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Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes[1]

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"The work will teach you how to do it."[2]

Recently there has been increasing popular and scholarly attention to employer efforts to limit competitive behavior by departing employees, particularly in the high-tech sector of the economy.[3] Both the use and enforcement of noncompete agreements[4] appear to be on the rise as employers contend with

[2] Anonymous proverb.

[3] Although noncompetes have always been a subject of academic debate, a significant amount of scholarship in this area has been produced during the last decade. *See*, *e.g.*, Samuel C. Damren, *The Theory of "Involuntary" Contracts: The Judicial Rewriting of Unreasonable Covenants Not to Compete*, 6 TEX. WESLEYAN L. REV. 71 (1999); Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L.J. 49, 56 (2001); Eric A. Posner & George Triantis, Covenants Not to Compete from an Incomplete Contract Perspective (Oct. 20, 2000), *available at* http://www.law.uchicago.edu/Lawecon/index.html; Edward M. Schulman, *An Economic Analysis of Employee Noncompetition Agreements*, 69 DEN. U. L. REV. 97 (1992); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001); Andrew J. Gallo, Comment, *A Uniform Rule for Enforcement of Non-Competition Contracts Considered in Relation to "Termination Cases"*, 1 U. PA. J. LAB. & EMP. L. 719 (1998). For articles focusing on the particular problems associated with the use of noncompetes in the high-tech industry, see Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999); Hanna Bui-Eve, Note, *To Hire or Not to Hire: What Silicon Valley Companies Should Know About Hiring Competitors' Employees*, 48 HASTINGS L.J. 981 (1997); Christine M. O'Malley, Note, *Covenants Not to Compete in the Massachusetts Hi-Tech Industry: Assessing the Need for a Legislative Solution*, 79 B.U. L. REV. 1215 (1999); Dan Messeloff, Note, *Giving the Green Light to Silicon Alley Employees: No-Compete Agreements Between Internet Companies and Employees Under New York Law*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 711 (2001); *cf.* Alan Hyde, Working in Silicon Valley: Economic and Legal Analysis of a High-Velocity Labor Market (2000) (unpublished manuscript) (on file with author) (discussing high-tech industry's use of trade secret claims under California law to protect comparable employer interests). Popular concern with the use of noncompetes and related issues is reflected in the frequent media attention given to employers' pursuit of litigation against defecting employees. *See*, *e.g.*, Kenneth Bredemeier, *In a Bind over Noncompete Clauses: More Workers Caught in Grip of Required Agreements*, WASH. POST, Mar. 18, 2000, at E1 (discussing increasing frequency of such agreements and spotlighting use by Washington, D.C. area companies); Kelly Zito, *Evolve Claims Intimidation by Peoplesoft*, S.F. CHRON., Mar. 21, 2000, at C1 (reporting on litigation initiated by enterprise software manufacturer after eighteen employees opted for job opportunities with competitor company).

[4] This Article uses the term "noncompete" to refer to a written agreement in which the employee covenants not to engage in competition with the employer after termination. *See infra* notes 16-17 and accompanying text. Such a provision should be distinguished from other types of restrictive covenants, including nondisclosure agreements (through which the employee covenants not to reveal the employer's trade secrets or confidential information to future employers) and nonsolicitation agreements (through which the employee covenants not to solicit either employees or clients of the employer to participate with the employee in a future competitive

an increasingly mobile workforce.[5] Employer reliance on such agreements is by no means extraordinary, and companies have attempted to protect their business interests in this manner for centuries.[6] What the current economic climate makes clear, however, is that existing doctrine fails to address fully the interests that employers are attempting to safeguard in using noncompetes, which in turn has resulted in significant confusion in the case law.[7] This Article elucidates the tension in existing legal

endeavor). While such additional promises frequently accompany promises not to compete in employment agreements, this Article focuses specifically on the issues raised by the most restrictive of these clauses, those that prohibit general competition, and considers such additional covenants only briefly by analogy. For a general explanation of the various types of restrictive covenants that may appear in an employment agreement, see Bui-Eve, *supra* note 3, at 1000-06.

[5] Evidence of the increasing use of noncompete agreements in employment contracts is anecdotal but prevalent. There appears to be consensus among practicing attorneys that noncompete agreements are being more frequently requested from a greater variety of workers and more vigorously pursued posttermination. *See*, *e.g.*, Bredemeier, *supra* note 3, at E1 (interviewing counsel noting recent rise in use of non-competes). An empirical study of court decisions performed by Professor Peter Whitmore in the late 1980s determined that the number of appellate decisions involving noncompetition claims more than doubled between 1966 and 1988. *See* Peter J. Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483, 484 n.2 (1990). More recently, Professor Katherine Stone noted even greater increases between the early 1970s and late 1990s. *See* Stone, *supra* note 3, at 577 n.239. It should be noted that such studies do not capture noncompete cases that failed to yield a written opinion, nor instances in which the presence of such an agreement deterred employee departure and therefore avoided litigation entirely. For this reason, the use of noncompete agreements is probably far more prevalent than those numbers suggest. *See* Charles A. Sullivan, *Revisiting the "Neglected Stepchild": Antitrust Treatment of Postemployment Restraints of Trade*, 1977 U. ILL. L.F. 621, 622-23 (noting that "the number of decisions reported constitutes only the proverbial iceberg's tip" since subsequent employers can avoid litigation by using the employee outside the agreement's scope and because "the mere existence of such clauses . . . induce[s] many employees . . . not to leave their employment to begin with").

[6] The first recorded instances of the use of employee noncompetition agreements date to fifteenth and sixteenth century England when such agreements were considered *per se* void as against public policy. *See* Harlan M. Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 631-32 (1960) (summarizing early history of noncompete law). The modern rule of enforceability traces to an eighteenth century British decision concerning the use of such a clause in a sale of business transaction. *See id.* at 629-31 (discussing Mitchel v. Reynolds, 24 Eng. Rep. 347, 349 (Q.B. 1711)).

[7] Case law on noncompetes is strikingly inconsistent, making enforceability perhaps one of the most complex, and consequently most litigated, areas of employment law. *See* Arthur Murray Dance Studios of Cleveland v. Witter, 105 N.E.2d 685, 687 (Ohio 1952) (describing body of precedent as "a sea—vast and vacillating, overlapping and bewildering" out of which "[o]ne can fish . . . any kind of strange support for anything"); Whitmore, *supra* note 5, at 485 (noting that the ambiguity

rules that limit enforceability of noncompetes based on particularized notions of substantive fairness, and proposes an alternative theory of enforcement focusing on substantive and procedural issues that arise at the time noncompetes are formed.

A central concern in the law and scholarship regarding noncompete agreements has long been the extent to which enforcement should be constrained to protect the mobility and economic freedom of workers. Due to historical concerns about employees' lack of bargaining power,[8] courts have treated such agreements as narrow remedial tools, designed to prevent damage to cognizable business interests, rather than as bargained-for alterations of the default rules of the employment relationship.[9] Courts in effect require an employer to demonstrate an interest separate and apart from its interest in retaining the departing worker in order to obtain an injunction against competition.[10] This Article argues that such a rule relies on an unworkable distinction between the employee and his or her work product, one which is incompatible with modern notions of the value of human capital. Where skilled labor is scarce, employers are apt to use noncompetes as a vehicle for retaining qualified workers as much as for protecting proprietary information and trade

surrounding the enforceability has resulted in vast amounts of litigation and reported decisions); *infra* notes 51-53 and accompanying text.

[8] *See*, *e.g.*, *Arthur Murray*, 105 N.E.2d at 704 (noting that the employee "is often in urgent need of selling [his labor] and in no position to object to boiler plate restrictive covenants placed before him to sign"; "[h]is individual bargaining power is seldom equal to that of his employer"); *see also* Orkin Exterminating Co. v. Foti, 302 So. 2d 593, 596 (La. 1974) (noting strong public policy reason against enforcing noncompete agreements is "disparity in bargaining power" between employee and employer, where employee, "fearful of losing his means of livelihood . . . contract[s] away his liberty to earn his livelihood in the field of his experience"); *infra* notes 26-29 and accompanying text.

[9] The legal rules that have evolved to limit noncompete enforceability require employers to demonstrate a "legitimate" or "protectable" interest in trade secrets, confidential information or customer relations as a threshold to accessing legal protection, and the extent of protection provided is limited to that which is reasonably necessary to safeguard the interest asserted. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981); *infra* Part I.B.

[10] *See* McGlothen v. Heritage Envtl. Servs. L.L.C., 705 N.E.2d 1069, 1072 (Ind. Ct. App. 1999) ("[A]n employer is not entitled to protection from an employee's knowledge, skill, or general information acquired through experience or instruction while in the [employer's] employment."); Hasty v. Rent-A-Driver, Inc., 671 S.W.2d 471, 473 (Tenn. 1984) ("In order for an employer to be entitled to [noncompete] protection, there must be special facts present over and above ordinary competition . . . such that without the covenant not to compete the employee would gain an unfair advantage. . . ."); *infra* Part I.B.

secrets. As modern employment relationships become increasingly short-term and traditional notions of employee loyalty decline, employers may turn to noncompetes to enforce through legal means shared notions of obligation and commitment that were previously self-enforcing.

The crux of the enforceability issue therefore is the relationship between the informal norms that develop between companies and their workers and the written noncompete agreement that purports to define the terms of employment.[11] Because of the evolving nature of these relationships and the limited opportunities employees have to negotiate the terms of their noncompetes, there is reason to doubt that the employee's acceptance of such an agreement constitutes a knowing assumption of the risks of enforcement.[12] On the other hand, consideration of the parties' informal understanding diminishes the predictive value of written agreements and encourages employers to overreach in the drafting stage.[13]

Responding to this dilemma, this Article offers a formation-based model of enforcement that draws on basic contract principles and the rules governing enforcement of premarital agreements under domestic relations law. Like noncompetes, premarital agreements are an attempt to control in advance the financial consequences of the dissolution of a legal relationship, and they have historically been subjected to comparable scrutiny for fairness. In recent decades, the trend in evaluating the valid-

[11] This is a central concern arising from relational contract theory, which suggests that exchanges take place within relational patterns that influence parties' behavior and the execution of the terms of their exchange. *See*, *e.g.*, IAN R. MACNEIL, THE NEW SOCIAL CONTRACT (1980); Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340, (1983) [hereinafter Macneil, *Values in Contract*]; Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763 (1998); *see generally infra* Part III.C.1. The merits of the various approaches to considering relational norms and other values that may influence contract interpretation are discussed *infra* in Part III.C.2.

[12] Noncompetes generally contain boilerplate language and frequently are not provided to the employee until after he or she begins employment. *See* Curtis 1000, Inc. v. Suess, 24 F.3d 941, 943 (7th Cir. 1994) (agreement signed two weeks after hire); Midwest Sports Mktg. v. Hillerich & Bradsby of Canada, Ltd., 552 N.W.2d 254, 259 (Minn. Ct. App. 1996) (same); Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28 (Tenn. 1984) (agreements of three employees signed three weeks, two weeks, and one day after hire); *cf.* Hopper D.V.M. v. All Pet Animal Clinic, Inc., 861 P.2d 531, 536 (Wyo. 1993) (agreement signed nine months after promotion). At that point, the employee's ability to negotiate the agreement's terms is necessarily limited. *See infra* Part IV.C.

[13] *See infra* Part III.C.2.

ity of premarital agreements has moved away from review of the substantive effects of enforcement in favor of assessing the quality of the spouse's consent and the fairness of the agreement at the time it was drafted.[14] Adopting this focus on formation in the context of noncompetes will normalize the enforcement of these agreements from the perspective of contract law. Ideally, it will also force parties to view such documents as binding contractual alternatives to informal relationships and consequently encourage them to enter into such agreements with caution and forethought.

This Article proceeds in four parts. Part I contains an overview of noncompete law and explains the evolution of the existing legal rules for determining enforceability. Part II critically considers the protectable interest requirement, the key doctrinal tool for assessing the fairness of noncompete agreements. It asserts that this approach fails to effectively address employers' interest in human capital or provide a workable standard for enforcement. Part III recharacterizes the employer's interest in using noncompete agreements as an interest in its workers. That usage may be justified as a means of protecting the employer's investment in employee development or of enforcing an implicit exchange of training and experience for spot commitments to particular projects. At the same time, such usage creates opportunities for employers to reach beyond the terms of the parties' shared understanding that cannot easily be resolved through judicial modification of the written agreement. Part IV explains the developing law of premarital agreements and proposes a formation-based model of noncompete enforceability. The new model limits judicial consideration of circumstances surrounding enforcement, focusing instead on the legitimacy of the parties' bargaining process, the quality of their exchange, and the reasonableness of the terms as of the time of drafting.

[14] *See* UNIF. PREMARITAL AGREEMENT ACT § 6, 9C U.L.A. 376 (2001) (providing that a premarital agreement is enforceable unless it was not executed voluntarily, or was unconscionable at the time it was formed and the party opposing enforcement did know of or receive fair disclosure of his or her partner's assets); *see also infra* Part IV.B.

I

From Policy to Doctrine: Substantive Limitations on Noncompete Enforceability

A noncompete is a written[15] agreement in which an employee covenants at the outset[16] of the employment relationship that he or she will refrain from competing with the employer in specified ways for a period of time following the termination of the rela-

[15] Only a small minority of states recognize oral noncompete agreements. *See*, *e.g.*, Metcalfe Invs., Inc. v. Garrison, 919 P.2d 1356, 1362 (Alaska 1996). Enforceable restraints are almost always in writing and some jurisdictions so require. *See*, *e.g.*, ChemiMetals Processing, Inc. v. McEneny, 476 S.E.2d 374, 376 (N.C. Ct. App. 1996); Geritrex Corp. v. DermaRite Indus., 910 F. Supp. 955, 960 (S.D.N.Y. 1996). In recent years, however, courts have held as a matter of trade secret law that, despite the absence of a noncompete agreement, an employer may be entitled to an injunction preventing competition in limited situations where any competitive employment by the employee would lead to disclosure. *See* Pepsico, Inc. v. Redmond, 54 F.3d 1262, 1271 (7th Cir. 1995) (enjoining employee from working where employment by competitor would inevitability lead to disclosure of trade secret distribution systems and marketing strategies used in plaintiffs' sports beverage business); Merck & Co. v. Lyon, 941 F. Supp. 1443, 1460 (M.D.N.C. 1996) (applying inevitable disclosure theory to enjoin future employment where employee's new job at drug company would involve same duties and require disclosure of former employer's supply agreements and projected product launch date). *But see* Bayer Corp. v. Roche Molecular Sys., Inc., 72 F. Supp. 2d 1111, 1120 (N.D. Cal. 1999) (holding that "California trade-secrets law does not recognize the theory of inevitable disclosure; indeed, such a rule would run counter to the strong public policy in California favoring employee mobility"); Del Monte Fresh Produce Co. v. Dole Food Co., 148 F. Supp. 2d 1326, 1337 (S.D. Fla. 2001) (noting that "[a]bsent evidence of actual or threatened misappropriation, a court should not allow a[n] [employer] to use inevitable disclosure as an after-the-fact noncompete agreement to enjoin an employee from working for the employer of his or her choice").

[16] Despite the fact that the employee frequently does not sign the agreement until after he or she begins working, *see supra* note 12, most courts have held that the offer of continued employment constitutes consideration for the employee's promise. *See*, *e.g.*, *Curtis 1000, Inc.*, 24 F.3d at 945 (finding that third noncompete covenant signed sixteen years after initial employment was supported by consideration because employee salesman was retained for an additional eight years); Abel v. Fox, 654 N.E.2d 591, 593 (Ill. App. Ct. 1995) (finding that "[c]ontinued employment constitutes adequate consideration for a post-employment covenant not to compete" signed in 1990 after employment had begun earlier that same year). In instances in which the agreement is requested long after employment commences, however, some courts require that the employee receive some increase in compensation, authority, or benefits to support the employee's promise. *See*, *e.g.*, Freeman v. Duluth Clinic, Ltd., 334 N.W.2d 626, 630 (Minn. 1983) (holding that noncompete agreement signed by employee two years after beginning employment and months after receiving a new promotion was invalid because employer offered no new consideration such as a pay raise, new promotion, or other benefit).

tionship.[17] While such agreements conform to contractual formalities, they are governed by a unique system of rules that substantially constrain their enforceability based on principles of substantive fairness. Due to normative concerns about employees' ability to bargain effectively and the potential impact of such agreements on employees' economic freedom, courts have restricted the use of noncompetes to the protection of discrete business interests that can be demonstrated at the time enforcement is sought. The following section briefly explores the policy issues underlying questions of enforceability and explains their doctrinal legacy.

A. Themes, Standards, and the Problem of Competing Policies

In assessing a request for injunctive relief pursuant to a noncompete agreement, a court is explicitly or implicitly balancing fundamental principles: freedom of contract, respect for personal autonomy, protection of the economic mobility of individuals, and, of course, the desire to enhance economic development in a manner that will benefit society as a whole.[18] On the one hand, noncompetes can be seen as legal tools necessary to preserve key business interests and relationships.[19] On the other hand, they may be considered tools of oppression, non-negotiable covenants imposed by employers that essentially inden-

[17] For sample noncompete clauses see GALE R. PETERSON, TRADE SECRET PROTECTION IN AN INFORMATION AGE C-53, C-63 (1997).

[18] *See* Blake, *supra* note 6, at 626-27 (summarizing key policy concerns underlying issues of noncompete enforceability).

[19] *See*, *e.g.*, Prudential Sec., Inc. v. Plunkett, 8 F. Supp. 2d 514, 519 (E.D. Va. 1998) (recognizing "that a company spending a great deal of time and money cultivating clients may see its efforts destroyed when a former broker violates a restrictive covenant and solicits his former company's clients"); PSC, Inc. v. Reiss, 111 F. Supp. 2d 252, 256 (W.D.N.Y. 2000) (holding that employers have an interest in preventing the employee from working for a competitor's company where "the transient employee possesses highly confidential or technical knowledge concerning manufacturing processes, marketing strategies, or the like"); Darugar v. Hodges, 471 S.E.2d 33, 36 (Ga. Ct. App. 1996) (noting that employer had the "right to protect itself from the risk that the former employee might use contacts . . . cultivated [while employed] to unfairly appropriate customers"); BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1225 (N.Y. 1999) (finding a legitimate interest "in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment"); Reed, Roberts Assocs., Inc. v. Strauman, 353 N.E.2d 590, 593 (N.Y. 1976) (recognizing "the legitimate interest an employer has in safeguarding that which his business made successful and to protect himself against deliberate surreptitious commercial piracy").

ture the employee to a single master.[20]

Historically, the dominant concern has been the risk of depriving individual employees of their ability to earn a living. During the fifteenth and sixteenth centuries, courts sought to protect apprentices, who purchased their training and license to trade through the guild system, by preventing masters from extending the requisite period of servitude through the use of restrictive covenants.[21] The dominance of the apprenticeship system as a means of entering a trade combined with the relative difficulty of traveling outside one's town or village made even narrow geographic limitations on postemployment competition particularly onerous.[22] Thus, the earliest recorded cases voided such agreements as unfair restraints of trade.[23]

The idea that all such restraints are invalid gave way to a more tempered approach by the early part of the eighteenth century. In *Mitchel v. Reynolds*,[24] an English court held that a limited restraint on future competition pursuant to a sale-of-business agreement could be valid where it was supported by good consideration under circumstances appearing just and honest. In so deciding, the court identified the concerns which ultimately formed the basis of the modern rule: the possible loss to the promisor of his or her means of earning a living, the danger of corporate monopolization, and the potential loss to society of the services of one of its members.[25] Although the case involved a covenant ancillary to a sale of a business rather than an employment con-

[20] *See*, *e.g.*, *Prudential Sec.*, 8 F. Supp. 2d at 519 (characterizing covenant not to compete as a "contract of adhesion" that must be strictly construed against enforcement); Vortex Protective Serv. v. Dempsey, 463 S.E.2d 67, 69 (Ga. Ct. App. 1995) (noting that noncompete agreements "injure the [employees] making them, diminish their means of procuring livelihoods and a competency for their families [and] . . . deprive [them] of the power to make future acquisitions, and expose them to imposition and oppression"); Bennet v. Storz Broad. Co., 134 N.W.2d 892, 898 (Minn. 1965) (holding that noncompete agreements "are looked upon with disfavor, cautiously considered, and carefully scrutinized").

[21] *See* Blake, *supra* note 6, at 632-39 (describing history of noncompete use in England and treatment under British common law).

[22] *See id.* at 632.

[23] *See generally id.* at 631-32 (summarizing first four known recorded decisions from 1414 through sixteenth century). Another explanation for the case holdings of this period is that courts were motivated to preserve the structures of the existing guild system; thus the voiding of such agreements can be characterized as a conservative effort to preserve the social status quo as opposed to a progressive move to protect workers. *Id*. at 632.

[24] 24 Eng. Rep. 347, 349 (Q.B. 1711).

[25] *See id.* at 350.

tract, the court noted in dicta the peculiar risks of applying such covenants in the employment setting: It expressed concern that abusive masters might utilize such agreements to prevent employees from engaging in legitimate competition at the end of their period of servitude.[26] Thus, in upholding the sale-of-business covenant before it, the court opened the door to enforceability of comparably worded covenants between employer and employee and at the same time raised the key policy concerns that would constrain judicial enforcement in future cases.[27]

The *Mitchel v. Reynolds* "rule of reason," as it has come to be called, ultimately formed the standard to be used in analyzing both sale-of-business and employee noncompete agreements. It was adopted by American courts and to this day characterizes the dominant judicial approach to enforceability.[28] So too has the social rhetoric of court decisions remained focused on the protection of individual workers. Modern courts routinely appeal to employees' lack of bargaining power in rendering a deci-

[26] *See id.* (recognizing that masters were liable to "give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come to set up for themselves").

[27] The distinction between agreements not to compete in employment contracts and those incorporated in contracts to sell a business remains viable, the latter type generally being viewed more favorably by courts and legislatures. *See*, *e.g.*, CAL. BUS. & PROF. CODE §§ 16600-16602.5 (West 1997) (declaring all contracts in restraint of trade void except those ancillary to the sale of a business or business interest or the dissolution of a partnership); Baker's Aid v. Hussmann Foodservice Co., 730 F. Supp. 1209, 1214 (E.D.N.Y. 1990) (noting that restrictive covenants ancillary to the sale of a business are "routinely enforced" whereas those appearing in employment agreements are "'rigorously examined'"). The distinction is based in part on the assumption that the promisor in the sale of business context will likely have greater bargaining power than an ordinary employee. *See* Watson v. Waffle House, 324 S.E.2d 175, 177 (Ga. 1985) ("[A] contract of employment inherently involves parties of unequal bargaining power to the extent that the result is often a contract of adhesion . . . [while] a contract for the sale of a business interest is far more likely to be one entered into by parties on equal footing."); *see also* Blake, *supra* note 6, at 648. It also reflects recognition of the fact that a business owner's ability to sell a going concern would be seriously undercut if he or she could not promise to refrain from future competition. *See id.* at 646 ("A transfer of good will cannot be effectively accomplished without an enforceable agreement by the transferor not to act so as unreasonably to diminish the value of that which he is selling.").

[28] *See*, *e.g.*, Mattis v. Lally, 82 A.2d 155, 156 (Conn. 1951); Ricou v. Crosland, 88 So. 380, 381 (Fla. 1921); Rakestraw v. Lanier, 30 S.E. 735, 737 (Ga. 1898); People v. Sheldon, 34 N.E. 785, 789 (N.Y. 1893); Queen Ins. Co. v. State, 24 S.W. 397, 400 (Tex. 1893); *see generally* Maureen B. Callahan, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 709 (1985) (noting that the *Mitchel v. Reynolds* rule "has survived virtually unchanged to the present day").

sion against noncompete enforcement. As stated by an Ohio court in the oft-cited *Arthur Murray v. Witter* decision:

> The average, individual employee has little but his labor to sell or to use to make a living. He is often in urgent need of selling it and in no position to object to boiler plate restrictive covenants placed before him to sign. To him, the right to work and support his family is the most important right he possesses. His individual bargaining power is seldom equal to that of his employer.[29]

Thus, while courts in the vast majority of jurisdictions have taken the position that noncompete agreements are enforceable if reasonable,[30] they have done so with reluctance. Courts consequently assess enforceability questions from a deeply ingrained point of view that noncompetes are the product of coerced agreement and will in most cases detrimentally curtail the individual worker's freedom to earn a living.

B. Rules, Thresholds, and the Requirement of a Protectable Interest

The legacy of these historical policy concerns manifests in the current doctrinal test for evaluating the substantive fairness of noncompete agreements. While concerns about bargaining power often underscore judicial decisions, the doctrinal analysis courts utilize eschews questions of contract formation in favor of examination of the purposes and effects of the covenant.[31] Ac-

[29] Arthur Murray Dance Studios of Cleveland, Inc. v. Witter, 105 N.E.2d 685, 703 (Ohio Ct. Com. Pl. 1952); *see also* PSC Inc. v. Reiss, 111 F. Supp. 2d 252, 257 (W.D.N.Y. 2000) (holding that "no restrictions should fetter an employee's right to apply to his own best advantage the skills and knowledge acquired by the overall experience of his previous employment"); Prudential Sec., Inc. v. Plunkett, 8 F. Supp. 2d 514, 519 (E.D. Va. 1998) (finding that "[g]iven the inequality of bargaining power, [employee] could not request . . . the contract be changed without risking denial of employment"); Orkin Exterminating Co. v. Foti, 302 So. 2d 593, 596 (La. 1974) (noting a strong public policy reason against enforcing noncompete agreements is "disparity of bargaining power" between employee and employer, where employee, "fearful of losing his means of livelihood . . . contract[s] away his liberty to earn his livelihood in the field of his experience").

