ESSAY

RELATIONSHIPS OF TRUST AND CONFIDENCE IN THE WORKPLACE

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INTRODUCTION

Like many consensual relationships that fit into a recognizable legal category, employment relationships are far from identical in their specifics. For example, within a business firm, although both the CEO and the lowest-paid employee doing routinized work are employees, the differences between them are compelling evidence of the heterogeneity within "employment" as a category. For many business firms, the CEO is understood as the firm's most visible embodiment by third-party observers as well as by fellow employees situated on lower ranks of the firm's internal hierarchy.[1] In contrast, many of the firm's employees, however essential to its operations, are invisible to externally situated third parties and, depending on the firm's size and

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[1] Ira Bashkow, *Afterword: What Kind of a Person is the Corporation?*, 37 POL. & LEGAL ANTHROPOLOGY REV. 296, 304 (2014) (stating that the CEO is "the most readily identifiable source of its personality, while serving as its public face in high-profile contexts").

organizational structure, to most fellow employees as well. Additionally, although a firm's employees share a common employer, the nature of their work spans a broad spectrum, ranging from responsibilities that necessarily involve exercising substantial discretion to closely monitored and highly specified tasks. Whether an employee manages the work of others distinguishes among categories of employees but does not necessarily correlate with either an employee's perceived importance to the firm's business revenues or the employee's relative level of compensation.[2] Additionally, employees vary in the type and extent of knowledge they possess, whether about the firm itself or otherwise material to its operations. Employees differ as well in their relative capacity to injure their employer, including through conduct that leads to adverse legal consequences. Some employment relationships exemplify mutual trust; others exemplify relationships between mutually wary parties.

Given these variations (and many others) in the characteristics of individual employment relationships, the intellectual and normative gist of employment law as a whole seems elusive. Employment law may also seem to lack the generalized principles that organize settled bodies of common law—such as tort, agency, and contract law—or that structure long-established fields in which statutes occupy a central presence, such as the law of business associations and trust law. A particular challenge for employment law as a subject, as this Essay argues, is to articulate the nature and origin of duties that employees owe their employers. For starters, is employment law itself the basis of employees' duties or is it best understood as a contextually useful collection of duties that stem from other sources such as contract, agency, and tort law, as well as from statutes?[3] Relatedly, are the duties applicable to employees amenable to coherent generalization, or do they vary too much across the undeniably wide range of employment relationships?[4] Answers to these questions matter be-

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2 The significance of nonmanagerial personnel to firm revenue is especially noticeable in portions of the financial services industry. *See, e.g.*, Stephen Grocer & Aaron Lucchetti, *Traders Beat Wall Street CEOs in Pay*, WALL ST. J., Apr. 6, 2010, at C1 (detailing constraints on executive pay in contrast to the structure and magnitude of traders' remuneration).

3 For example, employment law has been characterized as consisting of "a mosaic of federal and nonpreempted state statutes laid over a range of common-law agency, tort, and contract doctrine relevant to the employment relationship," while the modern employment relationship is "governed by a matrix of sometimes overlapping federal and state statutes, and state common-law doctrine . . . ." Michael C. Harper, *Fashioning a General Common Law for Employment in an Age of Statutes*, 100 CORNELL L. REV 1281, 1288, 1297 (2015). Of course, a mosaic, like a matrix, has a meaningful existence as a constructed object distinct from its individual raw-material components.

4 Whether agency law is either intellectually coherent or distinctive continues to be debated. As I have written elsewhere, earlier scholarship about the subject in the United States was daunted by Oliver Wendell Holmes's critique characterizing the subject as a

cause they structure inquiry into how the law should apply to facts not yet addressed by a controlling precedent and because they furnish a starting point to critique such precedents.

This Essay focuses on one troublesome question: whether, under what circumstances, or to what degree employees owe a fiduciary duty of loyalty to an employer. One answer, adopted by some courts and by the Restatement (Third) of Agency (Agency Restatement), characterizes all employees as agents and thus subjects them all to a fiduciary duty of loyalty, albeit coupled with the cautionary insight that the duty, highly contextual in what it requires, does not impose a monolithic template on the relationships to which it applies.[5] Another answer, adopted by some courts and by the Restatement of Employment Law (the Restatement),[6] restricts the applicability of fiduciary duty to employees within a specified category, which in that Restatement are employees in relationships of trust and confidence with their employers.[7] Choosing between these alternatives presents a dilemma because each alternative carries practical and theoretical implications, plus a distinctive set of strengths and limitations.

In particular, if all employees are deemed to be agents, the work done by many will lack implications that seem meaningfully connected to the law of agency. This is because many employees' work does not involve transacting or otherwise interacting with third parties

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collection of anomalous results that were inexplicable through conventional applications of other subjects' legal principles, which did not make agency itself sufficiently coherent to be a "proper title in the law." *See* Deborah A. DeMott, *The Contours and Composition of Agency Doctrine: Perspectives from History and Theory on Inherent Agency Power*, 2014 U. ILL. L. REV. 1813, 1817–18 (quoting Oliver Wendell Holmes, Jr., *Agency*, 4 HARV. L. REV. 345, 345 (1891)). Responses to Holmes took different forms, but debate over the status of agency law continues. *See id.* at 1815 n.5, 1832–33.

5 RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006) (characterizing employment categorically as a relationship of agency); *id.* § 8.01 cmt. c (observing that "[f]iduciary obligation, although a general concept, is not monolithic in its operation"). For the underlying proposition that fiduciary obligation is a constitutive element of an agency relationship, see *id.* § 1.01 (defining agency as "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"). One implication is that an actor who owes no duty of loyalty is not an agent. *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2666–67 (2013).

6 This was formerly known as the "Restatement (Third) of Employment Law"; its new title reflects the fact that it was not preceded by earlier Restatements of the subject. The published text of the Proposed Final Draft [hereinafter "Proposed Final Draft"] uses the "Restatement (Third)" title. This Essay notes changes to the Restatement text occurring after publication of the Proposed Final Draft with references to the "final text" (2015).

7 Depending on the circumstances, employees not within this category may owe "an implied contractual duty of loyalty to the employer in matters related to their employment." RESTATEMENT OF EMP'T LAW § 8.01(a) (2015). The prototypical example of a "nonfiduciary" employee subject to an implied contractual duty of loyalty is an employee who "come[s] into possession of [his or her] employer's trade secrets." *See id.* § 8.01 cmt. a. For discussion of implied contractual duties of loyalty, see *infra* text accompanying note 96.

external to the employer's organization. Moreover, employers may be tempted to respond to wrongful-termination suits brought by former employees with counterclaims asserting a breach of fiduciary duty allegedly committed by the employee, particularly when the now-former employee has joined or formed a competing business. Such counterclaims are troubling when the sole basis for any allegation of disloyal conduct is the fact that the employee, having departed, repositioned himself or herself as or within a competitor, using no means that are themselves wrongful. If the prospects of such a counterclaim deter the assertion of meritorious claims of wrongful termination, characterizing all employees as fiduciaries seems problematic. However, if only employees in positions of trust and confidence are subject to fiduciary duties of loyalty, employers may respond with private-ordering solutions. That is, employers may deploy individual agreements that explicitly characterize many members of the work force as having relationships of trust and confidence with the employer.[8] At the least, attempts to contractualize such a fiduciary duty raise questions about the construction and application of contract terms. Contractualized solutions may also risk underinclusiveness—that is, omit situations in which a duty of loyalty should apply. And, unlike the Agency Restatement, the Restatement does not address in general terms the significance of language that characterizes a relationship, whether contained in separate agreements with individual employees or in a statement unilaterally issued by the employer.[9]

Separately, to begin fiduciary-duty analysis with the concepts and vocabulary of relationships of trust and confidence (as the Restatement does[10]) may prove an awkward fit, at least initially, with developed jurisprudence. This is because fiduciary-duty analysis usually proceeds categorically, while examining the factual specifics of trust and confidence in particular situations proceeds only in marginal or fringe situations that are not categorized as fiduciary.[11] Overall, the cases applying trust-and-confidence formulations turn on fact-specific inquiries that are structured against a backdrop of settled fiduciary categories with characteristics that serve as analogies and benchmarks for these inquiries along their peripheries.

