LEGAL PROTECTION FOR EMPLOYEE MOBILITY

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Legal Protection for Employee Mobility

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A critical function of labor law around the world is to ensure labor mobility. Every system of labor law places limits on the employer's ability to impede this mobility. Employees' promises not to move to, or start, competing businesses are not automatically enforced in any legal system.

There are several reasons that such covenants not to compete (restrictive covenants, noncompetes) are not automatically enforced. We shall refer to these as labor law values, competition values, and economic growth values. The first two are recognized in nearly every legal system, and economic growth is surely not rejected as a value. In other words, variation among jurisdictions does not reflect lack of agreement on fundamental values.

Working men and women have a right to work, to practice their skills and professions. They are free to enter into economic life, to support themselves and family, to develop services as they are able and to compete with others. Common law jurisdictions tend to understand this right in this economically liberal sense. Civil law jurisdictions often add an additional understanding of the right of economic participation, often in their constitutions: the right to work is also the right to the social and moral development of the person. People must be free to choose work because work is one of the chief ways in which they develop as mature, responsible, happy and satisfied adults. Systems of labor in which workers may not select their employment have been tried but are today universally rejected as incompatible with human dignity. A third, related labor law value is the protection of the weaker party. Of necessity, working men and women may enter employment contracts in which more powerful employers extract promises that are against the best interests of working people. Many jurisdictions regard the "protection of the weaker party," implying scrutiny of such imbalances of power, as a major function of labor law generally. We shall refer to these values of freedom to work, dignity of the worker, and protection of the weaker party, as the "labor law values." Most jurisdictions are more likely to enforce restrictive covenants growing out of sale of a business, than restrictive covenants in a contract of employment. This Chapter deals only with restrictive covenants in contracts of employment.

Employee promises not to compete may also be disfavored in the name of free competition. Monopolies, cartels, and other restrictions on competition inevitably damage the public by interfering with markets and raising prices. A building contractor may not lawfully agree, in any legal system, with other contractors that only one of them will construct buildings in a given region. Such a covenant in restraint of trade creates a monopoly that obviously

harms consumers. A similar agreement between that contractor and his employee is potentially equally injurious to the public. A jurisdiction that enforces the contractor-employee agreement is thus making a very partial exception to the general refusal to enforce agreements to restrict competition. We shall refer to values of this type as "competition" or "antitrust" values.

Finally, there has been much attention in recent years to the critical role of employee mobility in high-technology industry, which often clusters in particular regions (Hyde 2003; Langlois 1992; Saxenian 1994), where employees share information with friends and colleagues across firm lines (Agrawal et al 2006; Correidora & Rosenkopf 2010; Feldman 2003; Sitkin 1986; von Hippel 1988); and may themselves frequently change employers (Fallick et al 2006). New firms are invariably founded by personnel departing established firms; if those older firms could extract and enforce promises not to compete, there could be no start-up firms (Almeida & Kogut 1999; Chatterji 2009; Franco & Filson 2006). Regions, such as Silicon Valley, California, and its analogs in Singapore, India, Israel, and elsewhere, that experience growth as knowledge spreads beyond the boundaries of the firm, demonstrate the "endogenous growth" through generation and diffusion of nonrivalrous and nonexclusive information (Cooper 2000; Romer 1990; Warsh 2007; on Singapore as a location of choice for Silicon Valley-type manufacture involving numerous networked contractors and employee mobility, see Franco & Filson 2006, McKendrick et al 2000). We shall refer to arguments of this type as "economic growth" values.

Some jurisdictions (California, Israel, India, Malaysia, Mexico) find some or all of these values so compelling that they never enforce an employee's promise not to compete with a former employer. Most jurisdictions, however, believe that there are sometimes reasons to enforce such a promise, and in individual cases may balance such concerns against the above acknowledged harms in enforcing such promises. They may believe, for example, that contracts should normally be enforced as written unless some overreaching occurred; or that employers will not train employees if those employees may immediately leave and compete with them; or that legal devices for enforcing property in trade secrets are so ineffectual that they must be supplemented by enforcing employee promises not to compete. Recent economic analysis casts doubt on all three of these assumptions, but they are commonly encountered as justifications for restricting employee mobility (Hyde 2012). Most systems of employment law purport to balance some or all of these values, though, as we shall see, there is variation in the relative importance given to particular reasons or sets of reasons. There is also variation as to whether individual cases will have recourse to the underlying reasons, as is the case when an individual legal decision is understood as a balance, or search for proportion, among competing interests. Other jurisdictions may instead incorporate the underlying values into flat rules that do not call for individuated application of the values in particular cases, as is the case in the jurisdictions that do not enforce any contractual limits on employee mobility

after employment. Cases rarely distinguish clearly among these values, although some or all are present in every legal system with which we are familiar.

In other words, it is possible to state a kind of global legal standard for the enforcement of employee promises not to compete. It is similarly possible with minor modification to apply such a standard to other impediments to employee mobility, such as the definition of employer trade secrets. The American Law Institute, which purports to "restate" the common law of US jurisdictions, has advanced in the Restatement of Employment Law the following summary of the US law of restrictive covenants, which, so long as it remains suitably abstract, might serve as a rough comparative law summary as well.

§8.06. Enforcement of Restrictive Covenant in Employment Agreement

Except to the extent other law or applicable professional rules provide otherwise, a covenant in an employment agreement restricting a former employee's activities is enforceable if it is reasonably tailored in scope, geography, and time to further a protectable interest of the employer, as defined in §8.07 [below], unless:

(a) the employer discharges the employee on a basis other than cause that makes enforcement of the covenant inequitable; or

(b) the employer acted in bad faith in requiring or invoking the covenant; or

(c) the employer materially breached the underlying employment agreement; or

(d) in the geographic region covered by the restriction a great public need for the special skills and services of the former employee outweighs any legitimate interest of the employer in enforcing the covenant.

§8.07. Protectable Interests for Restrictive Covenants

An employer has a legitimate interest in protecting, through a reasonably tailored restrictive covenant with its employee, the employer's

(a) confidential information,

(b) customer relationships,

(c) investment in the employee's reputation in the market, or

(d) investment in the purchase of the employee's business.

Obviously, a statement of law at this level of generality masks considerable conflict and diversity. May all four listed employer interests really be protected by an enforceable restrictive covenant? If any employer could claim that its employment of an individual improved that employee's returns in the labor market, merely because the employee worked at this particular employer, then any could enforce a restrictive covenant. Startups are more profitable when founders worked at firms in the industry with valuable patents even if the new firm makes no use of them (Chatterji 2009), and employees make more on the next job if they previously worked at a firm with valuable technology (Balsvik 2011, Franco and Filson 2006, Møen 2005). If the exception does not swallow the rule, how may it be determined that a given employer has really made such protectable investments, beyond the training that any enterprise must give employees? For any protectable employer interest, how does the tribunal determine whether a given restriction is reasonable in geographic scope and duration? Since most jurisdictions independently protect an employer's confidential information, is there any difference between the confidential information independently protected as a trade secret, and the confidential information that supports the enforcement of a restrictive covenant? There is little global uniformity in approach to these questions. While this variety complicates the presentation in this chapter, it also permits empirical analysis of the consequences of various legal regimes of employee mobility.