[30] A limited number of states refuse to enforce noncompetes in employment agreements or place substantial additional limits on their usage. *See* CAL. BUS. & PROF. CODE § 16600 (West 1997); COLO. REV. STAT. § 8-2-113 (2001) (providing limited protection for trade secrets, recovery of expenses for training or educating, and executive and management personnel, officers, and their professional staff); N.D. CENT. CODE § 9-08-06 (1987).

[31] For instance, courts will rarely examine the consideration supporting a noncompete agreement, presuming that the offer of employment itself is sufficient, *see supra* note 16, and despite the rhetoric of unequal bargaining power, courts almost never

cording to the classic formulation in the Restatement (Second) of Contracts, a covenant not to compete is "unreasonably in restraint of trade," and hence unenforceable, where (1) "the restraint is greater than what is needed to protect the promissee's legitimate interests" or (2) the promissee's need is outweighed by hardship to the promisor or the public at large.[32] In essence, the Restatement provision reflects not a "rule" of reasonableness so much as a standard by which courts can achieve a balance of interests.[33] A court must weigh the needs of the employer, characterized as its "legitimate" or "protectable" interests, against the gravity of the restriction placed on the mobility and economic freedom of the employee.[34] Oddly, its function is to consider not

inquire into the quality of the employee's consent. *Cf*. Stewart E. Sterk, *Restraints on the Alienation of Human Capital*, 79 VA. L. REV. 383, 409 (1993) (noting that courts apply the "reasonableness" test even in situations involving sophisticated parties bargaining at arms' length with the assistance of counsel). The viability of an approach to noncompete enforceability based on close scrutiny of the formation process is discussed at length in Part V, *infra*.

[32] RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981).

[33] *See* ALTA Analytics, Inc. v. Muuss, 75 F. Supp. 2d 773, 784 (S.D. Ohio 1999) (noting that the applicable state law "has eschewed a bright line rule in favor of an overall standard of 'reasonableness,' that enables courts to consider all factors relevant to the contract and to 'fashion a contract' that is reasonable based on the facts of the case"); *see generally* CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP 200 (1994) (characterizing the movement away from "clear, open-and-shut demarcations of entitlement" to "fuzzy, ambiguous rules of decision," often based on principles of equity or reasonableness, as a "substitution of 'mud' rules for 'crystal' ones").

[34] In precise accordance with the Restatement rule, some jurisdictions also consider the damage to society that may result from the loss of the employee's services. *See* Merrill Lynch, Pierce, Fenner, & Smith Inc. v. de Liniere, 572 F. Supp. 246, 249 (N.D. Ga. 1983) (noting that "the public has little interest in having its choice restricted to brokers *other* than the one who has served them" in denying an injunction barring broker from serving his former clients); Liautaud v. Liautaud, 221 F.3d 981, 988 (7th Cir. 2000) (voiding noncompete agreement restricting employee from opening a sandwich shop anywhere in the world because it injured the public as a whole by permanently depriving the public of employee's sandwich shop and stifling competition). However, in most cases, courts do not treat societal interest as a factor to be considered separately from its two-step inquiry assessing protectable interest and reasonableness of scope. *See* Milton Handler & Daniel E. Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. REV. 669, 717-20 (1982) (suggesting that public injury was used by the common law merely to invalidate covenants or agreements where no protectable interest was shown, and not as a separate requirement to be factored into every decision which analyzes the reasonableness of the restriction); Lester, *supra* note 3, at 56 (explaining that public interests are most often adversely affected when the restrictions are not reasonable in scope). Those limited instances where societal interest is given distinct attention tend to involve highly specialized employees engaged in essential services. *See Merrill Lynch*, 572 F. Supp. at 249 (noting that "[a] stock broker stands

so much the language of the covenant or traditional contract defenses, but the operation of the covenant in relation to the situation in which its enforcement is sought.[35]

This balancing of interests takes place within a developed doctrinal framework that contains specified prerequisites to enforcement. At the threshold, employers must show that they have an underlying interest that the law is willing to recognize. Employers have no right to enforce a noncompete merely for purposes of indenturing an employee to his or her current post, nor any right to prevent competition per se.[36] To avoid unfair effects on employees and competitors, courts require the presence of special interests or circumstances that justify a restriction.[37] If there

in a different relationship to his customers from that of other kinds of salesman" because "of the important role of the broker in protecting the financial welfare of his clients"); Carter-Shields v. Alton Health Inst., 739 N.E.2d 569, 577 (Ill. App. Ct. 2000) (finding agreement restricting physician from practicing medicine within a twenty-mile radius unenforceable as against public policy because it would "deprive at least some patients of an on going relationship with the physician of their choice").

[35] *See* Stone, *supra* note 3, at 578 (noting that the law of noncompete enforceability "occupies a peculiar legal never-never land, somewhere between contract and tort, in which party consent and externally imposed obligation are intimately but complexly intertwined").

[36] *See* Davis v. Albany Area Primary Health Care, Inc., 503 S.E.2d 909, 912 (Ga. Ct. App. 1998) (holding that the "avoidance of competition is not a legitimate business interest sufficient to justify such an uncertain geographic limitation" as the one imposed on employee physician); Hasty v. Rent-A-Driver, Inc., 671 S.W.2d 471, 473 (Tenn. 1984) ("[A]ny competition by a former employee may well injure the business of the employer. An employer, however, cannot by contract restrain ordinary competition.").

[37] *See*, *e.g.*, Hapney v. Central Garage, Inc., 579 So. 2d 127, 130 (Fla. Dist. Ct. App. 1991) (noting in support of the protectable interest rule that "all consumers benefit from the availability of goods and services, the quality and price of which are determined by fair competition, unfettered by artificial monopolistic practices"); Vortex Protective Serv., Inc. v. Dempsey, 463 S.E.2d 67, 69 (Ga. Ct. App. 1995). The *Vortex* court noted that unreasonable employee restraints

> "tend to deprive the public of services of [citizens] in the employments and capacities in which they may be most useful to the community . . . , discourage industry and enterprise, and diminish the products of ingenuity and skill; prevent competition and enhance prices, and expose the public to all the evils of monopoly."

Id. (quoting Rakestraw v. Lanier, 30 S.E. 735, 738 (Ga. 1898)); Reed, Roberts Assoc., Inc. v. Strauman, 353 N.E.2d 590, 593 (N.Y. 1976) (expressing distrust of noncompete agreements because "our economy is premised on the competition engendered by the uninhibited flow of services, talent and ideas"); *Hasty*, 671 S.W.2d at 473 ("In order for an employer to be entitled to [noncompete] protection, there must be special facts present over and above ordinary competition . . . such that without the covenant not to compete the employee would gain an unfair advantage.").

is no such interest identified, or if the interest is judged insufficient, enforcement is denied.

Those interests that satisfy this test and constitute "protectable" employer interests fall into two doctrinal categories: interests in customer relationships or business goodwill[38] and interests in confidential or secret business information.[39] The classic scenario implicating the customer relationship interest is the salesperson or customer account representative. Where an employee's primary function is to market products to clients, a reasonable covenant preventing that employee from marketing comparable products in the same geographical area on behalf of a competitor is generally enforceable.[40] In such situations the law recognizes that the employer is neither attempting to indenture the employee nor restrain legitimate competition, but rather is seeking to prevent the employee from departing with the customer base that the employer developed.

[38] *See*, *e.g.*, Farr Assocs., Inc. v. Baskin, 530 S.E.2d 878, 881 (N.C. Ct. App. 2000) (finding employer consulting firm had a legitimate interest in protecting its customer base where employee was a behavioral consultant for large companies who developed close relationships with employee and would be inclined to take their business with the departing employee); Mertz v. Pharmacists Mut. Ins. Co., 625 N.W.2d 197, 204 (Neb. 2001) (finding employer had legitimate interest in protecting its customer goodwill because employee was the "only [salesman] in most of Nebraska for three years . . . and would have had the opportunity to appropriate [customers]"); BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1225 (N.Y. 1999) (noting that "[t]he employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment").

[39] *See*, *e.g.*, Comprehensive Tech. Int'l, Inc. v. Software Artisans, Inc., 3 F.3d 730, 739 (4th Cir. 1993) ("When an employee has access to confidential and trade secret information crucial to the success of the employer's business, the employer has strong interests in enforcing a covenant not to compete because other legal remedies often prove inadequate."); Earthweb, Inc. v. Schlack, 71 F. Supp. 2d 299, 312 (S.D.N.Y. 1999) (noting that noncompetes are enforceable "'to the extent necessary (1) to prevent an employee's solicitation or disclosure of trade secrets, [and] (2) to prevent an employee's release of confidential information regarding employer's customers'") (quoting Ticor Title Ins. Co. v. Cohen, 173 F.3d 63, 70 (2d Cir. 1999)).

[40] Cases which are particularly convincing to courts are those in which the product sold is fungible or where it is easy for the customer to mistake the sales person with the actual employer. *See*, *e.g.*, Diversified Fastening Sys., Inc. v. Rogge, 786 F. Supp. 1486, 1489 (N.D. Iowa 1991) (noting that the products sold in the concrete fastener industry were fungible and, therefore, "direct contact with customers by a company's sales force and the relationship between the sales force and the customer are the most important factors in making sales"); McGlothen v. Heritage Envtl. Servs., L.L.C., 705 N.E.2d 1069, 1073 (Ind. Ct. App. 1999) (recognizing as protectable goodwill employee's direct contact with customers, where employee was a salesman for a waste management company and admitted customers regarded him as the employer).

The interest in so-called proprietary information is more complicated. Courts have consistently held that employers cannot possess a protectable interest in an employee's general skills or know-how.[41] To legitimize a noncompete agreement based on business information, an employer must do more than simply supply the employee with general training or experience; it must demonstrate that the employee was privy to trade secrets or other confidences.[42] The modern concept of a trade secret encompasses any information which endows the holder with a competitive advantage and which is not generally known or available within the industry.[43] Thus, under varying circumstances, customer lists, pricing methods, marketing strategies, product specifications, costs, and profit margins have been held to constitute protectable interests justifying a postemployment restraint.[44]

[41] *See*, *e.g.*, *McGlothen*, 705 N.E.2d at 1072 ("[A]n employer is not entitled to protection from an employee's knowledge, skill, or general information acquired through experience or instruction while in the [employer's] employment."); Carolina Chem. Equip. Co. v. Muckenfuss, 471 S.E.2d 721, 724 (S.C. Ct. App. 1996) ("One who has worked in a particular field cannot be compelled to erase from his mind all of the general skills, knowledge and expertise acquired through his experience."). The distinction between general knowledge and confidential information is discussed more fully in Part II.A, *infra*.

[42] *Compare* BABN Techs. Corp. v. Bruno, Civ. A. No. 98-3409, 1998 WL 720171, at *6 (E.D. Pa. Sept. 2, 1998) (finding sequencing strategy and product information of employer's lottery company was protectable as confidential information "despite its lack of status as trade secret"), *with* Dyer v. Pioneer Concepts, Inc., 667 So. 2d 961, 964 (Fla. Dist. Ct. App. 1996) (finding no protectable interest in employee training because sending employee on seminars and training employee to do general skills associated with floor stripping did not provide employee with "any unique or specialized training"); *see also* Hapney v. Cent. Garage, Inc., 579 So. 2d 127, 132 (Fla. Dist. Ct. App. 1991) (finding no protectable interest where employee learned to repair cruise control units and cellular telephones because such training did not "go[ ] beyond what is usual, regular, common, or customary in the industry"). The distinction between general skill training and trade secrets is discussed more fully in Part II.B, *infra*.

[43] *See* UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 438 (1990); *see also* Gold Messenger, Inc. v. McGuay, 937 P.2d 907, 911 (Colo. Ct. App. 1997) (defining trade secret as "the whole or any portion or phrase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information . . . or other information relating to any business or profession which is secret and of value"); *Carolina Chem. Equip. Co.*, 471 S.E.2d at 724 ("A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."); *see infra* Part II.A.

[44] *See*, *e.g.*, Lumex, Inc. v. Highsmith, 919 F. Supp. 624, 629-30 (E.D.N.Y. 1996) (finding "Cybex prototypes of new and future equipment, including manufacturing costs and pricing structure, sales training, projected release dates and projected life span" to be confidential information not generally known outside of the company);

Assuming that an employer is able to demonstrate a protectable interest in one of these two ways,[45] the employer must then show that the terms of the covenant are reasonable under the circumstances. This reasonableness inquiry focuses on three elements: the temporal duration of the restraint, the geographic boundaries in which the employee is prevented from engaging in competitive employment, and the scope of the covenant, meaning the way in which competitive employment violative of the agreement is defined.[46] If the covenant is broader in these respects than what is deemed necessary to protect the employer's

Centrol, Inc. v. Morrow, 489 N.W.2d 890, 894 (S.D. 1992) (finding that agricultural consulting company's customer lists, revenue reports, financial statements, patron survey forms, soil test results and crop consulting data were confidential information which could be protected by a noncompete).

[45] Some jurisdictions also recognize a protectable interest where the services of the employee are in some way unique, such as where the employee is a well-known artist, athlete or performer. *See* Borg-Warner Protective Servs. Corp. v. Guardsmark, Inc., 946 F. Supp. 495, 501 (E.D. Ky. 1996) (recognizing employer interest in employees "possessing special, unique, or extraordinary qualifications . . . [like] newspaper writers and reporters; actors and actresses; singers; music teachers; [and] professional athletes"). However, this interest has been confined to narrow circumstances where it is the name of the defendant, not just the work he or she provides, that makes performance valuable, such that the employee's persona is a form of employer goodwill. *See*, *e.g.*, MTV Networks v. Fox Kids Worldwide, Inc., No. 605580/97, 1998 WL 57480, at *6 (N.Y. Sup. Ct. Feb. 4, 1998) (finding defendant was "unique employee" due to his role as master of ceremonies for presentations to future advertisers and media persons and was perceived as the "'public face' of MTVN"). Even so, such cases usually involve the presence of other forms of protectable interests, like confidential information, in addition to unique services. *See* Nigra v. Young Broad. of Albany, Inc., 676 N.Y.S.2d 848, 849 (N.Y. Sup. Ct. 1998) (noting that "'unique services' is a very slim reed which has never actually served as the sole basis for judicial enforcement of an anti-competition clause").

[46] There is a sliding scale relationship between these considerations; that is, the more narrowly the document is drawn in one area, the more tolerant a court will be of other more broadly worded elements. *See*, *e.g.*, Am. Software USA, Inc. v. Moore, 448 S.E.2d 206, 207 (Ga. 1994) (noting that as the category of customers the employer is trying to protect becomes more narrow, the need for a defined territorial restriction becomes less necessary); Farr Assocs., Inc. v. Baskin, 530 S.E.2d 878, 881 (N.C. Ct. App. 2000) ("Although either the time or the territory restriction, standing alone, may be reasonable, the combined effect of the two may be unreasonable. A longer period of time is acceptable where the geographic restriction is relatively small, and *vice versa.*"). Thus, where the scope of competitive behavior can be limited, modern courts have shown a willingness to uphold national or even international geographic restraints, previously considered void, in recognition of the legitimacy of corporate interests extending beyond conventional boundaries in the increasingly globalized marketplace. *See*, *e.g.*, Superior Consulting Co. v. Walling, 851 F. Supp. 839, 847 (E.D. Mich. 1994) (finding absence of any geographic term acceptable where former employer did business in forty-three states and with foreign nations and scope of competitive behavior could be reduced); *Farr Assocs., Inc.*, 530 S.E.2d at 882 (rejecting argument that covenant was overly broad due to

legitimate interests, the court will, in most jurisdictions, redraft or "blue-pencil" the provision to accommodate what it perceives as the needs of the employer in light of the anticipated effect of the restraint on the employee's ability to earn a livelihood.[47]

Thus, the modern approach to noncompete agreements is one of limited enforceability pursuant to distinct doctrinal specifications. The policy concerns historically in tension within this area of law are given voice in a two-step test requiring the employer to demonstrate special circumstances that legitimize its use of the agreement. This approach recognizes discrete interests as permissible, largely because they are deemed reflective of what is considered to be employer property.[48] In the absence of thresh-

absence of defined territorial limit where scope of covenant was limited to servicing clients of former employer).

[47] There are three approaches to the problem of noncompetes that are overbroad in scope, duration, or geographic limitation. Some courts will uphold the agreement provided it can delete, or "blue-pencil," the unreasonable portion of the agreement. *See*, *e.g.*, Licocci v. Cardinal Assocs., Inc., 445 N.E.2d 556, 561-62 (Ind. 1983); Dixie Parking Serv. v. Hargrove, 691 So. 2d 1316, 1320-21 (La. Ct. App. 1997) (blue-penciling agreement's geographic scope by deleting nine listed parishes and retaining only the two parishes where employer currently operated). Others are willing to redraft the agreement entirely to create a reasonable restraint even if the offending portion of the agreement cannot be grammatically severed from the whole. *See*, *e.g.*, Marshall v. Gore, 506 So. 2d 91, 92 (Fla. Dist. Ct. App. 1987) (redrafting agreement that prohibited employee from working for any computer software business to create prohibition against working for a competitor of employer); Raimonde v. Van Vlerah, 325 N.E.2d 544, 546-47 (Ohio 1975) (rejecting the 'blue-pencil' doctrine as overly strict because "the entire contract fails if offending provisions cannot be stricken," and choosing to modify the contract in such a way that both parties would find reasonable). A minority of courts decline to revise overbroad agreements entirely, and simply find them unenforceable if they overreach in any way. *See*, *e.g.*, Harville v. Gunter, 495 S.E.2d 862, 864 (Ga. Ct. App. 1998); Mid-States Paint & Chem. Co v. Herr, 746 S.W.2d 613, 616 (Mo. Ct. App. 1988) (noting that "if the contract contains no specifically expressed time or geographical limitations the court may not write into the contract any such limitations but must declare the entire provision void"); *see generally* Callahan, *supra* note 28, at 710 (describing the three approaches and discussing their prevalence).

[48] Of course, if the employee is appropriating that which is considered employer property, the conduct would be actionable under tort law irrespective of the noncompete agreement. Thus, it has sometimes been suggested that an interpretation of noncompete law that limits protection based on principles of ownership unnecessarily duplicates existing law. As discussed in Part II.A, *infra*, a strong argument can be made that extant case law on noncompete enforceability in fact recognizes employer interests beyond those protectable through claims of misappropriation of trade secrets and violations of the employee duty of loyalty. *See infra* note 84 and accompanying text. However, even assuming the rights are coextensive under these regimes, noncompetes are still valuable to employers in that they offer a preventive remedy. Tort law requires that the employer demonstrate actual or threatened misappropriation, which can be difficult to prove and which requires the

old circumstances, such as employee access to proprietary business information, it is considered likely that the employer is using the covenant for an improper purpose or is exploiting the employee.[49] Thus, the primary purpose of the protectable interest requirement is to screen legitimate from illegitimate uses of noncompetes, while the reasonableness inquiry ensures that the restraint requested does not reach beyond that which is necessary for protection of those limited interests.[50]

II

DISTINGUISHING BETWEEN WORKER AND WORK PRODUCT: AN ASSESSMENT OF THE PROTECTABLE INTEREST MODEL

A starting point for assessing the effectiveness of the current doctrinal approach is the universal uncertainty that exists among both lawyers and laypeople as to whether and when a court will deem a given covenant enforceable. Noncompete law is an area fraught with ambiguity stemming not from the absence of author-

employer to suffer the disclosure it wishes to avoid by applying for relief. *See*, *e.g.*, Comprehensive Techs. Int'l, Inc. v. Software Artisans, Inc., 3 F.3d 730, 736 (4th Cir. 1993) (finding evidence of short development time and lack of documentation in former employees' creation of competitive software product insufficient to demonstrate unlawful copying and denying plaintiff's misappropriation of trade secret claim); Eden Hannon & Co. v. Sumitomo Trust & Banking Co., 914 F.2d 556, 561-62 (4th Cir. 1990) (noting that because judges will not issue injunctions until disclosure is imminent or has already occurred, the former employee "tends to get 'one free bite' at the trade secret"). A noncompete entitles the employer to an immediate injunction provided the mere existence of a trade secret or confidential information is established. *See id.* at 561-62 (suggesting that employers often request such agreements to avoid onerous proof requirements associated with seeking an injunction against trade secret disclosure).

[49] *See*, *e.g.*, Reed, Roberts Assocs., Inc. v. Strauman, 353 N.E.2d 590, 594 (N.Y. 1976) (finding that "real purpose" of noncompete was "to prevent any voluntary withdrawals from the firm and compel active partners who came in with clients . . . to remain with the firm indefinitely" and agreement therefore "savored of servitude").

[50] It should be noted that despite the precision of the doctrine, courts do not always conform clearly to these distinct steps in rendering their analyses. *See* Edward M. Schulman, 69 DENV. U. L. REV. 97, 98 (1992) (observing that while courts purport to utilize a multistep test, "any consideration of hardship to the employee and injury to the public is usually subsumed by the analysis of the employer's protectable interest"); Gary P. Kohn, Comment, *A Fresh Look: Lowering the Mortality Rate of Covenants Not to Compete Ancillary to Employment Contracts and to Sale of Business Contracts in Georgia*, 31 EMORY L.J. 635, 646 (1982) (suggesting that courts often inappropriately disregard the threshold requirement that the employer demonstrate a protectable interest when the terms of the covenant appear reasonable under the second prong of the legal test).

ity, but the excess of it, much of which is facially inconsistent.[51] The abundance of law and lack of clarity have affected the practices of employees and employers, who are often ill-informed about the ramifications of these agreements.[52] Departing employees often mistakenly believe that these clauses are never enforceable, while employers are at times dismayed to find their carefully crafted agreements rejected as unreasonable. Thus, from a pragmatic perspective, the current law falls short of establishing the framework necessary to negotiate fairly between the needs of the employer and employee in the context of any particular employee defection.[53]

From a theoretical perspective, this confusion and lack of consistency reflect a fundamental problem with the premise on which the current test is based—the idea that employers' legitimate business interests are tangible and discrete and can be distinguished from the employee. The following section considers courts' use of protectable interests as a proxy for determining when a noncompete agreement is appropriate from a policy perspective. Within that model, the subcategory of "confidential in-

[51] As put most eloquently by the Ohio court in *Arthur Murray*:

> This is not one of those questions on which the legal researcher cannot find enough to quench his thirst. To the contrary there is so much authority it drowns him. It is a sea—vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long.

Arthur Murray Dance Studios of Cleveland v. Witter, 105 N.E.2d 685, 687; *see also* Sterk, *supra* note 31, at 404 (noting that use of a reasonableness standard rather than a bright line rule encourages inefficient litigation of enforceability issues); Whitmore, *supra* note 5, at 485 (noting that the ambiguity surrounding enforceability has resulted in vast amounts of litigation and reported decisions). If this was the status of the law forty-five years ago when the *Arthur Murray* court ruled, one can only imagine how much more unnavigable the waters are today.

[52] *See* Kurt H. Decker, *Refining Pennsylvania's Standard for Invalidating a Non-Competition Restrictive Covenant When an Employee's Termination Is Unrelated to the Employer's Protectible Business Interest*, 104 DICK. L. REV. 619, 621 (2000) (noting that employers are often mistaken about the proper uses of restrictive covenants); Whitmore, *supra* note 5, at 485 (noting that abundance of precedent makes it difficult for lawyers to predict how courts will treat a given noncompete); Gallo, *supra* note 3, at 733 (noting that because there is no way to predict whether a covenant will be enforced, it is difficult for an employer to confidently write such an agreement even where its interests are strong); *cf.* Sterk, *supra* note 31, at 438 (noting the uncertainty generated by distinctions between enforceable and unenforceable noncompetes in sale of business context).

[53] This uncertainty has significant economic implications. *See* Callahan, *supra* note 28, at 705 (noting that uncertain validity of noncompetes causes employers to rely less upon such agreements, resulting in lower wages for employees having access to confidential information, and creates incentives for employees to breach).

formation" has grown increasingly important as a basis for protection. In theory, employee access to such business information suggests that the employer's intent in requesting enforcement of a covenant is to prevent the improper disclosure of information that it owns, as distinct from asserting any claim to the employee or to the employee's own knowledge or experience. As will be seen, the concept of confidential business information escapes meaningful definition, and in many situations, particularly those involving employer-provided training, it is insufficiently severable from the employee to be capable of performing the policing function that the law expects of it.

A. The Confidential Information Free-For-All

Suits alleging interests in business-planning, customer-related or other "confidential" information are perhaps the most common amongst modern noncompete cases. This is not surprising given that modern companies frequently are unable to point to specific trade secrets of the traditional secret recipe variety associated with manufacturing industries.[54] Under the existing doctrinal scheme, information-producing or service-oriented companies seeking to assert a protectable interest must rely on some type of financial or business-related data, what might be thought of as a "soft" trade secret. Notwithstanding the prevalence and arguable importance of the confidential information category, however, an examination of recent case law suggests that courts have embraced no clear rule regarding what information can be legally classified as confidential and have taken very different approaches to determining whether an employee's access to information justifies enforcement of a noncompete.