To frame its discussion of fiduciary duties in employment relationships, this Essay opens in Section II with a brief survey of the fiduciary landscape, a metaphorical terrain that includes several contested features. Section II turns to fiduciary duties of loyalty in the context

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8 For the implications of statements in employer-issued handbooks that purport to impose duties on employees, see *infra* text accompanying note 125.

9 RESTATEMENT (THIRD) OF AGENCY § 8.06 cmt. b (2006).

10 *See* RESTATEMENT OF EMP'T LAW § 8.01(a) (2015) (discussing the duty of loyalty owed by "[e]mployees in a position of trust and confidence with their employer").

11 *See infra* Part I.B.

of employment relationships, to the alternatives sketched above, and to the relevant specifics of the Restatement. Section III examines potential implications of the Restatement's use of relationships of trust and confidence as the starting point for fiduciary analysis. At a minimum, analysis within the Restatement's framework should not presuppose a narrowly defined prototype of employees who occupy relationships of trust and confidence. Returning to this Essay's initial examples, relationships of trust and confidence encompass employees in addition to the occupants of c-level positions in large firms.[12] This Essay concludes by celebrating the Restatement's completion while also noting that its answer to whether employees owe fiduciary duties leaves open several significant questions. Central among these are the role of contract within employment law and, more generally, the ties between employment law and other bodies of law.

I
Surveying the Fiduciary Landscape

A. Lay Understandings of Fiduciaries

In lay usage and understanding, a fiduciary is an actor whom one should be able to trust to be loyal to one's interests.[13] Fiduciary relationships stem from or create disparities of power and information, such that the relationship's beneficiary[14] is or becomes vulnerable to the actor who occupies the fiduciary role.[15] Such relationships require or engender trust by the beneficiary with a correlative potential for abuse by the fiduciary, often—but not necessarily—effected

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12 That is, senior management members with titles beginning with "Chief." *See* Black's Law Dictionary 1104 (10th ed. 2014) (defining "c-level management" as "[c]ollectively, the officers of an organization holding titles prefixed by 'chief'; the upper tier of top management").

13 Dictionary definitions of "fiduciary" are not identical, of course, but many reflect the long legacy of the law of trusts. *See, e.g.*, Concise Oxford English Dictionary 527 (Catherine Soanes & Angus Stevenson eds., 11th ed. 2004) (defining it initially as "[l]aw involving trust, especially with regard to the relationship between a trustee and a beneficiary"); The Random House Dictionary of the English Language 528 (Jess Stein & Laurence Urdang eds., 6th ed. 1973) (defining it initially as "a person to whom property or power is entrusted for the benefit of another"); Webster's New World Dictionary, College Edition 539 (10th ed. 1964) (defining it initially as "designating or of a person who holds something in trust for another"). Definitions in general dictionaries are not so different from the legal dictionary definition. *See* Black's Law Dictionary 743 (10th ed. 2014) (defining it as "[s]omeone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care, and disclosure").

14 I use this term loosely, not as defined by the law of trusts.

15 *See* Julian Velasco, *A Defense of the Corporate Law Duty of Care*, 40 J. Corp. L. 647, 695-96 (2015) (quoting Julian Velasco, *Fiduciary Duties and Fiduciary Outs*, 21 Geo. Mason L. Rev. 157, 161 (2013)) ("At its core, a fiduciary relationship is one in which one party—the fiduciary—is trusted with power over the interests of another—the beneficiary—who becomes vulnerable as a result.").

through deceptive or disingenuous means.[16] As a consequence, when an actor in a fiduciary position acts disloyally or fails to take an action that loyalty requires, it is justifiable that the beneficiary would feel betrayed, not just disappointed or aggrieved in a generalized way. Indeed, the beneficiary might feel deceived, at least about the fiduciary's allegiances and the truth about the beneficiary's relationship with the fiduciary.[17]

Thoughtful lay understandings of fiduciary relations also encompass the specifics of what a duty of loyalty may require. In particular, deceit by an actor who owes a fiduciary duty of loyalty often consists of more than affirmative misrepresentations. In a fiduciary role, the actor may deceive through omissions, usually because the other party trusts the fiduciary to be forthcoming and is justified in feeling betrayed when the fiduciary actor is less than candid or straightforward.[18] An example from Collin O'Neil illustrates this point in the context of an informal, trusting relationship between two people, Bob and Sue: Bob does not want Sue to know that it was he who spilled coffee on her laptop.[19] Bob does not lie to Sue by telling her either that he stopped drinking coffee two weeks ago or that her cat knocked over Bob's mug of coffee when Bob was out of the room.[20] Instead, Bob dips the cat's paws in cold coffee so that Sue, when she discovers both the damaged laptop and the cat's coffee-stained paws, will draw her own inference, one that exculpates Bob.[21] O'Neil characterizes Bob's strategy as an example of "covert deceit" that implicates Sue's expectation that Bob is honest and would not trick her into believing something he does not himself believe.[22] To be sure, Bob might have deceived Sue even if she did not trust him, "[b]ut it remains the case that the *actual* opportunity he takes rests on her trust," which Bob abused.[23] And as it happens, Bob's conduct, analyzed through the

16 For a representative judicial statement, see *In re* MF Global Holdings Ltd. Inv. Litig., 998 F. Supp. 2d 157, 181 (S.D.N.Y. 2014) ("A fiduciary relationship arises where one party's superior position or superior access to confidential information is so great as virtually to require the other party to repose trust and confidence in the first party, and the defendant was under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. . . . Broadly stated, a fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another." (internal quotations omitted)).

17 For full development of this argument, focused on relationships that invite trust from the victim, see Collin O'Neil, *Lying, Trust, and Gratitude*, 40 PHIL. & PUB. AFFS. 301, 303 (2012).

18 *See id.* at 308–09 (explaining that a breach of trust gives rise to feelings of betrayal because it disappoints expectations of the trustee's good will).

19 O'Neil hypothesizes that this is because Bob does not wish to replace the damaged laptop, *id.* at 302, but one might imagine other explanations.

20 *See id.*

21 *See id.*

22 *See id.* at 327.

23 *Id.*

framework defined by common-law fraud, may be an example of an implied misrepresentation made through conduct and, if the relationship between Bob and Sue is characterized as fiduciary or sufficiently fiduciary-like, as an example of constructive fraud.[24]

B. Categorical and Ad Hoc Fiduciary Relationships

To be sure, the law applicable to fiduciary relationships is more complicated than the lay understanding. Its underpinnings are also the subject of ongoing and vigorous debate among legal scholars.[25] Nonetheless, basic features of the fiduciary landscape are not controverted. Most fiduciary relationships "are treated as such as a matter of status or convention."[26] In the culminating point of accretion and generalization over a long period of time, certain relationships are "habitually treated as fiduciary."[27] Well-known examples of habitual or categorical fiduciary relationships include those between trustees and beneficiaries, agents and principals, directors and corporations, lawyers and clients, and guardians and wards, as well as the relationship among partners.[28] For other relationships—such as those between parents and children, doctors and patients, and elected officials and the polity—recognition of the category as fiduciary is either less settled or more variable across jurisdictions.[29]

Apart from settled or status-based characterizations, courts impose ad hoc or fact-based fiduciary duties when although the parties' relationship was not categorically fiduciary, its characteristics nonetheless justified one party's expectation of loyal conduct from the other.[30] For example, in *Burdett v. Miller*,[31] the plaintiff invested in three tax

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24 *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9 cmt. c (Tentative Draft No. 2, 2014) (stating that fraud can be implied). In any event, a fiduciary's failure to disclose material information may result in liability if the fiduciary is under a duty to speak, i.e., disclose the information. *See id.* § 13(b); *infra* text accompanying notes 82–85.

