

The Ethics of Lateral Hiring

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ABSTRACT: Lateral hiring is the intentional action of one employer to identify, solicit, and hire an individual or group of employees currently employed by another firm, a practice often pejoratively labeled "poaching." We use the method of critical genealogy to demonstrate that the norms that discourage lateral hiring are constructions used by powerful employers to control the turnover of their employees, making them subjects of their employer's power rather than free and autonomous people in their own right. We suggest instead that ethical responsibility for entertaining or rejecting lateral hiring offers rests with the focal employee(s). We conclude that the form and symmetry of loyalty between employees and their current employers are the determinants of the appropriateness of an employee's decision to entertain and accept outside offers. These conclusions imply responsibilities for employers to forge (and employees to honor) symmetrical relational loyalty in the workplace, but not for alternate employers to refrain from making lateral hiring offers.

MICHAEL HOMULA, director of talent acquisition for FirstMerit Bank keeps a short list of top people working at other companies in the banking industry. Rather than subject these "stars" to the uncertainties of the interview process, he, without warning, sends them an employment offer letter along with a cover letter stating they may start in two weeks. The tactic helps FirstMerit hire passive job seekers who typically do not respond to standard recruiting approaches (Sullivan, 2005).

Wanting to reestablish itself in Ukraine, law firm Squire Sanders & Dempsey relaunched its office in Kiev by hiring seven associates from a local firm (Moshinsky, 2008).

The founder of a new charter school needed to hire thirty teachers in a short period of time. When local advertisements did not attract the best applicants, glossy recruiting packets were sent to teachers featured in a newspaper advertisement placed by the school district announcing "Educator of the Year" awards, encouraging them to consider employment at the new school. The mailing was followed up by telephone calls further encouraging the award-winning teachers to apply for open positions (Kempton, 2007).

These three anecdotes illustrate a widespread practice we are calling "lateral hiring," the intentional actions of one company to identify, contact, solicit, and hire an individual or group of individuals currently employed by another company (Baron & Kreps, 1999; Bui-Eve, 1997; Cappelli, 1999). On one level, lateral hiring is nothing more than one tactic among many that firms use to identify, attract, and hire employees (Barber, 1998). US Federal Reserve Board economists Fallick and Fleischman (2001) estimate that in any given month four million people, or 2.7 percent of the total US labor force, move from one employer to another without any intervening spell of unemployment. This is the same proportion of the labor

force moving from unemployment to employment in any given month. Of these four million monthly job hoppers, the researchers estimate that 80 percent found their new employment without the benefit of job search activity suggesting lateral hiring plays a very important role in the US labor market.

Despite its apparent ubiquity, lateral hiring is quite controversial. During the 1980s, the United States and Europe shifted from manufacturing and distribution based economies requiring financial capital to develop and sustain economies of scale to service and information based economies requiring intellectual and human capital to attain ongoing innovation and mass customization (Boudreau & Ramstad, 1997). As firms have begun to recognize employees as their primary source of competitive advantage, disputes over the control of human capital have become a frequently litigated issue (Stone, 2004). Key actors in the employing firm may feel that the actions of the rival firm violate established norms of competition (Polenske, 2004), interfere with internal employment relationships by encouraging disloyalty on the part of employees, or that the hiring firm is not hiring the employee(s) to gain competitive advantage but seeking to sabotage smooth running operations (Sullivan, 2003). Professional recruiters have been debating the appropriateness of lateral hiring for some time. Finlay and Coverdill's (2002: 56) ethnography of the executive recruiting industry suggests hiring a competitor's employees violates "a little unwritten rule" of business. UK based writer Tom Nash (1989: 92) calls lateral hiring a "deplorable practice" and clearly "beyond ethical boundaries" simply because employing firms will profit less from investments in employees. Several popular press articles use the term "stealing" to describe lateral hiring (Appleton, 2000; de'Campo, 2002; Sullivan, 2000) but fail to consider the implications of asserting that employers have property rights over their employees. Alternatively, proponents of the practice see no ethical quandaries. The CEO of one software company stated "[T]here's only one hard fast rule when it comes to recruiting hot talent: Don't break the law. Pretty much everything else goes" (Westcott, 2006: 29). One recruiter echoed these sentiments when he stated, "Other than misleading a candidate about the merits of the job, everything a recruiter does to find and recruit top people is in my opinion fair game" (Adler, 2005). The competing justifications for lateral hiring, or the dearth thereof, cited by scholars and practitioners alike suggest that a systematic normative treatment of the phenomenon is in order.

We will argue that the existing (if oft-violated) norm against lateral hiring on the part of other employers is a form of domination of employees. Using the method of critical genealogy (Crane, Knights, & Starkey, 2008; Foucault, 1998; West, 1989), we will argue that norms forbidding recruitment of other firms' employees are social constructions that exist to preserve and legitimate employers' power over their employees. These are impossible to justify when employees are considered free people rather than subjects. Instead, we will argue that the responsibility to reject lateral hiring often rests with the employees themselves, and then only under the rare condition of symmetrical relational loyalty (Hart & Thompson, 2007) between employees and their employers.¹ Although lateral hiring is often characterized as the "theft" of another employer's employees, an employer can have no property right to an employee, and maintenance of such an invalid right under the guise of ethics is

wrong. Rather, a prospective employer is free to make offers to employees of other firms, and employees are generally free to accept them.

This also raises questions about the broader context of the ethics of competition—as well as that of freedom of choice. A brief example illustrates the larger issue. When a business loses a customer to a competitor in fair competition, it is usually recognized that the customer received a better deal. On the other hand, in the same situation when a business loses an employee fairly to a competitor (or an unrelated employer, for that matter), charges of moral impropriety are often invoked. Why don't the same principles of perfect competition, freedom, and choice apply? We will argue that in a free market economy, the same principles of competition for customers apply, for the most part, to employees as well (see Smith, 1977; Knight, 1997; Baumol, 1991; Acton, 1993; Sen, 1994; and Hunt, 2000, for a variety of perspectives).

Our argument will proceed as follows. First we will fully define and explicate the concept and process of lateral hiring. Next we will describe the method of critical genealogy and its normative bases in critical ethics. Third, we will examine the social psychology of the sense of offense that arises from the loss of one agent's power over another person, which often results in the creation of norms to protect that power. Then we will examine the historical construction and enforcement of norms within communities of employers, using justifications considered legitimate within those communities at different times and places. Having characterized those norms as historically contingent, we will examine loyalty as a justifiable basis for free employees' rejection of lateral hiring offers. After reviewing loyalty as a three-fold construct in its own right, we will discuss the circumstances in which an employer has a valid claim to the loyalty of their employees, and specifically to expect those employees to reject alternate employment offers. We will finally discuss the implications of our study: an application and extension of the psychological contract theory of loyalty (Hart & Thompson, 2007), an application of the genealogical method to a problem of business ethics, a contribution to the project of critical ethics in exposing the operation of power and domination in ethics itself, and a contribution of an ethical perspective on lateral hiring to the human resources literature.

A FRAMEWORK OF LATERAL HIRING

The term "lateral hiring" emerged from the practice of corporate law firms in the early 1900s. Paul D. Cravath, head of the New York firm Cravath Swaine, developed the "up or out" tournament model that law and other professional service firms use to evaluate and motivate junior associates to this day. A keystone of the early "Cravath System" was the prohibition of laterally hiring experienced attorneys from other firms (Shah, 2005; Galanter & Palay, 1991).

