrecy idea submissions, self-disclosing ideas, and hot news. See *Lehman v. Dow Jones & Co.*, 783 F.2d 285 (2d Cir. 1986) (idea submissions); *Bristol v. Equitable Life Assurance Co.*, 30 N.E. 506 (N.Y. 1892) (self-disclosing ideas); *Int’l News Serv. v. Associated Press*, 248 U.S. 215 (1918) (hot news). The restriction on self-disclosing ideas, however, is often honored in the breach rather than in the observance. See, e.g., *Franke v. Wiltschek*, 209 F.2d 493, 495 (2d Cir. 1953).

¹³ See, e.g., *Phillips v. Frey*, 20 F.3d 623, 628 (5th Cir. 1994)

¹⁴ E.g., *Metallurgical Indus. Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1201 (5th Cir. 1986).

¹⁵ E.g., *B. C. Ziegler & Co. v. Ehren*, 414 N.W.2d 48, 52 (Wis. Ct. App. 1987).

in confidence for the claimant.¹⁶ Because a trade secret consists of an intellectual “work,” the claimant must also show that the work is minimally novel. To avoid confusion with patent’s novelty requirement (and with apologies for the cumbersome jargon), I refer to this requirement here as the “non-ascertainability” requirement: The work must be “not . . . readily ascertainable by proper means by . . . other persons who can obtain economic value from its disclosure or use.”¹⁷ In jurisdictions that follow the Uniform Trade Secrets Act, these elements suffice. Jurisdictions that follow common law, however, require the claimant to show one last element, that the work is “continuous use in the operation of the [claimant’s] business.”¹⁸

If a claimant has a cognizable interest in the secret, the interest entitles him to prevent others from making wrongful uses of the work. In practice, misappropriation doctrine anticipates and prevents three common kinds of wrongful activity—espionage by competitors, breaches of licensing agreements by licensees, and breaches of nondisclosure agreements by employees.¹⁹ Theoretically, however, it is difficult to explain exactly how trade secrecy misappropriation law specifies that *these* activities are “wrongful” without sweeping other competitive activities that are implicitly “legitimate.” Patent law makes actionable any use of an intellectual work under patent²⁰ but trade secrecy does not. If a competitor discovers that information by its own independent research, the competitor enjoys an absolute privilege to deploy the fruits of its research for its own advantage.²¹ A competitor is also entitled to reverse-engineer the secret from products the claimant sells publicly.²² In trade secrecy, “[i]t is the employment of improper means to procure the trade secret, rather than the mere copying or use, which is the basis of . . . liability.”²³

¹⁶ *E.g.*, UNIF. TRADE SECRETS ACT § 1(4)(i) (making an element of trade secrecy information’s “not being generally known to . . . other persons who can obtain economic value from its disclosure or use”); RESTATEMENT (FIRST) OF TORTS § 757 cmt. b, at 6 (1939) (making trade secrecy depend on “the extent to which the information is known outside of [the claimant’s] business”).

¹⁷ UNIF. TRADE SECRETS ACT § 1(4)(i). *See also* *Buffets, Inc. v. Klinke*, 73 F.3d 965, 968 (9th Cir. 1996); *Forest Labs., Inc. v. Pillsbury Co.*, 452 F.2d 621, 624 (7th Cir. 1971).

¹⁸ RESTATEMENT OF TORTS § 757 cmt. b, at 5 (1939). *See also* Eric R. Claeys, *Use at Common Law and in the Uniform Trade Secrets Act*, 33 *HAMLIN L. REV.* (No. 3, forthcoming 2010), available at http://www.law.gmu.edu/assets/files/publications/working_papers/1034UseatCommonLaw.pdf.

¹⁹ *See* Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 *STAN. L. REV.* 311, 318 (2008).

²⁰ *See* 35 U.S.C. § 271(a) (2010).

²¹ *See* UNIF. TRADE SECRETS ACT § 1; RESTATEMENT (FIRST) OF TORTS § 757 cmt. a, at 4 (1939).

²² RESTATEMENT (FIRST) OF TORTS § 757 cmt. a, at 4 (1939); *accord* UNIF. TRADE SECRETS ACT § 1.

²³ RESTATEMENT (FIRST) OF TORTS § 757 cmt. a, at 4 (1939).

To specify “improper means,” trade secrecy enumerates four different general breaches of standards of fair competition.²⁴ Doctrinally, a defendant misappropriates a trade secret if he uses or discloses it unconsentedly (1) in violation of a duty of confidence,²⁵ (2) after acquiring it with reason to know that it was publicly available only by accident,²⁶ or (3) by other unenumerated improper means.²⁷ A defendant also misappropriates (4) if he unconsentedly uses or discloses a secret with reason to know that the secret was previously misappropriated under one of those three primary theories.²⁸ For ongoing misappropriation, a secret claimant is entitled to injunctive relief;²⁹ for completed misappropriation, he is entitled to compensatory damages, restitutionary damages,³⁰ or the reasonable license value for use of his secret, depending on which is most appropriate on the facts of the case.³¹

The rights and duties specified in misappropriation law provide a platform for contracting with trade secrets.³² Trade secrets are assignable.³³ Trade secrets provide consideration in license agreements.³⁴ Employers routinely include trade secret nondisclosure provisions in employment contracts.³⁵

²⁴ See RESTATEMENT (FIRST) OF TORTS § 757, at 1-2 (1939).

²⁵ UNIF. TRADE SECRETS ACT § 1(2)(ii)(B)(II); RESTATEMENT (FIRST) OF TORTS § 757(b), at 2 (1939).

²⁶ UNIF. TRADE SECRETS ACT § 1(2)(C); RESTATEMENT (FIRST) OF TORTS § 757(d), at 2 (1939).

²⁷ UNIF. TRADE SECRETS ACT § 1(2)(i), (ii)(A); RESTATEMENT (FIRST) OF TORTS § 757(a), at 2 (1939).

²⁸ UNIF. TRADE SECRETS ACT § 1(2)(ii)(B)(I), (III); RESTATEMENT (FIRST) OF TORTS § 757(c), at 2 (1939); *Williams v. Curtiss-Wright Corp.*, 681 F.2d 161, 164 (3d Cir. 1982).

²⁹ *Winston Research Corp. v. Minn. Mining & Mfg. Co.*, 350 F.2d 134, 141-42 (9th Cir. 1965); UNIF. TRADE SECRETS ACT § 2(a).

³⁰ In this Article, I use “unjust enrichment” to refer to theories of recovery by which a plaintiff may hold a defendant *prima facie* liable for extracting a wrongful gain even in the absence of a legal wrong grounded in a moral harm to the plaintiff, like a tort or a breach of contract. I use “restitutionary damages” to refer to remedies that make the defendant disgorge his gains, whether the gains resulted from unjust enrichment or a legal wrong grounded in a moral harm.

³¹ *Sperry Rand Corp. v. A-T-O, Inc.*, 447 F.2d 1387, 1392-95 (4th Cir. 1971); UNIF. TRADE SECRETS ACT § 3(a).

³² For example, Roger Milgrim’s treatise on trade secrecy devotes four chapters to the creation and protection of trade secrets by contract or in employment relations and only two to litigation. *Compare* 1 ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS chs. 4-5 (2009), *and* 2 *id.* at chs. 6-7, *with* 4 *id.* at chs. 14-15.

³³ 1 *id.* § 2.02, at 2-38 to -44.

³⁴ See 2 *id.* § 7.01[2], at 7-24 to -33.

³⁵ See, e.g., JAMES H.A. POOLEY, TRADE SECRETS 228-29 (1989) (providing sample language for a nondisclosure agreement).

II. THE FOUNDATIONS OF TRADE SECRECY

Although most commentators agree on most aspects of the previous restatement, they do not agree whether trade secrecy has any coherence. Trade secrecy law and scholarship are replete with cases and articles struggling to ground the field in some other seemingly-fundamental field of law. Although there are many specific rationalizations for trade secrecy, I will sort them into five rough overarching groups.

A. Tort

Explanations in the first group sound in some variation on tort.³⁶ As Justice Oliver Wendell Holmes put it in the 1917 case *E.I. du Pont v. Masland*, “the starting point” for a trade secrecy dispute “is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs.”³⁷ The drafters of the first *Restatement* classified trade secrecy with torts, and the current *Restatement* classifies it with unfair competition, a family of tort. Vincent Chiappetta claims that trade secrecy is explained and rationalized best by unpacking the implications of the different theories of misappropriation, the torts protecting trade secrets.³⁸

The tort view, however, is obviously unsatisfying. As Mark Lemley explains,

The problem with the tort view is that it is ultimately empty. It presupposes a wrong without offering any substantive definition what that wrong is. . . . [M]any trade secret cases arise out of a ‘duty’ explicitly stated in a contract, such as a technology license or an employment agreement. But if that is the wrong, trade secret law is nothing more than contract law.³⁹

The tort view suffers similar problems even when there is no contract. It is now well-settled law that a defendant may use improper means if he eavesdrops to acquire a secret even if he commits no crime, tort, breach of contract, or other violation of law in the process. The *Restatement (Third) of Unfair Competition* contrasts a hypothetical in which a competitor acquires information about a new chemical process by photographing a half-built plant from the road with one in

³⁶ See MELVIN F. JAGER, TRADE SECRETS LAW § 4.2 (2010).

³⁷ *E.I. du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917).

³⁸ See Chiappetta, *supra* note 3, at 73-74. Accord Lynn Sharp Paine, *Trade Secrets and the Justification of Intellectual Property: A Comment on Hettinger*, 20 PHIL. & PUB. AFF. 247, 249 (1991).

³⁹ Lemley, *supra* note 19, at 321.

which the plant builder fences the plant and the competitor acquires the same information by paying a commercial pilot to photograph the plant aerially without trespassing. In the first hypothetical, the competitor's means are legitimate; in the second, they are improper.⁴⁰ In the 1970 decision *E.I. duPont de Nemours & Co. v. Christopher* (which supplies the fact pattern for the second hypothetical), the U.S. Court of Appeals for the Fifth Circuit called the aerial photography a "school boy's trick."⁴¹ *Christopher* made patent an anti-competitive-intelligence-gathering norm long latent in trade secrecy law.⁴² All the same, that principle "begs a larger question: why is it bad to acquire information in this way?"⁴³ Espionage counts as "improper means" and therefore as misappropriation only if "improper means" get specification from some set of normative principles alien to tort.

B. Fairness and Equity

Some authorities argue that the principles of fair play presumed by the misappropriation torts flow from principles of fairness or one of many different senses of the term "equity." Courts sometimes describe trade secrecy as focusing on "[t]he maintenance of standards of commercial ethics."⁴⁴ Some suggest that trade secrecy may be explained primarily as an outgrowth of equity.⁴⁵ Historically, many seminal trade secret cases were litigated in equity,⁴⁶ and misappropriation doctrine provides equitable remedies in negative injunctions and restitutionary damages. Some commentators interpret the latter remedy as proof that trade secrecy's foundations lie in unjust enrichment.⁴⁷ Any of these foundations would suggest that the "locus of the trade secret right is in the behavior of the non-owner B, rather than the trade secret of the owner A."⁴⁸

⁴⁰ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 43 cmt. b, illus. 2, at 494, cmt. c, illus. 3, at 494-95 (1995).

⁴¹ 431 F.2d 1013, 1016 (5th Cir. 1971), *cert. denied*, 400 U.S. 1024 (5th Cir. 1971).

⁴² *See, e.g.*, Note, *Theft of Trade Secrets: A Need for a Statutory Solution*, 120 U. PA. L. REV. 378, 385-89 (1971).

⁴³ Lemley, *supra* note 19, at 322.

⁴⁴ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974).

⁴⁵ *See, e.g.*, Henry E. Smith, *An Economic Analysis of Law Versus Equity* 20 (Mar. 10, 2010) (unpublished manuscript, on file with author), *available at* <http://extranet.isnie.org/uploads/isnie2010/smith.pdf>.

⁴⁶ *See, e.g.*, *Salomon v. Hertz*, 2 A. 379 (N.J. Ch. 1886); *Peabody v. Norfolk*, 98 Mass. 452 (1868); JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* § 952 (A. E. Randall ed., 1920)

⁴⁷ *See* HANOCH DAGAN, *UNJUST ENRICHMENT* 98-102 (1997); Hill, *supra* note 5, ¶¶ 80-95; *cf.* Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEG. STUD. 449 (1992) (reprinted in 34 MCGEORGE L. REV. 541 (2003)).

⁴⁸ Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1153 n.148 (2000).

Yet fairness- and equity-based accounts are unsatisfying as well. Although it is necessary that B act unfairly or inequitably, B's misconduct by itself does not suffice to endow A with a cause of action in misappropriation. If B quits and develops a competing product relying on designs learned and used while in A's employ, B may act immorally, but he does not misappropriate if A did not take reasonable precautions to protect its designs.⁴⁹ In another case, A sold a computer in a fire sale, B discovered that the computer mistakenly contained valuable customer lists, and B then bought the computer and paid a former secretary of A for the password to access the lists. B "may have obtained the lists by improper means," but "any such impropriety does not create liability" when, as in this case, A did not take reasonable precautions to protect and mark off the lists as secret.⁵⁰ If B puts his child up to getting a job in a A's restaurant kitchen to steal A's recipes, B may act inequitably, but he does not misappropriate if A's recipes are readily ascertainable and therefore generic.⁵¹ Like tort-based views, fairness- and equity-based views presuppose that A has a minimally-legitimate claim in relation to his secret; without such a claim, B is not culpable in trade secrecy for conduct that seems unfair or inequitable.

C. Property

These gaps suggest another view, the property view.⁵² In this view, "[r]ights in a trade secret are in the nature of property rights just as, properly understood, one's legal rights in real estate are the property, not the tangible real estate itself."⁵³ According to this view, "[t]he starting point in every case [involving trade secrecy] is not whether there was a confidential relationship, but whether, in fact, there was a trade secret to be misappropriated."⁵⁴ This view has been used to explain the problems noted in the examples at the end of the previous section. According to Lynn Tyler, the property-based account *limits* the scope of trade secrecy, by preventing claimants from protesting misconduct if they do not have a requisite proprietary interest.⁵⁵

⁴⁹ *Electro-Craft Corp. v. Controlled Motion, Inc.* 332 N.W.2d 890, 895-96, 901-03 (Minn. 1983).

⁵⁰ *Defiance Button Mach. Co. v. C & C Metal Prods. Corp.*, 759 F.2d 1053, 1064 (2d Cir. 1985).

⁵¹ *Buffets, Inc. v. Klinke*, 73 F.3d 965, 967-69 (9th Cir. 1996).

⁵² See JAGER, *supra* note 36, § 4.3; Charles Tait Graves, *Trade Secrets As Property: Theory and Consequences*, 15 J. INTEL. PROP. L. 39 (2007); Miguel Deutch, *The Property Concept of Trade Secrets in Anglo-American Law: An Ongoing Debate*, 31 U. RICH. L. REV. 313 (1997); Note, *supra* note 44, at 388.

⁵³ 1 MILGRIM, *supra* note 32, § 2.01, at 2-2 to -3.

⁵⁴ *Van Prods. Co. v. General Welding & Fabricating Co.*, 213 A.2d 769, 780 (Pa. 1965).

⁵⁵ See Lynn C. Tyler, *Trade Secrets in Indiana: Property vs. Relationship*, 31 IND. L. REV. 339, 340-41 (1998).

The property view explains several other features of trade secrecy—assignability, licensability, descendibility,⁵⁶ and also the fact that trade secrecy misappropriation states a rights-based tort. Yet the property view remains out of favor. The first *Restatement of Torts* pronounced in 1939 that “[t]he suggestion that one has a right to exclude others from the use of his trade secret because he has a right of property in the idea has been frequently advanced and rejected,”⁵⁷ and that pronouncement has stuck. As the *Restatement* suggests, the main sticking point relates to the idea of a “right to exclude.” Again, patent law does not provide broad defenses for independent work or reverse engineering; trade secrecy does. As a result, a trade secret claimant cannot exclude competitors from the information embedded in his secret work—only from stealing it or bribing an employee or licensee to disclose it. So as Samuelson concludes, trade secrets are “not ‘good against the world,’ . . . A does not have the right to exclude B from the trade secret, he merely has the ability to prevent B from taking certain actions to obtain it.”⁵⁸

D. Relational Obligations

As an alternative, the fourth view holds that trade secrecy protects and reinforces “relational” norms arising out of agency arrangements and contracts. Many courts and commentators maintain that trade secrecy should be coextensive with

⁵⁶ See 1 MILGRIM, *supra* note 32, § 2.02, at 2-38 to -44.

⁵⁷ RESTATEMENT (FIRST) OF TORTS § 757 cmt. a. at 4 (1939). *Accord* E.I. du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 102 (1917).

⁵⁸ Samuelson, *supra* note 48. *Accord* Bone, *supra* note 2, at 243 (contrasting trade secrets with patents and copyrights, which “confer property rights against the world”); John C. Stedman, *Trade Secrets*, 23 OHIO ST. L.J. 4, 21 (1962).

Commentators also cite in favor of the property view the legal principle that trade secrets are protected under constitutional takings principles. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Philip Morris Co. v. Reilly*, 312 F.3d 24 (1st Cir. 2002). Compare Richard A. Epstein, *The Constitutional Protection of Trade Secrets Under the Takings Clause*, 71 U. CHI. L. REV. 57, 59-73 (2004) (praising *Monsanto* and *Philip Morris*), with Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365 (1989) (criticizing *Monsanto*). Trade secrets deserve to be protected under the Takings Clause if they count as private property, but to cite takings law as proof that they are puts the cart before the horse. See Michael A. Risch, *Why Do We Have Trade Secrets?*, 11 MARQ. INTEL. PROP. L. REV. 1, 19-21 (2007). In addition, in practice, takings cases are so often influenced by concerns about public law regulatory programs that they provide unreliable information about private rights as they are understood when such public law schemes do not interfere. See Eric R. Claeys, *The Penn Central Test and the Tension between Classical- and Modern-Liberal Theories of Property*, 30 HARV. ENVTL. L. REV. 339 (2006); see also JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 36-38 (2001) (noting similar conceptual differences between the rights assigned in tort accident law and in public risk-regulation law).

contract.⁵⁹ Other courts imply fiduciary duties from employment relationships⁶⁰ or from relations between a firm with a trade secret and a prospective firm (even if it secretly harbors intentions to misappropriate secrets in bad faith).⁶¹

These relational approaches seem superficially plausible because most trade secrecy litigation focuses on the species of misappropriation for breaches of duty of confidentiality.⁶² Yet contractual and other relational theories of trade secrecy beg important questions as well. Although some have been noted in previous scholarship,⁶³ the problems are more numerous and severe than that scholarship has suggested.

