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Human Capital and Employee Mobility: A Rejoinder

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As a scholar, it is gratifying yet humbling to receive a thoughtful commentary on one's own work. In this instance, I am overwhelmed to receive four such commentaries, each of which engages the ideas in my essay, *Knowledge at Work*,[1] in a serious and insightful fashion. The commentators each approached the piece from a different perspective, and thereby interrogated different aspects of it. Together they initiate a scholarly dialogue that will, I hope, continue long beyond the half life of this issue of this journal. To respond to all their comments, questions and critiques would take far more pages than any reader could be asked to endure. What I will do instead is respond to several of the most interesting points raised and thus use the commentaries to move the discussion forward.

Each of the commentators begins with a succinct summary of my argument, and I shall do so as well. In *Knowledge at Work*, I claim that the nature of the employment relationship has changed in a way that is incompatible with the emerging trends in the law of post-employment restraints.[2] Specifically, I argue that employers no longer implicitly promise employees long-term employment, but rather promise to provide them with training and networking opportunities that will enable them to develop skills that they can use elsewhere in the labor market.[3] However, employers have also become ever more conscious about the value of employees' knowledge and seek to control how that knowledge is used.[4] Employers increasingly seek to impose restraints on employee mobility either by enforcing covenants not to compete or by bringing trade secret actions.[5] At the same time, courts have revised their approaches to both noncompete

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[1] Katherine V.W. Stone, *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721 (2002).

[2] *Id.* at 724.

[3] *Id.* at 762.

[4] *Id.* at 722-23.

[5] *Id.* at 723.

covenants and trade secrets in ways that favor employers.[6] I argue that courts should reverse their current pro-employer approaches and instead weigh the implicit terms of the employment relationship in their deliberations.[7] When a court concludes that one term of the employment relationship is that the employer will give an employee "employability security"—that is, opportunities to develop his or her human capital and social networks—then courts should not restrain that employee from taking these assets away and deploying them for his or her own benefit.[8]

My argument uses a description of the changing employment relationship to argue for a change in legal interpretation. Several of the commentators take issue, in one way or another, with this approach. Professor Catherine Fisk questions whether my effort to adumbrate and articulate the implied terms of the employment relationship is ultimately an effective way to help employees retain control over their human capital.[9] She does not dispute the accuracy of my description, but she questions whether it is a helpful characterization for the purpose of bringing about legal change.[10] Drawing on her knowledge of the history of the law of employee inventions and the at-will doctrine, Professor Fisk argues that when courts read implied terms into employment contracts, they are usually terms that serve employers' interests, not those of employees.[11] She proposes instead that the issue should be framed in terms of nonwaivable rights and public policy—that when employers have given employees assurances that they could use training in subsequent employment, public policy should not enforce a restrictive covenant.[12]

While Professor Fisk's suggestion is instructive, I am not convinced that the language of nonwaivable rights and public policy is any more immune from judicial revision than the language of implied contract. A public policy of enforcing contracts could very easily trump a public policy of protecting employees' reasonable expectations based on employer assurances. Whether those reasonable expectations are called "nonwaivable rights" or "implied contract" terms, the court will still have to decide when an employee's understanding of the terms of the employment deal warrant enforcement.

Professor Fisk's argument raises a larger question about the role of description and narrative in law. Employment relationships are infinitely

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[6] *See id.* at 739.

[7] *Id.* at 724.

[8] *Id.* at 756.

[9] *See* Catherine L. Fisk, *Reflections on the New Psychological Contract and the Ownership of Human Capital*, 34 CONN. L. REV. 765, 766-67 (2002).

[10] *Id.* at 767.

[11] *Id.* at 773-74.

[12] *See id.* at 783-85.

varied and complex, and the law is constantly seeking metaphors to capture the relationships and obligations between the parties. While the concept of the employment contract has become commonplace, it is far from a totally satisfactory way to characterize the employment relationship. Thus, for example, it is often stated that employment contracts are incomplete. They contain numerous hidden terms, such as who supplies the tools, who determines the pace of work and the nature of the product, what is the expected level of effort, who is responsible for safety and what safety precautions shall be used, how frequently the worker shall be paid and the circumstances under which the worker can be fired. Historically, many of these unstated terms were filled in by custom;[13] in the recent era, many are filled in by law.[14] Some are also made manifest by a written employment agreement such as a collective bargaining agreement or an individual employment contract. However, even in those cases where there is a written agreement, there are numerous unstated terms that must be divined from other sources.