25 *Compare* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993) (describing fiduciary relationships as contractual), *with* Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303, 305 (1999) (arguing fiduciary relationships "arise and function in ways alien to contractualist thought").

26 Andrew S. Gold & Paul B. Miller, *Introduction* to PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 1, 2 (Andrew S. Gold & Paul B. Miller eds., 2014) (hereinafter PHILOSOPHICAL FOUNDATIONS).

27 *Id.* at 2–3.

28 *Id.*

29 *Id.*

30 Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 936 (2006). An alternate formulation, using the vocabulary of economic analyses of fiduciary law, characterizes ad hoc fiduciary relationships as ones typified by the presence of "an agency problem"—that is, the possession by one party of "difficult-to-observe discretionary power affecting" the other party's welfare. Robert H. Sitkoff, *An Economic Theory of Fiduciary Law*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 26, at 197–201.

31 957 F.2d 1375 (7th Cir. 1992).

shelters recommended by an accountant whom the plaintiff befriended when she enrolled in a course he taught.[32] Like the fictional Bob in Collin O'Neil's hypothetical, the defendant did not explicitly lie but instead failed to disclose a series of material facts. These included the facts that the first tax shelter he recommended was its sponsor's initial venture; the investment units would not be marketable; the plaintiff's investment would represent a third of the total invested by anyone; and, for a later project, the defendant himself was the owner of the units he urged the plaintiff to buy.[33] But the tax shelters were worse than worthless: not only did the plaintiff lose her investment (the shelter promoters, friends of the defendant, absconded to Canada), she was required to make good on the bank letter of credit through which she secured her investment.[34] In the court's analysis, the defendant solicited the plaintiff's trust in matters in which he represented himself to be an expert, "as well as trustworthy"; the plaintiff, not an expert herself, reposed trust in the defendant.[35] Additionally, the defendant did nothing to dispel the fiduciary consequences of his conduct, such as "explaining the character and circumstances of the investments" to the plaintiff, disclosing his own interests, or assuring that the plaintiff received prospectuses before she invested.[36] Although the defendant did not obtain direct control over the plaintiff's wealth, as would a trustee or an investment manager, he invited her uncritical reliance on him.[37]

Other examples of the imposition of fact-based fiduciary duties are consistent with the structure of the court's analysis in *Burdett*: the determinative question is whether one party, having been invited to do so, "reposed confidence in another and reasonably relied on the other's superior expertise or knowledge."[38] Answering the question requires fact-specific inquiry into the parties' particular relationship, an inquiry against a commercial backdrop structured around the general assumption that contractual lender-borrower and debtor-creditor relationships do not impose fiduciary duties on the lender or

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32 *Id.* at 1378–79. The court's opinion does not state whether the defendant was a registered investment adviser. In 1963, the Second Circuit enabled the imposition of a federal fiduciary duty on advisers under the Investment Advisers Act of 1940. *See* SEC v. Capital Gains Research Bureau, 375 U.S. 180, 189–90 (1963). For a full history and its implications, see generally Arthur B. Laby, SEC v. Capital Gains Research Bureau *and the Investment Advisers Act of 1940*, 91 B.U. L. REV. 1051, 1056–66, 1080–88 (2011).

33 *See Burdett*, 957 F.2d at 1379.

34 But the shelters did generate tax benefits for the plaintiff, plus the opportunity to write off losses from the fraud against her income. *See id.*

35 *Id.* at 1381.

36 *Id.*

37 *Id.* at 1381–82.

38 Wiener v. Lazard Freres & Co., 672 N.Y.S.2d 8, 14 (N.Y. App. Div. 1998).

creditor.[39] Some courts recognize that no bright line divides arm's-length relationships from ones in which a fiduciary duty constrains one or both parties.[40] A central inquiry is whether to characterize the trust reposed by the victim as, on the one hand, the product of the victim's credulity or the defendant's personality or, on the other hand, the consequence of the defendant's position in the transaction,[41] comparable to the dominance created by a fiduciary actor's role in a habitual fiduciary category like a trustee or an agent.

Informal fiduciary relationships and the terminology of relationships of trust and confidence became more prominent for business and corporate lawyers following *United States v. Chiarella*.[42] In *Chiarella*, a criminal prosecution for insider trading, the Court held that a "duty to disclose arises when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.'"[43] Breach of a duty of disclosure is crucial for insider-trading liability because the relevant statutory provision—Section 10(b) of the Securities Exchange Act of 1934—is a general antifraud measure that prohibits the use of any manipulative or deceptive device or contrivance in connection with the purchase or sale of securities contrary to rules adopted by the SEC.[44] A longstanding understanding about trading on the basis of nonpublic information is that a trader who is an employee of the entity that issued the security owes the issuer a fiduciary duty that prohibits trading without the issuer's consent.[45] Post-*Chiarella* developments, in contrast, focus on noninsiders who come to possess inside information. In 2000, the SEC adopted Rule 10b5–1, which proscribes the purchase or sale of securities on the basis of material nonpublic information by any person "in breach of a duty of trust or confidence" owed to the issuer of the security, its shareholders, or the

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39 *See id.*

40 *See, e.g.*, United States v. Pappert, 112 F.3d 1073, 1080 (10th Cir. 1997) ("[T]here is not a bright line between formal or informal fiduciary relationships, and run-of-the-mill commercial relationships.").

41 Advocare Int'l, LP v. Horizon Labs., Inc., 524 F.3d 679, 695–98 (5th Cir. 2008).

42 445 U.S. 222 (1980).

43 *Id.* at 228 (quoting RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1976)).

44 That is, in section 10(b), Congress did not specify or define insider trading as conduct that violates the Securities Exchange Act.

45 *See* SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 852 (2d Cir. 1968) (treating an employee-geologist as a fiduciary); *see also* 18 DONALD C. LANGEVOORT, INSIDER TRADING: REGULATION, ENFORCEMENT & PREVENTION § 3:5 (2012) (suggesting "no reason to depart" from assumption that all employees owe duties of loyalty that include an obligation not to profit from information given in the course of employment; all employees—including a law firm's janitor—may have privileged access to inside information, if only through waste paper). The legal implications of tipping—sharing inside information with others to use in their trading—are beyond the scope of this Essay.

source of the information.[46] More recently, in *Skilling v. United States*,[47] the Court relied on its earlier formulation in *Chiarella* in interpreting the federal mail fraud statute, suggesting that both formal and informal fiduciary relationships are salient in the mail fraud context.[48]

One reason that the lines demarcating fiduciary relationships are no brighter is that particular relationships may change over time, morphing away from arm's length qualities into those warranting the application of fiduciary duties, whether as the consequence of entry into a formal or "habitual" fiduciary relationship or as an occasion for the fact-specific imposition of fiduciary duties, as in *Burdett*.[49] For example, when a securities broker assumes effective control over a client's nondiscretionary account, the broker becomes subject to the fiduciary duties of a discretionary account's investment manager.[50] Indeed, prior to the creation of a formal agency relationship with a client, a broker in whom the client has already reposed trust and confidence may owe the client a fiduciary duty of disclosure concerning complicated or obscure terms in the broker's fee and commission structure.[51] In general, although cases finding ad hoc fiduciary relationships fit into patterns, these patterns of duty imposition have not

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46 17 C.F.R. § 240.10b5–1(a) (2000). For its history and the SEC's rationale, see *Selective Disclosure and Insider Trading*, U.S. SEC. & EXCHANGE COMMISSION, www.sec.gov/rules/final/33-7881.htm (last modified Aug. 21, 2000). Rule 10b5–2 includes an expressly nonexclusive statement of circumstances under which a relationship of trust and confidence exists, including an agreement to maintain information in confidence, a history between the source of the information and its recipient such that the recipient knows or reasonably should know that the source expects the information to be kept in confidence, or receiving information from a close family member unless the recipient can demonstrate an absence of a reasonable expectation that the information be kept confidential. *See* 17 C.F.R. § 240.10b5–2 (2000). For the leading case, involving tips by a husband concerning a major development in his wife's family's business, see United States v. Chestman, 941 F.2d 551, 555 (2d Cir. 1991).