Courts almost invariably treat the question of whether there is a protectable interest in confidential information as a matter of state common law. This makes sense given that state statutes re-

[54] On the movement from a manufacturing to a service-oriented economy, see generally STEPHEN A. HERZENBERG ET AL., NEW RULES FOR A NEW ECONOMY: EMPLOYMENT AND OPPORTUNITY IN POSTINDUSTRIAL AMERICA 1-3 (1998) and Anthony Carnevale & Donna Desrochers, *Training in the Dilbert Economy*, 53 TRAINING & DEV. 32 (1999). Even companies that continue to provide tangible products often find that the underlying technologies are being developed and disseminated so quickly that they lose their competitive value and trade secret status almost immediately. *See* David G. Majdali, Note, *Trade Secrets Versus the Internet: Can Trade Secret Protection Survive in the Internet Age?*, 22 WHITTIER L. REV. 125, 141-43 (2000) (surveying cases holding that information made accessible over the internet loses its protected status).

garding noncompetes generally do not specify what constitutes a legitimate interest, let alone provide particular guidance as to what falls within the "confidential information" category.[55] Surprisingly, though, courts have given little attention to the more detailed statutory framework offered by the law of trade secrets, the sister interest with which confidential information is inevitably paired. Trade secret law sets out rigorous criteria for invoking court protection under which a plaintiff must prove the existence of qualifying information that derives independent economic value from not being publicly known, plus the presence or likelihood of misappropriation of the secret.[56] Despite the fact that courts generally treat the protectable interest in confidential information as coextensive with employers' interest in trade secrets,[57] few courts do more than recite the uniform definition of a trade secret in assessing the presence of a protectable interest and none appear to make a genuine effort to apply its language.[58]

[55] Only ten states have statutes specifically addressing noncompetes. *See*, *e.g.*, ALA. CODE § 8-1-1 (1993) (Alabama); CAL. BUS. & PROF. CODE §§ 16600-16602.5 (West 1997) (California); COLO. REV. STAT. § 8-2-113 (2001) (Colorado); FLA. STAT. ANN. § 542.335 (West 1997) (Florida); LA. REV. STAT. ANN. § 23:921(A)(2) (West Supp. 2002) (Louisiana); MICH. COMP. LAWS ANN. § 445.774a (West 1989) (Michigan); N.D. CENT. CODE § 9-08-06 (1987) (North Dakota); S.D. CODIFIED LAWS § 53-9-11 (Michie 1990) (South Dakota); TEX. BUS. & COM. CODE ANN. §§ 15.50-.52 (Vernon Supp. 2002) (Texas); WIS. STAT. ANN. § 103.465 (West Supp. 2001) (Wisconsin). Only four of the ten state statutes enumerate the employer's protectable interests. *See* COLO. REV. STAT. § 8-2-113 (Colorado); FLA. STAT. ANN. § 542.335 (Florida); LA. REV. STAT. ANN. § 23:921(A)(2) (Louisiana); S.D. CODIFIED LAWS § 53-9-11 (South Dakota). Only the Louisiana statute purports to define "confidential" information, but it does so broadly and only in the limited context of appropriation of a computer program. LA. REV. STAT. ANN. § 23:921(A)(2).

[56] The Uniform Trade Secrets Act defines trade secret as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that derives independent economic value" from not being known and which is subject to reasonable efforts to maintain its secrecy. UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 438 (1990); *see also* Economic Espionage Act of 1996 § 101(a), 18 U.S.C. § 1839(3) (Supp. IV 1998) (defining "trade secret" to include "financial, business, scientific, technical, economic, or engineering information" that has independent economic value and which the owner takes reasonable measures to keep secret).

[57] *See* Bus. Intelligence Servs., Inc. v. Hudson, 580 F. Supp. 1068, 1072 (S.D.N.Y. 1984) (looking to trade secret definition to determine enforceability of noncompete prohibiting disclosure of confidential information).

[58] This is a problem not only in noncompete cases, but in the law of trade secrets generally, which is due at least in part to the ambiguity inherent in creating a workable definition of the term. *See* Alan Hyde, *Employment Law After the Death of Employment*, 1 U. PA. J. LAB. & EMP. L. 99, 114 (1998) (noting courts' refusal to define trade secrets and doubting whether a meaningful definition could be set

This absence of legal guidance has resulted in a free-for-all as to what confidential information actually is and whether it is sufficiently present in any instance to justify enforcement of a noncompete. In some cases, courts have read the category generously with seeming deference to the employer's own characterization of the information as confidential. For instance, in *Comprehensive Technologies International, Inc. v. Software Artisans, Inc.*,[59] a case involving both noncompete and trade secret claims, an employee responsible for developing data processing software left midproject to establish his own company with several former employees. He soon developed a competing data processing program.[60] On CTI's subsequent trade secret claim, the court analyzed the employer's computer programs and their components and concluded that no trade secret interest had been demonstrated.[61] It found that CTI had failed to show that the database organization, its access techniques, or its identifiers were not publicly available.[62] It further concluded that the arrangement and interaction of these functions within the employer's programs were common to all computer programs of the same type and therefore established no protectable trade secret interest even when considered as a composite.[63]

Having dismissed the trade secret claim, however, the court went on to conclude that the employer had demonstrated a legitimate interest in confidential information justifying enforcement of the employee's noncompete.[64] Without any explanation of the applicable legal standard, the court cursorily concluded that "[a]s the individual primarily responsible for the design, development, marketing and sale of CTI's software, [the employee] became intimately familiar with every aspect of CTI's operation, and *necessarily* acquired information that he could use to compete with

forth); Gilson, *supra* note 3, at 599 (suggesting courts' reluctance to more carefully define "trade secret" is attributable to imprecision in the Uniform Trade Secrets Act).

[59] 3 F.3d 730, 732-34 (4th Cir. 1993).

[60] *Id*. at 734.

[61] *Id*. at 737.

[62] *Id*.

[63] *Id.* In addition, the court noted that even if *CTI* had established a trade secret, there was insufficient evidence of misappropriation. *See id.* (dismissing as mere circumstantial evidence the fact that the competitor program was developed quickly and without documentation).

[64] *Id*. at 739.

CTI in the marketplace."[65] The only additional explanation or source proffered in the opinion to support this generalized conclusion was the fact that the employment agreement containing the noncompete recited that the employee would have access to confidential and secret information.[66]

Such rote conclusions are typical of many cases involving the assertion of confidential information as a protectable interest. Having seemingly rejected the use of precise trade secret standards, courts have established no substitute system of rules for evaluating the information alleged to be protectable, and, consequently, decisions finding a sufficient employer interest often appear to lack analytic rigor. The availability of careful legal analysis is also limited in part by the information itself and the fact that the employer's motivation for the use of the covenant is in theory the avoidance of disclosure.[67] Even under trade secret law, where the proof requirements are more exacting, courts have recognized that an employer need not enumerate all of its secrets to obtain protection, as doing so would compromise the very information it wished to protect.[68] Thus, those cases that discuss the confidential information that the employee possesses often do so only in general terms, without identifying what in particular justifies the restraint.

While such cases suggest to some extent that employers have considerable leeway in using noncompetes, others exhibit a more rigorous approach. In *Earthweb, Inc. v. Schlack*,[69] for instance, the court carefully parsed the responsibilities of the defendant-employee and the information alleged to be confidential and concluded that the company had no protectable interest justifying the enforcement of a noncompete. The case involved

[65] *Id*.

[66] *Id.* This is consistent with the general idea that because noncompetes are the product of mutual consent embodied in the form of a written contract, injunctions to support their enforcement are less onerous, or at least less surprising, to the employee. Another way to explain the result is that the court used the noncompete to sidestep the difficult trade secret analysis; by enforcing the noncompete the court could give the employer the relief it sought without declaring the subject matter a true trade secret. *See* Stone, *supra* note 3, at 585 (analyzing *CTI* decision).

[67] *See* Gilson, *supra* note 3, at 602; Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUD. 683, 691 (1980) (suggesting that purpose of using a noncompete is to avoid process of airing secret in open court).

[68] *See* Vermont Microsystems, Inc. v. Autodesk, Inc., 88 F.3d 143, 150 (finding contention that company should have provided list of trade secrets "unpersuasive inasmuch as such a practice could have jeopardized VMI's security").

[69] 71 F. Supp. 2d 299 (S.D.N.Y. 1999).

Earthweb's operation of a family of Web sites offering products and services to information technology (IT) professionals.[70] The defendant, Schlack, was a vice president with editorial responsibility for all content appearing on Earthweb's Web sites.[71] After working for one year, Schlack was hired away by a provider of print-based IT information to develop a competitor Web site.[72]

On Earthweb's motion for injunctive relief, the court initially found that the type of employment which Schlack had accepted did not fall within the precise definition of competition precluded by his employment agreement, and that the agreement consequently could not bar him from assuming his new position.[73] Notwithstanding this determination, the court devoted the bulk of its opinion to analyzing whether the noncompete would be enforceable if the parties had contracted to cover Schlack's new job.[74] In so doing, the court surveyed each source of information that could conceivably be deemed confidential to which Schlack had been exposed.[75] It considered Schlack's knowledge of Earthweb's business plan, contracts with licensees, and marketing strategy, as well as Schlack's exposure to technical information.[76] In each area, the court concluded that Schlack's knowledge was tangential or conceptual in nature, and therefore did not include Earthweb's proprietary information, or that the information in question was publicly available or insufficiently sophisticated in some other respect to rise to the level of confidential information.[77] Thus, the court concluded that Earthweb had failed to establish a protectable interest justifying a restraint, and that the noncompete agreement could not have been enforced even if Schlack's competitive behavior had fallen within its parameters.[78]

While the depth of analysis exhibited in *Earthweb* may be atypical, its existence demonstrates how the absence of a consis-

[70] *Id*. at 302.

[71] *Id*. at 303.

[72] *Id*. at 303, 306.

[73] The relevant difference between the two companies' products was that Earthweb derived its contents through licensing agreements with third parties whereas the competitor Web site contained information prepared by a staff of in-house journalists. *Id*. at 306.

[74] *Id*. at 312-17.

[75] *Id*. at 313-16.

[76] *Id*. at 314-16.

[77] *Id*.

[78] *Id*. at 316.

tent approach to what constitutes confidential information can be a double-edged sword for employers seeking to enforce noncompetes. The seeming willingness of many courts to sanction a reasonably drafted restrictive covenant without close examination of the alleged confidential information supporting it has encouraged an expansive lay understanding of what justifies the use of such an agreement.[79] In practice, noncompete agreements are requested with alarming frequency in employment relationships where the presence of confidential information is difficult to imagine under even the most liberal understanding of the term.[80] *Earthweb* suggests that these agreements might ultimately be held unenforceable. Yet while the case could offer a dose of reality to some employers, it is unlikely to undermine the *in terrorum* effect that the existence of such agreements has on employees, and the collective effect of the large number of cases employing a less rigorous analysis may be profound.[81]

[79] *See* Lumex, Inc. v. Highsmith, 919 F. Supp. 624, 630 (E.D.N.Y. 1996) (praising defendant's explanation of confidential information as "anything not known outside Cybex" as a good lay definition of the legal term).

[80] *See* Stone, *supra* note 3, at 586 (noting that courts no longer require the presence of a trade secret and have allowed employers to enforce covenants against a variety of employees including manicurists, carpet installers, and liquor deliverymen). Other surprising examples of employees asked to sign such agreements, allegedly to protect their employer's proprietary information, include bartenders, *see* Daiquiri's III on Bourbon, Ltd. v. Wandfluh, 608 So. 2d 222 (La. Ct. App. 1992), cosmetologists, *see* Carl Coiffure, Inc. v. Mourlot, 410 S.W.2d 209 (Tex. Civ. App. 1967), pest exterminators, *see* Orkin Exterminating Co. v. Etheridge, 582 So. 2d 1102 (Ala. 1991), garbage collectors, *see* Brewer v. Tracy, 253 N.W.2d 319 (Neb. 1977), janitors, *see* Royal Servs., Inc. v. Williams, 334 So. 2d 154 (Fla. Dist. Ct. App. 1976), night-watchmen, *see* Stein Steel & Supply Co. v. Tucker, 136 S.E.2d 355 (Ga. 1964), and undertakers, *see* Folsom Funeral Serv. v. Rodgers, 372 N.E.2d 532 (Mass. App. Ct. 1978). Similar concerns have been raised concerning the prevalence of training repayment agreements. *See* Anthony W. Kraus, *Repayment Agreements for Employee Training Costs*, 1993 LAB. L.J. 49, 49 (noting that repayment agreements have been used to protect employers' interests not only in sophisticated professions and high-tech industries, but also in connection with low-tech industrial craft training). For discussion of the use of noncompetes to protect employer investments in training, see Part II.B, *infra*.

[81] *See Earthweb*, 71 F. Supp. 2d at 310 (noting that a noncompete "can be a powerful weapon in the hands of an employer [as] the risk of litigation alone may have a chilling effect on the employee"); Michael J. Hutter, *Drafting Enforceable Employee Non-Competition Agreements to Protect Confidential Business Information: A Lawyer's Approach to the Case Law*, 45 ALB. L. REV. 311, 320 (1981) (noting that employees subject to noncompete agreements are reluctant to depart knowing their employment opportunities may be greatly curtailed); Sterk, *supra* note 31, at 410 (observing that "by limiting the number of attractive alternatives available to an employee, a restrictive covenant may . . . 'coerce' that employee to remain with his initial employer"); Sullivan, *supra* note 5, at 622-23 (discussing the chilling effect of

That is not to suggest that *Earthweb* offers a better approach, or that employer overreaching is the only concern. What may be most striking about *Earthweb* is the fact that Schlack was not an entry-level or semiskilled employee, but a corporate officer involved to some degree in all aspects of his employer's business. That some portion of the knowledge Schlack acquired at Earthweb could legitimately be deemed proprietary would hardly seem to stretch the concept of a protectable interest. Leaving aside the difficulties it presents in application, if confidential information as a category has any purpose within the common law analysis it must be that it captures and legitimates an employer interest in something less than a trade secret.[82] Although trade secret law has expanded to protect some forms of business-planning and customer-related information,[83] it historically protected only particular processes or formulae.[84] Confidential information may therefore be viewed as a more flexible basis for invoking noncompete protection which embraces less

noncompetes on employees); *cf.* Victoria A. Cundiff, *Maximum Security: How to Prevent Departing Employees from Putting Your Trade Secrets to Work for Your Competitors*, 8 COMP. & HIGH TECH. L.J. 301, 309 (1992) (suggesting employers' use of confidentiality agreements keeps employees from leaving and guides their future actions).

[82] *See* Gilson, *supra* note 3, at 605 (suggesting that noncompetes may provide an added measure of protection in situations where intellectual property law does not clearly embrace employers' asserted property interests) (quoting J. Charles Mokriski, *Trade Secrets: Protect Your Competitive Edge—Or Perish*, MASS. LAW. WKLY., May 30, 1994, at 33); Hutter, *supra* note 81, at 324-25 (noting that customer lists, or other confidential business information that employee had access to, which does not rise to the level of a trade secret may still be protected under noncompete law). However, some scholars have critiqued this view arguing that noncompete protection should be limited to those instances in which a true trade secret is at stake. *See* Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 98 (1981); Phillip J Closius & Henry M. Schaffer, *Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531, 541 (1984).

[83] *See* Lumex, Inc. v. Highsmith, 919 F. Supp. 624, 630 (E.D.N.Y. 1996) (holding that trade secrets include information dealing with new equipment, manufacturing costs, processes such as pricing structures, sales training, projected product release dates and life spans, and profit margins); Pepsico, Inc. v. Redmond, 54 F.3d 1262, 1270 (7th Cir. 1995) (finding the existence of a trade secret in Pepsico's methods of pricing, distributing, and marketing its sports drink).

[84] *See*, *e.g.*, Imperial Chem. Indus. v. Nat'l Distillers & Chem. Corp., 342 F.2d 737, 742 (2d Cir. 1965) (noting that trade secrets exist "in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage"); *see also* Kitch, *supra* note 67, at 690 (suggesting that trade secret law's coverage overwhelmingly deals with "process technology—how to make something").

tangible information and composite knowledge gained from employment. To the extent the *Earthweb* court was looking for a smoking gun in the form of a customer list, marketing plan, or specific piece of software, it may have missed the forest for the trees.

Cases like *Earthweb* and *CTI* exhibit both a difference in analytic approach and a tension within the law. In holding the employer to the line, *Earthweb* was acting consistently with the underlying assumption that employee access to tangible, discrete proprietary information is a requirement of proof that, if present, will ensure the employer is not impermissibly attempting to restrain the individual employee. Yet cases like *CTI* implicitly recognize that not all proprietary information can be easily captured or defined, and suggest that an employer may have a justifiable interest in an employee's composite or abstract knowledge gained on the job. While such an interest makes intuitive sense, particularly in light of the type of work many service employees perform in an information-driven economy, it seriously jeopardizes the long-standing distinction between information and individual that the law of noncompete enforceability has historically embraced as a means of keeping the underlying policy concerns in balance.

B. The Trouble with Training

This problem of delineating the boundaries of confidential information leads inevitably to larger questions about the relationship between noncompete law and the ownership of human capital. The difficulty presented by the competing approaches described above can be cast as a problem of the inseparability of knowledge from the people who possess it. Implicit in the current legal approach to enforceability is the assumption that the value of protectable information must lie outside any individual's interpretation or implementation of the knowledge in question. This is to ensure that the employer's goal is to contain the information itself rather than those employees who use it. In trade secret law, the concept of such a distinction between worker and work product is imbedded in the requirement that information have "independent" economic value to be legally protectable.[85]

[85] *See* UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 438 (1990) (defining trade secret as one that "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by

Thus, an employer pursuing a trade secret claim may be called on to show that the knowledge in question can be applied in contexts other than the employer's business in order to obtain an injunction.[86]

Such independent value would in most cases be present where the dispute involved a traditional trade secret, like a secret formula or process, that could be used competitively by any other business that happened to obtain it. Moving up the ladder of abstraction, however, value increasingly derives not from information as raw data but from its application in particular contexts.[87] A company's ability to effectively utilize confidential business or customer-related information rests largely on the competency and skills of its employees, who in turn often obtain their expertise from the experience and training provided to them on the job. In such cases it is human capital, or knowledge imbedded in people, that comprises the employer's interest rather than data or information in the traditional sense.[88]

proper means by, other persons who can obtain economic value from its disclosure or use").

[86] *See* Applied Indus. Materials Corp. v. Brantjes, 891 F. Supp. 432, 438 (N.D. Ill. 1994) (rejecting employer's trade secret claim because "the information [employee] obtained during his employment with [employer], which ended in 1990, [was] so outdated that it lack[ed] current economic value"); George S. May Int'l v. Int'l Profit Assocs., 628 N.E.2d 647, 653-54 (Ill. App. Ct. 1993) (rejecting trade secret claim because employer failed to prove that its manuals, software, and financial information had "economic value to both its owner and its competitors"); *cf*. Religious Tech. Ctr., Church of Scientology Int'l v. Scott, 869 F.2d 1306, 1310 (9th Cir. 1989) (holding that scientologists' church scriptures appropriated by competitor church did not constitute trade secrets because the church did not prove the scriptures gave them an economic advantage over competitors).

[87] *See* Kitch, *supra* note 67, at 711-12 (noting that detailed knowledge of one application could prove valueless to employee who defects to competitor that uses entirely different systems). Indeed, Kitch suggests one way companies can protect valuable information is to compartmentalize the production process so individual employees' knowledge of their employer's procedures is limited to familiarity with their specific job or unit. *Id.* at 712.

[88] This type of information has been called "tacit" knowledge, referring to the skill and experience required for effectively creating and implementing an idea as opposed to the resulting innovation. *See* Gilson, *supra* note 3, at 577 n.10. Value deriving from tacit knowledge and human capital has been increasingly emphasized in the business management literature of the last decade and is particularly important to high-tech and other new economy companies whose "products" are knowledge-based. *See* PATRICK H. SULLIVAN, VALUE-DRIVEN INTELLECTUAL CAPITAL 13-16 (2000) (describing origin and development of concept of intellectual capital in business management field from 1980s to present); KARL ERIK SVEIBY, THE NEW ORGANIZATIONAL WEALTH 3-8 (1997) (demonstrating high proportion of intangible corporate assets to market value for major global companies including high-tech

For this reason cases involving employer-provided training and on-the-job experience present a significant challenge to the assumptions underlying noncompete law and the rules governing enforceability. To the extent that the value of information is wrapped up in the quality of its implementation, employer-provided training and exposure are necessary components to creating the competitive advantage that the employer will ultimately wish to protect. They also have concrete value to the employer in that they are generally provided at some cost.[89] At the same time, however, training and on-the-job exposure create value for the individual employee in terms of the resulting increase in his or her own skills, knowledge, and marketability. Since these qualities are indistinct from the employee, fundamental principles of noncompete law dictate that an employer cannot have a protectable interest based on the provision of training or an employee's experience because it is akin to recognizing an employer interest in restraining the individual.

Traditionally, courts have managed this tension by applying the confidential information concept in cases where an employer's interest rests in whole or in part on training. While the provision of generalized training alone cannot form the basis of an enforceable noncompete, a protectable interest may be demonstrated where the training is "extraordinary" or so highly specialized that it itself constitutes a form of confidential information that would otherwise be protected.[90] The distinction is in theory based on the type of information transmitted to the employee in the training process. In *Kelsey-Hayes Co. v. Maleki*,[91] for instance, the employee was a neophyte electrical engineer who had been hired by a research and development facility to translate mathematical algorithms into a standard computer language. The employee had been hired straight out of college, apparently without any relevant prior experience, and was placed

businesses); Gilson, *supra* note 3, at 594-95 (noting that the intellectual property of high-tech firms is usually informal in character and embedded in human capital).

89 This is frequently the case even if no formalized training is provided because the employer may pay the employee more than his or her worth during the period in which the employee is learning the job. *See infra* Part III.B.1.

90 *See* Thermo-Guard, Inc. v. Cochran, 596 A.2d 188, 194 (Pa. Super. Ct. 1991); Robbins v. Finlay, 645 P.2d 623, 627 (Utah 1982); Voorhees v. Guyan Mach. Co., 446 S.E.2d 672, 677 (W. Va. 1994). Two state statutes specifically list specialized training as a protectable interest. *See* COLO. REV. STAT. § 8-2-113 (2001) (Colorado); FLA. STAT. ANN. § 542.335 (West 1997) (Florida).

91 765 F. Supp. 402, 403 (E.D. Mich. 1991).

under the tutelage of one or more senior employees in order to gain the requisite programming skills.[92] He ultimately left to become a programmer at another research and development facility.[93] On the employer's subsequent action, the court rejected the argument that the employer's provision of training justified enforcement of the employee's noncompete agreement.[94] The court emphasized that the employee had merely learned to use a nonproprietary computer language that was used by companies nationwide.[95] The employee was never taught the significance of the algorithms he translated, which were generated by the company's scientists.[96] Drawing a distinction between "skills" and "secrets," the court concluded that knowledge of the computer language was a general skill in which the employer could have no legitimate competitive interest.[97]

Thus, the *Kelsey-Hayes* court treated training as a subset of the interest in trade secrets and confidential information. Absent a showing that the employer-provided training transmitted proprietary information, the covenant failed to meet the protectable interest threshold and was deemed unenforceable.[98] It is significant that within such an analysis, the cost to the employer of providing the training has little bearing on whether the employer's interest is protectable. Since the proper inquiry is whether confidential information has been transmitted, it has been held that even where the employer expends funds to support formalized

[92] *Id*.

[93] *Id*. at 404.

[94] *Id*. at 407.

[95] *Id*. at 405-06.

[96] *Id.* at 406.

[97] *Id.* at 407-08; *see also* Springfield Rare Coin Galleries, Inc. v. Mileham, 620 N.E.2d 479, 486 (Ill. App. Ct. 1993) (finding no protectable interest in employer training employee to authenticate rare coins by a general process used in the industry); Brunner v. Hand Indus., 603 N.E.2d 157, 160 (Ind. Ct. App. 1992) (finding no interest in employer's provision of training in polishing orthopedic equipment using a nonunique process); Tom James Co. v. Mendrop, 819 S.W.2d 251, 253 (Tex. App. 1991) (finding that measuring methods and tools used in custom tailored men's clothing business were general in nature and not specific enough to justify protection).

