

THE LAW AND ETHICS OF RESTRICTIONS ON AN EMPLOYEE'S POST-EMPLOYMENT MOBILITY⁺

by

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ARTICLE ABSTRACT

Employee mobility as a conduit for knowledge transfer to a business competitor has become an increasing source of concern for many employers in the modern business environment where the skills, relationships, and knowledge embedded in a firm's employees has become an important source of competitive advantage. Employers may seek to restrict the post-employment mobility of their employees to address this concern through the use of various legal mechanisms. Accordingly, policymakers are increasingly asked by employers and employees to address these concerns by adjudicating disputes in the courts and in legislatures, despite not having a full ethical grounding for these policy decisions. We first analyze the incentives and preferences of employers and employees related to employee mobility and then examine three legal mechanisms used to address employee mobility: covenants not to compete, the inevitable disclosure doctrine, and garden leave. We then review the business ethics implications of each mechanism and make recommendations for the policy makers based on property rights, utilitarian and fairness perspectives.

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employment opportunities, an idea recognized by both California law and public policy. We respect trade secrets, and will defend ourselves against these claims.¹

[E]very Man has a *Property* in his own *Person*. . . The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his."²

I. INTRODUCTION

The skills, relationships, and knowledge bound up in a firm's employees have long been recognized as a source of important competitive advantage.³ Yet as companies increasingly rely on the strength of their human capital – in other words, their employees – for generating revenue, the potential economic harm done by departing employees who move to a competitor can become increasingly severe. As a result, firms are keen to use all available legal tools to restrict the post-employment mobility of their valuable employees, even as public policy may be shifting toward prioritizing employee mobility.⁴ This tension in the modern workplace also has business ethics implications as employers, employees, and competitors navigate these conflicting economic incentives and policy goals.

Recent news reports about Bank of America, simultaneously the United State's largest lender and deposit holder, emphasize this human capital management reality. The financial press reported that in an apparent response to the loss of "a financial adviser with \$5.9 billion in client assets to a rival" some high value employees of the bank's U.S. Trust private clients division received notice that there would be a new term of employment imposed on them. In advance of their usual bonus payments the employees were told they must sign a new "garden leave" provision to keep their jobs.⁵ The additional contract clauses changed the previous terms such that "[a]dvisers who previously could leave after two weeks notice now must remain for 60 days and are forbidden from soliciting clients for a total of eight months."⁶ One observer, the president of an executive search firm, assessed the employer's actions this way: "They're sending the message, 'Make no mistake, you will incur our wrath, this is not a place you want to leave'." She then cautioned that, "[i]t's very rare that a company would have garden-leave provisions for producers, and I think this could backfire if people view it as draconian."⁷ The efforts were reportedly taken by the wealth management unit "to stem defections as rivals jockey to manage money for high-net-worth individuals."⁸

In contrast to an employer's fears of employee mobility that transfer valuable knowledge to competitors, the ease of changing jobs in the U.S. can be an important way for an individual to advance her career and increase her earnings.⁹ In difficult economic times, however, a prospective employee's leverage to negotiate the terms of employment may be diminished alongside a corresponding increase in the negotiation position of employers.¹⁰ While the parties are likely concerned with the usually negotiated terms of employment such as salary and benefits, an underappreciated issue is that of restrictions on the employee's post-employment career mobility. In exchange for even an entry-level job, an enthusiastic and eager-to-please new employee may casually agree to a restrictive covenant that will have significant, unforeseen, and potentially damaging career consequences in the future.

When it comes to restrictions on an employee's post-employment freedom to take any new job she may choose, employers and employees interests are often in sharp conflict. In these common instances the courts, sometimes with assistance from legislatures, must balance concerns of fairness, choice of vocation, freedom of contract, economic efficiency, the public interest, knowledge transfer, and business realities. While courts routinely adjudicate these disputes over employee mobility, what are the ethical justifications for choosing one outcome over another? There are obviously tradeoffs inherent in any contract between an employer and an employee in which the parties bargain over the work required and the compensation provided for that work. Yet, does the law adequately protect employee freedoms while allowing employers to protect their hard-earned competitive advantage? Does the law favor one party over another in this instance? What is best from a societal standpoint? Should the law favor one party, and if so, what are the underlying principles to support that potential imbalance? Moreover, what are the ethical implications of an employer's decision to restrict the future employment choices of an employee? Also, of the available options and justifications for restricting an employee's freedom of professional movement, which options have the most ethical and practical grounding – and why?

While these questions persist, to date there has been little guidance for courts and policy makers on what ethical considerations surround post-employment legal restrictions on employee mobility. A broad view of why these legal tools and their attendant moral implications are increasingly important for employers comes initially from business law and employment law scholars, who in the last decade or so have focused on the fast-evolving nature of the employment relationship. Some of the consistent themes inherent in this body of research are the importance of technology and knowledge management for business advantage, alongside a trend toward individualized contractual relations between employees and their employers in a changing American employment market. For instance, Katherine V.W. Stone has explored the "new psychological contract" between employers and employees.¹¹ Kenneth Dau-Schmidt has examined the role of technology¹² and labor contracting in the modern workplace.¹³ Terry Dworkin and Elletta Callahan have detailed the use of nondisclosure

agreements and measured their effectiveness against other attempts to restrict information, including covenants not to compete.¹⁴ Joan Gable and Nancy Mansfield have also looked at the legal implications of the “cyberspace workplace” where workers often work remotely through the use of new technologies.¹⁵ Michael Garrison and John Wendt have also specifically looked at the policy implications and emerging trends in restrictions on employee mobility.¹⁶

Another assumption in this evolving workplace is that employees are mobile and that the old paradigm of long term and even lifetime employment with one employer is gone.¹⁷ A fast moving and competitive labor marketplace has replaced the old employer-employee arrangement. This new dynamic has been called a “high-velocity labor market, particularly in the high-tech sector.”¹⁸ In this context there has also been criticism of legal rules that impede the ease of mobility and the speed of this labor market.¹⁹ Moreover, the impending new RESTATEMENT OF EMPLOYMENT LAW is further evidence that both legal scholars and practitioners are currently debating the roots and underlying values of the U.S. employment laws, including legal rules that directly implicate employee mobility.²⁰

This paper seeks to add a new dimension to this debate by examining the law and ethics aspects of three modern mechanisms for restricting an employee’s post employment mobility to a competitor or the founding of a competing enterprise. The paper is structured as follows. Part II below presents the background and discusses the motivations and incentives for employers to restrict the professional mobility of their former employees. Next, Part III discusses the law and the associated public policy concerns of three legal mechanisms for restricting post-employment mobility: covenants not to compete, the doctrine of inevitable disclosure, and garden leave. Part IV provides a business ethics critique of these mechanisms from cost-benefit, property rights, and fairness perspectives. Part V then presents recommendations for policy makers related to balancing the competing interests involved in restricting employee mobility, as well as suggestions for additional research. Finally, Part IV provides a brief conclusion.

II. BACKGROUND ON EMPLOYEE MOBILITY RESTRICTIONS

Employment mobility is generally supported by public policy and favored by employees in today’s economy. Nevertheless, there are valid reasons why employers have an interest in managing their current and former employee’s ability to be professionally mobile. This section considers these sometimes conflicting interests together with some of the over-arching policy issues with legal constraints on employee mobility.

In general, the economic mobility of employees ensures their personal freedom to pursue a livelihood of their choice, in the position where their capabilities will be most productive, and where they are most likely to achieve success.²¹ Society benefits from maximized productivity, as well as the dissemination of skills and knowledge which can contribute to innovation.²² In recent times, freedom of mobility has become increasingly more important for employees, as the new psychological employment contract has done away with the security of long-term employment, pay and promotions based on tenure, and generous pensions for retirement.²³ Instead, as employees bear the risks of economic cycles, save for their own retirements, and are paid only what globalized markets will bear, their efforts must be focused on developing the worth of their own human capital in order to ensure the marketability of their labor.²⁴ Indeed, marketing their labor by switching jobs seems to have a large impact on financial success. A recent economic study found that among college graduates, those making three job changes at optimal points in their career gained wage increases amounting to as much as thirty-two percent.²⁵ On the other hand, restricting employee mobility can have the effect of depressing wage levels.²⁶

To place this discussion in a contemporary context, we consider the fast-paced modern business world where much of the business and technology know-how is held by a firm’s employees. As high technology and knowledge usage has become increasingly important, firms have come to rely on their employees (in other words, human capital) for their competitive advantage. Firms need to manage the risk of losing this advantage, particularly when those valuable employees depart to work for a competitor.

A recent example from the technology sector drives this point home. The Wall Street Journal recently reported how Google, Inc. unveiled its Google Wallet and Google Offers concepts in advance of a summer 2011 product launch.²⁷ Like other recent Google ventures into the mobile device market with its Android operating system, these technology products go beyond the company’s original core search engine and advertising business model. The so-called digital wallet “will let consumers with Android smartphones pay for goods and services or receive coupons and offers by waving the phone in front of a special reader at the checkout counter.”²⁸

On the same page of the business section that day it was also reported that eBay and its PayPal division filed a lawsuit against Google in a matter related to the exact same mobile-payments business activities.²⁹ Specifically, eBay claims “that Google poached two senior executives...who then recruited other employees from eBay [and that] those employees used PayPal trade secrets to develop Google digital commerce products.”³⁰ The lawsuit alleges in particular that one of the former executives “transferred digital documents outlining PayPal’s mobile-payment and point-of-sales strategies just days before leaving the company for Google. eBay says those documents were critical to its mobile-payments strategy.”³¹ In leaving eBay, the executive took not only his personal inalienable human capital, but he also allegedly misappropriated trade secrets and shared them with a competitor, breached his fiduciary duties, and violated an agreement to not solicit fellow employees.³²

This vignette illustrates a modern day dilemma concerning worker mobility that arises for the employers, employees, competitors, and policy makers involved. In a fast moving business world where knowledge and the individuals who create and use that knowledge are key sources of competitive advantage, the legal mechanisms available to employers have become more important than ever. Indeed, because of this importance and the impact on individual freedom of mobility, the underlying normative justifications relied on by courts and legislatures are also of great importance. To establish the motivations and stakes involved with issues of employee mobility this part reviews why employers have huge incentives to attempt to control when their workers end the employment relationship and where they move afterwards.

As a strategic matter, employers will seek a sustainable competitive advantage over their business rivals.³³ To the extent that human capital is a source of sustainable competitive advantage in its business model, a firm will compete by excluding the human capital of their employees from use by competitors. In effect, a strategic employer may want to treat the human capital (i.e., the employee) as a rivalrous and excludable private good. For instance, a technological advantage may come to a firm in the form of a piece of factory machinery, which belongs exclusively to the firm that owns it. Those ownership rights mean that other firms can be excluded from the use of that machinery. The technology in the machinery may be patented to gain a time-limited monopoly to exclude others from utilizing it. Or the unique and valuable technology or a process used to create a tangible product may be kept secret with some effort to qualify as a trade secret.

However, human beings are obviously not some sort of transferable technological commodity owned by firms. An undeniable prohibition on slavery or involuntary servitude makes it clear that employees are free to leave a job, under at-will employment or under an employment contract, and cannot be forced to work.³⁴ While employed, the individual owes a fiduciary duty of loyalty to the employer.³⁵ This duty of loyalty will provide the employer with some comfort (and potential legal recourse if violated) that an employee will not engage in activities like competition to the employer's detriment. Employers will, however, seek to use other legal means to impact the ability of their workers to leave and engage in damaging competition.

An initial tactic for employers is to claim ownership of a piece of knowledge in a way that it can be separated from the employee and, thus, restricted from use by that employee without permission.³⁶ Examples of proprietary knowledge ownership held by an employer would be patent rights or, perhaps less defined, rights in propriety trade secrets. Both patent protection, with all of its formal requirements and federal approval, and trade secret law, which arises circumstantially and requires specific requirements, are separate areas of law outside of the employer-employee relationship.