47 561 U.S. 358, 407 n.41 (2010). In *Skilling*, the defendant (of Enron notoriety) was charged with conspiracy to commit wire fraud by depriving a corporation and its shareholders whom he served as a senior officer of the intangible right to his honest services in violation of 18 U.S.C. § 1346. The Court held that the defendant's conduct did not violate the statute because it criminalized only the "bribe-and-kickback core" of cases decided under a more general statutory formulation that the Court invalidated earlier in *McNally v. United States*, 483 U.S. 350, 360–61 (1987). *See Skilling*, 561 U.S. at 409.

48 *See* United States v. Milovanovic, 678 F.3d 713, 723 (9th Cir. 2012); *see also* United States v. Lupton, 620 F.3d 790 (7th Cir. 2010). In *Lupton*, a real-estate broker who was characterized as an "independent contractor" in a contract which engaged him to facilitate the sale of state-owned properties committed honest-services fraud by soliciting kickbacks from other brokers in exchange for crunching numbers to assure success of their proposals. *Id.* at 793–98. The court determined that his contractual designation as an "independent contractor" was not determinative of agency status for criminal-law purposes. *Id.* at 800–01.

49 *See* DeMott, *supra* note 30, at 941 (noting that parties' dealings over time may form the basis for a fiduciary duty).

50 *See, e.g.*, Davis v. Keyes, 859 F. Supp. 290, 294 (E.D. Mich. 1994).

51 Martin v. Heinold Commodities, Inc., 643 N.E.2d 734, 741 (Ill. 1994).

crystallized into across-the-board principles that are meaningful once divorced from the contexts in which they originated. On some topics—exemplified by the insider-trading cases—courts analyze questions relevant to the imposition of ad hoc fiduciary duties against a backdrop dominated by categorically defined fiduciaries, as the law in that context presupposes to be the case for an issuer's employees.[52]

C. The Content of Loyalty

Across the habitual or conventional categories, fiduciary duties are formally similar and are structured as a general standard or principle along with "specific subsidiary or implementing rules that elaborate on the application of loyalty and care to recurring circumstances," in Robert Sitkoff's formulation.[53] For example, an agent's specific duties of loyalty prohibit acquiring a "material benefit from a third party" through use of the agent's position, including material benefits received in connection with "transactions conducted or other actions taken on behalf of the principal."[54] Additionally, an agent may not deal with the principal as an adverse party, or on behalf of an adverse party, in a transaction connected with the agency relationship;[55] nor may an agent compete with the principal or assist the principal's competitors during the agency relationship.[56] Finally, and unsurprisingly, an agent's duty of loyalty proscribes using, whether for the agent's own purposes or those of a third party, the principal's property or confidential information.[57]

Agents, like other fiduciaries, also owe duties that do not stem from the duty of loyalty, although that duty may shape or color how the agent should discharge nonloyalty duties.[58] Conventionally in some settings, like corporate law, these nonloyalty duties are characterized as duties of "care," as in Robert Sitkoff's formulation.[59] Thus, for trustees, the prudent investor rule elaborates how a trustee should discharge the investment function.[60] Comparable duties for agents, termed duties of performance,[61] often originate in any contract that

52 *See, e.g.*, United States v. Chiarella, 445 U.S. 222, 232–33 (1980) (discussing fiduciary relationships in the insider-trading context).

53 Sitkoff, *supra* note 30, at 202 (emphasis omitted).

54 RESTATEMENT (THIRD) OF AGENCY § 8.02 (2006).

55 *Id.* § 8.03.

56 *Id.* § 8.04.

57 *Id.* § 8.05.

58 Whether duties that are not duties of loyalty should be characterized as "fiduciary" is open to dispute. *See, e.g.*, Velasco, *supra* note 15, at 648 (arguing that stripping fiduciary duty of nonloyalty components would impoverish it).

59 *See* Sitkoff, *supra* note 30, at 201–02.

60 *See id.*

61 RESTATEMENT (THIRD) OF AGENCY §§ 8.07–8.12 (2006). The counterpart duties were designated "duties of service and obedience" in the Restatement (Second) of Agency.

links principal to agent.[62] An agent's distinctive duties of performance, as defined by any agreement with the principal, require exercising care, competence, and diligence,[63] as well as conduct by the agent that adheres to the scope of the agent's actual authority and complies with lawful instructions given by the principal.[64] Additionally, an agent has a duty to use reasonable effort to provide material (and relevant) information to the principal,[65] a duty of performance that is closely related to the agent's duties of loyalty. Of course, through disclosure the agent may obtain the principal's consent to conduct that would otherwise breach a duty of loyalty, and facts that the agent knows or learns, if shared with the principal, enable the principal to make better-informed assessments of its own interests on an ongoing basis.

Fiduciary duties are often characterized as "default" rules—that is, ones that the parties may alter.[66] But how a duty may be altered depends on the nature or type of duty. Varying an agent's duties of loyalty requires consent from the principal;[67] for example, self-dealing by the agent breaches the agent's loyalty unless the principal consents.[68] Effective consent in this context requires specificity about the agent's conduct plus disclosure to the principal of facts material to the principal's judgment, unless the principal already knows the facts or manifests indifference to learning them.[69] In sharp contrast, an agent's duties of performance (or "care") may be varied or specified through agreement with the principal, which does not require either the particularization or the knowledge that typifies effective consent to conduct that would otherwise breach an agent's duties of loyalty.[70] Thus, an agreement that defines or varies an agent's duties of performance is effective, like a bilateral contract, on an ex ante basis. But at least in the context of agency relationships, a principal's purported consent to an agent's breach of a duty of loyalty is not effective unless informed by facts pertinent at the time the principal gives

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See id. § 8.07 note a. Relatedly, "employees" in the earlier Restatements of Agency were termed "servants." *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

62 RESTATEMENT (THIRD) OF AGENCY § 8.07 (2006). Although agency is a consensual relationship, its formation does not require an enforceable contract—or any contract at all— between principal and agent. *See id.* § 1.01 cmt. d.

63 *Id.* § 8.08.

64 *Id.* § 8.09.

65 *Id.* § 8.11.

66 *See, e.g.*, Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383, 384 (2007).

67 *See* RESTATEMENT (THIRD) OF AGENCY § 8.06 (2006).

68 *See, e.g., id.* § 8.01 cmt. b, illus. 3.

69 *Id.* § 8.06.

