COVENANTS NOT TO COMPETE IN EMPLOYMENT CONTRACTS: WORTH A CLOSER LOOK IN THE CLASSROOM

By

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I. INTRODUCTION

Covenants not to compete ("noncompetes")[1] are a well-recognized risk management tool for employers. Now they are also on students' radar. Many have heard of the Subway Restaurant manager in Detroit who reportedly signed a covenant not to compete with her employer's business within one hundred miles for one year.[2] When the manager left and took a job with a competing sandwich shop in violation of the agreement, Subway's attorney advised both her and her new employer of Subway's intent to enforce the provision. She was promptly fired from the new job.[3] Other students may be aware of the noncompete signed in 2012 by the new University of Arkansas football coach, Bret Bielema. Coach Bielema agreed not to coach football at another Southeastern Conference school until after 2018.[4]

Students themselves may have been asked to sign noncompetes as a condition of obtaining employment or even internships. One student who took a summer internship with a party planning firm after her sophomore year, for example, was required to sign a noncompete providing that for a period of two years after the internship she may not

> control, manage, operate, be employed or engaged by, or otherwise assist or engage in, or assist any other person in engaging in, any aspect of the Business … including without limitation by performing service in any executive, managerial, sales, market, or research capacity, anywhere in the United States or in any other country in which the [company] is then doing business.[5]

It is impossible to know exactly how prevalent noncompetes are because they become public only in those cases that lead to litigation. It is said that they are common and becoming more so.[6] Noncompetes are particularly prevalent in industries that depend on protection of intellectual property, such as software development[7] or scientific research,[8] in the contracts of salespeople,[9] and in contracts of key personnel in media,[10] service industries,[11] and management.[12] They may be required for employees, managers, and partners of accounting firms.[13] Indeed, noncompetes have been found in contracts for employees as varied as "factory welders to CEOs, computer programmers to yoga instructors, doctors to bakers, lawyers to artists, markets strategists to bioengineers."[14] Many students may be asked to sign noncompetes early in their careers. Therefore, this is the sort of real-life issue that students are likely to find relevant and engaging in the classroom.[15]

Coverage of noncompetes is standard in American[16] and Canadian[17] business law and legal environment courses, with only a few pages in the textbook typically dedicated to the topic. This paper recommends that professors expand coverage of noncompetes for several reasons. First, from a practical perspective, it is the contract legality issue students are most likely to

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confront in their business careers and therefore the most important.[18] Second, the topic of noncompetes promotes careful consideration of features of a common law system that may be particularly challenging to students: variations of law from jurisdiction to jurisdiction and changes in the law over time.[19]

Moreover, expanding coverage of noncompetes in a business law or legal environment course can further these valuable learning objectives: (1) to enhance students' understanding of fundamental policy concerns underlying contract and employment law; (2) to encourage students to examine the desirability of noncompetes in employment contracts from multiple perspectives; (3) to encourage students to reach a reasoned conclusion on whether noncompetes are legal and ethical in particular situations; and (4) to encourage students to think broadly about how businesspeople can adapt to applicable legal standards and act wisely to retain valued employees and protect business interests.[20]

Part II of this paper presents a primer on the law of noncompetes, with discussion of policy concerns underlying the law and current trends and issues. While readers will have some level of familiarity with the law of noncompetes, it is hoped that the update, especially as it goes to non-U.S. law, will be helpful. Part III presents ideas for expanding classroom coverage of noncompetes, with exercises that may be implemented easily in an introductory business law or legal environment course. Professors might choose one or more to complement existing coverage of contract law and enhance students' understanding of contract law and policy in general, noncompetes in particular, and the impact of law on business.

II. A PRIMER ON THE LAW OF NONCOMPETES IN EMPLOYMENT CONTRACTS

A. Policy Underlying the Law

A basic tenet of contract law is freedom of contract. Freedom of contract means that, as a general premise,

> Private parties should be left to their own talents and devices in negotiating a business contract. "It is not the role of the courts to make an otherwise valid contract more reasonable from the standpoint of one contracting party." Thus, the courts are not charged with the obligation to rescue a party from a bad bargain.[21]

In a classic 1943 essay, Yale law professor Friedrich Kessler asserted: "Rational behavior within the context of our culture is only possible if agreements will be respected. It requires that reasonable expectations created by promises receive the protection of the law or else we will suffer the fate of Montesquieu's Troglodytes, who perished because they did not fulfill their promises."[22] Further to emphasize its importance, Kessler called freedom of contract "one of the firmest axioms in the whole fabric of the social philosophy of our culture."[23] Courts in general should be "extremely hesitant" to void contracts.[24]

Professor Kessler noted that freedom of contract rests on the notion that each party can effectively look out for its own interests and that "a contract is the result of the free bargaining of the parties . . . who meet each other on a footing of social and approximate economic equality."[25] Often that is not the case. When bargaining strength is unequal, the law may properly limit freedom of contract.

Furthermore, as Kessler observed, there are other fundamental principles in play. A well-functioning economic and social system is not based solely on freedom of contract, but also on "freedom of enterprise" and social justice.[26] He argued, "The 'prestabilized harmony' of a

social system based on freedom of enterprise and perfect competition sees to it that the 'private autonomy' of contracting parties will be kept within bounds and will work out to the benefit of the whole."[27] Kessler thereby recognized three entities that may have an interest in the enforcement of a contract: the two contracting parties and the public. The law must balance their respective interests. Toward that end, certain restrictions on freedom of contract may be warranted.[28]

Seventy years after Professor Kessler's commentary, freedom of contract remains a fundamental principle.[29] Changes in the world, such as new technology, have necessitated ongoing review of contract doctrines,[30] but the basic considerations are the same today. Courts and scholars continue to debate the proper balancing of freedom of contract against other fundamental values, including justice.[31]

There is considerable disagreement about what constitutes justice, or fairness, in the context of contracting. Consider, for example, the difficulty of defining the "just term" or "just price."[32] Does justice simply mean that rules are equally and predictably applied to all parties? Does it require adherence to community standards of good faith or fairness? Does it require equality of exchange and a focus on distributive justice? These are difficult, philosophical questions.[33]

Nonetheless, courts over the past several decades have focused on contract fairness, with an accompanying willingness to restrict parties' freedom of contract in certain situations.[34] For example, it is due to a concern for fairness that courts may refuse to enforce exculpatory clauses, punitive liquidated damage clauses, or noncompetes.[35] There is little consensus, however, on what restrictions are appropriate.[36] The law of noncompetes, described below, certainly reflects this lack of consensus.

Courts are sensitive to criticism that they are being paternalistic.[37] A court acts paternalistically if it "prohibits an action on the grounds that it would be contrary to the actor's own welfare."[38] A court does so, for example, by disallowing a disclaimer of the warranty of habitability or by refusing to enforce an exculpatory clause or punitive liquidated damage clause. Restrictions that are solely or primarily paternalistic may be particularly controversial as they may evidence disrespect for personal autonomy.[39] Scholars argue that paternalistic actions are sometimes justified[40] and that certain actions may appear to be paternalistic but actually give effect to the intentions of a party lacking the bargaining power to negotiate desired terms.[41] Such concerns about disparate bargaining power frequently arise regarding noncompetes.

Courts may be more willing to restrict freedom of contract when not only the welfare of a party to the contract is at issue but also the public interest.[42] Courts will often refuse to enforce contracts that impose "negative externalities" on third parties or that are "injurious to society" at large.[43] For such reasons, courts would not enforce price fixing agreements,[44] contracts to sell body parts or sexual services, or contracts to commit a crime or tort,[45] for example. Courts will thus consider the effects that noncompetes may have on third parties or the public at large.

Noncompetes can affect third parties or the public in negative ways. First, courts recognize a general public interest in employees' freedom of mobility.[46] If noncompetes are enforced, employees' mobility is fettered to a degree. Second, it is thought that competition in general brings better and cheaper goods and services; restraints of trade such as noncompetes hinder free competition and thus may be detrimental.[47] Individuals' access to goods and services is also an issue. If the public is able to do business with other competitors in the market, enforcement of a noncompete may not violate the public interest.[48]

Contracts of certain types of employees present special public policy concerns. For example, a central issue in cases involving noncompetes in partnership and employment contracts of doctors is the effect of noncompetes limiting individuals' access to *preferred* providers and continuity of care. But noncompetes in doctors' contracts are common and often upheld.[49] Interestingly, the American Bar Association prohibits noncompetes in the partnership or employment contracts of lawyers, deeming them unethical and contrary to public policy in limiting clients' choice of representation.[50] Noncompetes in contracts of media employees may also present special public policy issues. Such noncompetes may be contrary to public policy if they would prevent a reporter or other media employee from "contribut[ing] to the free flow of information [that] helps to inform the public's decision-making on political, cultural, consumer, and personal issues."[51]

On the other hand, enforcement of noncompetes may positively impact the public. Companies may be more likely to invest in research and development of human resources, which ultimately benefits the public and individual employees, if they have the protection of noncompetes.[52] For similar reasons, the public has a general interest in the protection of trade secrets and other confidential information, a value that is protected by noncompetes.[53] Moreover, there is a general public interest in freedom of contracting.[54] Society relies on confidence that contractual obligations will be enforced by the courts; to the extent that courts refuse to enforce noncompetes, that confidence may be undermined.

Against this policy backdrop, lawmakers and courts determine the legality of noncompetes in employment contracts. [55] To what degree and in what circumstances should freedom of contract prevail over freedom of competition? How should courts balance the interests of employers, employees, and the public? Reasonable people could certainly come to different conclusions on such difficult questions. It is not surprising, therefore, that jurisdictions have developed different legal standards and approaches. In all jurisdictions, noncompetes are disfavored, due to concern for individual employees whose employment options are restricted and potential negative impact on third parties and the public. But as discussed in the next part of this paper, the law of noncompetes can lead to quite different results from one jurisdiction to another.

B. American Law – Varying State Law Approaches

Statutes in California[56] and North Dakota[57] provide that all noncompetes in employment contracts are void. These statutes reflect a long-standing, strong public policy interest in favor of employee mobility and free competition. As one California court bluntly put it, "The interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed an illegal act accompanying the employment change."[58] California views agreements that prohibit the solicitation of the former employer's customers with growing disfavor; indeed, while historically non-solicitation agreements have been allowed in California, there is now uncertainty as to whether they are enforceable in that state.[59] California law does include protections for trade secrets[60] and may permit enforcement of agreements prohibiting the use of trade secrets by former employees.[61] California regards such limited, trade-secret-related legal protections as adequate to protect employers' interests.