Fisk herself points out, "contract law has never been a perfect fit for employment."[15] Despite its inadequacies, however, we use the concept of contract to describe the employment relationship and then imply the missing terms. Because we must necessarily imply terms, the decision about which terms to imply determines our view of the mutual obligations and reasonable expectations of the parties. As Fisk correctly points out, courts implied the at-will term in the late nineteenth century, and by doing so, changed the relative power of the parties.[16] Fisk claims that my narrative in which a worker exchanges effort and organizational citizenship behavior for an employer's promise of employability security could be contrasted with a counter-narrative in which the employer has total power which it uses to control not only the job performance but the post-employment prospects of its employees.[17]

Fisk's counter-narrative is not a plausible account of the mutual obligations and understandings of today's employees. As I explain in more detail

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[13] *See* John R. Commons, LEGAL FOUNDATIONS OF CAPITALISM 300-303 (1195 ed.) (on the role of custom in employment relationship).

[14] *See, e.g.*, Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)(1) (1998) (imposing a duty on employers to maintain a place of employment that is "free from recognized hazards to employees").

[15] Fisk, *supra* note 9, at 769.

[16] *Id.* at 771-73. There is some dispute about whether the implication of the at-will term improved or worsened workers' conditions. *Compare* Fisk, *supra* note 9, at 771-73 (arguing that the at-will term was disadvantageous to workers because it deprived them of job security) *with* Karen Orren, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES (1991) (arguing that the at-will relationship and the conception of free labor that it embodied was a major improvement for American workers).

[17] Fisk, *supra* note 9, at 770.

in *Knowledge at Work*, employers need to extract more than blind obedience and routine task performance; they need to elicit effort and imagination that goes beyond specific job demands.[18] An employment relationship based only on an employer's power and employee's submission will not elicit the organizational citizenship behavior that employer's seek.

More important than the plausibility of Fisk's proposed counter-narrative is the question of how a court will choose between the two narratives. She states, "[g]iven the informality of employment relations and the wealth and contested nature of the facts that would be necessary to choose between the two narratives, I am not confident that the employee's interpretation of the nature of the unwritten employment contract will be the dominant narrative."[19] Yet contests over the choice of legal doctrine are often contests over competing narratives. The purpose of my article is to provide an understanding of the nature of the underlying relationship that will support a particular narrative and corresponding interpretative trajectory. Because courts constantly, and often unwittingly, imply terms into the employment relationship that themselves become constitutive of the relationship between the parties,[20] and because the choice of which terms to imply flows at least in part from an understanding of the nature of the underlying exchange, it is important for legal scholars to provide narratives about the employment relationship that can guide courts in making these choices. Thus, Professor Fisk's concerns ultimately implicate the power and plausibility of my narrative. If I have given a valid description of the new employment relationship—and she seems to concede that I have[21]—then the most we can hope for is that it will wind its way into the popular and judicial understanding of the employment relationship and help to shape the normative background upon which legal decisions rest.

Fisk also points out that even if courts do imply employee-friendly terms or refuse to enforce restrictive covenants, employers can circumvent them with waiver or choice of law clauses.[22] However, she usefully refers to some of the recent findings of behavioral economists that suggest that the initial allocation of default rules can make a difference because parties are often reluctant to waive them.[23] She concedes that if the behavioral economists are correct about the stickiness of default rules, and if I am

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[18] Stone, *supra* note 1, at 733.

[19] Fisk, *supra* note 9, at 770.

[20] *See, e.g.*, Payne v. The Western & Atlantic R.R., 81 Tenn. 507 (1884) (implying at-will term in employment contract of unspecified duration); Farwell v. Boston & Worchester R.R., 45 Mass. (4 Met.) 49, 56-57 (1842) (implying assumption of risk and fellow servant doctrine for workplace injuries into contract of employment).

[21] *See* Fisk, *supra* note 9, at 784.

[22] *See id.* at 783.

[23] *Id.*

correct about the nature of the new employment relationship, then my article "*may* work a substantial change in the law regarding employee human capital."[24] Coming from such a knowledgeable and thoughtful labor law scholar as Professor Fisk, I take this as a ringing endorsement.