One point has been appreciated: A claimant may establish a valid claim to a trade secret without proving he stands in a relationship that triggers any duty of confidence. If trade secrets were fundamentally relational, one would expect the law to require proof of the relation—as attorney-client privilege law requires the client to prove he has an attorney-client relation.⁶⁴ A claimant must prove that an alleged misappropriator owed him a duty of confidence before proving that he misappropriated by breaching such a duty. Yet the claimant does not need to establish the confidence to prove that the misappropriated work is a legal secret. Because the interest in a secret requires proof only of value, secrecy, reasonable precautions, and non-ascertainability,⁶⁵ a claimant may have a secret if he discovers a tool design for himself and does not share it with anyone else. “[I]t can hardly be said that the protection arises out of contract” or confidentiality, “given that no one can enter into a contract with himself.”⁶⁶

Separately, two of the four theories of misappropriation are extremely difficult to explain if trade secrets sound in confidential relations. As section A explained above, a stranger misappropriates if he acquires a secret by eavesdropping by

⁵⁹ See JAGER, *supra* note 36, § 4.1; Thornton Robinson, *The Confidence Game: An Approach to the Law of Trade Secrets*, 25 ARIZ. L. REV. 347 (1983). Cf. Edmund W. Kitch, *Intellectual Property and the Common Law*, 78 VA. L. REV. 293 (1992) (arguing that contract theories generally underlie intellectual property).

⁶⁰ See *Town & Country House & Home Service, Inc. v. Evans*, 189 A.2d 390, 392-93 (Conn. 1963); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. b, at 479-80 (1995).

⁶¹ See, e.g., *Phillips v. Frey*, 20 F.3d 623 (5th Cir. 1994); *Smith v. Dravo Corp.*, 203 F.2d 369, 376-77 (7th Cir. 1953).

⁶² See, e.g., David S. Almeling et al., *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZ. L. REV. 291, 302 & Table 2 (2010) (reporting that, in trade secrecy misappropriation cases litigated in federal court between 1950 and 2008 and generating a reported opinion, 90% or more of the cases involved an employee, former employee, or a business partner).

⁶³ E.g., Lemley, *supra* note 19, at 323-24.

⁶⁴ See, e.g., 1 EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 64-390 (5th ed. 2007).

⁶⁵ And, in common law jurisdictions, the continuous-use element.

⁶⁶ See Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L.J. 803, 812 (2001).

improper means, even if he breaks no other law while eavesdropping. In *Christopher*, the pilot and unnamed competitor owed no duty of contract, confidentiality, or fiduciary care to du Pont. Yet the former were liable for improper-means misappropriation even if they did not “cause any other harm than that to the interest in the trade secret.”⁶⁷ Similarly, relational accounts cannot explain why a defendant may be liable for misappropriating an accidentally-disclosed secret when he has no legal relation to the secret’s owner.⁶⁸ Even if the defendant is otherwise a stranger to the owner, he misappropriates if he uses or discloses the secret without the owner’s consent as long as he has “reason to know” that the secret is secret and accidentally disclosed.⁶⁹ Once a claimant establishes a valid legal interest in a secret, that interest imposes duties on strangers to exclude themselves from using accidentally disclosed secrets and from gathering competitive intelligence improperly.

Relational views overlook one last feature: Trade secrecy law warps general principles of relational fields of law to make them accord with its own principles.⁷⁰ Consider *Chicago Lock Co. v. Fanberg*.⁷¹ Chicago Lock manufactured a high-end tubular lock; the key codes for many of these locks had gradually percolated among locksmiths as locksmiths decoded the locks for customers who lost their keys.⁷² The Fanbergs, father and son locksmiths, assembled a catalog of those key codes and resold the catalog to interested locksmiths.⁷³ Chicago Lock’s theory of misappropriation persuaded the district court, and it is quite plausible if the core of trade secrecy lies in a confidential relation. The key codes were confidential. If the locksmiths breached duties of confidence to their lock-owning customers when they shared the customers’ key codes with the Fanbergs, Chicago Lock could plausibly rely on those breaches of confidence to propound a theory of improper-means misappropriation.⁷⁴

⁶⁷ 431 F.2d 1013, 1016 (5th Cir. 1971) (quoting RESTATEMENT (FIRST) OF TORTS § 757 cmt. f., at 11 (1939)), *cert. denied*, 400 U.S. 1024 (5th Cir. 1971).

⁶⁸ See *B.C. Ziegler & Co. v. Ehren*, 414 N.W.2d 48 (Wis. App. 1987); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40(b)(4), at 453 (1995); UNIF. TRADE SECRETS ACT § 1(2)(ii)(C); RESTATEMENT (FIRST) OF TORTS § 757(d), at 2 (1939). See also Samuelson, *supra* note 48, at 1153 n.148, 1157 n. 169 (citing UNIF. TRADE SECRETS ACT § 1(2)(ii)(C)).

⁶⁹ UNIF. TRADE SECRETS ACT § 1(2)(ii)(B); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40 cmt. d, at 457 (1995). See, e.g., *Ralph Andrews Prods., Inc. v. Paramount Pictures Corp.*, 271 Cal. Rptr. 797 (Ct. App. 1990).

⁷⁰ In this respect, there is a trade secrecy/contract interface parallel to the property/contract interface noted by Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001).

⁷¹ *Chicago Lock Co. v. Fanberg*, 676 F.2d 400 (9th Cir. 1982).

⁷² *Id.* at 402.

⁷³ *Id.*

⁷⁴ See *id.* at 405.

Yet the Ninth Circuit rejected that theory: The duty of confidentiality “could give rise only to an action by ‘injured’ *lock owners* against the individual locksmiths.”⁷⁵ In other words, even if confidential relations existed between the lock owners and locksmiths, trade secrecy’s organizing norms do not bootstrap on confidentiality norms. The Ninth Circuit insisted that Chicago Lock’s trade secret not be converted “into a state-conferred monopoly akin to the absolute protection that a federal patent affords.”⁷⁶ That anti-monopoly norm is external to the field of confidentiality; the Ninth Circuit seemed sure it was internal to trade secrecy.

Now, contract law often deals with anti-monopoly policy. Under standard doctrine, a contract is void against public policy if it restrains trade.⁷⁷ But that doctrine makes things even worse for relational accounts, because trade secrecy excludes restraint-of-trade principles from a contractual provision barring the disclosure of a trade secret.⁷⁸ That principle goes back to the earliest reported American trade secret decision. In *Vickery v. Welch*, when the buyer of a secret sought to recover a bond on the ground that the seller violated an exclusivity provision and disclosed the secret to another party, the seller argued that the exclusivity and nondisclosure provisions violated public policy.⁷⁹ The Massachusetts Supreme Court rejected that argument: As long as *one* party held exclusive control over the secret, it was “of no consequence to the public whether the secret art be used by the plaintiff or the defendant.”⁸⁰ Along the same lines, courts often construe vague nondisclosure provisions to apply only to trade secrets. If a contract requires an ex-employee to disclose and assign to his former employer any unspecified “ideas or improvements,” a court will construe the language to refer only to trade secrets or patents developed during and within the scope of employment for the employer and deem it void against public policy to the extent it purports to reach more broadly.⁸¹ These rules do not necessarily make trade secrecy pro-monopoly, but they do suggest trade secrecy has its own internal guiding norms to say when legal relations trigger valid interests or invalid monopolistic arrangements.

E. Trade Secrecy Nihilism

The last option is “none of the above.” Some scholars think that trade secrecy lacks any single unifying theory. In this view, it refers to a collection of unrelated

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ RESTATEMENT (SECOND) OF CONTRACTS §§ 186-88, at 239-44 (2007).

⁷⁸ *See, e.g.,* Gordon v. Landau, 321 P.2d 456, 459 (1958).

⁷⁹ 19 Pick. 523 (Mass. 1837).

⁸⁰ *Vickery*, 19 Pick. at 527.

⁸¹ GTI Corp. v. Calhoon, 309 F. Supp. 762, 772-73 (S.D. Ohio 1969).

judgments about a class of business information. Some torts have such a catch-all flavor—say, the torts grouped under the rubric of invasion of privacy.⁸² Robert Bone suggests that trade secrecy lacks unifying character. In Bone’s telling, trade secrecy *used* to have internal coherence, but only within a nineteenth-century normative and conceptual framework. That framework, he argues, was rendered obsolete by Legal Realism. Now, “there is no such thing as a normatively autonomous body of trade secret law,” and the field consists “merely [of] a collection of other legal norms—contract, fraud, and the like—united only by the fact that they are used to protect secret information.”⁸³

III. TRADE SECRECY AND THE CONCEPTUAL ANALYSIS OF PRIVATE LAW

Although the last Part raised many questions, at this point the most striking facts are as follows. Even though they have not yet come to any agreement, most judges and trade secrecy scholars assume that some norm informs trade secrecy and makes it operate as a unified whole. These authorities are trying conscientiously to test different norm-hypotheses by asking how well they “fit” trade secrecy doctrine. From the standpoint of a conceptual philosopher, these authorities are appealing in an implicit and unarticulated way to the insights of private law theory.

More recently, some trade secrecy and tort scholars have tried to make that appeal more explicit and articulated. James Hill has interpreted trade secrecy to sound in unjust enrichment; in the course of doing so, he has drawn on principles of corrective justice as propounded by Ernest Weinrib.⁸⁴ John C.P. Goldberg and Benjamin Zipursky have propounded a theory of tort focusing on “civil recourse,” a subfield of corrective justice in its ecumenical sense. Goldberg and Zipursky suggest that trade secrecy tracks the corrective and recourse-based structure appropriate to more routine “property tort litigation” like trespass to land or chattels.⁸⁵

Although I intend to follow and build on these developments in this Article, I acknowledge at the outset that further conceptual study must proceed with caution. In tort, scholars assume that scholarship sorts itself (overgeneralizing somewhat) into three camps: doctrinal, law and economic, and philosophical. In tort, law and economic scholars disregard doctrinal scholarship on the ground that it asserts explanations and justifications relying only on “intuition and any available facts.”⁸⁶ The same scholars are even less charitable toward corrective

⁸² I thank Benjamin Zipursky for this analogy.

⁸³ Bone, *supra* note 2, at 241, 245.

⁸⁴ See Hill, *supra* note 5.

⁸⁵ GOLDBERG & ZIPURSKY, *supra* note 10, at 251; see *id.* at 250-54.

⁸⁶ ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 3 (3d ed. 2000).

justice and fellow-traveling approaches to tort, for they find such approaches “mush—lacking in clear or persuasive guidelines for determining what conduct counts as ‘wrongful.’”⁸⁷ Although IP has the same rough divisions as tort, in IP, the law and economic camp is much better represented—even dominant. Landes and Posner’s skepticism toward philosophical analyses of IP illustrates the general trend among elite IP scholars generally; Bone’s nihilism illustrates what happens when one applies Landes and Posner’s skepticism logically and relentlessly to doctrine.

Yet Landes, Posner, and Bone’s arguments are not convincing enough to conclude that, at the outset, it would be a waste of time to apply private law theory to trade secrecy. While Landes and Posner profess to be skeptical that “noneconomic theories of intellectual property have much explanatory power or normative significance,” they explicitly assume and do not demonstrate the grounds for their skepticism.⁸⁸ And at the outset, Bone’s argument seems to have loose ends. Bone does not consider doctrines suggesting that trade secrecy has internal content—primarily the elements needed to prove a valid secret, but also the principle from *Fanberg. Christopher*’s rule also suggests that trade secrecy has autonomous content; Bone proposes to eliminate that discrepancy by eliminating the case’s holding.⁸⁹ Bone proposes to downsize trade secrecy to focus primarily on cases involving breaches of contracts or confidential relationships.⁹⁰ Yet although he notes how trade secrecy declares inapposite the restraint-of-trade defense,⁹¹ he does not consider whether this rule suggests that trade secrecy drives contract rather than the other way around.

At a minimum, it is worth exploring whether these and other loose ends may be reconciled. Furthermore, the property of consilience is relevant here. Consilience holds that, other things being equal, a hypothesis that can explain a wider range of observations is preferable to one that can explain fewer observations.⁹² If a conceptual analysis can answer most of the questions raised in the last part, that analysis’s consilience provides a compelling reason to prefer it to an analysis, like Bone’s, in which trade secrecy exists as a normative category “largely as a matter of historical contingency.”⁹³ Similarly, since many scholars, judges, and lawyers cling strongly to the intuition that trade secrecy has its own distinct character, a conceptual account that reveals that character is strongly to be preferred over one that defies the practitioner’s point of view and

⁸⁷ WARD FARNSWORTH & MARK F. GRADY, *TORTS*, at xlvii (2d ed. 2009).

⁸⁸ LANDES & POSNER, *supra* note 6, at 5.

⁸⁹ *See id.* at 297-99.

⁹⁰ *See* Bone, *supra* note 2, at 244, 297-98, 304.

⁹¹ *See id.* at 252 & n.56 (citing *Vickery*).

⁹² *See* COLEMAN, *supra* note 69, at 41.

⁹³ Bone, *supra* note 2, at 245.

insists “there is no such thing as a normatively autonomous body of trade secret law.”⁹⁴

In short, there still remains a significant path along which to apply private law theory to study trade secrecy—even if that path is fraught with some significant interdisciplinary land mines. Let me explain how I propose to pursue the path while avoiding the mines.

In this Article, I apply to trade secrecy some of the fruits of conceptual philosophy analyzing the relations between different basic fields of private law—especially property, tort, contract, and remedies. Like most conceptual analysis, the analysis I offer here is primarily positive. It explores whether the basic structure of trade secrecy law can be explained in relation to normative concepts internal to that field. It tries to identify the norms trade secrecy protects and the relations the law assumes and prescribes between different relevant fields of private law. Although this Article will refer often to normative concepts—especially interests, rights, and duties—it does so primarily to explain the categories that American trade secret law takes for granted as a positive matter.

To be sure, this mode of argument creates a few problems. For one thing, my positive explanation cannot hang together unless the normative justifications I assume for trade secrecy are minimally persuasive. I make some effort to explain and defend these justifications. Because this Article is explaining positive conceptual and structural issues, however, those justifications will be somewhat preliminary.

Nor can my positive conceptual claims hang together unless the norms I find central to trade secrecy are minimally determinate. I think those norms are determinate enough to explain the basic relations between trade secrecy misappropriation, contract, and remedy law. By making this claim, however, I do not mean to suggest that the norms explain every feature of trade secrecy doctrine, or that the concepts described here completely settle or eliminate the need for normative argument. I assume here that concepts and normative reasons have a more complicated relationship. Concepts help the law hone in on what a political community believes to be ideal normative relations by instituting a series of approximations. If a political community finds a set of norms convincing, the concepts that follow from those norms supply reasons for action in some actors (often, rights-claimants) and reasons for abstaining from action in others (often, non-claimants). Those concepts help order legal and other social interactions by establishing basic presumptions about who has what rights in certain act-situations likely to recur. Those basic presumptions do not settle all normative issues, but they do channel subsequent normative issues by making them subsidiary issues.

⁹⁴ *Id.*

Let me also explain to whom this Article is written. This Article speaks to issues that may interest three different communities of scholars. The Article is written to appeal most directly to trade secrecy and other IP scholars who are open to the possibility that trade secrecy doctrine might be internally coherent. By stipulation, scholars in this group assume that a reasonably competent lawyer can understand and predict the content of trade secrecy doctrine by reading and synthesizing trade secrecy case decisions without specialized training in economics or another social science. Such scholars need no special explanation or justification to be interested in answering the questions with which this Article began. Also by stipulation, such scholars are open to the possibility that conceptual-philosophical analysis can help answer those questions.

A second community consists of scholars who specialize in conceptual philosophy. By stipulation, such scholars include many of the contributors to this Symposium Issue. Such scholars assume that private law-theoretic scholarship has had many successes explaining the structures of many basic fields of private law, but that more work remains to be done to explain the relations between different fields. This Article should be illuminating to them as a case study.

Finally, this Article may or may not interest IP scholars as skeptical of conceptual analysis as Landes, Posner, and Bone—IP scholars whom I call here “instrumentalist utilitarians.” This Article is not written to respond fully to the expectations of such utilitarians, but it does engage their views at a few judiciously-chosen points of contact. I do so primarily to help IP scholars in my first hypothetical community. I hope this Article clarifies for IP scholars who believe that doctrine may be internally coherent how instrumentalist utilitarian analysis asks questions significantly different from those implicit in doctrine and explicit in conceptual analysis. Instrumentalist analyses—most notably, dominant law and economic methodologies—downgrade a set of questions about the private law’s structure that conceptual philosophy finds central.

Separately, instrumentalist utilitarian analyses make two assumptions typical of act utilitarianism: Legal rules are justified to the extent that they promote social welfare, not individual welfare; and the law may realistically and should normatively “implement[] a case-by-case cost-benefit test that has unconstrained access to contextual information.”⁹⁵ In contrast, trade secrecy law operates much more indirectly. If and to the extent that trade secrecy is justified on utilitarian grounds, it promotes welfare by promoting legal rights in the expectation that individuals will enlarge social welfare in the rational pursuit of their rights. These points by no means refute utilitarian premises—but they do show that

⁹⁵ Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 J. TORT LAW (forthcoming 2011) (manuscript at 6-7, on file with author).

standard instrumentalist utilitarian ideal assumptions must be relaxed considerably to accord with existing trade secrecy law.⁹⁶

With that background, let me outline the rest of this Article's argument. The next Part restates the tenets of private law theory I apply in the remainder of the Article. In Part V, I apply that theory to describe conceptually the normative interest in a trade secret, and I explain provisionally why that interest seems to state a proprietary interest. In Parts VI and VII, I show how the parts of tort, contract, remedies, and unjust enrichment take their bearings from the normative interest described in Part V.