The questions of this chapter are obviously not of equal importance in all systems of employment law, though they are probably of increasing importance in all of them. German employers, for example, rarely extract promises not to compete from employees. There is essentially no labor market for mid-career German professionals—Germany has the second-lowest mobility rate for personnel in the European Union, next to Italy—so departure of personnel has not been either a problem for German employers, or an opportunity for those employees (Casper 2007:98-101, 180-81; Vitols and Engelhardt 2005). It is likely however that many such labor markets will increasingly experience mobility, both national and international, though most will probably fall far short of California. There is no inevitability of development here.

Space obviously does not permit a comprehensive account of global variation on these matters. Instead, this chapter will follow the following plan. Part A will present and contrast three ideal types of enforcement of restrictive covenants. Part A1, Nonenforcers, will discuss the legal devices that some jurisdictions use to ensure employee mobility by never enforcing restrictive covenants. California (and some other US jurisdictions), India, Israel, Malaysia, Mexico, Argentina, Chile, and several other Latin American jurisdictions are "nonenforcers." They never enforce restrictive covenants. In some cases, this reflects a broad view of labor law

values; in others, sensitivity to competition; in others, historical accident that has become institutionalized.

Part A2 will discuss "low enforcers": jurisdictions that rarely enforce restrictive covenants, almost never longer than one year. This group includes most of the member states of the European Union, most common law jurisdictions, China, and Japan.

Part A3 will present a group portrait of a small number of "high enforcers", jurisdictions that normally enforce a restrictive covenant merely because the employee signed it; do not require that employers demonstrate much in the way of special protectable interest; frequently enforce for periods longer than a year; rewrite unreasonably long or broad covenants to make them reasonable; and take a correspondingly broad view of trade secret protection. These jurisdictions include Thailand, Korea, and some US states such as New Jersey and Illinois.

All these comparisons will be somewhat doctrine-bound, as there is an interesting gap in the literature. We have been unable to locate a single "legal realist" or "sociolegal" study of restrictive covenants that identifies, even for a single jurisdiction, the social or economic factors that actually predict the degree of enforcement.

Part B will explore scholarship on these issues that permits systematic comparison among our ideal types. Part B1 will examine the little scholarship that assembles data bases of decisions. Part B2 will examine recent studies that use information theory to analyze judicial classifications of information. Part B3 will consider historical studies of how jurisdictions develop into nonenforcers, low enforcers, or high enforcers. Part B4 will examine economic and sociological literature making empirical comparisons between nonenforcers and high enforcers, or between low enforcers and high enforcers. So far, every study shows all social advantage to lie with a refusal to enforce restrictive covenants. Jurisdictions that never enforce restrictive covenants, or do so only minimally, experience higher growth, more business start-ups, higher employee compensation, and attract talent from jurisdictions that enforce restrictive covenants. Part C will conclude by reflecting on the construction of narratives in comparative law.

A. Three Models of Regulating Employee Competition

1. Nonenforcers

Several important legal systems never enforce negotiated limits on employee competition. Employees are always free to leave employment and either join a rival firm or go into competition with their former employer. Such jurisdictions typically expand their nonenforcement into a broader policy of employee mobility. For example, they may have a restricted definition of the kind of trade secret or confidential information that the departing employee may not take to the new employer. There are several paths to this outcome.

Most European, Asian, and Latin American constitutions protect the worker's fundamental right to earn a livelihood. In Asia and Latin America, some of these provisions have been construed to render noncompetes unenforceable.

The largest such jurisdiction is India. India has implemented its constitutional protection of the right to earn a livelihood with the Indian Contract Act (1872), Sec. 27 of which provides: "Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void." An exception permits such restraint as part of a sale of business. The section is interpreted in just such absolute terms. Noncompetes are unenforceable after the term of employment; there is no inquiry into reasonableness. Indian courts will not enforce noncompetes valid in other jurisdictions, Taprogge Gesellschaft MBH v. IAEC India Ltd, AIR 1988 Bom 157. Nor will they enjoin a former employee from adopting and using processes learned at his previous employment, Dessicant Rotors Int'l Pvt Ltd v Sarkar (New Dehli High Court 2009); M/s Sociedade de Fomento Indl. Ltd v. Kamath, AIR 1995 Bom 158. This absolute opposition to noncompetes has been succinctly explained: first "autonomy is a crucial ingredient in individual well-being and law should not help individuals to give up further autonomy unnecessarily"; and "unnecessary restraints hinder the free flow of labour and resources crucial to the efficient functioning of a market economy." (Pollock and Mulla: 795, as quoted in Kanagasabai 2010). India combines this commitment to employee mobility with unusually weak intellectual property protection for software, and this combination arguably helps account for the growth of the Indian software industry (Anand 2012). Indian courts will, however, enforce contracts that restrict approaches by the former employee to his former employer's customers.

Malaysia is similar. The Malaysian Contracts Act 1950, Sec 28, is taken verbatim from Indian Sec. 27 and is interpreted with reference to Indian cases. Bars on competition following employment are unenforceable. As in India, restrictions on soliciting customers or other employees, or on use of confidential information, are tested for reasonableness as in common law jurisdictions (discussed below Part B2a). Wrigglesworth v. Wilson Anthony, [1964] 30 MLJ 269 (noncompete unenforceable against departing solicitor under Sec. 28; "The distance and place in respect of the restraint are irrelevant").

While Latin American countries all have labor codes that derive from Continental European origins, they diverge in their attitudes toward employee competition. Mexico is a nonenforcer. Article 5 of the Mexican Constitution, following its prohibition of forced labor, expressly provides: "no person can legally agree to his own proscription or exile, or to the temporary or permanent renunciation of the exercise of a given profession or industrial or commercial pursuit." (http://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf). Mexican employers evade this language by entering into contracts with departing employees in which the employer pays compensation in exchange for the employee's promise not to

compete. Should the employee then compete, the employer sues to enforce the contract in civil court (as opposed to the Conciliation and Arbitration Board). The civil court solemnly declares the contract null and void under Article 5, then orders restitution of any amounts paid under it. The threat of such restitution is said to be a disincentive to employee competition (de la Vega Gómez and Schiaffino 2010). Presumably, however, the need for the employer actually to pay compensation during the period covered by the "null and void" noncompete must dissuade many employers from following this procedure.