The remaining forty-eight states allow some enforcement of noncompetes in employment contracts.[62] An Indiana decision summarizes the relevant policy concerns and a basic approach:

> Indiana courts have generally recognized and respected the freedom to contract. However, covenants not to compete are in restraint of trade and are not favored by the law. Noncompetition agreements are strictly construed against the employer and are enforced only if reasonable. Covenants must be reasonable with respect to the legitimate interests of the employer, restrictions on the employee, and the public interest. To determine the reasonableness of the covenant, we first consider whether the employer has asserted a legitimate interest that may be protected by a covenant. If the employer has asserted such an interest, we then determine whether the scope of the agreement is reasonable in terms of time, geography, and types of activity prohibited. The employer bears the burden of showing that the covenant is reasonable and necessary in light of the circumstances. In other words, the employer must demonstrate that the former employee has gained a unique competitive advantage or ability to harm the employer before such employer is entitled to the protection of a noncompetition covenant.[63]

The *Restatement (Third) of Employment* reiterates such standards. As a starting principle, "a covenant in an agreement between an employer and former employee restricting a former employee's working activities is enforceable if it is reasonably tailored in scope, geography, and time to further a protectable interest of the employer."[64] Protectable interest is defined as an interest in the employer's confidential information, customer relationships, or "investment in the employee's reputation in the market."[65] Even if such an interest is at stake, as the *Restatement* makes clear, noncompetes that are overbroad in scope, geographical limitations, or duration are not enforceable. What may be reasonable in those regards is highly fact specific and often unpredictable.[66] Furthermore, some states take a narrower view of protectable interest and a stricter view of reasonableness.

Among the states that will enforce noncompetes, there is actually considerable variation, both in the degree to which they are willing to enforce noncompetes and in the particular types of restrictions imposed on noncompetes. This is true whether there is a noncompete statute or noncompetes are governed solely by case law.[67] Some states set relatively specific requirements;[68] others simply rely on a broad reasonableness standard.[69]

Moreover, other types of restrictions may be imposed. Some states make distinctions for certain types of employees. For example, noncompetes may be allowed only for "executive and management personnel" and not other types of employees.[70] Delaware prohibits noncompetes in the contracts of physicians.[71] Both Maine and New York prohibit noncompetes in "broadcasting industry" contracts.[72] Some states permit only certain non-solicitation clauses and not broader noncompetes. For example, Oklahoma allows only agreements that prohibit the former employee from "directly solicit[ing] the sale of goods, services or a combination of goods and services from the established customers of the former employer."[73] While noncompetes prohibiting solicitation of "established customers" are allowed, the Oklahoma Supreme Court has suggested that this term should be narrowly construed, so that noncompetes cannot prohibit solicitation of "present customers" or customers with whom the employer has a "temporary or single-event" relationship.[74]

Professor Norman Bishara analyzed state laws and categorized the states based on strength of enforcement, setting them on a spectrum from strong to no enforcement.[75] Bishara counts Florida and Kansas as those states most willing to enforce them.[76] Indeed, assuming that the employer pleads a protectable interest, Florida law presumes that a noncompete with a duration of six months or less is reasonable.[77] As noted above, California and North Dakota refuse to enforce any noncompetes in employment contracts.[78] Oklahoma's noncompete statute reflects a strong policy position in that state against noncompetes. Legislatures in other states, including Massachusetts[79] and Minnesota,[80] have recently considered outright bans on noncompetes, but to date such efforts have stalled or failed.

C. Foreign Law

American instructors might consider comparing foreign jurisdictions to launch interesting policy discussions about the merits of the current approaches in American states. More practically speaking, multinational companies must look at noncompetes from a global perspective. Employees of these companies may sign a noncompete in the United States and later go to work for a competitor abroad. An important question, therefore, is the degree to which foreign courts will enforce such noncompetes.[81]

Additionally, as noncompete law in Canada and other common law countries is similar to that in various American jurisdictions, as explained below, instructors there could adopt many of the exercises proposed here. A comprehensive discussion of other law outside the U.S. is beyond the scope of this paper, but some brief information follows.

As a starting point, it is appropriate to recognize that labor and employment law in general differs greatly in most other countries from the U.S. approach. For example, most other countries by statute require written employment contracts, recognize a right to work, and expressly favor the rights of the employee over those of the employer.[82] Specifically, even other common law countries do not generally recognize the doctrine of at-will employment for private employees.[83] This greater level of protection for employees would lead to an expectation that noncompetes would be disfavored, and they are.

Not surprisingly, just as particular states in the United States have reached different conclusions on the enforceability of noncompetes, countries have adopted different approaches. India and the Russian Federation regard noncompetes in employment contracts as entirely void,[84] and noncompetes are almost never enforced in Chile and Mexico due to those countries' constitutionally-protected right to freedom of employment.[85] Noncompetes are enforceable in many countries.[86]

In those countries that will enforce noncompetes, the familiar theme of "reasonableness" generally permeates legal standards, as it does in American jurisdictions.[87] Moreover, the same public policy concerns–balancing the interests of the employer, the employee, and the public—are at play.[88] For example, the Supreme Court of Canada held that a noncompete in an employment contract would be enforceable

> only if it is reasonable between the parties and with reference to the public interest. As in many of the cases which come before the courts, competing demands must be weighed. There is an important public interest in discouraging restraints on trade, and maintaining free and open competition unencumbered by the fetters of restrictive covenants. On the other hand, the courts have been disinclined to restrict the right to contract, particularly when that right has been

> exercised by knowledgeable persons of equal bargaining power. In assessing the opposing interests the word one finds repeated throughout the cases is the word "reasonable."[89]

Under Canadian law, noncompetes are presumed unenforceable, but a reasonable noncompete will be upheld.[90] The burden is on the former employer to prove reasonableness by showing a protectable proprietary interest and appropriate limits on duration and geographic scope. If that is shown, the noncompete shall be enforced unless the employee can prove that it is not in the public interest to do so.[91] Canadian courts are particularly unlikely to enforce noncompetes when bargaining power is greatly unequal or when a non-solicitation clause would suffice.[92] Furthermore, Canadian courts will not rewrite overbroad agreements.[93] In sum, it may be said that "Canadian law and public policy thus favor the employee."[94]

Even if the law of the foreign country permits noncompetes, however, enforcing them abroad may be difficult for practical or legal reasons. Among other challenges may be thorny choice-of-law questions.[95] Companies should also anticipate the costs of drafting and enforcement. Obviously, it would be impossible to draft a standard noncompete to cover all employees in all countries.

D. Trends and Current Issues

Based on his empirical study, Professor Bishara argued in 2009 that there is a trend in the United States toward greater enforcement of noncompetes.[96] Professors Michael Garrison and John Wendt, on the other hand, have concluded that recent state supreme court cases and legislative developments show heightened judicial scrutiny of noncompetes, making it more difficult for employers to enforce them.[97] Some of this lack of unanimity about trends in noncompete law may be due to the difficulty of assessing and categorizing myriad common law decisions and a large array of varying state requirements.

What is clear, however, is that the law on noncompetes is not static. Legislatures around the country continue to consider noncompete legislation, some to ease noncompete enforcement,[98] some to restrict it.[99] Court cases have proliferated,[100] providing judges opportunity to adjust or refine the law.[101] Changes in the law may come more quickly through legislative action than common law development. That may be advantageous or not. A recent editorial on proposed noncompete legislation in Connecticut opined, "Legislative remedies . . . are often not the best answer. Such remedies are often drastic and short-sighted. The cure lies in a process of orderly judicial reconsideration and doctrinal evolution."[102]

Scholars suggest that much recent attention to the law of noncompetes is due to changes in the employment relationship attributable to technology[103] or pressures imposed by globalization[104] or the economic downturn.[105] It has also been fueled by academic studies from management and social psychology scholars on how noncompetes affect entrepreneurship and business decisions on where to locate. Some research suggests that entrepreneurs are more likely to locate in states such as California that ban or greatly restrict noncompetes.[106] These studies have gained considerable attention both in the academic literature[107] and the popular press[108] and may influence policymakers in states are looking to attract businesses, especially technology-based businesses that may bring high paying jobs.

A prominent empirical study by Professor Matt Marx and coauthors concludes that enforcement of noncompetes significantly decreases employee mobility, particularly of employees in technologically specialized jobs.[109] Mobility is thought to be "a key to the growth

and development of new firms and, by extension to regional economic development."[110] These researchers conclude that "noncompetes drive away those workers who are most productive and collaborative, while retaining arguably less attractive workers,"[111] thus creating a "brain drain" of highly skilled workers and entrepreneurs.[112]

One should be wary of reaching broad conclusions based on these studies, as the researchers themselves identify limitations.[113] It would an oversimplification to assign primary credit for either a vibrant or moribund entrepreneurial climate to noncompete policy. Companies and individuals, of course, may take many factors into account in deciding where to locate or where to work. Moreover, it is not clear that the entrepreneurial climate is positive even in those states that are most hostile to noncompetes.[114] Nonetheless, the Marx and other studies suggest some important points.

First, employers may have different ideas on the desirability of noncompetes. Startup companies may prefer to locate in states with weak noncompete enforcement, all other factors being equal. These small, new firms are in need of employees and may not have the resources or inclination to engage in battles on noncompetes. At least at first blush it would appear that large, established companies may seek the protection of noncompetes and prefer to be in states that allow them.

But some scholars make the case that noncompetes are broadly destructive of working relationships and ultimately lead to less success for all firms. Professor Orly Lobel argues, "[E]xcessive controls of talent and inventiveness are harmful to careers, regions, and innovation." [115] Furthermore, "[H]igh employee turnover—talent moving fluidly among businesses—is positively correlated with productivity, particularly in industries in which research and development are core activities."[116] She maintains that this is true at large, established companies such as Coca-Cola and Southwest Airlines, as well as at small, newer firms.[117] She suggests that in the absence of noncompetes, employee morale and productivity are higher due to the greater sharing of knowledge.[118] Lobel's theories are based on the management, social psychology, and organizational strategy disciplines.[119]

Other scholars make a more practical point regarding the desirability of noncompetes:

> A less costly, more direct and effective strategy for employee retention would be to increase employee morale and job satisfaction, in turn enhancing loyalty to the firm. The employer interested in reducing turnover and training costs, protecting working relationships between teams of workers, protecting customer relationships, and preventing the leakage of valuable information to its competitors will not be able to accomplish all of those goals with a noncompete clause.[120]

Even in states that honor noncompetes, they must be limited in scope and enforcement is uncertain and may require great expense. Moreover, retaining employees by compulsion likely does not lead to the same productivity of a loyal employee who stays with a company by choice. The literature offers suggestions on how to engender that sort of employee loyalty, such as providing employees good pay and a voice in how the company is run.[121]

Companies that elect to have employees sign noncompetes, of course, must consider optimal terms. Figure 1 lists some "best practices" for noncompetes, in light of legal requirements and ethical considerations.

Employers located in jurisdictions friendly to noncompetes often include a choice of law provision. Such provisions are common in business contracts of various types. They are generally thought to be beneficial, as the parties thus know in advance the law that applies and

need not dispute that issue. Courts in some recent noncompete cases, however, have declined to enforce choice of law provisions if law of the named jurisdiction would in that court's view contravene public policy.[122]

Employers should avoid drafting overly restrictive noncompetes, for both ethical and legal reasons. Employers perhaps perceive little risk in drafting unreasonable noncompetes because employees may rarely challenge them, believing the restrictions valid or lacking inclination or resources to fight unreasonable noncompetes in court.[123] Moreover, courts in most states will merely "blue-pencil" overly restrictive noncompetes, reforming their terms to be reasonable,[124] rather than striking down illegal clauses altogether. There may thus seem to be little risk in overreaching. But in addition to the fact that it is un-

- Tailor noncompete to **specific legal requirements** of your jurisdiction. There is no standard noncompete that will satisfy the requirements of every jurisdiction and fit every employee's particular situation.
- Consider **which employees** should have noncompetes—e.g., only those in executive positions or with access to proprietary information.
- Sign when **employment commences**.
- Make sure employee **signs knowingly**. Present noncompete separate from other paperwork, explain it, and give employee time to consider it.
- Minimize need for interpretation. **Be specific**, for example, in defining geographic limitations or competitors for whom employee may not work.
- Consider **choice of law** and forum selection clauses.
- **Don't overreach**. Better to have a less restrictive noncompete that is enforceable than a more restrictive one that is not.