IV. PRIVATE LAW THEORY

A. Utilitarian Analysis and Private Law Theory

Many IP scholars may wonder why it is interesting, let alone important, to search for one or a few norms supplying the foundations for trade secrecy. This reaction follows from instrumentalist utilitarian premises. To appreciate the disjunction between those premises and the object of private law theory, let us consider one significant argument in one prominent utilitarian account of trade secrecy, by Friedman, Landes, and Posner ("FLP").⁹⁷

FLP claim that the policy aim of trade secrecy is "congruent with the basic economic explanation for patent protection—that it provides a means of internalizing the benefits of innovation."⁹⁸ They consider why trade secrecy allows independent discovery (while patent bars it) and requires secrecy (while patent law requires disclosure of an invention in the patent). In their explanation, patent law focuses on inventions that will take considerable time and expense to replicate, while trade secrecy focuses on intellectual works that are low-cost or -expense to replicate.⁹⁹ FLP also consider why trade secrecy confers more limited protection over secrets than patent and copyright law do, respectively, over inventions and works of authorship. FLP propound a veil-of-ignorance argument, developed by analogy to the practices by which states determine which kinds of espionage to tolerate and interdict by other states. In this analogy, bribing a competitor's employees is the commercial equivalent of hiring secret agents, and reverse-engineering a competitor's design from products on the shelf is the equivalent of satellite surveillance. The costs of losing intelligence

⁹⁶ For more elaborate developments of this point, see Stephen A. Smith, *The Normativity of Private Law*, 31 OXFORD J. LEG. STUD. 1 (2011).

⁹⁷ David D. Friedman et al., *Some Economics of Trade Secret Law*, 5 J. ECON. PERSP. 61 (1991).

⁹⁸ *Id.* at 64.

⁹⁹ *Id.* at 65-66.

dominate in the former scenarios, but the gains from gathering intelligence dominate in the latter.¹⁰⁰

I think some parts of FLP's argument make some sense, especially their insights about the relations between trade secrecy and patent law. Nevertheless, I recount their arguments here to highlight a few more general and debatable features of utilitarian analysis. First, taken together, these various strands have the feel of a "Just So Story," an explanation developed ad hoc to fit the particulars of trade secrecy. FLP have little or no evidence to support their account.¹⁰¹ Their account is ad hoc because it appeals to arguments with different foundations to explain different parts of the doctrine. FLP explain the secrecy requirement and the defenses for independent discovery and reverse engineering in terms of a social-welfare criterion, innovation-promotion. When they explain the scope of misappropriation doctrine, however, they flip and focus on *private* welfares, the likely utility profiles individual secret-claimants and competitors have in relation to intelligence gathering.

The disjunction between those two utilitarian explanations is extremely revealing in several other ways. Consider more closely FLP's innovation-based argument. If innovation policy were really fundamental, trade secrecy law would not need to focus on particular parties. Individual cases would present opportunities for courts to set prospective precedents inducing parties specifically resembling the parties at bar to act in whatever manner seemed most likely to encourage future innovation. Yet trade secrecy law seems to have it backwards. Misappropriation doctrine has a bilateral structure. It confers rights-claims to individual secret-claimants against individual defendants. These rights-claims are structured in terms much more general than FLP's logic suggest appropriate. The rights-claims encourage different individuals with few common characteristics to pursue different ends with similar legal entitlements. Finally, the law protects these rights-claims retrospectively by asking whether that defendant misappropriated this secret from this claimant.¹⁰²

Now turn back to FLP's espionage analogy for misappropriation. To a philosopher of law, this analogy remains problematic. It purports to explain trade secrecy through a hypothetical bargain likely to increase the utility profiles of all the parties. Yet why is that bargain normatively binding? For one thing, how do FLP know that competitors in fact have the utility profiles FLP assume they have?

¹⁰⁰ See *id.* at 66-68.

¹⁰¹ See *id.* at 66 (suggesting "that trade secret protection pushes toward the correct social outcome" in situations in which the marginal costs of replicating a discovery are falling, "though whether it attains it is unknown").

¹⁰² See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 114-44 (1995); Jules L. Coleman, *The Structure of Tort Law*, 97 *YALE L.J.* 1233 (1988) (reviewing WILLIAM LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987)).

In reality, in any market, competitors could sort themselves into up- and down-market segments. Some manufacturers may compete by researching and developing more attractive products or more efficient assembly lines; others may prefer to keep R&D costs down by copycatting the discoveries of competitors. Even if misappropriation enlarges net social welfare or net average private welfare of all competitors, the doctrine may diminish the private welfare profiles of the copycats.

To a philosopher of social concepts, that possibility raises basic problems. Socially, people are inclined *not* to obey or submit to government coercion without some persuasive explanation why the law claims legitimate authority over them. Ordinarily, people expect that such a claim appeals at some level to their interests. Copycat competitors will have the same expectation as other competitors. It will not do to assert, without serious qualification, to copycats: “You must suffer so that your up-market competitors as a whole or society as a whole may be better off.” Copycatting is perfectly legitimate in many situations—as trade secrecy itself confirms, by making it legitimate to copy and use business information that falls within common industry knowledge, is readily ascertainable by skilled competitors, or has not been marked off by reasonable precautions. Without an explanation why it is wrong to copy and use valid trade secrets, a judgment of misappropriation seems to a down-market competitor a raw assertion of government power favoring up-market elites. So FLP’s argument falls short when it purports to explain trade secrecy misappropriation in terms of a veil-of-ignorance argument supposedly appealing to competitors’ concurrent utility profiles. So stated, the appeal lacks a legitimate public reason that down-market copycats must accept, however grudgingly.

FLP suggests that the public reason consists of the satisfaction of the preferences of all the competitors. Here, FLP create a more specific kind of “Just So Story,” in terms outlined by Coleman. FLP cannot explain positively how individual competitors all agree they should be bound to do what contributes to the average reciprocity of advantage of all competitors if that criterion seems likely to detract from their individual utility profiles.¹⁰³ FLP might suggest that competitors all fall into the grip of “a kind of ideological illusion.”¹⁰⁴ In other words, because they have deep-seated social needs, all citizens reflexively accept that the law should maximize social welfare even when doing so detracts significantly and regularly their individual welfares. Yet that possibility remains to be demonstrated. In addition, other things being equal, an observer should prefer an account of law that makes this connection between law and social needs explicit—as private law theory does.

¹⁰³ COLEMAN, *supra* note 69, at 26-27.

¹⁰⁴ *Id.* at 25.

B. Interests, Rights, and Law

In what follows, I provide an extremely abbreviated overview of those social practices and the insights they provide about private law. My restatement relies substantially on general terminology propounded by Joseph Raz and Joel Feinberg, and it relies considerably on structural insights by Jules Coleman and many of his students. That said, the restatement remains a restatement, and I am responsible for its synthesis.

In this account, “the private law” refers to fields of law that regulate and settle disputes between private parties. The private law presumes and declares that private parties are endowed with domains of freedom to conduct legitimate activities for ends constitutive of human flourishing. Following Feinberg, I call those domains here “interests.” An “interest” confers in moral agency a combination of rights, powers, and responsibilities similar to the combination a partner enjoys in a partnership. Understood against that backdrop, the term “interest” captures nicely the fact that each member has both individual and group aims, and that those aims are informed in part by psychological motivations and in part by reasoned justification. When a moral agent has such an “interest,” he has a “stake” in pursuing the activities he may freely pursue as ingredients of his well-being. That stake connotes that the agent faces risk. Through incompetence, bad luck, or the interference of others, a moral agent may fail to realize his goals. The stake is also concrete enough to give the agent a psychological motivation and a moral responsibility to use the domain of freedom for his own good. When an agent pursues individual interests in different aspects of his life, his interests in the plural converge in a normative interest in the singular, understood as “the harmonious advancement of all one’s interests in the plural,” all the “distinguishable components of a person’s well-being.”¹⁰⁵

The partnership analogy clarifies the character of interests because it captures interests’ simultaneous social and individual aspects. A partnership presumes that all of the partners have individual endeavors and partnership endeavors. It also presumes that partners are normatively equal in relation to the latter. Although partners have different talents and needs, those talents and needs are similar enough that the partnership may distribute the benefits of the partners’ joint endeavors back to the partners in proportion to some commonly-agreed criterion of desert. The partners are normatively equal in that all have equal claims that their interests be defined and protected, and common benefits be distributed, consistent with those criteria. Similarly, in a political community, citizens may pursue and advance their joint well-being while concurrently pursuing their own

¹⁰⁵ See JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 33-34 (1984); J.E. Penner assumes a similar conception of interests without elaboration in *THE IDEA OF PROPERTY IN LAW* 49-63 (1997).

and possibly-conflicting individual well-beings. When an agent has a valid moral interest, others harm or wrong him by setting back his interest and leaving it in a worse condition than it would have been in but for the invasion.¹⁰⁶

Interests vary in strength, shape, and character. Although children have strong interests in their parents' continued love and support, children have very few specific claims on how parents provide such love and support. The needy have interests in prosperous people's being charitable, but they have weaker specific claims on that charity than children have on parents' support. Some interests, however, ground strong social entitlements. Assume that an interest is commonly and authoritatively held to be valid and important, that it confers on bearers moral powers to pursue certain courses of action in their individual advantages, and that it also confers on them claim rights to exclude others from interfering with such pursuits. Such conventions declare "rights."¹⁰⁷ Rights help order social relations by signaling how far different individuals' interests run in commonly repeating act-situations.

Different political communities may determine differently the content of rights and other interests.¹⁰⁸ Once a community settles on the precise contours of the norms that ground rights and other interests, however, it may rely on law to help determine them. In general, the law determines interests authoritatively in several senses. Laws warn citizens what they should refrain from doing if they want to avoid being penalized by public officials and coerced by state power. Yet laws are also instituted, and public officials claim the power to penalize or coerce citizens who violate them, on the ground that the laws secure the interests of individual citizens justly reconciled to those of the community as a whole and vice versa. So laws impose settlements on disputes among different interests, and they do so while embodying a practical reason why those settlements are just.¹⁰⁹

C. *The Private Law*

Yet different fields of law "individuate," which is to say they focus on different human interests as they are challenged in different repeating act-situations.¹¹⁰ The private law individuates from other broad fields of law by securing citizens' rights

¹⁰⁶ See FEINBERG, *supra* note 105, at 34.

¹⁰⁷ See Joel Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243 (1970), and especially *id.* at 255-56.

¹⁰⁸ Here, I intend that the terms "interests" and "determined" avoid taking sides in natural law/positivism debates. See Eric R. Claeys, *The Private Law and the Crisis in Catholic Scholarship in the American Legal Academy*, 7 J. CATHOLIC SOC. THOUGHT 253, 256-57, 258 n.12 (2010).

¹⁰⁹ See JOSEPH RAZ, *THE AUTHORITY OF LAW* 3-33 (2d ed. 2009).

¹¹⁰ See JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* 121-67 (1980); PENNER, *supra* note 105, at 48-49.

in their relations to one another. As a complete field, the private law presumes and declares that individuals have rights. The private law also specifies the bounds of those rights, by identifying the actions that “wrong” parties by setting back the interests underlying the rights.¹¹¹ The private law also institutes legal mechanics by which parties who suffer wrongs seek rectification from those who wrong them.¹¹²

Within the general domain of private law, different fields of private law individuate further. The first and most important division separates two aspects of law. On one side lie the “first-order” interests the private law aims to secure.¹¹³ For brevity’s sake, I will refer to these interests in this Article in terms of two coarse and overarching categories, property and liberty.¹¹⁴ Property covers people’s normative interests in being free to decide how to use for their own benefits assets external to their own persons.¹¹⁵ Liberty covers individuals’ domains of freedom to decide how to use their own persons. Liberty and property interests may be declared by stand-alone laws, and some parts of the law focus exclusively on one or the other. Thus, the law of estates and future interests belongs uniquely to the field of property law.¹¹⁶ Quite often, however, liberty and property interests are embodied, declared, and specified in other fields of private law—most obviously contract and tort. Thus, although a land owner has property rights in the control and use of his land, those rights are specified by the torts of trespass to land and nuisance.¹¹⁷ A party’s liberty to compete freely at common law may be induced by learning what he is free to do if he abides by the duties the tort of unfair competition imposes on him and what he is *not* free to contract under relevant public-policy limitations on freedom of contract.

When a political community specifies the content of liberty and property interests, those interests set baselines on which most of the private law layers

¹¹¹ See FEINBERG, *supra* note 105, at 32-35.

¹¹² See WEINRIB, *supra* note 102, at 18-20, 142-44 (1995); JULES L. COLEMAN, RISKS AND WRONGS 303-24 (1992).

¹¹³ COLEMAN, *supra* note 69, at 32.

¹¹⁴ Penner contrasts “property” and “personal” rights. PENNER, *supra* note 105, at 113-14. I am following Blackstone, who classified absolute moral rights into categories for personal security, liberty, and property. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 125-141 (1st ed. 1765-1769). Penner’s category for personal rights and my category for “liberty” interests could be specified much more finely than I do so here, to cover one’s locomotion, reputation, freedom to marry, choice of work, choice of confidantes, or so forth. That specificity would add clarity in many other contexts, but not here.

¹¹⁵ See PENNER, *supra* note 105, at 49-51.

¹¹⁶ See Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009 (2009). I thank Henry Smith for encouraging me to make this point more explicit.

¹¹⁷ See e.g., Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379 (2010).

“second-order dut[ies] of repair” in corrective justice.¹¹⁸ Although specialists will insist on qualifications,¹¹⁹ as a first approximation, if one individual interferes with another’s right as specified by controlling community norms, corrective justice requires that the former is required to undo the wrong and that the latter is entitled to be restored as closely as practicable to the free exercise of his right.¹²⁰

Different fields of private law individuate from one another by instituting corrective justice in different recurring act-situations. In general, tort institutes corrective justice in relation to invasions of liberty and property interests between parties who have not entered into any binding transaction governing their rights.¹²¹ Contract institutes corrective justice in relation to wrongs to liberty and property rights that arise after parties have exchanged interests voluntarily in valid bargains.¹²² The rights and wrongs presumed in tort and contract focus on preventing the infliction of unjust harms on another, not on preventing the extraction of unjust benefits. In some extreme cases, however, parties acquire wrongful benefits from other parties not covered by torts or contracts—think of the case in which A mistakenly repays a debt to B twice. Unjust enrichment provides a backstop for such cases.¹²³ The law of remedies plays a role in these and other fields. Similarly, however, it focuses on another aspect of rights cutting across a wide range of transactions—how best to rectify rights after a wrong or unjust act has occurred by a transaction involving the right. Remedy law institutes, partly specifies, and embodies the responsibility wrongdoers owe to rectify wrongs to a victim in act-situations in which the wrongdoer wrongfully transacts with the victim’s rights.¹²⁴

¹¹⁸ COLEMAN, *supra* note 69, at 32.

¹¹⁹ *See infra* section VI.A.

¹²⁰ *See, e.g.*, ARISTOTLE, NICOMACHEAN ETHICS V.4, at 85-87 (Joe Sachs trans. 2002); Coleman, *supra* note 9, at 287.

¹²¹ *See, e.g.*, WEINRIB, *supra* note 102, at 145-202; COLEMAN, *supra* note 112, at 198-429; *see also* Nicholas J. McBride, *On the Conceptual and Philosophical Foundations of Tort Law*, in OXFORD ESSAYS IN JURISPRUDENCE: FOURTH SERIES 219 (Jeremy Horder ed., 2000).

¹²² *See, e.g.*, Peter Benson, *The Unity of Contract Law*, in THE THEORY OF CONTRACT LAW 118 (Peter Benson ed., 2001); Stephen A. Smith, *Towards a Theory of Contract*, in OXFORD ESSAYS IN JURISPRUDENCE: FOURTH SERIES, *supra* note 124, at 107.

¹²³ *See* Dennis Klimchuk, *The Normative Foundations of Unjust Enrichment*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT 81, 82-83 (Robert Chambers et al. eds., 2009); Scott Hershovitz, *Two Models of Tort (and Takings)*, 92 VA. L. REV. 1147 (2006).

¹²⁴ *See, e.g.*, Jules L. Coleman & Jody Kraus, *Rethinking the Legal Theory of Rights*, 95 YALE L.J. 1335, 1344-46 (1986). More precisely, Kraus and Coleman’s article focuses on the role that “property” and “liability rules” play in specifying norms in transactions between parties, but those rules implicate the coverage of remedies so much that their observations apply to many choices courts face between damages and injunctions.

D. Rights-Based and Formalist Accounts of the Private Law

The account of private law I am restating here differs from another account often equated in IP scholarship¹²⁵ with “private law theory,” the account of Ernest Weinrib. In Weinrib’s account as in my restatement, corrective justice imposes duties on actors to refrain from interfering unduly with others’ private rights and also to rectify interferences they inflict on those rights. However, in Weinrib’s account, the “private law [is] normatively self-sufficient”¹²⁶ so that “the purpose of private law is [simply] to be private law.”¹²⁷ Weinrib believes that the private law can be self-sufficient because “Kant’s concept of right” adequately explains “the governing idea for relationships between free beings.”¹²⁸

These claims seem to me normatively unsatisfying¹²⁹ and positively unrealistic.¹³⁰ I doubt that a lawyer can understand most (or at least the most important) features of individual rights or the private law’s structure by deducing them solely from principles of Kantian right.¹³¹ Although the private law presumes and embodies a principle of normative equality among citizens, citizens are normatively equal inasmuch as they are all entitled equally to rights structured to encourage them to enjoy and pursue interests. Although rights declare and establish regular social and then legal institutions, “substantive ambitions or purposes . . . shape the structure of the legal institution[s] and determine [their] content.”¹³² Some normative theories, especially instrumentalist utilitarianism, encourage the law to use individual conduct to promote social welfare with at best peripheral regard to individual autonomy or the private utility individuals take from autonomy. Weinrib’s account presumes one of two other extreme positions: Either the private law does not focus on general welfare, or in the private law that

¹²⁵ See, e.g., Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 YALE L.J. 1126, 1165-66 & nn. 175, 180 (2009) (book review) (citing WEINRIB, *supra* note 102, to illustrate basic principles of corrective justice as applied to copyright); Hill, *supra* note 5, ¶ 115 (same in relation to trade secrecy).

¹²⁶ WEINRIB, *supra* note 102, at 109.

¹²⁷ *Id.* at 5.

¹²⁸ *Id.* at 19.

¹²⁹ Kantian theory has been described as normatively unsatisfying because it makes “the autonomy of ethics . . . logically independent of any assertions about human nature,” in contrast with theories of ethics that seek “to preserve morality as something psychologically intelligible.” Alasdair MacIntyre, *Hume on the ‘Is’ and the ‘Ought,’* in *AGAINST THE SELF-IMAGES OF THE AGE* 109, 124 (Univ. Notre Dame Press, 2d prt., 1984) (1971). I agree with that criticism. See Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 897-906 (2009) .