While seemingly nothing more than "hiring away" the employees of another firm, lateral hiring is a complex interaction among three parties—an employer, an employee or group of employees, and a second employer seeking the services of the employee(s). We define lateral hiring as the intentional actions of one employer to identify, contact, solicit, and hire an individual or group of individuals currently

employed by another organization. Intentionality on the part of the agent of the hiring company is the hallmark this practice (Baron & Kreps, 1999; Bui-Eve, 1997; Cappelli, 1999). The hiring of another company's employees after they have approached the hiring company on their own or responded to a broad-based job advertisement would constitute typical recruiting and not lateral hiring.

We see little value in drawing a clear distinction between hiring one or multiple employees. Lateral hiring of a single employee, sometimes called "poaching" or "cherry-picking" (Sullivan, 2000) differs from the hiring of multiple employees, "talent raiding" (Bordwin, 1999; Gardner, 2002), only in magnitude. Clearly, attempting to hire away another company's employees solely to harm the rival's business and not for the use of their skills and services is a clear example of unfair competition and a qualitatively more significant moral transgression (Bui-Eve, 1997). Absent the primary intention of harming the business the processes, outcomes and moral implications of hiring multiple employees remain essentially the same as hiring a single employee.

We also suggest that the two employers involved in these interactions need not be competitors or customers of one another for lateral hiring to take place. Clearly, such preexisting relationships between companies improve the quality of information about potential employees and facilitate the hiring process (Finlay & Coverdill, 2002). One employer, however, may covet the employees of another regardless of geographic proximity (labor market competitors) or production and distribution of similar products (product market competitors). For example, a hiring manager from a wood products manufacturer in Cincinnati may identify an outstanding Vala programmer (or two) working at an insurance company in Seattle. The manufacturer's successful hire of such a person constitutes lateral hiring.

Finally, our conception of lateral hiring draws no boundaries around the length of employment of the hired employee. Lateral hiring may involve the targeting and solicitation of long-term employees; newly hired employees; even individuals that have accepted job offers but have not yet shown up for their first day of work. We acknowledge that soliciting and hiring people so early in a budding employment relationship may have different moral implications than the lateral hiring of someone with five to ten years of experience. Nevertheless, these actions fall squarely within our broad definition of this interesting hiring practice.

Narrowing the Domain of Lateral Hiring

A number of tactics are associated with but independent of the pattern of interaction we are calling lateral hiring. These practices can roughly be categorized into (1) deception, (2) trade secret misappropriation, and (3) breach of employment contract (Bui-Eve, 1997). Sometimes, agents seeking to laterally hire use ruses to contact and entice the target employee. At the candidate identification stage, this would include using deceptive means to identify desirable employees in other companies. Examples include stealing or using ill-gotten company directories (Appleton, 2000; de'Campo, 2002; Zimmerman, 2001); having a recruiter call and pretend to be someone organizing a prestigious conference then asking for names of people to

invite; pretending to have previously spoken with someone in a target department or working on a target product and asking the receptionist to name names in order to spark a memory; and any other tactic that involves misrepresentation of the identity of the caller (Adler, 2005). Misrepresentation of identity is also used to make contact with identified employee targets. This might include recruiters pretending to be students, industry newsletter writers, customers, etc. to get past gatekeepers and receptionists (de'Campo, 2002). Such practices are contrary to the National Association of Executive Recruiters Member Code of Ethics and may be a violation of US federal law (Westcott, 2006).

A second category of tactics that falls outside the scope of simple lateral hiring is *misappropriation of trade secrets*. A trade secret is "any formula, pattern, device, or compilation of information which is used in one's business, and which gives an opportunity to obtain an advantage over competitors who do not know or use it" (Flynn, 1998: 122). Our exclusive focus is on the hiring of individuals for their skills, knowledge, and expertise not trade secrets specific to their employer (Bui-Eve, 1997). This practice is distinct from lateral hiring and is best left to legal scholars or independent examination (Liebman, Kahnke, & Bundy, 2005).

The final category of practices sometimes associated with but actually distinct from simple lateral hiring is inducing *breach of an employment contract*. There are four common types of employment restrictions companies use to control the post-employment activities of their current employees. These include non-solicitation agreements (forbidding the recruiting of former co-workers); non-disclosure agreements (prohibiting the disclosure of proprietary information); non-compete agreements (prohibiting competition with an employer by working at a competitor or starting a rival business); and invention assignments (restricting the use of ideas and inventions developed in the course of employment) (Bui-Eve, 1997). Our conception of lateral hiring focuses on the targeted hiring of individuals employed on an at-will basis and not those bound by formal contracts and agreements. The presence of a binding contract in the lateral hiring process creates issues of ethics, legality, and contract enforcement far outside the scope of this paper (Sayre, 1923; Wonnell, 1993).

A CRITICAL GENEALOGY OF LATERAL HIRING

Our first research question is "Why do such prevalent and simple market transactions frequently evoke moral condemnation?" We believe that the answer to this question is in part historical: norms against lateral hiring develop within communities of employers to solve problems of employee turnover. Managers generally and intentionally strive to obtain control over resources upon which they are dependent (Pfeffer & Salancik, 1978), and norms against lateral hiring enhance the control of an employer over its own employees. But, the solutions to some powerful participants' problems are themselves problems for weaker participants: a lack of mobility within a labor market limits employees' potential to exit declining or no longer desirable firms (Hirschman, 1970).

The emergence of anti-competitive norms, including norms against lateral hiring is a topic of interest across a number of disciplines. Networks with the potential to collude can emerge out of formal associations (joint ventures, industry associations), friendship networks among key managers, and among regularly interacting competitors (Ingram & Roberts, 2000; Trapido, 2007). Agreements to informally suspend competition for labor are more likely to emerge the greater the frequency of interaction among the firms, the greater the similarity among the firms, and when one firm takes the lead in developing and enforcing the norm. While the pressure to defect from the agreement is strong, violators are stigmatized for directly harming a friendly rival, encouraging "disloyalty" among the target's employees, and face the uncertainty of retaliation or exclusion from group benefits. Anti-lateral hiring norms typically erode as competitors not part of the network begin lateral hiring in the labor market (Aldrich, 1979; Baird, 1997).

The genealogical method (Foucault, 1998; West, 1989) tracks the emergence of norms within a community through historical accounts, and is especially useful for highlighting the influence of powerful parties in shaping norms for their own benefit. A history of the development of a norm will often show that the norm emerges to solve a problem faced by a powerful party, and that a justification is subsequently created to legitimate that norm, using arguments that are current at the time (West, 1989). The process is similar to the process of retrospective justification in the sense-making-intuition model of individual and collective moral judgment (Sonenshein, 2007; Weick, 1979), in which decision-makers appropriate available justifications to legitimate ethical decisions that they have already made on the basis of intuition.

The genealogical method of tracing the emergence of norms stems from the historical perspective on moral reasoning that began with Hegel. He noted that reason could not prescribe maxims for action without operating upon assumptions about human purposes, and that those human purposes are specific to the time, place, and culture of the people who hold them (Hegel, 1975). Nietzsche subsequently argued that not only the content but even the idea of morality was historically contingent, and in fact that it was an ideology contrived to confer social advantage upon its proponents. His critical *Genealogy of Morals* (1996) was the first application of the method. Foucault applied a similar critical genealogical technique in his studies of prison (1977) and sexuality (1978), with the goal of illustrating the emergence of people's socially constructed and historically contingent experiences of themselves as subjects of others (Crane, Knights, & Starkey, 2008; Scott, 1996). Foucault demonstrated that sexual taboos in particular developed in response to problems of health and hygiene, and later took on a universal character (Foucault, 1978; Scott, 1996). On the opposite side of the Atlantic, Dewey argued that "[f]or practical purposes morals mean customs, folkways, [and] established collective habits" (1922: 75), and that "reason pure of all influence from prior habit is a fiction" (1922: 31). For Dewey, morality is necessarily a matter of adapting one's habits to live harmoniously in community, which necessarily must entail some critical engagement of those habits and their histories (1922). Fellow Pragmatist Cornel West (1989) has embraced genealogy as a crucial method for his program of "prophetic Pragmatism": identifying the historical and cultural contingency of institutions and patterns of

thought allows the collective habits of a community to be critically and selectively reappropriated, with the intention of giving power to the powerless.

