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At-Will Fiduciaries? The Anomalies of a “Duty of Loyalty” in the Twenty-First Century

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Marian K. Riedy* and Kim Spurduto**

At-Will Fiduciaries? The Anomalies of a “Duty of Loyalty” in the Twenty-First Century

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I. INTRODUCTION

Oceans of ink have been expended describing, analyzing, and applying the “duty of loyalty” owed by corporate directors and officers.¹

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1. Representatives from a very long list of the scholarly articles and books are: FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991); Alison Grey Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, 25 UCLA L. REV. 738, 758 n.59 (1978); Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL.

Comparatively little attention has been paid to the common law “duty of loyalty” owed by employees to their employers—a duty imposed virtually unanimously by the courts of every state.² Given the unique status of corporate directors and officers—guardians of billions of dollars of corporate assets—the extensive discourse on the nature of their legal duties is eminently reasonable, if not imperative. But given the fact that the employee’s duty of loyalty embraces roughly 140 million people,³ employee job mobility has never been higher, and the number of lawsuits involving the duty has “mushroomed” in the last few years,⁴ the concept deserves close scrutiny. This article proposes the at-will employee’s common law duty of loyalty fails the tests of reason and fairness. The bases for the duty appear too flimsy to justify the burdens it imposes and the uncertainties it causes, and this duty, therefore, has no legitimate role in today’s business environment.⁵

For the vast majority of the employees in the United States, their employment relationship is “at-will.”⁶ This common law doctrine means, as any law school graduate knows, the relationship can be terminated by either the employer or employee at any time, for any reason, or for no reason at all, with or without cause,⁷ and without prior notice. There are only limited exceptions: a termination that violates a federal or state antidiscrimination statute or a “fundamental public policy of the jurisdiction” is prohibited.⁸ Only such rare circumstances

J. CORP. L. 27 (2003); David S. Ruder, *Duty of Loyalty—A Law Professor’s Status Report*, 40 BUS. LAW 1383 (1985). The number of cases interpreting only Del. Code Ann. tit. 8, § 102(b)(7) (1991 & Supp. 2000) (limiting personal liability for certain breaches of fiduciary duty not including breach of the duty of loyalty) gives some indication of the number of judicial ruminations on this issue nationwide.

2. See *infra* section II.A.

3. *The 2012 Statistical Abstract*, U.S. CENSUS BUREAU, <http://www.census.gov/compendia/statab/> (last modified June 26, 2014), archived at <http://perma.unl.edu/36EH-M5UG>.

4. *E.g.*, Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 577–78 (2001).

5. Whether employees of nonprofits should be subject to a duty of loyalty is an issue not addressed in this article, because just as the duties of the directors of non-profit corporations may justifiably differ from those required in the for-profit world, see Thomas Lee Hazen & Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors’ Fiduciary Duties*, 14 U. PA. J. BUS. L. 347 (2012), so, too, might those of the employees.

6. *E.g.*, Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protections in an At-Will World*, 83 CORNELL L. REV. 105, 108 (1997). The alternative, of course, is a contractual relationship.

7. Only in the state of Montana must an employer have “cause” to terminate an at-will employee. See Mont. Code Ann. 39-2-901 to -915 (1997).

8. ROGER LEROY MILLER, *BUSINESS LAW TODAY: THE ESSENTIALS* 516 (Erin Joyner et al. eds., 10th ed. 2014).

may give rise to a wrongful termination cause of action,⁹ and these exceptions are “quite narrow and often difficult to prove.”¹⁰

The at-will doctrine has for many years been roundly criticized,¹¹ though it also has strong advocates.¹² Without becoming submerged in the scholarship, these opposing positions can be summarized as follows: the “anti” position centers on the proposition that the doctrine is harsh and unfair. The employer exercises the termination power inherent in the at-will doctrine far more frequently than the employee, and at the same time employees suffer far more from termination and the threat of termination than the employer because employees are simply more vulnerable than the employer.¹³ The proponents of the doctrine rely primarily on economics: at-will employment is so widely prevalent that it must be “market mimicking,”¹⁴ which means it is efficient. One of the market forces at work, theoretically, is that employment at-will reduces the cost of both firing and quitting because either can be accomplished without the threat of litigation.¹⁵ From the point of view of the employer, “[t]he flexibility afforded by the contract at-will permits the ceaseless marginal adjustments that are necessary in any ongoing productive activity conducted, as all activities are, in conditions of technological and business change.”¹⁶ The employee benefits as well, in that she is free to leave rather than succumb to whatever “enormous demands” the employer could make if the employee were subject to a fixed-term contract.¹⁷ Otherwise stated, workers would demand a fixed-term contract if it were more economically advantageous than at-will employment.¹⁸

9. *Id.*

10. Kim, *supra* note 6, at 107 n.9.

11. See Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 5–6 (2010) (footnote omitted) (“To be sure, for the last fifty years, employment law scholars have evinced a near consensus that employment at will—the American default rule that permits termination by either party for any reason or no reason—ought to be abolished.”).

12. A seminal and widely-quoted advocacy article is Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

13. For references to and summaries of many of the scholarly articles on the subject, see Arnow-Richman, *supra* note 11; Kim, *supra* note 6; Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62 (2008).

14. See generally Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 226, 271 (2001) (disputing also the “standard economic wisdom” underlying much of the debate about various aspects of employment law).

15. Epstein, *supra* note 12, at 966-67.

16. *Id.* at 982.

17. *Id.* at 966.

18. *Id.* Epstein’s argument is nuanced and complex. This brief summary hardly does it justice. But because this article is not about economics and the law, and the arguments presented here do not depend in any way on the relative economic value of at-will versus contractual employment relationships, this passing refer-

Whatever the relative merits to employers, employees, and the public welfare of at-will employment compared to a contractual relationship, it is quite likely that at-will employment is here to stay.¹⁹ As the percentage of the unionized workforce continues to decline²⁰ and worker mobility—inherent in the twenty-first century global economy—continues to increase, the percentage of at-will employees—already the predominant employment relationship in this country—seems likely to increase. Given these facts, it is imperative that the at-will relationship be defined at law in such a way as to maximize its benefits and minimize potential harms.

One of those harms is the employee's vulnerability to the economic disaster of suddenly losing a job.²¹ A number of "fixes" to the at-will doctrine that could reduce the nature and extent of this particular harm have been proposed,²² the most popular being some version of the "just cause" limitation on an employer's right to terminate.²³ But absent a wholesale judicial revision of the common law at-will doctrine, or legislative action, neither of which appears forthcoming,²⁴ the unfettered right of the employer to terminate an employee—so long as the reason is not specifically unlawful—will remain unfettered.

ence to a significant body of scholarly research is intended solely to point the reader to the literature that does address the economic issue in depth.

19. Arnow-Richman, *supra* note 11, at 4 (footnote omitted) ("[T]he likelihood of economic-based termination is part and parcel of a modern, fast-paced, interconnected economy that is constantly reinventing itself. Given this reality, one might think that the rights of workers terminated for economic reasons—whether individually or collectively—would top employee advocates' agenda for legal reform. But this is not the case.").
20. According to a January, 2014 press release from the U.S. Bureau of Labor Statistics, the percentage of union workers in 2012 was 11.3%, a number representative of a continual decline over the last several decades. *Union Members Summary*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/news.release/union2.nr0.htm> (last modified Jan. 24, 2014), *archived at* <http://perma.unl.edu/D8L8-K2W7>.
21. *See generally* Arnow-Richman, *supra* note 11; Epstein, *supra* note 12, at 982 ("The strength of the contract at will should not be judged by the occasional cases in which it is said to produce unfortunate results . . ."); Porter, *supra* note 13, at 63 ("Losing one's job has long been recognized as one of the most stressful and traumatic experiences a person may ever endure."); Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 77–78 (2000).
22. Proponents of revisions to the at-will doctrine are typically aiming at a wider spectrum of perceived problems with the at-will doctrine than sudden job termination, including, for example, terminations for unjust and unfair—though not illegal—reasons. But unexpected job loss is usually on the list of issues to be remedied. *See generally, e.g.*, Porter, *supra* note 13.
23. Arnow-Richman, *supra* note 11, at 5.
24. *See, e.g.*, Summers, *supra* note 21, at 78.

This article proposes a means of improving the at-will world for employees—insofar as that world includes the threat of a sudden end to one’s livelihood—that does not tamper with the “at-will-ness” of termination itself. As discussed below, the employee’s common law duty of loyalty prohibits an employee from, *inter alia*, competing with the employer during the employment relationship, though he can “prepare” to compete. That distinction is a fine one, and arguably impossible to draw *ex ante*.²⁵ Therefore, to the extent the duty of loyalty deters employees from taking steps to prepare for a sudden termination for fear that those steps would later be deemed a breach of duty—or penalizes employees who have successfully transitioned to a new job but are then sued for breach of the duty of loyalty—eliminating that duty for at-will employees will reduce the emotional and economic toll of the at-will employment doctrine.²⁶ In addition, because the at-will employee’s duty of loyalty rests on a shaky jurisprudential foundation and is unworkable, unfair, outdated, and unnecessary, it should be abandoned. In its place, an at-will employee should owe only the duty of “good faith and fair dealing” derived from contract law, which, in effect, would fill any hole left in the legal web defining the employment relationship when the duty of loyalty is excised.

Part II provides an overview of the duty of loyalty as it is applied by the courts in the various states. Part III returns to various aspects of the law regarding the duty of loyalty that are particularly ambiguous, and argues the ambiguity infects the very validity of imposing a duty of loyalty and renders it very difficult for employers and employees to understand and comply with the duty. Part IV illustrates why the jurisprudential provenance of the duty of loyalty—emanating from the medieval doctrine of master and servant—understandably does not map clearly onto the twenty-first century global employment market. Finally, Part V argues the duty of loyalty is not necessary to “protect” the employer from “bad” conduct on the part of the employee—which is its essential function—and that if removing the duty of loyalty does pose any significant threat, requiring good faith and fair dealing by the employee satisfactorily fills any perceived gaps.

25. See generally Scott W. Fielding, *Free Competition or Corporate Theft? The Need for Courts to Consider the Employment Relationship in Preliminary Steps Disputes*, 52 VAND. L. REV. 201, 205 (1999).

26. For several reasons, as is evident in the discussion in various parts of this Article, it is reasonable to draw a distinction between at-will and contract employees in regard to the imposition of a duty of loyalty. Arguably, however, many of the arguments made here against the duty of loyalty would apply as well to contract employees, though this point is not further explored in this article.

II. THE EMPLOYEE'S DUTY OF LOYALTY IN THE COURTS

All jurisdictions recognize the duty of loyalty in the employment context.²⁷ The duty of loyalty is a common law doctrine and, therefore, varies somewhat from state to state. Nonetheless, in all states, the doctrine has a similar contour, though the boundaries of that contour are quite “fuzzy.” Despite the hundreds, if not thousands of reported cases implicating the duty of loyalty,²⁸ several aspects of the duty remain unsettled. This uncertainty exists not only between states, but also among the various courts of the same jurisdiction.²⁹ This section provides an overview of the similarities and differences in the case law on the origins of the employee's duty of loyalty; to whom it applies; what conduct it requires and prohibits; and the consequences of a breach. Three representative cases involving an alleged breach of the duty are then described in some detail to render the concepts more concrete.

A. Overview

The duty of loyalty finds its genesis in the law of agency. By definition, agency is a fiduciary relationship: “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.”³⁰ It follows necessarily that the agent/fiduciary owes a fiduciary duty of loyalty. “An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.”³¹ Because an employee is

27. RESTATEMENT (THIRD) OF EMP'T LAW § 8.01 note a (Preliminary Draft No. 7, 2010).

28. Citations in this article are to be representative and are not intended to be inclusive.

29. *Compare, e.g., Berry v. Goodyear Tire & Rubber Co.*, 242 S.E.2d 551 (S.C. 1978) (finding tire salesman who was fired by his employer after nineteen years because he worked for competitor while on sick leave was disloyal and not entitled to severance pay), *with Lowndes Prods., Inc. v. Brower*, 191 S.E.2d 761, 767–70 (S.C. 1972) (holding key employees who contacted and met with investors and a customer of current employer to lay plans to start a competing textile company, who left their employer without notice, and who leased space and ordered materials to build manufacturing equipment were guilty of disloyalty and owed damages to employer).

30. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006); *see Ruesga v. Kindred Nursing Ctrs. W., L.L.C.*, 161 P.3d 1253, 1261 (Ariz. Ct. App. 2007) (quoting RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006)); *Huong Que, Inc. v. Luu*, 58 Cal. Rptr. 3d 527, 535 (Cal. Ct. App. 2007) (same); *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 100 (Iowa 2011) (same).

31. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006); *Huong Que, Inc.*, 58 Cal. Rptr. 3d at 535 (quoting RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006)); *Emerson Elec. Co. v. Marsh & McLennan Cos.*, 362 S.W.3d 7, 13 (Mo. 2012) (same).

traditionally deemed an agent of the employer, the employee owes a duty of loyalty to the employer.³² This rule applies whether the employment relationship is contractual or at-will.³³

Case law does not provide consistent or clear answers to several questions regarding the nature and scope of the employee's duty. For one, although the employee's duty of loyalty derives from "fiduciary" principles in the law of agency, it is uncertain whether all employees' common law duty of loyalty rises to a fiduciary duty.³⁴ Some courts refer simply to a "duty of loyalty."³⁵ Many courts, without even examining the specifics of the relationship between the employee and the employer, simply (and frequently slothfully) apply the "rule" that the existence of an employment relationship per se casts a "fiduciary