¹³⁰ See, e.g., COLEMAN, *supra* note 69, at xiii-xv; COLEMAN, *supra* note 112, at 6-11, 433. I thank Greg Keating for helping me clarify my reasons for distinguishing Weinrib’s approach.

¹³¹ See WEINRIB, *supra* note 102, at 114-44 (deducing principles of legal correlativity from Kantian right).

¹³² COLEMAN, *supra* note 112, at 200.

general welfare consists simply of a community of autonomous moral actors freely respecting one another's normative equality and autonomy.

I prefer the sources on which I rely here because they follow a middle path. In this path, the “private law can neither be explained nor justified in isolation from the social values that determine its initial entitlements.”¹³³ The law presumes and reinforces a conceptual structure of autonomy and equality, but it does so because and to the extent the autonomy and equality are means to ends—the sources of flourishing underlying the interests underlying the rights.¹³⁴ FLP's account of trade secrecy backs into this understanding in a coarse and casual way. They assume that the social welfare of innovation is coterminous with the private welfare competitors get from protecting their own information and from gathering intelligence on their competitors' information. Interest-based theories of rights make this connection tighter and more explicit.

By contrast, Weinrib's account either downgrades or makes irrelevant how individuals prosper in the course of exercising their rights within those rights' responsible limits. I doubt that trade secrecy or any other IP doctrine may be explained without connecting IP rights and the normative equality they require to an account of human prosperity or flourishing. Maybe I am wrong, but until someone provides such an explanation the possibility seems unlikely. When James Hill applied Weinrib's theory to trade secrecy, the most he could glean from it is that the theory requires contract-breachers to make good on their contracts, tort-feasors to repair their torts, and unjust beneficiaries to disgorge their benefits.¹³⁵ Wisely, Hill appealed neither to Weinrib's theory nor to Kantian principles to justify the specific norms trade secrecy enforces.¹³⁶ Kantian right may be able to prescribe that “[t]he plaintiff's right to be free from wrongful interferences with his or her entitlements is correlative to the defendant's duty to abstain from such interferences.”¹³⁷ Absent information about how entitlements encourage the prosperity or flourishing of their holders, Kantian right seems incapable of specifying the entitlements.

¹³³ Hanoch Dagan, *The Limited Autonomy of Private Law*, 56 AM. J. COMP. L. 809, 813 (2008). I thank Shyam Balganesch for encouraging me to clarify the relation between the conceptual approach I restate here and Weinrib's and instrumentalist utilitarian approaches.

¹³⁴ See, e.g., Claeys, *supra* note 117, at 1414-17 (criticizing Weinrib for prescribing fault as a general preference even when fault is not consistent with the interests implicated in the possessory interest in using land).

¹³⁵ See Hill, *supra* note 5, ¶¶ 111-23.

¹³⁶ See *id.* ¶¶ 74-80 (citing normative values of well being, personhood, and propriety of means).

¹³⁷ WEINRIB, *supra* note 102, at 144.

E. Corrective Justice in the Private Law

In that case, the private law is designed to secure rights embodying normative interests logically prior to the private law. The private law therefore presumes there exists a principled distinction between, on one hand, normative rights and, on the other hand, the legal structures that impose duties on others to respect those rights or correct wrongs to the rights.

IP scholars have missed this separation. Several have suggested that corrective justice supplies primary norms of conduct.¹³⁸ Not so. As Coleman explains,

Someone does not incur a second-order duty of repair unless he has failed to discharge some first-order duty. However, the relevant first-order duties are not themselves duties of corrective justice. Thus, while corrective justice presupposes some account of what the relevant first-order duties are, it does not pretend to provide an account of them.¹³⁹

Of course, since this Article is positive, Coleman's claim is insightful only to the extent that it clarifies the structure and character of trade secrecy law. It generates two hypotheses to be tested. First, if trade secrecy follows patterns prevailing elsewhere in private law, the normative interest in a trade secret is likely to sound in a field of law logically prior to fields like tort, contract, remedies, or unjust enrichment. If "liberty" and "property" declare two separate general classes of normative rights, we should be able to explain the normative interest in a trade secret as belonging to a family or genus within one of these two classes. Part V explores this inquiry.

Second, in tort, contract, remedies, and unjust enrichment, we should expect to see doctrines varying to fit the normative interest in a trade secret. Doctrines in those fields should vary as necessary so that, when a lawyer surveys all the doctrines taken as a whole, the substantive rules they establish embody the standards of conduct citizens must obey to secure the normative interest in a trade secret.¹⁴⁰ Parts VI and VII explore these interrelations.

¹³⁸ See, e.g., Hill, *supra* note 5, ¶¶ 104-23; Gordon, *supra* note 8, at 171-77, 196-220.

¹³⁹ COLEMAN, *supra* note 69, at 32, 34.

¹⁴⁰ To the extent "commercial morality" counts as an explanation separate from tort or other corrective fields, such morality is likely to be similarly parasitic on the normative interest in a trade secrets.

V. THE NORMATIVE INTEREST IN A TRADE SECRET

A. *Alternatives to Property*

If the account in Part IV is more or less accurate, it leaves three possibilities: property; a liberty interest in competing freely; and a liberty interest in directing a relation with a fiduciary or another confidential business agent. The property possibility seems perfectly understandable. When lawyers speak of a “property tort,” they intuit that the “tort” is judged by how well it protects and rectifies wrongs to the property right it is supposed to secure.¹⁴¹ Lawyers may have more trouble disentangling the interests covered by the torts for confidential relations or unfair competition from the torts protecting those interests, but both torts still presume and embody similar relations. When tort law provides an action for acquisition of confidential information by improper means,¹⁴² it simultaneously declares a normative liberty interest a claimant has in preserving confidences free from strangers’ snooping or confidantes’ violating confidences. Similarly, when unfair competition law declares a general cause of action for business practices that are harmful and unfair, it declares a liberty interest competitors have in competing freely.¹⁴³

Provisionally, there are reasons for doubting that trade secrecy is grounded in a normative interest in confidential relations. Provisionally, the simplest conceptual way to pursue this inquiry is to ask whether a secret-claimant needs to prove he has a confidence to have a cause of action. As section II.D explained, trade secrecy law does not require such proof. The law requires that the trade secret be a secret but not that it be the center of a confidence.

Here is another fairly simple test: When a secret-claimant has a confidential relationship, must the confidential information run with the relationship or is it severable? If the confidence is central to the conceptual structure of trade secrecy, it should be difficult or impossible to sever the confidence from the confidential relation. For example, attorney-client confidentiality runs from the seller of a business to its buyer,¹⁴⁴ but the seller may not sell a communication as a separate asset to a third party without waiving the privilege claim.¹⁴⁵ By contrast, while trade secret can convey with the sale of a business, it is also severable and assignable. In these and other respects, the confidentiality created by a trade secret seems a consequence of some other normative interest, not an

¹⁴¹ See, e.g., GOLDBERG & ZIPURSKY, *supra* note 10, at 227-54.

¹⁴² RESTATEMENT (FIRST) OF TORTS § 759, at 23 (1939).

¹⁴³ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1, at 3-4 (1995).

¹⁴⁴ See 1 EPSTEIN, *supra* note 64, at 36, 756-57.

¹⁴⁵ See 81 AM. JUR. 2D *Witnesses* § 336 (2010).

interest arising primarily out of a fiduciary relation or some other confidential relation.

A liberty interest in free competition explains many features of trade secrecy, especially the value or competitive-advantage requirement. Yet the interest in free competition also begs important questions. Trade secrecy interests dovetail often but not always with the interest one sees in ordinary competitive disputes. Ordinarily (that is, when only the liberty interest is at issue), “unfair” competition and “improper means” refer to acts motivated “from sufficiently bad motive and to gratify some desire unrelated to competition.”¹⁴⁶ Yet one would need to strain these constructions of “unfair” and “improper” to the point of absurdity in order to explain several of trade secrecy’s causes of action—especially the ones for accidental disclosure and *Christopher*-style competitive-intelligence gathering.¹⁴⁷ In addition, unfair competition ordinarily states a harm-based tort, yet trade secrecy misappropriation is a rights-based tort.

B. The Status of Normative Interests in Corrective Justice

At this point, the only candidate still standing is a normative interest in a trade secret grounded in property. This suggestion, however, may make readers skeptical. As section III.C acknowledged, trade secrecy does not have many of the strong or exclusionary features we associate with legal rights we associate commonly with property. Or, the suggestion may make readers uneasy. Perhaps I am using conceptual analysis too aggressively, to pigeonhole the interest in trade secrecy into a “property” category into which trade secrecy does not fit well. To respond, let me clarify what I regard as the reach and limits of conceptual analysis. Once the reach and limits have been set, the rest of this Part can explain more precisely in what respects trade secrecy is grounded in a proprietary interest.

Many previous conceptual studies of the private law have described the general relations between fields that establish an institutional structure for protecting rights—e.g., tort—and fields that supply the inputs for those corrective fields—e.g., property. To identify novel insights about conceptual structure, previous scholarship has focused on paradigm cases, in which normative interests present obvious and uncontroversial reasons for action. On one hand, private law theorists cite the liberty interest in free competition as a paradigm case in which the law usually *refrains* from declaring that the plaintiff has a legal right. If party A runs a better gas station than B’s, B’s interests have been set back, but not in

¹⁴⁶ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 130, at 1014 (5th ed. 1984).

¹⁴⁷ *Cf. id.* at 1015 (suggesting that “certain unfair competition torts appear to involve less a question of tortious activity than a question of property”); *id.* at 1022-23 (explaining trade secrecy on this basis).

any sense that creates a moral wrong needing rectification.¹⁴⁸ A and B's concurrent competition interests signal that A need not abstain from threatening B's competitive interests except by extreme conduct, like rumor-mongering or harassing B's customers. On the other hand, to provide paradigm cases where any unconsented interaction is uncontroversially wrongful, private law theorists often cite assault and battery,¹⁴⁹ or property trespasses, which protect similarly-broad interests in "the exclusive right to deal with the thing owned."¹⁵⁰ In these cases, the underlying interests supply B with a strong claim right and moral power in using the thing in question (his body, or his land). It also supplies A with a correlative and strong warning to exclude himself from B's thing; this prohibition against intruding on B's thing acts as a clear proxy for a more substantive warning that A ought not to engage with B's domain of freedom in any way.

These paradigm cases are perfectly useful as long as a scholar is focusing on general conceptual inquiries. When studying the general conceptual structure of law, it is advisable to focus on the basic normative entitlements, for these entitlements help establish the law's basic architecture. Here, however, we are trying to fit a specific and controversial doctrine into architecture largely established. Trade secrecy's normative premises are not as convincing as the rationales for unfair competition or trespass to land. Nor do those premises justify entitlements that as narrow as unfair competition's or (to move more to parallel doctrines in IP) as broad as patent's.

As a result, the inquiry we are pursuing here extends into two fields of scholarship that have remained in the background in the private law-theoretic scholarship restated in Part IV. Private law analysis of trade secrecy raises questions associated not only with corrective justice but also in two other fields. One field is normative property theory: whether the law should declare and protect a right to a trade secret under conditions roughly approximating those set forth in contemporary trade secrecy doctrine. Another field is conceptual property theory: whether the right to a trade secret enforced in practice is best described and conceived of as a property right or some other normative right. If confidentiality and free-competition interests are more robust than I suggest here, the list of inquiries may need to be lengthened accordingly.

Although these inquiries are intertwined, they cannot be disentangled in a single Article. To minimize entanglements, I focus in this Article primarily on the relation between the underlying interest and corrective fields of the private law, while making what I consider plausible assumptions about the property-related normative and conceptual issues. I will explain and justify my property

¹⁴⁸ See, e.g., FEINBERG, *supra* note 105; Hershovitz, *supra* note 123, at 1166.

¹⁴⁹ See e.g., COLEMAN, *supra* note 69, at 32.

¹⁵⁰ Ernest J. Weinrib, *Restitutory Damages As Corrective Justice*, 1 THEORETICAL INQUIRIES IN L. 1, 12-17 (2000); see also WEINRIB, *supra* note 102, 178-83.

assumptions provisionally in the rest of this Part. Of course, these assumptions will make the Article's thesis about the property interest correspondingly provisional.¹⁵¹

C. The Normative Interest in Trade Secrecy

The most obvious clues to understand the normative character of trade secrecy may be found in the elements to claim a cognizable legal interest in a secret and the main defenses against misappropriation. Conceptually, trade secrecy declares a normative right tailored to protect a normative interest in determining exclusively the research to develop and the efforts to deploy commercially a secret and competitively-valuable intellectual work. The work must be "valuable" in the sense that it confers regular competitive advantage, not enjoyed by some of the secret-claimant's competitors, to the secret-claimant. The work must be (in layman's terms) minimally novel or (in technical terms) non-ascertainable by significant research by a reasonably competent competitor. The work must be "secret" in three senses: The work consists of information that no competitor has yet discovered *and* publicized; the work is known only by the claimant and individuals who commit to use it only confidentially and for ends determined by the claimant; and the claimant takes reasonable steps to notify non-confidantes that he intends to keep the work secret and proprietary.

When a claimant satisfies these elements, he is entitled to a normative right protecting a normative interest in determining exclusively the commercial use of the secret, the research to discover or assemble it, and the efforts to reduce it to commercial practice. Primarily, the claimant gets to *use* his work—that is, deploy it to make products that are more attractive than competitors' products on quality, price, or some other margin attractive to customers. To make the fullest use of his work, the claimant is entitled to *determine* how to use the work. He justly claims a right to decide with which products to deploy it. He also justly claims a right to decide whether to deploy and what combination of employees, suppliers, distributors, and licensees to deploy to make most commercially effective use of the secret. He also justly claims a right to sell the secret as a self-standing business asset.

Although my definition speaks of a trade secret as a normative right securing a normative interest, in practice there is very little difference between the social and legal right and the underlying normative interest. In other fields, especially land, chattels, or patents, rights of exclusive control and possession run much broader than any owner's narrow and immediate interests in using their assets. In these fields, rights of control protect a broad and long-range interest in use, their

¹⁵¹ In other words, for scholars interested primarily in normative or conceptual property theory, this Article serves only as a prologue to subsequent scholarship directed to them.

freedom to engage the thing into their life plans over a long time period.¹⁵² By contrast, in trade secrecy, the normative right is as narrow as the underlying use interest. The normative interest focuses only on the claimant's intellectual "work" and (to say the same thing more elaborately) the research to discover or assemble and the efforts to deploy that work commercially. By the same token, no competitor with a secrecy claim over information may justly prevent other competitors from acquiring parallel interests in the same information by similar work of their own.

That limitation explains why trade secrecy institutes a defense for independent discovery. It also explains why and in what sense a trade secret confers a "right to exclude." Trade secrecy does confer such a right, but only in senses somewhat removed from most readers' understandings of the terms "exclusion" and "right." Secret-claimants are entitled to exclusion, but the exclusion is keyed to the intellectual work and its use: Any claimant is entitled to exclude competitors and strangers *only* from using or disclosing without his consent *his* iteration of the work, *his* research and development to generate his work, or *his* efforts to make commercially gainful use of the work. Similarly, claimants are entitled to a "right" in Feinberg's sense, a claim right against unconsented use of their intellectual work and a moral power to decide how to deploy that work. Yet the moral power and the claim right are both limited to avoid conferring on claimants a negative liberty to exclude others from the intellectual content of a trade secret if any other competitor discovers that content independently.

D. A Labor-Based Justification for the Right to a Trade Secret

The case law and commentary set forth at least two explanations why this normative right and interest are justifiable. Older cases¹⁵³ and legal treatises relied on a moral theory of labor. In this theory, anyone who engages in "intellectual labour"¹⁵⁴ deserves a property right exclusively to use and determine the use of the useful intellectual contribution he makes and keeps to himself. Oversimplified a little, labor consists of intelligent and purposeful activity producing goods rationally "beneficial to any particular Man"¹⁵⁵ or "necessary or useful to his Being."¹⁵⁶ To constitute labor, an intellectual work must produce rational benefit. The "value" element of trade secrecy instantiates this requirement: If a mousetrap is rationally beneficial, and the secret helps the businessman make or sell a better mousetrap, the secret is rationally beneficial,

¹⁵² See PENNER, *supra* note 105, at 49-50, 70-72.

¹⁵³ See *Peabody v. Norfolk*, 98 Mass. 452, 457-58 (1868).

¹⁵⁴ 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 298 (1827).

¹⁵⁵ JOHN LOCKE, TWO TREATISES OF GOVERNMENT §II.26, at 286 (Peter Laslett ed., 1989).

¹⁵⁶ *Id.* § I.86, at 205.

too. In addition, to constitute labor, it is also necessary that an intellectual work be minimally novel. The work must consist of an “Invention [or] Art[.]” not already in “the common stock of Mankind.”¹⁵⁷

If “labor” refers to something substantially like the above, legal and social policy should institute a starting presumption against trade secrecy.¹⁵⁸ All competitors start with parallel *liberty* interests in laboring. When competitive information is publicly available—already in the political community’s intellectual common stock—many different competitors may all appropriate it into their own competitive plans and generate rational benefit for themselves. By the same token, employees who acquire the same public information deserve moral powers to exit their firms and use that information in competition against those firms. This justification explains the general character of the liberty interests competitors enjoy thanks to unfair competition law. It also explains why trade secrecy seems a member of the unfair competition family. It also explains why courts take extra care, in disputes involving ex-employees, not to restrain those ex-employees’ liberties to use general skills or knowledge that reasonably competent workers would acquire in the course of working in the same industry.¹⁵⁹

That said, when a claimant-competitor develops a minimally novel intellectual work, his discovery or information gathering constitutes intellectual labor. If his work is doctrinally valuable and non-ascertainable, those elements suggest that the work helps generate products rationally beneficial to customers and that common social knowledge does not know how to generate this rational benefit. The claimant who discovers or assembles new information deserves a reward for having contributed to the discovery or assembly to society’s store of knowledge. That reward consists of the exclusive use of the intellectual work for the increment of time the work’s intellectual content remains secret. Although competitors and ex-employees deserve and have a moral power to compete against a firm, they may not bootstrap that power into a liberty to deploy the firm’s competitive discoveries against it. Trade secrecy’s value and non-ascertainability elements instantiate this moral claim. When a claimant proves these elements, he proves that his secret deserves to be protected not by the weak norms associated with unfair competition but the stronger norms associated with trade secrecy.

¹⁵⁷ *Id.* § II.37, at 294, § II.44, at 299.

¹⁵⁸ I thank Jonathan Barnett and Pamela Samuelson for encouraging me to acknowledge and clarify this point.