In the United States, standards for enforcing noncompetes are matters of state law. There is considerable variation among the states, which creates natural experiments to which we will refer in Part B4. The best-known jurisdiction that never enforces noncompetes is California. An 1872 statute, now codified as California Business and Professional Code Sec. 16600, provides: "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." Gilson (1999) has shown that the adoption of this statute reflects nineteenth century codification and no considered policy judgment. Some other western states (for example Montana and Oklahoma) enacted the same or similar language, but understood it merely to codify a common law approach testing such restraints for reasonableness (Malsberger 1996). California courts, however, for reasons not well-understood, interpreted the statute as a complete ban on restrictive covenants. At some point, possibly as early as 1909, the area around Stanford University developed a concentration of high-technology businesses characterized by venture capital, ease of starting a business, and rapid employee mobility (Hyde 2003). The region's leading chronicler (Saxenian 1994) attributes this pattern to various demographic and geographic factors, not mentioning any legal factors. Gilson (1999) claims that California law's refusal to enforce noncompetes entirely explains Californian dominance in high-technology. Hyde (2003) documents a process in which the unenforceability of noncompetes encouraged a culture of startups, employee mobility, and information sharing. Employers and their lawyers today share that culture and do not sue departing employees even under legal theories that might permit this, such as the law of trade secrets. Whatever the history, today courts, and the California business establishment, identify their leadership in high technology with a broad policy of employee mobility, for which Sec. 16600 is taken to stand. The California Supreme Court has recently emphasized that there are no exceptions to that section: all covenants not to compete are unenforceable in California, Edwards v. Arthur Andersen LLP, 189 P2d 285 (Cal 2008)("Sec. 16600 represents a strong public policy"). Lower California courts now apply this policy of employee mobility, refusing, for example, to enforce an agreement that the departing employee will not solicit customers of the former employer. The employee is liable only if he tortiously violates an independent obligation to preserve trade secrets, The Retirement Group v. Galante, 98 Cal Rptr 3d 585 (Ct. App 2009). California courts

have long refused to give independent force to agreements to preserve trade secrets; such agreements may cover only secrets that the law independently considers trade secrets, and if they go beyond, they become unenforceable noncompetes. State Farm Mut.Auto Ins. Co. v. Dempster, 344 P2d 821 (Cal App 1959).

Israel also essentially never enforces noncompetes, largely for the reasons that California now understands its statute to protect: the economic benefits of employee mobility, particularly in high technology. The path to this result is a bit complicated. Until the late 1990s, Israel followed a common law "reasonableness" analysis, until the legal landscape was changed by two decisions: Checkpoint and Frumer v. Redguard (National Labor Court 1999), and AES Systems v. Sa'ar (Supreme Court 2000). As a result of those cases, Israeli employers seeking enforcement of a restrictive covenant must demonstrate a particular need for enjoining employee mobility, beyond the fact that the employee signed it and the old employer would prefer not to face competition. Formally this is little different from the formulation of the American Law Institute, purporting to restate US law, stating that US employers seeking to enforce a restrictive covenant also must demonstrate a "protectable interest" (Secs 8.06-8.07). In practice, however, Israeli employers are almost never successful in demonstrating such a protectable interest, and thus Israeli courts almost never have occasion to evaluate restrictive covenants for reasonableness. Employer claims that departing employees will disclose trade secrets, or that they need reimbursement for training costs, are normally rejected, or, where accepted, support injunctions only for very brief periods of under a year (Mundlak, personal communication).

Characteristics of nonenforcers: Nonenforcers typically recognize that the former employer may have an independent cause of action against departing employees for theft of trade secrets or confidential information. However, they may be careful to limit this doctrine, lest it turn into the kind of restraint on competition that they have abolished. For example, India recognizes only very limited property rights in software (Anand 2012). California does not permit employers to designate trade secrets beyond the statutory definition. It requires plaintiffs in trade secret cases to identify the precise secret taken, which is a strong disincentive to litigation in the technology sector, where firms often do not want their rivals to know even which projects are under development.

2. Low enforcers

A larger group of jurisdictions sometimes enjoin employees from competing with former employers. These jurisdictions value the worker's mobility, but, unlike India, Mexico, or California, balance it against supposedly legitimate employer interests in preserving confidential information or recouping training. Jurisdictions in this group often state that

restrictive covenants are not preferred. Enforcement for longer than a year or eighteen months is rare, and may (in the civil law world) be conditioned on the plaintiff, that is, the former employer, compensating the employee.

a. Common law jurisdictions

Common law jurisdictions (excluding, of course, the nonenforcers: India, Malaysia, California and a few other western US states, Israel) normally analyze noncompetes along the lines of the US Restatement. There must be a clear, negotiated promise not to compete, not merely one inferred from context. The plaintiff employer must demonstrate what the ALI calls a "protectable interest" but which non-US common law jurisdictions are more likely to term a "property right." And the noncompete must be reasonable in duration and geographic scope to protect that property right. It is rare for common law jurisdictions to discuss matters of policy, or, for example, to describe themselves as "low enforcers." The inquiry into "reasonableness" is normally the proxy for these policies. Some common law jurisdictions describe noncompetes as "presumptively void" unless the above showings are made (Elsley v JG Collins Insurance Agencies Ltd, [1978] 2 SCR 916 (Canada); CLAAS Medical Centre Pte. Ltd v. Ng, [2010] SGCA 3, at par.44 (Singapore)("prima facie void")). While this phrase is not commonly used in the US, the US practice of placing the burden of proof on the party seeking to enforce the noncompete, and requiring that party to demonstrate protectable interest and reasonable scope, is substantively the same as treating the noncompete as presumptively void. Many famous common law cases reinforce these generalizations. The quotations that follow are from classic English cases and have been cited in hundreds of reported cases around the common law world (see generally Goulding et al 2011). As in any system, it can be difficult to form a reliable picture of how they are applied in practice.

Part of employment contract and conspicuous: Often cited is the decision of the UK Employment Appeal Tribunal, refusing to enforce a purported contract, signed by the former employee, restricting commissions to employees still on payroll on the payment date. The Tribunal held that the employment contract was formed when the employee started work the previous week and did not include terms presented to him afterwards, at least where these were onerous and had not been sufficiently brought to his attention. Peninsula Business Services Ltd v Sweeney, [2004] IRLR 49.

Property right: "I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the Court. Wherever such covenants have been upheld, it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employers' trade connection or utilise information confidentially obtained….[T]he reason, and

the only reason, for upholding … a restraint on the part of an employee is that the employer has some *proprietary right*, whether in the nature of a trade connection or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—reasonably necessary." Herbert Morris Ltd v Saxelby, [1916] AC 688, 709-710.

"The employers' claim for protection must be based upon the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation." Stenhouse Ltd v Phillips, [1974] AC 391, 400.

Property rights are least controversial when applied to patents, trade secrets, or other intellectual property. They are more controversial when applied to customer relations or stable staff, which are not employer property at all (see Riley 2009 for critique of the broadening concept of property in Australian case law on noncompetes).

Effect of employer's repudiation: Many English cases explore the implications of the General Billposting rule that a repudiation of an employment contract by the employer releases the employee from any restrictive covenants that it contains. General Billposting Co Ltd v Atkinson [1909] AC 118 (HL). The rule is often applied when the employee is wrongfully terminated. The American Law Institute found for the US that "The case law specifically addressing the enforceability of reasonable restrictive covenants against discharged employees is quite variable." Restatement of Employment Law Sec. 8.06, Reporter's Note f (Tent. Draft No. 3, 2010). It proposes that a reasonable restriction should be enforceable against the employee discharged for cause, but not against those terminated without cause, Sec. 8.06, Comment f, while recognizing that the US cases do not all adopt such an approach. It further suggests, Comment g: "If the employer materially breaches the employment agreement, it cannot enforce an otherwise valid restrictive covenant contained in the agreement."