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32. *E.g.*, *St. Paul Fire & Marine Ins. Co. v. Hoskins*, No. 5:10cv087, 2012 U.S. Dist. LEXIS 30770, at *15 (W.D. Va. March 7, 2012) ("An agency relationship, as in the employer-employee relationship, creates a fiduciary duty on the part of the agent, or employee, to the principal, or employer."); *Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 479 (Mo. 2005) ("[E]very employee owes his or her employer a duty of loyalty."); *Futch v. McAllister Towing of Georgetown, Inc.*, 518 S.E.2d 591, 594 n.1 (S.C. 1999) (noting that the difference between an "agent" and "employee" is often one "of degree" and that, in any event, the rules regarding the duty of loyalty apply "with equal force to agents and ordinary employees"); *Williams v. Dominion Tech. Partners, L.L.C.*, 576 S.E.2d 752, 757 (Va. 2003) ("We have long recognized that under the common law an employee, including an employee-at-will, owes a fiduciary duty of loyalty to his employer during his employment.").
33. *See, e.g.*, *Phansalkar v. Andersen Weinroth & Co., L.P.*, 344 F.3d 184, 200 (2d Cir. 2003); *St. Paul*, 2012 U.S. Dist. LEXIS 30770, at *15; *Gustafson v. Full Serv. Maint. Corp.*, No. 4:11CV00443AGF, 2012 U.S. Dist. LEXIS 27903, at *3 (E.D. Mo. March 2, 2012) (applying Missouri law); *Gross v. Akin, Gump, Strauss, Hauer & Feld, LLP*, 599 F. Supp. 2d 23, 32 (D.D.C. 2009); *Draim v. Virtual Geosatellite Holdings, Inc.*, 631 F. Supp. 2d 32, 39 (D.D.C. 2009); *Lucas v. United Fabricating, Inc.*, No. 5:06CV154 (STAMP), 2007 U.S. Dist. LEXIS 64269, at *14 (N.D.W. Va. Aug. 29, 2007); *Cent. Lewmar, L.P., v. Gentilin*, No. 03-4671(JWB), 2005 U.S. Dist. LEXIS 45902, at *9 (D.N.J. June 1, 2005); *Bray v. Squires*, 702 S.W.2d 266, 270 (Tex. App. 1985).
34. Charles A. Sullivan, *Mastering the Faithless Servant? Reconciling Employment Law, Contract Law, and Fiduciary Duty*, 2011 Wis. L. Rev. 777, 801 (2011) ("On the core question of whether employees are per se fiduciaries, the law is more than a little confused . . .").
35. *E.g.*, *Keystone Fruit Mktg., Inc. v. Brownfield*, 352 F. App'x 169, 171 (9th Cir. 2009) (applying Washington law); *Guidant Sales Corp. v. George*, No. 05-2890 (PAM/JSM), 2006 U.S. Dist. LEXIS 83008, at *12 (D. Minn. Nov. 14, 2006); *Cent. Lewmar*, 2005 U.S. Dist. LEXIS 45902, at *7; *Diamond Phoenix Corp. v. Small*, No. 05-79-P-H, 2005 U.S. Dist. LEXIS 12798, at *11 (D. Me. 2005) (holding allegations of complaint insufficient to show fiduciary relationship or breach thereof, but denying motion to dismiss on separate count for breach of "duty of loyalty"); *Jet Courier Service, Inc. v. Mulei*, 771 P.2d 486, 492 n.10 (Colo. 1989); *Futch*, 518 S.E.2d at 594; *Everbrite Electric Signs, Inc. v. Yezzi*, 425 N.W.2d 39, at *1 (Wis. Ct. App. 1988).

duty” of loyalty on the employee.³⁶ Many courts, however, tie the existence of a fiduciary duty to facts that demonstrate a “special confidence” has been reposed in the employee at issue, or that she is a “key” employee.³⁷ These courts discern that employees without especial responsibilities—sometimes referenced as “mere employees”³⁸—do not necessarily have a fiduciary relationship with the employer and therefore may owe no fiduciary duty.³⁹ These cases acknowledge the direc-

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36. *E.g.*, *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, Inc.*, 813 F. Supp. 2d 489, 521–22 (S.D.N.Y. 2011) (applying New York law); *Nat’l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc.*, 592 F. Supp. 2d 86, 94 (D.D.C. 2009) (“Generally, fiduciary principles are applicable to employees.”); *Las Luminarias of the N.M. Council of the Blind v. Isengard*, 587 P.2d 444, 449 (N.M. 1978) (“It is well settled that the employment relationship is one of trust and confidence and places upon the employee a duty to use his best efforts on behalf of his employer.”); *Bray*, 702 S.W.2d at 270.
37. *ATC Distrib. Grp., Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 716 (6th Cir. 2005) (finding that the district court improperly granted summary judgment to employee defendants solely because it did not need to consider the employees’ “alleged positions of trust and access to confidential information” on the grounds that salespeople cannot owe fiduciary duties to an employer); *Talentburst, Inc. v. Collabera, Inc.*, 567 F. Supp. 2d 261, 265–67 (D. Mass. 2008) (finding employee–employer fiduciary duties depends on an evaluation of whether the employee held “positions of trust and confidence” (emphasis omitted)); *Chelsea Indus., Inc. v. Gaffney*, 449 N.E.2d 320, 326 (Mass. 1983) (“Employees occupying a position of trust and confidence owe a duty of loyalty to their employer and must protect the interests of the employer.”); *W. Blue Print Co., LLC v. Roberts*, No. WD72025, 2011 Mo. App. LEXIS 606, at *21 (Mo. Ct. App. April 29, 2011) (holding all employees owe a duty of loyalty, but the employment relationship does not per se create a fiduciary relationship); *Burbank Grease Servs., LLC v. Sokolowski*, 717 N.W.2d 781, 796 (Wis. 2006) (“If the employee is a key employee, then a fiduciary duty of loyalty will exist.” (internal quotation marks omitted)); see also 19 RICHARD A. LORD, WILLISTON ON CONTRACTS § 54:26 (4th ed. 2001) (“[T]he employer–employee relationship is not one from which the law will necessarily imply a fiduciary duty in every case.”).
38. *E.g.*, *Standard Chlorine of Del., Inc. v. Sinibaldi*, 821 F. Supp. 232, 254 (D. Del. 1992) (quoting *Brophy v. Cities Serv. Co.*, 70 A.2d 5, 7 (Del. Ch. 1949)) (applying Delaware law).
39. *E.g.*, *Calkins v. IPD Analytics, L.L.C.*, No. 08-23188-CIV-MORENO/TORRES, 2009 U.S. Dist. LEXIS 85702, at *14 (S.D. Fla. Apr. 16, 2009) (rejecting the argument that every employee–employer relationship amounts to that of principal and agent and gives rise to fiduciary duties); *Veco Corp. v. Babcock*, 611 N.E.2d 1054, 1059 (Ill. App. Ct. 1993) (holding officers owe fiduciary duty while employees are merely prohibited from engaging in “demonstrable business activity” in competition with their employer); *cf.*, *e.g.*, *Bancroft-Whitney Co. v. Glen*, 411 P.2d 921, 934–35 (Cal. 1966) (holding duty of loyalty applies to corporate officers); *Md. Metals, Inc. v. Metzner*, A.2d 564, 568 (Md. 1978) (holding duty of loyalty applies to a “corporate officer or other high-echelon employee”); *Chelsea*, 449 N.E.2d at 326–27 (holding duty of loyalty applies to “corporate officer, director, or trusted agent or employee”).

tor of a public corporation may owe a different kind of duty to the corporation than, say, a custodian.⁴⁰

In some jurisdictions the distinction drawn between “fiduciaries” and other employees results in a distinction between the nature of the duty each owes: all employees owe a duty of loyalty, but the obligations imposed by the duty are “more rigorous” for an employee in a fiduciary position of “special confidence” than are those imposed by the common law duty of loyalty.⁴¹ In others, the distinction leads to the conclusion that a cause of action lies for a breach of a fiduciary duty—should one be justified given the particularly “trustworthy” nature of the employer–employee relationship at issue—but not for breach of the common law duty of loyalty.⁴² But in those jurisdictions in which the duty of loyalty does not give rise to a separate cause of action, the employee nonetheless bears the obligation to act loyally toward the employer.⁴³ At least, no court has specifically held that an employee *does not* owe a common law duty of loyalty.⁴⁴

40. *See* ATC Distrib. Grp., Inc. v. Whatever It Takes Transmissions & Parts, Inc., 402 F.3d 700, 716 (6th Cir. 2005) (finding that the district court improperly granted summary judgment to employee defendants solely because it did not need to consider the employees’ “alleged positions of trust and access to confidential information” on the grounds that salespeople cannot owe fiduciary duties to an employer).

41. *E.g.*, *Rash v. J.V. Intermediate, Ltd.*, 498 F.3d 1201, 1211 (10th Cir. 2007) (applying Texas law) (“[T]he fiduciary relationship establishes a distinct and separate obligation than the duty of loyalty to an employer The fiduciary duty exists because of the ‘peculiar’ trust between the employee-agent and his employer-principal. Thus, the bonds created by a fiduciary relationship are stronger and the obligations are correspondingly more rigorous than those ascribed to the duty of loyalty.” (citation omitted)); *Gustafson v. Full Serv. Maint. Corp.*, No. 4:11CV00443AGF, 2012 U.S. Dist. LEXIS 27903, at *5 (E.D. Mo. March 2, 2012) (finding, in Missouri, the duty of loyalty precludes the employee from competing with the employer but fiduciaries must act with “utmost good faith”); *Cameco, Inc. v. Gedicke*, 724 A.2d 783, 789 (N.J. 1999) (“The scope of the duty of loyalty that an employee owes to an employer may vary with the nature of their relationship. Employees occupying a position of trust and confidence, for example, owe a higher duty than those performing low-level tasks.”).

42. *Mattel, Inc. v. MGA Entm’t, Inc.*, No. CV 04-9049 DOC (RNBx), 2011 U.S. Dist. LEXIS 55756, *16–22 (C.D. Cal. 2011); *Talentburst*, 567 F. Supp. 2d at 265–67 (no independent claim if no fiduciary duty); *Dalton v. Camp*, 548 S.E.2d 704, 708–09 (N.C. 2001); *see generally* *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 600 (Iowa 1999) and cases cited therein.

43. *Condon*, 604 N.W.2d at 598 (“We recognize the existence of a common law duty of loyalty which is implied in employment relationships.”); *see Dalton*, 548 S.E.2d at 709 (finding a breach of the common law duty of loyalty, though not a separate claim, is a defense to a wrongful termination action).

44. *E.g.*, *Mattel*, 2011 U.S. Dist. LEXIS 55756, at *12 (applying California law, the court stated, “non-fiduciary employees owe no duty of loyalty to their employers,” but held that no cause of action for breach of a duty of loyalty lays separate and apart from the claim of breach of fiduciary duty).

Courts often note that the scope of this “duty of loyalty”—be it owed by an employee-fiduciary or an “ordinary” employee—is “often blurred at the edges.”⁴⁵ Blurry, too, is the distinction between what a fiduciary must do to act loyally and what a “mere” employee must do, or refrain from doing. That is, despite the language in many cases defining a fiduciary employee’s duty as being more “rigorous” than other employees,⁴⁶ or contrasting the offending employee’s conduct with the “punctilio” required of a fiduciary, in no reported case has the court explicitly found activities that would be disloyal if undertaken by a fiduciary employee would nonetheless be “loyal” enough if conducted by an ordinary employee.⁴⁷ As noted above, the consequences of breaching the duty may be different and a jury may well weigh the situation differently if it decides, based on the instructions given, that the employee was a fiduciary. But as a general matter, the types of conduct that can constitute a breach of the duty of loyalty seem to be the same for any employee.⁴⁸

Though the obligations imposed by the duty of loyalty cannot be described with precision, certain overarching rules are fairly definite. First, the duty of loyalty imposes obligations on the employee that are separate and apart from the duty to perform the job.⁴⁹ An employee can perform up to, or even exceed, job expectations and nonetheless breach the duty of loyalty. Second, the common law duty of employees is confined to “all matters connected with the agency,”⁵⁰ which in the employment context translates into the scope of employment. Third, an employee is prohibited from competing with the employer while employed,⁵¹ though case law seems unanimous that an employee may

45. *Aon Risk Servs., Inc. v. Liebenstein*, 710 N.W.2d 175, 190 (Wisc. Ct. App. 2005) (“key employees” owe a fiduciary duty), *abrogated on other grounds by Burbank Grease Servs., LLC v. Sokolowski*, 717 N.W.2d 781 (Wis. 2006).

46. *Rash*, 498 F.3d at 1211.

47. *See Gustafson v. Full Serv. Maint. Corp.*, No. 4:11CV00443AGF, 2012 U.S. Dist. LEXIS 27903, at *6 (E.D. Mo. March 2, 2012) (holding the employee’s alleged “dishonest and insubordinate” behavior was insufficient to show a breach of the duty of loyalty, but not reaching the issue of whether the alleged conduct would have sustained the claim had she been a fiduciary).

48. *E.g.*, *Benchmark Med. Holdings, Inc. v. Rehab Solutions, LLC*, 307 F. Supp. 2d 1249, 1267 (M.D. Ala. 2004) (applying Delaware law) (holding that whether or not an employee is a fiduciary, he or she can still be liable, as an agent, for breach of the duty of loyalty for “wrongful appropriation” of a corporate opportunity).

49. Leslie Larkin Cooney, *Employee Fiduciary Duties: One Size Does Not Fit All*, 79 Miss. L.J. 853, 858 (2010).

50. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

51. *E.g.*, *Eckard Brandes, Inc. v. Riley*, 338 F.3d 1082, 1086 (9th Cir. 2003) (applying Hawaii law); *Think Vacuums, Inc. v. March*, No. 09-61883-CIV-COOKE/BAND-STRAS, 2011 U.S. Dist. LEXIS 12558, at *6 (S.D. Fla. February 9, 2011); *Guidant Sales Corp. v. George*, No. 05-2890 (PAM/JSM), 2006 U.S. Dist. LEXIS 83008, at *12 (D. Minn. Nov. 14, 2006).

“prepare to compete” by taking steps to form a new company⁵² or making initial contact with potential customers, for example.⁵³ Finally, employees are prohibited from disclosing or using confidential information, appropriating the property (including customer lists) of the employer, or engaging in self-dealing through use of the employee’s position with the employer.⁵⁴

These specific prohibitions are merely the tip of the iceberg in terms of the restraints on employee behavior imposed by the duty of loyalty—at least conceptually. The duty is violated when an employee’s actions are “inconsistent with promoting the best interest of their employer at a time when they were on its payroll,”⁵⁵ or when the employee acts in a manner “contrary to the employer’s interest.”⁵⁶ Two ABC reporters, who attained part-time jobs at a Food Lion, Inc., violated the duty of loyalty by secretly videotaping allegedly unwholesome food handling practices, which then aired on an ABC broadcast.⁵⁷ The duty “arguably extends to harmful speech, insubordination, neglect, disruption of employee/employer relations, or discrediting the employer’s name, product or reputation.”⁵⁸ The employee’s common law duty of loyalty is theoretically not as “monolithic” as that imposed on corporate directors and officers,⁵⁹ but aside, perhaps, from the limited right to “prepare to compete” while employed, the doctrine as stated and applied appears very close to the “self-abnegation” expected, at least by some commentators, of directors and officers.⁶⁰

52. *E.g.*, *Veco Corp. v. Babcock*, 611 N.E.2d 1054, 1059 (Ill. App. Ct. 1993) (“[E]mployees may plan, form, and outfit a competing corporation while still working for the employer, but not commence competition.”); *Futch v. McAllister Towing of Georgetown, Inc.*, 518 S.E.2d 591, 597 (S.C. 1999).

53. *E.g.*, *Bray v. Squires*, 702 S.W.2d 266, 270 (Tex. App. 1985).

54. RESTATEMENT (THIRD) OF EMP’T LAW § 8.01 cmt. a (Preliminary Draft No. 7, 2010).

55. *Lowndes Prods., Inc. v. Brower*, 191 S.E.2d 761, 767 (S.C. 1972).

56. *Cent. Lewmar, L.P. v. Gentilin*, No. 03-4671(JWB), 2005 U.S. Dist. LEXIS 45902, at *7 (D.N.J. June 1, 2005) (applying New Jersey law); *see also Hilb, Rogal & Hamilton Co. of Richmond v. DePew*, 440 S.E.2d 918, 921 (1994) (stating that a breach occurs when the conduct is “adverse” to the employer’s interest).

57. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (applying North Carolina law) (affirming jury verdict that there had been a violation of the duty of loyalty). *But see Dalton v. Camp*, 548 S.E.2d 704, 709 (N.C. 2001) (rejecting *Food Lion* to the extent that North Carolina does not recognize an independent claim for breach of the common law duty of loyalty, absent any fiduciary relationship, but not on the grounds that the reporters’ conduct complied with the duty of loyalty).