Professor Steven Wilf challenges my argument from several perspectives.[25] While he generously describes portions of my essay as "masterful narratives,"[26] he questions my focus on contract law as the venue for my law reform agenda.[27] Professor Wilf argues that trade secret law is really about property, not about contract.[28] Under trade secret law, employers can create property where it did not previously exist. By taking measures to ensure secrecy, an employer can gain a property right in certain types of knowledge, which then acquire value because they are "property."[29] Wilf explains that while not all knowledge can be "property-ized" in this fashion, the open-ended definition of a trade secret gives employers a great deal of leeway to create this unusual form of property.[30]

Professor Wilf's argument is that once we see trade secret law as enabling employer self-help in the creation of valuable property rights, we must also see that the law does not merely act upon the relations between the parties but also constitutes their relationship.[31] If employers need to take steps to ensure secrecy, then they will treat employees with suspicion by attempting to cabin in and control the knowledge and post-employment activities of their employees. Professor Wilf suggests that this is now common practice in the industrial world, and that the increased use of contractual provisions to protect proprietary knowledge, such as restrictive covenants, is part of this legal-constituted reality.[32]

Professor Wilf's argument about the constitutive power of trade secret property rules is suggestive and interesting. If he is correct that trade secret law creates a climate of distrust, that would seem to undermine my claim about the terms of the new psychological contract. Indeed, Wilf's argument raises an empirical question about how far employers go to protect proprietary information, and whether his predicted increase in workplace distrust has come to pass. I would contend that his initial example of

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[24] *Id.* at 784 (emphasis added).

[25] *See generally* Steven Wilf, *Trade Secrets, Property, and Social Relations*, 34 CONN. L. REV. 787 (2002) (commenting on the arguments made in *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace*).

[26] *Id.* at 790.

[27] *Id.*

[28] *Id.* at 795.

[29] *See id.* at 793-94.

[30] *See id.*

[31] *Id.* at 794-95.

[32] *Id.* at 797, 802.

workplace mistrust is not the norm, but rather, today's employers seek to instill trust and obtain cooperation. Thus, I would claim, employers more often use post-employment restraints not as an *expression* of their mistrust but rather as a *substitute* for the kinds of closed and cabined procedures that Wilf describes. One piece of evidence that supports my claim is the publicity practices of employers. If employers wanted to maintain an *in terrorem* regime to keep information confidential, they would publicize to their incumbent workers their previous efforts to enforce restrictive covenants or restrain the use of trade secrets. The fact that they generally do not do so suggests that employers do not want to instill distrust, but rather want to encourage their employees to believe that they will benefit from the human capital they obtain on their jobs. While firms may have strict trade secret policies, Professor Fisk explains how such policies do not necessarily negate the proposition of the new psychological contract.[33] She writes, "[i]t seems quite plausible to me that firms simultaneously maintain employee-restrictive trade secret policies—treating all the economically valuable knowledge as secret—while allowing low- and mid-level managers to reassure employees that they are getting valuable training and networking opportunities."[34]

Professor Wilf's main point is that property should be understood from a social-relations perspective, and that property in trade secrets should be understood as embodying norms of commercial morality.[35] This is an important insight that could explain the expansive approach courts have taken in recent years to the definition of trade secrets. Insofar as courts have adopted a more individualistic, non-interventionist perspective in general,[36] this pro-business view of commercial morality is probably affecting not

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[33] Fisk, *supra* note 9, at 776.

[34] *Id.*

[35] *See* Wilf, *supra* note 26, at 797-99.