Reasonableness: The employer who proves a property right may enforce only a covenant that is reasonable between the parties, and not injurious to the public. Surely the most quoted statement of this rule, found in decisions in *inter alia* the UK, Canada, Australia, Hong Kong, and Singapore, comes from Nordenfeld v. Maxim Nordenfeld Guns & Ammunition Co., [1894] A.C. 535 (H.L.):

> The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule.
>
> But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in

reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.

Nordenfeld's reference to "adequate protection" has been interpreted as the outer limit of enforceability. "I think it is clear that what is meant is that for a restraint to be reasonable in the interests of the parties it must afford *no more than* adequate protection to the party in whose favour it is imposed." Herbert Morris v. Saxelby, [1916] 1 AC 688 (HL)(emphasis original). It is rare in common law jurisdictions to find restraints longer than a year to be reasonable (but see Riley 2009, criticizing increased enforcement in Australia). For example, in Singapore the known outlier, enforcement for two years (Heller Factoring, [1998] 3 SLR 299), stands out (Ravi Chandran, personal communication).

Characteristics of low enforcing common law jurisdictions: the hallmark of legal analysis in a low-enforcing jurisdiction is the requirement that the plaintiff employer demonstrate particular need for restricting employee mobility. The desire not to face competition is not such a particular need. It is rare in practice for an employer to identify successfully any such need other than the protection of its trade secrets or particularized investment in customer relations.

It is sometimes asserted that an employer may restrict the mobility of an employee who has received very specific training, beyond "the skill, experience, know-how and general knowledge acquired by an employee as part of his job during his employment, even though that will equip him as a competitor, or potential employee of a competitor, of the employer." FSS Travel and Leisure Systems Ltd v Johnson, [1998] IRLR 82 (CA), but we have been unable to find any cases resting a noncompete on this ground. The American Law Institute does not recognize an employer interest in training that will support restricting mobility, and there appear to be no US cases that recognize an employer's training of an employee, or investment in that employee's reputation, as reasons to restrict the employee's mobility. Metro Traffic Control Inc. v Shadow Traffic Network, 22 Cal App 4th 853, 862 (1994) ("Actors, musicians, athletes, and others are frequently trained, tutored, and coached to satisfy the requirements of their sponsors and audiences, but their talents belong to them to contract away as they please…. Simply hiring personnel who possess the requirements specified by a customer does not convert the employee into a 'trade secret.' In other words, a stable of trained and talented at-will employees does not constitute an employer's trade secret.")

It is often asserted that enforcement may be denied if doing so would harm the public interest. However, very few cases actually deny enforcement on this ground. Most involve medical professionals who, if enjoined from practicing, would leave a geographic area underserved. (Trebilcock 1986:106-119; Restatement Sec. 8.06(d), comment i. A rare case

denying enforcement as not in the public interest is *Thomas Cowan & Co Ltd v Orme* [1961] MLJ 41 (Singapore) (noncompete reasonable between the parties but unenforceable because it unreasonably harmed public interest by perpetuating a monopoly in fumigation). In light of the economic evidence discussed in Part B4 infra, showing how restricting employee mobility harms the public interest, greater attention by common law courts to the public interest would probably reduce further the enforcement of noncompetes.

In contrast with civil law jurisdictions, it is unusual in the common law world for enforcement of a noncompete to be conditioned on payment to the employee. Enforcement, though rare, can nevertheless be quite cruel as the employee is unable to work in his or her area of expertise and receives nothing from the former employer (Marx 2011).

b. European Union civil law countries.

In all member states of the European Union (EU), it is difficult to enforce a noncompete for anything but short periods of time and limited geographic scope. This results from application of national constitutions and labor statutes, as there are not yet common EU rules dealing with covenants not to compete, apart from peculiar provisions concerning self-employed commercial agents (Directive 86/653/EEC).

The validity of non-competition agreements under EU law.

Restrictive covenants are deeply incompatible with fundamental principles of EU law, specifically competition law, though development of this principle mostly lies in the future.

The European Commission has expressed concern about the compatibility of non-competition agreements with EU law, most fully in the answer given on behalf of the Commission by Mario Monti, then European Commissioner for Competition, to a written question of June 2002. Mr. Monti wrote: "A particular clause which has a disproportionate effect on a person's ability to seek employment may well amount to a barrier to the provision of services under Article 49 of the EC Treaty as well (e.g. in the case where a company which operates in the high-tech sector needs to recruit a highly qualified person to be able to provide its services). Any rules that may hinder or make less attractive the exercise of a fundamental freedom guaranteed by the EC Treaty, such as the freedom to provide services must, according to the established case-law of the Court of Justice, fulfil certain requirements. There are four such requirements: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it. It is for the national authorities to apply the said criteria in individual cases and the question of the compatibility or otherwise of an agreement with the said criteria is a matter for the national courts to assess in the light of Community rules and principles on free movement of workers and services".

Non-competition agreements can, if not proportional, therefore conflict with EU law and in particular with the freedom to provide services and the free circulation of dependent workers. Proportion might be evaluated from different perpectives. The Commission, as we saw, considered the needs of the enterprise—the example given was of a company, operating in the high-tech sector, which needs to recruit a highly qualified person to be able to provide services. Presumably a given restrictive covenant by one employer might therefore be disproportionate to the hiring needs of other employers. However, it might also be disproportionate to the well-recognized needs of employees, for example an employee, prevented by a covenant not to compete, from moving to other European countries to respond to job offers. Every restrictive covenant limits both competitors' freedom to hire and employees' freedom to move. It is not yet clear what sort of interest by the employer extracting the noncompete, if any, might sustain its enforceability in the teeth of the recognized harm to competitors and employees.

EU law of competition suggests that this balance should normally tip toward not enforcing restrictive covenants, even without considering any labor law values. EU rules on competition are designed to prohibit agreements which stifle competition. In particular, article 101 of the Treaty on the functioning of the EU prohibits as incompatible with the internal market "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market". Although the rule has primary reference to agreements between enterprises, agreements restricting competition between employer and employee may be included as "concerted practices", that "have as their object or effect the prevention, restriction or distortion of competition within the internal market".

An issue that would arise, should the EU begin to regulate restrictive covenants, would be whether the covenant, in order to come under EU regulation, would have to interfere with the functioning of the European labour market as a whole, for example a "mass" restrictive agreement by a big company in order to prevent a large number of its employees from moving anywhere in the European labour market. It is however quite possible that a breach of EU law would arise even if the limitation purportedly imposed on employees lay only within the borders of a Member State. As stated by the European Court of Justice (case V.C.H., October 17th, 1972) the prejudice of the internal common market between Member States may also result from purely national agreement, as long as it is likely to affect the entire territory of the Member State and therefore not limited local markets. Such an agreement has the effect of "reinforcing the compartmentalization of markets on a national basis, thereby holding up the economic interpenetration which the treaty is designed".