It is also true that knowledge is not bounded in the same way as other economically exploitable assets.³⁷ Because business-valuable knowledge can be easily diffused and may lose value as it becomes dispersed, employers may try to restrict access to information such as trade secrets, and they may be more comfortable with doing that by contract.³⁸ In addition, employers will also make efforts to protect other proprietary information that may not rise to the level of a protectable trade secret, such as a client list.

Using contracts to achieve competitive advantage,³⁹ employers may utilize a variety of contractual tools to manage what, from their perspective, is undesirable knowledge diffusion. Short of directly impacting employee mobility by contract, as discussed below in the context of covenants not to compete and garden leave, employers may use contracts to supplement the default legal framework for trade secret protection in their jurisdiction. For example, employee-executed nondisclosure and confidentiality agreements are contractual provisions that restrict the transfer of information and are beyond the default rule of an employee's duty of loyalty.⁴⁰ These agreements seek to stop knowledge flows to competitors; however they do not by themselves restrict an employee from engaging in competition or necessarily address employee mobility. In addition, unlike some contractual restrictions such as covenants not to compete, "[c]onfidentiality agreements... are enforceable even in states in which anti-competition clauses are prohibited."⁴¹ Based on the background in this section on employer motivations to restrict knowledge transfer, the next section lays out three legal mechanisms that directly address a former employee's freedom of mobility.

III. LEGAL MECHANISMS FOR RESTRICTING EMPLOYEE MOBILITY

In this part we examine three illustrative legal mechanisms used by employers to restrict the freedom of post-employment mobility of their workers. In turn we discuss each concept along with the relevant legislation and case law that further explains how the mechanism is applied in various jurisdictions. This descriptive discussion sets the stage for Part IV where the business ethics and philosophical analysis of each concept leads to subsequent conclusions about the best use, if any, of these legal tools.

A. NONCOMPETES

The most widely used contractual tool for restricting an employee's post-employment mobility is the covenant not to compete.⁴² The covenant not to compete (also called a non-competition agreement or, simply, a noncompete) comes in two types; where restrictions on post-employment competition with the employer is agreed to by either a former employee or by a former owner, who has sold the goodwill of the business.⁴³ In either instance, the contract restricts, for a specified time and scope, the otherwise legally permissible activities of the individual. By definition, the noncompete is a contract between an employer and an individual employee that goes beyond the default rules of an employee's fiduciary duties while in a current

employment relationship. While noncompete enforcement is, on its face, an anti-competitive tactic, courts will allow enforcement when the restrictions are reasonable and legitimate business interests are being protected.⁴⁴

Thus, for instance, the New York Court of Appeals has pointed out that, “[i]n general, we have strictly applied the rule to limit enforcement of broad restraints on competition” and in specific cases “limited the cognizable employer interests under the first prong of the common-law rule to the protection against misappropriation of the employer’s trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary.”⁴⁵ As is the case in New York, some states will evaluate whether an employee possesses such an extraordinary skill and expertise that a strict imposition of post-employment restrictions is necessary to protect the employer from unfair competition.⁴⁶ Not all litigated cases require such expertise and knowledge on the part of the employee.⁴⁷

In the vast majority of jurisdictions that do enforce noncompetes, courts will use a reasonableness test. A standard articulation of the reasonableness standard comes in the New York Court of Appeals case of *BDO Seidman v. Hirshberg*.⁴⁸ There the court stated the common reasonableness test as follows:

The modern, prevailing common-law standard of reasonableness for employee agreements not to compete applies a three-pronged test. A restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public [citation omitted]. A violation of any prong renders the covenant invalid.⁴⁹

The majority of United States jurisdictions will enforce noncompetes to some extent.⁵⁰ Research shows that the majority of states have what can be construed as a moderate level of noncompete enforcement.⁵¹ There are, however, a few states where there is a virtual ban on noncompetes.⁵² Most famously, California has a strong, long-standing stance in favor of employee freedom that disallows noncompetes and the state’s courts have continually upheld the ban based on public policy grounds.⁵³ However those jurisdictions that allow post-employment noncompete enforcement will apply some version of the reasonableness test coupled with an evaluation of the stakeholders’ interests.⁵⁴ Enforcing states use the reasonableness test to balance the rights of several stakeholders: the parties to the contract (i.e., employees and employers), as well as considering the policy impact and the public interest.⁵⁵

While noncompetes arose in common law, there is a trend among many states to codify their noncompete policy.⁵⁶ Several states are currently contemplating noncompete legislation, most notably the Commonwealth of Massachusetts⁵⁷ and the State of Illinois.⁵⁸ While some states ban noncompetes by statute such as California,⁵⁹ others have legislation outlining permissive boundaries for noncompetes, such as Texas.⁶⁰ Other states disfavor noncompetes or ban them with significant exceptions such as Colorado.⁶¹ In addition, new research related to the effects of noncompetes has started to create a picture of the role of these mobility-inhibiting contracts, which further sheds light on the possible economic role of restricting employee mobility.⁶²

The post-employment implications of noncompete enforcement are clear for affected employees.⁶³ These workers are limited, at least for an amount of time and a geographic or topical scope that a court finds to be reasonable, from going to work for a competitor of their former employer or starting a competing business. While an employee who is subject to an enforceable noncompete is prohibited from moving to a new position that is contrary to the terms of the contract, the employer has, at least in theory, already provided its consideration to support the agreement.⁶⁴ In other words, the former employer does not normally have any additional obligations once the terms of the noncompete are triggered by the termination of employment.

Again, it is important to note that policy makers acknowledge that noncompetes are, on their face, anti-competitive and would normally be unenforceable as against public policy.⁶⁵ Accordingly, most state courts will allow a covenant not to compete, but “only if it is necessary to protect a legitimate business interest, reasonably limited in time and space, and consonant with the public interest.”⁶⁶ While the details vary by jurisdiction, legitimate protectable business interests may include investments in training and building the employee’s reputation, confidential and proprietary information such as customer lists strategies, and client relationships.⁶⁷ In effect, most states recognize that some enforcement of noncompetes, however limited, is allowable to protect the interests of employers in sharing confidential and proprietary knowledge with their employees.

In summary, even if a noncompete will lessen otherwise lawful competition, and potentially inhibit the flow of knowledge, most states today will allow this compromise. Noncompetes can be controversial and highly litigated. Because of the risk of overreaching and improper cost shifting, the next sections discuss two alternative mechanisms which may still protect the employer’s interest without harming the employee’s rights.

B. INEVITABLE DISCLOSURE DOCTRINE

A relatively new concept that has yet to gain much traction in U.S. jurisprudence is the inevitable disclosure doctrine.⁶⁸ The thrust of the concept is that it assumes that a former employer who was privileged to acquire an employer’s confidential information or trade secret will inevitably use or disclose the knowledge in their new employment.⁶⁹ Therefore, a judicial injunction is sought to prohibit the employee from beginning the new employment. Essentially, it is legal rationale in a handful of states that allows an employer to argue, even in the absence of a non-compete agreement, to “enjoin a departing employee from taking a job on the grounds that he or she will ‘inevitably disclose’ some unspecified trade secret.”⁷⁰

Inevitable disclosure developed in the common law and has seen a resurgence in its attempted application since the widespread adoption of the Uniform Trade Secret Act and, in particular, following the 1995 Seventh Circuit case of *PepsiCo v. Redmond*.⁷¹

While instances of successful arguments for injunctive relief may be rare, one can imagine an employer arguing for inevitable disclosure-based injunctive relief as part of the irreparable harm contemplated by a court when evaluating a request for a preliminary injunction.⁷² A court could be more amenable to the argument that irreparable harm will occur initially during a time sensitive and short term relief of a temporary restraining order. However, a long term permanent restraining order seems more drastic because of the resulting open-ended mobility restriction, particularly if there are assurances that the trade secret will not be conveyed, perhaps because of an existing and enforceable nondisclosure agreement.

However, where there is evidence of wrongdoing or behavior consistent with the misappropriation of trade secrets, a court may be more likely to restrict the departing employee's choice of mobility under a theory of inevitable disclosure. For instance, in *Bimbo Bakeries, Inc. v. Botticella*, the Third Circuit Court of Appeals was asked to review a trade secrets misappropriation case where a departing executive was one of only a few individuals with access to the plaintiff's trade secret, the process for creating famous Thomas' English Muffins "nooks and crannies."⁷³ In the absence of a noncompete (the employment had been in California), the court was asked to uphold a preliminary injunction enjoin the employee from going to work for a competitor. Evidence was also presented that the employee-defendant had continued to work for the plaintiff for some time in a knowledge-sensitive role after secretly accepting employment with the competitor. Even though the employee had signed a "Confidentiality, Non-Solicitation and Invention Assignment Agreement," the court upheld the injunction, thus endorsing a theory of inevitable disclosure, at least in the short term.⁷⁴

Interestingly, the *Bimbo* court added that there were multiple public interests at play in such a case, including upholding the sanctity of confidentiality agreements and protecting trade secrets.⁷⁵ The court went further to list several more interests, including "a public interest in employers being free to hire whom they please and in employees being free to work for whom they please" and citing with approval Pennsylvania precedents that had articulated "a societal interest in employee mobility."⁷⁶

As discussed below, criticism of inevitable disclosure from an ethical perspective is perhaps even easier than critiques of noncompetes. This is because the inevitable disclosure logic allows an employer to restrict mobility without ever bargaining for or paying for the right to restrict a knowledge transfer. Since it is not a contract-based remedy an employer seeking inevitable disclosure protection essentially argues for a default rule to protect their intellectual property as captured in a trade secret. In effect, the employer is asking for a court to determine that a former employee will eventually, even unconsciously, divulge or otherwise use the trade secret in competition. In effect, the remedy is a prohibition on the former employee going to work for a competitor where the trade secret will surely be used sooner or later.

Perhaps worse, the implication is that the restriction on mobility is not bounded in time and scope like a noncompete term subject to a reasonableness test. To the contrary, the information that is the subject of the trade secret in an inevitable disclosure action will be protectable – and thus the grounds to prevent the employee from moving freely – as long as the information remains a bona fide trade secret.

C. GARDEN LEAVE

Garden leave is a relatively new mechanism for limiting post-employment mobility. Originally a concept in British law, there is some evidence that it is beginning to be used in the United States.⁷⁷ Like a noncompete, garden leave is a contract-based restriction on mobility and is, thus, the result of the parties' negotiation, unlike the application of the doctrine of inevitable disclosure. There are few discussions of garden leave in the U.S. academic literature,⁷⁸ although there are mentions of the growing use of garden leave by U.S. employers for various types of employees in both media reports⁷⁹ and by practitioners.⁸⁰

In the case of garden leave, "the employee agrees to give notice some months prior to departure - say, six months - during which period the employer must pay the employee's salary but may choose not to assign any duties, and in any event may prevent the employee from working elsewhere."⁸¹ Thus, rather than leaving the employer and immediately entering the employ of a competing enterprise, the employee is paid to remain at home idle and, at least metaphorically, work only in their garden. Accordingly, garden leave serves as a "means of avoiding the restraints on specific performance" because "the employer...contract[s] for a relatively long period of notice by the employee to terminate the employment, and ... pay[s] the employee's salary during this period without requiring the employee to come into work...on the assumption that the employee will have to stay home and work in the garden, but will be financially secure until the period of notice expires and he or she is then free to work for the competitor."⁸²

Garden leave is like a noncompete in that it protects an employer's interest in information by limiting mobility, but it has the extra advantage of forcing the employer to bear those costs, post-employment, which compensates the employee. Thus, because the employer has an immediate and tangible cost to restricting mobility it would logically follow that employers would refrain from using garden leave to restrict the mobility of lower-level employees who do not really have confidential knowledge. This would also mean that employers would avoid paying garden leave to even top managers for

longer than is necessary to protect valuable knowledge. It is, therefore, less subject to criticism that an employee's right to earn a living is ignored.