[98] *Kelsey-Hayes Co.*, 765 F. Supp. at 407; *see also* Hapney v. Cent. Garage, Inc., 579 So. 2d 127, 132 (Fla. Dist. Ct. App. 1991) (holding that employee's training was not protected but could have been if employer's knowledge and methods constituted trade secrets or other confidential information); Thermo-Guard, Inc. v. Cochran, 596 A.2d 188, 193-94 (Pa. Super. Ct. 1991) (finding no protectable interest because "no such specialized training or sales and marketing techniques were in fact conveyed to [employees] during their employment at Thermo-Guard").

training, such expenditures are insufficient to support a noncompete if the employee gains only generalized knowledge or experience.[99] However, in deciding the case in favor of the employee in *Kelsey-Hayes*, the court made a point of noting that the cost of providing computer language training to the defendant-employee was negligible. The employer had provided no formalized instruction, and the employee gained most of his knowledge either on the job or by consulting publicly available instruction books that were provided to him.[100]

Indeed, despite the distinction between general skills training and proprietary information, there appears to be growing judicial sensitivity to employer claims based on costly investments in training and development of employees, regardless of the character of the training provided.[101] This is particularly striking in cases involving less skilled employees who would be unlikely to access business secrets in the training process. In *Borg-Warner Protective Services Corp. v. Guardsmark, Inc.*,[102] for instance, the employees worked as security guards for Guardsmark, a company that provided private security services to various clients, including the Gap retail stores. The employer utilized an extensive screening process in recruiting and hiring guards, which involved the assessment of a twenty-eight-page application and numerous background checks.[103] Once hired, each employee received general safety training and underwent an eighty-hour on-the-job training process in which the employee received instruction from

[99] *See* Landpoint Surveys, Inc. v. Stockwell, No. CA99-1022, 2000 WL 1586348, at *3-4 (Ark. Ct. App. Oct. 25, 2000) (holding that sending employee to a two-day seminar in Houston to learn how to be a GPS technician was not evidence of extraordinary or specialized training); Orkin Exterminating Co. v. Foti, 302 So. 2d 593, 598 (La. 1974) (finding that expense of furnishing the employee with training at Orkin's Manager Training School was not enough to validate covenant where employee learned only general managerial skills); Diesel Driving Acad., Inc. v. Ferrier, 563 So. 2d 898, 905 (La. Ct. App. 1990) (holding that "even if the claimed expenses were substantial in amount, most of the expenses were for the type of training that consistently has been found legally insufficient to support enforcement of an agreement not to compete").

[100] *Kelsey-Hayes Co.*, 765 F. Supp. at 406-07.

[101] *See, e.g.*, Brunswick Floors, Inc. v. Guest, 506 S.E.2d 670, 673 (Ga. Ct. App. 1998) (noting that "'[i]n determining the legitimacy of the interest the employer seeks to protect, the court will take into account the employe[r]'s time and monetary investment in the employee's skill and development of his craft'") (quoting Beckman v. Cox Broad. Corp., 296 S.E.2d 566, 568-69 (Ga. 1982)); *see generally* Kraus, *supra* note 80, at 51 (noting this trend).

[102] 946 F. Supp. 495, 496 (E.D. Ky. 1996).

[103] *Id*. at 496.

a supervisor at the facility where he or she would be assigned to work.[104]

When a second security company, Borg-Warner, obtained the Gap contract, it attempted to hire the guards that Guardmarks had trained and stationed at the Gap store.[105] In Guardsmark's subsequent suit to enforce the guards' noncompete agreements, the court recognized that the security guards were employed in low-level positions that did not involve the use of extraordinary skills or the provision of unique services.[106] Notwithstanding, the court found in favor of Guardsmark based on a "more modern approach," emphasizing the costliness of the employer's investment in hiring and training.[107] Drawing on cases involving the appropriation of customer contact information and business goodwill, the court noted that Guardsmark's training familiarized the employees with the particular security requirements of the client's site and afforded the guards the opportunity to learn the client's culture.[108] The court did not suggest that this information was proprietary.[109] Rather, the court appeared persuaded by the fact that the employer had devoted significant time and money to recruiting and training its employees, creating a windfall for the new security company, which would be spared a comparable layout.[110] It concluded that Guardsmark was particularly vulnerable to having its experienced employees "'opportunistically appropriated'" by competitors or clients, and that the employer had a legitimate interest in protecting itself contractually from the loss of that "'work product.'"[111]

Such analysis largely defies the distinction between general skills training and the acquisition of specialized information required for a legitimate interest in training under the traditional

[104] *Id*. at 496-97. Guardsmark did not charge the Gap for the first two weeks of a new guard's placement at its facility during which time this training was provided. *Id*. at 497.

[105] *Id*.

[106] *Id*. at 501-02.

[107] *Id*. at 501.

[108] *Id.* at 502.

[109] It seems implausible to assert that the guards' knowledge of the Gap facility could constitute confidential information even under the broad approach previously discussed. *See supra* Part II.A.

[110] *See Borg-Warner Protective Servs. Corp.*, 946 F. Supp. at 502 (noting that the two week on-the-job training and the employees' familiarity with the culture of the client's firm made Guardsmark "vulnerable to disintermediation").

[111] *Id.* at 502 (quoting Consultants & Designers, Inc. v. Butler Serv. Group, 720 F.2d 1553, 1558 (11th Cir. 1983)).

doctrine. By enforcing the security guards' noncompetes, the court recognized that even generalized training may be protectable where it is costly to the employer and hence valuable to the competition. More importantly, in equating the trained security guards with the employer's work product, the court implicitly abandoned the assumption that an employer's interests must be distinct from its employees in order to be protected. In so doing, the court recognized that in some circumstances the employees themselves are assets of the company.

The potential implications of such an approach can be seen in *Balasco v. Gulf Auto Holding, Inc.*, a case involving a nonpiracy clause. In *Balasco*, a former sales manager of the Courtesy car dealership hired away several sales personnel to work at a competitor dealership in contravention of the manager's employment contract.[112] It was the employer's practice to hire personnel with little or no sales experience and "invest[ ] considerable money and time to teach them the Courtesy way of selling cars" utilizing both in-house and outside trainers.[113] There was no allegation that the training consisted of proprietary information, nor any articulated claim that the personnel in question had acquired any client goodwill from their experience or training. Notwithstanding, the court concluded that the parties' "agreement was necessary to protect the substantial investment Courtesy makes in specialized training for its sales staff," and further that the agreement protected the "legitimate business interests of promoting productivity and maintaining a competent and specialized sales team."[114] Thus, the court recognized not only the employer's interest in protecting its investment in nonproprietary training, but seemingly went further to suggest that the employer had an interest simply in retaining an effective staff.

Although the enforcement of a nonpiracy clause is less damaging to the employee than the enforcement of a noncompete agreement,[115] the apparent expansion of the legitimate interest

[112] Balasco v. Gulf Auto Holding, Inc., 707 So. 2d 858, 860 (Fla. Dist. Ct. App. 1998).

[113] *Id*. According to the employer, it took up to six months to develop their raw recruits into effective sales personnel. *Id*.

[114] *Id*.

[115] Such a clause does not prevent the employee from earning a living, only from soliciting other employees of clients to join his or her competitive pursuit. *See*, *e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ran, 67 F. Supp. 2d 764, 774 (1999) (holding that "[employee's] agreement not to solicit [employer's] clients was not an

concept in *Balasco* is one that could be drawn in any case involving a noncompete under similar facts.[116] The employer in *Balasco* apparently had no identifiable interest in information, but, in the words of the court, had demonstrated a legitimate interest in the quality of its personnel. In this way, cases that relax the confidential information requirement to permit an interest in costly, but not proprietary, training pave the way for greater judicial recognition of employees as protectable corporate assets, fundamentally undercutting the distinction between worker and work product on which the current law rests.

Indeed, the rigid division between permissible and impermissible interests may well be collapsing. While the difference between information that is and is not confidential may be difficult to draw, the training cases suggest that the distinction between people and information is even more elusive. Cases like *Borg-Warner* and *Balasco* bring this confusion to a head because they do not involve "information" in the obvious sense of the word, but rather the transmission of skills, experience, and composite knowledge, the value of which is inextricably bound up with the employees themselves. Yet the complexity of such cases rests on more than mere linedrawing. It would be possible to dismiss these decisions as outliers, contrary to existing doctrine and overstepping the bounds of policy in recognizing novel employer interests, but for the fact that their results seem somehow fair. The significance of *Borg-Warner* and *Balasco* may well be that, despite the public policy rhetoric, there are instances in which employers legitimately have an interest in retaining qualified workers, and enforcing a noncompete to protect such interests does not violate fundamental principles of worker protection. If that is the case, then the doctrine's implicit reliance on the worker/work product distinction not only creates difficulties in

illegal agreement not to compete, as it in no way precluded him from pursuing his vocation, but rather was a reasonable and enforceable anti-piracy provision").

116 Courts generally find that non-solicitation, non-disclosure, and antipiracy clauses are governed by the same law as noncompete agreements. *See*, *e.g.*, Sevier Ins. Agency, Inc. v. Willis Corroon Corp. of Birmingham, 711 So. 2d 995, 998 (Ala. 1998) (holding that state statute limiting contracts in restraint of trade applied to employment agreements irrespective of whether they were classified as covenants not to compete or as nonsolicitation agreements); Flickenger v. R.J. Fitzgerald & Co., 732 So. 2d 33, 34 (Fla. Dist. Ct. App. 1999) (using the same general law of restrictive covenants to enforce agreement precluding disclosure of confidential information, solicitation of employer's clients and employees, and competition with employer for three years after employment).

application, but also misconceives the purpose of the protectable interest requirement. If an employer-asserted interest in the value of a particular worker can be justified in instances where that value is the result of employer investment, then the absence of discrete secret information is not an effective proxy for determining when the use of a noncompete offends public policy. To the extent the protectable interest approach continues to envision an easy division between people and their work products, the current legal test will necessarily be both over- and underinclusive in identifying appropriate uses of these agreements.

III

Engineering Workplace Relationships: A Revised Description of Employer Interests and the Worker Protection Problem

The previous section demonstrates that the protectable interest concept is functionally unworkable and, in many cases, fails to describe accurately the interests of contemporary employers. As a result, employers seeking enforcement must pigeonhole their actual interests into one of the preexisting categories, most often the confidential information category, resulting in various contortions of the doctrine and eroding the predictive value of existing case law. More importantly, because the doctrine is rooted in policy opposing efforts to restrain individual workers, its fairness inquiry is misdirected. The focus on the presence or absence of a protectable interest precludes investigation into whether efforts to retain workers may in fact be legitimate and whether, by contrast, such efforts might indicate employer overreaching.

The following section seeks to understand this distinction between proper and improper restraints on workers in the context of the modern employment relationship. Crucial to such an analysis is a consideration of the way employers operate in an economy that has changed significantly in the last several decades. Thus, the section begins with a brief overview of the changing work environment. It then recharacterizes the interest underlying employers' use of noncompetes as an interest in people rather than in discrete information. In light of the current workplace dynamic, employers are inclined to use noncompetes as a means both of protecting investments in training and policing employee loyalty and commitment. While that behavior may be

acceptable in some instances, it is also subject to abuse. The section suggests that noncompete agreements give employers the best of the old employment regime and the new workplace in the form of a legal midway point between term employment and employment at will. It is the employer's discretion to use noncompetes to enforce its own conception of the parties' social contract of employment that poses challenges for noncompete doctrine and workplace policy.

A. The New Workplace in the New Economy

An analysis of the forces motivating employers' increased reliance on noncompete agreements starts with an examination of the new workplace and how it departs from prior models of the employer-employee relationship.[117] The modern employment relationship has undergone a profound change in the last twenty years. The secure, long-term employment relationships associated with an earlier era are largely obsolete today, having been replaced with a variety of short-term employment arrangements: Companies are increasingly outsourcing work and relying on contingent, part-time and other flexible work models.[118] From the perspective of employees, job tenure is in decline and job hopping is commonplace.[119]

These aspects of the modern workplace, while not revolutionary,[120] represent a significant break from the model of employ-

[117] The concept of a "new workplace" and recent changes in the implicit understanding between workers and employers have received attention from a variety of academic disciplines, including law, *see*, *e.g*., Stone, *supra* note 3, at 522; Hyde, *supra* note 58, at 101-02 (1998), sociology, *see*, *e.g.*, RICHARD SENNETT, THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM (1998), and business management, *see*, *e.g.*, PETER CAPPELLI, THE NEW DEAL AT WORK: MANAGING THE MARKET DRIVEN WORKFORCE 17 (1999); HERZENBERG ET AL., *supra* note 54, at 12-14. Thus, this section draws on literature from multiple fields in describing these developments.

[118] *See* Stone, *supra* note 3, at 539-41 (reviewing statistics on growth of temporary agencies and use of part-time employees and independent contractors). Professor Stone refers to this segment of the workforce as the "precariously" employed, a category which encompasses all workers who are employed without "any implicit or explicit promise of job security." *Id.* at 542.

[119] An increasing number of employees in the middle of their careers have already made several job switches. Daniel M. Gold, *Switching to New Jobs, Endangering Savings*, N.Y. TIMES, Jan. 17, 1999, at sec. 3, p. 10.

[120] Research suggests that the long-term employment system that is currently being overthrown is a recent and largely aberrational phenomenon that followed on the heels of a low job security regime similar to that which is developing today. *See* CAPPELLI, *supra*, note 117, at 51-57 (describing "putting-out" labor system of nine-

ment that was in place for much of the last century. During the decades preceding the boom in the services industries, employment relationships reflected a particular style of labor management that evolved in manufacturing industries. Typical of this approach were sharply differentiated job descriptions embracing distinct skills, close supervision and internal training of employees by middle management, and hierarchical but well-defined ladders for promotion and advancement.[121] Although positions within such structures tended to be low skill, employers successfully combated the problem of turnover and low morale by making tacit promises of long-term job security, by providing progressive wage increases, and by offering an array of benefits and services.[122] Thus, the model of implicit lifetime employment within a single company became the norm.

In recent years, however, employment practices have dramatically altered in response to a variety of economic changes. Since the mid-twentieth century, the economy has moved from one primarily dependent on traditional industries and the manufacturing of hard goods to one in which information management and other service-sector jobs predominate.[123] The routinization and structure associated with manufacturing cannot easily be imposed on the work performed by employees within these industries.[124] More importantly, technological advances in communication and the resulting globalization of the economy

teenth century as characterized by flat organizational structure, significant autonomy among low-level workers, and extensive reliance on independent contractors and other forms of outsourcing).

121 *See id.* at 59-64 (describing characteristics of labor management systems initiated by Alfred Taylor, Henry Ford, and Frederick Taylor during mid-twentieth century); SENNETT, *supra* note 117, at 39-45 (describing Fordism and the routinization of work); Stone, *supra* note 3, at 529-32 (describing "scientific management" approach to labor management).

122 *See* Stone, *supra* note 3, at 532.

123 Service sector jobs grew by thirty-six million between 1959 and 1999, such jobs comprising approximately forty-one percent of American jobs and providing approximately fifty percent of total United States earnings in 1999. *See* Carnevale & Desrochers, *supra* note 54, at 32-33. The percentage of the workforce in services industries surpassed that in goods and manufacturing in the early 1950s. *See* HERZENBERG ET AL., *supra* note 54, at 2-3.

124 *See* SENNETT, *supra* note 117, at 51 (describing modern approach of "flexible specialization," which seeks to deliver more varied products more quickly to the market, as "the antithesis of the system of production embodied in Fordism"); Carnevale & Desrochers, *supra* note 54, at 33 (noting that unlike manufacturing, in which success was measured by the achievement of high volume at low cost, success in the new economy demands more complex skills, and, consequently, more complex performance standards).

have led to increased competition and the need for greater flexibility within companies.[125] Employers must be capable of altering business strategies and production capabilities with minimal lead time in order to meet fluctuating market demands and are therefore unable to promise employees long-term employment along defined career paths.[126] Instead, employers are hiring skilled employees who can meet their immediate goals and are then replacing or redirecting those workers when their needs change.[127] Thus, employees today can anticipate frequent lateral moves both between and within companies and departments over the course of their careers.[128]

These changes in the economy and the workplace have altered the expectations of employees and employers about the nature of their relationship, what is often referred to as the "social" or

[125] *See* CAPPELLI, *supra* note 117, at 4-5 (attributing recent changes in work practices to, among other things, increasingly competitive product markets and pressures to create market niches); SENNETT, *supra* note 117, at 52 (positing that "[t]he most strongly flavored ingredient in th[e] new productive process is the willingness to let the shifting demands of the outside world determine the inside structure of institutions"); Stone, *supra* note 3, at 549 (noting significance of increased trade and global competition and pressures to achieve short-term cost reduction in explaining contemporary labor management trends).

[126] *See* CAPPELLI, *supra* note 117, at 5 (noting that such competition reduces market lead time, making long-term investments impractical for companies); Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?*, 76 IND. L.J. 29, 31 (2001) (predicting firms will be increasingly reluctant to hire specialized workers under implicit long-term contracts due to risk that skills will become superfluous in changing global market).

[127] *See* CAPPELLI, *supra* note 117, at 49 (1999). This trend is reflected in the contemporary practice of downsizing despite profitability and favorable conditions. Whereas downsizing was historically a response of last resort to declines in business and economic downturns, a growing number of contemporary layoff initiatives are attributed to restructuring and outsourcing efforts designed to enhance productivity. *See id.* at 116-17 (summarizing findings in AM. MGMT. ASS'N, 1994 AMA SURVEY ON DOWNSIZING: SUMMARY OF KEY FINDING (1994)); FREDERICK F. REICHHELD, THE LOYALTY EFFECT: THE HIDDEN FORCE BEHIND GROWTH, PROFITS, AND LASTING VALUE 94-95 (1996).

[128] Professor Stone refers to this employment trajectory as the "boundaryless career." Stone, *supra* note 3, at 553-54. A quintessential example is the employment pattern that predominated among high-tech employees in California's Silicon Valley during the late 1990s. *See* Hyde, *supra* note 3. However, the phenomenon exists in all sectors of the economy. A 1995 study of leading companies found that managerial positions had a lifetime expectancy of three to four years, meaning that such jobs were designed with the expectation that the employee would leave within that time frame. *See* CAPPELLI, *supra* note 117, at 115 (summarizing findings in CORPORATE LEADERSHIP COUNCIL, PERFECTING LABOR MARKETS: REDEFINING THE SOCIAL CONTRACT AT THE WORLD'S HIGH-PERFORMANCE CORPORATIONS (1995)).

"psychological" contract of employment.[129] Previously employers and employees implicitly understood at the outset of their relationship that the employee's career development within the company would proceed along a predesignated path: The employee who performed adequately and demonstrated loyalty and commitment to the company would be rewarded with a lifetime job with steady pay and periodic advancement through an existing hierarchy.[130] Thus, the employee could safely invest in acquiring firm-specific skills and rely on the company to manage his or her career development. Now, the market has in effect replaced the employer's own rules and policies for controlling its labor force. Since employers cannot predict how changes in the market will alter their labor needs, they are essentially encouraging employees to benchmark their professional development against the demands of the industry as a whole rather than in relation to the internal hierarchy of the company itself.[131] The new understanding between employers and employees is that,

[129] Such an understanding is not a contract in the legal sense, but rather refers to the underlying, often unspoken, expectations of the parties. *See* CAPPELLI, *supra* note 117, at 21 (distinguishing psychological contracts from legal contracts as agreements arising from individual perceptions of appropriate behavior not tied to any formal written document); Stone, *supra* note 3, at 549-50 (characterizing psychological contract as the belief in the existence of a reciprocal exchange creating mutual obligations); Thomas A. Kochan, *Reconstructing America's Social Contract in Employment: The Role of Policy, Institutions, and Practices*, 75 CHI.-KENT L. REV. 137, 137 (1999). For an explanation of how such contracts develop and their effect on workplace behavior from an organizational psychology perspective, see Denise M. Rosseau, *Psychological and Implied Contracts in Organizations*, 2 EMPLOYEE RESP. & RTS. J. 121, 123-29 (1989).

[130] *See* CAPPELLI, *supra* note 117 at 21 ("The psychological contract that accompanied the lifetime corporate employment model represented an exchange of job security and predictable advancement for loyalty and good performance."). Significantly, employers frequently acknowledge such implicit understandings and conform their behavior to comply with their terms even in the absence of a legal obligation to do so. *See* Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1917 (1996) (noting how corporate norms, such as limiting discharge to for-cause situations and retaining older workers despite declining performance, coexist with inconsistent doctrinal rule of employment at will).

[131] *See* John Case, *The Question We All Wonder About: "For Whom Do You Work?"*, BOSTON GLOBE, Dec. 29, 1993, at 44 ("[I]n today's new economy, we work for ourselves simply because we can no longer count on the benevolence of the organizations that issue those paychecks."). This phenomenon has been described as the substitution of external market solutions for the internal labor markets governed by employer-generated rules and policies. *See* CAPPELLI, *supra* note 117, at viii; Schwab, *supra* note 126, at 31-32; *see generally* Rock & Wachter, *supra* note 130, at 1915 n.6 (defining the internal labor market as the network of arrangements, understandings, and agreements that constitute the employment relationship within

rather than grooming employees for internal promotion, employers will offer employees work experience that will keep them marketable to other employers in the event that they are terminated.[132] Thus, the employer's promise of long-term employment has been replaced by a promise of employability, and the new understanding is that the employee's lifelong relationship will be with the market rather than the company.

B. Noncompetes and the Employer's "People" Interest

This landscape poses obvious challenges for employees who must monitor their career development against changing demands and the chronic risk of losing their jobs. However, it also poses significant difficulties for the employer who must ensure access to a pool of qualified workers while having little ability to forecast its needs. Because the common law system of employment at-will places no limitations on the parties' ability to terminate their relationship, employers risk losing competent employees to their competitors. Thus, in a tight labor market, where highly skilled employees are scarce, companies may view noncompetes as a means of protecting one of their most important assets: their workers. This subsection offers a justification for that use in economic and sociological terms. As explained below, employers' use of noncompetes can be characterized as a means of securing the employer's investment in employee development, or as enforcing a new "social" contract of employment that envisions an exchange of training and experience for spot commitments to particular projects and goals.

1. Protecting Investments in Human Capital

Since much of the value of high-tech and service-oriented companies lies in the thoughts, skills, and creativity of their employees, the success of these companies depends on their ability to

firms as distinguished from the external employment market in which firms seek to fill vacancies and workers search for jobs).

132 *See* Stone, *supra* note 3, at 569 (describing Rosabeth Moss Kanter's recommended model for offering workers "employability security" in place of employment security) (citing ROSABETH MOSS KANTER, ROSABETH MOSS KANTER ON THE FRONTIERS OF MANAGEMENT 190-94 (1997)); Hal Lancaster, *A New Social Contract to Benefit Employer and Employee*, WALL ST. J., Nov. 29, 1994, at B1 (suggesting employees should look to their current employers to provide satisfying work, learning opportunities, and career management skills rather than long-term security along defined career paths).

harness and develop human capital.[133] Yet competition for talent makes it difficult for employers to attract and retain qualified workers. Since the message employers are sending their employees encourages self-reliance and disclaims long-term employment,[134] employees have little incentive to remain in any one employment relationship. Modern employers are therefore at risk of losing significant assets through voluntary attrition.[135]

This phenomenon poses a paradox to employers seeking to maximize their intellectual assets. While financial contributions to employees' professional development can augment a company's value, in practice employers may not reap the benefit of such investments due to employee defection.[136] In theory, the use of fixed-term employment contracts could resolve the problem of voluntary attrition, but such agreements pose difficulties of enforcement and undermine employers' efforts to achieve flexibility in the face of changing market demands.[137] Thus, despite the strategic importance of cultivating internal talent, employers may not make such investments for fear that their efforts

133 *See* Gilson, *supra* note 3, at 585 (noting importance of information embedded in human capital in describing "knowledge spillover" effect that occurs when employees defect to new companies); *supra* notes 87-88 and accompanying text.

134 *See infra* Part II.A.

135 The dollar cost of employee turnover, though difficult to measure, can be extremely high. *See* REICHHELD, *supra* note 127, at 96-98 (citing anecdotal evidence from the trucking, auto service and investment brokerage industries). One business management expert estimates that in the investment brokerage industry, the total outlay involved in bringing a new broker to profitability exceeds $100,000 and that for each new recruit that reaches the profitability point, two others will defect before yielding any return for the employer. *Id.* at 103-05.

136 This reality perpetuates a "vicious cycle" in which the failure to train creates shortages of skilled employees, which in turn leads employers to step up efforts to hire experienced workers from the ranks of their competitors, which in turn reduces companies' incentive to train workers internally. *See* CAPPELLI, *supra* note 117, at 6.

137 As a general rule, fixed-term contracts are not specifically enforceable against employees. RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981) ("A promise to render personal service will not be specifically enforced."); *see also* Sterk, *supra* note 31, at 387-88 (describing the basis for this rule as rooted in the Thirteenth Amendment's protection against involuntary servitude as well as practical concerns about courts' ability to supervise forced job performance). Such agreements therefore hamstring the employer to a set term during which it must retain the employee without providing any guarantee that it will retain the benefit of the employee's services during that period. For this reason, law and economics scholars have suggested that noncompetes offer an efficient alternative to fixed-term contracts. *See* Posner & Triantis, *supra* note 3; *cf.* Lester, *supra* note 3, at 53 (suggesting noncompetes may "fill a gap where other legal and extra-legal mechanisms fall short").

will merely aid the competition.[138]

To combat this cycle, employers may turn to noncompetes as a vehicle for protecting financial investments in their workers.[139] Economics-influenced literature has historically supported the use of noncompetes for such purposes, recognizing that the provision of general[140] training creates human capital that the employee may be inclined to sell to competitors for a profit.[141] Such incentives occur where the employer overpays the employee at the outset of the relationship, anticipating that it will recoup its loss by paying the employee less than his or her true worth for a period after training is provided.[142] During this "pay back" pe-

[138] The incidence of employee poaching and mass defections legitimate this concern. *See*, *e.g.*, Hyde, *supra* note 3 (discussing widely publicized trade secret lawsuit brought by Intel against four employees who defected to competitor Broadcom); Rebecca Buckman, *Tech Defectors from Microsoft Resettle Together*, WALL ST. J., Oct. 16, 2000, at B1 (describing Microsoft "brain drain" resulting from teams of software developers defecting en masse to form "spin-off" competitor companies); *see also* CAPPELLI, *supra* note 117, at 182-85 (describing poaching as a standard way for companies to meet their skills needs and discussing headline examples from high profile companies).