70 *See id.* § 8.08 (noting the agent's duties of care, competence, and diligence are "[s]ubject to any agreement with the principal").

consent.[71] Nor is hypothetical consent relevant; that is, it is no defense to the agent that the principal would have consented had the agent made disclosure of material facts, or that a reasonable person in the principal's position would have consented, or even that the agent's conduct benefitted the principal.[72]

D. Larger Theoretical Challenges

Beyond these observable features of the law, scholars contest much within the theoretical realm of the fiduciary landscape, including whether the law applicable to the varieties of fiduciary relationships can be generalized or justified by a set of underlying principles or concepts. A narrower point of disagreement is whether in some sense, if only metaphorical, fiduciary duties are best regarded as stemming from contracts, a question with implications for Section III of this Essay. Many judicial opinions explicitly treat fiduciary obligation as extracontractual, imposed "as a matter of social policy rather than by mutual consensus" in the Third Circuit's formulation.[73] However, an academically influential body of scholarship begins with the assumption that fiduciary duties are not distinctive at all but instead represent a hypothetical type of contractual response when the parties' real-world contract is incomplete in some respect.[74] One difficulty with the contractualized view is its misfit with some settled characteristics of fiduciary doctrine. For example, as discussed above, in determining whether a principal has consented to conduct by the agent that would otherwise constitute a breach of the agent's duty of loyalty, the law of agency looks to whether the principal in fact consented, knowing the specifics.[75] More generally, as Daniel Markovits observes, parties to an arm's-length contract share gains anticipated from trade ex ante through terms that define rights, typically enforceable through an expectation measure of damages in the event of breach.[76] Parties to a fiduciary relationship share ex post: a fiduciary must take

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71 For further elaboration on this distinction and its implications, see generally Deborah A. DeMott, *Defining Agency and Its Scope*, *in* COMPARATIVE CONTRACT LAW: BRITISH AND AMERICAN PERSPECTIVES (Larry A. DiMatteo & Martin Hogg eds., forthcoming 2015), *available at* scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6101&context=faculty_scholarship.

72 *See id.* (manuscript at 23) (on file with author) (arguing that such a rule would incentivize agents to breach their duties of loyalty "in the hope that the eventual outcome would prove advantageous to the principal").

73 Bohler–Uddeholm Am., Inc. v. Ellwood Grp., Inc., 247 F.3d 79, 105 (3d Cir. 2001) (internal quotations omitted).

74 The most influential early work in this vein is Easterbrook & Fischel, *supra* note 25, at 438 ("Good faith in contract merges into fiduciary duties . . . .").

75 *See supra* note 67 and accompanying text.

76 Daniel Markovits, *Sharing* Ex Ante *and Sharing* Ex Post, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 26, at 211 ("Contract law vindicates promisees' rights through the expectation remedy.").

initiative on his or her beneficiary's behalf and is subject to a duty of loyalty, termed by one influential court a "'free-floating' duty" that is applied at the time of the wrong.[77] And fiduciary law does not entertain the concept of efficient breach, a frequent outcome for relationships defined by arm's length contracting.[78] Indeed, distinctively fiduciary remedies—the imposition of a constructive trust and an accounting of profits—by design operate ex post the fiduciary's breach.

Another distinctive feature of the law involving fiduciary relationships that eludes capture by contractualized accounts is the significance of knowledge and how or whether the fiduciary shares it with the beneficiary.[79] A fiduciary may well know more about a beneficiary (at least about some things) than the beneficiary knows about himself or herself.[80] Many fiduciary duties also create duties to know something and impose duties of disclosure. For example, an agent's duty of loyalty prohibits self-dealing unless the principal consents; one among the suite of an agent's duties of performance requires making a reasonable effort to inform the principal of facts material to the agency relationship.[81] The principal's power of control over the agent (a constitutive element of any agency relationship[82]) is facilitated by facts the agent furnishes; these facts often concern the then-current state of the world, as opposed to its state as known by the principal when forming the agency relationship.[83] To be effective, that is, the principal's mechanisms of control require current information, which enables the principal to furnish the agent with updated instructions as the situation warrants. And the power to give interim instructions, a basic element and mechanism of control, is constitutive

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77 Gerber v. Enter. Prods. Holdings, LLC, 67 A.3d 400, 419 (Del. 2013) (quoting ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC, 50 A.3d 434, 440–42 (Del. Ch. 2012)). *Gerber* and *ASB Allegiance* contrast fiduciary duty with the implied contractual covenant of good faith and fair dealing, which looks to the past and what the parties would have agreed to had they considered the question at the time of contracting. *See id.* at 419.

78 Markovits, *supra* note 76, at 211–13.

79 *See* Richard R.W. Brooks, *Knowledge in Fiduciary Relations*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 26, at 225, 229.

80 *Id.* at 225, 237–38.

81 RESTATEMENT (THIRD) OF AGENCY § 8.11 (2006).

82 *See id.* § 1.01 cmts. c & f; Hollingsworth v. Perry, 133 S. Ct. 2652, 2667 (2013).

83 These include facts about the agent—for example, his or her self-dealing. Thus, a claim for breach of the fiduciary duty of loyalty is "really the opposite of a misappropriation claim in that it is the agent or employee that withholds information or conceals activity of his [or her] own when the relationship gives rise to a duty to disclose, whereas the essence of a misappropriation claim is the theft of the employer's information." Wysong Corp. v. M.I. Indus., 412 F. Supp. 2d 612, 623–24 (E.D. Mich. 2005) (alleging that agent, aided by employee, breached duty of loyalty through nondisclosure of competitive activity).

of an agency relationship.[84] In short, within the scope of a fiduciary relationship, a fiduciary's knowledge is relational, a fact elided by contractualist accounts.[85]

II
Employment and Fiduciary Relationships

Whether all employees owe fiduciary duties to their employer has not been answered consistently, whether by courts or the Restatements. This section opens by discussing how the Restatement of Employment Law resolves this question, then turns to the definition of relationships of trust and confidence. These serve as the linchpin in the Restatement's imposition of fiduciary duty.

A. The Restatement of Employment Law: The Content of Fiduciary Duty

The Restatement addresses employees' duties of loyalty in section 8.01, which differentiates from all other employees those "in a position of trust and confidence" with the employer.[86] Employees in a position of trust and confidence owe their employer "a fiduciary duty of loyalty . . . in matters related to their employment,"[87] which generally has the specific content of an agent's duties of loyalty but narrowed in one respect. An employee breaches the duty of loyalty by "competing with the employer while employed,"[88] or "misappropriating the employer's property . . . or otherwise engaging in self-dealing through the use of the employee's position with the employer,"[89] or "disclosing or using the employer's trade secrets . . . for any purpose adverse to the employer's interest . . . ."[90] The duty not to use or disclose trade secrets is narrower than an agent's duties of nonuse and nondisclosure of the principal's confidential information, which encompasses information beyond trade secrets,[91] a category limited to

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84 I have written elsewhere about an agent's duties in interpreting instructions received from the principal, arguing that the agent's fiduciary role furnishes a basic benchmark against which the agent should interpret instructions. Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, *in* Philosophical Foundations, *supra* note 26, at 321.

85 *See* Brooks, *supra* note 79, at 229.

86 Restatement of Emp't Law § 8.01(a) (2015).

87 *Id.*

88 *Id.* § 8.01(b)(2).

89 *Id.* § 8.01(b)(3).

90 *Id.* § 8.01(b)(1).

91 Restatement (Third) of Agency § 8.05(2) (2006). However, a comment in the Restatement refers to "the background rule that allows employers to share trade secrets *and other confidential information* with their employees." Restatement of Emp't Law § 8.03 cmt. a (2015) (emphasis added). Elsewhere it is made clear that confidential information that is not a trade secret can be protected only through contract. *Id.* § 8.02 cmt. a.

information that "derives independent economic value from being kept secret."[92] One wonders about information that an employer treats as confidential and often has a duty to keep confidential, such as patients' names and medical histories in hospital records.[93] To be sure, as explored at greater length below, an employer may impose nonuse and nondisclosure obligations on employees that reach information beyond the trade-secret category.[94]

Other employees, not in relationships of trust and confidence with the employer, owe implied contractual duties of loyalty "in matters related to their employment" depending on the nature of the positions they hold.[95] Additionally, employees "who come into possession of the employer's trade secrets owe a limited fiduciary duty of loyalty" concerning those secrets.[96] Left unexplained is why employee shenanigans in these categories aren't treated identically—that is, why wouldn't it be a breach of the limited-purpose fiduciary duty to misappropriate an employer's property, as distinct from disclosing or using the employer's trade secrets? If treated as a breach of contract, would the misappropriation of property entitle the employer to recover any profits gleaned by the employee or to impose a constructive trust[97] over the misappropriated property itself or its proceeds? Both, of course, are conventional remedies for this type of breach of fiduciary duty, as under appropriate circumstances is replevin.[98]

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92 RESTATEMENT OF EMP'T LAW § 8.02(a) (2015). An intriguing question, which this Essay does not explore, is whether the category of trade-secret information overlaps completely with the category of nonpublic material information for securities-law purposes.