58. Cooney, *supra* note 49, at 859 (footnotes omitted).

59. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. c (2006).

60. Larry E. Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899, 903 (2011); *see also* Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 776 (2000) (“[F]iduciary law’s loyalty obligation requires

An employee can be discharged,⁶¹ disciplined, reprimanded, or lose wages for the period of disloyalty for breaching the duty of loyalty.⁶² If the employee is a fiduciary—and in those jurisdictions in which a separate claim is allowed for a “simple” breach of the duty of loyalty—the employer can seek “ordinary” or compensatory damages caused by the breach.⁶³ An employer may also seek “disgorgement.” That is, if an agent receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to deliver it, its value, or its proceeds, to the principal.⁶⁴ An employer may seek to disgorge the profit earned by the disloyal employee or the profit the employer would have earned had the employee not been disloyal.⁶⁵ In some jurisdictions, the employer is entitled to seek disgorgement even if it has not suffered any actual injury.⁶⁶ An employer may obtain injunctive

that one party completely subordinate self-interest and act exclusively for the benefit of the other party.”).

61. *E.g.*, *Berry v. Goodyear Tire & Rubber Co.*, 242 S.E.2d 551, 552 (S.C. 1978).
62. *E.g.*, *Food Lion*, 193 F.3d at 515; *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 301–02 (2d Cir. 2006) (holding that appropriate damages for employee’s breach of fiduciary duty is limited to employee’s salary for period of disloyalty); *see Sullivan*, *supra* note 34, at 807; *see also PM Servs. Co. v. Odoi Assocs., Inc.*, No. 03-1810 (CKK), 2006 U.S. Dist. LEXIS 655, at *117 (D.D.C. January 4, 2006) (“[N]o compensation is owed an employee who has breached his duty of loyalty” (quoting *Riggs Inv. Mgmt. Corp.*, 966 F.Supp. 1250, 1266 (2006)) (internal quotation marks omitted)); *Futch v. McAllister Towing of Georgetown, Inc.*, 518 S.E.2d 591 (S.C. 1999) (an employee is not entitled to receive compensation during the period it breached its duty of loyalty).
63. *E.g.*, *Everbrite Electric Signs, Inc. v. Yezzi*, 425 N.W.2d 39 (Wis. Ct. App. 1988).
64. RESTATEMENT (SECOND) OF AGENCY § 403 (1958); *see, e.g.*, *Radio TV Reports, Inc. v. Ingersoll*, 742 F. Supp. 19, 22 n.6 (D.D.C. 1990) (citing *Miller Bldg. Supply, Inc. v. Rosen*, 503 A.2d 1344, 1348 (Md. 1986)).
65. *Everbrite*, 425 N.W.2d 39, at *1; *Cooney*, *supra* note 49, at 866; *see generally Sullivan*, *supra* note 34 (employees must “disgorge the compensation paid during the period of faithlessness”).
66. *E.g.*, *Jet Courier Service, Inc. v. Mulei*, 771 P.2d 486, 497 (Colo. 1989) (soliciting coworkers to leave to work for competing company need not be successful to constitute breach because no harm need be shown); *ABC Trans Nat’l Transp., Inc. v. Aeronautics Forwarders, Inc.*, 413 N.E.2d 1299, 1314–15 (Ill. App. Ct. 1980) (holding that it is misconduct itself that is wrongful and “it makes no difference whether the result of an [employee’s] conduct is injurious to the [employer]”); *Everbrite*, 425 N.W.2d 39; RESTATEMENT (SECOND) OF AGENCY § 469 cmt. a (1958) (agent breaches duty of loyalty by acting in competition with principal even though agent’s conduct does not harm principal); *see Sullivan*, *supra* note 34, at 779–80 (“The net result [of the alternatives to compensatory damage available for breach of the duty of loyalty] is that an employer can recover substantial amounts of compensation otherwise due without proof that it suffered any damage whatsoever and, indeed, even if it is established that there were no such damages.”); *see also News Am. Mktg. In-Store, Inc. v. Marquis*, 862 A.2d 837, 843 (Conn. App. Ct. 2004) (holding that an employer cannot recover for breach of the duty of loyalty as a tort action absent a showing of injury, though it can recover compensation paid to a disloyal employee if it can prove the monetary amount paid).

relief against a disloyal former employee.⁶⁷ Often the “disloyalty” at issue involves third parties—a new employer, for example—and, depending on the facts involved, those third parties can be sued for compensatory damages or disgorgement for aiding and abetting the breach of duty.⁶⁸

B. Representative Cases

The following three cases, in all of which the employer’s claim of breach survived a motion for summary judgment, are representative of the factual outline common to many duty of loyalty cases. Though every case is unique in many regards, many arise from the same basic situation: an employee terminates employment, and the ex-employer alleges the employee did something in breach of the duty before ending the relationship. As discussed above, the employer may claim, *inter alia*, that as a consequence of the alleged breach the employee cannot collect salary or other compensation that would otherwise be owed or that the employee and a third party—the new employer or the employee’s newly-established company, for example—owe damages, disgorgement of profits, or other remedial measures. Though these cases have the same basic factual skeleton and involve an at-will employment relationship, they arise from very different industries: high-tech, personal fitness, passenger railway service. The cases also, arguably, differ significantly in terms of their rank on the disloyalty spectrum, insofar as “loyalty” means some affirmative moral obligation arising from a special relationship⁶⁹ instead of a colorless legal construct. Thus, these cases are intended to illustrate a cross-section of the duty of loyalty cases, which will be used to anchor the discussion in the succeeding sections.

In *Brewer & Pritchard, P.C. v. Johnson*, the co-defendant, Chang, worked as an associate in the B&P law firm.⁷⁰ The employment relationship was at-will.⁷¹ Mr. Chang had a friend, Henry King, whose father and other members of a Chinese delegation were injured in a helicopter crash.⁷² Chang assisted King in finding an attorney to sue

67. See, e.g., *Inner-Tite Corp. v. Brozowski*, No. 2010-0156, 2010 Mass. Super. LEXIS 159, at *70–71 (Mass. Super. Ct. April 14, 2010) (granting one year-long permanent injunction that restrained and enjoined defendant from engaging in plaintiff’s industry, interacting with plaintiff’s customers and sales representatives in the defendant’s former geographic region, or utilizing or disclosing plaintiff’s confidential or proprietary information).

68. E.g., *Nat’l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc.*, 592 F. Supp. 2d 86 (D.D.C. 2009) (new employer sued for aiding and abetting breach of duty); *News Am. Mktg.*, 862 A.2d 837 (same).

69. See generally *Johnson*, *supra* note 1.

70. *Brewer & Pritchard, P.C. v. Johnson*, 7 S.W.3d 862, 864 (Tex. App. 1999).

71. *Id.* at 867.

72. *Id.* at 864.

to recover for his father's injuries.⁷³ Chang met with partners at B&P and told them he could "sign up" the client because of his fluency in Mandarin.⁷⁴ The firm was "definitely interested" in the case.⁷⁵ Chang and a partner discussed candidates for referring the case—which would be a significant business opportunity for the firm—and fee sharing arrangements.⁷⁶ Chang then "shopped" the case around to several other lawyers, and King ultimately signed a retainer with Johnson, who referred the case to noted personal injury lawyer Joe Jamail.⁷⁷ Jamail ultimately settled the case for \$15,000,000.⁷⁸ Johnson received a \$3,000,000 referral fee.⁷⁹ When Chang's partner heard Jamail had the case, he asked Chang how it happened, and Chang said it must have been because Jamail was very famous.⁸⁰

Shortly after these incidents Chang left the firm.⁸¹ B&P then sued him for, *inter alia*, breach of fiduciary duty, and Johnson for civil conspiracy.⁸² Applying Texas law, the trial court granted Chang's motion for summary judgment in which Chang argued that as an at-will employee he owed no fiduciary duty to B&P.⁸³ The court of appeals reversed. Extending precedent that a fiduciary duty is owed when the employment relationship is based on an oral understanding, though not a written contract, the court ruled that the relationship of an associate to the firm and its members, whether the associate be an at-will employee or not, is a fiduciary relationship as a matter of law.⁸⁴ Whether the duty had been breached and caused damage would be for the jury to decide.⁸⁵

In *Taser International, Inc. v. Ward*, the defendant, Steve Ward, worked for three years as an at-will employee with Taser, the Arizona company famous for its "stun gun."⁸⁶ Taser also manufactures accessories for electronic control devices.⁸⁷ During his employment, Ward

73. *Id.*

74. *Id.* at 865.

75. *Id.* at 864.

76. *Id.* at 864–65.

77. *Id.*

78. *Id.* at 864.

79. *Id.*

80. *Id.* at 865.

81. *Id.* at 866.

82. *Id.*

83. *Id.*

84. *Id.* at 867–68.

85. *Id.* at 868. In the defendants' summary judgment motion, they claimed, *inter alia*, that Chang breached no duty if it was owed because he received no portion of the fee for the case and the helicopter crash victim made his own choice of attorney, such that nothing Chang did or did not do caused any harm. *Id.* at 871–72. The court did not reach these arguments.

86. *Taser Int'l, Inc. v. Ward*, 231 P.3d 921, 923 (Ariz. Ct. App. 2010).

87. *Id.*

developed a design for an eyeglass mounted camera device.⁸⁸ Because he served as vice-president of marketing and international sales and had access to confidential and proprietary information, including new product ideas, Ward had sought advice of counsel as to whether he could develop the clip-on camera independently of his employer.⁸⁹ Before he left Taser, Ward worked with a separate product development company, received a development proposal from that company for the new camera device, and drafted a business plan for commercializing the product.⁹⁰ He did not, however, “solicit or recruit any Taser employees, distributors, customers, or vendors; he did not buy, sell, or incorporate any business; he did not acquire office space or other general business services; he did not contact or enter into any agreements with suppliers or manufacturers for his proposed clip-on camera; and he did not sell any products.”⁹¹ After leaving Taser, Ward established his own company and began marketing the clip-on camera to consumers and law enforcement personnel.⁹² Ten months after Ward resigned, Taser announced its new “AXON” device, a “state of the art audio-video earpiece with imager, speaker, and microphone [that] integrates into the communication loop between existing radios and the [officer’s] communications headset.”⁹³

Taser then sued Ward, claiming, *inter alia*, breach of the duty of loyalty.⁹⁴ On cross motions for summary judgment, the trial court granted judgment for Taser.⁹⁵ The court of appeals reversed. The appellate court agreed that, as an employer, Ward owed Taser the “fiduciary duty” required of an agent, so that Ward was obligated “to act with entire good faith and loyalty for the furtherance of the interests of his principal in all matters concerning or affecting the subject of his agency” or pay Taser for any loss occasioned by the failure to so act.⁹⁶ Specifically, while employed by Taser, Ward could not compete with Taser, though he could prepare to compete.⁹⁷ In reviewing the facts of record, the court noted that Taser did not claim Ward’s product competed with the AXON, and that there was a dispute as to whether

88. *Id.* at 924.

89. *Id.*

90. *Id.*

91. *Id.* at 927.

92. *Id.* at 924.

93. *Id.* at 924 n.5.

94. Taser also alleged tortious interference with contract, breach of contract, conversion, and unjust enrichment. *Id.* at 924. The relationship of these claims and others is often asserted in addition to breach of the duty of loyalty—misappropriation of trade secrets, copyright, and patent infringement being among them—is discussed *infra* Part V.

95. *Id.* at 925.

96. *Taser*, 231 P.3d at 926.

97. *Id.*

Taser even had a competing product in the design stage.⁹⁸ But it sent the case back to the jury, nonetheless, to decide whether Ward had engaged in “preliminary” or “substantial” design and development of his clip-on camera. The former would be acceptable, but the latter in breach of the duty of loyalty.⁹⁹

In *National Railroad Passenger Corp. v. Veolia Transportation Services, Inc.*, plaintiff (Amtrak) sued the successful bidder for a contract to operate a commuter rail service in a competitive procurement by the South Florida Regional Transportation Authority (SFRTA), the commuter service between Miami and Palm Beach.¹⁰⁰ Amtrak alleged, *inter alia*, that Veolia aided and abetted a breach of fiduciary duty by three former Amtrak employees.¹⁰¹ The alleged breach occurred when three at-will Amtrak employees allowed Veolia to identify them as putative members of the “key management team” for the Florida rail service should Veolia win the contract award: Veolia made the Amtrak employees contingent offers of employment, meaning they would only come to work for Veolia if Veolia won the competitive procurement.¹⁰²

On cross motions for summary judgment, Veolia argued, *inter alia*, that if any duty were owed it did not extend to the SFRTA procurement because that procurement was outside the employees’ scope of employment, given that the Amtrak employees had no job responsibilities for business development, no responsibilities for South Florida, and no responsibilities for the SFRTA procurement.¹⁰³ Because an agent owes a fiduciary duty to the principal; an agent is one who acts for and under the control of the principal; and an “employee” acts for and under the control of the employer, the court indiscriminately held, “fiduciary principles are applicable to employees.”¹⁰⁴ Further, “employees—especially managers, corporate officers, and directors—owe an undivided and unselfish loyalty to [their corporate employers,] such that there shall be no conflict between duty and self-inter-

98. *Id.* at 928.

99. *Id.* Taser also alleged that Ward violated his fiduciary duty by failing to notify Taser that he was planning to form a competing business. *Id.* at 931. Accordingly, the court applied the rule that the employee is not obligated to notify the employer of preparations to compete, but must notify if he is actually competing; and because the facts were disputed as to whether Ward was competing or preparing to compete, this claim would also have to be decided by a jury. *Id.* at 931–32.

100. *Nat’l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc.*, 791 F. Supp. 2d 33, 37 (D.D.C. 2011).

101. *Id.*

102. *Id.* at 38–39.

103. *Id.* at 44.

104. *Id.* at 47.

est”¹⁰⁵ At least “managers,” then, owe a “general duty of loyalty.”¹⁰⁶ And because the Amtrak employees were deemed to be at some undefined level of management (each supervised at least someone), the court held that they owed such a duty to their employer.¹⁰⁷ Whether that general duty had been breached would be a question for the jury.¹⁰⁸

III. A RIDDLE WRAPPED IN A MYSTERY INSIDE AN ENIGMA¹⁰⁹

It is argued here that the duty of loyalty imposed on at-will employee rests on a very shaky jurisprudential foundation that can readily be dismantled. Among the reasons for undertaking that task are that the current rules defining who owes exactly what to whom are so amorphous—if not just plain meaningless—that the entire doctrine flunks one of the basic tenets of a just legal system: that the law can be understood and obeyed and the consequences of disobedience are reasonably clear.

A. The Riddle—The At-Will Employee as Fiduciary?

In an agency relationship, by definition, the agent owes a fiduciary duty to the principal.¹¹⁰ The universal justification for imposing a legal duty of loyalty on employees is that they are ordinarily deemed “agents” of the employer because, like agents, employees work for and under the control of the employer. Thus, as an agent owes a fiduciary duty to the principal, by definition, so, too, must an employee.¹¹¹

On its face, this conclusion may seem logical and unassailable. The formula mimics a Euclidean principle (the transitive theorem), according to which two things that are both equal to a third thing must equal each other (if A equals B, and B equals C, then A must equal C). Employees and agents are “equal” in that both work for and

105. *Id.* (quoting *Gov’t Relations, Inc. v. Howe*, No. 05-1081, 2007 U.S. Dist. LEXIS 4952 (D.D.C. Jan. 24, 2007)) (internal quotation marks omitted).