Combining these principles of freedom to provide services and the free movement of

workers, and anti-competitive rules, suggests EU law's adversity to non-competition agreements between employer and employee. This adversity might exist even if, as is often argued, the protection of freedom of competition brought by European law is more protection of the market system in its objective structures, rather than protection of spheres of individual freedom. However, in practice, restrictive covenants in Europe are normally evaluated under national constitutions and other legislation, to which we now turn.

Restrictive covenants under European national constitutions and statutes

European countries typically regard the regulation of restrictive covenants as a question of balancing the freedom of the employer against the freedom of the worker, both sets of freedoms often regarded as constitutional.

The employer seeking to enforce a restrictive covenant can invoke its freedom of economic initiative of the employer-entrepreneur, considered as the freedom to dispose of resources (material and human) in order to produce. This principle is located at the basis of all European constitutions: in some Constitutions it is expressly provided - for example, in the Spanish (Article 38), the Italian (Article 41) and the Hungarian (Article 9) ones - in others it is only implicit. This freedom of economic initiative includes a freedom of contract. The employer, on this view, is free to agree with employees to restrict their post-contractual competition. The employer may invoke agreements that represent companies' strategies or initiatives in order to preserve their know-how (knowledge, experience, secrets), or their investments in human resources (cost of acquisition and training of certain employees). Therefore, what is freely stipulated by parties in an agreement, should be considered invalid only if in conflict with other constitutional principles. As stated by the French Constitutional Court (Constitutional Council n 2002-465 de 13 janvier 2003) the legislator cannot legally invalidate contracts concluded if there is not a sufficient reason of general interest.

This freedom of economic initiative provides not only a legal support to covenants not to compete, but also a first limitation for them. In fact freedom of economic initiative provides, as a corollary, the right to compete, granting to each person to perform the same activities already carried out by another individual and then to fight against him to conquer the market. The principle of free competition – a principle embraced by all EU countries, in accord with EU Treaties that recognize this principle widely and firmly - prohibits restrictive agreements that go beyond the legitimate initiative of the entrepreneur, encroaching into the realm of equal freedom of economic initiative of his competitors and of his employee. In other words, the very principle of freedom of economic initiative that might be thought to support restrictive covenants, simultaneously renders invalid any restrictions which have no purpose except to prevent the employee (or any other person) from competing with the former employer. We will see later how this translates into concrete limitations.

The most important counterweight, to the interests of the employer who seeks to enforce a covenant not to compete, is the protection of individual workers. The right to work, here meaning the right of individuals to free choice of employment, not only in order to satisfy their family and own needs, but also to develop their own person, is recurrently present in the European Constitutional Charters. Recurrent is also a link between employment and human personality: the work is elevated to an instrument of social, moral and political development of the citizen; a means for workers to make an improvement in their personality through the improvement of their professional position.

From the protection of the right to work as a means of livelihood and social and moral development of the citizen comes the right of the citizen-worker to accede to job opportunities offered by the labour market. Guaranteed free movement inside the labour market is the tool necessary to ensure an effective right to work to the citizen. This right finds an express recognition in many European Constitutions: article 12 of the German provides the freedom of employment; article 35, par. 1 of the Spanish Constitution recognizes the right to choose a profession and to improve professionalism; article 35 of the Italian Constitution states the promotion of training and professional advancement; Section 18 of Finland's Constitution recognizes the right to receive training that promotes employability. While the recognition of the right to work is the main antagonist to the validity of non-competition agreements, it is not an insurmountable obstacle. The Italian Constitutional Court, in a judgment quite dated, but still relevant, stated that the recognition of the right to work provided by Article 4 of the Italian Constitution can be derogated where the statutory law places restrictions for the protection of other interests and other social needs (Corte Costituzionale 61/1965).

The protection of the right to work is recognized in many European Constitutions under a second and no less important profile: the protection of human dignity, including professional dignity. In all European jurisdictions the inviolability of human dignity is configured as a limit on the choices taken by individuals exercising their freedom of contract. Therefore, the restrictions imposed on the employee through a non-competition agreement must still allow the expression of his professionalism. The degree of compression to which the dignity of the profession may lawfully be submitted by a non-competition agreement varies from country to country.

The translation of the constitutional values into statutory rules.

European legislation on restrictive covenants is thus normally understood as a balance among these conflicting interests.

As mentioned above, the freedom of economic initiative by itself can never justify restricting free competition. There must be another purpose that justifies limiting competition, and the limit must be proportional to that purpose. In practice, this is substantially similar to the doctrine of restraint of trade of common law countries. There is little difference between

“employer protectable interest” of the common law and European civil law’s “socially and objectively appreciable interest” necessary to justify the restriction provided by a covenant not to compete. Sometimes the need to demonstrate such an interest is expressly required by the statutory rules (i.e. Spanish Workers Statute, German Commercial Code; Hungarian Labour Code); more often it is imposed by case-law.

The employer’s interest is always measured by the actual needs of the employer, compared to the subjective characteristics of the employee and the activity he can perform. Specifically, for the existence of such a legitimate interest there must be a “competitiveness” of the activity the employer wants to inhibit in the employee. Therefore any agreement that imposes restrictions on the worker, outside of the activities that can be considered competition, is considered null and void.

Spanish, German, and French case-law recognize an employer's legitimate interest only where there is a loss or potential damage that the company may suffer as a result of the passage of the worker into competition. Thus the interest of employers is restricted only to those workers who: have access to important information, have close relationships with customers (such as commercial) or are aware of the lists of clients and price lists, perform particular functions or possess a particular experience. By contrast, the employer has no legitimate interest in restricting the mobility of employees who perform simple tasks. Belgian legislation provides strict and objective rules which limit the employer's interest to those employees who receive a salary higher than a given amount.

In addition to the requirement of legitimate employer interest, European legal systems fairly uniformly place identical limits to the non-competition agreement. A covenant not to compete must be in writing, must be of limited duration, specify the geographic area of validity of the agreement and the activity inhibited by the agreement, and provide for compensation to the worker. These are all conditions for the validity of the covenant, except for the indication of the duration of the agreement. It is a rule shared by the various jurisdictions that the agreements exceeding the law time limits are valid only up to the roof of the law, and ineffective for the remaining period; whereas if the written agreement is too broad considering the other limits (object, space, etc…) or lacking of legitimate employer interest, European tribunals will not rewrite it to be reasonable, but they will refuse to enforce it at all.