93 *See, e.g.*, 45 C.F.R. § 164.502(a) (2015) (prohibiting disclosure of confidential health information).

94 *See infra* notes 115–21 and accompanying text.

95 RESTATEMENT OF EMP'T LAW § 8.01(a) (2015).

96 *Id.* In the final text, an employee's possession of trade secrets itself explicitly triggers the imposition of a fiduciary duty of loyalty, albeit one "limited," presumably in scope, to matters concerning the secrets. *Id.* In contrast, in the Proposed Final Draft, a comment observed only that an employee in possession of an employer's trade secrets "may become a fiduciary for a limited purpose." Proposed Final Draft § 8.01 cmt. a.

97 The Restatement does not mention this well-established remedy for breach of a fiduciary duty of loyalty. Section 9.09(d) states that "[i]f an employee personally profits from a breach of fiduciary duty, the employer can recover those profits." RESTATEMENT OF EMP'T LAW § 9.09(d) (2015). Perhaps recovery of profits could include recovery of misappropriated property, or property otherwise acquired via a breach of fiduciary duty, but constructive trusts go unmentioned. On constructive trusts, see RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 (2011). Additionally, the remedial possibility articulated by Section 9.09(d) is inconsistent with an earlier statement that limits relief for breaches of the fiduciary duty of loyalty to situations "causing economic injury to the employer." RESTATEMENT OF EMP'T LAW § 8.01 cmt. e (2015).

98 *See, e.g.*, FryeTech, Inc. v. Harris, 46 F. Supp. 2d 1144, 1154, 1157 (D. Kan. 1999) (holding that employer had superior rights in equipment it sought to replevy although former employees had transferred ownership to another entity; employees took equipment that employer instructed them to dismantle and scrap to establish own enterprise to compete with employer).

Perhaps because it specifically targets issues arising in the employment context, the Restatement does not delineate duties of performance (or care) that are counterparts to those discussed above for agents and other fiduciary actors. Instead, the comment accompanying section 8.01 directs attention to the Agency Restatement for "other [employee] obligations."[99] This omission is understandable—it avoids repeating content readily available elsewhere—but it also has the consequence, whether or not intended, of situating the duty of loyalty in isolation from complementary duties, including the agency-law duties to use best efforts to furnish material information to the principal, to follow lawful instructions, and to use care. The omission also forestalls discussion of the relationships among these duties. And the omission may reflect the assumption, central to the treatment of employees' duty of loyalty, that just as for many employees a duty of loyalty would have "little practical application,"[100] so too would duties of performance because so little of significance might escape the monitoring to which many rank-and-file employees are subject in performing work that does not require exercising discretion. Moreover, for both types of duties and for many employees, recourse to litigation and remedies outside the workplace would not be typical.[101]

In contrast, the Agency Restatement, by characterizing all employees as agents, subjects all of them to fiduciary duties. Relatively recent cases from different jurisdictions support its solution, while others support the solution in the Restatement.[102] Like the Agency Restatement, courts characterizing employees as agent fiduciaries counsel caution, noting the varied contexts in which claims of disloyalty may arise and the context-specific scope of the duty of loyalty that an employee owes an employer.[103] And some courts acknowledge that some claims of breach of fiduciary duty require the application of "rules of reason"[104] and not application in a mechanical or "nonsensical, Stalinist way."[105]

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99 RESTATEMENT OF EMP'T LAW § 8.01 cmt. b (2015).

100 *Id.* § 8.01 cmt. a.

101 *Id.* § 8.01 cmt. e ("Employers typically enforce the duty of loyalty through legitimate workplace discipline, including termination of employment.").

102 *Compare, e.g.*, TalentBurst, Inc. v. Collabera, Inc., 567 F. Supp. 2d 261, 266 (D. Mass. 2008) (applying Massachusetts law and finding that duty of loyalty does not extend to rank-and-file employee in absence of special circumstances indicating a relationship of trust and confidence), *with* Synthes, Inc. v. Emerge Med., Inc., 25 F. Supp. 3d 617, 667 (E.D. Pa. 2014) (applying Pennsylvania law and finding that employee, as agent of employer, owes employer a duty of loyalty).

103 *See* Cameco, Inc. v. Gedicke, 724 A.2d 783, 789–90 (N.J. 1999) (discussing the scope of employer-employee duties); RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. c (2006) (observing that fiduciary obligation does not operate monolithically).

104 *Cameco*, 724 A.2d at 789.

105 *See* Seibold v. Camulos Partners LP, C.A. No. 5176-CS, 2012 WL 4076182, at * 21 (Del. Ch. Sept. 17, 2012). In *Seibold*, a hedge fund's former partner/senior analyst

B. Relationships of Trust and Confidence

The Restatement's criteria specifying which employees occupy positions of trust and confidence unquestionably capture the most obvious candidates: employees who "exercise substantial discretion and are not subject to close supervision" in discharging "managerial, supervisory, professional, or similar highly skilled work responsibilities"[106] for the employer or have substantial discretion and little direct oversight in carrying out their tasks, especially when they have been "entrusted with . . . the employer's trade secrets."[107] Prototypes coming immediately to mind are senior executive officers of public companies,[108] nonofficer employees who negotiate transactions on their employer's behalf, and employees who work as investment bankers or securities brokers.

However, employees may occupy positions of trust and confidence outside these transactional and C-suite prototypes although

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breached his fiduciary duty by, inter alia, downloading massive amounts of a fund's work product to create a resource for competing with the fund. *See id.* Although by taking work product for his own purposes, the former partner/senior analyst breached fiduciary duty, *see id.*, the court noted that the principle stated in Restatement (Third) of Agency section 8.05 "should not be read in a nonsensical, Stalinist way that allows employers an easy excuse to penalize employees for human behavior that does not diminish the effectiveness of the employer in any way." *Id.* n. 207. In particular, *Seibold* notes that employees often make incidental use of employer property—like computers—for their own purposes, "[b]ut so too do employees' own computers, paper, and resources get used for work benefiting their employers." *Id.*

106 RESTATEMENT OF EMP'T LAW § 8.01 cmt. a (2015). The predecessor formulation in the Proposed Final Draft encompassed employees who exercised "managerial responsibilities" or had "substantial discretion and little direct oversight in carrying out their tasks, and especially when they have been entrusted with the employer's trade secrets." Proposed Final Draft § 8.01 cmt. a.

107 RESTATEMENT OF EMP'T LAW § 8.01 cmt. a (2015). The Restatement does not explore whether the term "relationship of trust and confidence" means different things in different contexts. For example, the ALI's ongoing project on economic torts states that failing to disclose a material fact constitutes fraud when an actor has a duty to speak, which includes an "actor . . . in a fiduciary or confidential relationship with another that obliges the actor to make disclosures." *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 13(b) (Tentative Draft No. 2, 2014). Confidential relationships "arise when one party is bound to act in good faith for the benefit of the other because they have a relationship of trust; typically one of the parties has gained a position of substantial influence over the other." *Id.* § 13(b) cmt. c. Although this formulation is descriptive, not analytic, its criterion of "substantial influence over the other" is not on all fours with the criteria in the Restatement. Nor does the Restatement explore the situation of employees who fall outside the trust-and-confidence criteria but have power to bind the employer to contracts with third parties, that is, to act as agents.