The uncertainty and troublesome aspects of noncompetes have, not surprisingly, made the garden leave option more attractive in some ways to protect both employer and employee interests. As one set of practical advice from corporate lawyers has framed these issues:

American courts usually enforce noncompetes only when they are reasonable and protect an employer's legitimate business interest. As many courts value free mobility of employees and open and fair competition, courts are commonly cautious when deciding the scope and/or enforceability of noncompetes. This uncertainty has created an environment where employers may be unable to sufficiently protect their interests against departing, well-trained, highly productive employees. A "garden leave provision" may effectively protect the legitimate interests of the business while not causing a financial hardship to the employee.⁸³

In light of the potential mutual benefits to employers and employees provided by garden leave, and because it is less controversial than noncompete restrictions, it may prove to be a popular alternative to other mobility-inhibiting mechanisms.

IV. AN ETHICS CRITIQUE OF RESTRICTIONS ON EMPLOYEE MOBILITY

Lawmakers drafting legislation on employee mobility restrictions, as well as judges officiating in litigation to enforce them, may cite property rights, cost-benefits analyses, and fairness arguments in determining the reasonableness and public policy impacts of such measures. However they may not have systematically thought through the deeper philosophical basis for these arguments. To assist in this evaluation, we explore the Lockean property rights, utilitarian philosophy developed from the writings of Bentham and Mill, and Rawlsian considerations of justice and fairness as applied to restrictions on employee mobility.

Turning first to the perspective of property rights, this section considers Locke's natural law arguments on the property rights to the fruits of one's labor as well as Locke's discussion of the contractual rights of master and servant. Within this discussion we will consider the concepts of consent and freedom to contract. After considering the ethics of employee mobility restrictions from the property rights lens, we thereafter turn to utilitarian cost-benefit analysis, and thereafter to a Rawlsian perspective on justice as fairness. We will then conclude with recommendations for deeper analysis in legislative and judicial decision-making over restraints on employee mobility.

A. PROPERTY RIGHTS PERSPECTIVE

John Locke, in his *Second Treatise on Government*, spoke of the basis for property rights being deduced on a moral basis from natural law. According to Locke, natural law suggests that "every Man has a *Property* in his own *Person*. . . The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his."⁸⁴ This natural property right that all persons have in their labor is necessary for subsistence and arises from every person's natural right to self-preservation.⁸⁵ Locke derives this right for self preservation from the argument that humans were created as God's servants, to survive at His pleasure rather than at one-another's pleasure. For purposes of self-preservation, mankind has the right to procure from the commons the food and drink and whatever else is necessary for subsistence.⁸⁶ Locke finds there is not only an individual right to self-preservation, but there is also an obligation on others to respect each person's right to self-preservation. Thus, according to Locke, there is a moral basis for individuals to have property interests in their own bodies and labor, the returns of which naturally belong to those individuals.

When it comes to ones' property rights in ones' self, Locke suggests that under the terms of natural law, "man cannot by compact, or his own consent, enslave himself to any one, nor put himself under the absolute, arbitrary power of another."⁸⁷ Nevertheless, Locke recognizes that an individual has the freedom to trade or exchange physical property that he has gained property rights over through the fruits of his labor. Thus, "In a state of perfect freedom [man is free] to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of Nature."⁸⁸ In this light, Locke recognizes that a man is free to sell his services for wages, which "gives the master but a temporary power over him, and no greater than what is contained in the contract between them."⁸⁹ Thus, the concept of freedom to contract is relevant in Locke's philosophy, as well as the strict interpretation of contractual terms. During the time of that contract, Locke indicates that the labor of the servant belongs completely to the master: "Thus the grass my horse has bit; the turf my servant has cut; . . . become my *property*. . . . The *labour* that was mine, removing them out of that common state they were in, hath *fixed my property* in them."⁹⁰ The master's (employer's) ownership of the product of the servant's (employee's) labor is well recognized today. Businesses can have rights in the capital, technology and information used by employees to contribute productively to the business, as well as rights to the results of the employee's production.⁹¹ These clauses are relevant to a Lockean consideration of restrictions on employee mobility, as discussed hereafter.

I. NONCOMPETES

Under Locke's concept of freedom to contract relevant to labor services, individuals could be free to agree to a contractual term such as a covenant not to compete. When it comes to noncompetes, however, the ownership and deployment of the productive capacity represented by the employee's knowledge, skills, and talents beyond the termination of the labor

contract are at issue. The noncompete controversially allows the former employer to assert a continuing right in restricting the employee's use of that productive capacity after the employee is no longer working for that employer, nor receiving continued compensation, nor being bound by the normal common law duties of loyalty to a current employer.⁹²

Noncompetes allow the employer to increase the predictability of access to an important resource, in this case a human resource, by raising the opportunity cost of the employee leaving to work for a competitor.⁹³ Accordingly, with the greater certainty of staffing that comes with an enforceable noncompete, an employer is more likely to invest in the employee by investing in valuable human capital.⁹⁴ Another main aspect of why noncompetes are important to employers is that they can be used as a shield if they provide anti-poaching or anti-raiding provisions that disallow a former employee from not only competing, but then also eviscerating the former employer's staff by hiring away the best and brightest workers.

An additional argument supporting these restrictions is that a noncompete is a contract clause, and like any contractual issue, is only binding upon mutual consent. Locke suggests that an individual has the freedom to consent to any agreement to sell their labor services, that is, to become a servant to a master, or an employee to an employer. Where consent is given, the fruits of the employee's labor belongs fully to the employer, for the full extent according to the agreed upon contractual terms. The initial question that begs to be answered is how does one define consent? Locke asserts natural law limits on the freedom to contract at that point where doing so would involve consenting to arbitrary constraints on an individual's right to liberty, such as constraints amounting to enslavement, or constraints on an individual's right to subsistence and self-preservation. As has been noted, the definition of consent can be troublesome because consent comes very close to coercion when one agrees to go along with an action simply because no other feasible option is available.⁹⁵ Yet as discussed below, because of unequal bargaining power, employees often find that they are required to sign off on non-negotiable, boiler-plate noncompetes if they want to keep their jobs.⁹⁶

Scholars have suggested that Locke's concepts of property rights in one's labor and the freedom to contract out one's labor to others underlie U.S. employment law.⁹⁷ Under freedom of contract, there may be an assumption that employers and employees agree to complete contracts, with all the terms fully negotiated and spelled out.⁹⁸ In this sense, if an employee accepts in advance that a non-compete covenant is part of the bargain, is the subsequent enforcement of that agreement a violation of the employee's rights? In a Lockean freedom to contract world, the answer may be "no", otherwise what is the point of such contracts? However, it seems inconsistent with a Lockean concept of property in one's person to hold a noncompete clause to be binding when the terms of the contract were not presented until after one started working (when one has declined any other prospective job offers). Further, is it even possible for the employee to consent to a non-compete covenant if she doesn't fully understand what she may be giving away at some future point? To what extent would an employee truly understand the value of her skills at some unspecified point in the future? Even if the employee were to have full awareness of the rights she is giving away in a noncompete, there is the question of whether the employee has an equal and free ability to negotiate these terms. Several debates, as discussed below, have been put forward regarding the employee's consent to the waiver of future rights that a noncompete represents. We will consider how a Lockean perspective might weigh in on these debates.

Freedom of contract assumes that the terms of a contract are freely negotiated. However, these days, the terms of a noncompete are not necessarily open for negotiation. As such, "[t]he new model of private ordering in employment relies on boilerplate documents, unilaterally drafted by the employer and presented as a condition of employment, often subsequent to the start of work. Their purpose is not to memorialize a negotiated set of terms, but to extract waivers of rights, thus realigning statutory and default rules to better reflect employers' interests."⁹⁹ Stone suggests that earlier in history, courts were very suspect of noncompetes in employment relationships because "they were often the result of vastly uneven bargaining power and thus contracts of adhesion."¹⁰⁰ The tides have shifted, though, and many authors have discussed the legal and ethical implications of differences in bargaining power between employees and employers.¹⁰¹

There are many factors that may limit an employee's ability to negotiate the terms of a non-compete agreement. For example, the timing when the noncompete is proffered by the employer may affect the balance of bargaining power. As Arnow-Richman notes, the employer can require signing of a noncompete at the point when the employee accepts the job, after the employee has started working, or at the end of the working relationship.¹⁰² There may be cognitive reasons that make it difficult for an employee to fully appreciate what they are bargaining for in signing a noncompete when they accept a job. At the beginning of an employment relationship, employees tend to be very optimistic about their future of working with that firm.¹⁰³ This has been compared to the period of courtship, where a suitor is unlikely to propose a pre-nuptial agreement and risk appearing not committed to the success of the relationship.¹⁰⁴ At the start of an employment relationship, employees are not likely to be anticipating reasons they might be later interested in employment opportunity with another employer, or at least they are reluctant to acknowledge that when about to start a new job. Further, at the outset, employees may not anticipate the hardship of being unable to work in their chosen field for up to a year or maybe three.¹⁰⁵ Employees are not likely to think about the fact that their skills could be rendered obsolete if they are required to spend a significant amount of time outside of their field, which could damage their ability in the future to sell their skills and services to other employers.

Noncompetes are also often required as a condition of continued employment when an employee has already been working for the firm for some time. It may be more difficult for the employee to decline to sign a non-compete agreement, as she has not been on the job market recently, and does not readily have other employment options. In many states, an offer of

continued employment is legitimate consideration for signing a noncompete, meaning that the employee may be in the position of having to sign the agreement or immediately leave the firm.¹⁰⁶ This take-it-or-leave-it approach certainly limits employee bargaining power to negotiate terms of a noncompete.

Noncompete clauses may also be proffered at the end of an employment relationship. Which party holds the stronger bargaining power could completely depend upon the circumstances, i.e., whether the employer or employee is about to terminate the relationship. Where the employee is planning to move on to another job, she may have little incentive to offer the employer any protection against unfair competition. On the other hand, where the employee has been fired, the employer holds all the bargaining power and the employee may be fully cognizant of the hardship that a noncompete may bring as she anticipates a stretch of time without employment in her chosen field.¹⁰⁷

Some argue that public policy is not favoring limitations of employee mobility, however evidence suggests that litigation to enforce noncompetes is more prevalent than ever before, and courts are more likely than before to uphold them.¹⁰⁸ Given the implications of a knowledge based economy, there is little surprise that courts might be favoring employers' interests to a greater extent. Further, employers may be emboldened by their strong negotiating position to draft extensive noncompete clauses, which if reviewed in litigation, might be found unreasonable by the courts. In states where "blue-penciling" contract modification is permitted there is no risk to the employer for over-reaching, because courts will not throw out an unreasonable noncompete, but rather will re-draft the clause to comport with what the court finds to be reasonable.¹⁰⁹ Where the employee's costs of challenging the restrictions of a noncompete in court, as well as the uncertainty of the outcome of a court decision, are both unbearably high, this might have a chilling effect on any employee's interest in fighting against the terms.

Regardless of when the noncompete was signed by the parties, the enforcement of a noncompete is only triggered at the point of a decision, on either side, to end the employment relationship. At that point, the employee may go along with the terms of the agreement without a fight, or ignore it, causing the employer to go to court to enforce the noncompete.¹¹⁰ The court process can be costly and drawn-out for both parties, and the court's finding of what is reasonable in the circumstances can be an outcome that neither party expected. Thus, in any particular circumstance where parties sign a noncompete agreement, the actual impact of the clause, and therefore, what the employer and employee are consenting to, would be more and more uncertain the farther removed the parties are from the point of both contract signature and the triggering event.

The Lockean perspective may not anticipate the difficulties of the nature of consent versus coercion, because freedom to contract is a natural right to be exercised by individuals as equals. In a master-servant relationship such as that of an employer-employee, the contract transfers powers over the servant to the master, to the extent of the time period and terms consented upon by parties to the contract. Even with consent, under a Lockean perspective, the actual outcome may be bounded by the party's absolute rights, such as Locke's preclusion against enslaving oneself and the individual's right to subsistence and self-preservation.