Figure 1. Best Practices for Noncompetes.

ethical knowingly to take advantage of employees in this manner,[125] there is significant legal risk: if "the employer lacked a reasonable and good-faith basis for believing the covenant was enforceable," it shall be struck down,[126] freeing the employee to compete at will. There may be further legal consequences for such overreaching. For example, Texas law in such cases authorizes an award of attorneys' fees.[127] Requiring an employee in California to sign a noncompete is criminal.[128]

III. IDEAS FOR EXPANDING COVERAGE OF NONCOMPETES IN A BUSINESS LAW OR LEGAL ENVIRONMENT COURSE

Inspired by a deeper understanding of noncompete law and policy, the author expanded coverage of noncompetes in two legal studies courses during the 2013-14 academic year. The first is a typical undergraduate introductory Business Law course.[129] The second is a graduate course in Fundamentals of Law for an interdisciplinary, science/engineering/business master's degree program with a focus on entrepreneurship.[130]

Both courses employ primarily a lecture/modified Socratic method format. A skillfully handled lecture combined with class discussion is an effective way to help students master complex material.[131] Students, however, tire of a single approach. The author has endeavored to

complement the lectures with occasional active learning, group-based work.[132] The topic of noncompetes provides a good opportunity for that sort of exercise.

A. Undergraduate Business Law Course

1. Pre-Class Preparation, Lecture, and Group Exercise

In past years, the author devoted one 75-minute class session to material from the textbook chapter on Capacity and Legality, with lecture on those topics. While discussion of capacity can be interesting and can make for an entertaining lecture,[133] in practice the topic is of relatively low importance. Accordingly, the author decided in 2013-14 to devote the majority (one full hour) of the class session to legality. Furthermore, the author regards noncompetes to be the most important legality issue, and other topics typically included in the textbook (e.g., gambling contracts, contracts to commit a crime, usurious contracts) to be both less important and understandable from the reading assignment. Therefore, this year, rather than having a longer lecture on a broad range of legality topics, the author shifted to a brief lecture focusing primarily on noncompetes, followed by a group exercise.

As pre-class preparation, students read the textbook chapter on Capacity and Legality[134] and were instructed to examine the sample noncompetes provided here in Appendix A. Viewing actual noncompetes underscores the real-life nature of this topic and fleshes out the brief, abstract discussion in the textbook. Having looked at actual agreements, students came to class with some basic idea of what terms may be included. They also saw that these agreements can vary widely.

Further, students were instructed to prepare before class brief written answers to the following Study Questions:[135]

- If your last name begins with A-L, think about noncompetes from an employee's perspective. Would you sign a noncompete? Would you sign under some circumstances but not others? Explain, listing two possible advantages of signing, and two reasons not to sign.
- If your last name begins with M-Z, think about noncompetes from an employer's perspective. Would you ask employees to sign a noncompete? Would noncompetes be appropriate under some circumstances or for some employees but not others? Explain, listing two possible reasons to require a noncompete, and two reasons not to require one.

The author began the class session with a fifteen minute lecture on noncompetes.[136] The lecture was designed to further two learning objectives: first, to enhance students' understanding of policy underlying the law, and second, to equip them to think about whether noncompetes are legal and ethical in particular situations. Accordingly, the lecture covered policy and legal issues set out in part II above. While students would have seen mention of "freedom of contract" in the textbook, the lecture aimed to develop in students a fuller understanding of that doctrine, its limits, and competing interests. The lecture examined varying state law approaches to noncompetes. A PowerPoint slide with a map depicting strength of enforcement in various states was a useful visual aid.[137]

The group exercise then commenced. The day's Study Question for students from the first half of the alphabet focused on noncompetes from the employee's perspective. These students were asked to form groups of four or five and spend about fifteen minutes discussing

whether and under what circumstances they would sign a noncompete. Each group was also asked to discuss the sample noncompetes and consider the likelihood that each would be enforceable and which they would feel most comfortable signing. Each group was provided a sheet on which to list positive and negative factors and was instructed to prepare briefly to explain its conclusions to the class.

Likewise, students from the last half of the alphabet formed groups to look at these issues from the employer's perspective. Working together, students generally came up with appropriate and varied considerations. The author circulated among the groups, prompting them to consider how the particular context would be important—for example, the employee's job, relative bargaining power, and whether the labor market would allow the employer easily to fill the position and the employee to find other work without violating the agreement. The author also encouraged students to think about broader, strategic, and ethical concerns. Figures 2 and 3 depict possible responses for an employee group and an employer group, respectively.

Would you sign a noncompete?

Advantages	***Disadvantages***
Quid pro quo—salary or promotion	Restriction on mobility, freedom
No choice if you want certain jobs	No money to fight it if challenged
Could work outside restricted industry during restricted time period	
May be unenforceable	
Employer may not try to enforce	
Could try to negotiate better terms later if wish to leave	

Figure 2. Form and Responses for Group Considering Noncompetes From Employee Perspective.

Until this point, students had been focused on a single point of view—that of the employee or employer. Full analysis and effective argument require, however, that students consider the points of view of all relevant stakeholders.[138] Toward that end, the entire class reconvened. First, a group that had considered the employee perspective presented; other employee groups then put forward any additional ideas. The author recorded students' ideas on advantages and disadvantages on a PowerPoint slide during the discussion. Next, similarly, an employer group presented, and a slide on advantages and disadvantages was developed. This intentional focus on the differing perspectives of employees and employers yielded a thoughtful, spirited discussion on the desirability of noncompetes.

Students finally were asked to share their views on the sample noncompetes. This provided opportunity to apply their knowledge of legal standards and also to think about strategic considerations. Students should observe, for example, that the first noncompete is of infinite duration[139] and for that reason is almost uncertainly unreasonable and unenforceable in any state. Ironically, employees might actually prefer to sign such an obviously overbroad noncompete, for the reason that it is unenforceable.[140] The second noncompete is also of infinite duration, and students might notice the ambiguity inherent in "any business substantially similar." The fourth noncompete has the virtue of being specific and could be completed with appropriate limitations on duration and geographic scope, but students may observe that employees are likely to find its length intimidating. Students may prefer the third or fifth noncompetes as shorter, still reasonable options. The liquidated damage provision in the sixth noncompete may well be punitive and illegal for that reason.

Will you ask new employees to sign noncompetes?

Advantages	***Disadvantages***
Protection against loss of proprietary information, goodwill, investment in training	May lose talented, ambitious people who refuse to sign
Deterrent effect—employees won't challenge	Costs of drafting and enforcement
May be other ways to retain employees	Creates negative work atmosphere?
	May be unenforceable
	May not be necessary due to other legal protections

Figure 3. Form and Responses for Group Considering Noncompetes from Employer Perspective.

2. Written Assignment

This topic provides natural opportunities for writing assignments that challenge students to think about broader policies underlying the law. As various jurisdictions' lack of unanimity suggests, reasonable people could disagree on the desirability of noncompetes. Moreover, even those who support noncompetes in some circumstances could disagree on particular standards. The written assignment for the undergraduate business law course challenged students to argue a position on the following question:

> The legislature of the Commonwealth of Massachusetts has been considering a bill that would outlaw covenants not to compete ("noncompetes") in employment contracts. The text of House Bill 1729 is available at https://trackbill.s3-us-west-2.amazonaws.com/bills/MA/188/1729/texts/current/pdf. Were the bill to become law, Massachusetts would join California and North Dakota in banning such covenants; they are enforceable to some degree in all other states. Evaluate the most compelling arguments for and against the Massachusetts legislation. Explain whether you would support such legislation and why.[141]

Students completed three- to four-page papers on this topic. They were required to augment their own analysis with research. Interestingly, students divided almost exactly evenly on whether or not they believed the legislation to be advisable.

Appendix B contains other recommended topics for written assignments on noncompetes, some with a policy focus, others with a more practical, managerial focus.

B. Graduate Legal Environment Course

Students in the graduate course came with inherent interest in the topic of noncompetes. All students were preparing to work in a science or technology field, where noncompetes are prevalent. Many students were preparing to launch their own technology firms. These students would be considering where it may be advantageous to locate their firms. They would also be hiring employees and perhaps asking them to sign noncompetes to protect the firm's competitive advantage. Other students expected to become employees of existing firms and would likely be asked to sign them. Thus, some students were naturally coming from the employer's perspective and others from the employee's. Those divergent interests provided an opportunity for particularly invigorating classroom discussion about noncompetes.

An entire class 75-minute class session was devoted to noncompetes. This class session followed a single class session on contract law in general.[142] As a pre-class reading assignment on noncompetes, the students read a short article laying out the basics of noncompete law[143] and two news articles highlighting managerial and strategic questions that may arise in connection with noncompetes.[144] They were also to look at the six sample noncompetes.

As in the undergraduate class, class began with a short lecture. Students in the graduate class similarly gathered in groups to discuss the advisability of noncompetes and the sample noncompetes from either the employee's or employer's perspective. The subsequent class discussion had a managerial focus, appropriate due to the career plans of these particular students. Among other topics, students discussed whether noncompete law would affect their company's decision on where to locate; whether it is ethical to require noncompetes; and how noncompetes may affect their workforce.

This course also required students to produce a written assignment. During the one-year interdisciplinary master's program, each student works on plans for commercializing an actual invention. For the law course, students wrote a report on legal issues connected with this thesis project, including the possibility of noncompetes. This task tested students' abilities to recognize strategic issues and to assess the enforceability of a noncompete in a particular situation.

Although this particular master's program has unique features, including the students' scientific background and the thesis project that provides a natural focus for the written assignment, the author believes that similar activities would translate well and easily to other graduate or undergraduate legal environment courses.

IV. CONCLUSION

The topic of noncompetes is a rich one for a business law or legal environment course. It presents opportunities to tie law and policy, law and ethics, law and strategy. It exemplifies the challenges businesses and employees may face in a changing, complex, uncertain environment. It may incite vehement opinions in students. In short, it begs for more than cursory attention.

Accordingly, this paper provides materials on noncompetes that are readily adaptable for use in business law or legal environment courses, on the undergraduate or graduate level. Instructors may simply use the materials gathered here to inform a deeper lecture and class discussion on noncompetes. They may put students to work on the group exercise or a written assignment, or both. Or these materials may inspire ideas for other worthy exercises.

Such a closer look at noncompetes will be of immediate practical benefit to students, as it arms them with knowledge about a controversial contract clause they may well see as they enter the workforce. Perhaps more importantly, it will enhance their basic understanding of law, policy, and strategic considerations for business.

APPENDIX A

SIX SAMPLE NONCOMPETES[145]

1. Employee agrees as a condition of employment that, in the event of termination for any reason, Employee will not directly or indirectly, either individually or as a principal, partner, agent, employee, director, or officer of any corporation or association, compete against the Company, or aid or assist any other person, firm, or corporation in any business which directly or indirectly competes with the Company or any subsidiary corporation thereof in the United States.