¹⁵⁹ *See, e.g.*, AMP Inc. v. Fleischhacker, 823 F.2d 1199, 1202 (7th Cir. 1987); GTI Corp. v. Calhoon, 309 F. Supp. 762, 767-72 (S.D. Ohio 1969); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. d, at 481-82 (1995).

More needs to be said, because some trade scholars believe “[i]t does not appear that any contemporary modern commentator believes in a trade secret theory premised on natural property rights.”¹⁶⁰ Yet this belief is not well-founded. Some scholars have suggested that trade secrecy may be explained on the basis of natural-rights labor principles.¹⁶¹ In addition, none of the objections to labor theory voiced in current scholarship seem convincing. Labor-based rationales are criticized on the ground that they “cannot explain two of the most basic features of trade secret law: its requirement of secrecy, and its concern with the way information is appropriated.”¹⁶² Yet labor theory can explain both. As for secrecy, labor theory requires a property claimant not only to work productively with assets but also to “appropriate” them,¹⁶³ to “bring things within our purposive activities”¹⁶⁴ and signpost to others that they should keep those things out of their purposive activities. This principle is instantiated in trade secrecy’s elements for secrecy and reasonable precautions. Because ideas are nonrival and nonexclusive, ordinarily, the law presumes that information in common social knowledge deserves to be left as common property, which is to say not propertized at all. To avoid that presumption, a claimant must confer on an intellectual work “proprietary marks, and [make it] a distinguishable subject of property.”¹⁶⁵ In trade secrecy, the precautions constitute the proprietary marks, and the secrecy makes it distinguishable from other information in the intellectual commons.

As for “the way information is appropriated,” or trade secrecy’s focus on improper means, that focus instantiates labor theory’s “enough and as good” proviso.¹⁶⁶ In this respect, patents and copyrights present hard justificatory cases, but trade secrecy does not.¹⁶⁷ The moral right to exclusive use of a novel and

¹⁶⁰ Graves, *supra* note 52, at 75; accord Bone, *supra* note 2, at 261.

¹⁶¹ Graves overlooked Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 415-18 (2003), and since Graves’s article was published Michael Risch has expressed some sympathy for a natural-rights labor theory, see *supra* note 69, at 28-33. Although neither Mossoff nor Risch has written a comprehensive explanation of trade secrecy in terms of labor theory, Mark P. McKenna has propounded such a comprehensive account of early trademark law. See Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007).

¹⁶² Bone, *supra* note 2, at 284.

¹⁶³ LOCKE, *supra* note 155, § II.26, at 286, §II.28, at 288-89.

¹⁶⁴ A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 273 (1992).

¹⁶⁵ 2 KENT, *supra* note 154, at 298-99. Accord *Bristol v. Equitable Life Assurance Society*, 30 N.E. 506 (N.Y. 1892).

¹⁶⁶ See LOCKE, *supra* note 155, § II.27, at 288.

¹⁶⁷ See Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, in *COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 43, 51-57 (Adam Thierer & Wayne Crews eds. 2002); Seana Valentine

valuable secret protects *only* the claimant's labor, not the general idea he labored to discover, reduce to practice, and use. A mousetrap maker does not have a right to exclude competitors from laboring to develop blueprints for a mousetrap similar to his. That limitation explains trade secrecy's defense for independent discovery. The mousetrap maker, however, does have a right to stop them from avoiding such labor by stealing his blueprints, eavesdropping around his precautions over them, or bribing one of his employees to supply them. That claim explains the general character of trade secrecy's theories for misappropriation.

To be sure, this explanation leaves a few loose ends—for example, whether reverse engineering counts as labor by competitors on information publicly available from a secret or as misappropriation of the claimant's secret. As a first approximation, however, the labor-based justification seems plausible enough to ground a not-absurd normative interest in trade secrecy.

E. A Utilitarian Justification for the Right to a Trade Secret

Gradually over the last century, the case law and commentary have recast the policies evident in labor theory in utilitarian terms. As the labor-based justification does, so the utilitarian justification also starts with a presumption against trade secrecy. Presumptively, when an idea is readily available and easy to copy and deploy, there is no point in making many individuals discover it individually to deploy to their own uses. When numerous competitors deploy it concurrently, they compete against one another, and the competition generates welfare benefits including cheaper prices or more-varying products. This presumption reaches its limit, however, when competitors copy ideas to such a degree that they discourage their competitors from discovering ideas that are not readily available and take significant effort, time, or capital to discover. Two or three of the elements of trade secrecy (value, non-ascertainability, and to an extent secrecy) establish indirect proxies predicting when this presumption should be rebutted.¹⁶⁸

Trade secrecy narrows protection for business secrets a little further to promote welfare along a different front—entitlement delineation costs.¹⁶⁹ Secrecy and clear precautions signpost to others that a claimant means to keep an

Shiffrin, *Lockean Arguments for Private Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 138, 147-48 (Stephen R. Munzer ed. 2001).

¹⁶⁸ The policies restated in this paragraph are distilled from *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 480, 482-83 (1974); *Abbott Labs. v. Norse Chemical Corp.*, 147 N.W.2d 529, 532-33 (Wis. 1967); *Winston Research Corp. v. Minn. Mining & Mfg. Co.*, 350 F.2d 134, 137-38 (9th Cir. 1965); *Wexler v. Greenberg*, 160 A.2d 430, 433-34 (Pa. 1960). See Claeys, *supra* note 18.

¹⁶⁹ See Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13 (1985).

intellectual work *out* of the intellectual commons. Those two facts provide a clear enough baseline that the law may signal to others that they should abstain from trying to acquire or engage with an intellectual work so signposted. That expectation then reduces some costs on social welfare indirectly. Claimants may be spared the even greater costs of taking extreme anti-disclosure precautions, and they may be encouraged to disclose secrets to potential licensees without forfeiting legal protection.

Although the normative vocabulary this justification uses differs substantially from the vocabulary of labor theory, these two justifications generate substantially similar explanations of the doctrine. Although differences may remain, I assume here that those differences are fairly trivial in relation to the substance of trade secrecy. That said, the utilitarian justification deemphasizes another consideration that is considerably more prominent in the labor justification—the link between normative justification and individual entitlement. To illustrate, let me contrast the labor-based theory briefly with Mark Lemley’s justification for trade secrecy. I choose Lemley’s account because in substance it coincides fairly closely (though not totally¹⁷⁰) with the labor-based account. Those similarities make more striking the differences in conceptual structure.

When the law and non-legal social discourse justify trade secrecy in terms of “labor,” they assume a moral vocabulary in which the individual interest that justifies “labor” does so only in situations in which the interest is coterminous with the welfare of society at large. By contrast, when the law assumes instrumentalist premises, it is much harder to explain why the law needs to focus as much as trade secrecy does on the claims of individual parties to *rights*. As Lemley emphasizes, to many if not most utilitarians in IP scholarship, policy analysis “must be instrumental. We grant rights over secret information for the same reason we grant rights in patent and copyright law—to encourage investment in the research and development that produces the information.”¹⁷¹ Lemley identifies three welfare policies that justify trade secrecy. Protection promotes innovation,¹⁷² spares claimants the costs of self-help in the form of antidisclosure measures, and encourages claimants to disclose secrets to licensees.¹⁷³ However, the law could promote all of these policies without

¹⁷⁰ The most significant difference is this: Lemley’s account treats trade secrecy and patent law as complements. The former applies to intellectual works that are not self-disclosing, while patent applies to works that *are* self-disclosing. See Lemley, *supra* note 19, at 338-41. In my opinion, this account does not explain satisfactorily why patent’s novelty, utility, and non-obviousness requirements are more demanding than trade secrecy’s non-ascertainability requirement. Nor does it explain why trade secrecy excuses and patent law makes tortious independent discovery and reverse-engineering. See Claeys, *supra* note 18.

¹⁷¹ Lemley, *supra* note 19, at 326.

¹⁷² *Id.* at 329-32.

¹⁷³ *Id.* at 332-37.

establishing a legal entitlement in an individual party, giving him a legal expectation that he may conduct designated activities without interference, or warning others that they will “wrong” that party if they interfere with his legal expectations. Law and government policy could instead encourage innovation by letting parties apply to a government agency for research subsidies and then instructing the agency to subsidize research when the likely social benefits outweigh the costs of the research. Law and government policy could also encourage licensing by promising firms who have business secrets that the government will compensate them for lost business opportunities if they share secrets with prospective licensees in negotiations that fall through later.

Trade secrecy pursues neither strategy. It establishes for a secret-claimant bilateral relations not with the government but with another private party or parties. In addition, trade secrecy focuses not on the pros and cons of particular research or development projects, but on more general characteristics like competitive value, non-ascertainability, and secrecy. To be sure, utilitarians can explain both differences as compromises. In such compromise accounts, all IP regimes “channel[] particular inventors to the form of IP protection that best achieves the goals of society.”¹⁷⁴ The value, non-ascertainability, and secrecy elements all provide rough proxies for the likely social utility of particular intellectual works. In other words, the law would detract from social utility if it instructed regulators or judges to acquire more finely-grained information about particular intellectual works, because such information would be more costly to gather and process than it would be revealing. All the same, it is significant that the foundational authorities on trade secrecy focus first on specifying when one has a right (that is, a trade secret) and when one engages in a wrong (that is, misappropriates). By contrast, in the utilitarian account, the private law of trade secrecy builds a structure around parties, rights, and wrongs not because these concepts are familiar and primary in pre-legal life but rather because they are unavoidable and necessary compromises to the constraints of incomplete information. Thus, even when a utilitarian theory explains the substance of trade secrecy, it portrays as derivative structures and institutions which labor theory and law both regard as primary.

F. The Right to a Trade Secret As Conceptual Property

Let me now explain briefly in what respects the normative right in a trade secret (whichever of the two foregoing justifications for the right one prefers to rely on) counts conceptually as a proprietary right. Conceptually, I believe “property” is defined most precisely as a normative right securing an underlying normative

¹⁷⁴ *Id.* at 341.

interest in determining exclusively the use of an external asset.¹⁷⁵ Individuals have interests in the “use” of external assets for a wide variety of reasons. At a minimum, we use what we eat, sleep on, and live in, but we also use external things to plan for our futures, constitute communities, and improve ourselves. We have interests in “determining” the uses of external assets because the freedom to choose how to use things is crucial to our moral agency and our pursuit of the goals our agency entitles us to pursue. Like other “interests” described in Part IV, the interest in property consists of a negative liberty, structured to encourage interest-bearers to pursue affirmative sources of gratification, with due regard of the proper claims of others.¹⁷⁶ For example, trespass ordinarily embodies and declares a normative interest that owners may exclude all unconsented entries for virtually any reason. However, neither trespass nor the underlying normative interest is so “exclusive” as to entitle owners to exclude those who want to commandeer a dock during a storm. As long as this right is tied closely to the storm triggering the claims of necessity, the owner’s normative property interest recedes in light of the victims’ urgent interests in their lives, health, and property.¹⁷⁷

If the foregoing definition of property is accurate, a trade secret counts as conceptual property. A trade secret embodies a property right in relation to an “external asset” because intangible intellectual works are just as much external assets as land or water.¹⁷⁸ Trade secrecy embodies an interest in determining the use of this work because its legal rights protect the secret-claimant’s freedom to decide how best to use the secret in competition, free from free-riding that might reduce or eliminate the legitimate competitive advantage the secret provides. The interest in a trade secret is exclusive because it entitles the claimant to exclude others from acquiring the secret from his research or using it inconsistently with his plans. The interest in use, however, always shapes the exclusion. The interest does not entitle the claimant to exclude others from laboring on their own to discover the intellectual contribution embedded in the secret, only from diverting his rendition of the contribution or his efforts to make beneficial use of it.

This classification will (also) require more elaboration than I can provide here. Let me at least consider, however, one prominent criticism—the one alluded to in section II.C: A trade secrecy cannot be a property right because it does not have a

¹⁷⁵ See Eric R. Claeys, *Exclusion and Exclusivity in Gridlock*, 53 ARIZ. L. REV. 9, 17-28 (2011) (book review).

¹⁷⁶ For much of the foregoing, I have relied on James Penner’s account of the normative interest in property in J.E. PENNER, *supra* note 105, at 49-51. On this point, however, Penner overemphasizes the negative liberty in property and underemphasizes the conception of gratification that limits and shapes the liberty. See *id.* at 50.

¹⁷⁷ See Eric R. Claeys, *The Right to Exclude in the Shadow of the Cathedral: A Response to Parchomovsky and Stein*, 104 NW. U. L. REV. 391, 401 (2010).

¹⁷⁸ See, e.g., PENNER, *supra* note 105, at 50.

boundary-driven “right to exclude.” For example, Oliver Wendell Holmes, Jr., described a property owner as one who is “allowed to exclude all, and is accountable to no one.”¹⁷⁹ It is reasonable to assume Holmes rejected the “property” view of trade secrecy for the “tort” view¹⁸⁰ at least in part because trade secrets do not allow claimants to “exclude all” from the general idea the claimant happened to have discovered and kept secret.¹⁸¹

Conceptually and doctrinally, however, a property right need not have all the characteristics of a strongly boundary-driven right to exclude to count as a property right. The notion of a “right to exclude” puts the cart before the horse. When property consists of an exclusive interest in determining the use of a thing, the ideal uses that shape the range of use determination also determine when the owner may exclude others.¹⁸² In particular, a usufruct entitles the owner to exclusive control and enjoyment of his legitimate uses and use choices—but he may not exclude others from acquiring parallel usufructs in the used resource.¹⁸³ On that basis, seminal American secrecy cases assumed that trade secrets are intellectual usufructs *and* property.¹⁸⁴ A trade secret’s discoverer “has not indeed an exclusive right to [the secret] as against the public, or against those who in good faith acquire knowledge of it; but he has a property in it.”¹⁸⁵

¹⁷⁹ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 246 (1881). See Mossoff, *supra* note 164, at 395-97.

¹⁸⁰ See *supra* note 37 and accompanying text.

¹⁸¹ The same may be said about Merrill’s conception of a right to exclude, Smith’s conception of exclusion, and Penner’s definition of property as a right to exclude others from a thing grounded in an interest in use of the thing. See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 740-45 (1999); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 978-79 (2004); PENNER, *supra* note 105, at 71.

¹⁸² See Claeys, *supra* note 178, at 23-25; cf. Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 HARV. J.L. & TECH. 321 (2009); Larissa M. Katz, *Exclusion and Exclusivity in Property Theory*, 58 U. TORONTO L.J. 275 (2009).

¹⁸³ “What distinguishes usufructuary rights from unowned resources is not the right to use the resource, but rather the right to exclude others from engaging in particular uses of the resource.” Merrill, *supra* note 181, at 746. This passage correctly confirms the general point, but it also illustrates the conceptual error. Merrill erroneously organizes the “exclusive right,” *id.* at 745, not around the general domain of free choice a user acquires in a usufruct but in the “particular uses” that may be delineated from that domain.

¹⁸⁴ See Claeys, *supra* note 18.

¹⁸⁵ *Peabody v. Norfolk*, 98 Mass. 452, 458 (1868). Lemley approximates this understanding, *supra* note 19, at 325, 329-30, although he does so using unhelpful “right to exclude” terminology. The account given in the text resolves problems that Deutsch does not satisfactorily consider in *supra* note 52, at 325-58.

G. The Right to a Trade Secret in Social Practice

Let me restate what this Part has established by illustrating in relation to the three most familiar fact-patterns from trade secrecy disputes: competitive-intelligence gathering, employer-employee disputes, and disputes involving licensors and licensees. In intelligence gathering, trade secrecy institutes norms that are exceptions to more general norms (declared by unfair competition principles) that most forms of competition are legitimate. Ordinarily, if information is generally known in a field of business, competitors enjoy, and reasonably expect that they and their rivals all enjoy, concurrent moral powers to appropriate and deploy that information to commercial advantage. In addition, if an intellectual work is not generally known, each competitor enjoys, and reasonably expects that it and its rivals all enjoy, concurrent moral powers to discover and deploy that work to commercial advantage through their own research and development. If, however, a claimant discovers a valuable secret, keeps it secret, and clothes it in reasonable precautions, the same norms endow him with an *in rem* claim right to exclude others from acquiring the fruits of his research or from using the research inconsistently with his direction. That claim right imposes on competitors a correlative *in rem* duty, to abstain from acquiring or using secrets marked off as proprietary and confidential by reasonable precautions.

These *in rem* normative powers, rights, and duties lay groundwork on which a claimant may build more intricate *in personam* normative relations, in employer-employee and licensor-licensee fact-patterns. The moral power to enjoy the exclusive use of the secret implies subsidiary powers to establish agency or contractual relationships involving the secret. If a claimant thinks he can not only discover a tool design but also assemble the tool in-house, the moral power entitles him to hire employees to follow his design to build the tool. If the claimant finds it more advantageous to out-source the assembly, however, the moral power also entitles him to enter into relations with prospective licensees. In either case, because the claimant deserves the exclusive use of the secret, if he enters into valid confidentiality agreements with employees or licensees, he acquires *in personam* claim rights that they keep the secret confidential and use it only consistently with his general intentions and direction. That claim right entails correlative *in personam* duties in employees or licensees.

Yet these ideal prescriptions remain only ideals. In real life, many individuals and competitors may prefer to disregard social norms when respect for such norms frustrates their pursuit their own individual advantages understood selfishly. Even so, the ideal prescriptions serve at least two crucial purposes in private law.

One purpose is philosophical. The foregoing account of the relevant normative interests supplies trade secrecy law with legitimate authority to coerce

parties. This account supplies the legitimate authority missing from FLP's account of trade secrecy.¹⁸⁶ On one hand, competitors do have a legitimate labor interest in gathering business information so low-grade that it is common industry knowledge or virtually indistinguishable from such knowledge. On the other hand, that interest does not entitle any competitor to appropriate valuable and non-ascertainable secrets that competitors have marked off with reasonable clarity as confidential and proprietary. The duty to refrain from acquiring or using such secrets is the sacrifice every competitor must make to enjoy the moral power and claim right that no competitor acquire or use its secrets. In the same spirit, this philosophical account can explain, as FLP cannot, why the law may justly stop any one competitor from claiming that *its* real interest is in competing down-market, by copycatting. When competitor A discovers a valuable secret, he adds to the information available throughout the political community. By classifying the discovery as valuable intellectual labor, trade secrecy aligns A's narrow competitive interests with everyone's general interest in having a wider array of prices and choices. And even if competitor B loses market share to A, B's interests are not set back in any meaningful way. A's secret does not deprive B of the right to compete with other advantages. Indeed, A's secret does not even prevent B from discovering the intellectual content of the secret. In addition, if B could appreciate its interests from a longer-range view, sooner or later A's discovery will trickle out of A's exclusive control into the society at large—by reverse engineering, independent discovery, or other avenues—and eventually percolate to B.