What emerges from the varied European legislation is the widespread desire - consistent with the constitutional principles already highlighted - to safeguard not only the prospect of economic livelihood of the worker, but also the free development of their professionalism. What varies considerably among the different legal system is the level of protection accorded to these values. In actual litigation, there is much more concern with labor law values, typically protection of the worker, than with competition values. For example, in Germany the prospect of economic livelihood of the worker is well protected by imposing a minimum remuneration

for the covenant not to compete at least equal to half of the salary of the employee. France similarly requires financial compensation to the employee ("contrepartie") that may lie somewhere between full compensation and the derisory. In some sectors in France, collective negotiations have defined the minimum compensation. By contrast, in other countries, such as Italy, any payment beyond the merely symbolic is sufficient, perhaps as little as 10 or 15% of salary. As mentioned (Casper 2007), there is little use in Germany of noncompetes and little litigation. It is possible that German tribunals are satisfied with enforcing a noncompete so long as the employee is compensated, while in Italy, where the constitution protects the right to practice a profession, tribunals place more emphasis on the reasonableness of the restriction, even if the employee is well-paid and the employer's interest legitimate.

France is a low enforcer that may be evolving towards nonenforcement. Five decisions of the Chambre Sociale de la Court de Cassation, all issued 10 July 2002, collectively require that a noncompete meet five conditions before it may be enforced. First, it must be included in the contract of employment. Second, it must permit some employment to the affected employee. Third, it must be "indispensable to the legitimate needs of the enterprise." Fourth, it must be limited in time and space. Fifth, as noted, the employer must compensate the employee with a *contrepartie*. As a result, when a French employee, who has signed a clause de non-concurrence, resigns or is dismissed, the employer has only two choices. It can "lever la clause de non-concurrence", permitting the employee to take any job. Or it may seek to apply the clause, paying the employee monthly compensation, with enforcement by no means certain. (Guillaume Maréchal, personal communication).

It is rare in Europe for the analysis of a restrictive covenant to consider the impact of its enforcement on levels of competition. Even though competition is a constitutional value present in all European Constitutional Charters and among fundamental principles of the European Union (see above), every question on the validity of non-competition agreements is resolved by national judges considering only the "social" aspects of the issue, that is to say the protection of workers as the weaker party to the employment relationship. As in common law jurisdictions, the need to protect competition requires that the employer identify a legitimate interest, such as protection of trade secrets or customer relations. A desire not to face competition is not such a legitimate interest. However, if the employer successfully identifies such a legitimate interest, there is no further inquiry into the effect on the particular labor or product market of enforcing the specific restrictive covenant.

c. Other Low Enforcing Jurisdictions

Japanese company work rules normally purport to restrain employees who leave employment from competing with their former employer. For decades, these provisions were mainly symbolic. Under the "lifetime employment" prevailing in large Japanese corporations, employees did not depart and there was no labor market for mid-career managers or professionals. Recently labor mobility has increased in Japan. Courts hearing cases under the work rules have determined to enforce only "reasonable" restrictions on competition. When personnel of a bar exam preparation school departed to found a rival, the court enforced the noncompete for two years against the departing director, on the grounds that this was necessary to protect trade secrets of the old employer, but refused to enforce the noncompete against instructors or auditors. (Tokyo Legal Mind, 894 HANREI TAIMUZU 73 (Tokyo Dist. Ct., Oct. 16, 1995); Ogawa 1999). If a noncompete does not protect employer trade secrets, it is enforceable only if the employer makes "counterpayment" to the employee. (Nihon Convention Service, 711 RODO HANREI 30, 47 (Osaka Dist. Ct., Dec. 25, 1996),*rev'd in part on other grounds, aff'd in part*, 745 RODO HANREI 42 (Osaka High Ct., May 29, 1998); Ogawa 1999). In Nihon Convention, the departing employees took no trade secrets, only good relations with customers; this was held insufficient to support enforcement of the noncompete. Japanese courts consider many different factors in their inquiry into reasonableness, and the cases are somewhat unpredictable, but overall, enforcement of noncompetes is not favored (Ogawa 1999).

China Employment Contract Law (2008), Art. 24, restricts enforcement of "competition restrictions" to "senior managers, senior technicians and other personnel with a confidentiality obligation"; requires compensation during the noncompete period, of at least thirty percent of average salary (Decision of Supreme People's Court, January 31, 2013); and cannot exceed two years.

3. High Enforcers

Korea, Thailand, and some US jurisdictions, are more likely to enforce noncompetes. They follow a common pattern. The noncompete is treated like any contract. It is not considered presumptively or prima facie invalid. The employer will not, in practice, have to show any special need for a noncompete. In such jurisdictions, it is enough that the employee signed it. Such jurisdictions do sometimes state that the noncompete must be "reasonable" in duration and geographic scope. However, since the purpose of the noncompete—that is, the employer's protectable property interest—is not clearly specified, the "reasonableness" inquiry is subjective and unfocused. Moreover, in high enforcing jurisdictions, an unreasonable noncompete may be redrafted by the court and enforced as rewritten.

Thailand gets the Olympic gold medal for restricting employee mobility. Its Supreme Court recently enforced a promise by a departing low-level manager in the logistics industry not to work in the industry for five years in Thailand, Vietnam, Cambodia, Laos, or Myanmar (JVK International Movers v. Howell, case 1275/2543, 2007). This is the longest and broadest

enforcement of a noncompete that we encountered in our research (since the laissez-faire nineteenth century when cartels and other agreements in restraint of trade were also enforceable). There are few, if any, jurisdictions that would restrain someone from working in his field for such a long period, and over five countries. The employer demonstrated no particular need for the noncompete. For example, it did not identify any trade secrets or confidential information, loss of which it feared.

Courts in Korea and Taiwan undertake a balancing process similar to common law jurisdictions, so it is difficult to say whether they are really high enforcers or not. We include them as high enforcers because they will rewrite an unreasonable covenant to one of reasonable length; they consider two years presumptively reasonable; and because other commentators have described Korea as favoring employers (Kim, Ki, and Kim 2010:78-4: "current trend is towards enhanced protection for employers and their trade secrets"). Taiwan, by contrast, is said increasingly to protect employees (Yu 2010:79-3). Such assessments by local counsel are interesting but difficult to evaluate; we return to this point in Part B when we discuss scholarship on these issues.

Intermediate appellate courts in two, but only two, US jurisdictions (Illinois and New Jersey) have enjoined employees from changing jobs on a theory known as "inevitable disclosure of trade secrets." This is the equivalent of giving every employer a noncompete without its negotiating it. As mentioned, employers in the US who sue departing employees, alleging the statutory "actual or threatened disclosure" of trade secrets, must normally identify the precise trade secrets, loss of which they fear. This is a disincentive to litigation. In the theory of "inevitable disclosure," the employer alleges simply that the employee had access to trade secrets (as all employees do); that the employee proposes to join a direct competitor to work on the same sort of matters; and that the employee will thus "inevitably disclose" something or other on the new job, though the old employer cannot demonstrate precisely what. National Starch and Chemical Corp. v. Parker Chemical Corp., 530 A.2d 31 (N.J. App.Div. 1987); Pepsico, Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995)(Illinois law); Strata Mktg. v. Murphy, 740 NE2d 1166, 1175-79 (Ill.App. 2000). No state supreme court has adopted the theory of inevitable disclosure. A few trial courts have. (Interestingly, there do not appear to be any New Jersey cases applying the theory since *National Starch*). Following the *Pepsico* decision, which was widely noted, hundreds of employers sued, all over the US, to enjoin the departure of personnel on the theory that they would "inevitably disclose" trade secrets. Nearly all of these suits were unsuccessful, courts adhering to the traditional standard that the employer must both identify trade secrets, and show that their loss was "actual or threatened," usually by showing some untrustworthiness in the departing employee. See, e.g., Whyte v. Schlage Lock Co., 125 Cal.Rptr.2d 277 (Ct.App. 2002); Northwest Bec-Corp v. Home Living Service, 41 P3d 263 (Idaho 2002) ("An employee will naturally take with her to a new company the skills, training, and knowledge she has acquired from her time with her previous employer.