Thus, the weaknesses of noncompetes from the Lockean perspective include a failure to resolve the issues of employee consent versus coercion to protect against employer overreaching, questions about the employee's ability to make a living from their property rights in their own productive capability, as well as a failure to gain certainty about protection of the employer's property rights to competitive information such as trade secrets. Greater certainty and better protection of the interests of both sides would be more beneficial for society. Next we will consider a Lockean point of view on two other forms of employee mobility restrictions to determine whether these mechanisms better ensure that interests in certainty and protection of property rights are available to both employers and employees.

2. INEVITABLE DISCLOSURE DOCTRINE

As discussed above, the inevitable disclosure doctrine results in a judicially enforced injunction giving employers rights to restrict employee mobility beyond the term of the employment contract.¹¹¹ The doctrine provides that "employers may enjoin a departing employee from taking a job on the grounds that he or she will 'inevitably disclose' some unspecified trade secret."¹¹² This doctrine is intended primarily to prevent the employee from revealing information (e.g. trade secrets) that is the property of the employer, where revelation of that information would decrease its value and/or impair the employer's competitiveness. Accordingly, an employer may restrict a former employee from joining a competitor if disclosure of confidential information would be inevitable in that new employment setting. The doctrine does not specifically have the goal of restraining the productive capacity of the employee, although that ends up as the ultimate effect. Consideration of this doctrine implicates both the Lockean concerns for protecting property rights on the one hand, and the right to self-preservation on the other.

Where the employer has invested efforts in developing the information as valued property (e.g. trade secrets), and relies upon the property for continued competitiveness, Lockean analysis would support the employer's right to protect that property from the encroachment of others.¹¹³ Locke holds that continued use of property is a requirement for ownership.¹¹⁴ Thus where an employer's company information that is used as a key to their competitive strategy is at issue, Lockean analysis could be used to defend measures to protect that property.

Alternatively, because the ultimate effect of the inevitable disclosure doctrine is to hinder the former employee's ability to use his skills in the type or work that may be his highest productive capacity, this doctrine bumps up against two

important Lockean considerations: first, the right of individuals to protect their own self-preservation, and second, the freedom of contract as applied to the terms of the master-servant relationship. Criticism of inevitable disclosure is perhaps even easier than critiques of noncompetes because the inevitable disclosure logic allows an employer to restrict mobility without ever bargaining for or paying for the right to restrict a knowledge transfer. As discussed above, Locke specifies that an agreement to sell one's services give the "master" limited power only as contained in the contract.¹¹⁵ Given that the inevitable disclosure doctrine gives the employer powers over the employee that are not covered by an agreement between them, Locke's view of freedom to contract would be undermined by the employer's ability to restrict employment opportunities under the inevitable disclosure doctrine.¹¹⁶ Moreover, Locke argues for an individual right to self-preservation, as well as an obligation on others to respect each person's right to self-preservation, and not to "take away, or impair the life, or what tends to the preservation of the life, liberty, health, limb, or goods of another."¹¹⁷ The rule of inevitable disclosure could potentially be used to block an employee from work in his chosen field indefinitely, for as long as the employer uses the protected information property (trade secrets). Thus to the extent that employee's the right of self-preservation is injured by actions of the employer that step beyond the agreed upon terms of their relationship, a Lockean analysis would find the doctrine of inevitable disclosure lacking.

3. GARDEN LEAVE

The concept of garden leave accomplishes many of the goals sought under the other employee mobility constraints discussed above, without incurring many of the negative impacts on the freedom of contract and the right of self-preservation. Locke's key concern of protecting property rights is ensured, yet appropriately limited in duration. Freedom of contract is promoted, as the details of the garden leave would be set forth in an initial employment contract consented to by both parties. Whereas the noncompete clause provides the employer with unilateral rights, and binds the employee with duties, the garden leave agreement generates bilateral rights and duties on the part of both the employer and employee. For this reason, garden leave provides mechanisms to protect each party's property rights, while limiting over-reaching on either side. The employer's interest in protecting property rights in competitive information is ensured, that protection lasts only for the period of time which the employer is willing to pay compensation. The employee preserves his interest in making a living and protecting his rights to his productive capacity in the long run. In the short-run, although the employee would not be actively using his productive capacity in his chosen field, he would be fairly compensated for that period. Finally, where the contract very clearly establishes the relevant duration of garden leave, there would be a limited role of the state in adjudicating the employer-employee relationship.¹¹⁸ From a Lockean point of view, the garden leave mechanism accomplishes the goals of preserving the liberty of the individuals involved. Moreover it is consistent with the Lockean natural rights tradition "which protects natural property rights and allows the state to restrict them only as necessary to protect the property owner and his property from force and fraud."¹¹⁹

B. COST BENEFIT VIEW

While a Lockean analysis focuses on individual rights, with a limited role for the state, a utilitarian perspective can be utilized to determine whether employee mobility restrictions are beneficial from a public policy perspective. Utilitarian analysis generally takes an ends-based, rather than means-based view to evaluate the morality of an outcome, with the goal of producing the greatest amount of happiness for the greatest amount of people.¹²⁰ Generally, utilitarian theory is applied using a cost-benefits analysis not simply to the interests of the individual parties involved, but rather to the overall outcomes for society.¹²¹ Thus, to determine the ethics of mobility restrictions we could weigh the benefit to be gained by employers, employees and greater society through permitting the enforcement of each type of restriction versus the cost incurred by employers, employees and greater society. Where the benefits most outweigh the costs, ensuring the greatest good, then there is an ethical basis for permitting mobility restrictions under utilitarian analysis.

1. NONCOMPETES

The costs and benefits of noncompetes to the past employer, employee, and future employer are suggested above. Briefly in terms of positives associated with noncompetes, the most obvious benefit is that it protects an employer from unfair competition in the cases where a former employee would otherwise be able to take valuable knowledge that belongs to an employer and use it to assist a competing enterprise. Thus, it is also important that noncompetes allow the employer to increase the predictability of access to an important resource, in this case a human resource.¹²² Accordingly, with the greater certainty of staffing that comes with an enforceable noncompete, an employer is more likely to invest in the employee by investing in valuable human capital.¹²³ Another main aspect of why noncompetes are important to employers is that they can be used as a shield if they provide anti-poaching or anti-raiding provisions that disallow a former employee from not only competing, but then also eviscerating the former employer's staff by hiring away the best and brightest workers. On the other hand, constraining employees from taking their knowledge, skills and productive capacity to the workplace where they will be most rewarded for utilizing them—whether this is in a competing firm or a personal entrepreneurial venture. In effect, a noncompete prevents the dispersion of knowledge and its most productive use.

The more difficult questions to answer related to noncompetes deal with the costs and benefits incurred by society. Again, it is important to note that policy makers acknowledge that noncompetes are, on their face, anti-competitive and would normally be unenforceable as against public policy.¹²⁴ Thus, only legitimate business interests are to be protected, and only for a limited time and space. The public policy implications of noncompetes related to human capital investment¹²⁵ and human capital in different industries,¹²⁶ fostering or impeding the rapid transfer of technology knowledge,¹²⁷ and in top management contracts¹²⁸ has been discussed in the legal literature. Some law & economics literature¹²⁹ and business economics and management literature has engaged in weighing the societal costs versus benefits of noncompetes.¹³⁰

This last area of scholarly work has recently seen an increase in empirical studies measuring the impact, if any, of noncompete enforcement on employee mobility,¹³¹ employee compensation and business investment,¹³² and entrepreneurial activity¹³³ in various business and jurisdictional contexts. The results have been mixed. On the one hand, it has been suggested that strong enforcement of noncompetes is good for the public interest because it leads to increased employer investment in human capital, which benefits society by leading to a better trained workforce.¹³⁴ On the other hand, Alan Hyde has recently interpreted new empirical research on noncompetes to suggest that the economic harm to the restriction of labor mobility and knowledge transfer outweighs any benefits, concluding that all noncompetes should be banned, as in California.¹³⁵ Moreover, because of asymmetries in negotiating position between powerful employers and individual employees there may be a tendency for employers to overreach in their noncompete terms.¹³⁶ Also, noncompetes are criticized simply for their anticompetitive nature. This is perhaps connected to concerns that noncompetes may cause economic harm via inefficient allocation of resources since these contracts restrict the free and rapid flow of labor. In other words, the criticism is that noncompetes allow one party to unfairly shift the burden of transaction costs related to restrictions to the weaker party, in this case the individual employee is less able to bear the costs of compliance with the contract. In addition, some commentators perceive that there is “heightened scrutiny of employee noncompete agreements [that] reflects some of the fundamental changes taking place in the economy and in the workplace.”¹³⁷ Specifically, noncompetes are problematic in the context of “the changing nature of the employment relationship, particularly the movement away from the traditional long-term employment relationship typical in the industrial age [and] the benefits of information sharing and employee mobility in the information age economy.”¹³⁸

In summary, states that allow employee noncompetes are, in effect, recognizing a public policy in favor of tempering free competition and mobility, to varying degrees, by allowing parties to contract for certain restrictions. Even if a noncompete will lessen otherwise lawful competition, and potentially inhibit the flow of knowledge, today most states will allow this compromise. However, the employer’s extension of control over a competitive human resource by contract comes with potential harm for individual employees who may disproportionately bear the costs of protecting an employer’s proprietary information as well as potentially impeding the development of entrepreneurial competitive ventures.

2. INEVITABLE DISCLOSURE DOCTRINE

The inevitable disclosure doctrine provides that “employers may enjoin a departing employee from taking a job on the grounds that he or she will ‘inevitably disclose’ some unspecified trade secret.”¹³⁹ Accordingly, an employer may restrict a former employee from joining a competitor if disclosure of confidential information would be inevitable in that new employment setting. Since it is not a contract-based remedy, an employer seeking inevitable disclosure protection essentially argues for a default rule to protect their intellectual property as captured in a trade secret. In effect, the employer is asking for a court to determine that a former employee will eventually, even unconsciously, divulge or otherwise use the trade secret in competition. In effect, the remedy is a prohibition on the former employee going to work for a competitor where the trade secret will surely be used sooner or later.

The problem with the doctrine is that the successful employer gets to restrict the employee’s choice of mobility, even without a prior agreement to that effect. In other words, the employer did not bargain for or compensate the employee, but still gets the extraordinary relief of an injunction which negates a person’s freedom of movement. Criticism of inevitable disclosure is perhaps even easier than a critique of noncompetes because the inevitable disclosure logic allows an employer to restrict mobility without ever bargaining for or paying for the right to restrict a knowledge transfer to a competitor.

Perhaps worse, the implication is that the restriction on mobility is not bounded in time and scope like a noncompete term, which is subject to a reasonableness test. To the contrary the information that is the subject of the trade secret in an inevitable disclosure action will be protectable – and thus the grounds to prevent the employee from moving freely – as long as the information remains a bona fide trade secret. This could lead not only to a temporary restraining order causing a break in the employee’s career, but also potentially to a permanent restraining order providing that the employee could never go to work for a certain company. Not only is the employee not compensated for this required limitation in career opportunities, but because this is a judicially granted mechanism, the employee as well as the employer must endure the time and expense of litigation.

It seems as though the inevitable disclosure method is an attempt to put the champagne cork back in the bottle, a desperate attempt for the employer to protect assets when they didn’t adequately consider the need for protection ahead of time, nor engage in adequate dialogue with the employee and future employer to resolve the issue to everyone’s satisfaction. Proponents of the inevitable disclosure doctrine as a preferable mechanism of employee mobility restriction assert that,

because it is solely judicially administered, there is assurance that the protection would be granted only in legitimate, reasonable and limited cases.¹⁴⁰ However, from a public policy standpoint, the contrary argument could be made. If it became the standard mechanism to require judicial intervention to resolve termination of employment when trade secrets are at issue, it could place an enormous burden on judicial resources. One would hope that this doctrine would be used only very rarely and cautiously when there are no other options to protect legitimate proprietary business information. It would be preferable for the primary mechanism used to resolve these disputes be one that encourages the parties to negotiate a mutually satisfactory resolution. This might be the strength of the garden leave mechanism, discussed next.