2. Employee will not own, manage, or materially participate in any business substantially similar to that of Employer's business within a ___-mile radius of the Employer's principal business address.

3. The undersigned understands and agrees that the Company has a vital interest in retaining the loyalty, fidelity, and continued employment and association of its employees and customers. He/she warrants, covenants, and agrees that while employed by the Company and for a period of one year following termination of his/her employment with the Company for any reason, he/she shall not, directly or indirectly, (1) induce, solicit, offer, or recruit, or attempt to induce, solicit, offer, or recruit and registered representative of the Company to apply for or accept employment with any other person or entity engaged in the securities business or which is in any manner in competition with the Company; or (2) induce, solicit or attempt to induce or solicit any customer of the Company to move his, her, or its account out of the company. Notwithstanding any provision set forth above, upon termination of employment with the Company, the Employee may contact, solicit, or do business with any customers whose accounts he/she serviced at any time prior to employment at the Company.

4. During my employment with the Company and for a period of _____ after my employment is terminated by the company or by me for any reason, with or without cause:

    a. I will not, in [define geographic territory], directly or indirectly, engage in or own or control any interest in (except as a passive investor in publicly held companies and except for investments held at the date hereof), or act as an officer, director, or employee of, or consultant or advisor to, any firm, corporation, or institution directly or indirectly in competition with or engaged in a business substantially similar to that of the Company, including the manufacture or sale of products or the provision of services which the Company was engaged in, or was developing at the time my employment terminates.
    b. I will not recruit or hire any employee of the Company, or otherwise induce such employee to leave the employment of Company, to become an employee of or otherwise associated with me or any company or business with which I am or may become associated.
    c. I will not solicit or have any contact with any person who was a customer of the Company at the time of my termination of employment or within one year prior thereto and for whom I rendered services or with whom I became acquainted as a result of my duties with the Company.
    d. I understand that in the event of a violation of any provision of this Agreement, the Company shall have the full right to seek injunctive relief, in addition to any other existing rights provided in this Agreement or by operation of law. I shall reimburse the Company for all costs, expenses, or damages it incurs as a result of any violation by me of any provision of this Agreement. This obligation shall include court costs, litigation expenses, and reasonable attorneys' fees.
    e. I acknowledge that the restrictions imposed by this Agreement are fully understood and will not preclude me from becoming gainfully employed following a termination of my employment with the Company.
    f. The foregoing restrictions are limited to [describe the type of activity or job the employee is precluded from taking]. [Delete this section of the employee is precluded from taking any position with a designated competitor.]

5. After the termination or expiration of this Agreement, Employee shall not engage in competition with Employer for a period of __ years, within the following geographic area: [describe area, using city names, square mile radius descriptions, or other geographic parameters].
    a. Competition defined. Competition means working for a company engaged in, or engaging in self-employment in, the [describe business]; or providing services similar to those provided while employed by Employer to any person or business that was a client of Employer during Employee's tenure.

b. Damages. In the event Employee breaches this Agreement, Employee agrees to pay $_____ as liquidated damages.

6. The Employee agrees to refrain completely from extending any services whatsoever to any client of the Employer or to any officer, employee, or related entity of such clients during his employment and for two years thereafter, whether directly or indirectly for his own behalf. In the event that such infringement of this agreement occurs, the Employee agrees to pay the Employer liquidated damages of two times the employer's annual fees received from the client prior to the infringement. This contract shall be enforced according to the law of the State of _____ and may be determined by arbitration.

APPENDIX B

ALTERNATE TOPICS FOR WRITTEN ASSIGNMENT

1. In his classic 1943 essay, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, Yale law professor Friedrich Kessler discusses the merits of this fundamental principle of law, as well as when and why freedom of contract properly may be limited. Read Professor Kessler's essay at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3728&context=fss_papers.[146] Discuss Kessler's analysis with reference to noncompete law. If Kessler's theories are followed, what sorts of limitations should the law impose on noncompetes? Does Kessler's analysis translate successfully to this particular kind of contract? Does it withstand the test of time? Would you suggest any refinements to Kessler's analysis? Explain.

2. You are Director of Human Resources for [*a small manufacturing firm* or *a national retailer* or *an accounting firm*] headquartered in [*your town*]. Having attended a professional meeting where noncompetes were discussed with enthusiasm, the CEO is wondering whether it may be advisable to have all employees sign noncompetes. The CEO has asked you to prepare a three- to four-page memo, recommending specifically what company policy on noncompetes should be and why. Briefly discuss any legal, ethical, and strategic concerns that underlie your recommendations.[147]

3. Describe the job you hope to obtain after graduation—what you would be doing and where you would be located. Could your employer properly seek a noncompete?[148] If so, what sorts of restrictions would be reasonable? Are you confident in your answers to these questions? Explain. Please also address whether you would sign such an agreement. How might a noncompete affect your working relationship with the company?

4. You are an entrepreneur planning to launch a new company. Will noncompete law affect your decision on where to locate your headquarters or manufacturing facilities? Explain.

[1] A covenant not to compete is "A promise, usually in a sale-of-business, partnership, or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partnership, or employer." BLACK'S LAW DICTIONARY 420 (9th ed. 2009).
[2] Amy Lange, *Woman Looking for Work After Subway Enforces Non-Compete Contract*, MYFOXDETROIT.COM (Oct. 30, 2013, 6:40 PM), http://www.myfoxdetroit.com/story/23823034/woman-fighting-to-work-at-another-restaurant-after-subway-enforces-non-compete-contract#ixzz2uRfZe4wX.
[3] *Id.*
[4] Gregory D. Hanscom, *When Coaches Can't Compete: Non-Competes in Sports*, NONCOMPETENEWS.COM (Sept. 30, 2013, 8:00 AM), http://www.noncompetenews.com/post/2013/09/30/When-Coaches-Cant-Compete-Non-Competes-in-Sports.aspx (linking to pdf of actual employment contract).
[5] E-mail from student to author (Oct. 28, 2013, 3:18 PM EDT) (on file with author) (providing copy of employment contract).
[6] *See, e.g.*, Ken Matheny & Marion Crain, *Symposium: Law, Loyalty, and Treason: How Can the Law Regulate Loyalty Without Imperiling It?: Disloyal Workers and the "Un-American" Labor Law*, 82 N.C.L. REV. 1705, 1745 (2004) ("[N]oncompetes are proliferating in number"); Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1149 (2009) ("In the past, only the most valuable employees . . . were subject to noncompetition clauses. Today, however, many at-will employees are also subject to such restrictions").
[7] Matt Villano, *The Noncompete Clause: Balk at Your Own Risk*, NYTIMES.COM (Jan. 21, 2007), http://www.nytimes.com/2007/01/21/business/yourmoney/21advi.html?_r=0.
[8] Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695, 696 (2011) ("[N]early half of technical professionals in several industries are subject to non-competes.").
[9] *E.g.*, Sam Williams, *Agreements With Employed and Independent Sales Reps*, INSIDE TUCSON BUSINESS (May 4, 2012, 12:00 PM), http://www.insidetucsonbusiness.com/sales_marketing/sales_judo/agreements-with-employed-and-independent-sales-reps/article_5c976624-954f-11e1-b925-0019bb2963f4.html.
[10] Cathy Packer & Johanna Cleary, *Rediscovering the Public Interest: An Analysis of the Common Law Governing Post-Employment Non-Compete Contracts for Media Employees*, 24 CARDOZO ARTS & ENT. L.J. 1073, 1073-74 (2007) ("[T]he use of such contracts has 'exploded to restrict everyone from the anchor to the tape editor.'"). This article cites sources suggesting a high prevalence of noncompetes in contracts of employees in radio, television, newspaper, advertising, public relations, and Internet-related industries. *Id*. at 1074.
[11] *See, e.g.*, Eric Ostroff, *Protecting Trade Secrets in the Restaurant Industry*, PROTECTING TRADE SECRETS (July 31, 2013), http://tradesecretslaw.wordpress.com/2013/07/31/protecting-trade-secrets-in-the-restaurant-industry/ (describing lawsuit brought by Miami restaurant to enforce noncompete against departed "celebrity" chef).
[12] *See* Norman D. Bishara et al., *When Do CEOs Have Covenants Not to Compete in Their Employment Contracts?* 52-53, http://ssrn.com/abstract=2166020 (Feb. 11, 2013), 68 VAND. L.REV. – (forthcoming 2015) (finding a statistically significant trend toward greater usage of noncompetes in CEO contracts, especially in jurisdictions that are willing to enforce them, and especially in longer term contracts and in profitable firms).
[13] Michael C. Lasky & Daniel S. Greenberg, *The Increased Importance of Non-Compete Agreements for Accounting Firms*, CPA J. 54, 54 (Aug. 2012) (citing "growing numbers" of accounting firms requiring noncompetes) .
[14] ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 51 (2013).
[15] *See, e.g.*, Shelley McGill, The Social Network *and the Legal Environment of Business: An Opportunity for Student-Centered Learning*, 30 J. LEGAL STUD. EDUC. 45, 53-55 (2013) ("[L]earning is most likely to occur when instructors present primary experiential opportunities that are relevant, reality based, and connected to the student's world."); Tonia Hap Murphy, *Reneging: A Topic to Promote Engaging Discussions about Law and Ethics in a Business Law or Legal Environment Course*, 26 J. LEGAL STUD. EDUC. 325, 339-41 (2009) (discussing desirability of bringing into the classroom real world issues students are likely to encounter early in their careers). Cognitive scientist Daniel Willingham notes that students are most likely to learn and remember material if they care about it and see its relevance to their lives. DANIEL T. WILLINGHAM, WHY DON'T STUDENTS LIKE SCHOOL? A COGNITIVE SCIENTIST ANSWERS QUESTIONS ABOUT HOW THE MIND WORKS AND WHAT IT MEANS FOR THE CLASSROOM 64-75 (2009).
[16] *See, e.g.*, JEFFREY BEATTY & SUSAN S. SAMUELSON, ESSENTIALS OF BUSINESS LAW 230, 295-96 (4th ed. 2012); HENRY CHEESEMAN, CONTEMPORARY BUSINESS LAW 212-13 (8th ed. 2015); KENNETH W. CLARKSON ET AL., BUSINESS LAW 279-81, 371-72 (13th ed. 2015); FRANK B. CROSS & ROGER LEROY MILLER, LEGAL ENVIRONMENT

OF BUSINESS 212-213, 389-390 (9th ed. 2015); NANCY K. KUBASEK ET AL., DYNAMIC BUSINESS LAW 373-75 (3d ed. 2015); O. LEE REED ET AL., THE LEGAL AND REGULATORY ENVIRONMENT OF BUSINESS 328 (16th ed. 2013).

[17] *See, e.g.*, DOROTHY DUPLESSIS ET AL., CANADIAN BUSINESS AND THE LAW 182-84 (5th ed. 2014); MITCHELL MCINNES ET AL., MANAGING THE LAW: THE LEGAL ASPECTS OF DOING BUSINESS 664-65 (4th ed. 2013); JAMES E. SMYTH, ET AL., THE LAW AND BUSINESS ADMINISTRATION IN CANADA, 171-176 (14th ed. 2013).

[18] Such an emphasis aligns with the wise suggestion that professors should emphasize "a managerial approach that is practical for future business practitioners." Marc Lampe, *A New Paradigm for the Teaching of Business Law and Legal Environment Classes*, 23 J. LEGAL STUD. EDUC. 1, 5 (2006).