[139] This, of course, is but one of many methods available to companies seeking to enhance employee retention. An increasingly common approach to the problem, one which relies on the carrot rather than the stick, is the adoption of equity-based compensation plans. *See generally* MARGARET BLAIR, WEALTH CREATION AND WEALTH SHARING: A COLLOQUIUM ON CORPORATE GOVERNANCE AND INVESTMENTS IN HUMAN CAPITAL (1996). *But see* CAPPELLI, *supra* note 117, at 185-87 (suggesting that "golden handcuff" compensation packages drive up labor cost without effectively thwarting poaching efforts). In some instances, companies have negotiated agreements with specific competitors under which each agrees to refrain from recruiting employees from the other. *See*, *e.g.*, Rebecca Buckman, *New Web Software Start-up Draws Microsoft Workers—and Its Ire*, WALL ST. J., Sept. 11, 2000, at B1 (reporting existence of anti-poaching agreement between Microsoft and local competitor Crossgain).

[140] Law and economics literature distinguishes between general and specific training, Specific training is unique to the particular employer who provides it, while general training may be useful to the current employer as well as to subsequent employers in the industry. *See* Kitch, *supra* note 67, at 683, 684 (summarizing GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS (2d ed. 1975)). In theory, specific training need not be protected by a noncompete because it does not create any value in the employee that another firm would seek to buy, but an employee with general training is likely to be in demand by other employers who wish to reap the benefit of the initial employer's investment. *See id.*

[141] *See*, *e.g.*, Callahan, *supra* note 28, at 717-18; Kitch, *supra* note 67, at 684-86; Schulman, *supra* note 3, at 115.

[142] Although in theory the employer would withhold the cost of training from wages, that is not always possible. Sometimes the training is sufficiently expensive that the worker cannot finance it through wages, as where the training involves the transmission of a trade secret. *See* Rubin & Shedd, *supra* note 82, at 96-97. Alternatively, the labor market may be such that employees have the bargaining power to

riod, the employee is more valuable to companies that have not invested in the employee's acquisition of skills, and he or she is liable to defect to competitors willing to pay the salary that a fully trained employee can command.[143] The noncompete protects the employer from the loss that would arise in that scenario. This is true regardless of whether the training involves trade secrets or other proprietary information as required under existing law. It is the cost to the employer, and the value of that training to other employers in the market, that justifies the restraint.[144]

Although this analysis appears most applicable to a junior employee receiving formalized training at the outset of employment, it can also apply to the informal acquisition of new knowledge by more experienced employees. Formalized entry-level training is in decline among employers,[145] in part due to the disincentives described above and because changing demands make it difficult for employers to anticipate the skills employees will need in the future.[146] Therefore, the employee in the new workplace is likely to be learning through exposure more than through instruction. Even so, the employer may be overpaying the employee during the progression of his learning curve. As employees are thrust into new projects and new work teams, they gain skills and know-how that increase their value both to their employers and the market. While the common law has historically viewed this type

insist on higher wages. *See* CAPPELLI, *supra* note 117, at 44 (noting that pressure to raise wages makes training difficult to fund).

143 *See* Lester, *supra* note 3, at 62-63; Callahan, *supra* note 28, at 716-17; Kitch, *supra* note 67, at 685; Rubin & Shedd, *supra* note 82, at 97.

144 That is not to say that the enforcement of a noncompete based on the employer's provision of training is necessarily efficient. *See* Lester, *supra* note 3, at 72-74 (suggesting that although noncompetes can be used to encourage optimal investments, practical barriers in formation and enforcement significantly undermine their value); Rubin & Shedd, *supra* note 82, at 109-10 (recognizing economic rationale for use of noncompetes to protect investments in training, but concluding that the likelihood of employer overreaching militates against expansion of the categories of legitimate employer interests). The limitations of the economic argument in support of enforcing noncompetes to protect investments in training are discussed more fully in Part III.C.2, *infra*.

145 *See* CAPPELLI, *supra* note 117, at 152-53 (reporting that per employee training expenditures dropped between 1983 and 1991 and that overall length of training has declined even where its incidence remains unchanged). This observation is particularly true of Silicon Valley where a significant amount of what was formally in-house training has been outsourced to educational institutions and other external providers. *See id.* at 176-77.

146 *See id*. at 44, 198.

of experiential knowledge as belonging solely to the employee, companies may have an ownership interest in it, at least to the extent of their financial investment in its acquisition. Thus, employers may use noncompetes as a way of recouping the cost of funded training, formal or otherwise, by ensuring that employees stay long enough for the employer to break even.[147]

2. Policing Loyalty and Organizational Commitment

Another aspect of the new employment relationship that may influence employers' use of noncompetes to protect their interest in their employees is the disintegration of traditional notions of company loyalty. While employers as entities are profit minded, employers consist of individual managers and decision makers who have personal interests at stake in their interactions with employees. These interests may include the intangible benefits of working with particular people and the desire to continue positive workplace relationships.[148] Although such interests are not entirely divorced from pecuniary concerns,[149] they might usefully

[147] It should be noted that despite the value of noncompetes to individual employers using the agreement in this manner, recent scholarship suggests that, in some instances, employers may be better served by the information "spillover" that occurs in economies that tolerate frequent movement between companies than they are trying to protect individual investments in workers. *See* Gilson, *supra* note 3, at 607-09 (comparing economic development in Silicon Valley to that in Boston's high-tech corridor and concluding that California law prohibiting enforcement of noncompete agreements contributed to Silicon Valley's increased success); Hyde, *supra* note 3 (attributing Silicon Valley's success to absence of noncompetes, infrequency of trade secret litigation, and work culture that tolerates rapid movement between jobs). Assuming this is the case, however, in the absence of an all-out adoption of California's legal regime, employers will always find it in their individual interest to request noncompetes from their own workers. *See* Gilson, *supra* note 3, at 609 (noting collective action problem posed by regime in which each employer tries to restrict mobility of its workers while taking advantage of spillover from other firms). The scholarship in this area has yet to advocate for the adoption of California's legal regime in other jurisdictions. *See id.* at 627-29 (noting that adoption of rules prohibiting noncompetes must be preceded by serious study of trade-offs between enhancing knowledge spillovers and reducing incentives for initial innovation which may result if employer property rights are diluted).

[148] *See* Macneil, *Values in Contract*, *supra* note 11, at 348-49 (discussing values of reciprocity and solidarity in relational contracts); Gudel, *supra* note 11, at 776-77 (same). Such interests often are not considered in the economic analysis previously presented. *See* Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 278 n.13 (1992).

[149] *See* REICHHELD, *supra* note 127, at 19-21 (advocating loyalty-based management approach focusing on retention of customers, employees and investors as key to long-term value creation); Stacey Wagner, *Retention: Finders, Keepers*, TRAINING

be conceived of as the employer's interest in employee loyalty.[150]

While expectations of loyalty were a pivotal component of the lifelong employment regime, their significance is less clear in an environment where rapid movement between jobs is both anticipated and necessary. Some modern employers are explicitly disclaiming expectations of loyalty in articulating a new approach to their relationship with workers.[151] Such statements serve to diffuse employees' lingering expectations of long-term employment, which the employer may ultimately be unable to meet. However, they also undercut employers' goal of retaining valued employees, as well as their efforts to motivate the type of above-average performance that will increase firm productivity.[152]

Significantly, loyalty is not a concept with a distinct legal definition in the employment context. Employers owe no freestanding duty of loyalty to their employees beyond compliance with their contractual obligations and are obviously free to terminate workers at will absent an explicit contrary arrangement. While employees owe a duty of loyalty to their employers under tort law, that duty is limited to refraining from direct competition with the employer or otherwise acting in derogation of the employer's interests, so long as the employment relationship continues.[153] This duty has never been interpreted to regulate the

& DEV., Aug. 1, 2000, at 64 (noting that positive working relationships and personal investments between employers and employees are known to improve productivity and profit margins).

[150] As articulated by organizational psychologists, loyalty comprises a variety of behaviors indicative of commitment, including emotional identification with the company, willingness to make personal sacrifices to advance the companies' goals or products, and intention to remain employed despite external opportunities. *See* Caroline Louis Cole, *Building Loyalty*, WORKFORCE, Aug. 2000, at 42 (summarizing findings of a study on worker attitudes conducted by Aon Consulting Worldwide's Loyalty Institute); Charles W. Mueller & Jean E. Wallace, *Employee Commitment*, WORK & OCCUPATIONS, Aug. 1992, at 211.

[151] CAPPELLI, *supra* note 117, at 25-28 (excerpting employment policy statements of major companies including Apple Computer, AT&T, and General Electric).

[152] Because employee creativity and teamwork are crucial to companies' success, employers wish to encourage innovative behavior that goes beyond bare job requirements. *See id.* at 46 (describing employer need for "extra-role" behavior by employees in new work systems which involve less employee supervision and greater reliance on employee initiative); REICHHELD, *supra* note 127, at 92 (characterizing desirable employees as those whose talent and self-motivation result in increased personal productivity and consequent surpluses for employer and customers); Stone, *supra* note 3, at 556-57 (describing employer interest in effecting "organizational citizenship behavior" and entrepreneurial activity).

[153] *See*, *e.g.*, Planmatics, Inc. v. Showers, 137 F. Supp. 2d 616, 626 (D. Md. 2001) ("'[A]n employee may not solicit for himself business which his position requires

nature of the employee's departure from the company or to touch competitive conduct posttermination. Because the employer and employee may terminate their relationship at any time, and any greater commitments between them must be defined by contract, loyalty has no legal significance in policing either the agreed upon terms of the relationship or the circumstances of its termination.[154]

As a business management and human resources matter, however, loyalty is a measurable,[155] albeit intangible, component of the employment relationship that can create value for the organization.[156] Companies have eschewed the rhetoric of loyalty in crafting their new deal with workers largely because it evokes the exchange of job security for good performance associated with

him to obtain for his employer. He must refrain from actively and directly competing with his employer for customers and employees, and must continue to exert his best efforts on behalf of his employer.'") (quoting Maryland Metals, Inc. v. Metzner, 382 A.2d 564, 568 (Md. 1978)); Western Elec. Co. v. Brenner, 360 N.E.2d 1091, 1094 (N.Y. 1977) (An employee is "'prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties.'") (quoting Lamdin v. Broadway Surface Adver. Corp., 133 N.E.2d 66, 67 (N.Y. 1936)); Lamorte Burns & Co. v. Walters, 770 A.2d 1158, 1169 (N.J. 2001) ("The duty of loyalty prohibits the employee from taking affirmative steps to injure the employer's business.").

154 As in other contractual relationships, however, courts imply a duty of good faith in fulfilling the terms of the agreement. *See*, *e.g.*, Kirke La Shelle Co. v. Paul Armstrong Co., 188 N.E. 163, 167 (N.Y. 1933) ("[I]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."). That principle may be interpreted, in certain circumstances, to prohibit unjust termination, as where the purpose of the termination is to avoid contractual obligations. *See*, *e.g.*, Metcalf v. Intermountain Gas Co., 778 P.2d 744 (Idaho 1989) (finding violation of covenant of good faith and fair dealing where employer terminated employee for hardship resulting from her extended absence despite fact that absences did not exceed the leave time permitted under company sick day policy); Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251 (Mass. 1977) (finding jury question on wrongful termination claim where company terminated employee salesman between initiation and consummation of new sales account, thereby depriving him of commission otherwise entitled to under terms of written contract).

155 There are various studies that purport to measure levels of loyalty and commitment within an organization through survey questions. *See*, *e.g.*, Cole, *supra* note 150, at 42; Mueller & Wallace, *supra* note 150, at 211.

156 Studies suggest that committed employees demonstrate higher performance and lower rates of tardiness and absenteeism, as well as a greater likelihood to place company interests above self-interests. *See* CAPPELLI, *supra* note 117, at 46. Loyal employee behavior can in turn lead to more effective selection and retention of customers, in addition to increasing general efficiency and reducing training costs. *See* REICHHELD, *supra* note 127, at 100-02 (positing seven distinct economic benefits associated with employee loyalty).

the old employment regime.[157] But employers are unable to disclaim their desire for some level of employee commitment on different terms. Companies need employees who will be innovative, hard-working, and loyal to their projects and their coworkers.[158] Such a conception of loyalty contemplates commitment to a particular product, work team, or project as opposed to long-term commitment to the company itself.[159]

The problem for employers, however, is how to encourage dedication and above-average performance while simultaneously telling employees they have no guarantee of continued employment and may be terminated for any reason.[160] That conundrum reflects the inherent limitation of an at-will system in which the employee has no incentive to go beyond specified job requirements, or even to see a job through, but where the success of the relationship from the employer's perspective depends on the employee's cooperation with evolving expectations and commitment to advancing the company's interests over time. In effect, the extracontractual understanding of the old regime, the tacit exchange of loyalty for security, resolved this conflict from both ends.[161] In the absence of such an agreement, however, the system is at odds with itself.

For this reason, employers may turn to noncompetes as a means of policing a new form of organizational commitment. Instead of seeking company loyalty in the traditional sense, employers are now asking employees to make spot commitments to particular work teams and projects. In return, the employees receive marketable experience.[162] It is in effect an exchange of cre-

157 *See supra* Part III.A.

158 *See* Stone, *supra* note 3, at 557 (discussing positive correlation between "affective commitment," described as the employee's identification with company goals and desire for company success, with high-quality job performance).

159 *Two Cheers for Loyalty*, ECONOMIST, Jan. 6, 1996, at 49; Tom Payne, *Company Loyalty: May it Rest in Peace*, MANAGE, July 1, 1995, at 30 (suggesting that corporate loyalty is not "dead," but rather has been redefined to fit the needs of the new workplace).

160 *See* CAPPELLI, *supra* note 117, at 13 (noting internal contradiction of the new workplace in which employers are seemingly demanding more from employees but offering less in return).

161 *See* Stone, *supra* note 3, at 529-32 (discussing how scientific management used promotion hierarchies and cause-only dismissal policies to combat problems of low morale and high turnover).

162 *See* discussion *supra* Part III.A. The desire for spot commitments is consistent with the way work is organized in the new workplace, usually around projects with specific time lines. During the two-year development of a new product, it may be crucial to keep the design team together, but less important to keep them together

dentials for commitment. On the one hand, this may suggest that the enforcement of noncompetes to protect employers' "people" interest violates the new social contract: If employers promise workers employability in exchange for loyalty to their work, the employees have in effect "purchased" their experience and should not be prevented from using the skills they acquire elsewhere.[163] On the other hand, noncompetes may be seen as a way of holding the employee to the terms of the tacit agreement where the employee would otherwise be inclined to breach. If, for instance, the understanding is that the employer will provide training necessary for an employee to contribute to a particular project in exchange for the employee's commitment to its completion, it might be appropriate to allow the employer to enforce a noncompete to prevent the employee from departing mid-project, though inappropriate to restrain the employee once the project has concluded.[164] While the old loyalty-for-job security compact was self-enforcing, the new one is jeopardized by the lure of external opportunities and the pace of change in a market where skills and experience are in high demand.[165] That difficulty is compounded by the message that employees should gauge their own development by external standards and that ulti-

for the next version, which may bear no relationship to the prior one. *See* CAPPELLI, *supra* note 117, at 176.

[163] Professor Katherine Stone convincingly asserts this argument in her recent scholarship. *See* Stone, *supra* note 3, at 590-91. Under such an analysis, the employee purchases experience through the work he or she provides rather than through reduced wages. Such a perspective dispels the economic justification for enforcement based on employer investment in training and development. *See id.* at 591 ("When an employer has promised to give an employee skill development and general knowledge as part of the employment deal, then it cannot be said that the employer has paid for its acquisition.").

[164] Many case outcomes are consistent with this observation, inclining toward enforcement of noncompetes where the timing of the employee's departure creates special hardships for the employer. *See*, *e.g.*, Comprehensive Techs. Int'l, Inc. v. Software Artisans, Inc., 3 F.3d 730, 737-41 (4th Cir. 1993) (enforcing noncompete against employees who departed during production of computer program to create competitor program for subsequent employer); *cf.* Hyde, *supra* note 3 (discussing "moralistic" quality of court analysis of trade secret claims in California).

[165] *See* Kraus, *supra* note 80, at 49 (suggesting that modern employers have been forced to implement training repayment contracts since they cannot rely on employee loyalty and job satisfaction to protect their investments); *cf.* CAPPELLI, *supra* note 117, at 15 (noting need for strong labor law to create incentives not to "cheat" in transactional relationships). Research on the relationship between formal contracts and informal social contracts suggests that parties will rely on informal understandings where the terms of such agreements are self-enforcing, but will opt for formalized contracts where there is a danger of opportunistic behavior. *See* Rock & Wachter, *supra* note 130, 1944.

mately the employee is likely to pursue his or her career elsewhere. In this environment, employers may look to noncompetes to enforce the new social contract and a new understanding of loyalty and commitment.

C. Revisiting Worker Protection: The Absence of Bargained-for Commitment and the Limitations of Preenforcement Review

The previous section explained why employers might, in contravention of the existing rule, attempt to use noncompetes for the express purpose of retaining their workers.[166] Such an analysis rejects the existing proxy for assessing fairness: If employers are in some manner purchasing or contracting for the right to keep an individual employed, the absence of a trade secret or other discrete information does not indicate the employer is overreaching. However, this analysis does not suggest that all uses of noncompetes to prevent employee attrition should be deemed legally permissible or that these agreements should be enforced according to their terms. Indeed, there is often reason to doubt the legitimacy of the written document and its particular terms as a reflection of a bargained-for exchange.[167] This uncertainty stems from the indeterminate nature of the parties' rela-

[166] It would be interesting to attempt empirical research to determine to what extent employers are using noncompetes for these purposes as opposed to traditional reasons, like trade secret protection. I know of no study that has attempted this. In fact, it may prove exceedingly difficult to execute such research due to its inevitable reliance on some form of self-reporting. My own anecdotal queries to human resources professionals as to why their companies use noncompetes have tended to elicit responses that echo the doctrinal rule. That is, employees are apt to say they use noncompetes to protect trade secrets and "confidential information" but are generally unable to elaborate meaningfully as to what exactly requires protection. It may be that these individuals, based on their professional experience and their interactions with attorneys, have learned the legal touchstone for enforceability and invoke it by rote. Or it may be that given the confusion surrounding the law, human resources understand this phraseology as embracing their interests in intellectual capital and employee loyalty. Either way, it suggests that a scientific effort to document the reasons for the use of noncompetes would be a challenging task.

[167] It should be noted that even within the economics-influenced literature relatively few commentators advocate a pure free market analysis of noncompete enforcement, recognizing that despite the viability of the employer investment model, various factors may lead the parties to create suboptimal contracts. *See* Gallo, *supra* note 3, at 723-24 (describing the "moderate" economic view of noncompete contracts under which judicial intervention may be justified where enforcement will yield inefficient results); *see generally supra* note 144. *But see* Callahan, *supra* note 28, at 725-27 (advocating for enforcement of noncompetes subject only to standard contract defenses).

tionship as of the time of formation and the likelihood that they will modify their implicit understanding as the relationship evolves. On the other hand, it is unlikely that judicial assessment of the fairness of the agreement at the time of enforcement provides a workable means of balancing the parties' interests, and it may compound the problem by diminishing the binding effect of written agreements and reducing the parties' incentive to contract responsibly. The following section explores those concerns.

1. Noncompetes from a Relational Contracts Perspective

Despite the viability of employers' interest in their workers from a business perspective, the explanation that employers are purchasing a right to their employees may ultimately be found deficient when measured against the practical consequences of enforcement in some instances. Case law not infrequently reveals employer efforts to enforce agreements worded broadly enough to jeopardize the employee's ability to engage in his or her profession.[168] A fundamental principle involving the sale of labor has always been a disdain for contracts that approximate a form of indentured servitude.[169] Restraint of competitive employment is not itself objectionable, and is sanctioned as an alternative to specific performance in situations where the breach of a contract for personal services cannot be remedied through money damages.[170] The problem, however, is that the duration and scope of the restraint in many noncompete agreements appear disproportionate to the breach in the context in which it occurs.

[168] *See*, *e.g.*, Nature House, Inc. v. Sloan, 515 F. Supp. 398, 399-400 (N.D. Ill. 1981) (noncompete prohibiting indefinitely employee artist from rendering any future drawings of birds for any entities); Gynecologic Oncology, P.C. v. Weiser, 443 S.E.2d 526, 528 (Ga. Ct. App. 1994) (a physician non-compete containing two-year restraint plus tolling provision permitting duration to be extended indefinitely during any period of violation); Karpinski v. Ingrasci, 268 N.E.2d 751 (N.Y. 1971) (noncompete placing lifelong restriction on defendant dentist's ability to practice oral surgery within a five county radius); Frederick v. Prof'l Bldg. Maint. Indus., 344 N.E.2d 299, 301 (Ind. Ct. App. 1976) (noncompete placing ten-year restriction on management trainee's competition in the contract cleaning business). In such situations the terms of the agreement, if applied as written, would not only constrain an employee's choice of work but seriously preclude his or her ability to earn a living.

[169] *See* Sterk, *supra* note 31, at 387-88 (discussing Thirteenth Amendment rationale for preventing employer from obtaining specific performance of a personal service contract); *see also* discussion *supra* Part I.A.

[170] The seminal case is Lumley v. Wagner, 42 Eng. Rep. 687, 693 (Ch. 1852) (restraining defendant opera singer from singing at any concerts other than plaintiff's where defendant breached an exclusive three-month performance contract).

In framing the noncompete problem from the perspective of employee protection then, the question becomes why the terms of written agreements often prove onerous to employees if we deem individual workers competent to enter into agreements to sell their labor and human capital. The historical response, previously discussed, is that employees lack bargaining power to negotiate fair terms of employment and that the agreement reached will therefore unduly favor the employer.[171] Law and economics scholars, as well as others who champion an expansive view of employer interests, have long disdained this rationale for judicial intervention.[172] From such perspectives, concerns about employee bargaining power appear overly simplistic against the current economic backdrop in which human capital is recognized as a valuable asset.[173] If the employer wishes to retain a particular worker, then by definition the employee must possess valuable skills and knowledge that give the employee some degree of leverage.[174] Such an argument does not maintain that employees have equivalent bargaining power as a rule, but rather that the relative bargaining strength of the parties will depend on the labor market and demand for the employee's skills, such that generalizations about employees as a class are of limited utility in justifying a pervasive policy of judicial intervention.[175]

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[171] *See supra* Part I.A.

[172] *See*, *e.g.*, Sterk, *supra* note 31, at 409 (arguing that "inequality of bargaining power . . . can provide, at best, only a partial explanation for legislative and judicial reluctance to enforce restrictive covenants"); Callahan, *supra* note 28, at 721 (noting that "[m]ost contracts are negotiated by parties with unequal bargaining power, and unequal shrewdness, yet courts do not invalidate or rewrite ordinary contracts on these grounds").

[173] Courts' ability to issue such injunctions may be considered a logical corollary to individuals' rights to alienate their services, which, if limited, may result in undesirable limitations on individuals' ability to enter into contracts of their choosing. *See* Sterk, *supra* note 31, at 411 ("By protecting an employee's freedom to leave his employer without serious consequences, courts impose a corresponding restriction on an employee's freedom to contract about future use of his 'own' human capital.").

[174] Arguably those employees asked to sign noncompetes are likely to be upper-level employees who have greater ability to negotiate with their employers. *See* Callahan, *supra* note 28, at 721-22 (reasoning that most sensitive information is in the possession of more highly skilled, sophisticated employees who have alternative employment opportunities). *But see* Stone, *supra* note 3, at 586 (noting increased prevalence of noncompetes within lower-level and lower-skilled professions such as beauticians and delivery persons).

[175] *See* CAPPELLI, *supra* note 117, at 34-35 (discussing effect of shifts in skilled labor supply on employee bargaining power and, by consequence, the implicit agreements reached between employers and employees). The dearth of high-tech em-

Even if a particular employee possesses valuable human capital that is in demand in the relevant market, however, there are reasons to distrust the quality of the bargain he or she reaches with the employer. Some of these reasons are procedural: Many noncompetes are presented to employees on the day they start their jobs or shortly thereafter, at which point the employee is effectively unable to assert the leverage he or she otherwise could by declining the job.[176] More importantly, even an employee who is given the opportunity to review a noncompete before accepting a position is likely to have little incentive to negotiate its terms. In general, employees have limited information on which to base a decision about the fairness of a noncompete or evaluate the risk of accepting its terms.[177] The employee cannot predict such things as the extent and value of training that the employer will provide, the progression of his or her wages, the personal satisfaction he or she will experience on the job, the duration of the parties' relationship, or the future direction of the company and the market, all of which will reveal the wisdom of signing the agreement.[178] Although the employer likewise has limited information from which to determine whether and what type of noncompete it should demand from its employees, it is certainly in a better position to make that prediction given that it controls the structures through which the employment relation-

ployees relative to the needs of employers in the late 1990s, many of whom were small start-up companies, presents an obvious example. *See* Margaret Coles, *IT Stars Use Courts to Cast Off Chains*, SUNDAY TIMES (London), Dec. 5, 1999, at 20 (noting that the "hot young talent in the information-technology world are 'more akin to rock stars than to regular employees'" in suggesting that such employees possess bargaining power and exercise it to refuse noncompetes); *cf.* Callahan, *supra* note 28, at 723 (arguing that the "solicitous treatment of employees assumes that they are both fungible and overabundant" in criticizing courts' willingness to investigate the substance of noncompete agreement based on bargaining power concerns).