108 Not all officers may be employees, at least for all purposes, but they are agents of the entity. *See* RESTATEMENT (THIRD) OF AGENCY § 3.03 cmt. e (2006). Although the Model Business Corporation Act defines an officer to be an employee, *see* MODEL BUS. CORP. ACT § 1.40(8) (2008), not all business-organization statutes follow this approach. *See, e.g.*, DEL. CODE ANN. tit. 8, § 142(a) (2013) ("Every corporation organized under this chapter shall have such officers with such titles and duties as shall be stated in the bylaws or in a resolution of the board of directors . . . .").

their roles are nonmanagerial and their work is more susceptible to monitoring by the employer. For example, a well-developed group of cases stem from alleged breaches of fiduciary duty by law firm associates—not typically the occupants of managerial roles within law firms—who refer potential clients elsewhere[109] or jumpstart competitive activities before leaving their present employer.[110] Most associates, however, do at least some work without much "close supervision," including work that brings them into contact with clients of the firm or information furnished by clients or developed for them.

But the range of employees in whom trust is necessarily reposed often reaches more widely. Recall Collin O'Neil's hypothetical figures, Sue and Bob, and assume that Sue is a commercially successful author who employs Bob as her assistant and, somewhat obsessively, checks frequently to determine how Bob's work is progressing.[111] Depending on the specific work assigned to Bob, and notwithstanding Sue's monitoring, Bob may learn a great deal about Sue, including information not protectable as a trade secret.[112] In the original hypothetical, at a minimum Bob knows that a valuable asset belonging to Sue—her laptop—has sustained major damage due to his carelessness.[113] Not only would Sue be justified in trusting Bob not to try to exculpate himself by framing her cat, Sue would also be justified in trusting Bob not to use this information for purposes other than her own. Returning to the law firm context, the firm likewise is justified in trusting that its cohort of employees whose work is restricted to data-entry or document-review tasks would keep confidential the information to which their work necessarily exposes them, an expectation accentuated by the firm's duties of confidentiality to its own clients. Moreover, if those employees trade in securities on the basis of nonpublic material information gleaned from their work, or

109 *See, e.g.*, Brewer & Pritchard, P.C. v. Johnson, 167 S.W.3d 460, 463–64 (Tex. App. 2005) (stating facts of case where an attorney referred clients to competing firm).

110 *See, e.g.*, Meehan v. Shaughnessy, 535 N.E.2d 1255, 1271 (Mass. 1989) (noting that attorneys removed cases from their departing firm).

111 In some industries, employers adopt compliance measures that involve real-time monitoring of employee activity, including that of employees who appear to fit within prototypical trust-and-confidence categories. For an extreme example from the hedge-fund sphere, see William Alden, *Bridgewater's Ray Dalio Says Taping Employees Has Legal Benefits*, N.Y. Times (Dec. 11, 2014, 11:43 AM), http://dealbook.nytimes.com/2014/12/11/bridgewaters-ray-dalio-says-taping-employees-has-legal-benefits/. The Restatement does not address how to categorize an intensely supervised employee who exercises substantial discretion.

112 This might include her travel plans, financial resources, status of works-in-progress, and relationships with publishers and editors, etc.

113 *See* O'Neil, *supra* note 17, at 302.

tip the information to others for trading purposes, they are subject to liability despite the routinized nature of their work.[114]

Whether the parties to a relationship must mutually understand it as one of trust and confidence is open to question, but the Restatement does not address this question. As the court formulated the definition of relationships of trust and confidence in *Burdett v. Miller*, what mattered was whether the defendant solicited the plaintiff's trust in his expertise and trustworthiness, not whether he shared the plaintiff's perception of himself or harbored intentions consistent with his external guise.[115] In even more extreme cases, an actor's self-understanding of an assumed role and its character may be completely at odds with an intentionally created appearance, as when an actor infiltrates a business firm or other organization in the guise of an employee to obtain information to be used in ways the employer would not wish.[116] For example, in *Council on American-Islamic Relations Action Network, Inc. v. Gaubatz*, the defendant undertook the role of an unpaid intern to enable him to surreptitiously remove documents and make videos intercepting conversations from the plaintiff's premises, all to supplement a documentary film sponsored by an ideological opponent of the plaintiff.[117] The infiltrated organization sued alleging that the interceptions violated federal and local wiretap statutes, which prohibit intentional interceptions of oral communications; an interception to which one party consents (as did the infiltrator posing as an intern) violates these statutes if done for the purpose of committing "any criminal or tortious act."[118] The *Gaubatz* court, treating a breach of fiduciary duty as a tortious act for this purpose, held that the question was whether the intern "understood himself as bound by a fiduciary duty of non-disclosure" to the organization, to be determined by the trier of fact.[119] On the one hand, personnel within the organization never explicitly discussed duties of confidentiality and the intern never signed and returned the confidentiality agreement he was given; on the other hand, evidence in the record suggested the

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114 *See, e.g.*, Christopher M. Matthews, *Law-Firm Employee Charged with Insider Trading*, WALL ST. J. (Sept. 16, 2014, 4:15 PM), http://www.wsj.com/articles/law-firm-employee-charged-with-insider-trading-1410898540 (describing a case where a "back-office employee" was charged with trading on inside information that he found on the firm's systems).

115 957 F.2d 1375, 1381–82 (7th Cir. 1992).

116 *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F. Supp. 1224, 1229 (M.D.N.C. 1996). *But see* Dalton v. Camp, 548 S.E.2d 704, 709 (N.C. 2001) (repudiating *Food Lion* as a statement of state law to the extent it can be read to support an independent claim for breach of fiduciary duty).

117 31 F. Supp. 3d 237, 244–45 (D.D.C. 2014).

118 18 U.S.C. § 2511(2)(d) (2012); D.C. CODE § 23-542(b)(3) (2013).

119 31 F. Supp. 3d at 262.

intern actively elicited the organization's trust in him.[120] The approach in *Burdett* is preferable: by deliberately creating a guise to evoke others' trust, a poseur like the defendant in *Gaubatz* should be subject to duties consistent with the guise. This is because posing as a person in whom trust can safely be reposed predictably leads to changes in the conduct of other actors.[121]

III
IMPLICATIONS

A. Contractualization and Its Limits

One foreseeable implication of requiring a relationship of trust and confidence to trigger the imposition of fiduciary duties on employees is self-help by employers. That is, employers may find it attractive to use individual employment agreements explicitly stating that the employer and the employee wish to form a relationship of trust and confidence. The Restatement does not include a general principle against which to assess the effect of employers' statements purporting to characterize the relationship or to impose duties on employees, whether made through individual employment agreements or through unilateral declarations by the employer. Moreover, the Restatement overall is not consistent in how it treats the significance of contract law in connection with employment relationships. The Restatement's initial section defining the conditions for the existence of an employment relationship, although stating that an individual renders services as an employee only when "the employer consents to receive the individual's services,"[122] does not require either an express agreement or a contract linking that individual and the employer. In contrast, a later section focused on contract-law issues in the employment context states in comment that "[a]t its core, employment is a contractual relationship."[123] But under the Restatement's basic definition of an employment relationship, the "core" is consent, not contract.[124]

In less general terms, the Restatement clarifies that an employer's unilateral statements purporting to impose obligations on employees, in contrast to individualized agreements, are not likely to be enforceable extramurally—that is, other than through the employer's power to

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120 *See id.* at 248, 258.