[19] Lampe noted these as features of the system that students find confounding. *Id*. at 11.

[20] This goal fits with Lampe's paradigm of emphasizing a relevant, practical, managerial approach. Lampe, *supra* note 18. Lampe argues in general for a de-emphasis of contract law topics. *Id*. at 36-37; *see also* Carol J. Miller & Susan J. Crain, *Legal Environment v. Business Law Courses: A Distinction Without a Difference?*, 28 J. LEGAL STUD. EDUC. 149, 151-62 (2011) (noting arguments for and against "business law" approach emphasizing contract coverage and broader "legal environment" approach). The author endorses a practical, managerial approach and suggests that contract law topics can provide excellent vehicles for important managerial lessons.

[21] LARRY A. DIMATTEO, EQUITABLE LAW OF CONTRACTS: STANDARDS AND PRINCIPLES 85-86 (2001) (quoting Stack v. State Farm Mut. Auto Ins. Co., 507 So. 2d 617, 619 (Fla. 1987)).

[22] Friedrich Kessler, *Contracts of Adhesion--Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 629 (1943).

[23] *Id.* at 641.

[24] *Id.* at 631.

[25] *Id*. at 630.

[26] Justice, for Kessler, "means freedom of property and of contract, of profit making and of trade." *Id*. at 640.

[27] *Id*.

[28] Kessler's particular focus was whether courts should deny enforcement to certain terms in standardized insurance contracts (adhesion contracts) foisted on policyholders. *Id.* at 636-48.

[29] *See, e.g*., DIMATTEO, *supra* note 21, at 85-86; Horacio Spector, *A Contractarian Approach to Unconscionability*, 81 CHI.-KENT L. REV. 95, 95 (2006) ("Given the strong case for freedom of contract, the burden of proof falls on any position that purports to restrain its scope."). The Supreme Court in a recent Federal Arbitration Act (FAA) case upheld class action waivers despite contrary policy arguments. *See* Am. Express Co. v. Italian Colors Rest., 133 S.Ct. 2304, 2309 (2013) (affirming that the FAA makes arbitration "a matter of contract" and that under the FAA, "courts must "rigorously enforce" arbitration agreements according to their terms."). Commentators have noted (and criticized) the Court's emphasis on freedom of contract principles in that case. *See, e.g.*, Jeffrey M. Hirsch, *The Supreme Court's 2012-2013 Labor and Employment Law Decisions: The Song Remains the Same*, 17 EMPL. RTS. & EMPLOY. POL'Y J. 157, 187-88 (2013) (discussing *American Express* and noting that "freedom of contract is a hallmark of several of the Court's cases this term and many earlier ones."); John M. Landry & Anna S. McLean, *The Contract Is King: The U.S. Supreme Court's Two Recent FAA Decisions*, 14 Class Action Litig. Rep. (BNA) 1193 (Sept. 27, 2013) (concluding that *American Express* "elevate[s] the FAA's freedom of contract goal over other state or federal public policy norms"). Freedom of contract is a cornerstone of the law in other countries as well. *See, e.g.*, RICK BIGWOOD, EXPLOITATIVE CONTRACTS 1 (2003) (discussing law of English-speaking nations and citing "our ordinary conviction that contracts apparently entered into should be binding").

[30] *See, e.g*., Scott R. Peppet, *Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts*, 59 UCLA L. REV. 676 (2012) (discussing information asymmetries and freedom of contract, and arguing that because consumers now have digital information that allows them to make informed decisions about firms and products, as well as contract terms, courts should generally enforce contracts as written). Peppet observes: "[C]ritical aspects of contract law were designed to resolve the problems of an economy in which contracting parties knew relatively little about each other, the goods they were trading, or the markets in which they operated"—a situation that may no longer exist. *Id*. at 745.

[31] *See, e.g.*, DIMATTEO, *supra* note 21, at 62-65. DiMatteo identifies four values underlying contract law: freedom, security, justice, and efficiency. *Id.* at 62. Freedom, security, and efficiency may be characterized as the "freedom norms." Id. at 64-65. Security means "security from interference with the exercise of contract rights and the security that the legal system will insure that you will receive what has been promised." Efficiency refers to "the benefits of maximizing wealth by minimizing costs." *Id.* at 62-63. Those who endorse a Law and Economics perspective would put the most weight on the value of efficiency. For a Law and Economics perspective on the desirability of enforcing noncompetes, see Norman D. Bishara, *Covenants Not to Compete in a Knowledge*

Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment, 27 BERKELEY J. EMP. & LAB. L. 287 (2006).

[32] *See, e.g.*, Richard Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 306 (1975).

[33] Comprehensive discussion is beyond the scope of this paper, but both DiMatteo and Bigwood provide thoughtful and comprehensive coverage. *See* DIMATTEO, *supra* note 21, at 149-77; BIGWOOD, *supra* note 29, at 59-86.

[34] "Through the courts, the law of contracts has rescued many parties from the harm of bad bargains. . . . Countervailing principles of fairness modify the full enforcement that is dictated by a cold application of freedom of contract." DIMATTEO, *supra* note 21, at 86-87.

[35] *See id.* at 91-97.

[36] *See, e.g.*, Richard Craswell, Coase Lecture at Univ. of Chicago: Freedom of Contract (Dec. 6, 1994), *available at* http://www.law.uchicago.edu/node/1303. Craswell observed, "Talking about freedom of contract is tricky, because the topic carries a heavy ideological charge. Depending on one's point of view, freedom of contract can be seen as a choice between individual liberty and heavy-handed government control, or between communitarian consensus and the worst excesses of *laissez-faire* capitalism." *Id.* at 1. Professor Craswell approaches the issue from a law and economics perspective, examining the efficiency of various restrictions. He notes, "[A]nalysis of the efficiency of any given clause will often be very difficult, and courts (or other legal institutions) may not be very good at the task." *Id*. at 20.

[37] DiMatteo quotes Farnsworth: "[N]owhere has judicial paternalism in the service of public policy been more at war with judicial *laissez-faire* in the name of freedom of contract as in the area of covenants not to compete." DIMATTEO, *supra* note 21, at 95 (quoting E. ALLAN FARNSWORTH, CONTRACTS §5.3, at 356-57 (2d ed. 1990)).

[38] *E.g.*, Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 763 (1983).

[39] Such paternalistic restrictions "raise special problems from a moral point of view." *Id.* at 764. *See also* BIGWOOD, *supra* note 29, at 64-65 ("People therefore generally 'deserve' to have their lives governed by their choices (at least where those people are governed by conditions under which they can in fact act autonomously), whether those choices turn out well or badly for them . . . . Strong reasons must be advanced in order to justify legal interference with autonomous choices on *paternalistic* grounds.").

[40] *See, e.g.*, Spector, *supra* note 29, at 105-06; Kronman, *supra* note 38. Another scholar finds Kronman's philosophical arguments unconvincing and suggests that paternalistic restrictions are in general "an affront to human dignity, an egregious attack on liberty," and in general an unwise abrogation of freedom of contract. *See* Walter Block, *Alienability, Inalienability, Paternalism and the Law: Reply to Kronman*, 28 AM. J. CRIM. L. 351, 352 (2001).

[41] Spector, *supra* note 29, at 105-06 (noting that under a utilitarian theory, in certain situations government interference may be "required, not to overrule the judgment of individuals respecting their own interest, but to give effect to that judgment; they being unable to give effect to it except by concert"). Spector gives the example of maximum-hours laws.

[42] *E.g.*, Kronman, *supra* note 38, at 763 (observing that many limitations on freedom of contract are imposed to protect the interests of third parties or the public at large and are relatively noncontroversial).

[43] BIGWOOD, *supra* note 29, at 93.

[44] Kronman, *supra* note 38, at 763.

[45] BIGWOOD, *supra* note 29, at 92-93.

[46] *See, e.g.*, Bimbo Bakeries USA, Inc. v. Botticella, 613 F. 3d 102, 119 (3d Cir. 2010) (citing a general public interest in "employees being free to work for whom they please"); *see also* Norman D. Bishara & Michelle Westermann-Behaylo, *The Law and Ethics of Restrictions on an Employee's Post-Employment Mobility*, 49 AM. BUS. L.J. 1, 8 (2012) (noting that "freedom of mobility has become increasingly more important for employees as the new psychological employment contract eschews notions of loyalty and commitment, thereby eliminating the security of long-term employment, pay and promotions based on tenure, and generous pensions for retirement"); 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, 94 (2010) (discussing "fundamental public interest in maximizing personal liberty").

[47] *See, e.g.*, Firstenergy Solutions Corp. v. Flerick, 2013 U.S. App. LEXIS 7520, at *21 (6th Cir. Apr. 15, 2013) (upholding district court grant of injunction enforcing noncompete and observing the "there is no indication that the public will be deprived of access to competitively priced electricity" thereby); Stryker Corp. v. Bruty, 2013 U.S. Dist. LEXIS 66838, at *21 (W.D. Mich. May 10, 2013) (noting public interest in bringing better medical technology to the market, but finding no evidence that noncompete at issue would hinder new employer from bringing its

products to market); APAC Teleservices, Inc. v. McRae, 985 F.Supp. 852, 867 (N.D. Iowa 1997) (noting that "the public has an interest in ensuring business competition that keeps prices low and quality high").

[48] *See APAC Teleservices*, 985 F.Supp. at 867; Beta Lasermike, Inc. v. Swinshatt, 2000 Ohio App. LEXIS 887, at *24 (Mar. 10, 2000) ("Public interest is not jeopardized as long as there are competitors in the business.").

[49] *See, e.g.*, Cent. Ind. Podiatry, P.C. v. Krueger, 882 N.E.2d 723 (Ind. 2008) (discussing policy concerns and affirming enforceability of reasonable noncompetes in employment contracts of physicians); *cf.* Nacogdoches Heart Clinic, P.A. v. Pokala, 2013 Tex. App. LEXIS 1066 (Feb. 13, 2013) (striking down noncompete in employment contract of cardiologist), *petition for review granted* , 2014 Tex. LEXIS 171 (Feb. 28, 2014); *see also generally* Michelle Bednarz Beauchamp, Sandra S. Benson & Lara Womack Daniel, *Why the Doctor Will NOT See You Now: The Ethics of Enforcing Covenants Not to Compete in Physician Employment Contracts*, 119 J. BUS. ETHICS 381, 382 (2012) (observing noncompetes' "major significance to patients because the physician-patient relationship is terminated and continuity of care is hindered," even if other physicians may be available).

[50] *See* ABA MODEL RULES OF PROF'L CONDUCT R. 5.6(a) cmt. 1 (2004).

[51] *See* Packer & Cleary, *supra* note 10, at 1111.

[52] *See, e.g.*, Bishara, *supra* note 31, at 305 ("[N]oncompetes are defended on the grounds that they help economic efficiency and growth because they protect legitimate employer interests and therefore provide the security that allows employers to invest in valuable generalized training."); O'Neill, *supra* note 46, at 94 ("[E]mployers need enough legal protection against uncompensated transfers of the values of their investments in employee hiring and training, customer service, research and development of products, to give them incentives to make those kinds of socially desirable investments."); Evan Starr, Training the Enemy? Firm-Sponsored Training and the Enforcement of Covenants Not to Compete 3 (Jan. 22, 2014) (unpublished manuscript), *available at* http://www-personal.umich.edu/~starre/papers/JMP/Starr_JMP_NoAppendix.pdf (describing empirical study and concluding that "at least for some high skill occupations firms are indeed responding to the increased protection of their confidential information by providing more training to their employees."). *But cf.* LOBEL, *supra* note 14, at 31 (arguing that contrary to conventional wisdom that employers will not invest in training without noncompetes, "new hard evidence and a fresh intuition suggest otherwise."). The theories of Lobel and other management scholars are discussed *infra*, text accompanying notes 106-119.