106. *Id.* at 48.

107. *Id.*

108. *Id.* at 50–51. Veolia ultimately prevailed after a two-week jury trial.

109. This is, of course, Churchill’s evocative description of Russia.

110. RESTATEMENT (THIRD) OF AGENCY § 1.01 (“Agency is the fiduciary relationship that arises when one person . . . manifests assent to another person . . . that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”). Not everyone adheres completely to the dictates of the Restatement, of course. *See* Ribstein, *supra* note 60, at 903 (“In short, a fiduciary relationship necessarily is an agency relationship but an agency relationship is not necessarily a fiduciary relationship.”).

111. *See supra* section II.A. The duty is variously deemed fiduciary, general, or simply a duty of loyalty. This Article returns to this distinction below.

under the control of another: the employer and principal, respectively. Therefore, employees and agents must be “equal” to each other in regard to the nature of the duty owed. But law is not mathematics. Employment law and agency law do not map perfectly onto each other in several respects. A non-employee agent is not, for example, protected by Title VII. A principal is not obligated by the Internal Revenue Code to withhold income taxes from compensation paid a non-employee agent, nor pay into a workers’ compensation fund. It does not necessarily follow, then, that just because an employee is ordinarily subject to some degree of control by the employer that employee must owe a fiduciary duty to the employer.

Indeed, focusing on the question of whether an employee is a “fiduciary,” instead of whether the employee is an “agent,” leads to the opposite conclusion, at least if the employee is at will. According to the classic definition, two elements must be present to create a fiduciary relationship. First, one party, the “entrustor,” designates a second party to serve as a substitute for the entrustor.¹¹² Not just any “substitution” fits this criterion. A homeowner does not create a fiduciary relationship by engaging a roofer rather than roof the house himself. Instead, in the words of the courts, the substituted function should implicate the imposition of some special “trust or confidence” in the second party.¹¹³ But this action alone does not render the second party a true fiduciary. Only if the entrustor also cedes power, as well as function, to the second party is a fiduciary relationship created.¹¹⁴ Thus, shareholders cede both trust and power to corporate officers and directors; trust beneficiaries cede both trust and power to the trustee.

It is that very relinquishment of control that poses a risk of abuse by the second party. And it is that risk the special obligations imposed on a fiduciary are intended to eliminate or reduce.¹¹⁵ Absent that relinquishment of control, the first party has other, adequate means of protecting against abuse,¹¹⁶ and the special rules regarding fiducia-

112. Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 808 (1983).

113. See *Standard Chlorine of Del., Inc. v. Sinibaldi*, 821 F. Supp. 232, 254 (D. Del. 1992) (applying Delaware law).

114. Frankel, *supra* note 112, at 809 (“[W]hile the fiduciary must be entrusted with the power in order to perform his function, his possession of the power creates a risk that he will misuse it and injure the entrustor.”); Ribstein, *supra* note 60, at 901 (“[M]y definition focuses on the particular type of entrustment that arises from a property owner’s delegation to a manager of open-ended management power over property without corresponding economic rights.”).

115. Ribstein, *supra* note 60, at 901 (“As in all economic agency relationships, the separation of control and economic ownership gives the manager or fiduciary an incentive to use her control to enrich herself rather than the property owner.”).

116. These non-fiduciary, duty-based means of control include financial incentives, the unfettered power to terminate the relationship, contractual limitations, direct oversight, control of performance, and monitoring, for example. See Frankel, *supra* note 112, at 812–15.

ries are unnecessary and, indeed, overly onerous.¹¹⁷ Otherwise stated, “[i]f the entrustor can protect himself from abuse of power, there is no need for the intervention of fiduciary law.”¹¹⁸

Thus, the quintessential fiduciaries—trustees and corporate directors—have been entrusted exclusive power to manage and control assets owned by others. The entrustors, on the other hand—beneficiaries and shareholders—have few or inadequate remedies, absent the imposition of a fiduciary duty. Fiduciary law is intended to protect the entrustors in the event the trustee or director takes advantage of her position of power to enrich herself at the expense of the entrustors, or simply does a poor job of managing the assets.¹¹⁹

This scenario is a far cry from the at-will employment relationship. In fact, the employment relationship is the mirror-image of the fiduciary relationship. The party wielding the power and control is the employer, yet it is the employee who owes the so-called fiduciary duty. In the world of trusts, the comparable rule would be that the beneficiary owes the fiduciary duty; and in the corporate world, the shareholders owe a fiduciary duty to the directors. Certainly, an employee could be granted such a significant amount of discretion and authority that she wields a significant amount of power and control over the employment relationship or the business as a whole. But as another scholar has concluded, “[i]t is not intuitively obvious that the employer is the vulnerable party in the employer-employee relationship.”¹²⁰ At the bottom, whether or not the employer exerts its power and control over an at-will employee, because it has the authority to terminate the employee at any time and for any reason, its potential control over the relationship is virtually absolute.¹²¹

To the contrary, it could be argued that the employer is vulnerable because an employee in an at-will relationship can terminate at any

117. See Ribstein, *supra* note 60, at 903 (“The strictness of the fiduciary duty helps explain its limited scope. A duty of self-abnegation is only rarely appropriate in a competitive marketplace. Such a duty is usually excessively costly when applied to commercial dealings because it undermines the incentives that motivate business people to provide high-quality goods and services.”).

118. Frankel, *supra* note 112, at 811.

119. For example, as Ribstein notes, in a non-fiduciary relationship, the parties can impose contractual limitations on the exercise of control that are enforceable through standard breach of contract remedies. But “parties in the limited category of relationships involving open-ended delegation of power cannot contract to limit the manager’s power without undermining the beneficiary’s objective in delegating power. This makes an additional fiduciary duty appropriate.” Ribstein, *supra* note 60, at 904.

120. Terry A. O’Neill, *Employees’ Duty of Loyalty and the Corporate Constituency Debate*, 25 CONN. L. REV. 681, 701 (1993).

121. See Frankel, *supra* note 112, at 810 (contrasting the power of a director to abuse the entrustment of power by shareholders to the powerlessness of employees, who “are usually expected to act only under the employer’s control”).

time. Thus, the employer is always at the risk of losing a valuable employee suddenly and without notice, with subsequent damage to the business—perhaps irreparable. In a buyer's market, as in the current economy, this risk might be small. But for some businesses or industries, and in a different economic climate, the sudden departure of one or more employees could well injure the employer. The imposition of a fiduciary duty on the employee may well minimize that risk. By preventing the employee from facilitating a quick departure by making substantial preparations to leave, for example, an employee may be deterred from making the attempt at all.¹²² But under these circumstances, the employer retains its unfettered right to terminate while the employee's right to depart has been circumscribed. Thus, by thrusting the employee into a fiduciary role, the "balanced" nature of the at-will relationship has been altered—only to the benefit of the employer. To the extent that an at-will employee has any fiduciary characteristics, then, one might still question whether it is fair, reasonable, or necessary to distort the at-will employment relationship by importing one-sided fiduciary duty into that relationship.

The assertion that imposing a fiduciary duty on the employee is unnecessary is discussed in detail in Part V. But, to summarize, the employer, unlike the typical entrustor, has a full quiver of tools to deter and punish "abusive" behavior on the part of the employee, in addition to the power to terminate the relationship in its entirety. For example, many, if not most, employees simply need the job, which is in itself a powerful incentive to respect the employment relationship.¹²³ This situation is unlike the typical fiduciary, such as a corporate director whose directorship is adjunct to his ability to make a living and whose performance may therefore need the enhancement of the duties imposed by fiduciary law. Should there be any threat or perceived threat of "disloyal" behavior, the employer can tighten its control over the employee, reduce his responsibilities, monitor his laptop and

122. See O'Neill, *supra* note 120, at 698 ("Thus, employers can avail themselves of the employee's duty of loyalty defensively, to prevent an employee from raiding its customers and other workers, or offensively, to punish the employee for taking another job or to deter others from joining him. In either case, this mandatory rule of law gives employers a powerful tool to counteract labor market forces that pose a threat to them."); *see also* Fielding, *supra* note 25, at 206 ("Prohibiting preliminary arrangements also raises fairness concerns because the rule places employees trying to start their own business at a competitive disadvantage. Most entrepreneurs have the ability to contact key players and even attempt to solicit their business before investing substantial funds into the venture."). To the extent employees are aware of the rules, the specter of starting at a "competitive disadvantage" may well discourage the attempt.

123. See O'Neill, *supra* note 120, at 710 ("Taken together, employees' lack of diversification and their expectation of long-term employment make them vulnerable to their employers in ways that others who provide services for compensation are not.").

cellphone, reduce his pay, and, if none of that works, fire him.¹²⁴ Should there be any threat or perceived risk from the employee's sudden termination of employment, the employer can simply offer a fixed-term contract. It would seem that the employer is well-able to protect itself, which calls into question the need for the additional control imposed by a "fiduciary" duty of loyalty.

For example, the role of Mr. Chang, the at-will associate in a law firm, to the partners and firm—as opposed to his relationship with a client, which is subject to very different considerations¹²⁵—seems little akin to a fiduciary relationship. The typical associate is completely at the beck and call of the partners, and, having no or few clients of his own, completely dependent on the partners and the firm for financial remuneration. The market is crowded and he may have few, if any, options should he be terminated. Additionally, he is often in need of training by the partners in order to be fully qualified to represent clients and move out on his own. The power, particularly in an at-will relationship, rests almost exclusively with the partners and firm, not the associate. He is entrusted with client matters, but he is obligated by the rules of professional responsibility to provide "zealous" representation, maintain confidentiality, and otherwise comport himself in a "loyal" fashion insofar as the business of the firm is concerned. Should the firm be concerned about associates referring cases to other attorneys or firms, the firm can readily adopt clear policies prohibiting this conduct and punish any offender by reducing wages or salary, demoting, or firing. But perhaps if the firm has not inspired confidence in its associates that it is the best firm for the potential referral, it doesn't deserve that referral.

Mr. Ward is arguably closer to the fiduciary model, but not by much. Though Ward was a vice-president of marketing and participated in "high level executive meetings" at Taser,¹²⁶ there is no indication in the decisions that he held any significant power in the employment relationship. Mr. Ward just did his job, and apparently did it well.¹²⁷

The Amtrak employees were even lower than Mr. Ward on the "fiduciary" scale. Although they all managed or trained someone, they were far below the Amtrak executive level. One ran a train between

124. See Sullivan, *supra* note 34, at 786 ("In most cases, at least where a collective-bargaining agreement is not involved, the employer's self-help remedy of discharging an at-will employee provides effective and cost-efficient relief for any perceived dereliction of duty—and without having to establish either the existence of the duty or its actual breach.").

125. Why the attorney-client relationship does fit within the paradigm of a fiduciary relationship is beyond the scope of this article.

126. Taser Int'l, Inc. v. Ward, 231 P.3d 921, 927 n.11 (Ariz. Ct. App. 2010).

127. Taser presented no evidence in its case against Mr. Ward that he "was derelict" in his job performance. *Id.* at 926 n.9.

Portland, Maine and Boston; one ran the station in Albuquerque; and one trained others in safety. None had been imparted with any “special trust” by Amtrak in regard to business development, government procurements, or the SFRTA procurement in any regard. The only particular “power” these employees had vis-à-vis Amtrak was to fail to do their job or walk off the job, with potentially damaging consequences to minor aspects of Amtrak’s day-to-day operations. Neither of these employee options smacks of the “power” a corporate director or trustee has over the fundamental operations of a business. And, again, all these employees were at-will and could be terminated at any time—surely a potent deterrent to abuse of the power wielded by all employees to fail in job duties. Walking off the job and finding a comparable job would have been a difficult enterprise, given Amtrak’s Congressionally-granted monopoly in the intercity passenger railway system in the United States. Further, because Amtrak was the “three hundred pound gorilla” in the passenger rail system, with no competition in the intercity market, it faced no real difficulty hiring alternatives. To label these Amtrak employees “fiduciaries” elevates form over substance—labels over reality.

Mr. Ward did have an option should he be fired for “disloyal” conduct or otherwise: he was designing his own product and planning to launch his own company. He perhaps took a risk—the risk that he would be discovered and fired—in taking those steps while he was employed by Taser. But the fact that it was a risk scarcely turned his relationship with the company into one in which he had the power and control over his employer’s business and assets, as a true fiduciary does over the entrustor’s affairs.

In any event, why Mr. Chang, Mr. Ward, and the Amtrak employees should have owed a “fiduciary duty” to their employers—given the nature and function of a “fiduciary”—is a riddle.

B. The Mystery—Who Owes a Duty?

As discussed in section II.A, most courts, by reference to the law of agency, conclude that employees owe a “fiduciary duty” to their employer, although others simply refer to a “duty of loyalty.”¹²⁸ Most frequently, no distinction is drawn by the courts between these two categories in terms of what the employee can and cannot do.¹²⁹ Other courts, however, speak of varying degrees of loyalty owed, depending on the employee’s particular position with the employer.¹³⁰ But be-

128. *See, e.g., Jet Courier Serv., Inc. v. Musei*, 771 P.2d 486, 492 n.10 (Colo. 1989) (noting that courts from many jurisdictions refer to a “fiduciary duty,” others to a “duty of loyalty,” and adopting the more general term “duty of loyalty”).

129. *See supra* discussion accompanying notes 41–48.

130. *Rash v. J.V. Intermediate, Ltd.*, 498 F.3d 1201, 1211 (10th Cir. 2007) (applying Texas law) (holding that the trial court erred in not instructing the jury on the

cause the employee's duty of loyalty rests squarely on the law of agency, which imposes a *fiduciary* duty, the provenance of any other "duty of loyalty" for a non-fiduciary employee is a mystery, indeed. It would seem to come only from "the deeply rooted conception of the employment relation as a dominant-servient relation rather than one of mutual rights and obligations."¹³¹ Arguably, that "conception" is just an insufficient rationale for the imposition of a legal duty, so only if the employee qualifies as a "fiduciary" should there be any duty of loyalty at all.¹³²

Whether a particular employee is a fiduciary is usually answered by the courts using a broader brush than is employed in the discussion above. That is, little if any explicit attention is paid to the balance of power between employer and employee,¹³³ the extent to which the employer has ceded control to the employee, or the real possibility of abuse by the employee because of a position of power and control.¹³⁴

employer's breach of fiduciary claim, and the error was not harmless though the jury had considered the breach of "duty of loyalty" claim). The court stated that although the two were "analytically similar," a fiduciary owes a "distinct and separate obligation than the duty of loyalty to an employer." *Id.* In *Jet Courier*, the court suggested that different degrees of loyalty might be owed depending on the particular employment relationship: "we need not determine whether the duty of loyalty discussed in this opinion applies in all its rigor to every employment relationship regardless of the nature of the work performed by the employee." *Jet Courier*, 771 P.2d at 492 n.10. Relatedly, some courts note that the employee's status may be considered in determining whether there was a breach of the duty. *See, e.g., Cameco, Inc. v. Gedicke*, 724 A.2d 783, 789 (N.J. 1999).