3. GARDEN LEAVE

Garden leave is like a noncompete in that it protects an employer's interest in information by prohibiting mobility, but it has the extra advantage of forcing the employer to bear those costs, post-employment, which compensates the employee. From a legal and economic perspective, Cynthia Estlund has pointed out that with garden leave an "employer gets the same protection as a similar period of 'non-competition,' [as with a noncompete] but must bear the primary economic burden itself rather than casting it on the employee. Employees' postemployment activities are still restricted; some opportunities may dry up and some employee knowledge may grow stale during the period of enforced idleness."¹⁴¹ In addition she observes that, however, "the garden leave device has the virtue of forcing employers to internalize the primary cost of restrictions on employees' postemployment activities, and thus to think twice about whether and how long they are willing to do so."¹⁴² Thus, because the employer has an immediate and tangible cost to restricting mobility it would logically follow that employers would refrain from using garden leave to restrict the mobility of lower-level employees who do not really have confidential knowledge. This would also mean that employers would avoid paying garden leave to even top managers for longer than is necessary to protect valuable knowledge. It is, therefore, less subject to criticism that an employee's right to earn a living is ignored. However, the garden leave clause also seems less subject to being placed under a reasonableness scrutiny by policymakers, and may also act as an improper restraint on trade or still allow employer overreaching.¹⁴³

Even though there are positives associated with garden leave over noncompetes or inevitable disclosure, there are also downsides. It is still restrictive from a public policy perspective, in that the public is still denied the benefit of the beneficial services and innovation/knowledge of the worker. The worker is not being a productive member of society – even if she is not being denied compensation to refrain from competition. This is similar to a noncompete where, realistically, the employee probably did not properly value the post-employment restriction and is thus likely never compensated up front for the later obligation. From a shareholder perspective, shareholders may complain that the firm is paying someone to not work and receiving no value, so there are business issues with that type of waste. Although, this cost to an employer may, arguably, be a good investment to reduce otherwise likely transfer of time sensitive skills to a competitor. Further, the worker is getting paid to lockup their skills and, thus, potentially being harmed by not having their skills remain sharp and relevant. Finally, it is still an anticompetitive mechanism which could lead to abuse, albeit perhaps less than the other two. The garden leave clause, however, also seems less subject to being placed under a reasonableness scrutiny by policymakers, and may also act as an improper restraint on trade or still allow employer overreaching.¹⁴⁴

C. FAIRNESS ANALYSIS

Rawls' ethical theory centers on justice and fairness in the design and evaluation of social institutions.¹⁴⁵ Scholars holding the traditional narrow view of the applicability of Rawls' "basic structure" of society generally reserve Rawlsian analysis for public law issues such as basic constitutional liberties and systems of tax and transfer, rather than private law issues such as provisions of employment contract law.¹⁴⁶ In this view, contracts are seen as a private outcome of promises made between specific parties, where there is little role for an analysis of overall social fairness. However, Rawls' own writings are ambiguous as to which social institutions are appropriately evaluated in terms of fairness in the basic structure.¹⁴⁷ A broader view asserts that Rawlsian analysis of justice as fairness can legitimately be applied to systems of private law such as the body of laws governing contracts.¹⁴⁸ In a Rawlsian analysis, "contract law would be constructed such that, when viewed in conjunction with all other legal and political institutions, it best serves the demands of the principles of justice".¹⁴⁹ For purposes of this discussion, we will take the broader view and utilize a simplified Rawlsian analysis to explore restrictions on employee mobility as part of the social institution of employment law.

To consider the fairness of various legal institutions controlling the mobility of employees, including contractual noncompete clauses, the inevitable disclosure doctrine and garden leave, we would engage in a Rawlsian thought experiment. Thus we would imagine ourselves in the "original position" behind a "veil of ignorance,"¹⁵⁰ not knowing whether we would be an employer seeking to protect business assets from unfair competition, an employee seeking to preserve her freedom of movement, or a start-up firm looking to hire experienced staff. The parties would not know what type of business assets would require protection, nor the nature of the competitive market. Moreover the parties would not know the skill level of the employee, the nature of the labor market, nor the relative bargaining power of employer and employee.

In this thought experiment, we would seek to establish a social order with impartial and rational principles, including the liberty principle which assumes that all persons are free and equal,¹⁵¹ and the difference principle, which permits social

and economic inequalities as long as the least-advantaged members of society are benefitted.¹⁵² The difference principle would not be applied on a transaction-by-transaction basis, rather the idea is to establish “a set of rules that, when applied generally, is instrumental to the overall scheme of legal and political institutions that maximizes the position of the least well-off, as compared to other possible schemes.”¹⁵³ From behind the veil of ignorance, we would want to determine reasonable mechanisms for employers to protect valuable firm assets such as strategic knowledge and information from unfair competition, which would also protect an employee’s ability to sell her labor services in an open market where they would be utilized at their highest value. From a societal perspective we might want to balance the growth and innovation benefits of a high-velocity labor market,¹⁵⁴ with a degree of stability and certainty in outcomes.¹⁵⁵

1. NONCOMPETES

As noncompete agreements are contractual clauses that can be negotiated between the parties, it seems logical that this mechanism could be ideal for protecting the interests of employers while preserving the rights of employees. But noncompete clauses are unilateral mechanisms with employees bearing the primary burden, and established employers gaining the benefit. Because the burden of the noncompete is externalized by the employer onto the employee, there is incentive for the employer to overreach. In the original position from behind a veil of ignorance, there are some concerns, particularly about whether the interests of the most vulnerable populations are protected by this practice. Differences in bargaining power do lead to employees signing noncompete clauses that are detrimental to their interests simply because they have limited alternate options.¹⁵⁶ This concern is underlined by instances of noncompete agreements being enforced against involuntarily fired, or low skilled employees who have few opportunities for alternative employment.¹⁵⁷

The effort by some state legislatures to narrow the applicability of noncompetes to only skilled, high-earning employees is one potential solution, as these individuals are more likely than low-earning employees to actually have access to business information worthy of protecting. This solution might be fairer to employees, however it could potentially increase the anticompetitive impact on society precisely because skilled employees are most likely to innovate and create start-up enterprises. Finally, one negative point for employees related to noncompetes is the uncertainty involved in whether proprietary business information will actually be protected, because employers are dependent on the courts to enforce noncompetes when employees resist these mechanisms. Because of these issues, under a Rawlsian analysis, it seems clear that use of noncompete clauses to protect competitive business information would not be seen as the fairest mechanism to any of the parties, but particularly to the most vulnerable.

2. INEVITABLE DISCLOSURE DOCTRINE

In some ways, this doctrine raises even more concerns than noncompetes related to the application of this mechanism because it doesn’t require prior notice to or the consent of the employees. Nevertheless, some commentators find the inevitable disclosure doctrine to be superior to noncompetes.¹⁵⁸ The upside of this doctrine is that it is crafted and enforced by judges who can carefully tailor the application of the doctrine to protect specific business information, while ensuring against over-reaching or a chilling effect. Thus this doctrine may be more balanced and equitable, with judges assuring the protection of the interests of the most vulnerable.

However, there are several downsides of the inevitable disclosure doctrine. First of all, employers may have less certainty about whether their competitive information will be protected because they are even more dependent on judicial enforcement than with noncompetes. For employees who are precluded from employment options as a result of the application of this doctrine, this is often not a temporary state of being, but rather a permanent injunction limiting future employment options. Finally, the social costs include not only the potential limits that low social mobility may have on innovation, but also the burden placed on limited judicial resources in order to adjudicate post-employment disputes.

3. GARDEN LEAVE

Given that the foundation of a Rawlsian analysis is to find a solution for the structure of society that all parties can agree upon regardless of their position in society, there are many reasons why Garden Leave might be preferable to the other employee mobility restraint mechanisms. There are several upsides to the concept of garden leave, the first being that it is not a unilateral, or court determined mechanism, but rather, a negotiated mechanism, where the benefits and burdens are shared by the employer and employee. While the employer receives protection of proprietary business information for the amount of time that is agreed upon, the employee is compensated for the lack of livelihood during that period. The burden is not externalized by the employer (as with noncompetes), but a cost for exercising this mechanism—the continued salary of the employee, is born directly by the employer.

Thus, there is incentive for the employer to tailor and limit the garden leave to only the amount of time and space that are relevant to the specific position and business knowledge gained by the employee. When it comes to social impacts, this mechanism has similar negative social impacts as the other mechanisms related to restraints on innovation as a result of labor mobility and knowledge transfer. However, with this mechanism, it remains possible for the employer to protect resources that it values. Because this mechanism involves a negotiated solution that shares costs and benefits between the parties, the negative impact on the court system is likely to be less in this case than with either noncompetes or the inevitable disclosure

doctrine. For these reasons, while there are still weaknesses, a Rawlsian analysis of employment mobility mechanisms is likely to favor garden leave over other options.

V. RECOMMENDATIONS FOR POLICY MAKERS

Thus far we have reviewed three mechanisms for restraining employee mobility and protecting employer proprietary information and scrutinized each using various business ethics frameworks. First, we examined these mechanisms from a Lockean property rights-based view, which emphasizes the employer's right to protect their business assets, and the employee's right of control over her labor. Second, we applied a utilitarian account of the costs and benefits to employers, employees, and society of such mechanisms. Finally, we applied a Rawlsian perspective analyzing the equality and fairness of each mechanism, with an eye on reducing the negative impact on the most vulnerable.

Our analysis shows that each mechanism is problematic in its own way. Accordingly, a court or state legislature wishing to further any of the ideals (achieving fairness, maximizing social benefits, or protecting property rights) needs to recognize the shortcomings of each. In this section, we offer recommendations to policy makers to overcome some of the shortcomings inherent to the problems of employee mobility restraints, while still seeking protections for proprietary business information. In general, we suggest that it would be most desirable for all persons concerned (except perhaps litigators who specialize in employment termination lawsuits), if the preferred mechanism protecting business proprietary information would prioritize open communication, mutual understanding, and negotiation between employers and employees rather than unilateral or judicially imposed obligations.

First off, the noncompete mechanism seems to inadequately protect individual's rights. This is because of the bargaining asymmetries inherent in the inception of the agreement between the employer and the employee at the time that the contract is formed. Noncompete enforcement is also subject to abuse by employers. For instance, the more powerful employer can use the mere threat of litigation over a noncompete to chill the employee's desire to move to a competitor or start a competing enterprise.¹⁵⁹ Post-employment enforcement also leads to the employee not being able to work in their preferred position, but she is bound by this restriction without additional compensation. Essentially, the employer has little cost incentive to not overreach and try to enforce the greatest restriction on mobility possible at the expense of the employee's property rights.

There are certain things that can be changed about the noncompete mechanism that might improve these issues and better achieve the ethical ideals. For example, limitations placed on whoever is subject to noncompete might help address property rights concerns. In addition, specific rules limiting the types of business information that may be covered by a noncompete may better ensure that the benefits employers gain by enforcement of noncompetes outweighs the social costs of constrained competition. Finally, the process of how noncompetes are established may be reformed to better achieve fair and equitable outcomes.

First, all states permitting noncompetes should limit their applicability solely to employees who are most likely to have possession of proprietary business information that is sufficiently valuable to require protection. For instance, proposed legislation in Massachusetts and Illinois seek to limit the type of employee covered by a noncompete to highly-compensated and business-crucial employees. In addition, Colorado has had a noncompete statute endorsing a policy of limiting noncompete enforcement to "Executive and management personnel and officers and employees who constitute professional staff to executive and management personnel" for over three decades.¹⁶⁰ For other jurisdictions interested in isolating the coverage of noncompetes to employees whose mobility to a competitor may be cause for legitimate concern, this coverage could be determined, for example, by setting a limitation by virtue of the employee's rank, salary, or expertise. Along this line of thinking, the type of business information that is protected by noncompetes should be limited to truly proprietary information that is strategically relevant to the firm's competitive competency.

Finally, in terms of the process of entering into a noncompete agreement, in order to ensure that there is no question that employees fully consent to a noncompete clause, the employer should disclose the terms that will be required of the employee at the outset, when the parties are negotiating all the relevant aspects of the job or of a promotion, such as salary and duties. Arnow-Richman suggests that this could be accomplished if courts simply refused jurisdiction over noncompete agreements that were not signed as part of the primary negotiation for the job.¹⁶¹ While the noncompete can be an important mechanism to protect business proprietary information, there would be a lot less litigation over these agreements if they were limited in these ways.