Although genealogy shares with other historical methods a concern with accounting for the emergence of social phenomena by recognizing patterns among historical facts, genealogy is subtly different from a typical historical analysis as a matter of epistemology. To Foucault, "truth is undoubtedly the sort of error that cannot be refuted because it was hardened into an unalterable form in the long baking process of history" (1998: 372); a given truth is a social fact whose descent and emergence is traced, in context, by genealogy. Genealogy does not excavate universal and generalizable truths by clearing away the obscuring sediment of time and culture; instead, it documents how a given truth that appears so immutable as to be taken for granted at some time and in some place is itself the contingent product of an ongoing interplay of powers (Foucault, 1998; Mahon, 1992; May, 1993). This documentation occurs as two complementary elements, descent and emergence, "merge to form a history without unity, goal, or origin" (May, 1993: 74). Descent (Foucault, 1998: 374) identifies a set of disparate and even vulgar discourses and practices that together over time constitute the phenomenon that is the object of the genealogy, howsoever noble it may appear today; emergence (Foucault, 1998: 376) shows how that constitution occurs through the interplay of powers that are concerned not with the creation of the object of the genealogy itself but rather with their own satisfactions (May, 1993). Emergence is never finally complete, nor does it progress continuously toward some goal. Rather, it is a haltingly ongoing process that continues to shape the object of the genealogy (Foucault, 1998: 376). Therefore, genealogy is epistemologically quite circumspect: it makes no claims about the generalizability of the truths it examines across contexts or even over time, but instead simply reveals the process by which a given truth has become true for a time. It does not attempt to adopt a perspective on history from outside of history, but instead recognizes its own categories of analysis as themselves products of history (Mahon, 1992).

"The final trait of effective history is its affirmation of a perspectival knowledge" (Foucault, 1998: 382). Foucault emphasized that historical origins are more lowly than lofty (Foucault, 1998: 372); genealogy therefore functions as a "curative science" (1998: 382) that debunks attempts to read contemporary conclusions into historical origins. A genealogy is always partly a political project, because the examination of the descent and emergence of a contemporary truth facilitates the critique of its claims to universality, and is therefore rhetorically useful for parties that have been subject to the claims of that truth (Foucault, 1998: 380).

For this reason, genealogy has also attracted the attention of Cornel West, an American Pragmatist who has adopted the method to critique interrelated systems of racial and class privilege. Although West embraces both the methods and the perspectivalism of Foucauldian genealogy (West, 1989: 223), he rejects Foucault's concern with explaining the emergence of the subject (i.e., the person as an entity upon which power is exercised) without reference to the subject as a participant in that emergence (Foucault, 1998). West finds this both unnecessarily impersonal and forgetful of the fact that "There are ascertainable changes stemming from who holds

power and who dominates whom" (Said, 1983: 221; quoted in West, 1989: 225). West perceives intentions where Foucault would find accidents, but the fundamentally perspectival character of genealogy, and its concern with illuminating the specific history of a situated truth rather than the origin of a universal truth, remain constant. For our purposes in this paper, we adopt West's perspective: we are concerned with illuminating the operation of power to create norms that protect its privileges in the workplace, and we believe with West that human agency is an important factor in the process of emergence (West, 1989: 225), that is, that employers have often acted intentionally rather than accidentally to protect their privileges.

Importantly, although genealogy is critical of the alleged universalism of particular situated norms, it is not a method that is useful only to ethical skeptics. Foucault in his later writings articulated an ethics consistent with his critical projects: one of the "technologies of the self" (1988), in which individuals do not cut themselves free from all power relationships but rather choose which ones to willingly subject themselves to in an ongoing project of self-definition (Crane, Knights, & Starkey, 2008). The technologies of the self are disciplines and practices that enable a person to intentionally shape their own ethos (Foucault, 1988). Power relationships are unavoidable in social life (Foucault, Becker, Fernet-Betancourt, & Gomez-Mueller, 1997), but the free person intentionally forges an ethos that both exercises power and accepts the exercise of others' power in such a way as to care for him- or herself as well as others (Foucault et al., 1997). For Foucault, "ethics is the considered form that freedom takes when it is informed by reflection" (Foucault et al., 1997: 284), and that freedom is the choice of exercises of and submissions to power (Foucault et al., 1997: 286). Therefore, for Foucault, "freedom is the ontological condition of ethics. . . . [W]hat is ethics, if not the practice of freedom?" (Foucault et al., 1997: 284).

If ethics is the reflective exercise of freedom, in such a way as to promote caring relationships with oneself and others, then the Foucauldian ethical project is one of promoting that freedom (Foucault et al., 1997). Genealogy is a technique for doing exactly that: revealing the domination of powerful parties over their subjects, by examining the descent and emergence of norms or mindsets whose universality is taken for granted. Revealing the historical contingency of these truths makes it possible to consider alternatives to them, and therefore to liberate their subjects from their authority, increasing those subjects' freedom (Foucault et al., 1997).

Our project is to highlight the contingency of norms against lateral hiring on the part of competing employers. Those norms treat employees as subjects of their employers; we would instead suggest that the right and responsibility to accept or reject lateral hiring offers rests with employees, for whom the freedom to accept or reject the practice of loyalty is preferable to subjection to the domination of their current employer over their job market prospects. In the next sections we will explore the power that employers have over employees, and then use the genealogical method to analyze the history of norms against lateral hiring.

Excursus: Power in the Employment Relationship

Because power is the foundation of our historical genealogy of norms against lateral hiring, it is necessary for us to establish the presence and operation of power in the employment relationship. We intend first to establish that an employer has more power in an employment relationship than an employee, and that a lateral hiring offer eliminates an employer's power advantage over the employee who receives that offer. We then suggest that the sudden shift in the status of the employee from power disadvantaged to power advantaged is disturbing for the employer. As we will demonstrate in the subsequent section, we believe that the creation, justification, and enforcement of norms against lateral hiring defend employers' power and prevent such insults to it.

Examining the lateral hiring phenomenon illustrates the power an employer holds over individual employees and the disruption that results when employees receive outside offers of employment. Simmel (1950: 122), among others, argues that the "simplest sociological formation" is the dyad, or relationship between two individual entities, which in this case is the relationship between an employer and employee. Simmel was also among the first to recognize the disruptions that occur to a dyad with the introduction of a third party. In a lateral hiring situation, a temporary triad is created when a third party, in the form of a potential employer is introduced into the employer-employee dyad. The third party's offer at the very least disrupts the equilibrium between the two parties; at the extreme the offer destroys the original dyad.

One useful lens for understanding these dynamics is Social Exchange Theory (SET). This theory attempts to explain how the relations between social actors develop, change, and dissolve. Social actors can be either individuals or groups acting as a single unit. As a process, social exchange is conceived as the interdependent activity of two or more actors where each owns or controls resources the other actor values. Resources can be tangible goods and services (money, favors, etc.) or such intangibles as status, love, friendship, etc. When one actor regularly exchanges resources with another the pair has formed an exchange relationship (Lawler, 2001; Molm, 1997; Molm & Cook, 1994).