This basic transfer of information cannot be stopped, unless an employee is not allowed to pursue her livelihood by changing employers."); LeJeune v. Coin Acceptors, Inc., 849 A2d 451, 467-70 (Md. 2004). The American Law Institute concluded that the doctrine of "inevitable disclosure of trade secrets" is limited to few states and only to "exceptional circumstances" typically requiring a "pattern of deceit or misappropriation" by the departing employee. Restatement Sec. 8.05, comment b.

B. Scholarly literature on the law of employee mobility, and suggestions for future scholarship.

The topic of legal restrictions on employee mobility has a thinner scholarly literature than some other topics in this volume. This doubtless reflects its uneven importance in different labor markets and systems of labor law. However, some very interesting scholarship is emerging. The variation among jurisdictions permits interesting comparative study, so far, however, limited to comparison among US jurisdictions.

1. Realist or socio-legal prediction of outcome: a gap in the literature

We have been unable to locate a single article that assembles a data base of decisions and examines which variable factors predict litigation outcomes. The closest is Arup (2012), who assembles a data base of over a hundred decisions from the Australian states of New South Wales and Victoria, which he then examines for their analysis of the type of information involved (see Part B2). Given such a database, one could regress such variables as the size of the old and new enterprise, type of industry, age and salary of the departing employee, and other variables, in order to determine the factors that actually predict when noncompetes will be found to be reasonable.

A New York lawyer who has litigated many cases involving noncompetes suggested to us, only partly in jest, that the law of New York is as follows. When the departing employee, against whom enforcement of a noncompete is sought, makes less money than the judge, the judge will find the noncompete to be an unreasonable interference with the working man or woman's right to make a living. However, when the departing employee makes more money than the judge, and especially if that high earner is younger than the judge, the judge will enforce the noncompete, finding it a reasonable attempt to recover the old employer's investment in the young person. While made in jest, the hypothesis is more than a little bit plausible. Belgian and Chinese law, as we have seen, specifically limit enforcement of noncompetes to employees with high salaries. As a descriptive thesis about New York law it could, in principle, easily be tested by assembling a data base of reported decisions, coded for variables of this type. Scholarship of this kind would permit advance beyond the truisms, endlessly repeated in the literature, that "reasonableness" is a vague standard and the cases unpredictable.

2. Information theory

As we have seen, cases in which employers successfully impede employee mobility often turn on the characterization of information. The employee's mobility may be impeded if the employee has disclosed or threatens to disclose "confidential information" or "trade secrets," categories that include such common reifications as "customer lists," "customer information," "business plans," and so on. The employee will be permitted, by contrast, to change jobs and trade on information that is "common knowledge" or the result of "general training." Some information will itself support the employer's cause of action, such as loss of trade secrets, while the same or other information may instead represent the employer's "protectable" or "property" interest supporting enforcement of a noncompete. As we also have seen, it is common for scholars to observe that all these legal categories are somewhat malleable.

Theorists of information have developed more refined categories of information but little use has been made of them in legal analysis. Arup (2012) classifies a set of Australian decisions by the type of information involved. He invokes a six-part matrix under which knowledge may be explicit, tacit, or personal, and each of these may apply to knowledge about production or about customers. Arup's main concern is that courts protect only knowledge that is genuinely confidential, not merged into employee know-how, and in his analysis this danger is particularly acute in cases involving knowledge about customers.

Hyde (2003) identifies several employer practices in Silicon Valley that individually and collectively transmit information across firm boundaries. Firms hire for short tenures with rapid employee turnover, which is positive for productivity in firms with high R&D expenditure (Andersson et al 2008) or that employ advanced technologies (Abowd et al 2007). They make heavy use of independent contractors and temporary employees whose loyalty is to technology rather than to organization (Barley and Kunda 2004). They frequently share technical information with rivals or make such inquiries themselves, a practice facilitated by rapid mobility of personnel (Feldman 2003; Saxenian 1994; Sitkin 1986). They do not sue departing employees and make this policy known when they recruit (Hyde 2003). Hyde explains this pattern through the New Economics of Growth (Lucas 1988, 1993; Romer 1986, 1990; Warsh 2006), in which legally nonexcludable information, shared by multiple users, is the key variable in rapid economic growth. Following this literature, Hyde does not distinguish between nonrivalrous information (codes and formulas that may be used simultaneously by many users) and rivalrous information (information in a human body that can only be in one place at one time), since both are important factors in economic growth. For example, the classic study of Collins (1974) showed that no laboratory ever successfully constructed a particular type of laser without employing someone who had previously worked with it, even though all of its plans

and specifications were in the public domain. Collins (2010) has considerably elaborated his concept of tacit knowledge. It is possible that these studies of information will someday influence legal understandings of employee intellectual property.

3. Historical studies

There are few historical studies of changing concepts of workplace intellectual property over time. Exemplary is Fisk (2009), documenting gradual acquisition by US employers of rights to exploit their employees' inventions, under the flexible device of implied contract. Similar studies for other jurisdictions would facilitate comparative analysis.

4. Economic and other empirical social science comparing jurisdictions

A growing body of empirical social science, all studying the US so far, examines the consequences of enforcing noncompetes. Some exploits the variation among US states to make comparisons between enforcers and nonenforcers. Some study consequences of changes in the law. While this work is in its infancy, so far *all* of it suggests that all the economic advantages accrue to jurisdictions that do not enforce noncompetes.

Early work often compared California, the leading nonenforcer, with enforcers such as Massachusetts. This is a noisy measure. There are many reasons California is not Massachusetts. Samila and Sorenson (2011) compared metropolitan areas based on a more sophisticated index with varying levels of enforcement of noncompetes, depending on which of a list of relevant legal doctrines had been adopted in a given state. They found that full enforcement of noncompetes reduces venture capital, business start-ups, and patenting. The finding on patenting is crucial. The usual legitimate reason for enforcing noncompetes, as we have seen, is their supposed tendency to encourage employer investment in training and information, investment that, supposedly, will never take place if employees are free to depart. If there is anything to this scenario, it is outweighed by its opposite. "[N]ot only does the enforcement of non-compete agreements limit entrepreneurship. . . but also it appears to *impede* innovation" (at 23; emphasis in original). Another interesting feature of the Samila-Sorenson study is that its results remain robust even if the San Francisco Bay area is entirely omitted from the comparisons. In other words, the association between employee mobility and economic growth is not limited to the specific conditions of information technology, or Silicon Valley in the 1990s. Similarly, Garmaise (2011), who studied executive compensation, shows that managers in jurisdictions that enforce noncompetes are less mobile, are paid less, and take more poorly paid jobs if they change jobs. They invest less in their own human capital. As a result, employers in jurisdictions that do not enforce noncompetes are more productive and better able to attract financing. Like Samila and Sorenson, Garmaise constructed an index that permits him to classify US states by differing levels of enforcement of noncompetes, which has already proved valuable to other researchers (Png, unpub).