[36] *See, e.g.*, Sidney W. Delong, *Placid, Clear-seeming Words: Some Realism about the New Formalism (With Particular Reference to Promissory Estoppel)*, 38 SAN DIEGO L. REV. 13, 14-15 (2001) (stating that "For several years, legal trendspotters have marked a retreat from realist jurisprudence in the law of contract. Variously termed the "new formalism," the "new conceptualism," the "new conservatism," or "anti-antiformalism," the trend is seen as a rejection of realist, context-sensitive standards of adjudication in favor of formalist rules implemented by a mechanical jurisprudence."); Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1133-35 (1995) (stating that "In eight of nine far-west states . . . courts have substantially abandoned the interventionist, egalitarian contract jurisprudence of the 1960s and 70s, substituting a far more classical, conceptualist ethic emphasizing once again 'freedom of contract' and marketplace economics."); Richard E. Speidel, *Afterword: the Shifting Domain of Contract*, 90 NW. U. L. REV. 254, 254 (1995) (Describing "[a] consensus extracted from this Symposium [is that] conceptualism has indeed been reborn (if it ever died) in the guise of a new formalism, sometimes called 'economic analysis.'"); *See also*, Robert A. Hillman, *The "New Conservatism" in Contract Law and the Process of Legal Change*, 40 B.C. L. REV. 879, 882 (1999) (stating that "recent reported decisions demonstrate an incremental enhancement of rules that favor the enforcement of written contracts over alleged oral, less formal representations or agreements.").

only fields like contract law and corporations, but trade secret law as well.

Wilf suggests that trade secret doctrine should reflect not the expectations of the parties, but the court's view of the "equitable property rights embedded in the trade secret."[37] In Wilf's analysis, courts should "balance" the employer's equitable property rights with the "equitable requirements of employees, competitors, and public welfare as a whole."[38] These judicial practices would, over time, alter employees' and employers' expectations and enable them to adjust their behavior accordingly.[39]

Wilf's position is not as different from mine as his prose suggests. For a court to determine the employers' "equitable property rights" and to balance them against "the equitable requirements of employees," it needs a normative view of the equities on both sides of the equation. My proposal that courts take the implicit promises of employers and the reasonable expectations of employees into account is meant to emphasize this point. It is my view that courts must weigh equities while they are defining the property right at stake and deciding whether to enforce a covenant. My article is meant to act as a guide for the courts to help them decide what belongs on these scales.[40]

Professor Dirk Hartog's commentary echoes some of the themes of Professor Wilf's, but adds some new themes as well.[41] Professor Hartog says that I fail to address the "holy grail of historical work"—the issue of transition.[42] He says I do not explain the transition from the old to the new employment relationship, nor do I state whether the transition is ongoing or complete.[43] Hartog proposes several possible factors to explain the change, including globalization, technological change, the growing weakness of affiliations, including unions, the ascendancy of neoconservative ideology, the weakening welfare state, and the growth of contractualism.[44] I would agree that these are all possible explanations for the transition I describe, and I would also agree that in my essay, I lack a thick account of causality.

Like Professor Wilf, Professor Hartog claims that I ignore the role of law itself in bringing about the changes in the employment relationship that I describe.[45] Hartog suggests that an important factor that enabled employ-

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[37] Wilf, *supra* note 26, at 800.

[38] *Id.*

[39] *See id.*

[40] *See generally* Stone, *supra* note 1.

[41] *See generally* Hendrik Hartog, *Stone's Transitions*, 34 CONN. L. REV. 821 (2002) (discussing the arguments presented by Professor Hartog in his response to *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace*).

[42] *Id.* at 826.

[43] *Id.* at 827-28.

[44] *Id.* at 828.

[45] *Id.* at 829.

ers to increase their power over workers is changing judicial doctrines about freedom of contract. Employers increased power enable them to restructure the workplace so as to shift many risks onto employees.[46] In Hartog's account, the courts are one of the causes of the change, rather than a neutral forum to appeal to in order to mitigate the effects.[47]

Professor Hartog's story adds some much-needed depth to the thin account of causality that I put forth. Yet while it is entirely plausible, it is also not a wholly satisfactory account. One still needs to explain why courts have adopted more freedom of contract positions, and how this change in judicial perspective has translated into increased employer power in the workplace. Such an inquiry would be a valuable task for a legal historian.

Hartog's story is not the only alternative to my narrative. One could tell a story that started with the decline of unions. Union decline, one might contend, led to increased employer power in the workplace, enabling employers to restructure their workplace practices in ways that gave them even more power and shifted more risks onto the workers. In this story, the rise of the same individualistic, neoliberal ideologies that reshaped judicial doctrine might have induced employees to spurn unions in the first place. In this account, neoliberal ideology begets neoliberal policies in a continual feedback loop.