131. Summers, *supra* note 21, at 78.

132. Sullivan, *supra* note 34, argues that "ordinary" employees and fiduciaries should owe different duties, and only the latter would be subject to forfeiture and other "extreme" penalties for breach of that duty; non-fiduciaries would only be subject to breach of contract remedies for breach of the more general "duty of loyalty." It is not clear, however, what would be the justification for imposing any duty of loyalty at all on "ordinary" employees.

133. *But see* *Diamond Phoenix Corp. v. Small*, No. 05-79-P-H, 2005 U.S. Dist. LEXIS 12798, at *15-16 (D. Me. June 28, 2005) (applying Maine law) (breach of fiduciary duty claim should be dismissed because complaint alleged no facts indicating that the employee was ever the "superior party" in the employment relationship); *Bryan R. v. Watchtower Bible & Tract Soc'y*, 738 A.2d 839, 846 (Me. 1999) ("A fiduciary duty will be found to exist, as a matter of law, only in circumstances where the law will recognize both the disparate positions of the parties and a reasonable basis for the placement of trust and confidence in the superior party in the context of specific events at issue.").

134. On occasion, usually in the older cases, the specific language of fiduciary law is at least mentioned. Thus, a fiduciary relationship has been defined as that which exists when

there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . , [and] 'it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.'

Instead, these elements are glossed over—or perhaps assumed to be present—if the employee is a “key employee,” a “manager,”¹³⁵ or, more generally, has “policy-making authority or has the ability to make decisions which bind the company.”¹³⁶ Even a “low level” employee may owe the duty if he is in a position of “trust and confidence.”¹³⁷

This “limitation” on the imposition of a fiduciary duty is imprecise,¹³⁸ but certainly it is quite narrow. For one thing, employers put some degree of “trust and confidence” in all employees, simply by virtue of tasking them with completing certain duties.¹³⁹ Thus, in order to cabin this concept slightly, courts may look for some “special” trust, including, for example, that the employee had access to trade secrets or confidential information,¹⁴⁰ has the authority to negotiate—if not necessarily execute—contracts binding on the employer,¹⁴¹ or has some other “meaningful authority.”¹⁴² Theoretically, these indicia of a “fiduciary relationship” would leave at least some non-managerial

Abbitt v. Gregory, 160 S.E. 896, 906 (N.C. 1931) (quoting 25 C.J. *Fiduciary* § 9, at 1119 (1921)).

135. Nat'l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc., 791 F. Supp. 2d 33, 47 (D.D.C. 2011); Talentburst, Inc. v. Collabera, Inc., 567 F. Supp. 2d 261, 266 (D. Mass. 2008).
136. Modern Materials, Inc. v. Advanced Tooling Specialists, Inc., 557 N.W.2d 835, 838 (Wis. Ct. App. 1996). *See also* Md. Metals, Inc. v. Metzner, 382 A.2d 564, 568 (Md. App. 1978) (duty of loyalty applies to “corporate officer or other high-echelon employee”).
137. Chelsea Indus., Inc. v. Gaffney, 449 N.E.2d 320 (Mass. 1983). *But cf.* Gustafson v. Full Serv., No. 4:11CV0043AGF, 2012 U.S. Dist. LEXIS 27903, at *6 (E.D. Mo. March 2, 2012) (stating that the allegation that the employee worked alone and unsupervised—such that she had been put in a position of trust—was not sufficient to invoke a fiduciary duty).
138. *E.g.*, Talentburst, 567 F. Supp. 2d at 265 (“The definition of ‘position of trust and confidence’ has not been clearly defined.”).
139. *See* Atlanta Mkt. Ctr. Mgmt. Co. v. McLane, 503 S.E.2d 278, 281 (Ga. 1998) (“The employee-employer relationship is not one from which the law will necessarily imply fiduciary obligations; however, the facts of a particular case may establish the existence of a confidential relationship between an employer and an employee . . .”).
140. *E.g.*, Talentburst, 567 F. Supp. 2d at 266, n.4; *See* Fowler v. Varian Assocs., Inc., 196 Cal. App. 3d 34, 42 (1987).
141. *E.g.*, Rash v. J.V. Intermediate, Ltd., 498 F.3d 1201, 1208 n.2 (10th Cir. 2007) (applying Texas law).
142. GAB Bus. Servs., Inc. v. Lindsey & Newsom Claim Servs., Inc., 99 Cal. Rptr. 2d 665, 669 (Cal. Ct. App. 2010), *overruled on other grounds* by Reeves v. Hanlon, 95 P.3d 513 (Cal. App. 2004); Kinesis Adver., Inc., v. Hill 652 S.E.2d 284, 295 (N.C. Ct. App. 2007) (“[A]n individual may owe a fiduciary duty to the corporation if he is considered to be a *de facto* officer or director, with authority for tasks such as signing tax returns, offering major input as to the company’s formation and operation, or managing the company.”). In contrast, for example, the court in *Gustafson* stated that the allegation that the employee worked alone and unsupervised such that she had been put in a position of trust was not sufficient to invoke a fiduciary duty. *Gustafson*, 2012 U.S. Dist. LEXIS 27903, at *6.

employees free from owing a fiduciary duty. But in reality, if an employee does something significant and successful enough to warrant his employer's filing a lawsuit against him—usually something like leaving to start a new business or by improving the business of an ex-employer's competitor—that “something” in and of itself can be used, explicitly or implicitly, to demonstrate that the employee had the requisite “trust and confidence.” According to this patrician approach, a mere “low level” employee devoid of such “trust and confidence” could not have succeeded on his own.

In any event, this seems to be the underlying ethos, given the relative ease with which the courts seem to detect sufficient “authority” in the employee or “trust” imposed by the employer for the breach of fiduciary claim to go to the jury.¹⁴³ Most of the employees alleged to have breached a fiduciary duty of loyalty had at least some form of managerial duties, access to confidential information, or some measure of authority to make decisions on the job. Many courts simply impose a “duty of loyalty” on an employee, without analyzing whether the employee is a fiduciary or not, on the grounds that employees are categorized as agents. As discussed in section II.A, it is the rare employee, indeed, who escapes the duty noose.¹⁴⁴

Mr. Chang was not a key employee or a manager of his law firm. The court imposed a fiduciary duty on this at-will associate on the grounds that his partners and his firm necessarily reposed a “special trust” in him simply because he was an attorney with the firm.¹⁴⁵ The court pointed to nothing in the record, however, to indicate that Mr. Chang had access to any confidential information about the firm's business—as opposed to confidential client information which he would be obligated to protect by his own ethical obligations—or had any au-

143. *E.g.*, *Eckard Brandes, Inc. v. Riley*, 338 F.3d 1082, 1086 (9th Cir. 2003) (“Nothing in the Restatement [of Agency] indicates, however, that ordinary employees have no duty of loyalty.”); *Lucas v. United Fabricating, Inc.*, No. 5:06CV54, 2007 U.S. Dist. LEXIS 64269, at *14 (N.D.W. Va. Aug 29, 2007) (applying West Virginia law) (holding an employee who had the authority to “turn away customers” owes a fiduciary duty).

144. Among these rare exceptions are the seamstresses and one intern, who Mattel alleged had breached their duty of loyalty by working for MGA Entertainment while employed by Mattel, giving rise to a claim of aiding and abetting the breach against MGM in *Mattel, Inc. v. MGA Entertainment, Inc.*, No. CV 04-90492011, U.S. Dist. LEXIS 55756, at *15 (C.D. Cal. 2011). The court held that no claim lies in California for breach of a common law duty of loyalty; these employees were not fiduciaries and, therefore, summary judgment was entered on Mattel's claim. *See also* *Cheney v. IPD Analytics, LLP*, No. 08-23188-CIV-MORENO/TORRES, 2009 U.S. Dist. LEXIS 85702, at *14 (dismissing employer's counterclaim against employee patent attorney where counterclaim failed to allege either an express or implied fiduciary relationship). But, again, these courts held that these “mere” employees were not subject to a claim for breach, but did not hold that “mere” employees owe no duty of loyalty at all.

145. *Brewer & Pritchard, P.C., v. Johnson*, 7 S.W.3d 862 (Tex. App. 1999).

thority to negotiate fees or settlements or make significant decisions for the firm or its clients. Mr. Ward, as vice president of marketing, fit into the “manager,” or perhaps the “key employee,” category of employees who are traditionally assigned a fiduciary duty. But this was not an issue in the decision: the court simply stated that in Arizona, “an employee/agent owes his or her employer/principal a fiduciary duty.”¹⁴⁶ According to the court, the Amtrak employees were “management level” and, therefore, owed a fiduciary duty to their employer.¹⁴⁷ The three employees’ titles were, indeed, “managerial,” as they were Assistant Superintendent for Maine Passenger Service, Senior Analyst in Amtrak’s Operating Practices Section, and District Manager of Stations, respectively. But in a company with 17,000 employees and hundreds, if not thousands, of “managers,” the titles alone do not indicate that Amtrak reposed any special trust or confidence in these particular employees.¹⁴⁸ In *Amtrak*, labels eclipsed logic.

When the smoke is cleared from the rhetoric, it becomes clear that employees are deemed fiduciaries solely because of their role, whether that role is “associate,” “manager,” or “key employee” of some sort. Assigning fiduciary duties to anyone in the role of “trustee” or “director” may make imminent sense, given that any trustee and any director is truly acting as a fiduciary for the beneficiary or shareholder. But deeming any “manager” a fiduciary when that “manager” may or may not have any really special role to play in the company’s business seems a more dubious proposition. Even more dubious is the proposition that anyone would know *ex ante* whether they qualified as a “manager,” “key employee,” or had some special trust or confidence imposed in them by the employer—when all they probably know is that they are supposed to do their job. It would be a mystery.

C. An Enigma—What is a Breach?

The courts typically employ sweeping language to describe the duty of loyalty owed by employees. Thus, for example, the employee is bound to “exercise the utmost good faith and loyalty,”¹⁴⁹ and act

146. *Taser Int’l, Inc. v. Ward*, 231 P.3d 921, 926 (Ariz. Ct. App. 2010) (quoting *McCallister Co. v. Kastella*, 825 P.2d 980, 982 (Ariz. Ct. App. 1992)) (internal quotation mark omitted).

147. *Nat’l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc.*, 791 F. Supp. 2d 33, 47–48 (D.D.C. 2011).

148. *But see* *FBK Partners, Inc. v. Thomas*, No. 09-292, 2010 U.S. Dist. LEXIS 126265, at *12–14 (E.D. Ky. 2010) (denying defendant’s motion for summary judgment because the defendant’s “title of ‘manager’ alone supports a contention of fiduciary duties where there were no further facts” regarding the defendant’s scope of employment were offered).

149. *AGA Aktiebolag v. ABA Optical Corp.*, 441 F. Supp. 747, 754 (E.D.N.Y. 1977).

“solely for the benefit of the principal.”¹⁵⁰ However, just as an agent owes a fiduciary duty “in all matters concerned with his agency,”¹⁵¹ an employee owes a duty of loyalty only within the scope of employment.¹⁵² Another specific exception to the duty of loyalty applicable in almost all jurisdictions is the employee’s right to prepare to compete: the employee does not breach the duty by making preparations to compete with the employer after the employment relationship has ended,¹⁵³ though he cannot actually compete while still employed.¹⁵⁴ These two limitations on the duty of loyalty theoretically give employees significant tools to enhance their financial security. That is, given a labor market in which “employers no longer implicitly offer workers long-term job security and employees no longer expect to remain in the same job for their lifetime,”¹⁵⁵ the employee’s right to explore alternative employers and alternative careers¹⁵⁶ should facilitate labor mobility and reduce the threat of sudden job loss. The problem with the first exception (scope of employment), however, is that it is rarely analyzed and frequently ignored by the courts. And the second—prepare to compete versus compete—is so vague as to be virtually incomprehensible, or at least difficult to apply in practice.

These problems are evident in the representative cases.¹⁵⁷ In *Taser*, for example, the court duly noted that Mr. Ward had a “duty to act with entire good faith and loyalty for the furtherance of the interests of his principal in all matters concerning or affecting the subject

150. *E.g.*, *Gross v. Akin, Gump, Strauss, Hauer & Feld*, 599 F. Supp. 2d 23, 32 (D.C.C. 2009).

151. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

152. *E.g.*, *Md. Metals, Inc. v. Metzner*, 382 A.2d 564, 568 (Md. Ct. App. 1978) (duty of employee to act solely for the benefit of employer in all matters within the scope of employment); *Chelsea Indus., Inc. v. Gaffney*, 449 N.E.2d 322, 326 (Mass. 1983).

153. *E.g.*, *Radio TV Reports v. Ingersoll*, No. 86-2852, 1989 U.S. Dist. LEXIS 11942, at *8 (D.D.C. Aug. 14, 1989). This distinction is drawn “to accommodate the competing policy considerations of honesty and fair dealing on the one hand and free and vigorous economic competition on the other.” *Jet Courier Service, Inc. v. Musei*, 771 P.2d 486, 493 (Colo. 1989). Thus, the courts grant “a privilege in favor of employees which enables them to prepare or make arrangements to compete with their employers prior to leaving the employ of their prospective rivals without fear of incurring liability for breach of their fiduciary duty of loyalty.” *Md. Metals*, 382 A.2d at 569.

154. *E.g.*, *Las Luminarias v. Isengard*, 587 P.2d 444, 452 (N.M. 1978). See cases from various jurisdictions cited in Fielding, *supra* note 25, at 206. Kentucky appears to be the only jurisdiction in which even preparatory steps to compete are prohibited, at least if the employee is a director or officer. See *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 807 S.W.2d 476, 483 (Ky. 1991).

155. Arnov-Richman, *supra* note 11, at 36.

156. See, *e.g.*, *Las Luminaras*, 587 P.2d at 452.

157. In *Brewer & Pritchard, P.C. v. Johnson*, the court did not reach the issue of whether there was sufficient evidence of breach to survive summary Judgment. *Brewer & Pritchard, P.C. v. Johnson*, 7 S.W.3d 862 (Tex. App. 1999).

of his agency.”¹⁵⁸ The alleged breach was that Mr. Ward developed a design for a clip-on camera that could compete with Taser products, even if Taser did not have such a camera on the market. Because Mr. Ward “was not responsible for product conception, design, or development at the company,”¹⁵⁹ whatever he did—compete, prepare to compete, or something in between—was arguably outside the scope of his employment and, therefore, no breach. But without even mentioning “scope of employment,” the court denied Mr. Ward’s motion for summary judgment. Similarly, in *Amtrak*, the court recited the rule that an employee owes a duty “to act solely for the benefit of the principal in all matters concerned with his agency” without analyzing what “matters” were “concerned with” “their agency.”¹⁶⁰ The alleged breach was that three Amtrak employees allowed their names to be used in a potential rival’s bid for a contract. Because, as Veolia argued repeatedly, these employees had no job responsibility remotely related to business development, procurement, solicitations, or even contracting, whatever they did was outside the scope of their employment and per se no breach. The court effectively ignored this argument.

In *Taser*, *Amtrak*, and the vast majority of cases dealing with the duty of loyalty issue, the scope of employment limitation on the duty of loyalty telescopes into the “compete/prepare to compete” paradigm. That is, if the alleged breach is that the employee disloyally “competed” with the employer, the courts fail to ascertain whether or not that conduct is outside the scope of employment. Two limits on the duty of loyalty become one.