Michigan in 1985 repealed, apparently inadvertently, its previous California-like statutory restrictions on the enforcement of noncompetes, and began after 1985 to enforce noncompetes. This created a natural experiment analyzed by Marx, Strumsky, and Fleming

(2009) by studying patents. Firm-to-firm mobility among inventors dropped 8.1 percent, with higher drops among inventors with more human capital. There was no social benefit from this decline in mobility. In particular, there was no increase in patents. Michigan employers may have gained the power to impede their employees' mobility, but they did not do anything useful with this power. The results did not change significantly if the automobile industry was completely excluded.

Marx, Singh and Fleming (unpublished) then tracked inventor mobility nationally, through the patent database, and found a significant brain drain from states that enforce noncompetes to states that do not, controlling for general economic conditions. The most productive, and most networked, patenting inventors are the most likely to move from enforcing to nonenforcing states. The result does not change if California is left out of the analysis entirely. Png (unpublished) found that adoption of the Uniform Trade Secrets Act also increases out-of-state mobility of scientists and engineers from states that had not previously been full noncompete enforcers, in Garmaise's typology.

What happens to employees who are subjected to a covenant not to compete? The first such study is by Marx (2011), who interviewed around sixty inventors in the automatic speech recognition industry. He found that the waste of human capital is enormous. A significant number were unable to use their skills again. They switched industries, or absorbed the cost of being out of work for the duration of the noncompete. Those that decided to change jobs anyway were much likelier to go to a large firm that could afford litigation with Employer 1 than to a smaller firm.

These are all studies that in principle could be adapted to make similar comparisons between enforcers and nonenforcers outside the US. Marx (2011), studying the labor market experience of those subjected to restrictions on mobility, presents no methodological difficulties if replicated outside the US, and is long overdue everywhere. Comparison between enforcers and nonenforcers could start with an adaptation of the typologies of Samila-Sorenson or Garmaise, then comparison for the outcomes they studied (patents, startups, economic growth, compensation, mobility of personnel), or related outcomes. The results of such comparison are not easy to predict. It is possible that other labor market factors will prevent enterprises outside the US from realizing California (or India or Israel)-style growth when employee mobility may no longer legally be impeded. For example, if German employers still make little use of noncompetes (Casper 2007) it cannot matter much (except to the affected individuals) whether they are enforced or not, and if there is still no labor market for mid-career German professionals (Vitols and Engelhardt 2005), there may be few productivity gains to be had from altering the law of employee mobility. On the other hand, there are surely other jurisdictions that, like the low-growth jurisdictions in Samila and Sorenson (2011), Garmaise (2011), Marx Strumsky Fleming (2009), Marx Singh Fleming (unpub), and Png (unpub) might owe some of that low growth to the impediments their law of employer intellectual property places on employee mobility and new business formation.

C. Conclusion: On narratives of comparative law

Thus, despite many differences in emphasis, all known systems of labor and employment law recognize the potential harm to the public in permitting employers to impede employee mobility or to extract "voluntary" promises to do the same. Without legal limits, impediments to employee mobility might have devastating impact on affected employees; harm consumers by limiting competition and new business formation; and harm entire societies by restricting economic growth, particularly the kind of rapid diffusion of information that is essential to technological advances. Consequently, every system of labor law places limits on employers' ability to impede employee mobility. Every system of labor law limits the enforcement of restrictive covenants and some very large jurisdictions never enforce them at all. Every system of labor law stakes out areas of knowledge that employees may carry into the labor market and take to their next employer: general knowledge; general training; scientific facts; information not kept secret by the old employer; the employee's own market reputation and (in some cases) customer relations. However, many of the common legal formulations are vague and cast unnecessary shadows on employee mobility. Global technological and economic growth would be enhanced by more widespread adoption of best practices.

We stand by this story. We are well aware, however, that this is not the way that the story is usually told in the comparative law literature on restrictive covenants and trade secrets (e.g. Lazar and Siniscalco 2010). It is more common to view this problem the wrong way round, through an American myth, propagation and enactment of which has taken a great deal of US diplomacy and publicity. In this myth, US economic growth depends on strong intellectual property rights. Other countries should join the US in recognizing these (mythical) intellectual property rights, and, if they would prefer not to, they will be forced to, in trade negotiations. For it is no secret that, for decades, the chief US objective in any trade negotiation has been the recognition by its partners of these supposed US intellectual property rights. US trade negotiators have not, for example, devoted much effort to job growth in the US, lower prices for US consumers, let alone a fair and just world. This myth simply ignores the thousands of vital US technology companies, particularly in information technology, that hold few patents; whose products may be reverse engineered; and whose internal practices and projects are entirely in the heads of employees who, in the US, can and will walk out the door, without fear of lawsuit, at any time (Hyde 2003). "[T]he regime of intellectual property rights under which the scientific and technological platform of the digital economy was constructed in the United States was radically at odds with present standards: software was not patentable and business processes were not even subject to copyright, let alone patent; cross-licensing of patents was widespread and in some instances mandatory; and the requirements of national security forced the active creation of second sources." (Janeway 2012:280).

Like any myth, the myth of intellectual property requires suppression of alternative narratives, such as the reality of employee mobility. California's principle of employee mobility is well-known, but rare indeed is the published reference to the similar policies of such large economies as India, Mexico, or Israel. By contrast, the supposed doctrine of "inevitable disclosure of trade secrets," giving every employer a restrictive covenant even if it didn't

negotiate one, has received enormous comment, despite the fact that it has supported injunctions in appellate courts in precisely two US jurisdictions, has been rejected in nearly all of the hundreds of US cases litigated under that theory, and is not part of the law anywhere outside New Jersey and Illinois. (Lazar and Siniscalco (2010) polled attorneys in every country in their international survey about the supposed doctrine of "inevitable disclosure of trade secrets," helpfully adding a footnote to each chapter explaining this doctrine, only to learn that it is, we are happy to say, entirely unknown outside the US).

The problem of the starting-point pervades every narrative of comparative law, no matter how scrupulous, including every narrative in this volume. There is never just one way of telling the story. There is never one obvious place to start. There is no master jurisdiction whose narratives are privileged. So we hope that our understanding of the comparative law of employee mobility, in addition to informing our readers, might also represent a kind of deconstruction of the entire enterprise of narratives of comparative law.

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