The employer-employee relationship is one of dyadic exchange with unequal dependence. In exchange for an employee's efforts, skills, and discretionary contributions, the employer provides money, benefits, and prestige. Despite the voluntary nature of the exchange, employees are typically dependent upon and thus power disadvantaged to employers. Employees have more immediate financial needs and less slack than employers; have limited knowledge of alternative opportunities; alternative employment may not provide the person-specific utility or benefits provided by their current employer; and job changes may require high transaction costs to relocate to an alternative labor market. This dependency gives the employer great power (McNulty, 1973).

When an agent from an outside firm makes an employee an offer of employment, the employee's new alternative immediately shifts the power advantage from the employer to the employee (Molm, 1997): the employee is no longer in a dependent position with respect to the first employer. A series of experiments conducted by

Molm, Quist, and Wiseley (1993, 1994) illuminate the emotional reactions that are associated with shifts in power in social exchange. In the informal transactions that constitute social exchange, actors evaluate the fairness of the transaction and their partner on the basis of reciprocity and balance. Actors expect a subjective correspondence between what they give and what they receive (Gouldner, 1960). In a study where subjects unknowingly interacted with a computer, subjects paired with "partners" of equal power that violated the norms of reciprocity were perceived as more unjust than "partners" that behaved reciprocally (Molm et al., 1993). When interacting with simulated computer partners that were structurally more powerful, failing to reciprocate was not perceived as unjust. However, when subjects interacted with unknowingly simulated partners that behaved in an identical, nonreciprocal manner but were less powerful, their behavior was judged as highly unjust. Molm, Quist, and Wiseley (1994) attribute this discrepancy to the metanorm that it is acceptable for the powerful to violate reciprocity norms but unjust for the disadvantaged to do the same.

Accordingly, employers experience a combination of insult and injury when a lateral hiring offer from a competing employer reverses their power advantage over an employee. We believe that this combination constitutes a practical problem for employers—one that norms against lateral hiring solve. Our critical genealogy in the next section will illustrate how those norms have emerged, and how justifications for them have been created.

Genealogy of Employers' Quasi-Property Rights Over Employees

Until the beginning of the industrial era, the rights of employers over employees in the cultures and economies of the North Atlantic nations were analogous to property rights. Although outright slavery was the most notorious instance of labor control, indentured servitude also exemplified the property model. These arrangements conferred immense discretion and flexibility upon employers over the labor process, and by restricting labor market exchanges, kept wages low. Importantly, these practices changed only as exogenous circumstances created labor shortages that threatened the enforceability of labor control and as the ideological underpinnings of labor control crumbled. Employers' creation and justification of quasi-property rights over their employees is a prime example of power using ethics to protect its privileges; our genealogy in this section will illustrate the phenomenon.

Starting with early Roman law, the "pater familias," or the eldest male of the household, had absolute authority over his wife, children, and household servants. These laws gave the householder the right to recover damages when the violent actions of an outside party incapacitated his household servants, and thus deprived him of their services. This notion of depriving a householder of his servants' services formed the foundation of later statute and common law presuming the employer had proprietary rights to his employees' labor (Sayre, 1923).

In 1348, the plague known as the Black Death killed off 50 percent of all English laborers. In response to the subsequent labor shortage and wage inflation, King Edward III passed the Ordinance of Labourers of 1349. Among its many provisions,

the new law (1) required all able bodied men to work; (2) forbade the breaking of contractual and voluntary labor agreements prior to the agreed term; (3) eliminated the ancient Roman requirement of violence to a householder's servant to recover damages for depriving him of his servant's services; and (4) allowed employers to take legal action against other employers for enticing a laborer, bound by contract or not, to work at another farm or business (Dodd, 1943; M.L.G., 1929; Sayre, 1923). Under this and related statutes, English law gave employers extensive control of employees' labor and energies and severely limited their mobility until the mid-1800s (Steinfeld, 1991).

Due to the shared legal heritage of England and colonial America, indentured servitude in the eighteenth-century United States was a natural consequence of the Statute of Labourers and the body of English labor law (Steinfeld, 1991). Indentured servitude originated in 1620 by the Virginia Company to overcome the economic and geographic obstacles of connecting poor, unemployed Europeans with plantation owners needing farm labor. In exchange for ship's passage, food, clothing, and lodging, indentured servants agreed to work for a master for up to seven years. One-half to two-thirds of all European immigrants to colonial America arrived as indentured servants. Indentured servants, like slaves, could be bought and sold without their permission and could be tortured for disobedience. Employers were able to enforce their rights to the servants' labor through the courts. Masters could sue other employers for damages for hiring such servants before their contract was complete. While masters did not *own* their indentured servants, they exercised a degree of control over individuals' energies and services, supplemented by the enforcement of the state that was akin to property ownership (Galenson, 1984; Steinfeld, 1991).

A combination of economic and ideological factors effectively and then officially ended indentured servitude. The growth and institutionalization of inter-continental shipping and banking following the Napoleonic wars enabled Americans with friends and family in Europe to more easily loan money to kin allowing them to purchase less expensive passage (Grubb, 1994). Moreover, Steinfeld (1991) argues that following the American Revolution, an ideological consensus emerged that freedom was not something held to a greater degree by landowners, a lesser degree by laborers, and a still lesser degree by indentured servants and slaves; rather, freedom and unfreedom were distinct and opposite. Indentured servitude became associated with slavery and thus fell out of favor, at least for the ethnic majority. Due to the factors described above, European indentured servitude effectively ended in the 1820s; Asian and European indentured servitude was officially ended at the passage of the Alien Contract Labor Law of 1885 (Galenson, 1984; Steinfeld, 1991).

Even so, employers used the courts to maintain their quasi-property rights over labor until the dawn of the twentieth century. Independent of slavery and indentured servitude, the legal system conceived of the employment relationship as existing between a master and a servant, giving the employer property-type rights to employees' services and person (Rothstein, Craver, Schroeder, Shoben, & VanderVelde, 1994). In fact, following the Civil War, Southern employers and land owners used these legal rulings to prevent freed Blacks from seeking alternative employment (Nockleby, 1980). While these common law rulings primarily affected individuals

employed under fixed contracts, they were also regularly used to control the movement of at-will employees. As late as the early 1900s, the judge in the case *Thacker Coal v. Burke* wrote that "it is not conceivable that a third party can maliciously entice away a lot of employees simply because there was not a contract fixing the service" (Sayer, 1923: 697).

The Rise of Collusion

By the end of the nineteenth century, the forces of the industrial revolution shifted the employment relationship from farming and craftwork to factory production. Employers stopped providing the food, clothing, shelter, lodging, and protection once provided to domestic servants. As a consequence, courts stopped giving the same legal jurisdiction a master had over his householders and began consistently viewing the employment relationship as a voluntary contractual relationship (Nockleby, 1980). Subsequently, employers were left to form voluntary exchange relationships with autonomous individuals giving them the right to utilize their employees' services until one or the other party decided to terminate the relationship (Steinfeld, 1991). Lacking the institutional and normative structures to support their exercise of control over employees' knowledge, labor and services employers accorded quasi-ownership rights to the labor and person of the employees of other employers in their economic and social networks. In this context emerged "gentleman's agreements" not to recruit or hire the employees of other network firms; even without bases in ideology or law, employers created norms among themselves to consolidate their control over their own labor resources.