And that one is vague, indeed.¹⁶¹ The line between preparation to compete—or “preliminary steps” to compete in the words of some courts—and competition has some definite mileposts. Generally, if an employee actively solicits the employer’s customers or clients,¹⁶² or

158. *Taser Int’l, Inc. v. Ward*, 231 P.3d 921, 926 (Ariz. Ct. App. 2010).

159. *Id.* at 927 n.11.

160. *Nat’l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc.*, 791 F. Supp. 2d 33, at 46 (D.D.C. 2011) (quoting *Gross v. Akin, Gump, Strauss, Hauer & Feld, LLP*, 599 F. Supp. 2d 23, 32 (D.D.C. 2009)) (internal quotation marks omitted).

161. See RESTATEMENT (THIRD) OF AGENCY § 8.04 cmt. c (“In retrospect it may prove difficult to assess the propriety of a former agent’s conduct because many actions may be proper or improper, depending on . . . the surrounding circumstances. For that reason it may be difficult to draw a clean distinction between actions prior to termination of an agency relationship that constitute mere preparation for competition, which do not contravene an employee’s or other agent’s duty to the principal, and actions that constitute competition.”).

162. *E.g.*, *Guidant Sales Corp. v. George*, No. 05-2890 (PAM/JSM), 2006 U.S. Dist. LEXIS 83008, at *11–13 (D. Minn. Nov. 14, 2006); *Nat’l R.R. Passenger Corp.*, 791 F. Supp. 2d at 49; *Radio TV Reports v. Ingersoll*, No. 86-2852, 1989 U.S. Dist. LEXIS 11942, at *10 (D.D.C. Aug. 14, 1989); *Inner-Tite Corp. v. Brozowski*, No. 2010-0156, 2010 Mass. Super. LEXIS 159, at *63–65 (Mass. Super. Ct. 2010); *but see* *Of Skincare, LLC v. Phytoceuticals*, No. CV 08-4470 ODW, 2009 U.S. Dist.

leads a “mass resignation” of employees,¹⁶³ disloyal competition has occurred. Drafting a business plan, renting office space, or having preliminary conversations with potential partners or employees is probably preparing to compete. But what real people do when they are planning to change jobs or open a new business rarely fits neatly into one of these categories, and everyone does these things in a different way.¹⁶⁴ For example, what language in a conversation with a prospective client turns it from a “preliminary” contact to a “solicitation?”¹⁶⁵ As one scholar concludes, “The preliminary steps doctrine . . . has failed to be a workable standard. Courts struggle to explain which preliminary activities are competitive. The lines drawn between what constitutes mere preparation and actual competition have been arbitrary”¹⁶⁶

If it is well-recognized by courts and commentators alike that the line between preparing to compete and competing is “arbitrary,” it is not so commonly observed that what is firmly placed on the “compete” side of the line actually has nothing to do with true competition. Thus, if an employee is “competing” with the employer during the employment relationship, he has breached the duty of loyalty even if the

LEXIS 58241 (C.D. Cal. July 8, 2009) (denying defendant’s motion for summary judgment on breach of duty claim arising out of mass resignation).

163. See *United Aircraft Corp. v. Boreen*, 413 F.2d 694, 699 (3d Cir. 1969) (applying Pennsylvania law); *Jet Courier Service, Inc. v. Musei*, 771 P.2d 486, 497 (Colo. 1989); *ABC Trans Nat’l Transp., Inc. v. Aeronautics Forwarders, Inc.*, 413 N.E.2d 1299 (Ill. App. 1980).
164. Cf. *St. Paul Fire and Marine Ins. Co. v. Hoskins*, No. 5:10cv087, 2012 U.S. Dist. LEXIS 30770, at *15 (W.D. Va. March 7, 2012) (“Whether [an employee’s] specific conduct taken prior to resignation [or termination] breaches a fiduciary duty requires a case by case analysis.”) (quoting *Feddeman & Co., C.P.A., P.C. v. Langan Assocs., P.C.*, 530 S.E. 2d 668, 672 (Va. 2000)); *Guidant*, U.S. Dist. LEXIS 83008, at *13 (“Whether an employee breached a duty of loyalty must be determined by considering all relevant circumstances.”); *Bancroft-Whitney Co. v. Glen*, 411 P.2d 921, 935 (Cal. 1966) (“No ironclad rules as to the type of conduct which is permissible can be stated, since the spectrum of activities in this regard is as broad as the ingenuity of man itself.”); *Md. Metals, Inc. v. Metzner*, 382 A.2d 564, 570 (Md. Ct. App. 1978) (“[T]he ultimate determination of whether an employee has breached his fiduciary duties to his employer by preparing to engage in a competing enterprise must be grounded upon a thoroughgoing examination of the facts and circumstances of the particular case.”). On occasion, however, as discussed below in regard to *Amtrak*, certain employee conduct may be common industry-wide, and a successful claim of breach of fiduciary duty based on that conduct may affect the future conduct of thousands of employees.
165. See *Rehabilitation Specialists, Inc. v. Koering*, 404 N.W.2d 301, 305 (Minn. App. 1987) (reversing summary judgment for employee and remanding for determination of whether employee’s pretermination contacts with employer’s customers amounted to impermissible solicitation); *Bray v. Squires*, 702 S.W.2d 266, 272 (Tex. App. 1985) (holding the issue of whether breach occurred when employer’s client discussed “possibility” of giving business to employees if they left the employer but gave no “assurance”).
166. Fielding, *supra* note 25, at 206.

employer has suffered no competitive harm. That is, as discussed in section II.A, the disloyal employee is subject to forfeiture of monies owed and disgorgement of profits made even if the employer can prove no loss of profits or customers or any other compensatory damages. Under these circumstances, where the employee has presumably found its own customers or new market segment and has not taken a share of the employer's business, it is a stretch to deem the employee's business as "competing" with the employer. In other words, the line between "competing" and simply succeeding at a business or changing employment is just arbitrary, at least insofar as it is divorced from the concept of "competition" with the employer.

Another example of the disconnection between true competition and what is deemed disloyal "competition" occurs when the employee simply changes jobs, moving from one large corporation to another. If the employee took steps before changing jobs that are deemed to have aided the new employer, the employee has breached the duty of loyalty, and the new employer becomes the "aider and abettor" of the breach.¹⁶⁷ But this is backward. Though "competition" is the breach, it is the new employer doing the competing, not the employee. None of the three Amtrak employees submitted a competing bid to SFRTA, nor could they have. The employee in this situation, in effect, aids and abets the new employer in competing with the old employee. But then, where is the breach? It is an enigma.

IV. WHY "LOYAL?"

It is argued above that the confusion and uncertainty in the justification for the duty of loyalty—that employees are fiduciaries of their employers—and in key aspects of applying the law in its current state undermine its validity and predictability. The argument now turns to the older jurisprudential foundation for the duty of loyalty—the master-servant relationship—and demonstrates the invalidity of that relationship to the modern-day employment relationship, as well as the lack of any sound policy or practical rationale for requiring at-will employees to be "loyal."

A. The Loyal Servant

As illustrated above, deriving an at-will employee's duty of loyalty from fiduciary principles is a significant stretch. But the modern view that the legal duty of an employee rests on fiduciary principles evolved from a very different type of relationship in the not-so-distant background—the master-servant relationship.¹⁶⁸ Before jettisoning the

167. *E.g.*, *Nat'l R.R. Passenger Corp. v. Veolia*, 592 F. Supp. 2d 86 (D.D.C. 2009).

168. *See* RESTATEMENT (SECOND) OF AGENCY § 2 cmt. a (1957). ("A master is a species of principal, and a servant is a species of agent."); James J. Brudney, *Reluctance*

duty of loyalty completely, the solidity of that older foundation must be examined.

One might question why the modern employee should be equated to a “servant” in this regard, thus perpetuating the “conception of the employment relation as one of employer dominance and employee subservience.”¹⁶⁹ But another, less politically-charged question is how the ancient role of the servant can possibly be mapped onto that of the modern employee? Thus, if loyalty should be owed by an employee/servant, to whom and how should it be demonstrated?

The paradigm of the loyal servant, perhaps, is the valet who dresses and otherwise attends to the needs of the master. Loyalty is owed to the master, of course. The needs and desires of the mistress should be considered, and perhaps even the children of the manor taken into account, but in the event of any conflict, there is no question about divided loyalty: to the master and the master alone it is owed. The valet demonstrates the required loyalty by performing his duties in exemplary fashion, keeping the confidences of the master and his family, and doing nothing to dishonor the master, his family, or the manor.¹⁷⁰

Fast forward to today. In similar fashion, supposedly, Amtrak’s employees are to be loyal to the corporation. Certainly, employees may well feel some sense of loyalty to the business for which they work. But surely this feeling is directed to one’s coworkers, supervisor, or even the corporate officers, and not truly to the legal construct called a “corporation.” In any event, the relationship between an employee at will and a corporate employer bears little, if any, resemblance to the personal bonds between a lord and his valet.

A partnership or sole proprietorship is, perhaps, different: an employee could truly be loyal to the one person or three partners for whom he worked. But even here, another distinction between the master–servant paradigm and the employee at will arises. Though a master had complete authority over a servant, he also had some responsibility for caring for the servant—feeding and clothing him, at

and Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law, 32 *COMP. LAB. L. & POL’Y J.* 773, 794 (2011) (“By contrast [with the law in other countries], the primary employee duties of loyalty under U.S. law—nondiversion of employer business to a competitor while still employed, nondisclosure of confidential information, nondisparagement of the employer’s products and services—seem to be grounded in the earlier, hierarchical master-servant relationship rather than in more contemporary, egalitarian contractual norms.”); Cooney, *supra* note 49, at 855 n.9 (“The duty of loyalty derives from the basic obligation of faithful service found in English master and servant law and has been a part of our earliest common law.”).

169. Summers, *supra* note 21, at 84.

170. See generally *Downton Abbey* (PBS television broadcast).

least—during the relationship.¹⁷¹ The food may have been poor and the clothing shoddy, but there was some mutuality of obligation between the master and the servant. That mutuality of obligation is missing in the modern duty of loyalty doctrine. The at-will employee must be loyal to the employer, but the employer owes no such duty to the employee.¹⁷² Given its history, one might be forgiven for wondering why the duty of loyalty the courts impose today is not, at the very least, reciprocal.

At least two additional differences between the role of servant and employee can be identified. First, the master–servant relationship was based on status,¹⁷³ and the servant was bound to the master until the master chose to discharge or emancipate the servant.¹⁷⁴ Imposing a duty of loyalty on the servant did not, therefore, serve as any additional limitation on the servant’s economic mobility. The duty of loyalty of an at-will employee works far differently. Though empirical evidence of the economic impact of the duty of loyalty is lacking, surely it is true that “employers can avail themselves of the employee’s duty of loyalty defensively, to prevent an employee from raiding its customers and other workers, or offensively, to punish the employee for taking another job or to deter others from joining him.”¹⁷⁵ Thus, “this mandatory rule of law gives employers a powerful tool to counteract labor market forces that pose a threat to them.”¹⁷⁶

Second, because the role of the servant was a specific legal status, it seems unlikely the servant was unaware of his role. The specific demands of the role may have been unknown until taught, but it would not come as a surprise to the servant to learn that he was a servant. Perhaps this is not so true of the employee. An empirical study indicates that at-will employees have a poor understanding of

171. See Frankel, *supra* note 112, at 799 (“Although the Power Bearer may attempt to minimize the care he gives and maximize the service he extracts, the Power Bearer takes care of the Dependent in order to ensure the Dependent’s services or other benefits from the relation for himself.”) (discussing master–servant and other status relationships).

172. As discussed below, in some jurisdictions the employer owes a duty of “good faith and fair dealing” even if the employment relationship is at-will. The *Restatement (Third) of Agency* § 8.15 (2006) provides that a principal owes the agent a duty to deal with the agent “fairly and in good faith,” but loyalty is not in the picture at all.

173. See Frankel, *supra* note 112, at 805.

174. *Id.*

175. O’Neill, *supra* note 120, at 697–98.

176. *Id.* at 698. See also Stone, *supra* note 4 (“Courts have become increasingly receptive to employer efforts to limit employee use of human capital by adopting expansive theories of trade secrets and employees’ duty of loyalty, and by expanding the circumstances under which they will enforce covenants not to compete.”).

their role insofar as the law grants the employer the right to terminate the relationship “at will.”¹⁷⁷ It seems quite likely that it would similarly be surprising for at will employees to learn that their duty to be loyal to the employer rests, at least in part, on their categorization as “servants” of the employer.

It would seem, then, that the loyal servant relationship should be relegated to history’s dustbin, and not be used as a template of what is expected of a modern-day employee.

B. The Vulnerable Master

Though the duty of loyalty is a broad concept, in practice it often arises when the employee has done something that allegedly damages the employer’s business. From the policy perspective, a primary reason for imposing this duty is that the employer is particularly vulnerable to “exploitative” behavior by employees resulting in loss of business or profits. An employee can easily lure a client he serves to himself or another business, or induce fellow employees, with whom he has a close relationship, to leave.¹⁷⁸ And certainly, there are breach of duty cases in which the facts indicate that a high-level employee apparently secured a significant amount of the employer’s business while he was employed, which may strike one as “exploitative,” indeed.

“Exploit” means to “use . . . for one’s own ends.”¹⁷⁹ What the employee is “using” in setting up his own business, presumably, is something that was “taken” from the employer, else why would that conduct be wrongful? That is, it is apparently just assumed that an employee cannot compete with the employer except for the existence of some benefit the employer has bestowed on the employee, of which it would be “disloyal” or unfair for the employee to use against the employer.

But this assumption—and the whole notion that an employee must have taken something from the employer when she successfully competes with it—is rarely if ever based on any evidence in the case.¹⁸⁰

177. See generally Kim, *supra* note 6.

178. Fielding, *supra* note 25, at 219–20. See *Md. Metals, Inc. v. Metzner*, 382 A.2d 564, 569–70 (Md. App. 1978) (“Examples of misconduct which will defeat the right to make arrangements to compete include: misappropriation of trade secrets; misuse of confidential information; solicitation of employer’s customers prior to cessation of employment; conspiracy to bring about mass resignation of employer’s key employees; usurpation of employer’s business opportunity.” (citations omitted)).

179. *Exploit*, DICTIONARY.COM, <http://dictionary.reference.com/browse/exploit?s=t> (last visited July 29, 2014), archived at <http://perma.unl.edu/DAX4-C5H9>.

180. This assumption may also be quite contrary to what employees expect. One scholar argues that at-will employees expect employers to provide training that can be used to increase employment potential pursuant to a “new psychological

The employer need not *prove* that the employee, in fact, exploited the employment relationship to “compete” with the employer; this is never recited as an element of the breach of duty claim. To be sure, if the employer is seeking compensatory damages, it must prove that the employee’s behavior caused its economic loss. But this is a different issue—the employee may have successfully taken some of the employer’s business, causing damage, but only because he was inherently a good salesman and not because of anything he learned on the job.