This explanation reconciles B's narrow pursuit of his immediate advantage to his more enlightened interest in being the member of a well-ordered society, in the manner in which a well-socialized member of A and B's political community would reconcile the narrow and the enlightened interests. FLP could arguably get to the same point by saying that trade secrecy encourages wealth-creating discovery or information-gathering and simultaneously bars wealth-diminishing espionage.¹⁸⁷ Again, however, that account justifies the law solely in relation to the advantages the *society* gets from the law—not at all in terms of why it is in the coerced party's normative interest to suffer coercion benefiting society and not the party. In this respect, FLP are abstracting from a crucial social function of law.

The ideal account of trade secrecy serves a second purpose—in law. In different recurring act-situations, tort, contract, remedy, and unjust enrichment law adjust their general principles to secure the normative right and interest in a trade secret when it should be secured. Let us turn to consider how those fields make such adjustments—starting with the tort of misappropriation.

¹⁸⁶ See *supra* section IV.A.

¹⁸⁷ See Friedman et al., *supra* note 97, at 68.

VI. MISAPPROPRIATION

A. *Protection, Recourse, Rectification—and Specification*

Trade secrecy's proprietary norms provide focus to misappropriation doctrine so the doctrine may serve its corrective functions. This assertion deserves clarification, for different readers may understand differently what it means to say that misappropriation is "corrective." At a fairly high level of generality, private law tort theorists have identified three competing accounts of tort.¹⁸⁸ In one, the "remedial" approach, corrective justice "states that *individuals who are responsible for the wrongful losses of others have a duty to repair the losses.*"¹⁸⁹ This approach makes corrective justice "the core of tort law."¹⁹⁰ In another approach, the "recourse" approach, the core of torts focuses on "what sort of conduct our legal system defines as wrongfully injurious toward another such that, when committed, the victim is entitled to exact something from the wrongdoer."¹⁹¹ The remedial view suggests that normative questions about the scope of rights and the character of wrongs are external to tort's core; by contrast, the recourse view suggests that such questions are at least as central as remedial concerns.¹⁹² In the third view, the "protective" view, the main aim of tort is to impose and enforce "primary obligations to avoid inflicting certain harms."¹⁹³ In this approach, corrective justice and recourse are "normatively subordinate" to whatever controlling norms justify legal rights: "[T]ortfeasors are obligated to undo the harms wrought by their torts [because] they have failed to discharge their primary responsibilities to avoid committing those torts in the first place."¹⁹⁴

¹⁸⁸ For a helpful enumeration, see Gregory C. Keating, *Is Tort a Remedial Institution?* 10-24 (USC Legal Studies Research Paper No. 10-10), available at http://paccenter.usc.edu/assets/docs/contribute/C10_11_paper_000.pdf.

¹⁸⁹ COLEMAN, *supra* note 69, at 15. As Coleman defines corrective justice, it does not necessarily require the party responsible for a loss to undo the loss in a proceeding that makes him answerable to the party suffering the loss. Others define corrective justice so that it requires an "integrated unity of doer and sufferer." WEINRIB, *supra* note 102, at 213.

¹⁹⁰ COLEMAN, *supra* note 69, at xiii. *See also id.* at 9-10, 36.

¹⁹¹ John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 919 (2010). *See also* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998).

¹⁹² *See* GOLDBERG & ZIPURSKY, *supra* note 10, at, 69. *See also* Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003).

¹⁹³ Keating, *supra* note 188, at 2.

¹⁹⁴ *Id.* at 3.

For the purposes of this Article, we need not settle which of these three imperatives is most central to tort.¹⁹⁵ In practice, tort fulfills all three.¹⁹⁶ To an extent, misappropriation doctrine protects secrets, by imposing duties not to misappropriate. To another extent, when a non-owner violates this duty, his violation triggers in doctrine a second-order duty to repair any losses the owner suffers from the misappropriation. To yet another extent, the field of misappropriation provides a scheme giving the owner recourse against the non-owner for the latter's wrong. Yet all three accounts recognize and leave room for one last imperative: Tort law *specifies* normative interests. In Stephen Perry's description, tort "makes claims of repair sensitive to the nature of the interest affected as well as to the character of the injurer's conduct."¹⁹⁷ Even if this function is ancillary to all three accounts just recounted, it may help explain the actual content of tort better than any of those three. As Coleman explains:

[M]uch of the content of the first-order duties that are protected in tort law is created and formed piecemeal in the course of our manifold social and economic interactions. These generate conventions that give rise to expectations among individuals regarding the kind and level of care they—we—can reasonably demand of one another. The content of these duties is then *further* specified in the practice of tort law itself.¹⁹⁸

This specifying function has not received the scholarly attention it deserves in corrective justice and related fields.¹⁹⁹ This neglect is unfortunate—and it confirms the general impression that tort's "language of wrongs [seems] dated, squishy, and inapt."²⁰⁰ To push back against those impressions, subsequent private law tort scholarship must show how tort doctrine adapts to fit and secure logically separate and prior normative interests. This Part illustrates using trade secrecy misappropriation. The field of tort supplies several basic design choices

¹⁹⁵ For what it is worth, I agree with Keating because his account comes closer to Blackstone's: "The primary objects of the law are the establishment of rights, and the prohibition of wrongs," with the former "necessarily prior" to the latter. 3 BLACKSTONE, *supra* note 114, at 1-2. Remedial approaches put the cart before the horse by putting remedies before rights-specification and wrong-prohibition. See Keating, *supra* note 191, at 3. Recourse theory conflates the various functions involved.

¹⁹⁶ See, e.g., 3 BLACKSTONE, *supra* note 188, at 2 (The law of torts exists "to protect the weak from the insults of the stronger": "[t]he more effectually to accomplish the redress of private injuries," and to restore "infringement or privation of the private or civil rights belonging to individuals, considered as individuals.").

¹⁹⁷ Stephen R. Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381, 406 (1992).

¹⁹⁸ COLEMAN, *supra* note 71, at 34. Accord Goldberg & Zipursky, *supra* note 191, at 975-76; Keating, *supra* note 188, at 37.

¹⁹⁹ See Claeys, *supra* note 117, at 1394-97, 1412-17.

²⁰⁰ Goldberg & Zipursky, *supra* note 191, at 919.

that may be taken off the rack and fitted to particular interests—especially relating to the harm requirement, scienter, and defenses. In trade secrecy, misappropriation doctrine applies those basic design choices to help doctrine approximate the normative interest described in Part V.

B. The Scope of Misappropriation's Possessory Interest

To begin with, misappropriation doctrine sifts out cases in which the plaintiff does not have a normative right along the lines explained in the last Part. Misappropriation law does so simply by making the plaintiff prove as part of his *prima facie* case that he may satisfy all four of the elements necessary to establish a legal trade secret. That fact, in turn, confirms Tyler's observation:²⁰¹ By requiring the plaintiff to demonstrate he has a legitimate right in a secret, misappropriation excludes as many disputes as it encompasses.²⁰² If B acts badly without acting badly in relation to A's proprietary interest in the exclusive use of his secret, A may claim a tort to some other interest but he may not claim he has suffered misappropriation of a trade secret. Since neither confidentiality norms nor unfair competition principles can explain why misappropriation requires a plaintiff to prove value, secrecy, non-ascertainability, or precautions, the elements for proving a trade secret call these accounts into question and confirm the proprietary account.

Separately, the foregoing account can also explain what might otherwise seem a puzzling rule from *Fanberg*:²⁰³ If locksmiths reverse-engineer Chicago Lock's codes in the course of opening its locks for lock-buying customers, neither the smiths nor the Fanbergs misappropriate if the former exchange the codes to the latter for the latter to publish. Chicago Lock has a normative interest in trade secrecy, but that interest does not entitle it to exclude the locksmiths from reverse-engineering the codes from locks in public circulation.

That relation between interest and claim provides further evidence confirming how utilitarian justifications must be revised substantially to fit trade secrecy. From an instrumentalist utilitarian perspective, *Fanberg* implicates several different and conflicting social policies: adequate privacy for lock customers; adequate incentives for Chicago Lock and competitors to develop secure locks; and adequate opportunities for Fanberg and other locksmiths to compete. Ideally, an instrumentalist utilitarian calculus would want to quantify the effects of different legal rules on all these policies—without regard to the identities of the parties. Yet the law does not try to tally these costs or benefits in so detailed or case-specific a calculus. As *Fanberg* shows, the law uses standing requirements

²⁰¹ See *supra* note 55 and accompanying text.

²⁰² See *supra* notes 49-51 and accompanying text.

²⁰³ See *supra* notes 71-76 and accompanying text.

to make specific parties assert specific policies. The designer of a high-end lock is entitled to complain about free-riding on its design but not about threats to the privacy of its customers, while the customers may complain about the latter but not the former. In utilitarian terms, standing requirements simplify the trier of fact's determinations by creating presumptions. Since customers have the strongest selfish stakes in making sure the law protects privacy at socially efficient levels, if no customers intervene, the law may presume the dispute does not implicate privacy policies significantly.

This indirect-utilitarian explanation can account for the law's fixation with party standing, but the explanation is more convoluted than the explanation that follows from corrective justice. According to corrective justice, the law must restore to a party deprived of an interest legal rights approximating that interest, without conferring on a party rights that extend beyond the interest. The Ninth Circuit insisted on the separations corrective justice prescribes. On one hand, Fanberg could not "be said to have procured the individual locksmiths to breach a duty of nondisclosure they owed to [Chicago Lock], for the locksmiths owed no such duty."²⁰⁴ On the other hand, if the locksmiths breached duties of confidence to their lock-owning clients by disclosing those clients' lock key codes to Fanberg, their breaches "could give rise only to an action by 'injured' *lock owners* against the individual locksmiths, not by the Company against the locksmiths or against the Fanbergs."²⁰⁵

In addition, *Fanberg* lends weight to proprietary and competition-based accounts of trade secrecy over alternative accounts. If trade secrecy sounded ultimately in confidential relations, *Fanberg* could have been decided for either party. On one hand, neither the Fanbergs nor the locksmiths stood in any confidential relation with Chicago Lock; on the other hand, the conduct of the former still jeopardized confidential interests held by the latter and its customers. Yet *Fanberg* presumed and enforced anti-monopoly norms that seem internal to trade secrecy.²⁰⁶ Those norms follow from unfair competition policy in a fairly straightforward manner. Absent more specific proof that Fanbergs or the locksmiths were acting in some unfair way, both seem to have been exercising "[t]he freedom ... to compete for the patronage of prospective customers," a "fundamental" imperative in unfair competition law.²⁰⁷ The same norm also informs property law and policy, however, when "property" is construed properly. If property consists of a right to determine exclusively the use of an external asset, it justifies near-monopolies over individual assets *only* when such monopolies enlarge the concurrent and beneficial uses of many different assets more

²⁰⁴ *Chicago Lock Co. v. Fanberg*, 676 F.2d 400, 405 (9th Cir. 1982).

²⁰⁵ *Id.*

²⁰⁶ *See id.*

²⁰⁷ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. a, at 3 (1995).

effectively than more qualified use rights do. When the Ninth Circuit cited monopoly concerns to limit the legal interests to which Chicago Lock could appeal, it cited norms associated with both unfair competition and property—not confidentiality.

C. Misappropriation's Rights-Based Structure

The proprietary account, however, can explain another feature of misappropriation that *cannot* be explained by unfair competition policies—misappropriation's rights-based structure. Ordinarily, unfair competition law requires a plaintiff to prove that the defendant's action "causes harm" to the former's business interests.²⁰⁸ The harm requirement helps keep robust the liberty interest in competing freely, for a broad interest "necessarily contemplates the probability of harm to the commercial relations of other participants in the market."²⁰⁹ By contrast, trade secrecy policy qualifies this liberty of free competition by imposing a duty on any competitor to refrain from interfering with any other competitor's exclusive use of his trade secrets. Doctrinally, misappropriation implements that trade secrecy norm in tort by leaving causation and harm out of the plaintiff's *prima facie* case. That rights-based structure could embody and secure confidentiality interests, but the same structure is commonly associated with normative proprietary interests. As Coleman explains, generally, the autonomy conferred by a rights-based tort entitles a property owner "to specify fully the terms of transfer *ex ante*, and to demand consent as a condition of legitimate taking or transfer. If all of the rights one has in property are property rights, then any action contrary to the will or autonomy of the rights-holder is a rights invasion."²¹⁰

This relation between exclusive use and autonomy explains why the "act" in a misappropriation tort focuses on acquisition, use, or disclosure, and also why the doctrine focuses specifically on those acts when they occur without the plaintiff's *consent*. As a matter of private law principle, a defendant may not be deemed liable for a tort unless she commits some act wronging the plaintiff.²¹¹ Because a secret's claimant enjoys an interest in determining exclusively the use of his work for his competitive enterprises, he must have the right and power to exclude others from using his work (or his research, or his efforts to deploy it) without his

²⁰⁸ *Id.*; *see id.* § 1 cmt. b, at 5.

²⁰⁹ *Id.* § 1 cmt. a, at 4.

²¹⁰ Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 *IND. L.J.* 349, 377 (1992). *Accord* GOLDBERG & ZIPURSKY, *supra* note 10, at 228-31.

²¹¹ *See, e.g.*, Francis Bohlen, *The Moral Duty to Aid Others As a Basis of Tort Liability*, 56 *U. PA. L. REV.* 217, 219 (1908) (noting and criticizing the traditional distinction between non-feasance and misfeasance).

consent. Since the claimant cannot enjoy the exclusive competitive advantage from the secret unless it remains secret, the interest also extends to a right and power to prevent others from acquiring or disclosing his work without his consent.²¹² Once trade secrecy norms commit to conferring on a claimant that right and power, misappropriation doctrine implements them by instituting a rights-based tort qualified by a consent element.²¹³

D. Improper Means

Yet misappropriation would be overbroad if it declared tortious *any* unconsented acquisition, use, or disclosure of a secret work, because the normative interest in a trade secret does not make illegitimate independent work or reverse engineering. Misappropriation could be further specified in one of two ways.

One way²¹⁴ is to qualify the *prima facie* cause of action further. The law may add an extra element or elements to the standard tort to focus misappropriation *only* on unconsented acts of acquisition, use, or disclosure that are somehow “wrongful.” “Wrongful,” in turn, hearkens back to the normative justifications entitling claimants to determine exclusively the use of their secret competitive discoveries and research. Misappropriation doctrine adds such an element or elements. At a high level of generality, the notion of “improper means” fills in this notion of wrongfulness;²¹⁵ more specifically, each of the four theories of misappropriation does so.

Three of the four theories of misappropriation enumerate what counts as unjustifiable unconsented use of a trade secret in an act situation that seems likely to recur in practice. Most commonly, a defendant uses improper means in the general sense by breaching an *in personam* obligation of confidentiality to the secret-claiming plaintiff. The breach of confidentiality may give rise to other wrongs outside of tort, especially in contract or the law of confidential relations. In principle, however, the breach also gives rise to a wrong peculiar to trade secrecy. The duty of confidence induces the secret-claimant to disclose the secret; the breach then seemingly frees the confidante to use it inconsistently with the claimant’s rightful domain of use determination. From the standpoint of the

²¹² A defendant is liable for acquiring a secret only under the improper-means theory of misappropriation. That limitation makes sense. Breach of confidence cases presume that the defendant-confidante acquired the secret legitimately; the wrong is in using or disclosing the secret inconsistently with the confidentiality arrangement. Similarly, there is nothing inherently wrong with being exposed to an accidentally disclosed secret or to a secret proffered by a third party who misappropriated it. It *is* wrong, however, then to use or disclose it having reason to know it was accidentally disclosed or previously misappropriated.

²¹³ See Keating, *supra* note 188, at 25.

²¹⁴ The other will be taken up *infra* section VI.F.

²¹⁵ See UNIF. TRADE SECRETS ACT § 1.

normative interest in a trade secret, the confidante ends up committing the same wrong to the secret-claimant as if he had stolen the secret.

The proprietary account of trade secrecy also explains, as other accounts do not, why it is almost always unjustifiable for a defendant to use or disclose a secret he acquires by accident or after someone else's prior misappropriation. These rules contradict general unfair competition norms. Under those norms, ordinarily, B deserves a liberty to compete by any means that do not involve theft, lying, or other acts wrongful to A. One would need to strain to explain why B competes unfairly by using against A information that he acquired without stealing from A. Now, confidentiality norms can explain trade secrecy's restraints on double misappropriation. Those restraints protect A's interests in keeping secrets confidential by instituting an anti-circumvention rule: B may not profit from A's confidential information simply because C and not B misappropriated the information.²¹⁶ This explanation, however, does not apply very persuasively to accidental disclosures. If inadvertent disclosure of an attorney-client communication can extinguish the client's interest in confidentiality, and if trade secrecy are grounded ultimately in confidentiality norms, the disclosure of a trade secret should extinguish a claimant's interest.

By contrast, misappropriation's accidental disclosure rules make much more sense as applications of proprietary norms. These rules protect for a secret-claimant his exclusive discretion to determine the use of *his* intellectual work. Assume that a secret escapes inadvertently, but that the secret-claimant signposts adequately that he means to continue to assert dominion and confidential status over the secret. The signposting provides enough warning (legally, "reason to know")²¹⁷ to strangers who stumble on the secret that they owe an *in rem* duty to exclude themselves from engaging with the work until due diligence indicates otherwise. The precautions give trade secrets the "keep off" characteristic that citizens associate with tangible property.

Of course, the proprietary interest developed in part V cannot explain every feature of the doctrine relevant in accidental-disclosure or double-misappropriation disputes. In particular, the account just described places considerable stress on the scope of reasonable precautions.²¹⁸ The justification and concept of the interest in a trade secret cannot settle definitively all questions about the scope of such precautions. Yet the foregoing account focuses and compartmentalizes questions about the misappropriator's duty and the claimant's precautions. Those doctrines must be structured as most likely to secure to

²¹⁶ A similar anti-circumvention principle explains some tort doctrines, like some applications of vicarious liability. See COLEMAN, *supra* note 69, at 36.

²¹⁷ UNIF. TRADE SECRETS ACT § 1(2)(ii)(B).