The doctrine of inevitable disclosure is perhaps even more antithetical to an employee-rights or fairness based ethical perspective. Specifically, the doctrine restricts the post-employment mobility of the employee as does the noncompete, but it does so without clearly defined temporal parameters because the theory is that the trade secret in the employee's possession always has the potential to leak out if the employee works for a competitor. The doctrine can arise in the absence of a noncompete or any other contractual agreement, and, thus, on its own an imposition of an inevitable disclosure-based injunction prohibits an employee's mobility without even requiring the employee's consent to this outcome, nor requiring the employer to negotiate or pay for the restriction. This means that the employee cannot work for a competitor – perhaps indefinitely – and never accepted the restriction, nor is she compensated for this severe restriction on her mobility.

With this in mind, the ethical implications for the violation of an employee's rights seems clear: the property rights of the employee in deciding how to sell her labor are violated, and they are violated without compensation. In this instance, the balance clearly shifts to the employer at the expense of the employee's property rights. The doctrine of inevitable disclosure is also antithetical to the idea of maximizing the social benefit of any mechanism. In terms of the potential benefits to society, this mechanism does not reward businesses acting with foresight in protecting business secrets, and who seek common ground with employees. Rather it rewards benefits to firms who have no other way to protect valuable trade secrets. In terms of costs to society, the fact that this doctrine is solely judicially enforced means that if it became a universal practice, significant judicial resources could be tied up in this mechanism (making employment litigators the most satisfied beneficiaries).

In terms of recommendations to improve this mechanism for restraining employee mobility in a manner better achieving ethical ideals, it would seem that the doctrine of inevitable disclosure would be best changed by limiting how it could be applied. Again, specifically, limiting who could be subject to the inevitable disclosure doctrine to better protect property rights; specifying what subject matter this mechanism can cover, to maximize benefits while minimizing social costs; and ensuring greater fairness and equity in the judicial process of imposing this mechanism. As with noncompetes, only high-level employees who are proven to have possession of high-level proprietary business information should be subject to such injunctions. Further, the employer should have to establish that the information actually possessed by the employee is sufficiently valuable to require protection, in other words, it should only be truly proprietary information that is strategically relevant to the firm's competitive competency.

Finally, in terms of process, before a judge can impose an injunction, there should be some evidentiary requirement that establishes that the employer has already met a very high standard for enacting measures to protect its business proprietary information. Such measures could include things like regularly requiring employees to sign confidentiality agreements; seeking and defending legal intellectual property protection for any business information, processes and knowledge that are subject to Federal patent, trademark, copyright and trade secret rules; and limiting which employees have access to full knowledge about proprietary key business processes, secret recipes, and client lists. In order to conserve rare judicial resources, the burden of proof to obtain an injunction based on the doctrine of inevitable disclosure must be sufficiently high to establish that all other mechanisms to protect business information have been attempted and this is really the last resort.

Of the three mechanisms, the case of garden leave seems to be on better ethical grounds in terms of the fairness and equity provided to the departing employee. With garden leave the employer internalizes the cost of enforcing a restriction on employee mobility. Thus, the potentially power-abusing party (the employer) will only restrict behavior that it thinks is truly worth purchasing and has an incentive to limit the period of mobility prohibition. When the employer willingly, if begrudgingly, bears those costs and does so after the employee leaves, it becomes clearer that removing the employee from the labor market has tangible costs. With garden leave the employer will more likely accurately value the true costs of restricting mobility and have an economic incentive to refrain from overreaching or any vindictive behavior. As compared to the bluntness of a noncompete for restricting unfair competition, garden leave may actually sharpen the issues related to competitiveness and specific employees' financial value to a firm.

Thus, with garden leave there is an ethically sound balance being struck between the individual rights of the employee to restrict the sale of her labor and the employer's protectable interest in curtailing unfair competition. The Lockean concern about abuse of the employee's property rights is alleviated because the garden leave situation creates a market for the employee's services, values them accordingly, and compensates the employee. Like the noncompete negotiation, but now with a market valuation component, the employee retains some power to sell her labor (i.e., choose to not work for a competitor), but does so on more balanced terms. Moreover, the incentives align for the employer to not overreach because it is forced to pay for any immobility it "purchases" during the garden leave period. For these reasons, the concerns about which employees, and to what information the garden leave applies appear to become less dire. In terms of procedural fairness, just as with noncompetes, in order to ensure that there is no question that employees fully consent to a garden leave clause, the employer should disclose the terms that will be required of the employee at the outset, when the parties are negotiating all the relevant aspects of the job, (or of a promotion) such as salary and duties. In addition, if the garden leave clause included a mediation requirement in the event of disagreement in application of the mechanism, this could ensure that open communication, mutual understanding, and negotiation between employers and employee would be prioritized over unilateral or judicially imposed obligations.

VI. CONCLUSION

Legislatures and judges have sought to find the socially optimal balance of the tensions between the desire for freedom of employee mobility and the need to protect business information that creates competitive advantage. Nationwide, legal decisions run the gamut with a wide variety of outcomes in terms of regulations and rulings permitting or prohibiting employee mobility restraint mechanisms such as those considered herein; noncompetes, the doctrine of inevitable disclosure and garden leave. While these legal opinions or legislative developments may refer generally to concepts such as property rights, utilitarian analyses and fairness, it is hoped that this review of the ethical and philosophical bases for these concepts might provide a much-needed context to support the decision-making of policy-makers.

Moreover, this analysis helps to address a gap in the literature on the evaluation of ethical issues related to employee mobility restraints. The discussion above may inform the debate on the appropriateness and the legitimate scope of these measures. This analysis may also support future researchers not only in their work in these specific legal mechanisms but perhaps more broadly in determining fairness, balancing costs and benefits, and evaluating property rights in the context of a knowledge-based economy.

Footnotes

⁺ Copyright 2011, the Authors. All rights reserved.

¹ Charlotte Raab, *Rivals Likely to Reach for Google's "Wallet"*, AGENCE FRANCE-PRESSE (May 29, 2011) available at http://news.yahoo.com/s/afp/20110530/tc_afp/usitinternetecomfinancegoogleebay (last viewed June 1, 2011) (quoting a Google spokesman commenting on a trade secret misappropriation lawsuit brought by eBay).

² JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT*, §26 (1967).

³ See, e.g., Sharon F. Matusik & Charles W.L. Hill, *The Utilization of Contingent Work, Knowledge Creation, And Competitive Advantage*, 23 ACAD. OF MGMT. REV. 680 (1998).

⁴ See Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 164 (2008) (finding that “recent developments signal a shift to a strict approach to [evaluating] restrictive covenants founded on a dominant policy concern for protection of employee mobility”).

⁵ Hugh Son, *BofA Forces 'Garden Leave' on Brokers After Defection*, BLOOMBERG BUSINESSWEEK, (Feb. 18, 2011) available at <http://www.businessweek.com/news/2011-02-18/bofa-forces-garden-leave-on-brokers-after-defection.html> (last viewed June 1, 2011).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See Catherine Rampell, *Many With New College Degree Find the Job Market Humbling*, N.Y.TIMES (May 18, 2011) (discussing the current difficult job market for college graduates and the importance of moving into a better job, including quoting an economist who observed that “If you don’t move within five years of graduating, for some reason you get stuck where you are. That’s just an empirical finding”).

¹⁰ See, e.g., Kate O’Neill, *Should I Stay or Should I Go? – Covenants Not to Compete in a Down Economy – A Proposal for Better Advocacy and Better Judicial Opinions*, 6 HASTINGS BUS. L. J. 83, 84 (2010).

¹¹ Katherine V.W. Stone, *The New Psychological Contract: Implications for the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001).

¹² Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1, 1 (2001).

¹³ Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LABOR LAW & POL’Y J. 313, 313-14 (2003).

¹⁴ Terry M. Dworkin & Elletta S. Callahan, *Buying Silence*, 36 AM. BUS. L.J. 151, 169-71 (1998).

¹⁵ Joan T.A. Gabel & Nancy R. Mansfield, *The Information Revolution and its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301, 323 (2003) (providing a detailed view of the legal implications for employment relationships in a technology-driven work environment).

¹⁶ Garrison & Wendt, *supra* note 4.

¹⁷ See, e.g. Stone, *The New Psychological Contract*, *supra* note 11.

¹⁸ ALAN HYDE, *WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET* (2003).

¹⁹ Alan Hyde, *Should Noncompetes Be Enforced?: New Empirical Evidence Reveals the Economic Harm of Non-compete Covenants*, 33 REGULATION 6 (Winter 2010-2011) <http://www.cato.org/pubs/regulation/regv33n4/regv33n4-2.pdf> (last visited June 1, 2011) (adapted from a chapter in MICHAEL WACHTER & CYNTHIA ESTLUND, eds., *RESEARCH HANDBOOK ON THE LAW AND ECONOMICS OF LABOR AND EMPLOYMENT LAW* (forthcoming, Edward Elgar, 2011)).

²⁰ See, e.g., Matthew W. Finkin, *Second Thoughts on a Restatement of Employment Law*, 7 U. PA. J. LAB. & EMP. L. 279 (2005). See also Rachel Arnow-Richman, *Response to the Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Putting the Restatement in its Place*, 13 J. EMP. RTS. & EMP. POL’Y J. 143 (2009) (“What we have seen is a widely documented trend toward short term employment, the rise of contingent labor, the rollback of employer sponsored health plans and benefits, a reversion to external labor market practices, and, more recently, the most significant economic downturn since the Great Depression”). *Id.* at 146 (citation omitted).

²¹ See Wexler, *infra* note 76.

²² *Id.* See also the cost-benefit analysis discussion, *supra* Part VI.A.

²³ See Stone, *The New Psychological Contract*, *supra* note 11.

²⁴ *Id.* See also Katherine V.W. Stone, *In the Shadow of Globalization: Changing Firm-level and Shifting Employment risks in the United States*, 24-45, in MICHELLE BERTHO, BEVERLY CRAWFORD, & EDWARD A FOGARTY (eds.), *THE IMPACT OF GLOBALIZATION ON THE UNITED STATES* (London, Praeger Pub. 2008).

²⁵ Rusty Tchernis, *Measuring Human Capital and its Effects on Wage Growth*, 24 J. OF ECON. SURVEYS 362 , 378 (2010).

²⁶ Mark J. Garmaise, *Ties that Truly Bind: Non-competition Agreements, Executive Compensation and Firm Investment*, J. LAW, ECON. & ORG. (2009) <http://jleo.oxfordjournals.org/content/early/2009/11/03/jleo.ewp033.full.pdf+html> (last visited June 1, 2011).

²⁷ Roger Cheng, *Google Unveils Its Digital-Walled Plan*, WALL ST. J. B3 (May 27, 2011).

²⁸ *Id.*

²⁹ Ian Sherr & Andrew Morse, *Ebay Sues Google Over Mobile-Payments System*, WALL ST. J. B3 (May 27, 2011).

³⁰ *Id.*

³¹ *Id.*

³² For a detailed description of the allegations, see PayPal, Inc. v. Google, Inc., Complaint, available at http://www.ebayinc.com/assets/pdf/fact_sheet/2011_PayPal_DOC.pdf (last viewed June 1, 2011).

³³ For a leading description of sustainable competitive advantage in the management literature, see Jay Barney, *Firm Resources and Sustained Competitive Advantage*, 17 J. MGMT. 99 (1991) (widely cited as the seminal work on the resource-based theory).

³⁴ A classic case embodying the rule against granting the equitable relief of specific performance for personal service contracts, but allowing an injunction against working for another employer in breach of an employment contract is *Madison Square Garden Corp. v. Carnera*, 52 F.2d 47 (2d Cir. 1931) (boxing promoter granted an injunction against a boxer whose intent to box for another employer violated an exclusive services contract).