All of these stories illustrate an interweaving of judicial doctrine, ideology, and social practices. While it is not clear where the causal chain begins, it is necessary for the chain to be broken in order to effectuate change. Therefore, it is necessary to devise strategies that have the possibility of changing outcomes. It is no more difficult to induce courts to change their approaches than it is to persuade employees to change their evaluation of the benefits of unionization or to convince the public to turn away from neoliberal ideology and reinvent the welfare state. Indeed, a change in judicial approach of the sort I am advocating might be the most feasible place to intersect the cycle and break the chain.

Professor Hartog also criticizes me for resisting the language of declension—refusing to condemn the new employment relationship as bad for workers.[48] He says that if the new regime is the result of the weakening of worker rights, then it would be necessary to criticize not only judicial enforcement of noncompete covenants, but the entire new employment relationship itself.[49] Hartog is calling for a different critique than I am propounding in this piece. In other writings, I have described the ways in which the new employment relationship creates risks for some while offer-

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[46] *See id.* at 830.

[47] *See id.* at 829-31.

[48] *Id.* at 831.

[49] *Id.*

ing opportunities for others.[50] I argue that, given the changing nature of the workplace, the law should address the vulnerabilities and injustices that presently result.

Unlike the other commentators, Professor Eileen Silverstein challenges my descriptive claims about the changing nature of the workplace and argues that there has not be any significant change in job tenure in the recent past.[51] She relies primarily upon a highly ideological piece by Kenneth L. Deavers entitled, *There is No Evidence "Lifetime Jobs" Are Disappearing*, published in the newsletter of the Economic Policy Foundation.[52] Deavers analyzes the 1998 Bureau of Labor Statistics ("BLS") Employee Tenure survey[53] and reports that the median tenure for workers twenty-five years and older was 4.7 years in 1998, and has ranged between that rate and 5.0 years during the 1983-1998 period.[54] This statistic is highly misleading because it does not break down the job tenure for different age groups above age twenty-five. Older employees have a longer opportunity to be on any job at all, so that there are substantially different job tenure outcomes for different age groups. The BLS data on tenure for each age group between 1983 and 1998 declines as follows:[55]

Figure 1

Age Group	*1983*	*1998*
age 25 to 34	3.0	2.7
age 35 to 44	5.2	5.0
age 45 to 54	9.5	8.1
age 55 to 64	12.2	10.1
age 65 and over	9.6	7.8

It is important to note that the above data for men's and women's job tenure experiences are combined. For my purposes, it is a mistake to combine the genders because I do not claim that there was a decline in job security for all workers in the 1980s and 1990s. Rather, I am interested in

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[50] *See* Katherine V.W. Stone, THE TRANSFORMATION OF WORK IN THE DIGITAL ERA [forthcoming, 2002].

[51] *See generally* Eileen Silverstein, *bringing forth a new world from the ashes of the old*, 34 CONN. L. REV. 821 (2002).

[52] *See id.* at 806 (citing Kenneth L. Deavers, *There is No Evidence "Lifetime Jobs" Are Disappearing, available at* http://www.epf.org/backg/b981016.htm (last visited Jan. 18, 2002) (on file with Connecticut Law Review)).

[53] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYEE TENURE IN 1998 (Sept. 23, 1998), *available at* http://stats.bls.gov/newsrels.htm [hereinafter BLS REPORT].

[54] Silverstein, *supra* note 52, at 806 (citing Kenneth L. Deavers, *There is No Evidence "Lifetime Jobs" Are Disappearing*, http://www.epf.org/backg/b981016.htm (last visited Jan. 18, 2002) (on file with Connecticut Law Review)).

[55] BLS REPORT, *supra* note 54.

the decline in job tenure for blue-collar males because they were the beneficiaries of the internal labor market form of job structures—i.e., the group that enjoyed de facto job security in long-term employment settings. These beneficiaries of the old labor system comprised approximately twenty-five percent of the adult population as recently as 1990.[56]

As I explain in my essay, the evidence unequivocally demonstrates that there was a significant decline in job tenure for blue-collar men over the age of twenty-five throughout the 1980s and 1990s.[57] The Current Population Survey ("CPS") shows that between 1983 and 1998, blue-collar job tenure declined from 12.8 to 9.4 years for men aged forty-five to fifty-four, and declined from 15.3 to 11.2 years for men aged fifty-five to sixty-four.[58] Even for men between thirty-five and forty-four, who had not been in the workplace very long, blue-collar job tenure declined from 7.3 to 5.5 years.[59] Because these are medians and are based on large data sets, they demonstrate a very significant change. Medians, especially based on large data sets such as the CPS survey of 50,000 households,[60] tend to change very slowly over time.