²¹⁸ See, e.g., Elizabeth A. Rowe, *Contributory Negligence, Technology, and Trade Secrets*, 17 GEO. MASON L. REV. 1 (2009).

claimants the interests they generally enjoy in determining the uses of their secrets.

Finally, the account of the normative interest set forth in section V.C explains why misappropriation doctrine keeps a specific category of “improper means” as a backstop to these three specifically-enumerated categories of improper means. Although space prevents me from covering all the ins and outs of improper means, here it suffices to consider the anti-competitive-intelligence gathering rule from *Christopher*. This principle is hard to explain through unfair competition principles. That body of law presumes that most means of competition are fair, and intelligence gathering is arguably fair. It is also hard to explain through confidentiality principles, because competitors do not owe any duty of confidence to a secret-claiming rival.

Yet the principle makes perfect sense as a specification of a normative proprietary interest in a secret. At the beginning of its discussion of improper means, the Fifth Circuit insisted that du Pont’s competitor “has a right to use [the methanol-making] process only if he obtains this knowledge through his own research efforts, but thus far all information indicates that [he] has gained this knowledge solely by taking it from DuPont at a time when DuPont was making reasonable efforts to preserve its secrecy.”²¹⁹ The court made the normative distinctions described in Part V. The normative interest in a trade secret imposes an *in rem* duty on all strangers to exclude themselves from the secret-claimant’s work, research to discover it, or efforts to make gainful use of it. To be precise, since the claimant’s proprietary interest is conditioned on his taking reasonable efforts to signpost that the secret is a proprietary secret, strangers owe an *in rem* duty to exclude themselves from accessing secrets marked off by reasonable precautions.

Readers may object on one of a few grounds. Again, the normative interest in a trade secret cannot explain all the features of reasonable precautions—say, whether and how much the “reasonability” of precautions should vary as intelligence-gathering technology varies. The account propounded here, however, is adequate if it can explain why misappropriation makes reasonable precautions an important legal category.

Separately, readers may protest that *Christopher* should not be taken too seriously—that the case applies to facts so extreme that it should not be treated as deeply revealing of misappropriation’s true character.²²⁰ I have a few responses. To begin with, *Christopher* is not aberrational. Shortly after the case was handed down, a case comment treated the case sympathetically on the ground that it made

²¹⁹ E.I. duPont deNemours & Co. v. Christopher, 431 F.2d 1012, 1016 (5th Cir. 1970), *cert. denied*, 400 U.S. 1024 (5th Cir. 1971).

²²⁰ I thank Pamela Samuelson and Benjamin Zipursky for encouraging me to respond to this objection.

patent norms the *Restatement (First) of Torts* had suspected to be latent in trade secrecy.²²¹ If *Christopher* had seemed an outlier, it is unlikely that the drafters of the *Restatement (Third) of Unfair Competition* would have used its facts to supply one of the *Restatement's* five illustrations for improper means.²²² Nor is the case unique. For example, in 1985, a Minnesota court of appeals affirmed a trial ruling letting a jury decide whether a competitor used improper means by instructing employees to search the trash of another competitor for discarded customer lists.²²³

More generally, this objection misunderstands the nature of this Article's argument. Because I am proposing a positive conceptual account, my account should be judged by whether it makes more sense of more doctrines and important structural features of trade secrecy than other accounts. I acknowledge that *Christopher's* holding is only one of many rules to be explained. Thus far, however, I have relied on it only as one of six facts confirming the proprietary account.²²⁴ The proprietary account is contradicted to some extent by the fact that *Masland* and other authorities suggest that trade secrecy does not declare a property interest.²²⁵ Yet the proprietary account can explain why that suggestion is conceptually wrong, and it can also identify a culprit for the conceptual confusion. In addition, the conceptual burden that applies to the proprietary account applies with to equal force to other accounts. Thus far, the confidentiality-based account can explain only two of the six doctrines explained by the proprietary account,²²⁶ and the competition-based account can only explain one.²²⁷ We have more doctrines and features to consider, but the trend is already fairly clear. In addition, it is revealing that critics do not explain *Christopher*—

²²¹ To the extent that this Comment criticized *Christopher*, it did so on the ground that the case's discussion of "improper means" was so vague as to require replacement by trade secrecy statutes. See Note, *supra* note 42, at 381-85.

²²² See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 43, cmt. c, ill. 3 at 494-95 (1995); see *supra* note 40 and accompanying text.

²²³ See *Tennant Co. v. Advance Mach. Co.*, 355 N.W.2d 720, 725-26 (Minn. Ct. App. 1984).

²²⁴ The elements for establishing that information counts as a legally-protected trade secret; the rule from *Fanberg*; misappropriation's rights-based structure; and misappropriation's doctrines for double misappropriation, accidental disclosure, and *Christopher*-style competitive-intelligence gathering.

²²⁵ See *supra* note 37 and accompanying text.

²²⁶ Why misappropriation has a rights-based structure, and why double misappropriation is tortious, but not why the elements of trade secrecy focus on value and non-ascertainability and not a confidential relation, the *Fanberg* rule, the prohibition against use of accidentally disclosed secrets, or the prohibition against *Christopher*-style competitive-intelligence gathering.

²²⁷ The *Fanberg* rule, but not why the law defines the elements of trade secrecy as it does, why misappropriation has a rights-based structure, or why the law deems wrongful double misappropriation, use of an accidentally disclosed secret, or *Christopher*-style intelligence-gathering.

rather, they propose to “eliminate” the case’s holding from trade secrecy doctrine.²²⁸ A conceptual analysis is not automatically wrong because it deals with objections as Procrustes dealt with his hotel guests, but example-chopping certainly does make such an analysis seem less persuasive.

E. Scienter

The proprietary account of misappropriation also clarifies why each of the four misappropriation theories chooses the standard it sets for scienter. Torts are often categorized by whether their *prima facie* cases require the plaintiff to prove that the defendant acted intentionally or negligently or instead impose strict liability by dispensing with any proof of state of mind. As Goldberg and Zipursky recognize, “[i]t is a weakness of this tripartite framework that wrongs such as trespass and nuisance defy its categories,” for trespasses and nuisances “[are] genuine wrong[s].”²²⁹ Misappropriation doctrine confirms Goldberg and Zipursky’s criticisms. It also confirms how misappropriation doctrine is parasitic on the normative interest in the exclusive use of the trade secret.

Doctrinally, in misappropriation, the dominant form of scienter is inquiry notice. The scienter is explicit in accidental disclosure and double-misappropriation disputes. Doctrine expressly requires the plaintiff to prove that the defendant acted with at least “reason to know” that the information acted on was a trade secret and that the use or disclosure of that information might be wrongful.²³⁰ Although improper means doctrine does not expressly require reason to know, cases like *Christopher* implicitly require it. Improper means circumvent precautions reasonably likely to communicate—that is, put others on inquiry notice—that the claimant intends that his work is meant to be kept secret, confidential, and proprietary. Inquiry notice is also implicit but easy to establish in cases involving a breach of a duty of confidentiality. When an employee or licensee stands in a confidential relation with a secret-claimant, the relation provides the former ample reason to know he is dealing with confidential information.

Neither normative justification nor conceptual explanation can prove that misappropriation doctrine *requires* inquiry notice or any other precise standard for scienter. One can appreciate as much by considering conversion, a tort protecting an interest no one doubts to be a proprietary interest. Conversion common law imposes liability on a strict-liability basis,²³¹ but the UCC exception for good-faith purchasers is accepted widely enough to count as a universal statutory

²²⁸ Bone, *supra* note 2, at 302-03.

²²⁹ GOLDBERG & ZIPURSKY, *supra* note 10, at 229.

²³⁰ UNIF. TRADE SECRETS ACT § 1(2)(ii)(B), (C).

²³¹ *See, e.g.*, Epstein, *supra* note 58, at 60.

exception to the common's law's presumption.²³² Nevertheless, if tort institutes scienters on a spectrum ranging from strict liability at one extreme to specific intent to harm on the other, both of the conversion scienters are far closer to the strict-liability end than they are to faulty scienters in the middle or intentional scienters at the other end. In addition, strict or inquiry-notice scienters make sense for trade secrecy if trade secrecy is grounded in interests in confidentiality or a proprietary claim. As with other property torts, “[f]ault is simply irrelevant” to the wrong of misappropriation, because the right of exclusive use determination conferred by a trade secret “would be fatally compromised by tolerating all reasonable (or justified)” uses or disclosures of a secret, “without regard to whether consent was given to those [uses or disclosures].”²³³ Inquiry notice may appropriately reflect a slight concession or adjustment to the fact that trade secrets consist of intangible information that non-owners might ordinarily assume to be unowned. Otherwise, however, trade secrets remain rights of control, and such rights “are a species of autonomy rights.”²³⁴ Confidentiality interests deserve protection under similarly strict scienter rules because they protect autonomy claims similar to those of property rights.

This explanation makes better sense of misappropriation than more general accounts of corrective justice and civil recourse do of other torts. For instance, Goldberg and Zipursky argue that strict liability makes no sense in some contexts (especially *Rylands v. Fletcher* liability for harms caused by accidental trespassory land invasions) because the conduct in those cases cannot be wrongful without bad scienter.²³⁵ This argument mistakenly separates tort's analysis of scienter from property's justification for the property interest. As Perry explains, strict liability is “best understood as relying on conceptions of fault”: “Wherever strict liability is said to have a hold in the common law of torts, it is never *general* strict liability There is always incorporated into the relevant doctrine a criterion of liability that focuses on some more specific aspect of the defendant's conduct.”²³⁶ Misappropriation does so largely by enumerating four specific “wrongs” by which alleged misappropriators may access or use secrets without discovering those secrets by their own independent efforts. There may be normative reasons why misappropriation should also require a claimant to prove that an alleged misappropriator accessed or used the secret with inquiry notice—but the doctrine clearly renders traditional notions of fault inapposite.

²³² See U.C.C. § 2-403 (2005).

²³³ See Keating, *supra* note 188, at 34, 38.

²³⁴ *Id.* at 33.

²³⁵ See GOLDBERG & ZIPURSKY, *supra* note 10, at 229-30, 267-68.

²³⁶ Perry, *supra* note 197, at 404.

F. Independent Discovery and Reverse Engineering

There is another way to confirm how misappropriation fits general “tort” menu options to the specifics of a proprietary normative interest in a trade secret—to abstract from the elements of a *prima facie* case for misappropriation and focus on the main affirmative defenses. Ordinarily, a field of tort “reach[es] sound systematic results by an indefinite series of approximations, each of which will move of closer to a fuller statement of the substantive law.”²³⁷ The *prima facie* case makes a first approximation, affirmative defenses then provide second approximations, the law may supply the plaintiff with responses or justifications to those defenses, and so on. Torts often differ in feel and character depending on how much work the *prima facie* case and main affirmative defenses do in these approximations. In trespass, the *prima facie* case sorts most cases, and defenses and privileges winnow out only a few false positives. By contrast, in negligence, the *prima facie* case sweeps in many false positives, contributory negligence screens many of them out, and last clear chance then restores some cases that contributory negligence treats as false negatives.²³⁸ Misappropriation doctrine differs substantially from both approaches. The *prima facie* case and the two main defenses, independent discovery and reverse engineering, hone in on virtually the same set of disputes by two different routes.²³⁹

Imagine that the *prima facie* cause of action for misappropriation were much stricter than it is under controlling law: The plaintiff must prove that he has a trade secret, that the defendant committed an act using or disclosing the secret, and that this act was unconsented. Imagine also that independent discovery and reverse engineering provided defendants with the only means to avoid liability.²⁴⁰ This hypothetical regime would expand the reach of misappropriation liability slightly, but very little. The regime would not generate different results in disputes over breaches of confidentiality. In both actual law and the hypothetical, the cases would focus on the plaintiff’s consent. In cases involving accidentally-disclosed or twice-misappropriated trade secrets, existing law excuses those who access or use trade secrets innocently, while the hypothetical doctrine would hold innocent defendants liable. Otherwise, the defenses rule out liability in all the situations in which the plaintiff probably could not prove liability anyway—because the defendant did not steal or copy the plaintiff’s secret.

²³⁷ Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEG. STUD. 165, 166 (1974).

²³⁸ *See id.* at 174-213.

²³⁹ Assuming that the plaintiff has a legitimate trade secret, and that the discussion focuses on liability and not remedy.

²⁴⁰ Besides denying that they committed an act of use or disclosure, or arguing that the plaintiff actually consented to the use or disclosure.

The hypothetical helps clarify the most important function of independent discovery and reverse engineering: Both provide safety valves on improper-means misappropriation doctrine. Because “improper means” is an ambiguous phrase, courts may construe it not as section VI.D suggested but rather as a placeholder justifying a wide range of condemnatory judgments on different competitive practices. The more comprehensively “improper means” is construed, the more closely it approximates the hypothetical strict-liability theory of misappropriation. But independent work and reverse engineering both allow defendants to escape strict liability or nebulous improper-means liability—by asserting interests in *their* own discoveries morally equivalent to the interests the plaintiffs assert in their secrets.

Indeed, in particularly close improper-means disputes, *prima facie* doctrine really converges with the defenses for independent discovery and reverse engineering. For example, in *Pioneer Hi-Bred International v. Holden Foundation Seeds*, Holden developed a line of hybrid seed corn (“L120”) that was virtually identical in DNA sequence to a competing “H3H” line of Pioneer. Holden denied having any H3H and argued it had discovered L120 independently;²⁴¹ Pioneer alleged but lacked direct evidence to prove that Holden had developed L120 by stealing or otherwise obtaining H3H improperly.²⁴² Pioneer proved “improper means” circumstantially with a variation on *res ipsa loquitur*. It introduced evidence that the two lines were substantially similar in DNA makeup, that Holden’s founder had tried to acquire many different Pioneer seed lines, that Holden had only “faulty” records explaining how it developed L120, and that all L120 seeds met with an “untimely disposal” before litigation.²⁴³ The trial court and the U.S. Court of Appeals approved of this circumstantial method of proof: In the absence of complete information, it was appropriate that the merits to focus on whether “Holden’s L120 story [was] less persuasive than Pioneer’s misappropriation claim.”²⁴⁴

Superficially, *Pioneer Hi-Bred* seems novel in relation to rules of evidence and not trade secrecy doctrine. The case does not announce any new insights about improper means on one hand or reverse engineering or independent discovery on the other. At a deeper level, however, the case confirms the proprietary account. The Eighth Circuit’s rules are harder to justify as extensions of unfair-competition or confidentiality norms. Holden had no confidential relations with and was a legitimate competitor of Pioneer. Maybe *Pioneer Hi-Bred*’s rule could be justified as an anti-circumvention rule protecting confidentiality interests. Nevertheless, the case seems much easier to explain as

²⁴¹ *Pioneer Hi-Bred Int’l v. Holden Found. Seeds, Inc.*, 35 F.3d 1226, 1229, 1237 (8th Cir. 1994).

²⁴² *Id.* at 1239.

²⁴³ *Id.* at 1238-39.

²⁴⁴ *Id.* at 1241.

an extension of *Christopher*'s anti-competitive-intelligence gathering rule. When the Eighth Circuit justified the trial court's holding that Holden was liable for misappropriation, the first case it cited was *Christopher*, which it cited for the proposition that "[c]onduct which is not otherwise unlawful may nonetheless be improper."²⁴⁵ That reliance provides further confirmation that *Christopher* is not a sport, and it also confirms the proprietary account of trade secrecy.

In addition, the case confirms the general thrust of this section—that improper means rule and the independent discovery defense hone on the same substance. When the Eighth Circuit affirmed the trial court's use of *res ipsa loquitur*, it approved of the trial court's legal decision to shift to Holden the burden of disproving that it had acquired H3H by improper means.²⁴⁶ In evidentiary terms, Holden was in the same position as it would have been if the trial court had found it *prima facie* liable for trade secrecy and then ordered it to prove independent discovery of the L120 line. That ruling confirms the normative foundations of trade secrecy. Assume Part V explains the normative interest in a trade secret tolerably accurately. If so, when the claimant has a valid trade secret, the ultimate goal in any trade secrecy dispute is to make the best forecast, on the basis of the information available, whether the defendant discovered the secret's intellectual content on his own or by accessing the claimant's research, development, or commercial use in some way. In *Pioneer Hi-Bred*, the trier of fact had extremely limited evidence. In conditions of incomplete evidence, improper means doctrine and ordinary civil standards of proof interfered with the fact trier's ability to make that determination. The Eighth Circuit adapted improper means doctrine, affirmative defenses, and evidentiary presumptions to fit the underlying proprietary interest in the exclusive use of a secret.

VII. CONTRACTS, REMEDIES, AND UNJUST ENRICHMENT

A. Contract

The trade secrecy/contract interface serves two functions that the trade secrecy/misappropriation interface does not: Trade secrecy law signals to contract that parties will have valid consideration if they assign trade secrets or make promises involving trade secrets. Conversely, contract enlarges a claimant's interest in using his secret for his own advantage. Contract law supplies a sophisticated institutional structure helping the claimant to deploy the secret to maximum advantage, through employees, licensees, or other business partners.

²⁴⁵ See, e.g., *id.* at 1238 (citing *E.I. DuPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1015, *cert. denied*, 400 U.S. 1024 (1971)).

²⁴⁶ See *id.* at 1240-41.

All the same, contract law has the same protective, remedial, and recourse-based features as misappropriation doctrine. Contract law protects trade secrets and those who agree to use such secrets confidentially; it imposes on both sets of parties a duty to abide by the promises they make for consideration. Contract law also rectifies wrongs occasioned by breaches of contracts involving secrets; it imposes on breachers legal duties to repair their breaches. Contract law also supplies the institutional framework for recourse.

As in misappropriation doctrine, however, trade secret-related contract doctrine also specifies; it adjusts doctrines generally available in contract to conform to and embody the normative interest in a trade secret. Although our discussion cannot be exhaustive, the restraint-of-trade defense illustrates the point well enough here. From one perspective, the restraint-of-trade defense ordinarily limits the individual liberty to contract. From another perspective, however, it narrows the rights of parties to a contract now to protect the interests of potential contractors later. Behind the veil of ignorance, the doctrine predicts, abolishing restraints on trade redounds to the interests of all potential contractors, including even the party who seeks to enforce the restraint. Contract law specifies this normative restraint on the liberty to contract by making the restraint-of-trade defense available.