[53] *E.g.*, Stryker Corp. v. Bruty, 2013 U.S. Dist. LEXIS 66838, at *21 (W.D. Mich. May 10, 2013) (noting public interest in protecting confidential information); Valspar Corp. v. Van Kuren, 2012 U.S. Dist. LEXIS 111862, at *41 (W.D. Pa. Aug. 9, 2012).

[54] *E.g.*, *Stryker Corp*., 2013 U.S. Dist. LEXIS 66838, at *21 ("it is well established that the public has a substantial interest in the enforcement of contractual obligations"); *Valspar*, 2012 U.S. Dist. LEXIS 111862, at *41; APAC Teleservices, Inc. v. McRae, 985 F.Supp. 852, 868 (N.D. Iowa 1997).

[55] This paper focuses on noncompetes in employment contracts. Noncompetes in contracts for the sale of a business or in dissolution of a partnership generally present significantly different policy concerns because bargaining power of the parties is more likely to be similar, it is more clear that the seller has been compensated for taking on employment restrictions, and it may be more clear that the buyer of the business would be harmed were the seller to commence a competing business nearby. *See generally* RESTATEMENT (THIRD) OF EMP'T § 8.07, cmt. d (2014). Not surprisingly given these policy differences, courts in all states are more willing to enforce noncompetes in that context than in employment contracts. *See id.*, reporters' note e (gathering representative cases). This distinction is made in other countries as well. *See, e.g.*, Payette v. Guay, Inc., [2013] 3 S.C.R. 95, paras. 35-37 (Can.) (observing that noncompetes are more readily enforceable in contracts for sale of a business because "an imbalance of power is not presumed to exist in a vendor-purchaser relationship.").

[56] *See* CAL. BUS. & PROF. CODE § 16600 (Deering 1941) ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."). Subsequent sections allow noncompetes only in the sale of a business or dissolution of a partnership. *See* CAL. BUS. & PROF. CODE §§ 16601-16602 (Deering 1941).

[57] North Dakota's law is modeled on California's. *See* N.D. CENT. CODE, § 9-08-06 (2013) ("Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void," except in the context of the sale of a business or dissolution of a partnership).

[58] Diodes, Inc. v. Franzen, 67 Cal. Rptr. 19, 25 (Cal. Ct. App. 1968); *see also* Edwards v. Arthur Andersen, LLP, 44 Cal. 4th 937 (2008) (reiterating the state's general prohibition of noncompetes and strong public policy interest in free competition and employee mobility); Ret. Grp. v. Galante, 98 Cal. Rptr. 3d 585 (Cal. Ct. App. 2009) (holding that § 16600 bars noncompetes in employment contracts without exception).

[59] *See, e.g.*, Sunbelt Rentals, Inc. v. Victor, 2014 U.S. Dist. LEXIS 14416, at *27 (N.D. Cal. Feb. 4, 2014) ("Covenants not to solicit a former employer's customers are treated as covenants not to compete, and are invalid under section 16600—except as necessary to protect trade secrets."); Fillpoint, LLC v. Maas, 146 Cal. Rptr. 3d 194 (Cal. Ct. App. 2012) ; Dowell v. Biosense Webster, Inc. 102 Cal. Rptr. 3d 1, 21 (Cal. Ct. App. 2009); *see also* Erin E. Gould, Comment, *Read the Fine Print: A Critical Look at Oregon's Noncompete and Nonsolicitation Agreement Laws*, 88 OR. L. REV. 515, 529-30 (2009) (discussing apparent national trend toward applying to non-solicitation clauses the same standards applied to noncompetes and observing apparent change in California law regarding enforceability of non-solicitation clauses); *California Court Strikes Down Post-Employment Noncompete Agreement, Raising Questions About the Validity of Employee Non-Solicits*, WILSON SONSINI GOODRICH & ROSATI (Aug. 29, 2012), http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert-fillpoint-llc-maas.htm (discussing recent cases that seem to be at odds with prior California decisions that allowed non-solicitation clauses); *The Difficulty of Enforcing Non-Solicitation Clauses in California*, HRTHAT WORKS BLOG (Jan. 30, 2013), http://www.hrthatworksblog.com/2013/01/30/the-difficulty-of-enforcing-non-solicitation-clauses-in-california/ ("Until the decision in *Edwards* [*see supra* note 58], it was at least hoped that while non-competition clauses were dead, non-solicitation ones were not. *Edwards* puts that fantasy to rest."). In many states, courts may regard non-solicitation clauses more favorably than broader types of noncompetes, as they do not preclude the employee entirely from working immediately in his or her chosen trade in the chosen locality. *See, e.g.* Picker Int'l, Inc. v. Parten, 935 F.2d 257 (11th Cir. 1991) (applying Alabama law).

[60] *See* Uniform Trade Secrets Act, CAL. CIV. CODE § 3426 (Deering 2014).

[61] *See, e.g., Sunbelt Rentals*, 2014 U.S. Dist. LEXIS 14416; CytoDyn of N.M., Inc. v. Amerimmune Pharms., Inc., 160 Cal. Rptr. 3d 600 (Cal. Ct. App. 2008).

[62] It is beyond the scope of this paper to provide comprehensive information on state laws, but such information is readily available. *See* COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (Brian M. Malsberger ed., 9th ed. 2013); *Employee Noncompetes: A State by State Survey*, BECK REED RIDEN (Aug. 14, 2013), *http://www.beckreedriden.com/wp-content/uploads/2013/08/Noncompetes-50-State-Survey-Chart-20130814.pdf*. Another excellent general source on noncompetes, examining law in various states and Canadian provinces and in various industries, is a recent report by the Covenants Not to Compete and Trade Secrets Subcommittee of the American Bar Association. *See* STRETCHING BEYOND THE SEA SHORE: NON-COMPETE GEOGRAPHIC RESTRICTIONS IN A VIRTUAL WORLD (David J. Carr et al., eds., 2013) [hereinafter STRETCHING BEYOND THE SEA SHORE].

[63] Pathfinder Commc'ns Corp. v. Macy, 795 N.E.2d 1103, 1109 (Ind. Ct. App. 2003) (citations and internal quotations omitted).

[64] RESTATEMENT (THIRD) OF EMP'T, *supra* note 55, at § 8.06. The Reporters' Notes therein also provide a wealth of information on particular states' laws and various typical approaches and restrictions.

[65] *Id.* at § 8.07(b).

[66] *See* RESTATEMENT (THIRD) OF EMP'T, *supra* note 55, at § 8.06, reporters' note c (gathering cases and noting "The inquiry into the reasonableness of geographic and temporal limitations is context-sensitive and depends heavily on the nature of the legitimate interest at stake."); STRETCHING BEYOND THE SEA SHORE, *supra* note 62, at 20-39; *see also* Ann C. Hodges & Porcher L. Taylor, III, *The Business Fallout From the Rapid Obsolescence and Planned Obsolescence of High-Tech Products: Downsizing of Noncompetition Agreements*, 6 COLUM. SCI. & TECH. L. REV. 3, 6-16 (2005) (discussing reasonableness standard and effect of short product life cycles in high tech industries, which may eliminate employers' need for noncompetes). A recent article called noncompete cases "unruly" and reported litigators' opinions that "no category of litigation is less predictable." Alan Hyde, *Should Noncompetes Be Enforced?*, REG., Winter 2010-11, at 6, 6.

[67] At least eighteen states have statutes relating to noncompetes. Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751, 759 (2011). "[A]vailable statutes addressing noncompetes vary widely and range from encouraging enforcement or segmenting applicable categories of workers to banning enforcement of post-employment restrictions." *Id.* at 773-74.

[68] For example, rather than adhering to a reasonableness standard, Louisiana sets particular statutory requirements:

> Any person, including a corporation and the individual shareholders of such corporation, who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment.

LA. REV. STAT. ANN. § 23:921(C) (2003). The Louisiana statute thus requires that the restriction only apply to activities in a "similar business," in a particular specified geographic location, and for no more than two years.
[69] For example, similar to Indiana, Massachusetts follows a general reasonableness standard: "A covenant not to compete is enforceable only if it is necessary to protect a legitimate business interest, reasonably limited in time and space, and consonant with the public interest." Boulanger v. Dunkin' Donuts, Inc., 815 N.E.2d 572, 576-77 (Mass. 2004).
[70] *See* COLO. REV. STAT. § 8-2-113(2)(d) (2003). Under the Colorado statute, noncompetes are generally void, but may be permitted in the sale of a business or for executive and management personnel.
[71] DEL. CODE ANN. tit. 6, § 2707 (2005).
[72] ME. REV. STAT. tit. 26, § 599(2) (1999); N.Y. LAB. LAW § 202-k (2009).
[73] OKLA. STAT. tit. 15, § 219A (2001). Any broader noncompete is void. OKLA. STAT. tit. 15, § 219B (2001).
[74] *See* Nitro-Lift Techs. v. Schneider, 273 P.3d 20, 30 (Okla. 2011), *vacated on other grounds*, 133 S. Ct. 500 (2012).
[75] *See* Bishara, *supra* note 67. Bishara examined the time period from 1991-2009. *Id.* at 773.
[76] *Id*. at 795. The Florida statute provides that noncompetes are not prohibited "so long as such contracts are reasonable in time, area, and line of business," but shall not be enforced unless they are in writing and the employer "plead[s] and prove[s] one of five listed "legitimate business interests," including proprietary information, relationships or goodwill with customer or clients, or specialized training. FLA. STAT. § 542.335 (2013). There is no relevant statute in Kansas. A leading Kansas case is Idbeis et al. v. Wichita Surgical Specialists, 112 P.3d 81, 86 (Kan. 2005) ("A noncompetition covenant ancillary to an employment contract is valid and enforceable if the restraint is reasonable under the circumstances and not adverse to the public welfare. The rationale for enforcing a noncompetition covenant is based on the freedom of contract.").
[77] FLA. STAT. § 542.335(1)(d)1.E. Noncompetes of more than two years duration shall be presumed unreasonable. *Id.*
[78] *See supra* notes 56 and 57.
[79] *See* An Act Relative to the Prohibition of Noncompetition Agreements, H.B. 1729, 188th Leg., (Mass. 2013). This bill was first introduced on Jan. 22, 2013. It is still under consideration by the Joint Committee on Labor and Workforce Development, with a Reporting Date of July 31, 2014. *See* COMMONW. OF MASS., https://malegislature.gov/Bills/188/House/H1729 (last visited Apr. 8, 2014).
[80] *See Minnesota House Mulls Bill Limiting Noncompete Agreements*, BUS. MGMT. DAILY (May 26, 2013, 12:00 PM), http://www.businessmanagementdaily.com/35235/minnesota-house-mulls-bill-limiting-noncompete-agreements.
[81] Such issues arose in connection with Microsoft's attempted enforcement of a noncompete against a Chinese executive who went to work for rival Google. *See* Marisa Anne Pagnattaro, *"The Google Challenge": Enforcement of Noncompete and Trade Secret Agreements for Employees Working in China*, 44 AM. BUS. L.J. 603, 605 (2007) (discussing Chinese national, regional, and local laws, and noting "Enforcement of noncompete agreements, however, can be a particularly vexing problem when dealing with employees in a global context."). Pagnattaro discusses the relevant legal standards but cautions, "Because tradition can influence outcomes in the legal system, merely concentrating on the letter of the law could result in wrong conclusions or be misleading." *Id.* at 625. She recommends best practices for noncompetes under Chinese law, including limiting duration and geographic scope, as well as providing specific compensation in exchange for the noncompete. *Id.* at 632-37. *See also* Patricia E. Campbell & Michael Pecht, *The Emperor's New Clothes: Intellectual Property Protections in China,* 7 J. BUS. & TECH. L. 69, 113 (2012) (noting that Chinese law permits noncompetes only for certain high-level employees).
[82] *See* 1 RESTRICTIVE COVENANTS AND TRADE SECRETS IN EMPLOYMENT LAW: AN INTERNATIONAL SURVEY 1-4 to 1-6 (Wendi S. Lazar & Gary R. Siniscalco eds., 2010) [hereinafter RESTRICTIVE COVENANTS].
[83] *See,e.g.*, Andrew Stewart & Janey Greene, *Choice of Law and the Enforcement of Post-Employment Restraints in Australia*, 31 COMP. LAB. L. & POL'Y J. 305, 305 (2010) (generally no employment at will in Australia); *Five Key Differences Between Canadian and U.S. Employment Law*, MCCARTHYTETRAULT (Sept. 28, 2012), http://www.mccarthy.ca/article_detail.aspx?id=6020 (no employment at will in Canada); *U.S. v. U.K. Employment Law: What's the Difference*, HIGHSTREETPARTNERS (Feb. 24, 2012), http://www.hsp.com/blog/2012/2/us-vs-uk-employment-law-whats-difference (no employment at will in United Kingdom).
[84] 1 RESTRICTIVE COVENANTS, *supra* note 82, at 1-18. The constitutions of both India and the Russian Federation expressly prohibit noncompetes.
[85] *Id.* at 1-17.