The job tenure data has been analyzed extensively by labor economists, whose results have been published in peer review journals. In my essay, I summarize the studies Henry Farber of Princeton University,[61] David Jaeger of Hunter College and Princeton University, and Anne Huff Stevens of Yale University.[62] These economists analyzed the BLS and the CPS employee tenure data, the BLS Displaced Worker Survey, and the Panel Study of Income Dynamics and found that they all showed a decline in job secu-

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[56] Not all groups of workers experienced dramatic declines in their job tenure in the 1990s. Rather, the decline in men's job tenure occurred primarily within the group of less well-educated men—those who had a high school degree or less. HENRY J. FARBER, ARE LIFETIME JOBS DISAPPEARING? JOB DURATION IN THE UNITED STATES 1973-1993, 2, 15-16, 25 (Nat'l Bureau of Econ. Research, Working Paper No. 5014, 1995). College-educated men also experienced a decline in their job tenure in the 1990s, but the decline of blue-collar job tenure remained far more pronounced. BLS Press Release: Employee Tenure in 2000, BLS Press Release: Employee Tenure in 1998, BLS Press Release: Employee Tenure in the Mid-1990s, *available at* http://stts.bls.gov. Furthermore, women did not experience a marked decline in their job tenure, and in some cases they even experienced a modest increase. FARBER, *supra* note 57, at 2.

[57] Stone, *supra* note 1, at 727-28 (citing HENRY J. FARBER, ARE LIFETIME JOBS DISAPPEARING? JOB DURATION IN THE UNITED STATES 1973-1993, 2, 15-16, 25 (Nat'l Bureau of Econ. Research, Working Paper No. 5014, 1995)).

[58] *Id.* at 726 (citing BLS REPORT, *supra* note 54).

[59] BLS REPORT, *supra* note 54.

[60] *Id.*

[61] *See* Stone, *supra* note 1, at 727 (citing HENRY S. FARBER, ARE LIFETIME JOBS DISAPPEARING? JOB DURATION IN THE UNITED STATES: 1973-1993 (Nat'l Bureau of Econ. Research, Working Paper No. 5014, 1995)).

[62] *See* Stone, *supra* note 1, at 727 (citing David A. Jaeger & Anne Huff Stevens, *Is Job Security in the United States Falling? Reconciling Trends in the Current Population Survey and Panel Study of Income Dynamics*, 17 J. LAB. ECON. S1 (1999)).

rity for blue-collar males in the 1980s and 1990s.[63] Others have reached similar conclusions.[64] These scholarly studies should dispel any doubts about the fact that job tenure for blue-collar males has declined in the past two decades.

Professor Silverstein also discounts the reports of sociologists, management theorists, executives, and journalists about the changing nature of employment, and counterpoises their analyses to the experiences of several of her friends whom, she claims, do not share the attitudes and understandings attributed to the new employment relationship.[65] While it is difficult to refute personal anecdotes, in this case Silverstein's own examples do not appear to challenge my argument. For example, Professor Silverstein discusses two friends, called "*E.*" and "*Q.*," each of whom has worked at their current jobs for three or four years.[66] She reports that they "act and think as though their futures are tied to the present [employer],"[67] although they also understand that their employers could or will change.[68] The attitude of *E.* and *Q.*—giving their best efforts to their present employer while knowing that employment is not permanent—is characteristic of the new employment relationship. The new employment relationship is the employment analog to serial monogamy—individuals give their all on a "24/7" basis but do not expect it to be a long-term relationship. Thus, on the basis of the superficial description provided, *E.* and *Q.* appear to epitomize, rather than disprove, the existence of a new employment relationship.

Silverstein further describes "*N.*" who quit three social services jobs because they did not provide adequate training.[69] The quest for training—employability—is also characteristic of the new employment relationship. The only anecdote of Silverstein's that suggests a different sensibility concerns "*Y.*" who has chosen to work in a university and to forego more lucrative possibilities in the private sector because the university setting is family friendly.[70] Universities are one of the remaining bastions of the old employment relationship where workers expect and usually secure long-term employment. That some workers are able to opt out of the changing workplace by retreating to the public sector or educational institutions does

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[63] *See* Henry S. Farber, *Has the Rate of Job Loss Increased in the Nineties?* Proc. 50th Ann Meeting Indus. Rel. Res. Ass'n 88, at 1 (1998); David A. Jaeger & Anne Huff Stevens, *Is Job Security in the United States Falling? Reconciling Trends in the Current Population Survey and Panel Study of Income Dynamics*, 17 J. LAB. ECON. S1, at S2-S3 (1999).