³⁵ For a general discussion of the employee duty of loyalty, see Benjamin Aaron & Matthew Finkin, *The Law of Employee Loyalty in the United States*, 20 COMP. LAB. L. & POL'Y 321 (1999). For a discussion of the duty of loyalty in a new employment context and the employees relationship to the corporation and society, see Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations* 97 CALIF. L. REV. 433 (2009). In addition, non-employee stakeholders such as members of a corporation's board of directors will also have a duty of loyalty to the entity. See, e.g., Dana M. Muir & Cindy A Schipani, *The Challenge of Company Stock Transactions for Directors' Duties of Loyalty*, 43 HARV. J. ON LEGIS. 437 (2006).

³⁶ For a discussion of the separation of knowledge ownership rights between employers and employees, see generally Norman D. Bishara & David Orozco, *Using the Resource-Based Theory to Determine Covenant not to Compete Legitimacy*, 87 IND. L.J. __ (forthcoming 2012).

³⁷ For instance, when describing the attributes of knowledge in the a study of geographic mobility of engineers, two scholars observed that, "Since ideas serve both as the inputs and outputs in their own production, their location need be constrained neither by the happenstance of the spatial distribution of raw materials, energy, and labor, nor by that of demand and markets."

Paul Almeida & Bruce Kogut, *Localization of Knowledge and the Mobility of Engineers in Regional Networks*, 45 MANAGEMENT SCIENCE 905, 905 (1999).

³⁸ See Kristen Osenga, *Information may Want to be Free, but Information Products do not: Protecting and Facilitation Transactions in Information Products*, 30 CARDOZO L. REV. 2099, 2117 (2009) (citing contract law as "an appealing alternative to traditional intellectual property protection" and adding that "[b]usinesses are comfortable and familiar with contracts, probably even more so than intellectual property").

³⁹ See, e.g., Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L.J. 724, 765 (2010).

⁴⁰ See Dworkin & Callahan, *supra* note 14, at 169-71.

⁴¹ *Id.* at 156-57 (Professors Dworkin and Callahan add that, "[c]oncerns regarding restraint of trade [as with covenants not to compete] are much less directly implicated in this context; restrictions on access to information, rather than employee movement, are involved").

⁴² While quantifying the number of noncompetes in use or the trend in noncompete usage or disputes over time is difficult since most are not publically reported, scholars agree that noncompetes are increasingly being used where there are enforceable. See, e.g., Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L.J. 49, 49 (2001) (stating that noncompetes "are an increasingly common feature of employment").

⁴³ In this paper the noncompete-focused discussion will concentrate on post-employment restrictions on worker mobility, as opposed to the issues related to the sale of the goodwill of a business and restrictions on the competition of former owners.

⁴⁴ See Dworkin & Callahan, *supra* note 14, at 169-170.

⁴⁵ *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 389 (1999), citing *Reed, Roberts. v. Strauman*, 40 N.Y.2d 303, 308 (1976).

⁴⁶ *Karpinski v. Ingrasci*, 28 N.Y.2d 45 (1971) (oral surgeon skills in a rural upstate New York community were not sufficiently unique and valuable to justify a refusal to enforce the contractual protection of employer); *see also* BDO Seidman v. Hirshberg, *supra* note 45 (accountant's services and skills not sufficiently extraordinary).

⁴⁷ For instance, some noncompete cases highlight that even low-skilled employees may be subject to noncompete enforcement actions. *See, e.g.*, *Borg-Warner Protective Servs., Corp., v. Guardsmark, Inc.*, 946 F. Supp. 495, 500 (E.D. Ky. 1996) (the court allowed noncompete enforcement against retail store security guards due to employer investment in the employees' training).

⁴⁸ BDO Seidman, *supra* note 45, at 88-89.

⁴⁹ *Id.* The court went on to write that the, "standard of reasonableness in determining the validity of employee agreements not to compete. 'In this context a restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee'" (citing *Reed, Roberts v Strauman*, 40 N.Y.2d 303, 307 (1976)). *Id.* at 389.

⁵⁰ *See generally* BRIAN MALSBERGER, ed., COVENANTS NOT TO COMPETE, A STATE-BY-STATE SURVEY (2009; and *supp.*).

⁵¹ *See* Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenant Not to Compete Agreements, Trends, and Implications for Employee Mobility Policy*, 13 U. PENN. J. BUS. L. 753 (2011).

⁵² The two states with near complete bans on covenants not to compete are North Dakota and California, although they permit restrictions on post-employment competition related to an owner's sale of a business. *See* Norman D. Bishara, *Balancing Innovation from Employee Mobility with Legal Protection for Human Capital Investment: 50 States, Public Policy, and Covenants Not to Compete in an Information Economy*, 27 BERKELEY J. EMP. & LAB. L. 287 (2006) at 294 (fn. 19).

⁵³ A recent California Supreme Court case on noncompetes addressing the public policy implications of the state's statutory ban on noncompetes is *Edwards v. Arthur Andersen, LLP*, 44 Cal. 4th 937, 949-50 (2008) (reiterating California's strong public policy against enforcing contractual restraints on employment and rejecting calls for a "narrow restraint" exception).

⁵⁴ *See* Gabel & Mansfield, *supra* note 15, at 321-22.

⁵⁵ *See, e.g.*, *Johnson Controls, Inc. v. APT Critical Systems Inc.*, 323 F.Supp.2d 525 (S.D.N.Y. 2004). In *Johnson Controls*, the court commented that, "New York courts have endeavored to balance public policy concerns relating to the benefits of competition and the unfettered flow of talent and ideas in our economy with employers' legitimate right to protect the fruits of their labor [citation omitted], the idea being that the proper balancing of these factors will produce the most wealth and innovation...for society."

Id. at 533-34.

⁵⁶ As of 2010, seventeen states have enacted some form of legislation addressing the enforceability of covenants-not-to-compete. *See* Bishara, *Fifty Ways to Leave Your Employer*, *supra* note 51. These states are: Alabama, California, Colorado, Florida, Georgia, Hawaii, Louisiana, Missouri, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Wisconsin. Other states, such as Tennessee and West Virginia have basic antitrust statutes that are invoked when noncompetes are evaluated. *See* TENN CODE ANN. §§ 47-25-101, 47-18-104 (2011) (disfavors any contract attempting to lessen competition) and W. VA. CODE § 47-18-3(a) (the state's antitrust statute), respectively.

⁵⁷ *See* Will Brownsberger, *Reform Noncompete Contracts – News*, <http://willbrownsberger.com/index.php/end-noncompete-contracts> (last visited June 1, 2011) (Massachusetts State Representative Brownsberger's website detailing plans to resubmit his co-sponsored noncompete reform legislation to the Massachusetts legislature).

⁵⁸ *See* Winston & Strawn, *HB 0016 Introduced to Create an 'Illinois Covenants Not To Compete Act'*, (Jan. 2011) http://www.winston.com/siteFiles/Publications/Updated_HB0016_Briefing.pdf (last visited June 1, 2011). Like Massachusetts proposed legislation, Illinois version of noncompete reform seeks to formalize the bounds of the traditional reasonableness test by requiring the contract to be "narrowly tailored to support the protection of a legitimate business interest" and apply it to specific levels of employees. The proposal also provides for rebuttable presumptions of legitimacy, including, "if (i) the covenant's duration exceeds one year; (ii) the covenant's geographic area extends beyond any region in which the key employee provides employment services during the one year preceding termination of the employment relationship; or (iii) the type of services covered by the covenant extends beyond the nature of the work performed by the key employee. (emphasis added). *Id.*

⁵⁹ CAL. BUS. & PROF. CODE § 16600 (2010).

⁶⁰ TEX. BUS. & COM. CODE § 15.50 (2010)

⁶¹ The Colorado statute, COLO.REV.STAT. § 8-2-113 (2010), bans noncompetes, however, it several exceptions, including the following related to sale of a business, employee training, and executive and management-level employees and their related professional staff. Specifically, section (2)(d) states an exception for, "Executive and management personnel and officers and employees who constitute professional staff to executive and management personnel." *Id.*

⁶² *See, e.g.*, Bruce Fallick, Charles A. Fleischman & James B. Rebitzer, *Job Hopping in Silicon Valley: Some Evidence Concerning the Micro-Foundations of a High Technology Cluster*, 88 REV. ECON. & STAT. 472 (2006) (measuring higher rates of employee mobility in Silicon Valley, California's high-tech sector as compared to other California industries or in a sample of states with noncompetes enforcement); Matt Marx, Deborah Strumsky & Lee Fleming, *Mobility, Skills, and the*

Michigan Non-Compete Experiment, 55 MGMT. SCI. 875 (2009) (using a natural experiment created by a change in noncompete enforcement law to find lower rates of mobility under a policy of noncompete enforcement); Toby E. Stuart & Olav Sorenson, *Liquidity Events and the Distribution of Entrepreneurial Activity*, 48 ADMIN. SCI. Q. 175 (2003) (studying the tendency of employees to become entrepreneurs after their employer-firm undergoes a dramatic change using noncompetes as one variable); and Garmaise, *supra* note 26 (finding that jurisdictions that enforce noncompetes will create an environment that creates lower wages and less investment from employers in their employees).

⁶³ For discussion of the implications for other employees, see *supra* note Part IV.A.I. and accompanying footnotes.

⁶⁴ Some states do not require additional consideration when a noncompete is signed after an employment has begun under a theory that continued employment or some additional terms of conditions of employment, such as a promise to modify an at-will employment assumption, is sufficient. See, e.g., *Lake Land Employment Group of Akron, LLC v. Columer*, 101 Ohio St. 3d 242 (2004) (Ohio Supreme Court resolved a split in the state appellate courts that an employee continuing with at-will employment relationship is sufficient consideration to support assent to a noncompete); and *Runfola & Assoc.*, 57 Ohio St. 2d 5 (1991) (a noncompete signed upon employer's promise to formerly at-will employee to discharge the employee only for specified causes is sufficient consideration). However, other states may require independent new consideration to support a noncompete for continuing at-will employees, but not for employees whom are terminable for good cause where mere continued employment is a sufficient consideration. See, e.g., *Stone v. Griffin Com.* 53 S.W.3d 687 (Tex. Ct. App. 2001).

⁶⁵ See, e.g., *Reed, Roberts v. Strauman*, *supra* note 45, at 307.

⁶⁶ *Ashland Mgmt. Inc. v. Altair Invs.*, 59 A.D.3d 97, 103-04 (N.Y. App. Div. 2008).

⁶⁷ See, e.g., Hyde, *Should Noncompetes Be Enforced?* *supra* note 19, at 8.

⁶⁸ The doctrine has also not seen much treatment in the academic literature. Following resurgence in the debate over inevitable disclosure and its wider application to address threatened trade secret misappropriation in the mid 1990s several student notes and comments addressed the topic. See, e.g. Brandy L. Treadway, *Comment: An Overview of Individual States' Application of Inevitable Disclosure: Concrete Doctrine or Equitable Tool?*, 55 SMU L. REV. 621 (2002); David Lincicum, *Note: Inevitable Conflict: California's Policy of Worker Mobility and the Doctrine of "Inevitable Disclosure"*, 75 S. CAL. L. REV. 1257 (2002); and Jennifer L. Saulino, *Note: Locating Inevitable Disclosure's Place in Trade Secret Analysis*, 100 MICH. L. REV. 1184 (2002). While these articles are useful, a full scholarly treatment of the subject is seemingly only available from Garrison & Wendt, *supra* note 4, at 148-164.

⁶⁹ Some jurisdictions, for example, uphold the doctrine of inevitable disclosure. See Hyde, *Should Noncompetes Be Enforced*, *supra* note 19, at 9 (criticizing New Jersey for a lack of venture capital or a culture or infrastructure of start-ups and point out that the state "vigorously enforces noncompetes" and one of three that has supported an inevitable disclosure regime).

⁷⁰ *Id.* at 9.

⁷¹ *PepsiCo v. Redmond*, 54 F.3d 1262 (7th Cir. 1995). For a detailed description of the *PepsiCo* case and the development of inevitable disclosure and its implications, see Garrison & Wendt, *supra* note 4 at 148-164.