121 For further elaboration, see Deborah A. DeMott, *The Poseur as Agent*, *in* AGENCY LAW IN COMMERCIAL PRACTICE (Danny Busch et al. eds., forthcoming 2015).

122 RESTATEMENT OF EMP'T LAW § 1.01(a)(2) (2015).

123 *Id.* § 2.01 cmt. b.

124 Likewise, a relationship of common-law agency does not necessarily involve a contract between agent and principal. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. d (2006).

discipline an employee or terminate employment.[125] Although the Restatement addresses agreements with individual employees that restrict their rights to compete postemployment[126] and agreements geared to protect trade secrets,[127] and states limits on the effectiveness of such agreements, it does not explore the impact of agreements that designate employment relationships as ones of trust and confidence. An obvious question is whether such an agreement is dispositive if, for example, an employee's conduct would constitute a breach of the duty of loyalty but the employee falls outside the Restatement's definition of a relationship of trust and confidence.[128] If the term in the agreement is not dispositive, who bears the burden of alleging and proving that the employee does or does not meet the definitional criteria? Elsewhere, in defining an employment relationship, the Restatement provides that designations or characterizations in an agreement or an employer policy statement are not controlling.[129] Left open is the status of provisions designating the character of a relationship that is uncontrovertibly one of employment.

More generally, contractualized solutions to fiduciary-duty problems are not problem free. One risk is that a "trust and confidence/loyalty" agreement would be yet another form to be signed and filed away in the employer's human resources department without having engaged the attention of many employees. Additionally, such an agreement may prove to be incomplete because human cognition is limited in its powers of foresight. Reflecting recently on Delaware's experience with contractualization in connection with governance arrangements for business entities, two distinguished judges were skeptical that drafters of the governing instruments were likely to succeed "in attempting to provide contractually for all reasonably conceivable circumstances."[130] Statutes in Delaware permit the organizational documents for partnerships and limited liability companies (but not corporations) to vary or eliminate fiduciary duties otherwise owed by the entity's managers to the entity and its members.[131] To the au-

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125 RESTATEMENT OF EMP'T LAW § 2.05 cmt. a (2015). No remedy for employees' breaches of duty is keyed to breach of a duty purportedly imposed in a unilateral employer policy statement.

126 *Id.* § 8.06.

127 *Id.* § 8.07(b)(i) (stating employer's legitimate interest in protecting its "trade secrets . . . and other protectable confidential information that does not meet the statutory definition of trade secret").

128 *See supra* note 107 and accompanying text.

129 RESTATEMENT OF EMP'T LAW § 1.01 cmt. g (2015); *accord* RESTATEMENT (THIRD) OF AGENCY § 1.02 (2006).

130 Leo E. Strine, Jr. & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, *in* HANDBOOK ON ALTERNATIVE ENTITIES (Mark Lowenstein & Robert Hillman eds., forthcoming 2015) (manuscript at 12), *available at* http://ssrn.com/abstract=2481039.

131 DEL. CODE ANN. tit. 6, § 15-103(f) (2013) (partnerships); *id.* § 18-1101(c) (limited liability companies).

thors, who adjudicated many cases involving contractualized governance provisions, "[t]he difficulties drafters have in substituting their own bespoke provisions for the equitable principles that have been forged by cases over centuries should not be surprising."[132] To be sure, governance arrangements for entities are more complex and, one assumes, harder to specify in advance than the duties owed by an employee, and thus the Delaware experience with alternate-entity governance may seem inapposite. Nonetheless, it suggests caution in assuming that provisions in individual employment agreements would replace conventional fiduciary duties in an entirely satisfactory way.

B. Duties of Loyalty and Duties of Disclosure

Under formulations of the Restatement, unless a specific agreement so requires, employees not subject to fiduciary duties do not have duties of disclosure to their employers, including the duty to furnish material information to the employer.[133] And, again in the absence of an agreement providing otherwise, an employee who is not subject to a duty of loyalty may work for a competitor of the employer subject to stated limitations.[134] Moonlighting—an economic necessity for many employees—breaches an employee's duties when the employee works for a competing employer during time committed to the first employer, uses or discloses the first employer's trade secrets, or injures the first employer "to any greater extent than would any other individual working for the competitor."[135] Requiring that restrictions on moonlighting be imposed through an explicit agreement seems attractive because it places employees on notice—indeed, more effectively than would a statement deeming their relationship with the employer to be one of trust and confidence—of particular forms of conduct that the employer disallows. However, absent such an agreement, an employee not in a relationship of trust and confidence owes no duty to the employer to notify the employer about the moonlighting; the employer may have a different perspective on how injurious

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132 Strine, Jr. & Laster, *supra* note 130. The difficulties are not surprising because the "equitable principles emerged in large measure to address the situations involving the exercise of authority by one person over another's property that could not be effectively addressed by contracting." *Id.*

133 RESTATEMENT OF EMP'T LAW § 8.01(a) (2015).

134 *Id.* § 8.04(c). Comment *b* states that "[a]n employer wishing to restrict moonlighting . . . must, in the typical case, obtain an enforceable agreement . . . or promulgate a reasonable workplace policy against such 'moonlighting.'" *Id.* § 8.04 cmt. b. However, unilaterally promulgated employer policy statements "do not provide an independent basis for imposing liability on the employee." *Id.* § 2.05 cmt. a.

135 *Id.* § 8.04 cmt. b.

the employee's work for its competitor may prove to be.[136] Like the Restatement's restriction of fiduciary duties to employees who occupy relationships of trust and confidence, the absence of duties of disclosure may reflect an assumption that many employees have no information of material interest to furnish to their employers, so narrowly defined are their roles.[137] How well this assumption applies in an increasingly knowledge-based economy in which business firms choose less hierarchical organizational structures is open to question. And it leaves one wondering why employees as a group are categorically so different from the hypothetical Bob, who not only attempts to frame the cat but, more generally, withholds material information from Sue, who trusts him.[138]

CONCLUSION

There is much to applaud about the Restatement of Employment Law. It represents the culmination of a long process of active debate and achieves a focused statement of legal principles applicable to an important type of relationship. Although its answer to the question of employees' fiduciary duties is attractive in many respects, the answer is complicated and comes with drawbacks. Additionally, the focused nature of the project itself may have inhibited the Restatement's engagement with broader questions. As this Essay demonstrates, fiduciary duties imposed on an ad hoc basis, triggered by finding a relationship of trust and confidence, resist generalization but tend to stem from inquiries at the periphery of categorically established fiduciary relationships. It muddies an already complex concept to require a fact-specific basis for the imposition of fiduciary duty that is geared to a categorically defined relationship,[139] employment. Additionally, the Restatement leaves many questions open and does not address instances in which well-established bodies of law—like that proscribing insider trading—seem at odds with the Restatement's formulations. More generally, the Restatement does not resolve the status of contract within employment law nor, more narrowly, the significance to be given to provisions in individual employment agreements and employers' unilateral declarations that purport to characterize the nature

136 *See* Cameco, Inc. v. Gedicke, 724 A.2d 783, 789 (N.J. 1999) ("To an employee, the possibility of conflict with the employer's interest may seem remote; to the employer, the possibility may seem more immediate.").

137 *See supra* notes 100–02 and accompanying text.

138 *See* O'Neil, *supra* note 17, at 302.

139 *See* United States v. Milovanovic, 678 F.3d 713, 729–30 (9th Cir. 2012) (Clifton, J., concurring) (stating that, in the mail-fraud context, "we should not muddy the meaning of 'fiduciary' any further by employing it here to mean something other than 'fiduciary' "). Additional confusion may stem from the Restatement's shifts in focus from fiduciary relationships to fiduciary duties owed by actors who are not otherwise deemed to be fiduciaries.

or quality of the relationship. Combining the complexity of trust-and-confidence determinations with these omissions may leave courts with little guidance.