[64] *See, e.g.*, Robert G. Valletta, *Declining Job Security*, 17 J. LAB. ECON. S170, S171 (1999) (citing numerous studies finding decreased job security in the 1980s and 1990s).

[65] Silverstein, *supra* note 52, at 809-10.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 810.

not disprove the trends at work in the private sector, but merely demonstrates that some would prefer the old arrangements.

Silverstein resists my description of the changing workplace in part because she interprets me to be endorsing it.[71] She states that the "[s]ocial costs associated with the new employment relations, all well-documented, go unacknowledged and uncounted . . . ."[72] She invokes Barbara Ehrenreich's recent book, *Nickel and Dimed*, as evidence that life is difficult for the working poor.[73] Ehrenreich's book is replete with examples of workers at the lower end of the labor market experiencing, and expecting, jobs of short duration.[74] Very few of the workers Ehrenreich encounters have been on their job more than two or three years and none of them expect their current jobs to be lifelong.[75] Several have been in their field of work for many years, but they lack the essential feature of attachment to a given employer that characterized the old employment relationship.[76] The low-wage jobs that Ehrenreich describes are what used to be called the secondary labor market by labor economists.[77] The secondary labor market, comprised of unskilled, insecure and low-wage jobs, is contrasted with the primary labor market in which jobs are secure and pay high wages and benefits.[78] While secondary labor market jobs have always been present, one feature of the changing labor market is that many jobs that were considered primary have now become secondary. Thus, for example, waitress jobs in full-service restaurants are now insecure jobs in fast food establishments.

Silverstein complains that I refuse to acknowledge the social costs that the new employment relationship imposes on many employees.[79] She is right that there are serious costs involved—as I said earlier, it imposes costs and increases the vulnerability of many, but poses opportunities for others. My goal in the essay was not to document those costs, but to attempt to identify the ways that the law could be changed to mitigate them. Rather than deny the changing reality of the workplace, I am trying to make it more fair and equitable. Thus, I do not explicitly take a position

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[71] *See id.* at 811-12.

[72] *Id.* at 812 (citation omitted).

[73] Silverstein, *supra* note 42, at 810 (citing BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001)).

[74] *See generally* BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001).

[75] *See generally id.*

[76] *See id.*

[77] *See id.* at 213-15; *see also* PETER B. DOERINGER & MICHAEL J. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS (1971) (discussing the reshaping of the internal labor market scheme).

[78] DOERINGER & PIORE, *supra* note 78, at 165.

[79] Silverstein, *supra* note 52, at 812-13.

about whether the new employment relationship is a good thing or a bad thing, but rather discuss what the changing world of work means for disputes about ownership of human capital.[80]

While Professor Silverstein rejects my analysis of the new employment relationship, she agrees that it is problematic for courts to liberally enforce post-employment restraints.[81] She thus proposes her own reasons why courts should not do so.[82] One of these reasons is that she says it is simply historically and morally wrong for courts to view knowledge acquired on the job as the property of employers.[83] Her only citation for this proposition is Pope Leo XIII's 1945 Encyclical entitled, *The Workers' Charter*.[84] This document is no doubt infused with noble sentiments and may have had far-reaching implications, but it is unlikely to provide American courts with sufficient authority for changing their approaches.

Another reason Silverstein offers for courts to refuse to enforce post-employment restraints is derived from an article by Ronald Gilson that argues that industrial districts such as Silicon Valley owe their success to the nonenforcement of covenants not to compete.[85] Gilson's article draws upon research by AnnaLee Saxenian that found that the extraordinary success of Silicon Valley was due, in large part, to the free sharing of employee knowledge.[86] Gilson uses those findings to argue that judicial restrictions on knowledge sharing is contrary to the collective interest.[87] I agree with Gilson's analysis, and in my essay I noted that Gilson's argument adds a new, although compatible, perspective to my own.[88]

While Gilson demonstrates that it can be in the public interest to refuse to enforce noncompete clauses, he cautions that there are other unique features of Silicon Valley that also explain its success. Gilson says that the Silicon Valley experience cannot be automatically duplicated elsewhere, and that blanket nonenforcement of covenants could have the negative ef-

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[80] *See generally* Stone, *supra* note 1.