This practice has been extensively documented in a variety of contexts. The earliest evidence of these arrangements comes from a detailed history of a Civil War watch manufacturer. Gitelman (1965) noted an agreement between the watch manufacturer and a local textile manufacturer not to hire each other's workers. In a classic study of labor markets, Myers and MacLaurin followed 1500 workers that moved between thirty-seven companies in one city over six years. The authors concluded that "gentleman's agreements" among the town's employers not to hire employees away from each other constituted a very difficult barrier to employees attempting to move from one firm to another (Myers & MacLaurin, 1943: 40). Several years later, Reynolds documented a very similar, strong norm against "labor pirating" among employers of another New England town (Reynolds, 1951: 51). These examples are not mere historical artifacts. Peter Glazier of the Glazier Group, a restaurant and event management company, claims to maintain "gentleman's agreements" with similar restaurateurs in the New York City area (Malone, 2005). In 2005, "big four" accounting firm KPMG admitted to creating and selling fraudulent tax shelters and agreed to pay \$456 million in penalties for their actions. While fighting and resolving these charges, the remaining three of the "big four," Deloitte & Touche, Ernst & Young, and PricewaterhouseCoopers unofficially but publicly agreed not to hire KPMG partners and associates until the crisis was resolved (Carlino, 2005). Finally, in June 2009, Google, Yahoo!, Apple, Genentech, and other technology firms were reportedly under investigation by the US Department of Justice for making agreements not to laterally hire each others' top talent (Kang, 2009).

It appears this recognition of quasi-property rights does not extend to all other employers' employees but only to other firms in which there is regular social and/or economic exchange. Kerr (1954) noted that anti-poaching gentleman's agreements are established and enforced by local employers' associations. In one study, members of the Chamber of Commerce of a local town pressured the management team of new manufacturing facility to avoid hiring workers already employed at other plants (Myers & MacLaurin, 1943: 41). In the United Kingdom the recruitment code of the Institute of Personnel Management explicitly discourages lateral hiring among members (Nash, 1989). The Institute of Directors, a UK group that represents and sets standards for company directors, encourages members to develop voluntary agreements among trade association members to refrain lateral hiring (Nash, 1989). Conversely, in his study of labor mobility among workers in the San Francisco Bay area, Malm (1955) noted that the firms in his study did not share these "gentleman's agreements." He concluded that due to the large geographic area and relative rarity of competitive interactions these agreements did not have a chance to form. A norm must be practically enforceable in order to form and persist.

Lateral Hiring Today: Residual Claims of Quasi-Ownership

Today, norms against lateral hiring are justified with reference to the control of invested human capital; that is, the knowledge, skills, and abilities that employees possess but which are developed through investments in education, training, and developmental experiences funded by the employer. Employers claim that the very knowledge that makes an employee attractive to another employer was in many cases created by the firm, and so the firm has the right to control its use (Stone, 2004).

The sense that an employer has a controlling interest in an employee is reflected in the language used to describe lateral hiring. Consider the most common term to describe lateral hiring: Poaching (Cappelli, 1999: 175). "Poaching" generally means "to take (fish or game) illegally" (Dictionary.com, 2004). In the sense used to describe hiring other companies' employees it means "To take or appropriate unfairly or illegally" (Dictionary.com, 2004). When managers claim that one or more employees have been "poached," they are expressing the loss of something they feel they owned.

Prahalad and Hamel (1990) popularized the notion that a company's internal characteristics, including technology, human & social capital, knowledge base, and managerial systems, are key drivers of firm performance and success. Over the last two decades, managers have begun to recognize the value of human capital and see employees as a primary source of competitive advantage (Stone, 2004). Employers invest in employees in myriad ways: market or above market pay and benefits, training investments not immediately recouped, providing stable employment through employee learning curves and economic fluctuations, and refraining from replacing employees when lower cost, higher skilled applicants apply (Baron & Kreps, 1999; Cappelli, 1999). Employees often assume that knowledge or skills acquired on the job belong to them and go with them when they leave a company. Employers, recognizing the value of this human and social capital want such assets used only in

their firm, or at least not used in competing firms. Recently, courts have been ruling in favor of employers seeking to prevent former employees from using general (i.e., non-trade secret) skills and knowledge gained on the job on the grounds that the employer paid for these skills/knowledge thus has post-employment rights to its usage (Stone, 2004: 144). We may be seeing the emergence of yet another norm to protect employers' control over a productive resource, in this case, the knowledge and skills needed to fulfill demanding roles in modern firms.

Drawing on the Western legal tradition, we see a three-stage shift in the conception of employee labor as a form of property. From early Roman times, through fourteenth-century England, to nineteenth-century America, employers maintained state supported control of their employees' bodies, and therefore (or at the very least) their labors and energies. Beginning with industrialization in the nineteenth century and continuing into the twenty-first century, employers have made collusive "gentlemen's agreements" not to hire each other's ostensibly free employees; these have been maintained by sanctions against transgressors within communities of employers rather than grounded in law or ideology. Employers, with the help of the legal system, are now staking out property rights to their employees' knowledge and skills as opposed to their bodies and labors by arguing that their investments in those employees' knowledge and skills gives them a vested interest (Stone, 2004). Residual notions of property are often used to justify norms against lateral hiring, and partially capture the value of investments made by the firm in the individuals who are hired away. Thus, employers construct claims of ownership of their employees, which then justifies norms against lateral hiring and prevents both wage inflation and business disruption whether among landowners in the Roman Empire, landowners in colonial Virginia, mill owners in nineteenth-century New England, or accounting firms in twenty-first-century New York.

The Problem with Norms against Lateral Hiring on the Part of Employers

The foregoing genealogy illustrates the development of justifications to ground norms against lateral hiring, as a legitimization of the actions of powerful parties (in this case, employers) to protect their interests. We argue that prohibitions against lateral hiring on the part of employers are in fact invalid, because they treat employees as subjects of their employers rather than as free people in their own right. Accordingly, our analysis is situated within the normative tradition of critical genealogy, which exposes subjection in order to increase the freedom of people who have been denied it (Crane, Knights, & Starkey, 2008; Foucault et al., 1997; West, 1989).

Labor market collusion in the form of gentlemen's agreements among employers not to hire each other's employees is in fact a wealth transfer from the employees whose wages are depressed to the employers who pay less for their labor. In economic terms such collusion creates an oligopsony, in which a few buyers of labor limit the opportunities for workers to move freely between employers; because workers are less willing to leave a job when a comparable new one is hard to find, an oligopsony reduces the price elasticity of labor supply, and drives down wages while increasing the proportion of the marginal product of labor retained by the

employer (Bhaskar, Manning, & To, 2002; Boal & Ransom, 1997). Moreover, we would also expect this interference with the market to create other inefficiencies for its participants: organizations are less able to hire employees with valuable and relevant experience in their industry or their location, lower wages draw fewer qualified workers into the field, and employees who are dissatisfied with their working environment or advancement prospects must search farther afield, perhaps at firms that do not value their experience, to find other opportunities. While employers may gladly accept these inefficiencies in order to realize wage savings, employees are doubly disadvantaged by such agreements among their employers: their wages are lower and their opportunities for advancement are limited.