Yet this limitation does not carry forward to contracts involving trade secrets. As the first reported American trade secrecy case explains, “The public are not prejudiced by the transfer of [the secret] to the plaintiff.... [I]t is of no consequence to the public whether the secret art be used by the plaintiff or by the defendant.”²⁴⁷ The court’s explanation reveals the operative concepts. Ordinarily, the right to contract freely is qualified by a responsibility not to use bargaining power to harm—the court said “prejudice”—potential contracting parties or third parties who may trade with them. A trade secret does not prejudice other parties, however, because it does not deny to others information either public or readily ascertainable to the public. So when a secret-claimant enters into a nondisclosure agreement with an employee or a producer-licensee, conceptually, he is not “prejudicing” others but rather legitimately “using” secret business information proprietary to him. Contract law adapts to embody this norm. It declines to take off the rack a defense generally available throughout contract and instead declares that the defense be *per se* unavailable in trade secrecy.

To be sure, the relations described here do not explain every feature of trade secrecy’s interface with contract. For example, the account provided here cannot explain another vexing contract-related question: Whether an alleged misappropriator may be implied to have assumed a duty of confidentiality from

²⁴⁷ Vickery v. Welch, 19 Pick. 523, 527 (1837).

his relation with the claimant and general norms of commercial morality,²⁴⁸ or whether no duty is established unless the party must expressly assume the duty.²⁴⁹ The normative interest in a secret can suggest that claimants be free to establish contracts, licenses, and confidentiality protections around secrets, but it does not determine how many or which formalities create those contracts. All the same, it is still important news that contract law stands in the same ancillary relation to the normative interest in a trade secret as misappropriation law does.

Neither unfair-competition nor confidentiality norms seem capable of explaining this restraint-of-trade principle. The contractual doctrine prohibiting unreasonable restraints of trade embodies a norm of unfair-competition policy—and trade secrecy makes that doctrine inapplicable. Furthermore, as section V.A suggested, a proprietary account explains much more cleanly than a confidentiality account why trade secrets are severable from the firm that develops and uses them and then assignable by contract. More than any other field of law, property focuses explicitly on issues of accession—whether a resource deserves to be treated as an “external asset” in its own right or an appendage to some other asset.

It is no response to say that the vast majority of trade secrecy misappropriation disputes involve allegations of breach of a duty of confidentiality. The ultimate foundations of landlord-tenant law sound in property law even though leases are contracts.²⁵⁰ Even though nondisclosure agreements and leases are contracts, in both the property rights offered as consideration impart to the contract characteristics that would otherwise be peculiar. The ultimate foundations of leases sound in property; the absence of the restraint-of-trade defense suggests that trade secrecy nondisclosure agreements sound in property as well.

B. Injunctive Remedies

Remedy law stands in basically the same ancillary relation as misappropriation and contract law to the normative interest in a trade secret. The law of equity and damages provide recourse and reinforce the duties of repair established in tort and contract. Of particular interest here, the law makes injunctions and damages available as appropriate to approximate the proprietary normative interest in a secret.

²⁴⁸ See, e.g., *Phillips v. Frey*, 20 F.3d 623 (5th Cir. 1994); *Burten v. Milton Bradley Co.*, 763 F.2d 461 (1st Cir. 1985).

²⁴⁹ See, e.g., *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532 (11th Cir. 1996); *Moore v. Ford Motor Co.* 28 F.2d 529 (S.D.N.Y. 1928).

²⁵⁰ See Epstein, *supra* note 66, at 812-13.

Again, while we cannot cover the relevant issues exhaustively, the main points are tolerably clear from a few basic features of trade secrecy remedy law. To begin with, injunctions are a matter available of course for ongoing misappropriations of a trade secret.²⁵¹ Injunctions protect and specify the interest in a secret just as the rights-based *prima facie* tort does. Because the underlying interest is in the *exclusive* use of a secret, ongoing unconsented use harms the interest in a manner not reparable by monetary compensation. So the injunction guarantees “that any transfer of his resources from B to A must proceed according to terms established by *ex ante* agreement.”²⁵²

The presumption for injunctions provides further evidence undercutting the unfair-competition hypothesis. Superficially, it corroborates the proprietary²⁵³ and confidentiality hypotheses,²⁵⁴ for both fields make injunctions readily available for ongoing invasions of rights.

Ultimately, however, the proprietary hypothesis explains the structure of misappropriation injunctions better than the confidentiality hypothesis. The former hypothesis explains better than the latter why trade secrecy law prefers to limit the duration of injunctions over “trade secrets for as long as they remained secret” and no longer.²⁵⁵ If trade secrecy sounded in confidentiality, claimants could reasonably argue that they should be entitled to block confidantes from using their secrets in perpetuity. A minority trend in trade secrecy equity law takes this position, on the ground that the suggestion that the confidante’s “wrong deprives him of the right which he would otherwise have had as a member of the public”²⁵⁶ to use the secret when made public.

Proprietary norms, however, stress that ideas remain proprietary only for the increment of time in which their discoverers enjoy exclusive control over them. As the Ninth Circuit explained in embracing the majority trend:

A permanent injunction would subvert the public’s interest in allowing technical employees to make full use of their knowledge and skill and in fostering research and development. On the other hand, denial of any injunction at all would leave the faithless employee unpunished where ...

²⁵¹ See, e.g., *Sperry Rand Corp. v. A-T-O, Inc.*, 447 F.2d 1387, 1391-92 (4th Cir. 1971). *Salomon v. Hertz*, 2 A. 379, 381 (NJ Ch 1886).

²⁵² *Coleman & Kraus*, *supra* note 124, at 1348.

²⁵³ See, e.g., *Sperry Rand*, 447 F.2d at 1392 (“An order to return stolen property cannot be faulted.”).

²⁵⁴ See, e.g., 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA § 1283, at 630-33 (14th ed. 1918) (justifying injunctions primarily to protect confidences).

²⁵⁵ *Winston Research Corp. v. Minn. Min. Co.*, 350 F.2d 134, 141 (9th Cir. 1965); see *Research Equip. Co. v. Galloway & Scientific Cages*, 485 S.W.2d 953, 956 (Tex. Civ. App. 1972).

²⁵⁶ *Conmar Prods. Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150, 155 (2d Cir. 1949).

no damages were awarded.... By enjoining the use of the trade secrets for the approximate period it would require a legitimate ... competitor to develop a successful [competing secret], [a] court denie[s] employees any advantage from their faithlessness, place[s] [a secret-claiming plaintiff] in the position it would have occupied if the breach of confidence had not occurred prior to the public disclosure, and imposed the minimum restraint consistent with the realization of these objectives upon the utilization of the employees' skills.²⁵⁷

That majority approach avoids some of the more extreme implications of a confidentiality account. It does so to further policies promoted in usufructuary property law—to give concurrent users concurrent powers to deploy and use productively the same asset.

C. Damage Remedies

Trade secrecy's damage remedies also refute the unfair-competition account, provide some evidence for the confidentiality account, and corroborate strongly the proprietary account. Damages for lost competitive advantage follow from all three accounts. Lost-rental royalty claims make the most sense in relation to proprietary norms. Such royalty claims approximate for the secret-claimant the value of the wrong suffered from the lost use of the secret—much as rental damages do in cases of long-term trespasses on land or dispossession of a chattel.²⁵⁸

Restitutionary damages accord with both proprietary and confidentiality norms. This conclusion may seem inconsistent with Coleman's suggestion that tort focuses only on wrongful losses, not wrongful gains.²⁵⁹ Yet Coleman's suggestion needs qualification. The suggestion is applicable to harm-based accident torts, but not to misappropriation and other rights-based torts. In trade secrecy, the claimant of a valid secret enjoys a proprietary interest in enjoying the use of the secret and the research preparing it for his own commercial ends. Because that "exclusive right to deal with the [secret] owned" automatically entails "the right to profit from such dealings," "any gains resulting from the misappropriation of property" or confidential information are losses to the right "necessarily subject to restitution."²⁶⁰ As long as the underlying interests in property or confidentiality are adequately justified and agreed to, restitutionary damages embody and specify those interests.

²⁵⁷ *Winston Research Corp.*, 350 F.2d at 142.

²⁵⁸ See Claeys, *supra* note 177, at 392-402.

²⁵⁹ See COLEMAN, *supra* note 112, at 369-71.

²⁶⁰ Weinrib, *supra* note 150, at 12.

D. Unjust Enrichment

Judging by what we have shown so far, unjust enrichment is the worst possible candidate for grounding trade secrecy. Like tort, contract, and remedies, unjust enrichment principles are parasitic. To determine whether B owes A a duty to restore to A enrichment B acquired unjustly from A, the law of unjust enrichment needs inputs specifying A and B's normative relations to one another. Most often, those relations come from background norms about different liberty or property interests, or from norms about contracts involving such interests.

Unjust enrichment, however, is a far worse candidate than the other three because it is a field of last resort. Unjust enrichment is a narrow field because the private law focuses much more naturally on "harms" and "wrongs" than it does on "benefits" wrongly or unjustly acquired. The private law skews to focus on "harms" and not "benefits" because it focuses on interests. If "wrongs" refer to interferences with interests, there will only be a few odd situations in which B stands in a culpable normative relation to A by acquiring a good from A without wronging A. As Scott Hershovitz explains:

[H]arms and benefits are not mirror images of one another. Harms are ... costs that result from wrongs, or rights infringements. ... We do not have a term in our moral discourse for the mirror image of harms. ... [So] why does the number of wrongful losses remedied by tort far exceed the number of wrongful gains remedied by restitution?

The answer is that there is an underlying moral asymmetry between losses and gains. We regard imposing costs on others as wrongful more frequently than we regard receiving a gain from others as wrongful. Law's harm-benefit asymmetry is a reflection of this underlying moral asymmetry.²⁶¹

Because of that asymmetry, unjust enrichment stands *twice* removed from the ultimate normative foundations of a subject-specific field such as trade secrecy. Not only does it borrow on norms about property, competition, and confidentiality—as tort, contract, and remedies all do as well—it also generates prescriptions *only* in situations where B has created an unjust normative relation with A in a situation in which B has not wronged A by misappropriating or violating a contract or a confidential relation.

This conceptual relation comes out in cases in which plaintiffs plead unjust enrichment as a fallback to misappropriation. In such cases, courts generally

²⁶¹ Hershovitz, *supra* note 123, at 1174-75.

construe unjust enrichment narrowly—so as not to generate an exception that swallows trade secrecy’s more general rules. *Sheets v. Yamaha Motors Corp.* is representative.²⁶² A retired machinist invented a modification for the air intake system on motorcycles, showed the design for the modification to representatives of Yamaha, and then sued Yamaha when he found Yamaha motorcycles incorporating his design. In a finding the Fifth Circuit held not clearly erroneous, the trial court found that Sheets failed to prove he had taken reasonable precautions to keep his modification secret. (He had shown the modification to Yamaha representatives and others without negotiating confidentiality agreements.²⁶³) Under the norms embodied in misappropriation doctrine, Sheets had waived any normative right to the exclusive use of his design. Without such a right, he was in no position to complain of misappropriation if Yamaha used his design for its own ends.

Important here, Sheet’s waiver doomed his unjust enrichment claim for exactly the same reasons as it did his misappropriation claim. The Fifth Circuit summarily rejected Sheet’s alternative count for unjust enrichment on precisely that basis. It found “dispositive”

that the application of the unjust enrichment doctrine in this case would contravene the more particularized requirements of the Louisiana Uniform Trade Secrets Act. ... Louisiana enacted an express statutory scheme to protect individuals and entities in the position of Wilbert Sheets when it adopted the Uniform Trade Secrets Act. Under Louisiana law, Wilbert Sheets is not entitled to fall back on the equitable doctrine of unjust enrichment after failing to establish a trade secret due to his failure to make reasonable efforts to maintain secrecy. Thus, in a very real sense the enrichment by Yamaha was brought about by Wilbert Sheets’ own failure to maintain the secrecy of his invention.... Under Louisiana law [Sheets] cannot now invoke principles of equity to recover for the benefits he alleges appellees enjoyed at his expense.²⁶⁴

If the law did not keep unjust enrichment so narrow, unjust enrichment would create considerable confusion, as one can see in *Koehring Co. v. National Automatic Tool Co.*²⁶⁵ When several employees quit began working for National Automatic Tool, Koehring sued National Automatic Tool (NATCO) for infringing patents and misappropriating trade secrets relating to plastic-injection molding machines. To prove misappropriation, Koehring alleged that NATCO

²⁶² 849 F.2d 179 (5th Cir. 1988).

²⁶³ *Id.* at 183-84.

²⁶⁴ *Id.* at 184.

²⁶⁵ 257 F. Supp. 282 (S.D. Ind. 1966).

used drawings, performance data, and engineering books brought to it by the former Koehring employees.²⁶⁶ In its primary holding, the court ruled that unpatented drawings and other materials were not trade secrets, because they either consisted of public information or had been distributed to purchasers. In the alternative, the court also rejected the claim that “NATCO should be charged with the knowledge of” the Koehring ex-employees because NATCO had “done nothing to induce [their] breach[es] of contract.”²⁶⁷ After holding that NATCO “committed no tort,” however, the court declared a “quasi contract for unjust enrichment” on the ground that NATCO “obtained the benefit of its employees’ unwarranted use of the HPM materials.”²⁶⁸

To hold that Koehring had a right deserving of restitution in unjust enrichment, the court contravened trade secrecy conceptual structure and policy in several respects. The court’s alternative holding is hard to judge. The court did not explicitly rule on whether NATCO had reason to know it was profiting from the Koehring ex-employees’ misappropriation—it only held that NATCO did not know about the prior misappropriation. If the court ruled in favor of Koehring because it intuited that NATCO had reason to know it was benefiting from the ex-employees’ misappropriations, it reached the right result. In that scenario, however, it was unnecessary and confusing for the court to reach that result using an unjust enrichment theory when misappropriation doctrine provided the standard for scienter. By contrast, assume the court thought NATCO culpable even though it had no reason to know the ex-employees had misappropriated Koehring secrets. Then, it created a significant doctrinal inconsistency with and threatened to undermine misappropriation doctrine.

The court’s primary holding is even worse. Conceptually, if the drawings and other materials were not trade secrets, Koehring had no right to their exclusive use, its employees could not have wronged it by using the drawings and other materials for their own purposes, and NATCO gained no benefit that belonged rightfully to Koehring. Substantively, the requirements for proving a trade secret stop employers from co-opting the law to prevent ex-employees from competing against them with general industry knowledge. The *Koehring* court’s main holding threatens to give employers a way to circumvent those strictures and deter competitors from hiring their employees.

When commentators suggest that trade secrecy is grounded in unjust enrichment, they cite most often the fact that trade secrecy makes restitutionary damages available.²⁶⁹ This argument puts the cart before the horse. On one hand, if “unjust enrichment” refers to some general norms about justice, fair

²⁶⁶ *Id.* at 290-91.

²⁶⁷ *Id.* at 291.

²⁶⁸ *Id.*

²⁶⁹ *See Hill, supra* note 5, ¶ 80.

enrichment, or a “propriety of means,”²⁷⁰ it cannot explain why trade secrecy makes *non*-actionable all the situations in which nonowner B acts wrongfully in relation to A’s secret without being liable for misappropriation. On the other hand, a field does not sound in unjust enrichment simply because it makes restitutionary damages available. Such damages are routinely available in property torts and torts involving misuse of confidential information.

In short, setting aside exceptional cases like *Koehring*, trade secrecy behaves exactly as we should expect knowing that the controlling norms are external to unjust enrichment and internal to trade secrecy. In addition, restitutionary damages simply provide further evidence refuting the unfair-competition account and confirming the confidentiality and proprietary accounts. Since the proprietary account has received far and away the most confirmation, however, it seems the best conceptual candidate to supply the normative foundations of trade secrecy.

CONCLUSION AND IMPLICATIONS

As a positive, conceptual matter, trade secrecy has a guiding normative principle. When a competitor discovers a secret and competitively-valuable intellectual work, he acquires a normative right and interest in determining exclusively the use of the efforts to research, develop, and deploy commercially that work. Also as a positive, conceptual matter, trade secrecy is a normatively autonomous body of law. Misappropriation, contract, remedy, and unjust enrichment doctrine do not supply content to trade secrecy; rather, all of them seem to adapt their features to fit the right and interest in a trade secret.

So in which field of law does trade secrecy’s guiding principle sound? This Article has ruled out misappropriation, contract, equity, and unjust enrichment, for the reasons just stated. Although liberty interests in competing and directing confidential relationships have the right conceptual structure, this Article has ruled them out because neither explains enough doctrines. The competition interest cannot explain why trade secrecy requires proof of value, non-ascertainability, secrecy, or reasonable precautions. In misappropriation, it cannot explain the tort’s rights-based structure or its theories for accidental disclosure, double misappropriation, or *Christopher*-style intelligence gathering. In contract, the liberty interest in competing *requires* the restraint-of-trade defense that trade secrecy makes unavailable. In remedy law, the competition interest cannot explain the preference for injunctions in trade secrecy or the availability of restitutionary damages. Similarly, a normative liberty interest in confidentiality cannot explain trade secrecy’s elements, it strains to explain *Fanberg*’s rule, and it strains and why it is wrongful for a non-confidante to use accidentally-disclosed

²⁷⁰ DAGAN, *supra* note 47, at 102 (emphases removed).

secrets. In contract, a confidentiality interest cannot explain the assignability of trade secrets; in equity, it cannot explain why courts prefer to make injunctions against ex-confidantes temporary and not perpetual.

This Article has also shown that the proprietary account of trade secrecy explains the most features of trade secrecy. To be sure, the proprietary account is contradicted by the fact that some cases and much commentary reject the suggestion that trade secrets are property rights. This problem, however, seems attributable more to conceptual confusion about property than it does to the doctrine itself. Even if I am wrong, however, this Article has helped clarify the conceptual debate, by suggesting that the normative right and interest in a trade secret need their own conceptual category.

These lessons will interest different communities of scholars to varying degrees. Scholars who study corrective justice or variations on it should find interesting not only this Article's insights about trade secrecy but also its more general observations about tort's relations with property, remedies, contract, and other fields of private law. In particular, this Article has suggested, theories of corrective justice or variations on it play a much more limited role in directing the contours of torts than such scholars sometimes suggest.

This Article's lessons should be of equal interest to IP scholars interested in making better sense of trade secrecy. This Article has answered questions that have troubled trade secrecy scholarship for decades. This Article has also illustrated the potential careful positive conceptual scholarship has to offer IP. Last but not least, least in trade secrecy and perhaps elsewhere, this Article has suggested why instrumentalist utilitarianism may not deserve the hegemonic status it now has in IP scholarship.