For example, Mr. Ward, a marketing professional, worked for Taser for less than three years when he conceived of his clip-on camera device. He may have been made aware of Taser’s plans for developing devices comparable to his clip-on camera—an issue which was in dispute¹⁸¹—but there was no evidence that he used anything he learned from or did for Taser as an employee that contributed to his inspiration. Certainly the court gave no indication that Taser would have to introduce any such evidence.¹⁸² In *Amtrak*, the court found that there was sufficient evidence that its employees put themselves in “direct competition” with Amtrak by participating in a competitor’s bid to withstand a motion for summary judgment. But the court made no mention of any facts that might indicate that such participation was enabled by anything those employees had gained or received from Amtrak; for example, there was no discussion of any training, years of service, specific accomplishments or rewards.

Thus, establishing that an employee has breached the duty of loyalty by competing with the employer does not require proof of any true “exploitation” of employer-provided skills or resources. Nor, as discussed in section III.C, does proving a breach require any showing of

contract.” *See generally* Stone, *supra* note 4. “One of the most important terms of the new psychological contract is the employers’ promise of general training and employability security in exchange for employee motivation, commitment, and organizational citizenship behavior.” *Id.* at 590–91. Thus,

[w]hen an employer has promised to give an employee skill development and general knowledge as part of the employment deal, then it cannot be said that the employer has paid for its acquisition. Nor can it be assumed that the employer intended to preclude the employee from using knowledge for her own advantage. Rather, the employee’s right to obtain and use the knowledge is often part of the overall employment package.

Id. at 591. *See also* Michael J. Garrison and John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 *Am. Bus. L.J.* 107, 166–67 (2008) (“Rather, if the employer makes any implied commitment at all, it is that employment will provide employees with the skills and experiences necessary to make them competitive in the market. Employability, not employment, is what the employer implicitly offers in exchange for the employee’s efforts and productivity.”).

181. The parties also disputed whether Taser had any such plans at all. *Taser Int’l, Inc. v. Ward*, 231 P.3d 921, 928 n.13 (Ariz. Ct. App. 2010).

182. *Id.* at 928.

competitive harm. Indeed, as discussed in section II.A, proving a breach does not require a showing of any harm to the employer at all. The employee who breaches the duty of loyalty, on the other hand, is subject to “pretty strong medicine,”¹⁸³ including disgorgement of profits and, in some states, punitive damages.¹⁸⁴ One might question whether this imbalance is at all fair.

V. ALTERNATIVE REMEDIES

In the sections above, the duty of loyalty imposed on an at-will employee has been criticized on many fronts. Nonetheless, the fact remains that an employer’s business can be damaged by an employee: Amtrak claimed that it lost some \$20 million in profits by losing a procurement contract as a result of the conduct of its employees.¹⁸⁵ This fact does not necessarily justify imposing a duty of loyalty, however, because of the myriad deterrents and punishments for damaging employee conduct the employer already has available. Arguably, if there are any holes in the employer’s armor, those holes would be better filled by imposing a duty of “good faith and fair dealing” on the employee, which duty should also be mutual and reciprocal.

A. Conduct Prohibited and Remedies Available

Most courts hold that an employee, regardless of his status, is obligated by the duty of loyalty to refrain from the following: competing with the employer while employed; disclosing or using confidential information for any purpose other than the employer’s benefit; and appropriating the employer’s property or self-dealing.¹⁸⁶ An “overwhelming number of reported decisions recognizing the employee’s duty of loyalty fall into one or more of these fact patterns.”¹⁸⁷ Assuming these particular types of conduct are most likely to occur and harm the employer—else why would most lawsuits arise from this type of conduct—the question is whether imposing a duty of loyalty on an at-will employee is a necessary and effective deterrent to this type of conduct or gives rise to a unique claim without which the employer could not recover compensation for the damage caused. The answer appears to be no.

As to whether the duty of loyalty is necessary to deter harmful employee conduct, it would seem the alternative—the fact that the at-will employee can be fired at any time—should be powerful enough.

183. Sullivan, *supra* note 34, at 780.

184. *Id.* at 780, n.14.

185. At trial, the jury found that Amtrak failed to prove causation.

186. RESTATEMENT (THIRD) OF EMP’T LAW § 8.01, cmt. a (Preliminary Draft No. 7, 2010).

187. *Id.*

Given any whiff of possible danger—an employee is becoming too “chummy” with clients and appears to be aiming to take off on his own with those clients, or failing to follow protocol to protect confidential information and perhaps scheming to download that information on a thumb drive to sell it to a competitor—the employer can simply let the employee go. Any actual harm can thereby be avoided. Of course, given a small business, a tight labor market, or the fact that a highly-valued or “key” employee is involved, firing the employee may not be a viable option. But giving a stern admonition and a warning that the employee is under suspicion could accomplish the objective of stopping the threatening conduct before it causes any true damage to the employer. The warning would also give the employee fair warning of what the employer expects. Another fact that may diminish the employer’s option to terminate as a deterrent to harmful conduct is the difficulty of detecting it, particularly given that employees are increasingly mobile and more likely to be working on a tablet or smartphone in an airport rather than a PC in the office.¹⁸⁸ But a private employer is generally free to monitor employee behavior—screening electronic communications on company-provided tablets and phones, for example—and, increasingly, employers are taking advantage of this opportunity.¹⁸⁹

In any event, imposing a duty of loyalty arguably adds little deterrent force to the power to terminate. The employer can terminate at a mere suspicion. The duty of loyalty can be invoked only if the employer can prove an actual breach—and it can be very difficult to ascertain whether the facts demonstrate a probable breach, given the uncertainties and ambiguities in the rules in this regard.¹⁹⁰ The duty of loyalty does little, if anything, to aid in early detection of potentially harmful behaviors—with the exception of a few jurisdictions, the duty does not require the employee to disclose that he is preparing to compete with the employer.¹⁹¹ An employee may refrain from competing with the employer or preparing to compete, knowing he could be immediately fired for doing so. But it is doubtful that many employees consider the abstract and abstruse principle of “fiduciary duty” as impinging on their very real, day-to-day decisions on employment opportunities or career enhancements.

As for other potentially harmful conduct, it seems highly unlikely that an employee would disclose that he is planning or preparing to do

188. Marian K. Riedy, Suman Beros, & H. Joseph Wen, *Managing Business Smartphone Data*, 14 J. INTERNET L. 3 (2011).

189. See generally Marian K. Riedy & H. Joseph Wen, *Electronic Monitoring of Internet Access in the American Workplace: Implications for Management*, 19 INFO. & COMM. TECH. L. 87 (March 2010).

190. See *supra* section III.B.

191. RESTATEMENT (THIRD) OF AGENCY § 8.04 cmt. c (2006).

something that might harm the business because he feels bound by the duty of loyalty—misappropriate property, for example. He may, however, refrain because—as is quite well known in the vernacular—this would just be theft. Thus, to the extent that the duty of loyalty prohibits conduct that is otherwise prohibited by the law, it would serve no additional purpose as a deterrent to that conduct unless the prohibitions of the duty were more widely and clearly known than those of other laws, which seems unlikely.¹⁹²

Much of the conduct prohibited by the duty of loyalty, however, is not specifically prohibited by other laws. Competing with the employer and “self-dealing” are not, per se, otherwise prohibited by law.¹⁹³ Nor is it illegal to use confidential information—which is not a trade secret—unless such information is obtained through illegal means, such as “hacking” into a computer or smartphone. Thus, these additional prohibitions imposed by the duty may have some deterrent value—particularly if an employer successfully sues for breach, the case becomes generally known in the business or industry, and the “condemned” conduct has been widespread. However, given that the fact pattern in breach of duty cases varies widely,¹⁹⁴ the efficacy of the duty of loyalty in deterring harm remains questionable at best.

The duty of loyalty may be largely meaningless in terms of deterring harmful behavior, but it does provide an avenue for the employer to seek compensatory relief for any harm actually caused by breach of the duty—at least in those jurisdictions in which the breach stands as a separate claim.¹⁹⁵ But in this role, the duty is partly duplicative because of the existence of other claims that the conduct of the “disloyal” employee often implicates, or there are other remedies the employer can employ to prevent harm. Thus, regarding the prohibition against competing with the employer, a typical case is *Taser*, in which the employee is sued for having set up a competing business or left to work for a competitor. The fact that he has been sued must mean that the employer lost something because of that move—something other than just the services of the employee who, as an at-will employee, can leave at any time without consequence. What might that “something” be? What is typically alleged to have been taken includes customers or prospective customers, proprietary information, or the opportunity

192. *See supra* sections III.A–B, and text accompanying note 160.

193. The exceptions, of course, are statutory and common law prohibitions against “self-dealing” by corporate directors and officers and other true fiduciaries, such as trustees.

194. *See, e.g.*, *Bancroft-Whitney Co. v. Glen*, 411 P.2d 921, 935 (Cal. 1966) (“No iron-clad rules as to the type of conduct which is permissible can be stated, since the spectrum of activities in this regard is as broad as the ingenuity of man itself.”).

195. The other role of the breach of duty claim or defense—to justify termination or non-payment or punish the ex-employee by seeking disgorgement or punitive damages—is discussed below.

to use work time and employer equipment or resources to develop intellectual property (which is owned by the employer pursuant to the “work for hire” doctrine). These “takings” give rise to independent claims—other than duty of loyalty—for compensatory relief: tortious interference with contract and with prospective business advantage,¹⁹⁶ misappropriation,¹⁹⁷ conversion,¹⁹⁸ and infringement of intellectual property.¹⁹⁹

Cases involving “pure” competition with the employer and no concomitant wrong do, however, exist. In *Taser*, the employee used only his own time, without using any resources or information obtained from the employer, to design a new product, which Taser alleged constituted disloyal competition because it was working on a design for a similar product.²⁰⁰ The only valid claim under these circumstances is breach of the duty of loyalty by competing with the employer.²⁰¹ Similarly, against an employee who solicits co-employees to “defect” and start or join another firm—if those employees are at-will—the only valid claim may be breach of the duty.²⁰² One might question whether a claim for compensation under these circumstances is justified at all: Why punish the resourceful employee who, it should be recalled, is performing his job duties just fine? One might also wonder whether more harm would be prevented by allowing an employee to openly compete without running afoul of the duty of loyalty, rather than punishing him and thereby encouraging the employee to surreptitiously prepare to compete. At least in the former situation, the employer would have an opportunity to prepare for what might come. In any event, the employer has a ready means of preventing harm from

196. See, e.g., *Keystone Fruit Mktg., Inc. v. Brownfield*, 352 F. App'x 169, 172 (9th Cir. 2009); *St. Paul Fire and Marine Ins. Co. v. Hoskins*, No. 5:10cv087, 2012 U.S. Dist. LEXIS 30770, at *15 (W.D. Va., March 7, 2012); *Guidant Sales Corp. v. George*, No. 05-2890 (PAM/JSM), 2006 U.S. Dist. LEXIS 83008, at *13 (D. Minn. Nov. 14, 2006); *Cent. Lewmar, L.P. v. Gentilin*, No. 03-4671(JWB), 2005 U.S. Dist. LEXIS 45902, at *10 (D.N.J. June 1, 2005) (New Jersey law); *Benchmark Med. Holdings, Inc. v. Rehab Solutions, Inc.*, 307 F. Supp. 2d 1249, 1267 (M.D. Ala. 2004); *Bray v. Squires*, 702 S.W.2d 266, 271 (Tex. App. 1985).

197. E.g., *Diamond Phoenix Corp. v. Small*, No. 05-79-P-H, 2005 U.S. Dist. LEXIS 12798 (D. Me. June 28, 2005) (applying Maine law); *News Am. Mktg. In-Store, Inc. v. Marquis*, 862 A.2d 837 (Conn. 2004).

198. E.g., *Diamond Phoenix*, 2005 U.S. Dist. LEXIS 12798; *News Am. Mktg.*, 862 A.2d 837.

199. See, e.g., *Taser Int'l, Inc. v. Ward*, 231 P.3d 921, 924 (Ariz. Ct. App. 2010).

200. These are essentially the facts, as found by the court, in *Taser*, though the employer had alleged misappropriation and other claims.

201. See generally *Taser*, 231 P.3d 921 (granting employee summary judgment on all claims but breach of fiduciary duty).

202. See generally *Jet Courier Serv., Inc. v. Musei*, 771 P.2d 486 (Colo. 1989) (alleging breach for competing while employed by soliciting co-employees as well as meeting with customers).

competing employees without the need for a claim of breach of duty: a non-compete agreement.²⁰³

A similar analysis and conclusion holds regarding a claim for breach based on the disclosure or use of confidential information. To the extent that the information at issue constitutes trade secrets, an employee would be subject to a claim of misappropriation or conversion, and no separate duty-based claim would be necessary for the employer to seek compensatory damages. To protect confidential information not otherwise protected by law, the employer could prevent unauthorized disclosure or use by requiring employees to execute a confidentiality agreement. An employee who appropriates property—the penultimate, specific prohibition ascribed to the duty of loyalty—can be sued for conversion or trespass. The final prohibited act imposed by the duty of loyalty—“self-dealing”—is less often raised in cases in which the employer is seeking compensatory damages.²⁰⁴ This is probably because, for the employer to have suffered direct loss as a consequence of an employee’s self-dealing, it must also have suffered some form of competitive injury. For that reason, when self-dealing is raised as a complaint against an employee, the specific injury allegedly caused is similar to that caused by competition: the employee “self-dealt” by contacting customers or otherwise engaging in conduct preparatory to leaving and setting up a new business or working with a new company.²⁰⁵ When these types of facts underlie the claim of breach based on self-dealing, the analysis and conclusion stated above—in regard to the prohibition against competing—would apply, and suggest that no separate claim is necessary.

203. This point was made in a related context by Fielding, *supra* note 25, at 231. Generally an agreement not to compete during and for a reasonable time after termination of the employment relationship with an at-will employee is enforceable, though with some exceptions. See generally Kate O’Neill, “Should I Stay or Should I Go?”—Covenants Not to Compete in a Down Economy: A Proposal for Better Advocacy and Better Judicial Opinions, 6 HASTINGS BUS. L.J. 83 (2010). During the employment relationship the employee could simply be prohibited from competing as a term of employment, but a non-compete agreement may provide the additional remedy of breach of contract to the employer’s right simply to terminate the employee who competes.

204. An employee may, of course, engage in other types of conduct that harm the employer: defaming the employer, for example, or hacking into the computer system. But for these wrongs that are not directly related to the employment relationship, other remedies lie, such as claims sounding in tort or alleging violations of state or federal statutes.

205. See, e.g., Charter Oak Lending Group, L.L.C. v. August, 14 A.3d 449 (Conn. 2011) (defendants, former employees, alleged to have improperly solicited plaintiff’s customers to move business to their new employer and thereby engaged in prohibited “self-dealing”). The same is true when the allegation is that the employee “usurped [a] corporate opportunity,” conduct closely related to “self-dealing.” See, e.g., Taser, 231 P.3d at 930–31.

The concept of self-dealing is, however, broader than causing economic injury to the employer,²⁰⁶ and it is by invoking those other aspects of self-dealing—the employee obtains “secret profits”²⁰⁷ or is involved in a transaction in which the employee had an interest adverse to his employer²⁰⁸—that the employer can utilize a breach of duty solely to punish the “disloyal servant.”²⁰⁹ It is argued above that the notion of “loyalty” has no place in the modern marketplace, and this argument gains force from the fact that the employer gains little additional legal protection from enforcing the duty of loyalty, other than the right to punish for disloyalty. One might argue that the determination of whether punishment is due should be left to the criminal justice system,²¹⁰ and not to the “divine right” of the employer.²¹¹ But to the skeptical, a further point should be noted: the employer has an alternative to using the prohibition against self-dealing imposed by the duty of loyalty to prevent self-dealing and punish an employee for its consequences, and that is an employment contract including such a prohibition.²¹² To be sure, a contractual arrangement is not the perfect solution from the employer’s point of view.²¹³ But on the other side of the scales of justice stands the at-will employee’s need to set aside something extra by “self-dealing” in order to be able to survive the economic consequences of a sudden termination of employment.