It is difficult to imagine justification for such a regime under the range of normative schemes that justify norms on the basis of the pragmatic and pluralistic agreement of the people who would be affected by them. A Rawlsian or other contractarian would find it implausible that an impartial observer would agree to such a limitation on their own opportunities to seek suitable employment while simultaneously accepting a lower wage (Rawls, 1971); a discourse ethicist would note a similar improbability while insisting on the importance of actual rather than hypothetical agreement (Alexy, 1989; Benhabib, 1992); and an adherent of Integrative Social Contracts Theory (Donaldson & Dunfee, 1994; Donaldson & Dunfee, 1999; Dunfee, 2006) may well note that the apparent hypernorm against collusion to manipulate a market's pricing mechanism in one's own favor, as evidenced by the proliferation of laws against such collusion in many markets, would deny legitimacy to any local authentic norms in favor of collusion. It would also be difficult to justify such collusion within normative systems that justify norms with reference to foundational principles; for instance, a Kantian capitalist would object to such collusion on the basis of its lack of respect for persons through restriction of employees' ability to seek meaningful work on their own terms (Bowie, 1998). However, a Pragmatic justification is not simply one that is acceptable on balance to the range of normative perspectives; because of the differing epistemic and ontological foundations of many normative systems, such an approach would be tantamount to "metaphysical musical chairs" (Callicott, 1990: 115, cited in Buchholz & Rosenthal, 1996). Nonetheless, we doubt the potential for formulating a coherent justification for such collusion that answers the objections of those employees disadvantaged by it. Although employers may be upset with each other for violating collusive agreements, that consternation must be classed as a breach of etiquette rather than of ethics, because of the fundamental unjustifiability of such collusion.

Moreover, because of the consequential implications for employees of prohibitions against lateral hiring, those employees ought to be considered rightful parties to the decision (Habermas, 1990). It is a fundamental tenet of Western moral philosophy that all persons are equal subjects of moral consideration (Taylor, 1989). This implies not only that their interests ought to count equally in any moral calculus, but also that they should retain the right to their own moral judgments (Taylor, 1989). Therefore, quite aside from the practical problem that prohibitions against lateral hiring seem to be unequivocally detrimental to the apparent interests of employees, it is important for those employees to be parties to moral decisions about whether

or not they ought to have (or take) the opportunity to work elsewhere. Norms against lateral hiring among employers make employees affected by the decision into subjects who are dominated by the norms of their employers. We suggest in the following section that as free people in their own right (as discussed in the critical genealogy section above), employees ought to have the decision about whether to entertain offers from other employers.

EMPLOYEE LOYALTY AS A CONDITIONAL DUTY

We have just concluded that from the employer's perspective most of the norms against lateral hiring are artifacts that are increasingly hard to justify in the modern socio-economic context. The next obvious research question is to apply the same focus to the employee. In other words, "under what conditions are norms against lateral hiring justified?" As articulated below, we argue that any moral obligations in a lateral hiring situation seem to revolve around issues of loyalty.

The concept of loyalty is useful for thematizing the set of obligations between an employer and an employee faced with a lateral hiring offer from a third party. Loyalty is a social-psychological phenomenon that entails normative evaluations of the other party's fulfillment of the expectations attendant to the relationship, especially the proportionality of the other party's commitments to one's own. Loyalty in any form entails enduring attachment, the rejection of alternatives, and some sense of obligation or duty to the relationship (Fletcher, 1993; Gilbert, 2001; Grosman, 1989; Pfeiffer, 1992). The appearance of a third party (prospective employer) into the employment relationship tests perceptions of loyalty obligations in several important ways. First, employers expect some level of devotion to the organization, which can range from meeting economic obligations to deeper senses of commitment to the organization; employees expect a reciprocal commitment to their well-being, from prompt payment of wages and benefits to the fulfillment of their personal and social aspirations. Second, loyalty requires that an employee and/or an employer must have and reject other employment options for loyalty to be a part of the employment relationship; without self-sacrifice, a claim of loyalty is only hypothetical. Finally, though the degree of obligation or duty that loyalty entails varies widely between relationships, at the very least each party must refrain from opportunistically taking advantage of the other party (Hart & Thompson, 2007). A claim of loyalty that obligates the claimant to nothing on behalf of the other party, whether or not self-sacrificing, is vacuous.

Loyalty as a social-psychological phenomenon varies systematically with respect to the content of the dimensions described above. Hart & Thompson (2007) have articulated three "currencies" of loyalty that are exchanged within the employer-employee relationship, which we discuss briefly below as they relate to lateral hiring.

Transactional loyalty pertains to basic exchanges that maintain relationships. This is the most fundamental part of the employment relationship in that employers are loyal by continuing to pay employees agreed-upon wages and employees are loyal by continuing to show up to work and fulfill job requirements. In other words, transactional loyalty is driven by self-interest that leads to mutual gain. As

noted above, however, self-sacrifice is an essential aspect of the loyalty relationship (Axinn, 1994; Hirschman, 1970; Schrag, 2001; Withey & Cooper, 1989): that self-interest is bounded to exclude self-serving opportunism at the expense of the other party. Fletcher notes that, "the minimal demand of loyalty is the maintenance of the relationship, which requires the rejection of alternatives that undermine the principal bond" (Fletcher, 1993: 8), while Hart and Thompson state that in the case of entertaining alternative employment possibilities:

[T]he "rejected alternative" that constitutes transactional loyalty is, instead, opportunistic self-interest, or seeking self-interest *at the expense of* the exchange partner. Transactional exchange partners who are loyal may end the relationship if a better alternative exists, but they will not act opportunistically. (Hart & Thompson, 2007: 305)

Thus, an employer would be hard pressed to rightfully accuse employees of disloyalty if they leave for better opportunities or higher pay. Conversely, (ab)using the loyalty of one's exchange partner instrumentally would be transactionally disloyal: drawing one's own employer into a bidding war for one's services against another potential employer, when one has already decided to accept the alternate offer and hopes only to increase its munificence, or using a firm's resources for market research, client solicitations, or other activities on behalf of one's new employer before quitting one's former job, would both qualify as opportunism.

Relational loyalty involves expectations and obligations formed in personal relationships: interpersonal affiliations, trust, and general allegiance to coworkers, supervisors, and the organization. Other authors have referred to similar issues as "group" loyalty (Fielder, 1992; Fletcher, 1993; Marantz, 1993; Oldenquist, 1982). Relational loyalty differs qualitatively from transactional loyalty in the content or currency of the exchange. Put simply, relational loyalty is based on the exchange of intrinsically valuable goods and transactional loyalty on extrinsically valuable ones. The latter are amenable to instrumental, arm's-length transactions, while the former are directly valuable to the self of the exchange partner and tend to form socio-emotional connections between exchange partners.

For instance, receiving a paycheck or even a commission payment is extrinsically valuable and will tend to cultivate transactional loyalty, while a discretionary bonus payment conveys a sense of appreciation from one's employer; that appreciation is intrinsically valuable and will tend to cultivate relational loyalty. Accordingly, relationally loyal employees feel a pride of affiliation with their employer; it is a salient aspect of who they are (Stryker & Serpe, 1994). Relationally loyal employers similarly feel affection for their employees; an employer's role as such is a salient aspect of their identity (Stryker & Serpe, 1994), and rather than being merely a marker of status or power, is rich with interpersonal content. Relationally loyal employees remain loyal to the organization in exchange for socio-emotional support, and employers remain loyal because of valued behaviors such as organizational citizenship behavior and perceived organizational support (e.g., Coyle-Shapiro & Conway, 2005; Eisenberger, Huntington, Hutchison, & Sowa, 1986; Shore & Tetrick, 1991; Van Dyne, Graham, & Dienesch, 1994). Empirical studies have found that

relational loyalty has a powerful influence on behavior, but the vague and far-reaching nature of its behavioral implications leave it susceptible to inadvertent breach (Hart & Thompson, 2007). Failing to honor the salience of one's relationship to others, for instance by shirking the symbolic duties through which managers convey commitment to the identities of employees (Mintzberg, 1973), would be considered a violation of relational loyalty.