176 *See supra* note 15 and accompanying text.

177 *See* Sterk, *supra* note 31, at 408-09 (suggesting that deficiencies in information or lack of insight could lead employees to sign noncompetes that are against their interest); Rena Mara Samole, Note, *Real Employees: Cognitive Psychology and the Adjudication of Non-Competition Agreements*, 4 WASH. U. J.L. & POL'Y 289, 307-08 (2000) (discussing bounds on employee knowledge or access to information relevant to assessing whether to sign noncompete).

178 To the extent the employee does consider such issues, he or she may discount the likelihood of the relationship terminating or of future competitive opportunities. *See* Sterk, *supra* note 31, at 409; Samole, *supra* note 177, at 308-11 (examining cognitive capability of employees and suggesting that employees confronted with noncompetes underestimate risks of agreement and are overly optimistic regarding their own success).

ship will develop.[179] Even so, the number of contingencies for which the employer can expressly provide by contract is finite.[180]

For all of these reasons, it may be inappropriate to view noncompete terms as the product of reasoned reflection or as dispositive of the parties' rights and obligations. The unreliability of the document as a formal contract is not a problem specific to noncompete agreements, but one that is ubiquitous in long-term contracts contemplating a significant degree of personal involvement from the parties. Scholars in relational contract theory have long suggested that parties in ongoing commercial relationships intend their contracts to be informally rewritten over time and expect that their behavior will be governed by relational norms.[181] If that is the case, judicial enforcement of the precise terms of their written agreements, without considering the context in which enforcement is sought, may actually violate the parties' contractual intent. This conclusion regarding long-term commercial contracts may be all the more convincing in the employment context where the aim of the relationship is not the sale of a tangible good, but rather the development and exploitation of the relationship itself.[182] The nature of employment, or

[179] Even where the employer's needs and the relevant labor market suggest that the employee has significant bargaining power, it is the employer who ultimately controls the trajectory of the relationship since it controls its infrastructure, including such things as the delivery of training, structure of compensation systems, promotion hierarchy, and so forth. *See* CAPPELLI, *supra* note 117, at 3. Additionally, the employer is much more likely to have access to counsel and to take the opportunity to make more reasoned decisions about the noncompete terms it wishes to offer. *See* Sterk, *supra* note 31, at 409.

[180] It is impossible for employers and employees to specify in advance their precise expectations regarding their relationship, just as it would be impossible to write down every job duty in a description of a particular position. *See* CAPPELLI, *supra* note 117, at 18 (describing the "virtual impossibility of managing employees through explicit contracts); *cf.* Lester, *supra* note 3, at 65 n.75 (discussing the difficulty of drafting to reflect all future contingencies and noting that lack of complete information may result in written contracts that contain vague, inaccurate or open terms).

[181] Relational contract theory proceeds from the proposition that "contract is fundamentally about cooperative social behavior." Jay M. Feinman, *Relational Contract Theory in Context*, 94 Nw. U. L. REV. 737, 743 (2000). It derives principally from the scholarship of Ian Macneil. *See*, *e.g.*, IAN MACNEIL, THE NEW SOCIAL CONTRACT (1980); Macneil, *Values in Contract*, *supra* note 11; Ian Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus,"* 75 Nw. U. L. REV. 1018 (1981) [hereinafter Macneil, *Economic Analysis*]. For additional commentary discussing relational values in contracting, see Gudel, *supra* note 11, and Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981).

[182] *See* Gudel, *supra* note 11, at 787-91; *cf.* Hugh Collins, *Market Power, Bureaucratic Power, and the Contract of Employment*, 15 INDUS. L.J. 1, 3 (1986) (noting

any contract for ongoing personal services, is that the arrangement evolves over time to reflect changes in the needs and expectations of the parties. The employer and employee have limited ability to formally describe all of the rights and obligations they expect to attach to their relationship as of the point of its initiation, let alone provide for the myriad of contingencies that will influence and affect their joint endeavor over time.[183] Reliance on oral or informal agreements enables the parties to continually readjust their obligations to one another in response to the dynamic factors that affect the workplace.[184]

In the context of noncompetes, enforcement of a written agreement may or may not accord with the parties' actual expectations. Enforcement of a noncompete to protect an investment in training, for instance, would be consistent with the parties' implicit understanding where the employer contributes to the employee's professional development and the employee voluntarily terminates employment before the investment has been "paid back." But judicial enforcement of the precise terms of the noncompete could subject the employee to restraints long after he or she had purchased the training and experience provided during the relationship.[185] Similarly, enforcement of a noncom-

that the characterization of the employment relationship as a contract "fails to grasp the nature of the social relationships involved").

[183] *See* Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1799 (1996) (describing sources of uncertainty that compromise parties' ability to express terms of employment at point of hire); Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause in Employment at Will*, 92 MICH. L. REV. 8, 19-20 (1993) (describing parties' inability to negotiate detailed employment contract as a result of difficulties anticipating future contingencies and difficulties monitoring and verifying performance of express obligations).

[184] Related to this concept is the idea of the "incomplete" contract in law and economics literature. From the law and economics perspective, parties intentionally leave out certain terms from their written contracts in order either to maintain flexibility in the face of future events or to avoid transaction costs associated with negotiating and drafting particular terms. Informational asymmetry may be one reason why parties choose incomplete or implicit agreements over comprehensive contracts. *See* Schwartz, *supra* note 148, at 280 n.16 (1992); *cf.* Goetz & Scott, *supra* note 181, at 1091 (characterizing relational contracts as those in which parties are incapable of reducing certain terms to writing either because of the inability to identify future conditions or because incorporation of known contingencies is too complex).

[185] *See generally* Lester, *supra* note 3, at 69 (discussing potential for opportunistic behavior by employer in situations where employee departs after the employer has recouped its financial investment in training). It is the timing of the employee's departure that determines whether the attempt at enforcement accords with the par-

pete would be consistent with the parties' implicit understanding if used to enforce spot commitments to the organization. However, it would be inappropriate where the employee departed after completing a project or was involuntarily terminated for cause or as a consequence of unforeseen market fluctuations.[186]

Thus, noncompete enforcement is problematic because it offers employers the best of two worlds: relational and contractual. Because they are formal contracts, noncompetes give the employer a guaranteed means of enforcing what would otherwise be dependent on voluntary compliance, namely a legal remedy for redressing employee defections where the employer sees fit to

ties' implicit understanding or constitutes a form of employer abuse. *See id.* ("[T]he relevant question is not simply whether the employer made a costly investment in training . . . [but] whether one party has appropriated some of the value of the training without paying for it.").

[186] Whether employers may invoke noncompete protection against involuntarily terminated employees has been debated extensively in the case law. Several courts have held that the act of firing a worker extinguishes the employer's right to obtain an injunction against competition. *See*, *e.g.*, Rao v. Rao, 718 F.2d 219, 223 (7th Cir. 1983) (concluding that implied contractual covenant of good faith and fair dealing precludes employer enforcement of noncompete following unjustified termination of employee); Insulation Corp. of Am. v. Brobston, 667 A.2d 729, 737 (Pa. Super. Ct. 1995) (concluding that method of termination is relevant factor to consider in assessing reasonableness of noncompete in refusing to enforce agreement against employee discharged for poor performance); *see also* Gallo, *supra* note 3, at 734-41 (analyzing courts' varying treatment of noncompete claims against involuntarily terminated workers). While this Article is chiefly concerned with employer efforts to avoid employee defection, it bears noting that the judicial trend toward disallowing enforcement in the involuntary termination context is consistent with the parties' understanding of their implicit agreement and the limits of the employer's interest in its workers. The act of terminating the employee belies the existence of any continued interest in the employee's skills, commitment, or services that could justify a restraint, regardless of the employer's expectations at the outset of the relationship. *See Insulation Corp. of Am.*, 667 A.2d at 735 ("The employer who fires an employee for failing to perform in a manner that promotes the employer's business interests deems the employee worthless. . . . [W]e conclude that it is unreasonable as a matter of law to permit the employer to retain unfettered control over that which it has effectively discarded."). Indeed, in situations in which the employee is terminated the implicit agreement of the new workplace specifically contemplates that the employee will be able to resell his human capital to competitors. *See* Stone, *supra* note 3, at 569-71; *supra* Part III.A. On the other hand, it may be necessary to distinguish between those employees terminated for cause and those terminated without cause, the rationale against noncompete enforcement applying only to the latter. Arguably, an employee who is terminated for breach of a term of an employment contract or for violating the duty of loyalty, for instance by disclosing a trade secret, should not be permitted to avoid application of an otherwise valid noncompete by engaging in behavior that leads the employer to terminate him or her. *See*, *e.g.*, Gismondi, Paglia, Sherling, M.D. v. Franco, 104 F. Supp. 2d 223, 233 (S.D.N.Y. 2000); *cf.* Cray v. Nationwide Mutual Ins. Co., 136 F. Supp. 2d 171, 178-79 (W.D.N.Y. 2001).

exercise it. On the other hand, since noncompetes do not contractually define any other aspect of the employment relationship, they create no legal obligation on the part of the employer to fulfill any of its own commitments under the parties' implicit understanding. From the perspective of the employee, this means the noncompete contract provides no assurance that employers will pursue enforcement fairly, or even that the employer will provide the training and experience it implicitly promised in exchange for its restraint on the employee's mobility. Thus, the value and the danger of unequivocal enforcement of noncompete agreements is that it allows an employer to legally effect compliance with some aspects of the parties' understanding, while foreclosing the interactive process of redefining the terms of the relationship that would otherwise protect the worker.

2. Binding Agreements and the Viability of Preenforcement Substantive Review

This disconnect between formalized agreements and implicit understandings in the employment context supports the existing sentiment that noncompete enforcement must be limited in some measure to protect workers. It is not at all clear, however, that substantive review of noncompetes in the context in which enforcement is sought is a desirable solution. Abandoning the protectable interest proxy in favor of a more open-ended evaluation may result in a less contrived assessment of the parties' interests, but it is likely to be at the expense of further increasing the uncertainty in the case law and reducing parties' incentives to craft the terms of their agreements with care.

At the outset, evaluation of noncompetes at the time of enforcement requires some consensus on the nature of the substantive inquiry. An initial question is what rule or standard the court should adopt in lieu of its current examination of the employer's protectable interest and the "reasonableness" of the restraint as a basis for determining whether enforcement is fair. One option is for the court to identify and impose an efficient outcome under the circumstances.[187] The court could assess the value of the training and experience provided by the employer and the value of the employee's work against the timing of the

[187] *See* Schwartz, *supra* note 148, at 277-78 (discussing the law and economics approach to contractual incompleteness which favors adoption of efficient rules to supplement incomplete contracts).

departure, and enforce the noncompete if the court determines that the employer was not sufficiently compensated for its outlay.[188] Alternatively, the court could enforce a result that accords with the parties' implicit understanding or with relevant external norms.[189] The court could require, for instance, that the parties establish the extracontractual terms of their relationship and enforce the noncompete only upon demonstration that the employee had violated an aspect of the shared understanding.[190]

Leaving aside for the moment the question of which approach achieves the more desirable outcome,[191] it is unlikely that either

[188] *See*, *e.g.*, MICHAEL J. TREBILOCK, THE COMMON LAW OF RESTRAINT OF TRADE: A LEGAL AND ECONOMIC ANALYSIS 147-48 (1986) (advocating a case-by-case approach to noncompete enforcement that inquires whether the employer has lost out on an investment in human capital); *see also* Lester, *supra* note 3, at 69-70 (explaining this approach).

[189] While relational contract theory often refers generally to the role of relational norms in judicial adjudication, at least some scholarship distinguishes between an approach that focuses primarily on the unique expectations that arise during the course of the parties' relationship and that which focuses on a transcendent concept of substantive fairness derived from relevant societal norms. *See* Schwartz, *supra* note 148, at 275-76 (distinguishing between "internal" and "external" relational approach to contractual incompleteness).

[190] *See*, *e.g.*, Macneil, *Economic Analysis*, *supra* note 181; Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927 (1990); *see also* Schwartz, *supra* note 148, at 275-76. The outcome under this approach would differ from that which would be reached under the efficiency-based approach in two scenarios. One would be where the employer had not recouped the cost of its outlay but the employee did not share the understanding that he would be required to stay. The other would be where the parties' understanding was that the employee would stay beyond the required time to recoup the employer's investment because the employer had an interest in maintaining commitment for non-pecuniary reasons.

[191] Although this debate concerns much of the literature on relational and incomplete contracts, *see* Schwartz, *supra* note 148, at 274-78 (suggesting that relational contract theory and economic analysis of "incomplete" contracts offer alternative means of addressing the shared problem of contract interpretation under circumstances that appear not to have been contemplated by the parties), it is not clear that the choice of approach will effect differing results in most cases. It has been argued for instance, that the parties to commercial relationships generally expect and intend that each will seek to maximize self-interest, which supports the conclusion that reliance on internal norms of the relationship will yield the result otherwise achieved by selecting terms that maximize efficiency. *See id.* at 276-77. Similarly, some scholars have predicted that principles of fairness, what might be considered the source of external norms, will increasingly reflect concerns of efficiency and maximization of joint gain under the theory that what is efficient is objectively fair. *See* Schwab, *supra* note 126, at 34. On the other hand, there appear to be some instances where the means selected will alter the ends achieved. Employees may know their employer intends to invest in worker training in order to maximize profits but not know or share in the understanding that a definitive commitment to remaining on the job is required for the employer to realize the benefit of its investment. Similarly, a

lays the foundation for a workable rule. The efficiency-based approach would require the court to engage in economically sophisticated valuations of the worker's marginal product relative to the investment of the employer. Executing such calculations in specific cases that may well prove infeasible.[192] Neither is it apparent how a court would define appropriate external norms or undertake an inquiry into the substance of an implicit agreement. The success of such an approach would be dependent on the parties' ability to prove the content of oral statements and substantiate their subjective understandings. Thus, in either of these cases, the specificity or subjectivity of the requisite inquiry would make it virtually impossible for parties to predict whether a particular agreement would be found enforceable at any given point in the parties' relationship.

Indeed, any of these forms of judicial review may have the perverse effect of diluting the significance that the parties might otherwise attach to their written terms. Particularly where a jurisdiction will revise an agreement deemed unfair, employers have an incentive to request more protection than what would appear reasonable.[193] In effect, by looking to the circumstances in which enforcement is sought, the law perpetuates a cycle in which parties fail to meaningfully consider the consequences of the terms they select or engage in serious negotiation, which in turn makes judicial intervention necessary.

Because of the difficulties of finding a workable standard for

shared norm may develop that requires the employee to remain on the job for personal or other non-pecuniary reasons beyond the time necessary for the employer to recoup its monetary outlay.

192 *See* Lester, *supra* note 3, at 70 (calling such an approach the "optimal rule in a first-best world" but questioning courts' ability to carry it out). The problem of judicial competency to determine efficient ex ante results has been a central concern of the law and economics literature on gap-filling in incomplete contracts. *See*, *e.g.*, Gillian K. Hadfield, *Judicial Competence and the Interpretation of Incomplete Contracts*, 23 J. LEGAL STUD. 159, 162 (1994) (suggesting that generalist courts have limited ability to determine efficient outcomes); *cf.* Schwartz, *supra* note 148, at 279-80 (suggesting that parties contract with knowledge that certain information will be observable to them but incapable of verification before a court). *But see* Eric Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 Nw. U. L. REV. 749, 762-69 (2000) (arguing that creating legally enforceable contracts deters highly opportunistic behavior even though courts lack competency to enforce them properly).

193 *See* Closius & Schaffer, *supra* note 82, at 547 (suggesting that judicial rewriting strategies "encourage employers to be 'unreasonable' because there is, in effect, no sanction for being unreasonable"); *see generally supra* Part I.B (describing "blue-pencil" approach to over broad noncompete agreements).

review, some commentators have suggested abandoning the use of noncompete agreements to protect employers' interests in people in favor of adopting "pay back" agreements designed specifically to reimburse the employer for the cost of training.[194] While prohibiting any type of contractual protection for training appears inconsistent with the recognition of the value of human capital to employers, an effort to limit that protection based on the form of the agreement does offer some advantages. "Pay back" agreements tend to be drafted more narrowly than noncompetes in that they require employee repayment of specific costs only in the event the employee departs within a designated time period. By limiting the duration of the employee's repayment obligation *ex ante*, such agreements in theory prevent the employer from redefining the terms of the understanding at the time of enforcement. Enforcement of such agreements should therefore be less onerous, or at least less surprising, to employees.

However, repayment agreements ultimately raise many of the same practical problems associated with noncompetes. Since it is the uncommon situation in which the parties discuss or attempt to anticipate the extent of the employer's investment or the length of the employee's commitment, the terms of the agreement are unlikely to be any more "fair" than those of a noncompete. The goal of requiring specifically drafted contracts may be to preclude any contractual agreement where such information is unknown, but it is equally likely that the employer will request such an agreement regardless, utilizing speculative terms to preserve the possibility of enforcement in the face of uncertainty. If at the time of the employee's departure the required payments prove more costly than the value of the employee's unreimbursed human capital, enforcement of the pay back provision is no less burdensome to the employee than the noncompete agreement.[195] Indeed, if the payments required are substantial,

[194] *See*, *e.g.*, Kraus, *supra* note 80; Lester, *supra* note 3, at 75-76; *cf.* Rubin & Shedd, *supra* note 82, at 100-07 (advocating continuation of existing rule limiting noncompete enforceability and against extending protection to other forms of training in order to avoid opportunities for overreaching). At least one state has adopted such an approach through legislation. In Colorado, employers are statutorily authorized to require employees who depart within two years of hire to repay the cost of their training. *See* COLO. REV. STAT. § 8-2-113(2)(c) (2001).

[195] One can argue that a repayment agreement is less onerous than a noncompete because the subsequent employer can easily assume the employee's contractual obligation. Yet noncompete agreements are themselves only slightly less amenable to

the agreement may prove more constraining because it forces the employee to produce cash and provides no option to comply with the agreement by refraining from competitive employment.[196] Thus, unless there is reason to trust the process by which the terms of such agreements are chosen, they are potentially as problematic as noncompetes and arguably should be subjected to the same form of judicial review at the time enforcement is sought.[197]

IV

TOWARD A FORMATION-BASED MODEL OF JUDICIAL ENFORCEMENT

It remains to be considered whether a viable doctrinal approach can be found to assess the appropriateness of enforcement in individual cases. Such an approach should recognize the parties' ability to purchase and sell human capital as a component of their employment contract, but limit to some degree employers' ability to impose and enforce terms that go beyond protection of their legitimate needs or violate agreed upon norms. Ideally, that approach should also enhance consistency and predictability in the case law.

While an administerable rule that achieves all of these ends may ultimately prove elusive, the following section offers some preliminary doctrinal suggestions. In so doing, it returns to basic contract principles and defenses as a means of determining whether enforcement of the express terms of an agreement is justifiable despite its potentially harsh effects. To that end, the Article examines a formation-based model of enforcement proposed

such a resolution. It is in fact commonplace among a certain class of employees for the poaching company to pay the employee's way out of an existing restraint. The situation with which the law must be concerned, of course, is that of the employee who has no such opportunity or is chilled in his or her efforts to find future work because of the existence of the agreement.

196 While relatively few judicial opinions involving repayment agreements have been handed down, the highly disfavorable treatment they have received suggests that courts share such concerns. *See*, *e.g.*, Brunner v. Hand Indus., 603 N.E.2d 157, 159 (Ind. Ct. App. 1992) (refusing to enforce repayment agreement under which defecting employee was required to reimburse employer $20,000 for training in treating orthopedic products).

197 An alternative may be to establish legislative limitations on such agreements. *See* Lester, *supra* note 3, at 76 (proposing the possibility of a cap on training costs and other statutory limitations). It is unclear, however, whether a single legislative scheme could account for the wide range of variables that will determine the appropriateness of such agreements in different situations across different industries.

by uniform domestic relations law to deal with the analogous problem of premarital agreements. Such a model rigorously examines contractual assent and the context in which it occurs to ensure that the parties' adoption of a written agreement represents a reasoned choice to reject flexibility in favor of legally fixing their obligations. The Article concludes by considering how a formation-based model of enforcement applied to noncompete agreements might achieve a more consistent approach to enforcement, one that strikes a balance between a pure freedom-of-contract ideals and an approach that seeks to enforce the implicit terms of the parties' relationship to achieve a substantively fair result.

A. Existing Limits on Contractual Enforceability

One way of crafting an alternative approach to noncompetes that avoids a contextualized substantive analysis at the time of enforcement is to return to fundamental contract principles in assessing how such agreements are formed. While contract law obviously does not contemplate review of the effects of enforcement, it does establish basic prerequisites and defenses to enforcement that in theory assure that parties willingly accepted the risks inherent in their agreement. In this respect, the concepts of assent and consideration are threshold requirements whose presence indicates that both parties agreed to their written terms pursuant to a true exchange.

The available defenses of duress and unconscionability focus on these basic ideas of consent and exchange in contract formation. The duress defense allows a party to escape contractual liability where that party's acceptance of the agreement occurred under circumstances that impaired the meaningfulness of his or her consent—for instance, where the party is threatened or coerced.[198] In the same way, the unconscionability doctrine looks at the terms of the agreement and the process through which they were reached to limit enforceability where the contract was unlikely to have been the product of knowing agreement. The

[198] *See*, *e.g.*, Rissman v. Rissman, 213 F.3d 381, 386 (7th Cir. 2000) (defining duress as a condition where one party is induced to contract by means of a wrongful act or threat); King v. Donnkenny Inc., 84 F. Supp. 2d 736, 738 (W.D. Va. 2000) (defining duress as the application of "undue pressure in a contractual bargaining process."); Wolfe v. C.S.P.H., Inc., 24 S.W.3d 641, 645 (Tex. App. 2000) (observing that duress requires proof of a threat to do something which the threatening party has no right to do).

doctrine takes into account procedural concerns such as the knowledgeableness and bargaining skill of the parties,[199] as well as the use of fine print and complex language to obscure unfavorable terms.[200] It also looks to the substantive terms of exchange to see if they were unduly favorable to one side as of the time of formation.[201] Thus, some scholars have suggested that existing contract principles sufficiently address concerns about the fairness of noncompete agreements and that any inquiry into enforceability should be limited to an analysis of these defenses.[202]

The problem with reliance on these contract principles and defenses as the sole bases for reviewing noncompetes is that courts tend to employ these doctrines with hesitation and only in very limited circumstances. The duress defense requires an actual or implied threat of loss or harm that leaves the "victim" of duress with "no reasonable alternative" but to accept the demands of the party with the superior bargaining position.[203] Such threats,

[199] *See*, *e.g.*, Metro. Prop. & Cas. Ins. Co. v. Budd Morgan Cent. Station Alarm Co., 95 F. Supp. 2d 118, 121 (E.D.N.Y. 2000) (noting that factors considered in assessing unconscionability include the experience and education of the aggrieved party as well as any disparity in the bargaining power); *In re* Turner Bros. Trucking Co., 8 S.W.3d 370, 376 (Tex. App. 1999) (finding agreement unconscionable where aggrieved party had difficulty understanding its terms); Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 403 (Utah 1998) (noting that factors bearing on unconscionability include whether each party had a reasonable opportunity to understand the contract terms and whether the contract terms were explained to the weaker party).

[200] *See*, *e.g.*, *Metro. Prop. & Cas. Ins. Co.*, 95 F. Supp. 2d at 121; Monscatiello v. Pittsburgh Contractors Equip. Co., 595 A.2d 1190, 1196-97 (Pa. Super. Ct. 1991) (finding fine print warranty disclaimer unconscionable).

[201] *See* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 689-91 (Cal. 2000) (holding preemployment application forms containing mandatory arbitration clauses unconscionable because terms were so favorable to employer); *Metro. Prop. & Cas. Ins. Co.*, 95 F. Supp. 2d at 121 (observing that substantive unconscionability requires determining if the contract terms were unreasonably favorable to the party against whom unconscionability is urged); *Ryan*, 972 P.2d at 402 (same).

[202] *See*, *e.g.*, Callahan, *supra* note 28, at 725-27 (concluding that unconscionability defense provides an appropriately limited mechanism for protecting genuinely disadvantaged employees); Sterk, *supra* note 31, at 405-12 (finding traditional concerns about bargaining power and anticompetitive behavior insufficient to justify treating exchanges of human capital pursuant to noncompete agreements different from other contractually alienable property interests). *But see* Closius & Schaffer, *supra* note 82, at 548-49 (suggesting that contract rules should be subordinated to agency rules in evaluating noncompetes and arguing that enforcement should be permitted only where the employee's fiduciary obligations provide a basis for the restraint).