⁷² Some sources state that only a few states have embraced inevitable disclosure. See, e.g., Hyde, *Should Noncompetes Be Enforced?*, *supra* note 19, at 9 (harshly criticizing New Jersey for allowing inevitable disclosure arguments and stating that perhaps three states subscribe to the inevitable disclosure doctrine). But see Treadway, *supra* note 19 at 626-33.

⁷³ *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102 (3rd Cir. 2010).

⁷⁴ *Id.*

⁷⁵ *Id.* at 119

⁷⁶ *Id.* (citing *Wexler v. Greenberg*, 160 A.2d 430, 434-35 (Pa. 1960)).

⁷⁷ See generally Greg T. Lembrich, *Note, Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291 (2002).

⁷⁸ A search of all law journals for all available years in the LexisNexis database reveals only about 15 scholarly articles mentioning of garden leave in a substantive manner, and several of those concern the Australian or British legal systems. Most of these articles merely cite a 2002 student note by Greg Lembrich, *supra* note 77.

⁷⁹ See, e.g., Son, *supra* note 5. See also Joe Rauch, *BofA's U.S. Trust Adding "Garden Leave" for Some*, REUTERS (Feb 18, 2011) available at: <http://www.reuters.com/article/2011/02/18/us-bankofamerica-ustrust-idUSTRE71H4OZ20110218> (last viewed June 1, 2010).

⁸⁰ See, e.g., Thomas B. Lewis & Mark F. Kowal, *Garden Leave Provisions: A Growing Trend in Employment Agreements*, 204 N.J. L. J. 1, Employment & Immigration Law Supp. (Apr. 18, 2011) available at: http://www.njlawblog.com/uploads/file/TBL%20MFK%20-%20NJLJ%20-%2004_18_11.pdf (last viewed June 1, 2011); see also Christopher P. Stief, *What In-House Counsel Should Know About 'Garden Leave' Clauses*, CORPORATE COUNSEL (digital ed.) ("garden leave" employment agreements start to bloom in the United States") (Oct. 22, 2008) available at: <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202425435456> (last viewed June 1, 2011).

⁸¹ Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-compete Covenants as a Hybrid form of Employment law*, 155 U. PENN. L. REV. 379, 425 (2006).

⁸² Bob Hepple, *The Duty of Employee Loyalty in English Law*, 20 COMP. LAB. L. & POL'Y J. 205, 214 (1999).

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- ⁸³ Lewis & Kowal, *supra* note 80, at 1.
- ⁸⁴ LOCKE, *supra* note 2, at §26.
- ⁸⁵ *Id.* at § 6 (1967)
- ⁸⁶ *Id.* at §25.
- ⁸⁷ *Id.* at §22.
- ⁸⁸ *Id.* at §4.
- ⁸⁹ *Id.* at §85.
- ⁹⁰ *Id.* at §28.
- ⁹¹ See PATRICIA H. WERHANE, *PERSONS, RIGHTS AND CORPORATIONS* (Englewood Cliffs, NJ: Prentice-Hall 1985). See also, PATRICIA H. WERHANE, TARA J. RADIN, & NORMAN E. BOWIE, *EMPLOYMENT AND EMPLOYEE RIGHTS* (2004).
- ⁹² See *supra*, explanation of covenants not to compete at Pat III, *supra*.
- ⁹³ See generally Rubin & Shedd, *supra*.
- ⁹⁴ See Bishara, *Balancing Innovation from Employee Mobility*, *supra* note 52.
- ⁹⁵ Michael Keeley, *Continuing the Social Contract Tradition*, 5 BUS. ETHICS Q 2, 241-256 (1995)
- ⁹⁶ See Arnow-Richman, *supra* note 20 (“Courts have generally rejected claims brought by employees fired for refusing to sign a noncompete”). See, e.g., *Maw v. Advanced Clinical Commc'ns. Inc.*, 846 A.2d 604, 611 (N.J. 2004) (termination for refusal to sign overbroad noncompete did not give rise to claim of wrongful discharge in violation of public policy).
- ⁹⁷ RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (Cambridge, MA: Harvard University Press 1995).
- ⁹⁸ Mark Roehling & Wendy Boswell, “*Good Cause Beliefs in an “At-Will World”?* A Focused Investigation of Psychological Versus Legal Contracts, 16 EMP. RESPS. & RTS. J. 4, 211 (2004).
- ⁹⁹ Arnow-Richman, *supra* note 20.
- ¹⁰⁰ Katherine V.W. Stone, *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 721-763 (2001).
- ¹⁰¹ See, e.g. Gerhard Blickle & Alexander Witki *New Psychological Contracts in the World of Work: Economic Citizens or Victims of the Market?* 3 SOC’Y & BUS. REV. 149 (2008); David Hart & Jeffrey Thompson, *Untangling Employee Loyalty: A Psychological Contract Perspective*, 17 BUS. ETHICS Q. 97- 317 (2007); and Pauline T. Kim, *A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997).
- ¹⁰² Arnow-Richman, *supra* note 20.
- ¹⁰³ Viva Moffat, *The Wrong Tool for the Job: The IP Problem with NonCompetition Agreements*, 52 WM. & MARY L. REV. ____ (forthcoming 2010).
- ¹⁰⁴ *Id.* at 93.
- ¹⁰⁵ Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 211-243 (1995).
- ¹⁰⁶ See O’Neill, *supra* at 84 (arguing that courts should “minimize[e] the enforcement of covenants not to compete where the assenting employee lacks significant bargaining power while preserving employers’ abilities to enforce these covenants against employees who enjoy such power” as a safeguard for vulnerable employees).
- ¹⁰⁷ *Id.*
- ¹⁰⁸ Bishara, *Balancing Innovation from Employee Mobility*, *supra* note 52.
- ¹⁰⁹ See Bishara, *Balancing Innovation from Employee Mobility*, *supra* note 52.
- ¹¹⁰ See Part II.A., *supra*.
- ¹¹¹ See Hyde, *Should Noncompetes Be Enforced?*, *supra* note 19.
- ¹¹² *Id.* at 9.
- ¹¹³ LOCKE, *supra* note 2, at § 27-34 (1967).
- ¹¹⁴ *Id.* at §37 (“whatsoever he tilled and reaped, laid up and made use of, before it spoiled, that was his peculiar right But if either the grass of his enclosure rotted on the ground, or the fruit of his planting perished without gathering, and laying up, this part of the earth, notwithstanding his enclosure, was still to be looked on as waste, and might be the possession of any other.”.)
- ¹¹⁵ *Id.* at § 85.
- ¹¹⁶ While property rights and freedom of contract are valued in Lockean analysis, Epstein suggests that a limited role of the state in ensuring these rights is preferable. See Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (1992); Richard A. Epstein, *Simple Rules For A Complex World* (1995). As Epstein notes, “[t]he unquestioned right to quit or to fire has powerful and desirable incentive effects. In particular, it serves as an effective check against the advantage-taking open to either side in a continuous relationship.” EPSTEIN, *supra* note 97, at 159.
- ¹¹⁷ LOCKE, *supra* note 2 at § 6.
- ¹¹⁸ EPSTEIN, *supra* note 97, at 159.
- ¹¹⁹ James E. Macdonald & Caryn L. Beck-Dudley, *A Natural Law Defense To The Employment Law Question: A Response To Richard Epstein*, 38 AM. BUS. L.J. 363 at 410 (2001).
- ¹²⁰ JOHN STEWART MILL, *UTILITARIANISM* (New York: Bobbs-Merrill 1957).

- ¹²¹ Robert Audi, *Can Utilitarianism be Distributive? Maximization and Distribution as Criteria in Managerial Decisions*, 17 BUS. ETHICS Q. 593-611 (2007)
- ¹²² See generally Rubin & Shedd, *supra*.
- ¹²³ See Bishara, *Balancing Innovation from Employee Mobility*, *supra* note 52.
- ¹²⁴ See, e.g., Reed, Roberts v. Strauman, *supra* note 45 at 307.
- ¹²⁵ Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEG. STUD. 93 (1981).
- ¹²⁶ Bishara, *Balancing Innovation from Employee Mobility*, *supra* note 52.
- ¹²⁷ See Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999).
- ¹²⁸ See Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 254-57 (2006).
- ¹²⁹ See Eric A. Posner & George G. Triantis, *Covenants Not to Compete from an Incomplete Contracts Perspective*, University of Chicago Working Papers 2d, no. 137 (2001) http://www.law.uchicago.edu/files/files/137.EAP_covenants.pdf (last visited June 1, 2011).
- ¹³⁰ Marx, et. al, *supra* note 62.
- ¹³¹ See Marx, et. al *supra* note 62; and Fallick, et. al, *supra* note 62.
- ¹³² Garmaise, *supra* note 26.
- ¹³³ Stuart & Sorenson, *supra* note 62.
- ¹³⁴ Posner & Triantis, *supra* note 129.
- ¹³⁵ Hyde, *supra* note 19.
- ¹³⁶ See, e.g., Stone, *Knowledge at Work*, *supra* note 100.
- ¹³⁷ Garrison & Wendt, *supra* note 4 at 164.
- ¹³⁸ *Id.* at 165.
- ¹³⁹ Hyde, *Should Noncompetes Be Enforced?*, *supra* note 19, at 9.
- ¹⁴⁰ Garrison & Wendt, *supra* note 4, at 178-85.
- ¹⁴¹ Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-compete Covenants as a Hybrid form of Employment Law*, 155 U. PENN. L. REV. 379 (2006).
- ¹⁴² *Id.* at 425.
- ¹⁴³ Hepple, *supra* note 82.
- ¹⁴⁴ *Id.*
- ¹⁴⁵ JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT*, (Cambridge, MA: Belknap Press 2001).
- ¹⁴⁶ Kevin A. Kordana & David H. Tabachnick, *Rawls and Contract Law*, 73 GEO. WASH. L. REV. 598 2004-2005
- ¹⁴⁷ *Id.* at 604-605, citing THOMAS W. POGGE, *REALIZING RAWLS* 21-23(Ithaca, Cornell U. Press, 1989) ("Rawls leaves this notion [of the basic structure] not merely vague but also ambiguous").
- ¹⁴⁸ *Id.* at 624-625. Thus a democratically elected legislature is charged with enacting legislation that is just and fair according to a Rawlsian basic structure.
- ¹⁴⁹ Kordova & Tabachnick, *supra* note 146 at 623.
- ¹⁵⁰ RAWLS, *supra* note 145 at 42.
- ¹⁵¹ *Id.*
- ¹⁵² *Id.*
- ¹⁵³ Kordova & Tabachnick, *supra* note 146, at 626.
- ¹⁵⁴ Hyde, *Should Noncompetes Be Enforced?*, *supra* note 19 at 6-11.
- ¹⁵⁵ Richard Nielsen, *High-Leverage Finance Capitalism, the Economic crisis, Structurally Related Ethics Issues, and Potential Reforms*, 20 BUS. ETHICS Q. 299 (2010).
- ¹⁵⁶ For a discussion of these issues, see Part IV.A.I., *supra*.
- ¹⁵⁷ Kenneth J. Vanko, *You're Fired! And Don't Forget Your Non-Compete.": The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COMM. L.J. 1 (2002).
- ¹⁵⁸ See Garrison & Wendt, *supra* note 4.
- ¹⁵⁹ See DiMatteo, *supra* note 39, at 765 (discussing the potentially coercive use of noncompetes by employers). Professor DiMatteo find employee noncompetes have "two strategic purposes: proprietary protection and strategic coercion"; with "[t]he second purpose seek[ing] to deter employee movement to a competitor"). *Id.*
- ¹⁶⁰ See COLO.REV.STAT, *supra* note 61.
- ¹⁶¹ Arnow-Richman, *supra* note 20, at 657 (calling for disclosure in employment contracts comparable to that called for in consumer protection law, "[e]ither through common law or statutory initiative, any term withheld until after the employee's acceptance of the initial offer would be unenforceable if the term could have been provided as part of the hiring process").