Finally, *ideological loyalty* entails a shared commitment to an ideal or social purpose (Hart & Thompson, 2007). An organization that espouses a commitment to ecological sustainability may attract employees who are motivated by the same commitment; ideological loyalty would then imply that the firm would act on its commitments, perhaps by obtaining certifications of the sustainability of its office buildings or manufacturing processes, while employees would support those and complementary efforts by recycling, taking public transit to work, or volunteering for company-sponsored service projects. A failure to follow through on these explicit or implicit commitments by either party would constitute a breach of ideological loyalty.

Characterizing loyalty in terms of these three currencies by nature implies the possibility of very dynamic relationships. Because expectations about loyalty are essentially psychological contracts, they do not necessarily entail obligations between parties—to the contrary, these “contracts” are no more than perceptions about obligations and may or may not be in line with the expectations of other parties. Thus, the various parties to a loyalty exchange may have very different expectations about the content of the exchange. When the expectations of the exchange are in line, the relationship would be said to be symmetrical. When those expectations differ, the exchange would be said to be asymmetrical. For instance, an employee may offer and expect transactional loyalty, while their employer may offer and expect relational loyalty. Such an employer may perceive disloyalty when an employee accepts another firm's employment offer, while the employee feels no obligation to remain. In short, asymmetrical loyalties do not necessarily imply disloyalty or unethical behavior—they may only mean that the terms of loyalty are not sufficient to win expected mutual cooperation. This begins to reveal the dynamism of loyalty relationships—at any given time the expectations of loyalty can change and can result in accidental or intentional symmetry or asymmetry (Hart & Thompson, 2007).

To illustrate, an employer may believe that paid time off for continuing education creates obligations of relational loyalty, while employees may believe that unless the firm provides them with opportunities to experience the satisfaction of applying the newly learned knowledge and skills the only loyalty they owe is transactional. The lack of explicit agreement makes it difficult to uphold the employer's claim that a defecting employee is disloyal if that employee has met the minimal requirements of transactional loyalty (e.g., remained with the firm for a non-trivial payback period after the training); but similarly, that employee's claim to be above reproach is suspect without the agreement of the employer. Therefore, in cases of asymmetrical loyalty where the employer is more loyal than the employee, the best that can be pragmatically hoped for is partial justification. To claim that employees owe the employer an obligation of relational loyalty that the employees themselves have not accepted and may even be unaware of is at best naïve and at worst disingenuous;

employers and employees ought instead to realize symmetrical loyalty by clarifying each other's expectations of the depth of loyalty being enacted. Conversely, if the employee is more loyal than the employer, entertainment of lateral hiring offers appropriate to the employer's currency of loyalty is potentially satisfactory to all concerned parties; though the employee may feel disloyal, no actual or implied agreement has been violated.

On the other hand, in a situation where expectations of relational or ideological loyalty are symmetrical, an employer may reasonably expect employees to decline offers from other firms, because defection to another firm disrupts relationships or purposes that both parties have agreed to support. Because relational loyalty is interpersonal and is developed within specific organizational contexts, it is difficult if not impossible for an employee to jump from a symmetrical relationship to another firm under the pretense of a better opportunity—relational loyalty would already need to be in place. Thus, when relational loyalty expectations are symmetrical, an employer may reasonably expect employees to decline outside offers because leaving violates the socio-emotional connection that both parties have cultivated, and damages the relational aspect of self in which each has invested.

One potential justification for norms against lateral hiring, that employers have invested in human capital and are owed the opportunity to profit from those investments, can also be examined from the standpoint of loyalty. Human capital investments are costly: education may be expensive, time-consuming, boring, or difficult (Ehrenberg & Smith, 1994), while on-the-job training entails the opportunity cost of lost productivity relative to the work of a trained employee. Employers therefore have an interest in retaining the employees in whom they have invested, in order to recoup the costs of those investments, while employees may be able to garner higher wages or other benefits working for employers who have made no investments to recoup. For this reason, employers generally invest in human capital that is specific to their own firm, while investment in human capital that is generally useful and therefore easily transferable is usually left to employees (Lepak & Snell, 1999; Lynch & Black, 1998). Employees, however, also benefit from investments in human capital, in that it generally increases their productivity, the potential for wage increases, and consequently, the receipt of outside employment offers (Ehrenberg & Smith, 1994). Therefore, it is in the economic interest of employees and employers to promote and protect investments in human capital.

Symmetrical loyalty expectations provide such promotion and protection. Transactional loyalty entails eschewing opportunism, which for employees precludes taking a new and better-paying job right after completing a valuable and company-funded training program (Hart & Thompson, 2007), and for employers precludes replacing adequately performing employees each time a marginally better qualified person applies and is willing to work for lower pay. These limited protections based on the honoring of mutually beneficial agreements enhance the feasibility of making human capital investments, and are likely to be agreed to by the actual parties to such an agreement in specific situations, perhaps even with a binding legal contract. However, the vagueness of the norm "eschew opportunism" limits its usefulness. Transactionally loyal employees may not recognize obligations to honor their employers' human

capital investments beyond the short term, and may not feel compelled to share their knowledge and skills with co-workers. Transactionally loyal employers may similarly recognize no obligation to provide employees with further developmental opportunities once they have a valuable skill set, and may be reluctant to commit to using an employee's original and developed human capital.

For longer-term relationships that support the continued development, usage, and dissemination of knowledge and skills, symmetrical relational loyalty plays a more important role. In a situation where both parties have made good faith commitments to symmetrical, relational loyalty, moral obligations are introduced. On the one hand, if relational loyalty is symmetrical, then entertaining or accepting a lateral hiring offer by the employee entails violating a mutual understanding that each party will honor the other's socio-emotional stake in the relationship. On the other hand, in the same situation (and for the same reasons), the employer would be reasonably obligated to maintain the relationship indefinitely. While one-off human capital investments imply transactional loyalty, an ongoing series of human capital investments combined with opportunities to use them, and thereby realize the intrinsic goods of self-efficacy, recognition, or growth, implies a commitment to relational loyalty.

Ideological loyalty does not necessarily entail an obligation to refuse lateral hiring offers on the part of an employee, however. As stated earlier, it is founded upon a commitment to an ideal or a social cause that is shared by the employee and the employer (Hart & Thompson, 2007), so an employee who receives a lateral hiring offer from an organization that is better-aligned with the focal ideology would not be disloyal to entertain it, while one who entertains an offer from an organization that is worse-aligned would be disloyal; neither circumstance is altered by human-capital considerations.