B. An Alternative Duty

Though the duty of loyalty imposed on an at-will employee may largely be unnecessary in terms of protecting the employer from direct harm caused by the employee, the fact remains that employers must cede some authority and control to employees, thereby leaving the employer vulnerable to abuse of that authority and control. This fact gives rise to a legitimate need to fill the gaps—small though they may be—between the legal obligations imposed on everyone—to refrain from misappropriation of trade secrets and tortious interference with

206. Self-dealing is defined as “[p]articipation in a transaction that benefits oneself instead of another who is owed a fiduciary duty.” BLACK’S LAW DICTIONARY 1481 (9th Ed. 2009).

207. *E.g.*, *Bessman v. Bessman*, 520 P.2d 1210, 1218–19 (Kan. 1974).

208. *E.g.*, *Birnbaum v. Birnbaum*, 539 N.E.2d 574 (N.Y. 1989).

209. *See generally* Sullivan, *supra* note 34.

210. Sullivan similarly objects to the “draconian” effects of the faithless servant doctrine, but proposes a different solution: that only true “fiduciary” employees be liable for the traditional punitive damages but other employees, owing a lesser duty of loyalty, should be subject only to traditional breach of contract damages. *Id.*

211. Summers, *supra* note 21.

212. This point was also made by Fielding, *supra* note 25, at 231 (“The employer, therefore, could buy additional protection by bargaining for a fixed-term contract.”).

213. *See supra* text accompanying notes 13–17.

contract, for example—and those imposed on employees. Further, some employers make significant investment in identifying, hiring, and training employees—and it may be fair to require, in return, something from the employee more than mere performance.

From the employee's point of view—though the duty of loyalty as currently constituted may be vague, outdated, and unfair—the imposition of some special obligations between employer and employee may just make sense. Many employees undoubtedly feel some sense of “loyalty” to the business or the boss. And most would surely admit that the employment relationship is, after all, a unique and a significant lifetime investment. Indeed, for many people the employment relationship is one of the most significant relationships in their lives, one in which much is invested and from which much is expected. To the extent that the imposition of a duty above and beyond the duty to perform may strengthen the employment relationship and increase the return on that investment, bearing such a duty may be worth the price.

What is proposed, then, is to replace the duty of loyalty for at-will employees with a duty of good faith and fair dealing²¹⁴ as “gap fillers” and to promote a trusting and productive working relationship. It is also proposed that the duty be mutual.

The duty of good faith and fair dealing is, of course, that which is universally imposed on both parties to a contract.²¹⁵ In contracts for the sale of goods, the duty is defined as follows: “honesty in fact in the conduct or transaction concerned.”²¹⁶ The U.C.C. further provides that, for a merchant, the duty also requires “the observance of reasonable commercial standards of fair dealing in the trade.”²¹⁷ At the common law, the definition of the duty varies somewhat from jurisdiction to jurisdiction, but a common theme is that both parties must act with “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.”²¹⁸ In fashioning a non-contractual duty of good faith and fair dealing to be imposed on the at-will employment relationship, it would seem reasonable to employ the key concepts from these various definitions: the duty would funda-

214. In the at-will employment context, the courts typically focus on the duty of loyalty of the employee as an agent of the employer. The “full” complement of duties of an agent, as a fiduciary, however, are often more broadly defined as including the duties of “good faith, loyalty, and fair dealing [towards his or her principal].” *E.g.*, *Science Accessories Corp. v. Summagraphics Corp.*, 425 A.2d 957, 962 (Del. 1980) (citing RESTATEMENT (SECOND) OF AGENCY § 387 (1957)). From this perspective, what is proposed is simply to delete the “loyalty” and retain the remainder of the agent/employee's traditional duties.

215. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

216. U.C.C. § 1-201(20) (2012).

217. U.C.C. § 2-103(1)(b) (2012).

218. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

mentally require honesty, but otherwise accommodate variations based on “standards of fair dealing in the trade” and the specific “expectations of the parties.”

This duty of good faith and fair dealing in the employment context suffers from none of the defects of the duty of loyalty. First, this duty is clearer and more definite than the duty of loyalty. Honesty is grounded in some core, verifiable, factual context. Honesty is honesty, and most people intuitively understand this obligation.²¹⁹ “Fair dealing in the trade” is not so definite, but, at least, incorporates some objective standard by which conduct is to be judged: the customs in a specific “trade” or industry. The other component—the expectations of the parties—is arguably as fuzzy as the concept of “loyalty.” But at least “expectations” is an *ex ante* proposition, and in the law of contracts, is tied to “objective” and “reasonable expectations.”²²⁰ As argued above, deeming conduct “disloyal” can too easily be done after the fact and based on a “gut instinct” of what loyalty entails.

Second, though the duty of good faith and fair dealing has a hard core—honesty—it is also flexible, because its obligations can vary by industry and the dealings between the parties (leading to their “expectations”). In contrast, the duty of loyalty imposes specific obligations—for example, do not compete and do not self-deal—regardless of the nature of the business or the specific job at issue. Thus, if it is a common practice in New York City for an associate to solicit others who do not make partner to leave, en masse, for another firm, it would not be a breach of their duty of good faith and fair dealing to do so, though it sounds like a breach of the duty of loyalty.

Third, the duty of good faith and fair dealing, derived as it is from contract law, reflects commercial values of the marketplace. Its business-like foundation stands in stark contrast to the status relationship from which the duty of loyalty was historically derived.

The employer’s immediate reaction to the proposal to eliminate the duty of loyalty and substitute a duty of fair dealing would probably be negative initially. To eliminate the firm proscriptions against competition by the employee, self-dealing, and the more open-ended obligations that flow from the broadest definitions of “loyalty” may seem a bad bargain. But one wonders whether, at bottom, the employer wouldn’t be more secure from employee transgressions and better able to delegate and trust in good performance by relying on honesty rather than loyalty.

219. *But cf.* “I did not have sexual relations with that woman.”

220. *E.g.*, Daniel B. Bogart, *Good Faith and Fair Dealing in Commercial Leasing: The Right Doctrine in the Wrong Transaction*, 41 J. MARSHALL L. REV. 275, 286 (2008) (“The question really becomes whether a third person in the aggrieved party’s shoes would reasonably believe that the breaching party acted in bad faith.”).

From the employee's point of view, it may be debatable whether the duty of good faith and fair dealing would be more or less onerous than the duty of loyalty. It should be of some comfort to know that conduct would be judged by some objective standards, rather than the elusive concept of loyalty. It would seem more dignified to owe a duty of good faith and fair dealing—just as any person doing business in the marketplace—rather than a duty of loyalty. In general, the employee could openly compete with the employer and would not have to worry about staying on the right side of the line between preparing to compete and competing. But as a concession for such freedom, he would be obligated to honestly admit to the fact if questioned by the employer. It would seem the scales would definitely be tipped towards favoring a duty of good faith and fair dealing, however, if that duty were mutual. Not only would the employer owe something “more” to the employee than compensation—unlike in the duty of loyalty regime—but at-will employees would then stand in this regard as equals with their contract employee counterparts.

The assertion that the employer should owe a duty of good faith and fair dealing, even to at-will employees, is not so very far-fetched. In a few jurisdictions, this is already the law.²²¹ The majority's reluctance to impose any such duty on employers “is primarily attributable to the perceived tension between a[n] . . . employer obligation to act honestly and fairly when terminating employees and an entrenched employer right to terminate without any such limitations.”²²² This “perceived tension” ostensibly comes from two principal sources. First, a duty of “good faith” would conflict with the employer's right to terminate an at-will relationship for any or no reason, including in “bad faith.”²²³ Second, in the law of contracts, what is required of the duty of good faith and fair dealing cannot be inconsistent with the terms of the contract.²²⁴ Because the employer in an at-will relationship specifically retains the right to terminate, “it would be incongru-

221. *E.g.*, *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1040 (Ariz. 1985); *Landry v. Mabey Bridge & Shore, Inc.*, No. N11C-09-146 PLA 2011 Del. Super. LEXIS 498, at *5–6 (Del. Sup. Ct. Nov. 7, 2011); *Wade v. Kessler Inst.*, 778 A.2d 580, 584 (N.J. Super. Ct. App. Div. 2001). *See also* Emily M.S. Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?*, 2005 UTAH L. REV. 1, 45–46 (discussing the implied obligation of good faith in at-will employment contracts). Whether the duty of good faith and fair dealing applies in pre-employment negotiations is a separate issue not here considered.

222. *Brudney*, *supra* note 168, at 808.

223. *See, e.g.*, *Bard v. Bath Iron Works Corp.*, 590 A.2d 152, 156 (Me. 1991); *Hunt v. IBM Mid Am. Emps. Fed. Credit Union*, 384 N.W.2d 853, 858–59 (Minn. 1986); *Hillesland v. Fed. Land Bank Ass'n of Grand Forks*, 407 N.W.2d 206, 214 (N.D. 1987); *Edelman v. Franklin Iron & Metal Corp.*, 622 N.E.2d 411, 414 (Oh. Ct. App. 1993); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 838 (Wis. 1983).

224. *E.g.*, *Sabetay v. Sterling Drug, Inc.*, 506 N.E.2d 919, 922 (N.Y. 1987).

ous”²²⁵ to draw any inference “that the employer impliedly agreed to a provision which would be destructive of his [unrestricted] right of termination.”²²⁶

These apparent conflicts between a duty of good faith and fair dealing and the right to terminate at-will can, however, readily be eliminated or minimized, and the perceived “tension” between the two doctrines accordingly ameliorated, if not resolved. An employment law duty of good faith and fair dealing is modeled on, but not identical to, the contract law duty and is not subject to the latter’s restrictions and conventions.

As for the other perceived conflict, it is possible to define the duty of good faith and fair dealing in this context more narrowly than it is employed in contract law—given that it is not here a contractual obligation—in order to minimize any infringement on the right to terminate. And this is precisely what has been done by those courts that impose the duty on employers in an at-will relationship. Thus, those recognizing the duty resolve this perceived conflict by restricting “bad faith” in this context to very specific conduct. For example, the Delaware Supreme Court defined four specific violations of the duty, which categories are “narrowly defined and exclusive,”²²⁷ and center on employer conduct that is fraudulent and deceitful.²²⁸ In Delaware and other states which impose the duty of good faith and fair dealing on employers, the employer is also in breach if it terminates the employee specifically to deprive the employee of compensation already owed.²²⁹ But a termination that is “bad, unjust, and unkind,”²³⁰ or contrary to the employee’s “reasonable expectations,” does not breach the duty.²³¹ Because fraud is itself actionable in tort, the only significant additional obligation the duty of good faith and fair dealing—as currently defined by the courts—would impose on the employer is to pay what is owed before terminating the employee, a limitation on the employer’s right to which few reasonable people could object.

Nonetheless, it cannot be gainsaid that an employer’s duty of good faith and fair dealing has the potential to conflict, to some extent, with its right to freely terminate. But when the application of two legal

225. *Id.*

226. *Id.*

227. *Landry v. Mabey Bridge & Shore, Inc.*, No. N11C-09-146 PLA, 2011 Del. Super. LEXIS 498, at *6 (Del. Super. Ct. Nov. 7, 2011).

228. *Id.*

229. *Wagenseller v. Scottsdale Mem’l Hosp.*, 710 P.2d 1025, 1040 (Ariz. 1995); *Landry*, 2011 Del. Super. LEXIS 498, at *6; *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744, 749 (Idaho 1989); *York v. Zurich Scudder Invs., Inc.*, 849 N.E.2d 892, 898–99 (Mass. App. Ct. 2006).

230. *York*, 849 N.E.2d at 899 (quoting *Gram v. Liberty Mut. Ins. Co.*, 429 N.E.2d 21, 28 (1981)) (internal quotation marks omitted).

231. *Id.*

doctrines poses an uncomfortable conflict, the courts do not ordinarily perpetuate that conflict—creative minds craft workable solutions. For example, in recognition of the fact that the employee’s duty not to compete with the employer conflicts with the employee’s vulnerability to job termination and the overall public interest in labor mobility, the courts created the exception for “preparing” to compete.²³² If one version of the “narrow and exclusive” restrictions on the employer’s right to freely terminate—flowing from a duty of good faith and fair dealing—doesn’t quite suit, it does not follow that no duty can be imposed at all.²³³ As one scholar observed, “[s]tates have developed a range of nuanced approaches to other employment-related common law concepts,”²³⁴ and should be able to do so in regard to a duty of good faith and fair dealing.²³⁵

VI. CONCLUSION

The law governing the at-will employee’s duty of loyalty suffers from multiple infirmities. First, it does not apply to employers and employees in a reciprocal manner. Second, its intellectual provenance harkens back to medieval concepts of master and servant that have little, if anything, to do with today’s employment market. Third, the concept is unreasonably vague when applied to the infinite creativity of at-will workers striving to achieve employment mobility, and creates a legal standard employees simply cannot understand as it applies to their everyday behavior. Fourth, the case law readily reflects that the duty of loyalty is unevenly applied, with most courts not even bothering to analyze the “scope of employment,” for example. In the alternative, imposing a duty of good faith and fair dealing would eliminate most of these issues and mitigate the remainder.

Why does this matter? First, in a global economy, it is important that the legal rules which form a key part of the employment relationship not only be fair and reciprocal, but also be perceived as fair and reciprocal. Second, twenty-first century employment rules should be based on twenty-first century employment conditions. Vestiges of out-moded and antiquated legal theories and constructs are ill-equipped to

232. Christopher Lyle McIlwain, *Backstab: Competing with the Departing Employee*, 29 CUMB. L. REV. 615, 622 (1998/1999) (“The tug-of-war between public policies favoring free competition and individual economic mobility and those promoting the integrity of the agency relationship has prompted the recognition of the right of agent-employees to prepare to compete with their principals prior to leaving their employ without incurring liability for breach of fiduciary duties.”).

233. Of course, a duty of good faith and fair dealing would have consequences on aspects of the employment relationship other than the right to terminate. However, because the main objection to imposing the duty seems to be directed towards the right to terminate, this has been the focus of the counter-argument.

234. Brudney, *supra* note 168, at 786.

235. *Id.*

cope with the frequency and scope of employee mobility today. Third, a virtue of any legal system is that its rules are clear and the application of those rules has predictable results. Arguably, a duty of good faith and fair dealing would go far towards achieving these objectives.

And how would such a significant change in employment law in the United States come about? A thoughtful model statute enacted in an important state would inevitably invite comparison and imitation. A lodestar decision by a respected appellate court would attract academic attention and provide precedent for those that follow. Perhaps, the marketplace will simply rebel. Employers or employees from "Gen Z" may simply refuse to tolerate a system that is unfair, unpredictable, difficult to administer, and rooted in antiquated concepts which governed the lord and his valet.