[86] *See generally id.* at 1-11 to 1-18. European Union member countries each take their own individual approach to noncompetes. *Id.*

[87] *See id.* at 1-15 to 1-16. Note that various countries may impose very particular and strict requirements for, for example, duration of the restriction, consideration that may be required, or type of employee (such as only senior management) who may be restrained. *Id.* at 1-11 to 1-18.

[88] *See generally* BIGWOOD, *supra* note 29.

[89] Elsley v. J.G. Collins Insurance Agencies, [1978] 2 S.C.R. 916, 923 (Can.) (upholding noncompete in employment contract of insurance agency manager). This general approach to noncompetes applies not only in the common law provinces but also under civil law in Québec. Payette v. Guay, Inc., [2013] 3 S.C.R. 95, para. 40 (Can.). Representative recent Canadian cases include Jardine Lloyd Thompson Canada, Inc. v. Harke-Hunt, [2013] 83 Alta. L.R. (5th) 350 (Can. Alta. Q.B.) (granting interlocutory injunction to enforce noncompete in employment contract of insurance broker); Thienes v. Godenir, [2011] 380 Sask.R. 145 (Can. Sask. C.A.) (discussing at length relevant cases and striking down unnecessary and geographically overbroad noncompete in employment contract of optometrist); and H.L. Staebler Co. v. Allan, [2008] 92 O.R.3d 107 (Can. Ont. C.A.) (finding that employer of commercial insurance salesperson had proprietary interest but striking down noncompete as geographically overbroad). *See also* STRETCHING BEYOND THE SEA SHORE, *supra* note 62, at 40-54 (gathering cases).

[90] Shafron v. KRG Ins. Brokers (Western) Inc., [2009] 1 S.C.R. 157, para. 17 (Can.).

[91] E.g., *Thienes*, 380 Sask. R. at paras. 37-41. The *Thienes* court emphasized, for example, that

> it is important to the public interest that people have convenient access to health care professionals. Included in the concept of convenience is the right of the client/patient to the choice of health care providers. To require members of the public to travel as much as 150 km to have reasonable choices of practitioners is clearly not in the public interest.

Id. at para. 64. While in common law provinces the burden of proving that a noncompete is contrary to the public interest is on the employee, Québec puts that burden as well on the former employer. Civil Code of Québec, S.Q. 1980, c-39, art. 2089 (Can.).

[92] *E.g., H.L. Staebler Co*., 92 O.R.3d at paras. 39-42 (observing that a non-solicitation clause is "more likely to represent a reasonable balance of the competing interests than is a non-competition clause" and that the latter are "enforceable only in exceptional circumstances").

[93] *Shafron*, [2009] 1 S.C.R. 157, at paras. 37-42 (observing that rewriting overbroad noncompetes substitutes judgment of the court for the parties' actual agreement and also would invite employers to overreach); *Elsley*, [1978] 2 S.C.R. at 925 ("The fact that it could have been drafted in narrower terms would not have saved it, . . . 'the question is not whether they could have made a valid agreement but whether the agreement actually made was valid.'" (citation omitted)).

[94] 2 RESTRICTIVE COVENANTS, *supra* note 82, at 52-9. For a comprehensive discussion of Canadian law on noncompetes, see *id*. at 52-7 to 52-20.

[95] *See, e.g.*, Campbell & Pecht, *supra* note 81, at 113 (noting that even though noncompetes are enforceable under Chinese law, there may be "poor enforcement"); Stewart & Greene, *supra* note 83 (noting that choice of law disputes may be most likely when laws differ greatly between available jurisdictions).

[96] Bishara, *supra* note 67, at 780; *accord* Matheny & Crain, *supra* note 6, at 1746.

[97] 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, 112 (2008) ("The emerging trend in the law of employee noncompete agreements suggests that courts are generally more inclined to invalidate employee noncompete agreements . . . and that the law of employee noncompete agreements is becoming more protective of the employee's interest in mobility."). Garrison and Wendt analyzed state supreme court cases from 1999-2006 and legislative developments from that time period.

[98] *See, e.g.*, Daniel P. Hart & Robert C. Stevens, *Top Five Trends in Georgia Restrictive Covenants Law Three Years After Constitutional Amendment*, LEXOLOGY (Nov. 11, 2013), http://www.lexology.com/library/detail.aspx?g=99069a60-aa00-4e7a-8815-1d1065dbe307 (discussing Georgia Restrictive Covenants Act, O.C.G.A. § 13-8-55 (2010), which in general makes it easier for employers to enforce noncompetes and has the effect of reversing "decades" of Georgia court decisions).

[99] *See supra* notes 79 and 80 on proposed Massachusetts and Minnesota bans on noncompetes; *see also, e.g.*, Assemb. 3970, 2013 Leg., 215th Sess. (N.J. 2013) (bill invalidating noncompetes for employees who are found eligible to receive unemployment compensation; died in committee); Daniel Schwartz, *Legislative Preview: New Life for Noncompete Bill or Is Judicial Reform Better?*, CT EMPLOYMENT LAW BLOG (Jan. 23, 2014), http://www.ctemploymentlawblog.com/2014/01/articles/legislative-preview-new-life-for-noncompete-bill-or-is-

judicial-reform-better/ (discussing bill imposing certain restrictions on noncompetes that was passed by Connecticut legislature in 2013 but vetoed by the governor).

[100] Ruth Simon & Angus Loten, *Litigation Over Noncompete Clauses Is Rising*, WALL ST. J. (Aug. 14, 2013, 8:06 PM), http://online.wsj.com/news/articles/SB10001424127887323446404579011501388418552 ("The number of published U.S. court decisions involving noncompete agreements rose 61% since 2002, to 760 cases last year . . . . Since most cases are settled out of court and most opinions aren't reported, that tally is likely low.").

[101] The Illinois Court of Appeals decided one notable recent case that "shred[ded]" current notions of Illinois case law and "roiled" the employment law bar. *See* Paul Merrion, *Court Voids Non-Competes for New Workers*, CRAIN'S CHICAGO BUS. (July 11, 2013), http://www.chicagobusiness.com/article/20130711/NEWS02/130709836/court-voids-non-competes-for-new-workers# (discussing Fifield v. Premier Dealer Servs., 993 N.E.2d 938 (Ill. App. 2013), in which the court ruled that newly hired workers must receive additional consideration to support noncompetes). *See also, e.g.*, *supra* note 59 (describing recent changes in California case law regarding non-solicitation clauses).

[102] *Editorial: Noncompetition Agreements: A Call for Judicial Reform*, CTLAWTRIBUNE.COM (Dec. 7, 2013), http://www.ctlawtribune.com/id=1202635019864. That editorial concluded, "Employee noncompetes have a valid role to play in Connecticut's economic mosaic; legislative reform would doctrinally freeze them in time and unduly limit the ability to make the measured adjustment in legal doctrine necessary to meet the state's changing social and economic needs." *Id.*

[103] *See, e.g.*, Bishara, *supra* note 31, at 296 (noting move to a "knowledge economy" and that particularly in technology-based companies human capital may be much more valuable than physical assets).

[104] *See, e.g.*, *id*. at 292 (noting "roiling trends" of globalization and move away from formerly commonplace "lifetime employment at a single firm").

[105] *See* O'Neill, *supra* note 46, at 91-92 (observing that employees' bargaining power depends upon the availability of other jobs and that in light of recent poor economy, employers may be more able to insist upon noncompetes).

[106] *See e.g.*, Matt Marx et al., *Mobility, Skills, and the Michigan Noncompete Experiment*, 55 MGMT. SCI. 879, 876-77 (2009) (citing several such studies). Some argue that California's ban on noncompetes is "the causal antecedent" of "the high-velocity labor market" and "unique culture" of Silicon Valley. *Id.* at 876.

[107] *See, e.g.*, Hyde, *supra* note 66, at 9-10 (discussing Marx's study and others and concluding "It seems clear that, on balance, the social advantage lies in following California and forbidding employers from enforcing noncompetes."); On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L REV. 833, 858-60 (2013) (arguing that "noncompete enforcement negatively affects not only mobility in general but entrepreneurship in particular.").

[108] *See, e.g.*, LOBEL, *supra* note 14, at 205-06; Scott Kirsner, *Time to Get Rid of Noncompete Agreements*, BOSTONGLOBE.COM (Apr. 19, 2014), http://www.bostonglobe.com/business/2014/04/19/time-get-rid-noncompete-agreements/VcIjVuaAcOopLZOvwqSMtK/story.html; Simon & Loten, *supra* note 100.

[109] Marx et al., *supra* note 106, at 887. These researchers drew conclusions based on the number of patents granted in Michigan before and after a 1985 change in the law that reversed the state's former ban on noncompetes.

[110] Matt Marx et al., *To Compete, or To Non-Compete*, 2009 HARV. KENNEDY SCH. RAPPAPORT INST. POL'Y BRIEF 1 (discussing findings of their Michigan study).

[111] *Id.* at 6.

[112] *Id*.