Finally, the discussion of asymmetrical loyalty in lateral hiring to this point directs us to the question "should employers rightfully be able to expect employees to remain loyal to the organization while at the same time maintaining the right to terminate an employee at any time?" Nearly all private sector employers explicitly claim "at-will" employment (Barry, 2007). Does this fact make relational loyalty at best a pleasant fiction and at worst a confidence game played by employers? We would argue that such an argument is needlessly reductionist. As we note above, relational loyalty involves expectations and obligations formed in personal relationships: interpersonal affiliations, trust, and general allegiance to coworkers, employers, and the organization. As we also note above, because expectations about loyalty are inextricably wrapped up in psychological contracts, the vague and far-reaching nature of its behavioral implications leave it susceptible to inadvertent breach (Hart & Thompson, 2007). Accordingly, the reciprocal expectations of relational loyalty cannot be defined closely enough to incorporate them into an employment contract or another formal codification; such codification would be the antithesis of the trust that differentiates relational from transactional loyalty. But, an employment relationship that is not "at-will" must necessarily delineate a set of legitimate causes for termination, howsoever specific or general. Such a delineation necessarily also identifies the set of illegitimate causes for termination,

and opens the way for opportunism on the part of employees who wish to engage in certain behaviors without threat of unemployment. Therefore, many employers not unreasonably opt to ground the employment relationship in the transactional loyalty of employment at-will, so that they are protected from opportunistic behavior on the part of employees for whom a breach of trust carries no sanction. However, the relational loyalty that may subsequently develop between employees and employers need not be reflected in changes to the underlying employment agreement; rather, it is a matter of interpersonal affiliations and trust that each side will exceed the requirements of transactional loyalty codified at their minimum by the convention of employment "at-will." That minimum, instead of foreclosing the possibility of relational loyalty, makes it possible by eliminating the blatant opportunism that would otherwise transform trust into naïveté.

CONCLUSION

We are not the first to raise the ethical tensions discussed in this paper. The Choshen Mishpat, a section devoted to monetary laws in the Shulchan Arukh, a sixteenth-century compilation of Jewish law, generally prohibits the hiring of already employed workers with the exception of religious tutors—which can be poached without qualm. These guidelines are based on the 'Tosafot Commentary' on the Babylonian Talmud, a twelfth-century tractate that explicitly discussed the legality of lateral hiring as an analogue of purchasing a plot of land when another was negotiating the price with the seller² (Meir, 2002, 2006). This paper provides modern ethicists with a definition of the practice, a genealogy illustrating the history of employers' claims of a controlling interest in employees' skills and energies, and an ethical analysis of the behaviors of all three parties to this dynamic.

The first contribution of this paper has been to provide a theoretically grounded normative dimension to the literature on lateral hiring. Heretofore, the focus of ethical analysis has been the actions of the laterally hiring employer. Our analysis shifts the focus of moral responsibility away from the lateral hirer onto the employee receiving the offer of alternative employment; we advocate greater freedom on the part of employees to choose which power relationships they will voluntarily subject themselves to on the basis of loyalty. If the lateral hirer is not engaged in deception, expropriation of trade secrets, or breaching employment or other contracts, we see no moral transgression associated with identifying, contacting, and offering employment to other companies' employees. The frequently invoked response to laterally hiring is that it violates implicit agreements about how "gentlemen" behave when it comes to recruiting.³ We conclude that these norms are historically contingent and difficult to justify, especially since they make employees into subjects of their employers' power, without discretion in their own choice of employment.

We argue for this shift by using and extending Hart and Thompson's (2007) work on loyalty in the employment relationship. The ethical implications of an employee considering unsolicited outside offers of employment are contingent upon the type and symmetry of the employment relationship in which they are involved. Our paper extended the original Hart-Thompson (2007) framework by clarifying

qualitative differences between relational and transactional loyalty and by elucidating a responsibility incumbent upon both parties to establish symmetry, so that the form of loyalty under which a given relationship operates and the responsibilities of each party therein are clearer. We conclude that employers that fail to establish symmetrical relational or ideological loyalty have no basis to claim ethical breach when employees leave for outside opportunities.

Furthermore, this paper also sheds light on the ethics of competition. Most economists would agree that unfree markets create inefficiencies (Smith, 1977). A universal feature of most market-based economies is the existence of competition and freedom of choice, yet choice is constrained with the existence of norms against lateral hiring (Knight, 1997; Hayek, 1978; Kirzner 1994). Collusion among buyers or among sellers in any market shifts power to them and away from their counterparties, typically in the form of pricing (Varian, 1993). We have argued that norms against lateral hiring are essentially a cartel of labor buyers and the resulting oligopsony is disadvantageous and inefficient for employees as well as a clear form of domination. Future research from this perspective could investigate, perhaps genealogically, the formation and enforcement of ethical norms that preserve the domination of cartel members over their subjects.

Finally, this paper has contributed to the emancipatory project of contemporary Pragmatic ethics by highlighting the operation of power in justifying norms that sustain its privileges, in this case the norms of employers to control the mobility of their workers. Critical genealogy could similarly be used to examine other social arrangements in which powerful actors regulate their weaker partners by promulgating norms that subjectify them, like prohibition of certain forms of speech or political participation on the part of employees outside of work (Barry, 2007). By focusing on a phenomenon that is relatively small in scale, yet still important for the life prospects of millions of people, our paper demonstrates the feasibility of using critical genealogy for analyzing various microeconomic relationships.

There are several practical implications of this paper. Lateral-hirers should carefully scrutinize charges of ethical violation associated with their attempts to identify, contact, and offer employment to employees of other companies. Our analysis would suggest that independent of the practices discussed above, claims of ethical breach by managers of the target firm are a misuse of ethics, an attempt to build collusion and reduce marginal labor costs and achieve worker control. There may very well be implicit or explicit agreements and a long tradition of restraint among a set of employers regarding the practice of lateral hiring. However, unless the individuals directly affected by these agreements have been party to and share in the benefits of such agreements, they are difficult to justify.

Employees, when faced with unsolicited outside offers, must consider whether their current employment relationship is symmetrical in its relational or ideological nature. Such mutually agreed arrangements require an owner or officer to authorize current and ongoing exchanges of relational or ideological currency and thus are seldom found in large firms and more likely to be found in new and small firms (Ram, 1994). Absent these commitments, outside offers should be considered if not courted.

Employers who have been targeted by lateral hirers should seek to build symmetrical relational and ideological employment relationships with their employees. If it is not practical to build such relationships with all employees, employers might consider building such relationships with key employees in pivotal positions within their organization. This type of employment relationship, commonly referred to as an "idiosyncratic deal" or "i-deal" (Rousseau, 2005) is founded on symmetrical loyalty. Such arrangements can reduce turnover propensities within a morally justifiably framework.

In conclusion, this study contributes to the human resource, Pragmatic ethics, and critical genealogy literatures. In light of our conclusions we hope the framework for surfacing the (mis)use of norms, rhetoric, and ethics to influence the behavior of the less powerful might be used in other contexts.

NOTES

Thanks to Bruce Barry for comments and suggestions on an earlier draft of this manuscript.

1. Our use of the term "employer" refers to the person with primary decision rights over the employment relationship, which is generally an employee's supervisor. We do not use "employer" to denote an organization, which besides being a conceptually problematic locus of loyalty behaviors, is also ontologically problematic as a moral agent. While it is true that an employee's supervisor does not always have sole decision rights over the employment relationship (because the right to terminate such a relationship may also be held, sometimes exclusively, by human resources staff or by higher-level managers), because of the supervisor's prerogatives to assign privileges and duties, rewards and punishments, praise or blame, that supervisor is generally the single most important determinant of the employee's relationship with the organization as a whole (Barnard, 1938; Gabarro & Kotter, 1980; Mintzberg, 1973).

2. See Tosafot Yeshanum, found in the Talmud tractate kiddushin 59a by Rabbi Issac ben Samuel ha-Zaken (twelfth century CE).

3. The director of the charter school highlighted in the first paragraph of this paper received an e-mail from the superintendent of the school district requesting a cessation of attempts to recruit district teachers. He argued the recruiting actions violated established "ethical guidelines," using this statement to support his assertion: "For years we have functioned among the various school districts with an understanding that it is inappropriate to recruit teachers who are [employed with] another district" (Kempton, 2007).

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