[203] *See* RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981) (stating that duress exists where contractual assent is induced by "an improper threat by the other party that leaves the victim no reasonable alternative"); *accord* Contempo Design, Inc. v. Chicago & Northeast Ill. Dist. Council of Carpenters, 226 F.3d 535, 551 (7th

however loosely defined, would rarely, if ever, accompany an employer's request for a noncompete in the ordinary employment case. Similarly, unconscionability is applied only to those situations in which both the unfairness of the terms and the circumstances under which they were reached combine to shock the conscience of the court. While such a standard would capture the "lifetime" covenant and other palpably excessive restraints, it would not touch the vast majority of noncompete provisions.

It seems unlikely, therefore, that an approach constrained by existing contract law applicable to a wide range of agreements will offer a viable solution to the problem of noncompete enforcement. While such an approach offers consistency and assures that the most egregious agreements are stricken, it does not account for the questions posed by the long-term and open-ended nature of the employment relationship and its impact on the concepts of consent and exchange. In the absence of circumstances that rise to the level of duress or unconscionability, basic contract law deems the signature of the employee evidence of assent and the offer of employment sufficient consideration for the employee's concession, irrespective of the limitations on enforcement that the parties may have implicitly assumed.

It does seems reasonable, however, to consider the possibility of enhancing the existing contractual inquiry to allow for a more careful review of contractual intent and issues peculiar to the formation of noncompete agreements. Appropriately, the point of the duress and unconscionability defenses is to avoid enforcement of agreements where both the terms and the process of reaching the agreement betray an absence of meaningful choice on one side. Having accepted the need for some judicial intervention in enforcement, an analysis of contract formation issues that is somewhat more rigorous than that which exists under current law may be less offensive to freedom of contract principles than a review that hinges on the substantive effects of enforcement. Since the historical debate about noncompete enforcement stems from concerns about bargaining power, analysis of

Cir. 2000); *see also Rissman*, 213 F.3d at 386 (defining duress as a condition where one is induced to contract under circumstances depriving him of his free will); Fred Ehrlich, P.C. v. Tullo, 710 N.Y.S.2d 572, 573 (N.Y. App. Div. 2000) (same); Milgrim v. Backroads, Inc., 142 F. Supp. 2d 471, 475-76 (S.D.N.Y. 2001) (noting that where aggrieved party has alternative choice for redress, any claim of duress must fail); Vail/Arrowhead, Inc. v. Dist. Ct. for the Fifth Judicial Dist., 954 P.2d 608, 613 (Colo. 1998) (same).

the process by which these agreements are reached and the context in which they are formed in fact seems particularly apposite. The following section looks at the law of premarital agreements as an area in which courts rigorously consider issues of consent and unconscionability in contract formation in order to strike a balance in enforcing agreements that raise similar substantive fairness concerns.

B. The Premarital Agreement Analogy

The premarital agreement, like a noncompete, is an effort to determine at the outset of a legal relationship the consequences of its termination. Coincident with the emergence of the new social contract of employment, the marital institution itself underwent significant changes in the latter part of the twentieth century. As a result of the creation of no fault divorce laws in the 1970s, divorce became increasingly accessible and consequently more prevalent among all segments of the population.[204] The rising rates of divorce and remarriage in modern society have led many couples to consider more carefully their economic futures in advance of marriage and attempt to plan for the contingency of marital dissolution through contract.[205] As in the em-

[204] *See* June C. Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463, 1493 (1990) (suggesting that no-fault divorce eliminated both the stigma and financial disincentives associated with divorce, leading to increase in divorce rates); Raymond C. O'Brien, *The Reawakening of Marriage*, 102 W. VA. L. REV. 339, 355 (1999) (estimating that no-fault divorce accounted for about one-fifth of the total increase in divorce rates between 1968 and 1988, and noting that between 1960 and 1990, the divorce rate in the United States doubled). Indeed, the unprecedented surge in divorce rates has given rise to a modern reform movement that advocates the adoption of "covenant marriages" and other fault-based initiatives. *See* Lynn D. Wardle, *Divorce Reform at the Turn of the Millennium: Certainties and Possibilities*, 33 FAM. L.Q. 783, 785-90 (1999) (noting public criticism of existing no-fault divorce laws and describing recent legislative reforms adopted in Louisiana and Arizona). For a brief summary of the history of American divorce law and the rise of the no-fault regime, see O'Brien, *supra*, at 352-57.

[205] *See* Cory Adams, *Part 3: Getting Married: Premarital Agreements*, 11 J. CONTEMP. LEGAL ISSUES 121, 122 (2000) (noting that sixty percent divorce rate forces couples to consider the likelihood of marital dissolution and suggesting that "serial spouse[s]" who have children from a prior marriage and/or substantial assets are likely to seek the protection of a prenuptial agreement); Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN'S RTS. L. REP. 147, 149 (1996) (suggesting that increase in second marriages and the increased tendency to marry later in life lead to greater reliance on premarital agreements); Allison A. Marston, *Planning for Love: The Politics of Prenuptual Agreements*, 49 STAN. L. REV. 887, 891 (1997) (suggesting various reasons for the

ployment context, would-be marital partners recognize that despite best intentions they are not guaranteed lifetime security in their relationships.[206]

From a legal and policy perspective, the history of premarital agreements is a tortured one that traces some of the same paths as the law of noncompete enforceability. Initially, premarital agreements that dictated the terms of marital dissolution were deemed void as a matter of public policy.[207] The reasons were two-fold. Premarital agreements were perceived as denigrating marriage and even encouraging divorce.[208] More importantly,

increased use of premarital agreements, including the prevalence of divorce and remarriage and the increase in individual assets brought by women to marriage as a consequence of their rising participation in the labor market and likelihood of marrying later in life than in past decades).

[206] *Cf.* CAPPELLI, *supra* note 117, at 2-3 ("If the traditional, lifetime employment relationship was like a marriage, then the new employment relationship is like a lifetime of divorces and remarriages, a series of close relationships governed by the expectation going in that they need to be made to work, and yet will inevitably not last.").

[207] *See*, *e.g.*, Reynolds v. Reynolds, 123 S.E.2d 115, 132 (Ga. 1961); *In re* Marriage of Gudenkauf, 204 N.W.2d 586, 587 (Iowa 1973); Crouch v. Crouch, 385 S.W.2d 288, 293 (Tenn. 1964); Fricke v. Fricke, 42 N.W.2d 500, 502 (Wis. 1950). By contrast, agreements governing property distribution upon death of a spouse were generally considered acceptable. *See*, *e.g.*, *In re* Cantrell's Estate, 119 P.2d 483, 486 (Kan. 1941); Gartner v. Gartner, 74 N.W.2d 809, 812 (Minn. 1956); Buettner v. Buettner, 505 P.2d 600, 603 (Nev. 1973); *see also* Gross v. Gross, 464 N.E.2d 500, 504 (Ohio 1984) (describing historical distinction between the two forms of premarital agreements and noting that agreements providing for property disposal upon a spouse's death were generally recognized as "conducive to marital tranquility" and upheld on the basis of "the spouses' interest in the preservation of their respective estates, and their reasonable desire to avoid disputes regarding such property after one spouse has died").

[208] It was believed that the sacredness of entering a marital union was offended by discussions of its possible demise. *See* Marston, *supra* note 205, at 897 (summarizing rationales for judicial non-enforcement of premarital agreements prior to 1970); Milton C. Regan, Jr., *Marriage at the Millenium*, 33 FAM. L.Q. 647, 649 (1999) (explaining that courts typically declined enforcement of premarital agreements for fear that such contracts were deleterious to the union or could cause parties to treat the marriage commitment lightly); *see also* Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 136 (1993). The perception that premarital agreements encouraged divorce was based on the fear that such agreements removed the husband's legal obligation of support upon divorce, thereby creating a financial incentive for husbands to leave their wives. *See Crouch*, 385 S.W.2d at 293 ("Such contract could induce a mercenary husband to inflict on his wife any wrong he might desire with the knowledge his pecuniary liability would be limited."); Cumming v. Cumming, 102 S.E. 572, 575 (Va. 1920) (noting that upholding these agreements "would be to invite disagreement, encourage separation, incite divorce proceedings, . . . and destroy every principle of the law of marriage, requiring that husband and wife shall live together during their natural lives, and that the husband, within his financial ability, shall furnish the wife

courts questioned the quality of the bargaining process through which such agreements were reached, presuming that wives-to-be did not have the ability or presence of mind to provide contractual consent.[209] Courts feared that women, confronted with the superior bargaining power of their husbands, would unwittingly contract away their right to support, just as they feared workers might contract away their ability to earn a living.

In the last thirty years, however, these sentiments have given way to tempered acceptance. Courts have rejected the contention that premarital agreements encourage divorce[210] and have taken a less gendered view of their effect on women.[211] At the

with reasonable necessaries for her support"); *Fricke*, 42 N.W.2d at 502 ("In every civilized country [there is] the obligation, sacred as well as lawful, of a husband to protect and provide for his family, and to sustain the [premarital agreement] would be to invest him with a right to be both a faithless husband and a vicious citizen.").

[209] *See* Stilley v. Folger, 14 Ohio 610, 648 (1846).

> What person so exposed to imposition as a woman, contracting,[sic] personally, with her intended husband, just on the eve of marriage, at a time when all prudential considerations are likely to be merged in a confiding attachment, or suppressed from an honorable instinct and sentiment of delicacy. Surely, it would be a reproach to the law, if the very virtues and graces of woman were thus allowed to become the successful means of overreaching and defrauding them in bargains.

Id.

[210] *See*, *e.g.*, Brooks v. Brooks, 733 P.2d 1044, 1050 (Alaska 1987) (finding idea that premarital agreements induce divorce "anachronistic" and concluding that "allowing couples to think through the financial aspects of their marriage beforehand can only foster strength and permanency in that relationship"); *Gross*, 464 N.E.2d at 506 ("[W]e conclude that the modern trends of marriage and divorce across the country dictate that reasonable laws must be forthcoming to accommodate these changing social attitudes. It may be reasonably concluded that [premarital] agreements tend to promote or facilitate marriage, rather than encourage divorce."). Occasionally, however, courts will reject an agreement where it is perceived as bestowing an advantage on a party that chooses to divorce. *See*, *e.g.*, *In re* Marriage of Noghrey, 215 Cal. Rptr. 153, 156 (Cal. Ct. App. 1985) (voiding prenuptial agreement giving wife $500,000 in the event of divorce because wife was thereby "encouraged by the very terms of the agreement to seek a dissolution"). It has therefore been argued that the modern interpretation of this issue has the perverse effect of voiding those agreements that provide benefits beyond that which ordinary marital property rules would permit while permitting agreements that are less favorable to the waiving party, usually the wife. *See* Atwood, *supra* note 208, at 136-37.

[211] Potter v. Collin, 321 So. 2d 128, 132 (Fla. Dist. Ct. App. 1975) ("In this day and age there is no longer any suggestion that women are unequal and in need of the protective arm of the court."); Osborn v. Osborn, 226 N.E.2d 814, 819 (Ohio Ct. Com. Pl. 1966) (finding judicial emphasis on women's lack of bargaining power outdated in light of women's increased status in contemporary society); Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990) (noting that "women are no longer regarded as the 'weaker' party in marriage . . . [n]or is there validity in the presumption that

same time, they continue to recognize the uniqueness of marriage relative to other contractual relationships, how that impacts the parties' ability to bargain, and the difficulties inherent in contracting in advance for future contingencies within a marriage.[212] The question has been how to account for these problems in creating a standard for judicial intervention. Historically, the law has focused on a contextualized assessment of the substantive effects of the premarital agreement's terms, much like the current law of noncompete enforcement. In particular, where the agreement purports to limit a spouse's right to support, courts have traditionally held that the allocation provided to that spouse must be reasonable for the agreement to be enforceable.[213] Thus, agreements providing for a waiver of all inheritance rights or a relinquishment of any claim to alimony by a dependent spouse have frequently been set aside.[214]

In addition to this line of inquiry, however, the law of premarital agreements has also focused heavily on issues of procedural fairness in the formation of the contract. A prevalent factor in assessing the enforceability of property allocations, for instance, is whether there was a full disclosure of assets by the party seek-

women are uninformed, uneducated, and readily subjected to unfair advantage in marital agreements"); *see also* Marston, *supra* note 205, at 897-98 (noting decrease in court expressions of paternalism toward women correlating with increase in enforcement of premarital agreements).

[212] *See In re* Marriage of Bonds, 5 P.3d 815, 829 (Cal. 2000) (noting that unlike commercial agreements that operate as a guide to achieving a joint objective, a premarital agreement is formed with the "anticipat[ion] that it never will be invoked" and "exists to provide for eventualities that will arise only if the relationship founders, possibly in the distant future under greatly changed and unforeseeable circumstances"); AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.02 cmt. c (Tentative Draft No. 4, 2000) [hereinafter PRINCIPLES] ("Parties entering a family relationship have expectations about their future partner that may disarm their capacity for self-protective judgment, or their inclination to exercise it, as compared to parties negotiating other kinds of contracts.").

[213] *See*, *e.g.*, Newman v. Newman, 653 P.2d 728, 736 (Colo. 1982); Scherer v. Scherer, 292 S.E.2d 662, 666 (Ga. 1982); Osborne v. Osborne, 428 N.E.2d 810, 816 (Mass. 1981); *Osborn*, 226 N.E.2d at 817; *In re* Estate of Geyer, 533 A.2d 423, 428 (Pa. 1987); Whitney v. Seattle-First Nat'l Bank, 579 P.2d 937, 940 (Wash. 1978).

[214] *See*, *e.g.*, Lutgert v. Lutgert, 338 So. 2d 1111, 1117 (Fla. Dist. Ct. App. 1976); Eule v. Eule, 320 N.E.2d 506, 510 (Ill. App. Ct. 1974); Johnson v. Johnson, No. 3-91-50, 1992 WL 209320, at *3 (Ohio Ct. App. Aug. 26, 1992); Bloomfield v. Bloomfield, 723 N.Y.S.2d 143, 146 (N.Y. App. Div. 2001), *rev'd,* 97 N.Y.2d 188 (N.Y. 2001); *see also* Matter of Marriage of Matson, 730 P.2d 668, 672 (Wash. 1986) (noting that in the event an agreement "attempts to eliminate, totally, community property rights, the court must zealously and scrupulously examine it for fairness").

ing enforcement.[215] Courts stress that for the agreement to withstand challenge, the spouse opposing enforcement must have signed the agreement knowingly and voluntarily.[216] Some courts have suggested that the waiving spouse must not only be informed of the financial position of the partner seeking enforcement, but must also be cognizant of his or her rights to support and property.[217] Thus, while there is no requirement of review by independent counsel, whether the waiving party had the opportunity to consult with an attorney is a factor to be considered in determining enforceability.[218] Furthermore, courts reviewing premarital agreements will frequently look to case-specific indicators of fairness in the bargaining process in making an assessment of voluntariness. For instance, the timing of the presentation of the agreement to the waiving spouse may impact enforcement: Courts are inclined to reject agreements presented too close to the time of the wedding to afford an opportunity for meaningful reflection.[219] Finally, courts look directly at the rela-

[215] *See*, *e.g.*, *In re* Estate of Ingmand, No. 00-1281, 2001 WL 855406, at *2 (Iowa Ct. App. July 31, 2001); McKee-Johnson v. Johnson, 444 N.W.2d 259, 266 (Minn. 1989); *Simeone*, 581 A.2d at 167; *Whitney*, 579 P.2d at 939; *see also Gross*, 464 N.E.2d at 506 (noting that premarital agreement is valid and enforceable where, *inter alia*, "there was a full disclosure, or full knowledge, and understanding, [sic] of the nature, value and extent of the prospective spouse's property").

[216] *See*, *e.g.*, Potter v. Collin, 321 So. 2d 128, 132 (Fla. Dist. Ct. App. 1975); Rinvelt v. Rinvelt, 475 N.W.2d 478, 481 (Mich. Ct. App. 1991); *McKee-Johnson*, 444 N.W.2d at 265; Lester v. Lester, 87 N.Y.S.2d 517, 521 (N.Y. Dom. Rel. Ct. 1949); *Whitney*, 579 P.2d at 939; *Osborn*, 226 N.E.2d at 817; Gant v. Gant, 329 S.E.2d 106, 114 (W. Va. 1985).

[217] *See*, *e.g.*, *Geyer*, 533 A.2d at 429 (noting that sufficient disclosure to sustain validity of premarital agreement "must include both the general financial pictures of the parties involved, and evidence that the parties are aware of the statutory rights which they are relinquishing"); *Matson*, 730 P.2d at 673 (noting in voiding prenuptial agreement that wife did not have "even a minimal understanding of the legal consequences of the rights she was signing away").

[218] *See*, *e.g.*, *Lutgert*, 338 So. 2d at 1117 (finding agreement unenforceable where wife was presented with agreement twenty-four hours before the wedding and was not afforded an opportunity to consult with an attorney); Fletcher v. Fletcher, 628 N.E.2d 1343, 1348 (Ohio 1994) ("[W]hen an antenuptial agreement provides disproportionately less than the party would receive under an equitable distribution, the party financially disadvantaged must have a meaningful opportunity to consult with counsel."); *cf. McKee-Johnson*, 444 N.W.2d at 266 (finding no procedural unfairness where wife waived her right to counsel and so acknowledged in the agreement); *see also* UNIF. PREMARITAL AGREEMENT ACT § 6 cmt., 9C U.L.A. 49-50 (2001) (noting that lack of assistance of counsel may be one factor in determining whether the statutory preconditions to enforceability of a premarital agreement are met).

[219] *See Lutgert*, 338 So. 2d at 1116 (voiding agreement where husband "sprang the agreement upon [his future wife] and demanded its execution within twenty-four hours of the wedding"); Bauer v. Bauer, 464 P.2d 710, 712 (Or. Ct. App. 1970) (in-

tive sophistication of the parties. Where a court deems the waiving spouse to be knowledgeable and experienced, his or her relinquishment of rights may be found enforceable despite the fact that the agreement's provisions would otherwise seem unfair.[220]

While the law in this area continues to consist of a review of both the substantive effects of enforcement and the contract formation process, the trend appears to be in favor of less of the former and more of the latter. In 1983, in response to concerns about uncertainty and inconsistency in the enforcement of premarital agreements, the National Conference of Commissioners on Uniform Laws promulgated the Uniform Premarital Agreement Act (UPAA).[221] Substantially adopted by twenty-six states,[222] the UPAA adopts a standard of enforcement that focuses almost entirely on contract formation issues, but which still accounts for circumstances peculiar to marriage. Its purpose is to enhance the enforceability and reliability of premarital agreements.

The UPAA provides that a premarital agreement is enforceable unless (1) it was not executed voluntarily, or (2) it was unconscionable at the time it was entered into and the party opposing enforcement did not know of or receive fair disclosure of his or her partner's assets.[223] Voluntariness, the primary issue in chal-

validating prenuptial agreement where wife was not advised of agreement until she was en route to the wedding); *Matson*, 730 P.2d at 672 (voiding prenuptial agreement because wife was required to sign contract on her wedding day, only three days after it was first presented to her).

[220] *See*, *e.g.*, Hengel v. Hengel, 365 N.W.2d 16, 20 (Wis. Ct. App. 1985) (noting that the wife was "moderately sophisticated in financial matters, that she was made aware of the contents of financial statements and, [sic] that she had independent knowledge of the substantial size of [husband's] estate before the marriage" in finding premarital agreement enforceable); Gant v. Gant, 329 S.E.2d 106, 116 (W. Va. 1985) (finding premarital agreement reasonable and enforceable despite wife's waiver of all alimony rights where "[b]oth parties were middle-aged, both had been married before, and the divorce occurred sufficiently close in time . . . to the signing of the agreement"); *Potter*, 321 So. 2d at 132 (finding premarital agreement enforceable where wife "was an educated woman with experience in the world of business and with experience in divorce and property settlement agreements" and chose to sign agreement against advice of counsel).

[221] For a discussion of the debate leading to the Commissioners' adoption of the UPAA standard, see *In re Marriage of Bonds*, 5 P.3d 815, 823-26 (Cal. 2000).

[222] Nat'l Conference of Commissioners on Uniform State Laws, Drafts of Uniform and Model Acts, *available at* http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last visited May 17, 2002).

[223] UNIF. PREMARITAL AGREEMENT ACT § 6, 9C U.L.A. 48-49 (2001).

lenging enforcement, looks to the quality of consent at the time of drafting. While not defined in the uniform law, the term has been interpreted as embracing many of the special procedural issues considered at common law, including coercion based on surprise or proximity to the parties' wedding, the presence or availability of counsel, knowledgeableness and sophistication of the waiving party, and whether there was a disclosure of assets.[224] In this way, the UPAA standard contemplates the ability to set aside an agreement for reasons beyond those which would justify a duress defense in a commercial context.[225] On the other hand, it limits inquiry into the substantive effects of the terms, choosing to evaluate substance through the lens of unconscionability rather than the common law reasonableness standard.[226]

[224] The most sustained assessment of the UPAA voluntariness standard is the recent California Supreme Court's decision in *In re Marriage of Bonds*, 5 P.3d at 824-25, which discusses such factors. For additional discussion, see Schwarz v. Schwarz, No. 01-99-01365-CV, 2000 WL 1708518, at *2-3 (Tex. App. Nov. 16, 2000); Donovan v. Donovan, No. 159622, 1999 WL 1499141, at *3-4 (Va. Cir. Ct. Sept. 28, 1999). In addition, the most recent tentative draft of the American Law Institute's Principles of the Law of Family Dissolution enumerates similar factors as relevant to determining whether a party's consent was "informed and not obtained under duress," the standard for enforceability adopted therein. PRINCIPLES, *supra* note 212, § 7.05(2). Specifically, under the ALI draft, where the parties are independently represented and sign the agreement at least thirty days before the marriage, a rebuttable presumption arises that the consent/no-duress requirement is satisfied. *Id.* § 7.05(3); *see also* Brian H. Bix, *Premarital Agreements in the ALI Principles of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 231, 236-37 (2001) (discussing the ALI's "procedural requirements" for the enforcement of premarital agreements).

[225] *See Bonds*, 5 P.3d at 830.

> [W]e believe the reference to voluntariness in the Uniform [Premarital Agreement] Act was intended to convey an element of knowing waiver that is not a consistent feature of commercial contact enforcement . . . [and] that subtle coercion that would not be considered in challenges to ordinary commercial contracts may be considered in the context of the premarital agreement.

Id.; *cf.* PRINCIPLES, *supra* note 212, § 7.05 cmt. b (contrasting adopted procedural requirements with traditional doctrine of duress that applies "only in very extreme cases of pressure" judged on the basis of objective circumstances).

[226] *See* UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2), 9C U.L.A. 49 (2001). The comments to the UPAA indicate that this is the same standard that applies to ordinary commercial contracts. *See id.* § 6 cmt., 9C U.L.A. 49-50 (2001). However, because the general inquiry into unconscionability contemplates a close examination of all facts and circumstances, consideration of unconscionability in the context of premarital agreement formation would likely take account of features peculiar to the relationship of intended marital partners. *See id.* ("In the context of negotiations between spouses as to the financial incidents of their marriage, the [unconsionability] standard includes protection against overreaching, concealment of assets, and sharp dealing *not consistent with the obligations of marital partners to deal fairly with each other*.") (emphasis added).

Significantly, the UPAA inquiry focuses on the circumstances that existed at the time of drafting, rather than the effect of the agreement at the time of enforcement as under some states' traditional common law standard.[227] Other than in narrow instances in which a party is in danger of becoming a public charge, the court is not to set aside a contract voluntarily agreed to merely because its terms ultimately prove harsh toward one of the parties under the circumstances existing at the time of enforcement.[228]

Thus, the UPAA aspires to a uniform formation-based assessment of the validity of premarital agreements, the defining feature of which is a searching examination of the circumstances surrounding the agreement process. To be sure, the proposed legislation has its critics, who argue for continued judicial review of the substantive effects of the agreement in light of the circumstances at the time of enforcement, particularly where the agreement limits a party's rights to spousal support.[229] What the UPAA suggests, however, is that unfair results do not themselves form a basis for nonenforcement. Rather, terms that are unconscionable at the time of drafting can be an indication of lack of consent in accordance with the traditional contract defense. While it is too soon to say whether the sort of fairness review that examines consequences of enforcement will be entirely eliminated, the trend in the courts appears decidedly in favor of nor-

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[227] *Id.* § 6(a)(2), 9C U.L.A. 49 (2001). The ALI Principles of Family Dissolution take an approach slightly more favorable to the party seeking to avoid the agreement, but which similarly limits inquiry into the substantive effects of the agreement. Pursuant to section 7.07 a court may not enforce a term of the parties' premarital agreement where enforcement "would work a substantial injustice," but such an inquiry may be made only where there has been a significant passage of time or change in circumstances between execution of the agreement and the time enforcement is sought. PRINCIPLES, *supra* note 212, § 7.07(2); *see also* Bix, *supra* note 224, at 237-39.

[228] UNIF. PREMARITAL AGREEMENT ACT § 6(b), 9C U.L.A. 49 (2001).

> If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

Id.

[229] *See* Atwood, *supra* note 208, at 147-48 (criticizing UPAA "eligibility for public assistance" test for insufficiently protecting long-time homemakers who may have sufficient skills to earn a minimum wage but will be unable to maintain their current lifestyle under terms of the agreement).

malizing these agreements such that premarital contracts are considered presumptively enforceable absent irregularities in formation.