[81] *See* Silverstein, *supra* note 52, at 804.

[82] *See id.* at 815.

[83] *Id.*

[84] *Id.* (citing H.H. POPE LEO XIII, THE ENCYCLICAL: RERUM NOVARUM; THE CONDITION OF THE WORKING CLASSES OR "THE WORKERS' CHARTER" 2-13 (1945)).

[85] Silverstein, *supra* note 52, at 815-16 (discussing 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)).

[86] 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, 578 (1999)) (citing ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (1994) (comparing the industrial districts of Silicon Valley and Route 128 in Boston, Massachusetts)).

[87] *See* Gilson, *supra* note 86, at 578, 627.

[88] Stone, *supra* note 1, at 763 n.227 (noting that Gilmore "made a similar but slightly different argument.").

fect of reducing incentives for investment in intellectual property.[89] Therefore, Gilson does not advocate a general policy of nonenforcement of covenants not to compete, but instead advocates that the rule of reason approach be maintained.[90]

Gilson's argument, then, does not lay the groundwork for a broad policy of nonenforcement of noncompete agreements. My article, on the other hand, attempts to make an argument that would support nonenforcement of restrictive covenants in a much wider range of cases.[91] My argument emphasizes the importance to both the public interest and fundamental fairness in taking employees' psychological contracts—their reasonable understandings of the terms of their employment relationship—into account.[92]

Silverstein also proposes an approach to restrictive covenants in employment that consists of changing the baseline that courts use to evaluate them.[93] She says: "The background legal rule could be that, in the absence of a written agreement identifying the worth to the employer of the employee's exclusive services, courts will not enforce covenants not to compete or disclose."[94] She proposes that courts scrutinize covenants more carefully than they currently do in order to ensure that they are the product of actual consent.[95] She further proposes that where employers force employees to accept covenants not to compete, they be required to subsidize employees during their nonworking time that is the result of such covenant.[96]

I endorse these proposals. The first two are examples of ways in which courts could take the implicit understandings of the parties into account. The background rule of disclosure would ensure that employees know the real terms of the employment relationship. The policing for consent is another way of saying that courts should elucidate the real terms—explicit and implied—of the employment relationship to discern whether ownership of the employee's human capital has been ceded to the employer. But neither reform can be achieved unless the courts are convinced that background rules should be changed. My essay is an effort to do that.

The third proposal of Silverstein's—to require employers, as the *quid pro quo* for enforcement of a covenant, to pay for an employee's livelihood

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[89] Gilson, *supra* note 86, at 627.

[90] *Id.* at 628.

[91] *See generally* Stone, *supra* note 1.

[92] *See generally id.*

[93] *See* Silverstein, *supra* note 52, at 817.

[94] *Id.*

[95] *See id.*

[96] *Id.*

during the term of the covenant[97]—goes far beyond any of my own proposals. Assuming this requirement were a nonwaivable obligation, it would be a far greater restriction on freedom of contract than any I have proposed. I find this to be an interesting idea, the impact of which would need to be considered in detail. I hope to see further work by Silverstein or others exploring this option. But no matter how desirable the *quid pro quo* option is, it will only be adopted if we convince courts or legislatures that it is fundamentally unfair for employers to impose post-employment restrictions on an employee's use of knowledge gained on the job.

In conclusion, this Symposium has provided a valuable opportunity to exchange viewpoints and engage ideas about the evolving law of post-employment restraints in light of changes in the employment relationship. Post-employment restraints have become increasingly prevalent in the employment relationship, and this trend is not likely to abate in the near future. Thus, the appropriateness and the legitimate scope of post-employment restraints needs to become a focus of scholarly consideration in the employment law area.

On a personal note, I have found the exchange in this symposium to be enormously valuable, and hope that others have found it so as well. I want to thank the editors of the *Connecticut Law Review* and the other participants for the enormous thought and effort that has gone into it.

[97] *See id.*