[113] Marx et al. note certain limitations of their study, including uncertainty as to factors other than noncompetes that may have influenced employee mobility and entrepreneurship. Marx et al., *supra* note 106, at 886-87. *See also* Bishara, *supra* note 67, at 761-67 (critiquing Marx and other similar studies). Among other issues, Bishara observes that some studies oversimplify strength of enforcement in various states.

[114] Data suggest that a general "decline in entrepreneurship and business dynamism has been nearly universal geographically the last three decades." *See* IAN HATHAWAY & ROBERT E. LITAN, DECLINING BUSINESS DYNAMISM IN THE UNITED STATES: A LOOK AT STATES AND METROS 6 (Brookings Inst. 2014). The data in the Hathaway and Litan study belie easy correlation with, for example, state tax rates, s*ee* Christopher Ingraham, *U.S. Businesses Are Being Destroyed Faster Than They're Being Created,* WASHINGTONPOST.COM (May 5, 2014, 2:51 PM), http://m.washingtonpost.com/blogs/wonkblog/wp/2014/05/05/u-s-businesses-are-being-destroyed-faster-than-theyre-being-created/?hpid=z5, or state policy on noncompetes.

[115] LOBEL, *supra* note 14, at 47.

[116] *Id*. at 40.

[117] *Id.*

[118] *Id*.
[119] *Id.* at 5.
[120] Matheny & Crain, *supra* note 6, at 1745.
[121] *Id.* at 1747-49. *See also* Claire Cain Miller, *Google Grows, and Works to Retain Nimble Minds*, N.Y. TIMES, Nov. 29, 2010, at A1 (describing California-based Google's methods for retaining talented employees, including bonuses, stock options, free massages, and time at work for their own projects).
[122] *See, e.g.*, Arkley v. Aon Risk Servs. Cos., 2012 U.S. Dist. LEXIS 96330, at *7 (C.D. Cal. June 13, 2012) (applying California law to noncompete despite choice of law provision naming Illinois law, because application of Illinois law would be "contrary to a fundamental policy of California law"); Del Monte Fresh Produce, N.A., Inc. v. Chiquita Brands Int'l, Inc., 616 F.Supp. 2d 805, 816 (E.D. Ill. 2009) (applying Illinois law to noncompete despite choice of law provision naming Florida law, because application of Florida law would be "contrary to Illinois' fundamental public policy," given lesser level of protection to employees under Florida law); *see also* STRETCHING BEYOND THE SEA SHORE, *supra* note 62, at 7-13.
[123] *See generally* Sullivan, *supra* note 6; Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963 (2006).
[124] *See* RESTATEMENT (THIRD) OF EMP'T, *supra* note 55, at § 8.08; Arnow-Richman, *supra* note 123, at 976 ("[T]he employer has the luxury of knowing that if an overbroad agreement is ultimately challenged in court, the judge is likely to reduce its scope rather than void it entirely. Thus, the predominate mode of judicial intervention . . . actually exacerbates the problem of *in terrorem* effects"). Observing such perverse incentives, Canadian courts will not rewrite overbroad agreements. *See* Shafron v. KRG Ins. Brokers (Western) Inc., [2009] 1 S.C.R. 157, paras. 37-42 (Can.).
[125] For example, from a Kantian perspective, such overreaching would be regarded as violating at least three of the prima facie duties: justice (including a duty to avoid committing injustice), fidelity (including a duty to avoid lying), and liberty (including a duty to enhance freedom where possible). *See, e.g.*, Denis G. Arnold et al., *Recent Work in Ethical Theory and Its Implications for Business Ethics*, 20 BUS. ETHICS Q. 559, 566-69 (2010); *see also generally* Bishara & Westermann-Behaylo, *supra* note 46 (discussing ethics of employer overreaching in reference to various schools of ethical thought).
[126] *See* RESTATEMENT (THIRD) OF EMP'T, *supra* note 55, at § 8.08.
[127] *See* Sentinel Integrity Solutions, Inc. v. Mistras Group, Inc., 414 S.W.3d 911 (Tex. Ct. App. 2013) (ordering employer to pay $750,000 in attorneys' fees to employee).
[128] CAL. LAB. CODE §§ 432.5, 433 (1963).
[129] The required introductory Business Law course at the University of Notre Dame includes an introductory unit on the American legal system, with coverage of torts and criminal law, and units on the law of contracts, sales, and agency. The three-credit-hour course is required for all sophomores in the College of Business. Class size is generally 36 students per section. These are traditional students, around twenty years of age, with little work experience. Class sessions are 75 minutes in length.
[130] Information about this master's program can be found at http://esteem.nd.edu. This is a required one-credit law course with about half of the class sessions focusing on intellectual property law. The remaining class sessions focus on business organizations, contracts, and products liability. As this course does not have a primary emphasis on contract law, it may be said that it takes more of a Legal Environment approach. *See* Miller & Crain, *supra* note 20. Class size is approximately 28 students. All of these students have undergraduate degrees in a technical field (science or engineering), Most have entered the master's program directly after completing their undergraduate degrees and are in their mid-twenties. Class sessions are 75 minutes in length.
[131] Marianne M. Jennings, *In Defense of the Sage on the Stage: Escaping the "Sorcery" of Learning Styles and Helping Students Learn How to Learn*, 29 J. LEGAL STUD. EDUC. 191, 225-26 (2012); *see also* LeVon E. Wilson & Stephanie R. Sipe, *A Comparison of Active Learning and Traditional Pedagogical Styles in a Business Law Classroom*, 31 J. LEGAL STUD. EDUC. 89, 104 (2014) (study finding that "overall students who were exposed to the lecture method of delivery performed slightly better than those who were instructed by active learning methods"). For an excellent discussion of different ways that active learning may be fostered in a traditional university classroom, see Michael F. Mascolo, *Beyond Student-Centered and Teacher Centered Pedagogy: Teaching and Learning as Guided Participation*, 1 PEDAGOGY & HUMAN SCI. 3 (2009).
[132] Varying delivery methods may be the optimal approach. *See* Jennings, *supra* note 131, at 225-26; Mascolo, *supra* note 131, at 14 (suggesting that a particular course might include "lecture, Socratic dialogue and a suite of active learning activities"); Wilson & Sipe, *supra* note 131, at 105 (suggesting "employing different curriculum delivery techniques depending on content and class rather than a single pedagogical style").

[133] Students are generally unaware that minors can disaffirm contracts, and they may wistfully imagine the things they could have gotten away with, at least under the capacity rules in the majority of states.
[134] The author uses CLARKSON, *supra* note 16.
[135] To encourage faithful, reflective reading of the assignments so that students come prepared for high-level class discussions, the author has students prepare written answers to study questions for each class. This reflects a "guided reading" approach. *See* Mascolo, *supra* note 131, at 16 (discussing guided reading in university courses as an effective form of active learning and emphasizing that effective pre-class assignments can be one vehicle by which a professor encourages "learning . . . through active reflection.").
[136] The author would be pleased to provide all PowerPoint slides from the lecture upon request.
[137] Professor Bishara kindly permitted the author to use the map included as Figure 14 in his article as a PowerPoint slide. *See* Bishara, *supra* note 67.
[138] In designing the exercises described in this paper, the author was influenced by the proposals of Anne Colby and her coauthors. *See* ANNE COLBY ET AL., RETHINKING UNDERGRADUATE BUSINESS EDUCATION: LIBERAL LEARNING FOR THE PROFESSION (2011). These authors urge that business education should equip students "to think and live like an educated person," *id*. at ix, and "to engage responsibly with the life of their times." *Id*. at 60. To that end, they propose that students must engage in "Multiple Framing": that "they learn that in order to solve complex problems, it is necessary to look at issues from several, not always compatible, points of view." *Id.* at 64. Students must learn to compare, contrast, and judge competing points of view. *Id.* As has been discussed, employers, employees, and the public will generally have quite different views and concerns about noncompetes, making this a natural opportunity to push students toward multiple framing.
[139] And of very broad geographic scope ("in the United States"). This, too, may be unreasonably broad, unless the employee worked with customers nationally or could do harm to the company even by working with a faraway competitor. *See* STRETCHING BEYOND THE SEA SHORE, *supra* note 66, at 21-24.
[140] Though it might be enforced after blue-penciling. *See supra* text accompanying notes 124-126.
[141] This question could be adapted to ask about similar legislation in other states. *See, e.g.*, *supra* note 99.
[142] As reading to accompany the class session on contract law, students read the contracts chapter from a standard Legal Environment text, ANTHONY L. LIUZZO, ESSENTIALS OF BUSINESS LAW 320-29 (8th ed. 2013). This brief coverage of contract law adequately prepared students to understand issues surrounding noncompetes.
[143] Vanessa Maire Griffith, *Non-Compete Agreements with Employees*, PRACTICAL L. (Dec. 2011-Jan. 2012), *available at* http://www.velaw.com/uploadedFiles/VEsite/Resources/Non-CompeteAgreementsEmployees2012.pdf (six-page summary of noncompete law).
[144] Joann S. Lublin, *Companies Loosen the Handcuffs on Noncompetes*,WSJ.COM (Aug. 12, 2013, 11:12 AM), http://online.wsj.com/news/articles/SB10001424127887324085304579008592336383078?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424127887324085304579008592336383078.html&cb=logged0.7602386835443768 (discussing possibility of negotiating whether a noncompete will be enforced when executive desires to leave a company); Simon & Loten, *supra* note 100 (WALL ST. J. article discussing increasing litigation and effects of noncompete enforcement on entrepreneurship and economic activity in various states).
[145] Sample agreement 3 comes from HRSPECIALIST, http://www.thehrspecialist.com/article.aspx?articleid=3889 (last visited Apr. 7, 2014). Sample agreement 4 comes from the Web site of Keeley, Kuenn & Reid, http://www.kkrlaw.com/articles/noncomp.thm (last visited Apr. 7, 2014). Sample agreement 5 comes from http://bookkeepingforstartups.com/wp-content/uploads/2013/04/SAMPLE_NONDISCLOSURE_AND_NONCOMPETITION_AGREEMENT_The_following_sample_nondisclosure_and.pdf. (last visited Apr. 7, 2014). Sample agreements 1, 2, and 6 are actual noncompetes provided to the author by practicing attorneys who wish not to be identified in this paper.
[146] The idea of integrating classic readings from other disciplines into the business curriculum is gaining traction. *See, e.g.,* Melissa Korn, *Why Some MBAs Are Reading Plato, Kant*, WALL ST. J., May 1, 2014, at B6 (describing business school courses that include foundational readings from philosophy, economics, and other disciplines to "push [students] to ponder business in a broader context"). By engaging with classic readings, "students . . . go beyond merely stating and arguing their personal opinions. Instead, they discover that their own questions have a history and can be better understood when placed within the larger context of critical arguments that make up an intellectual tradition . . . ." COLBY ET AL., *supra* note 138, at 58. This topic is in that tradition.
[147] Obviously, one key issue is the degree to which noncompetes are legally enforceable in the state where the company is located. Instructors might provide basic guidance on how to find the relevant statute or representative

cases via LEXIS or Westlaw, or simply provide to students the text of the statute or a good, representative case. For comprehensive sources on statutes and cases from around the U.S., see *supra* note 62.

[148] Again, successful papers would address the legality of noncompetes in that jurisdiction, and apply the law to the particular job. Students should be asked to do appropriate research on their state (or country) of choice.