C. Suggestions for a Formation-Based Analysis of Noncompetes: Assessing the Quality of Bargain and Exchange

A formation-based analysis comparable to that recognized in the premarital agreement context can provide an alternative approach to assessing enforceability of noncompete agreements. As previously noted, because the distinguishing attribute of such an approach is its focus on the events surrounding the creation of the agreement, it is closer to a true contract analysis under which the parties' bargain is necessarily enforceable absent specific defenses such as duress or unconscionability.[230] However, the formation-based approach contemplated here goes beyond confirmation of bargain and exchange to a qualitative review of circumstances at the point of agreement. The inherent problem with noncompetes is that the parties' inability to define precisely their future obligations makes them unlikely to bargain seriously over contractual specifics or, from the perspective of the employee, to view the written agreement as the final arbiter of the terms of his or her relationship.[231] Courts must therefore examine more rigorously issues of consideration and assent to determine whether the parties' agreement can be treated as a fair and consensual allocation of future risks. That goal may be accomplished by closely investigating at least three broad aspects of the formation process: the ability of the employee to bargain regarding the agreement's terms, the appropriateness of the scope of the restraint as of the time of formation, and the consideration provided by the employer in exchange for the noncompete.

The first aspect of this form of review contemplates an examination of the bargaining process itself to determine whether the employee has given meaningful consent to the noncompete. Fear of unequal power relationships has long motivated court decisions, yet the current legal test based on the protectable interest requirement does not provide for direct examination of the bargaining process, nor would an approach focusing purely on sub-

[230] *See supra* Part IV.B.

[231] *See supra* Part III.C.1.

stantive effects of enforcement.[232] Under a formation-based model of review, however, courts would consider the process by which the agreement was reached in order to determine whether the employee legitimately assumed the risk that the noncompete's terms would prove onerous.

In executing that inquiry, courts could look to many of the same factors deemed relevant under the law of premarital agreements. The timing of the presentation of the agreement, whether there was actual discussion or negotiation regarding its terms, and the relative sophistication of the parties should all be relevant in determining the agreement's enforceability. A noncompete signed after the date of hire, for instance, should be presumptively unenforceable. In such a situation, it is impossible for the employee to assert any leverage in disputing the agreement's terms, as the employee has already terminated his or her previous employment and done the preparation necessary to assume the new position.[233] Courts should also consider whether the employee consulted with counsel. Although legal representation should not be a requirement, as with premarital agreements, courts can look to whether the employee was informed of the significance of the noncompete and encouraged to have it

[232] Indeed, the current approach has been criticized for emphasizing a policy of protecting workers with unequal bargaining power but not taking actual bargaining power into account in assessing enforceability. *See*, *e.g.*, Callahan, *supra* note 28, at 721-22 (asserting that most employees subject to noncompetes are "highly skilled" and "relatively sophisticated" and finding it "puzzling" that the law "protect[s] persons who are able, ex ante, to assess the desirability of the terms, who are able to foresee the consequences of such terms, and who are free not to contract if the terms are sufficiently unfavorable"); *cf.* Sterk, *supra* note 31, at 409 (observing that "[i]f unequal bargaining power were the only reason for refusing to enforce restrictive covenants, one would expect full enforcement in those cases where sophisticated parties, negotiating at arms length and with the assistance of counsel, bargained for restrictive covenants"); *see also* Lester, *supra* note 3, at 60-61 (describing current approach to bargaining power issue as "inconsistent" in that courts "pay[ ] lipservice to policing inequality of bargaining power, . . . [but] routinely analyze covenants alone, paying scant attention to the actual bargaining power of the parties").

[233] *See*, *e.g.*, Flexcon Co. v. McSherry, 123 F. Supp. 2d 42, 44 (D. Mass. 2000) (noting in refusing to grant preliminary injunction against competition that employee signed noncompete as part of "routine paperwork" three days after commencing employment and neither offer letter nor letters regarding subsequent promotion mentioned covenant); Corroon & Black of Nashville, Inc. v. Lee, 1984 Tenn. App. LEXIS 2695, at *4-5 (Tenn. Ct. App. Feb. 16, 1984) (refusing enforcement of noncompete signed two weeks into employment in conjunction with related employment forms where employee had numerous preemployment discussions with employer regarding details of employment that did not include mention of noncompete).

independently reviewed, such agreements being presumptively valid where the employee was educated as to the effect of the commitment and chose to sign it anyway.[234] Ultimately, this analysis should focus on all factors that indicate whether the employee had a real opportunity to alter or reject the agreement's terms, including the employer's amenability to negotiation and the extent of the employee's bargaining power. An unemployed individual signing a boilerplate agreement should be viewed differently from a highly skilled worker voluntarily leaving a position to assume a new job whose terms are negotiable.[235]

In addition to looking at the quality of the employee's consent from a procedural perspective, courts should also review the terms of the agreement itself. The second aspect of the formation-based approach to enforceability proposed here is an inquiry into the appropriateness of the restraint, which, like the UPAA's approach to substantive review, occurs as of the time of agree-

[234] *See*, *e.g.*, Retina Servs., Ltd. v. Garoon, 538 N.E.2d 651, 651-52, 655 (Ill. App. Ct. 1989) (finding agreement enforceable against defendant-ophthalmologist who signed three prior negotiated agreements with employer while represented by counsel and consulted a reputed expert in medical noncompete agreements prior to signing agreement sought to be enforced against him); Maltby v. Harlow Meyer Savage, Inc., 637 N.Y.S.2d 110 (N.Y. App. Div. 1996) (finding agreement enforceable where employees had option to sign noncompete in conjunction with new job with higher salary and chose to do so after consultation with counsel); *cf.* Campbell Soup Co. v. Desatnick, 58 F. Supp. 2d 477 (D.N.J. 1999) (refusing to enjoin employer from seeking to enforce noncompete where employee, who negotiated original employment contract under advice of counsel, had thirty-day period in which to review subsequent noncompete contract and elected not to seek representation). *But see* Motion Control Sys., Inc. v. East, 546 S.E.2d 424, 425 (Va. 2001) (finding noncompete overbroad and unenforceable although employee consulted with counsel and succeeded in proposing minor changes to agreement before signing).

[235] *See*, *e.g.*, *Campbell Soup Co.*, 58 F. Supp. 2d at 479-81 (denying senior executive's motion to enjoin enforcement of noncompete against him where employee negotiated terms of original contract of employment and successfully refused noncompete pursuant to advice of counsel, but subsequently signed new contract containing noncompete two years later without making significant effort to renegotiate agreement); Habif, Arogeti & Wynne, P.C. v. Baggett, 498 S.E.2d 346, 350 (Ga. Ct. App. 1998) (holding agreement enforceable against managing partner who "was in a bargaining position equivalent to that of [his employer]"); Delli-Gatti v. Mansfield, 477 S.E.2d 134 (Ga. Ct. App. 1996) (holding noncompete enforceable against physician who was able to negotiate favorable changes in vacation time and partnership opportunities under employment contract and had two other job opportunities when she elected to enter into plaintiff's employ); *cf. Maltby*, 637 N.Y.S.2d at 111 (finding agreement enforceable where employees "were provided with the choice of signing the contract containing the restrictive covenant or continuing with their old employment contract," which contained no noncompete but offered less favorable terms of employment).

ment.[236] Under the current legal test, reasonableness of scope, duration, and geographic limitation is evaluated as of the time of enforcement with little consideration of the parties' expectations at the point at which the agreement was formed.[237] Similarly, proposals based on enforcing relational norms or efficient outcomes would assess the appropriateness of the agreement in the context of enforcement.[238] However, it is the parties' initial expectations that indicate whether the agreement was intended to be a binding long-term solution to the problem of fluctuations in the parties' relationship over time. If the parties negotiated an agreement that was fair under the circumstances, the agreement should be enforceable.

In making the difficult determination as to whether a noncompete's terms were fair as of the time of agreement, the distinction drawn between liquidated damages and penalties in the area of contractual remedies provides a helpful analogy. Noncompetes may be compared to stipulated damages clauses insofar as employers view them as a predetermined measure of compensation for the premature departure of an employee.[239] Such clauses in commercial contracts are enforceable only if they represent a reasoned forecast of future loss where actual damages are difficult to assess.[240] They are not enforceable if they are so dispro-

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[236] UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2), 9C U.L.A. 49 (2001) (providing that "a premarital agreement is not enforceable if the party against whom enforcement is sought proves that . . . the agreement was unconscionable *when it was executed*") (emphasis added); *see also supra* Part IV.B.

[237] *See supra* Part I.B.

[238] *See supra* Part III.C.2.

[239] *See* Posner & Triantis, *supra* note 3 (suggesting that employers may use such clauses as alternatives to liquidated damages provisions, which are often ineffective due to capital constraints of employees). Similar comparisons have been made between stipulated damages clauses and premarital agreements. *See*, *e.g.*, *Recent Developments: Pennsylvania Supreme Court Rejects Substantive Review of Prenuptial Agreements*, 104 HARV. L. REV. 1399, 1402-03 (1991).

[240] *See* Cray v. Nationwide Mut. Ins. Co., 136 F. Supp. 2d 171 (W.D.N.Y. 2001). "[P]arties to an agreement may provide for the payment of liquidated damages upon its breach, and such damages will be upheld if (1) the amount fixed is a reasonable measure of the probable actual loss in the event of breach, and (2) the actual loss suffered is difficult to determine precisely." *Id.* (quoting Willner v. Willner, 538 N.Y.S.2d 599, 601 (N.Y. App. Div. 1989)).

> "Liquidated damages is the sum a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damages that will probably ensue from the breach, is legally recoverable as agreed damages if the breach occurs."

Wasserman's Inc. v. Township of Middletown, 645 A.2d 100, 105-06 (N.J. 1994)

portionate to the sustained loss as to suggest an intent to compel performance.[241] With respect to noncompetes, the current legal rules encourage employers to use broadly drafted standardized forms which may be revised at the time of enforcement, but which in the interim create strong disincentives against employee defection.[242]

To encourage the creation of more well-reasoned agreements, courts assessing enforceability should consider whether the agreement is actually sculpted to reflect the employer's anticipated needs for the particular job opening. Like the UPAA, such an approach relies on the law of unconscionability in examining the terms as of the time of drafting, but should reach beyond the limited substantive review associated with commercial unconscionability to consider the reasonableness of terms. In conducting that inquiry, courts should consider all of the existing reasonableness factors, including scope, duration, and geographic limitations with the burden on the employer to prove the reasonableness of the request as of the time of formation.

One aspect of reasonableness that courts currently do not, but should, consider directly is whether the duration of the restraint is affected by the length of the parties' relationship. Employers should have an obligation to make reasoned assessments of their expected commitment from employees in relation to their

(quoting Westmount Country Club v. Kameny, 197 A.2d 379, 382 (N.J. Super. Ct. App. Div. 1964)); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981) ("Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.").

241 *See* Equity Enters. v. Milosch, 633 N.W.2d 662, 671-73 (Wis. Ct. App. 2001) (noting that "[s]tipulated damages substantially in excess of injury justify an inference of . . . an objectionable *in terrorem* agreement designed to deter a party from breaching the contract" in concluding that clause requiring payment of sum equaling three and a half times actual loss must be "closely scrutinized" in determining enforceability on remand); Capricorn Sys., Inc. v. Pednekar, 546 S.E.2d 554, 558 (Ga. Ct. App. 2001) (finding stipulated damages clause that "arbitrarily" set damages at $50,000 unenforceable where recited amount bore "no rational relationship to actual or potential damages" and special damages could be "easily calculated as substantially less than the liquidated damages in the contract"); Coleman v. Chamberlain & Sons, Inc., 766 So. 2d 427, 430 (Fla. Dist. Ct. App. 2000) (holding unenforceable stipulated damages provision requiring former employee to pay 200% of one year's gross revenue for each defecting client where former employer demonstrated no actual damages and admitted purpose of clause was to penalize former employees); RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981) ("A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.").

242 *See supra* note 192 and accompanying text.

planned investment and draft noncompetes with restraints that diminish the longer the employee stays in his or her job, much like a pay back agreement.[243] An agreement that does not provide for an enforceability cap based on length of service could be deemed presumptively unreasonable. In addition, courts can enhance the reasonableness assessment by considering industry standards relevant to the job in question, much in the way trade usages are employed in evaluating commercial agreements.[244] Since employers find themselves on both sides of this issue, as parties seeking to restrain departing employees and parties seeking to hire individuals subject to such restraints, courts should defer to an apparent consensus on what constitutes the appropriate scope, duration, or area for a noncompete.

The purpose of such inquiries is to move from a regime in which courts essentially redraft the parties' agreements based on the circumstances at the time of enforcement to one in which the parties make a knowing decision to have specified contractual terms supercede some of the otherwise flexible aspects of their implicit agreement. Thus, in assessing the reasonableness of the noncompete, a final factor to assess should be the consideration offered to the employee. This suggestion departs from the premarital agreement model, which treats the impending marriage as the consideration for the agreement from the perspective of both parties and does not inquire further into the existence of an exchange.[245] The law of noncompetes has historically taken a similar approach, treating the employment itself as the consideration for the employee's promise.[246] Although the employee's po-

[243] For instance, Colorado's statute on restraints of trade permits employers to enforce repayment agreements only in instances where the employee departs within two years of hire. *See* COLO. REV. STAT. § 8-2-113(2)(c) (2001).

[244] *Cf.* U.C.C. § 2-202 (2001) (providing that a final written agreement may be supplemented by usages of trade). The U.C.C. defines "usage of trade" as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." *Id.* § 1-205(2).

[245] *See In re* Marriage of Barnes, 755 N.E.2d 522, 527 (Ill. App. Ct. 2001); Lieberman v. Lieberman, 587 N.Y.S.2d 107, 109 (N.Y. Sup. Ct. 1992) ("[P]remarital agreements are entered into in contemplation of marriage and the consideration for the agreement is the marriage itself."); *cf.* UNIF. PREMARITAL AGREEMENT ACT § 2, 9C U.L.A. 41 (2001) ("A premarital agreement must be in writing and signed by both parties. It is enforceable without consideration.").

[246] *See, e.g.,* Garcia v. Laredo Collections, Inc., 601 S.W.2d 97, 98-99 (Tex. Civ. App. 1980) ("When the execution of a covenant not to compete is contemporaneous with the acceptance of employment, the latter becomes the consideration for the covenant.").

sition may be at-will, courts have taken the view that continued employment up to the point at which enforcement is sought creates sufficient after-the-fact consideration, to support the employee's earlier promise not to compete.[247]

If courts are to consider the reasonableness of the noncompete and the quality of the employee's consent, however, they must to some extent take account of what the employee was offered in exchange for that agreement. Where there is a written contract of employment, of employment that assure some form of job security, such as a fixed term or for-cause discharge provision, could create the presumption of a fair agreement.[248] However, where the parties enter into an at-will relationship, courts should look to see what, if anything, the employee was offered beyond the mere opportunity to perform the job. Such an inquiry would merely require that the terms of the at-will arrangement suggest that the employee's decision to accept the agreement was a reasoned one. Such terms could include the award of a signing bonus for those employees accepting the agreement, higher wages than what is generally offered for such a position in the relevant market, or the promise of job-related training or opportunities

[247] *See* Coastal Unilube, Inc. v. Smith, 598 So. 2d 200, 201 (Fla. Dist. Ct. App. 1992) (finding sufficient consideration to support noncompete where at-will salesman worked less than one year after signing agreement); Brignull v. Albert, 666 A.2d 82, 84 (Me. 1995) (finding sufficient consideration to support noncompete where optometrist worked three years after signing agreement); Copeco, Inc. v. Caley, 632 N.E.2d 1299, 1301 (Ohio Ct. App. 1992) (finding sufficient consideration to uphold noncompetes where at-will copy machine salesmen worked two years after signing agreements before resigning to start competing company); *see also supra* note 16. In instances in which the agreement is requested long after employment is commenced, however, some courts require that the employee receive some increase in compensation, authority, or benefits to support the employee's promise. *See*, *e.g.,* Freeman v. Duluth Clinic, Ltd., 1334 N.W.2d 626, 630 (Minn. 1983) (finding invalid noncompete agreement signed two years after beginning employment and months after a new promotion because no new consideration such as a pay raise, new promotion, or other benefit was offered to employee physician).

[248] Existing case law suggests that courts are more inclined to enforce noncompetes in situations where the employer offers reciprocal benefits under a formal contract. *See*, *e.g.*, Maltby v. Harlow Meyer Savage, Inc., 637 N.Y.S.2d 110, 111 (N.Y. App. Div. 1996) (finding agreement enforceable where employer offered employees new contract providing more job security and higher salary than employees received in their previous positions); *cf.* Becker v. Blair, 361 N.W.2d 434 (Minn. Ct. App. 1985) (enforcing employee's promise to repay training costs pursuant to fixed-term employment agreement); Corroon & Black of Nashville, Inc. v. Lee, 1984 Tenn. App. LEXIS 2695, at *5-8 (Tenn. Ct. App. Feb. 16, 1984) (distinguishing cases in which employee was promised term employment or notice prior to discharge in refusing to enforce noncompete signed by at-will employee after commencing employment).

for skills development.[249] As apparent from the last of these nonexhaustive examples, this inquiry may consider some of the factors relevant to the protectable interest inquiry. However, the focus of the inquiry is not the employer's need for protection but whether the terms of the employment offer justify the risk to the employee.[250]

The preceding suggestions illustrate how a formation-based inquiry might affect the determination of a noncompete's enforceability. Like the current test and other proposals for reform, the formation-based model has a number of limitations. It cannot guarantee just results for every employee or eliminate the problem of unpredictable results. In addition, the formation-based model focuses on the competing interests of employer and employee and gives limited regard to third party concerns, such as the public's interest in freely accessing an employee's services.[251]

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[249] While such factors are not formally part of the existing legal inquiry, such considerations clearly compel many court decisions, particularly where the employee is highly compensated. *See*, *e.g.*, Retina Servs., Ltd. v. Garoon, 538 N.E.2d 651 (Ill. App. Ct. 1989) (noting in enforcing noncompete that employee's 1987 negotiated contract provided for compensation in excess of $300,000 plus $50,000 in fringe benefits); EMC Corp. v. Allen, No. 97-5972-B, 1997 WL 1366836 (Mass. Super. Ct. Dec. 15, 1997) (noting in enforcing noncompete that employee was compensated with an annual salary of approximately one million dollars including bonuses and stock options); *cf.* Flexcon v. McSherry, 123 F. Supp. 2d 42, 44 (D. Mass. 2000) (noting in denial of employer's request for injunction that defendant's job was not "as high-powered, well-compensated or international as job" in precedent case which found noncompete enforceable).

[250] Texas courts have adopted an approach consistent with this suggestion. By statute, noncompetes in Texas are unenforceable unless "ancillary to or part of an otherwise enforceable agreement at the time the [noncompete] agreement is made." TEX. BUS. & COM. CODE § 15.50 (Vernon Supp. 2002). Because courts have held that the commencement of an at-will employment relationship does not constitute an "otherwise valid agreement," where an employer seeks to enforce a noncompete against a worker with no job security, it must establish a separate consideration for the restraint, such as an express promise to provide specialized training. *See*, *e.g.*, Light v. Centel Cellular Co., 883 S.W.2d 642, 644-45 (Tex. 1994). Presumably, this means that the employer's failure to provide the promised consideration would be actionable and could excuse the employee's compliance with the terms of the post-employment restraint. *See id.* at 626 (suggesting that employer's promise to provide training in an agreement containing a noncompete clause would be enforceable against the employer regardless of the duration of the parties' employment relationship).

[251] The Restatement version of the current doctrinal test for enforceability nominally precludes enforcement of noncompetes where "the promissee's need [for an injunction] is outweighed by the hardship to . . . the public [at large]." RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981). However, in administering the rule of reason, few courts directly consider the public interest as a factor distinct from the effect of the agreement on the employee himself or herself. *See supra* note 37 and

The analysis offered here, however, does not preclude development of additional defenses to enforcement or application of other sources of law designed to protect either the contracting parties or the public.[252] What the formation-based approach offers is a preliminary compromise between treating noncompete agreements as ordinary contracts and subjecting them to outright review for substantive fairness to the employee based on postformation effects. The approach aims not at prescribing appropriate terms for a given employment relationship, but rather at ensuring that the contract vehicle is used responsibly. The formation-based model encourages employers to use discretion in requesting these agreements and attempts to provide employees with an opportunity to review and to question them. The ultimate goal is to enforce those noncompetes that are entered into with recognition of their distinct legal consequences, and avoid

accompanying text. This omission is consistent with the view expressed by some that despite rhetoric regarding the harsh societal effects of restraints on trade, the anticompetitive effects of individual employee noncompete agreements are negligible. *See*, *e.g.*, Sterk, *supra* note 31, at 406-08; Callahan, *supra* note 28, at 712–18. On the other hand, if the public interest is an important concern, but is omitted from the existing inquiry on the assumption that policing reasonableness effectively eliminates third party effects, it may be necessary to supplement the formation-based model of enforcement with an exception that captures those cases in which unique facts suggest that enforcement will unduly burden the public, for instance where a noncompete will deprive a small community of its physician.

[252] For instance, it may be useful to consider how doctrines such as impossibility could apply to protect employees in situations where unforeseeable changes in the market or other unexpected circumstances render noncompetition impracticable under the terms of the agreement. The possibility of such an application is suggested by the ALI approach to premarital agreement enforcement, which permits a limited defense where there has been a significant and unanticipated change in circumstances and enforcement would work a substantial injustice. *See* PRINCIPLES, *supra* note 212, § 7.07(2); *see also supra* note 233.

With respect to third party interests, a lingering question remains the extent to which federal antitrust law might apply to prohibit certain noncompete agreements. Some scholars and commentators have argued that the antitrust regime may be an appropriate tool for policing the aggregate effect of such agreements on particular industries from a public perspective, in contrast to state law which concentrates primarily on the balance of interests between the individual employer and employee. *See*, *e.g.*, Sullivan, *supra* note 5, at 647-50; Note, *The Antitrust Implications of Employee Noncompete Agreements: A Labor Market Analysis*, 66 MINN. L. REV. 519, 546-49 (1982). Courts, however, have thus far been reluctant to embrace such an approach. *See, e.g.,* Borg-Warner Protective Servs. Corp. v. Guardsmark, Inc., 946 F. Supp. 495, 498-500 (E.D. Ky. 1996) (finding it "impossible, as a matter of law, for . . . employees to provide the plurality of actors imperative for a § 1 conspiracy" under the Sherman Act because employees "did not have an independent personal stake . . . [or] stand to benefit from conspiring to restrain trade").

those that serve merely as placeholders guaranteeing the employer a judicially crafted remedy.

Conclusion

This Article has advocated a formation-based approach to noncompete enforceability in recognition of the mounting problem of unpredictable and inconsistent case results and the disconnect between the current legal test and employers' interest in employee retention. Existing law strives to maintain an historical distinction between the use of noncompetes to protect narrowly defined business interests and the impermissible use of noncompetes that restrain individual workers, a distinction that proves unworkable in many modern contexts. The excess of reported decisions, and the confusion they demonstrate, is attributable in part to inherent difficulties in crafting and applying a definition for confidential business information. It is also due to the fact that in some instances employers have a legitimate interest in retaining workers who are themselves important business assets.

A central concern of the Article has therefore been achieving an alternative approach to enforceability that abandons the protectable interest concept without abandoning the underlying principles that support some judicial intervention to protect workers. The problem with the current approach, and many existing proposals for reform, is that its focus on the after-the-fact effects of the agreement increases the uncertainty of enforcement, undermines freedom of contract, and eliminates any incentives for employers to craft these agreements with care. Even where the employee has bargaining power, there is unlikely to be negotiation over the terms of a noncompete in a legal regime where courts will reinterpret or rewrite the agreement in light of future events. If the law of premarital agreements is any indication, a better approach may be to invite judicial scrutiny of the formation process as opposed to the consequences of enforcement. Such an approach treats noncompetes as contracts and reviews them in accordance with basic contract principles, but requires greater scrutiny of contractual formalities than would be expected in a typical commercial exchange. Whether such an approach could be useful in evaluating other unilaterally imposed terms in employment contracts may well be an issue worth exploring in future research.[253] At least with respect to noncom-

[253] For example, one potentially fruitful area of inquiry may be the applicability of

petes, by evaluating the quality of the employee's consent, both in terms of the process by which agreement is reached and the terms of the parties' exchange, courts may achieve a fairer and more consistent balance between preserving employers' right to contract and protecting employees from the effects of burdensome terms.

a formation-based analysis to contractual agreements to arbitrate future employment disputes, including federal discrimination claims. Since the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991), which held that such arbitration agreements are enforceable subject to ordinary contract defenses, lower courts have consistently enforced such arbitration agreements provided the employee had some minimal awareness of the existence of the arbitration clause and there is no showing of fraud or duress. *See*, *e.g.*, Seus v. John Nuveen & Co., 146 F.3d 175, 183-84 (3d Cir. 1998). Some have criticized this approach, however, as failing to account sufficiently for the inequality in the parties' respective bargaining positions and have suggested that employee consent to such agreements is insufficiently informed to constitute a voluntary waiver of the procedural rights afforded under federal employment legislation. *See*, *e.g.*, Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered,* 18 HOFSTRA LAB. & EMP. L.J. 479, 512-24 (2001). Whether the principles espoused in this piece could form the basis for a more nuanced approach to analyzing the enforceability of agreements to arbitrate is a question for further analysis that is beyond the scope of the Article.